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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
In the Court of Common Pleas

Honorable Kristi Curtis,
Common Pleas Judge of the Third Judicial Circuit

Case No.: 2020-000083

Justin McBride, Petitioner,

v.

State of South Carolina, Respondent.

APPENDIX

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STATE OF SOUTH CAROLINA

County of Williamsburg

The State of South Carolina,
Plaintiffs

vs.

Justin McBride,
Defendant

Transcript of Record
2010-GS-45-00283

October 28th-30th, 2013
Kingstree, S.C.

Before the Honorable John C. Hayes, III, Judge.

A P P E A R A N C E S:

Ms. Kimberly Barr,
Assistant Solicitor for the State

Mr. Derrick Mobley,
Attorney for Defendant

Margaret T. Sullivan,
Court Reporter

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THE COURT: Yes. Ladies and gentlemen of the jury, this is the State versus Justin McBride. Mr. McBride, would you please stand and turn and let the jury see who you are? Mr. McBride is represented by Derrick Mobley. The state is represented by Ms. Kimberly Barr. I don't have a jury list from you yet, I don't believe. A witness list.

MS. BARR: Your Honor, I have that. Please the Court, Judge, this is Indictment 2010-GS-45-283. It's a two-count indictment for criminal sexual conduct with a minor in the first degree, and assault with intent to commit criminal sexual conduct with a minor in the first degree. Your Honor, we you have the state's proposed witness list. May I approach?

THE COURT: Yes. Mr. McBride is charged with two counts. They are criminal sexual conduct with a minor in the first degree, and assault with intent to commit criminal sexual conduct with a minor in the first degree. It's alleged that these occurred here in Williamsburg County on June 21st 2010. And it is alleged that Mr. McBride engaged in oral sex with a child less than 11 years of age at the time. And that he did attempt at that same time or same date to engage in sexual

intercourse with the same child. He has entered a plea of not guilty to these two charges and his plea to not guilty to these two charges, places on the state the burden of proving his guilt beyond a reasonable doubt.

Similarly to what I did earlier, I have questions to go over regarding the service as a juror in this particular case. At this time if any of you have to discuss any of these with me, I am going to ask you to stand where you are and tell us your situation; that is, if you feel like you need to respond to one of these questions or one of these statements, just stand where you are and I have a dialogue with you from where you are.

First, are any of you related by blood or marriage or are you a close personal friend of Justin McBride? If so, please stand.

(Whereupon, no response.)

THE COURT: No one stands. If any of you have heard anything about this case, know about it from any source whatsoever, seen any news articles if there were any, heard anybody mention it at school, work or in your neighborhood. If so, please stand.

(Whereupon, no response.)

THE COURT: No one stands. If any of you were members of the grand jury which passed on this two-count indictment at an earlier time, if so please stand.

(Whereupon, no response.)

THE COURT: No one stands. Are any of you related by blood or marriage or have you used the services of the Solicitor, Mr. Finney's office here in this circuit, Third Circuit, or if any of you have -- are related by blood or marriage or have used services of Mr. Mobley, please stand. Yes, ma'am, your name and number.

THE JUROR: My name is Shumara, and McBride's sisters are my niece.

THE COURT: His sisters are your niece, but he is not your nephew. You have got to say yes or not.

THE JUROR: Sir?

THE COURT: You shook your head, but we have got to make -- we have got to keep a record of this so your answer was no. He is not your nephew; right? Would that affect your ability to be fair and impartial in the trial of this case?

THE JUROR: Sir?

THE COURT: Would you be able in spite of

the fact that his sisters are your nieces, would you still be able to be fair, or would that make you unable to be fair?

THE JUROR: Will I be able to?

THE COURT: Yes.

THE JUROR: Yes, sir.

THE COURT: You could be fair?

THE JUROR: Yes, sir.

THE COURT: You can remain with us then, thank you. Yes, ma'am, your name and number.

THE JUROR: No. 79. Janice Gamble. I'm a principal at the school where Justin graduated from two years ago. And I also know him.

THE COURT: Would that affect your ability to be fair and impartial? Would you still be able to be fair in this trial?

THE JUROR: I believe so.

THE COURT: Okay. Or you believe so or?

THE JUROR: I will.

THE COURT: Thank you. Have any of you or a member of your immediate family been involved in law enforcement in any level or in the prosecution of criminal cases, been a sheriff's deputy or U.S. Marshal or military policeman, solicitor, attorney general, U. S. Attorney or anything like that? If

so, please stand.

THE JUROR: I have two cousins, I'm sorry. Doris Powell. Juror 151. I have two cousins that are deputies.

THE COURT: Where?

THE JUROR: In Georgetown County.

THE COURT: Would like affect your ability to fair and impartial in this trial?

THE JUROR: No, sir.

THE COURT: Thank you. You may be seated. Yes, ma'am, your name.

THE JUROR: Again?

THE COURT: Yes, ma'am.

THE JUROR: My husband used to work for the sheriff's department and the police department for the past 30 years.

THE COURT: Here in Williamsburg?

THE JUROR: Yes, sir.

THE COURT: Is this a county case or a city case?

MS. BARR: It's a town of Kingstree case, Your Honor.

THE COURT: Beg your pardon?

MS. BARR: Town of Kingstree case. City case.

THE COURT: City case.

MS. BARR: Yes, sir.

THE COURT: Would that affect your ability to be fair and impartial in this trial?

THE JUROR: No, sir.

THE COURT: And I know you just stood a minute ago, but we have to make a record of this. Go ahead and tell us your name again.

THE JUROR: Juror 79, Janice Gamble.

THE COURT: Yes, see we have to -- I can tell who it is. But later somebody might be reading this and they will have to know that. Your name and number.

THE JUROR: My number is 78. My name is Quincy Graham. And I have brother that was a state trooper with Williamsburg County.

THE COURT: But he is not associated with Kingstree police. I mean, he might work with them.

THE JUROR: No, sir.

THE COURT: Would you be able in spite of that, be fair and impartial in this trial.

THE JUROR: Yes, sir.

THE COURT: Thank you. I appreciate it. She did call that to my attention earlier. Have,

are any of you or member of your immediate family members of, or contributors to organizations that are what you would call victim's advocates; particularly, those who would focus on criminal sexual conduct issues or sexual battery issues? If so, please stand.

(Whereupon, no response.)

THE COURT: No one stands. Have any of you or a member of your family worked as a social worker or been social welfare, family service worker or been, are any of you or a member of your family a psychologist or psychiatrist? If so, please stand.

(Whereupon, no response.)

THE COURT: No one stands. Do any of you contribute to or are you members of organizations; such as, the Paternal Order of Police, Sheriff's Association, Trooper's Association, Mother's Against Drunk Driver's, Student's Against Drunk Driver's or CAV. Citizen's Against Violence? If so, please stand.

(Whereupon, no response.)

THE COURT: No one stands.

MR. BARR: Your Honor, for the record, if you would note the State objects to certain

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request to charge by the defense; particularly,---

THE COURT: Well these aren't request to charge. These are jury questions. And I have marked out all. The only other one that I intend to go over in some fashion would be No. 11.

MS. BARR: Thank you, Your Honor.

THE COURT: I know we have some teachers here, a principal here. And so I am going ask to this question. And I expect at least one or two people to stand. Have any of you worked with children in the past as a volunteer or as an employment; that is, have you been a principal of a school, taught fine arts at a school, been a guidance counselor at a school, been a coach for little league, taught ballet? Anything like that? If so please stand.

And I am going to ask all of you to just tell me your name and number. And then I am going to ask you generally whether you can be fair and impartial; that is, the questions will be to all of you after you tell me your name and number. And while you are standing; that is, I used to coach little league. I'm a boyscout troop leader or whatever. After we get all of that on the record, I will then ask any of you who could not

be fair and impartial to raise your right. But we will start with our principal again.

THE JUROR: Juror 72, Janice Gamble. I taught, as well as, I am still a principal.

THE COURT: Yes, sir.

THE JUROR: I'm not sure of my number. My name is George Hutto. I did summer camp with kids from ages 8 to 15.

THE COURT: Thank you. Yes, sir. Remain standing, because I have got another follow up question. Yes, sir.

THE JUROR: Juror 113, owner and director of the day care.

THE COURT: And your name. This lady that just stood up.

THE JUROR: I'm juror No. 8. I was a volunteer grandparent, would that?

THE COURT: That will be fine. Yeah, just remain standing. Yes, ma'am.

THE JUROR: 92. Jennifer Holliday. I'm currently teaching in culinary and fine arts.

THE COURT: What ages?

THE JUROR: Kindergarten through 12th grade.

THE COURT: Yes, sir.

THE JUROR: Juror No. 99, Chris Kennedy. I'm a little league coach for children in the sports league.

THE COURT: Now we go back go the lady.

THE JUROR: Me?

THE COURT: Yes, ma'am.

THE JUROR: Juror No. 125. Jenny McKenzie. I was a teaching assistance for 15 years. For children.

THE COURT: Thank you. Next lady.

THE JUROR: I'm Juror No. 97 Elizabeth Johnson. I'm a retired language art's teacher for Williamsburg County schools.

THE COURT: Yes, sir.

THE JUROR: Yes, my name is James McLaughlin. And I believe my number is 129. I have an outreach program in Cades.

THE COURT: Yes, ma'am, in the blue.

THE JUROR: Juror 151. Joyce Powell. I was the assistant volley ball coach for 7 years.

THE COURT: Yes, ma'am.

THE JUROR: Sheree Britt. And I think my number is 18. I work with the YMCA, and children from age, well kindergarten through fourth in after school daycare program.

THE COURT: If any of you would be unable to fair and impartial, please raise your right hand. All can be seated. Do you know who one of the most famous people from Andrews is? Chubby Checker. I got to meet him one time. We didn't do the twist together.

The following are possible witnesses in this case. I do not know that all will testify, but they are listed as possible witnesses. Even if they don't testify, their names may come up. So if you are related by blood or marriage or a close personal friend or acquaintance of any of these individuals, please stand: Sergeant Trena Hamlet of the Kingstree Police Department. Lieutenant Thomas Dean McCrea from the Kingstree Police Department. Then from the Children's Center, Robin Griggs, Katie Brown, Dr. Susan Luberoff. And it's called Durant Children's Center. Sherry Dennis.

Then not associated with the police or the children's center, Angelica McBride, Benjamin McBride. Victim 1 [redacted], Emma Cooper, Samantha Cooper, Gladys M. Evans. I've asked you earlier about Justin McBride. Corena McBride. Officer Dozier, I don't have his first name, from the

Kingstree Police Department. Officer McClary. I don't have his or her first name from the police department. Officer W. Hamlet and Officer B. Thornton from the Kingstree Police Department. Also from the Kingstree Police Department, Officer Cornell Knight, Investigator Trena Hamlet. Then the Durant Children's Center. And I've already asked you, I've got a Robin Griggs. And this says Robin T. Griggs. And Dr. Luberoff. I've already asked you about them. Any of you related by blood or marriage or a close personal friend or acquaintance of any of those individuals? If so, please stand.

(Whereupon, no response.)

THE COURT: No one stands. Anything further from the state?

MS. BARR: Nothing further.

THE COURT: Anything further from the defense?

MR. MOBLEY: I beg the court's---

THE COURT: Yes, sir.

MR. MOBLEY: ---indulgence. Nothing further, Your Honor.

THE COURT: I will ask your No. 6. I neglected to ask that. Have any of you or a

member of your immediate family been either the victim of or accused of being involved in some sort of inappropriate sexual situation? An assault, or any criminal sexual conduct or lewd act on a child. Or even contributing to the delinquency of a minor or anything like that? If so, please stand.

(Whereupon, no response.)

THE COURT: No one stands. Thank you. The way we draw juries in this court is, as follows; strikes are five and five. We'll check on that. It might be 5 and 10. If you hear your name called, please come forward. And come, at this time don't stop there at the break in the bar. Come all the way up right in front of the clerk. The clerk will you will turn around and you will face first the table that will be to your right. And, Ms. Barr, will say either present the juror or excuse the juror. If she says excuse the juror, you may return to your seat. If she says present the juror, turn to your left and face the table where Mr. McBride and his attorney Mr. Mobley are seated.

Mr. Mobley will say either excuse the juror, which again means you may return to your

seat or swear the juror. If you hear the words, swear the juror, you may come have a seat in the jury box. And we will draw 12 jurors and two alternates. Please come forward when your name is called. I am going to ask the clerk to swear you in. And I've already asked these questions. But when you are swearing, you are swearing; not that what you are going to say is true. But what you have said or done or not done to this point, is true and correct. Please stand and raise your right hand.

(Whereupon, the jury is sworn.)

THE COURT: Anyone feels they have not, I think everybody is agreeing by doing that, that they have been honest to this point. Strikes are 5 and 10. So we will draw a group. And from that, then we will draw the jury. So it will take us a few minutes while we get this done.

THE CLERK: Juror No. 7 Jamell Alston (m-b) accepted. Jury No. 18 Sherry Britt (f-w) Defense struck. Juror No. 113 Willie McClary (m-b) defense struck. Juror No. 146 James more son (m-b) defense struck. Juror No. Janice Gamble (f-b) Defense struck. Juror No. 94 George Hutto (m-w) accepted. Juror No. 24 Montey Brown (m-b)

state struck. Juror No. 138 Omekia Boyd (f-b). Accepted. Juror No. 137 Henrietta Moyd (f-b) defense struck. Juror No. 199 Joe Wilson (m-w) defense struck. Juror 143 Willie Nesmith (m-b) accepted. No. 4 Alex Alston (m-b) accepted. Juror No. 50 Terry Culick (f-w) state struck. Juror No. 118 Jesse McCrea (m-w) accepted. Juror No. 132 Jessica Mims (f-w) accepted. Juror No. 60 Brenda Epps (f-b) state struck. Juror No. 35 Kayla Carsten (f-w) defense struck. Juror No. 19 Antonie Brown (m-b) accepted. No. 141 Lawrence Nesmith (m-b).

THE COURT: Send the sheriff to check on Mr. Nesmith.

THE CLERK: Juror No. 133 Evelina Mitchell (f-b) defense struck. Juror No. 99 Christopher Kennedy (m-w) defense struck. Juror No. 8 Juanita Anderson (f-b) defense struck. Juror No. 162 Jimmy Riggins (b-m).

THE COURT: Mr. Riggins, when you came up here, did you tell me you knew Mr. McBride?

THE JUROR: No, I don't know him.

THE COURT: Okay.

THE JUROR: Well I know somebody else.

THE COURT: Somebody else was here, but

not him.

THE JUROR: Yeah.

THE COURT: Okay, thank you. We were just a little confused.

THE JUROR: But I did serve less than 5 years ago.

THE CLERK: No. 162 accepted. Juror No. 13 Wendy Bone (f-w). Accepted. Juror No. 190 Latarsha Washington (f-b) accepted. Juror No. 125 Jenny McKenzie (f-w) defense struck. Juror No. 56 Alexander Durant (m-b) state struck. Juror No. 15 Victoria Branham (f-w) accepted.

THE COURT: We will draw two alternates. One for the state. And two on each. One per alternate for the state and two per alternate for the defense.

THE CLERK: Juror No. 129 James McLaughlin (m-b).

MR. MOBLEY: Your Honor, for my clarification, how many strikes do I have for the alternative?

THE COURT: As to each, as to this gentleman, the state has one, you have two. As to the next one that's called up, the state has one, you have two. Basically she has got two. And you

have got four. But you can't -- it's chopped up into one, two, one two.

THe CLERK: Defense struck. Juror No. 49 Will Cooper (m-b) accepted. Juror No. 151 Joyce Powell (f-w) defense struck. Juror No. 176 Michael Smith (m-w) defense struck. Juror No. 192 Myrtle Wheeler (f-w) accepted.

THE COURT: Anything from the state involving the strikes at this time?

MS. BARR: No, sir.

THE COURT: Anything from the defense involving the strikes at this time?

MR. MOBLEY: None, Your Honor.

THE COURT: Counsel, come up here just a minute and let's make sure we are on the same.

(Whereupon, the attorneys approach the bench and confer with judge.)

THE COURT: Madam Clerk, do you have a call back number?

THE CLERK: Yes, it is on their card.

THE COURT: Okay. Those of you who were not chosen, I am going to ask you to bear with me just one minute. And then I'll have some information for you. I'll have some information for all of you right now basically. Those of you

who were chosen, we're not going to start the actual presentation of the testimony until tomorrow morning because we have some legal matters we need to take up. And that might take all afternoon. But even if it doesn't, I don't want you sitting around in the jury box or the jury room waiting on us to take care of some things we need to take care. So we're going to start the trial at ten in the morning. Make sure you are here at ten. And when you leave, the bailiff will tell you -- take you the jury room and show you where that is, and you are to report at ten in the morning.

Now even though you have not been sworn in, you are on this jury panel. So you are not to discuss this case with anyone. If anyone tries to discuss this case with you and they approach you and try to this discuss this case with you, tell them you cannot do so, because you are serving as a juror. And report back to me if anyone tries to discuss this case with you, you are a seated juror. And they will be in trouble with the court for trying to talk to a seated juror.

Do not to make up your own mind or discuss

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the case among yourselves as the jury panel, until I instruct you at the end of the trial when you go in to deliberate and return a unanimous verdict. Prior to that time you don't have all the tools you need to make a fair and reasoned decision.

Now, also while you are serving on the jury don't let yourself be -- I know you're not going to let anybody discuss the case with you. Don't let yourself be exposed to any news coverage or media. Don't read anything about this case, watch anything about this case or listen to anything that remotely deals with the trial. If anything catches your eye or ear, if it has anything to do with this trial or this type issue please disregard it and don't listen to it and watch it or read anything about this case. You must base your verdict solely on the evidence and law in this trial.

In this modern world, we have access to everything by our phones and by our computers. Do not use either of those devices or any other devices to do any research about this case. Don't try to find out anything about the state or anything the counsel or Mr. McBride. Or don't try to find out anything about the charge is. I will

tell you that at the end of the trial. Don't try to find out anything about court procedure or evidence. Just don't do any independent research by use of any device whatsoever; including, using Google or the Cloud or any kind of device such as that.

And while the next thing may sound a little strange, but I think it's important. Don't use any social media to let people know you are on the jury. Don't email someone and said hey, I am serving on the jury panel. Sure as the world, they will email you something back that you shouldn't hear or shouldn't know. So just concentrate on the trial and not anything else at this time. Are you okay? Do you need some water?

THE JUROR: No.

THE COURT: Anything else the state wants me to cover before we stop?

MS. BARR: No, Your Honor. Thank you.

THE COURT: Defense?

MR. MOBLEY: No, Your Honor.

THE COURT: Madam Clerk?

THE CLERK: No, sir.

THE COURT: Everyone else, I will be with you in just a minute. I would ask you now to

keep in mind those things. And I will see you back at ten in the morning. If you will go out this way to the jury room. If you will just go up these steps and follow the bailiff, she will show you where the jury room is. And we'll see you at 10 in the morning. Have a pleasant evening.

Before, you leave, Mr. Nesmith, Willie Nesmith, you are the foreman of the jury. When you come back tomorrow, you will take this first seat.

(Whereupon, At 12:09 p.m. jury is dismissed.)(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: You may Proceed.

MS. BARR: The State is ready, Judge. I believe there are a number of pretrial matters that the defense would ask for court to hear at this time.

THE COURT: All right.

MR. MOBLEY: Thank you, Your Honor. May it please the Court, obviously I represent Mr. Justin McBride. At the time of the alleged offense Mr. McBride 16 at the time. Law enforcement was called to home. Law enforcement arrived at that particular time. They

subsequently interviewed at that particular time. Now he did make some make statements to law enforcement. And due to the fact that he was a minor, as well as making statements to the law information, in regards to a matter that he was being under investigation for, I think that it would be prudent to request at this particular time, Your Honor, a Jackson v. Denno hearing to make sure that the actual statements that were provided to law enforcement, were free and voluntary.

One that to make sure that he was under interrogation, and wasn't under the custodial interrogation of counsel in this particular matter. Especially if the state intends to use any of his particular statements during the course of this trial which I anticipate doing.

Now, Your Honor, to be quite candid with the court, my client, he does place himself at the location, which is going to be a part of the process of, it's not absolute denial. However, he places himself at the scene. So, we have some -- we are going to have inquiries into that as well; to make sure when he gave that he was mirandized. It was free and voluntary, and he understood these

rights as a 16-year-old minor, Your Honor. And who all was present and make sure his constitutional rights were protected at that particular time.

THE COURT: Does the state plan to use his statement?

MS. BARR: Judge, we may. We haven't made the decision at this point whether or not we will offer it into evidence. But I think out of abundance of caution, we probably need to have Jackson versus Denno hearing.

THE COURT: Well if we're going to do it, we might as well do it now while we're got the jury out. Call you first witness.

MS. BARR: We'd call Trena Hamlet.

Trena Hamlet, Being first duly sworn, testified as follows:

DIRECT EXAMINATION by Ms. Barr:

Q State your full name for the record.

A Willa Trena Hamlet.

Q And back in June of 2010, ma'am, where were you employed?

A Kingstree Police Department.

Q And were you a -- well tell me what we you did with the Kingstree Police Department back

in June of 2010.

A Well during this time, I believe, I might have just been the victim's advocate at the time.

Q Okay. And on that occasion did you respond out to the home of Victim [redacted]?

A Yes.

Q And tell me what was the nature of the call?

A The initial call was given to the street officers. And one of the officers called me on the cell phone, because he stated it was the juvenile female that was making the complaint. And he thought maybe she would feel more comfortable talking to a female officer. So when I arrived, the street officers as well as their commander was on the scene.

Q Now when you talk about the female who had made the complaint, we're talking about Victim [redacted]

A Uh-huh. (affirmative.)

Q Is that right? Is that a yes?

A Yes.

Q And she was how old at the time?

A She was nine at the time.

Q And did you take a statement from her?

A A verbal statement, yes.

Q As a result of that statement, tell me what then did you do?

A Once I arrived on the scene, I spoke with the officers that were on the scene. And then again, they explained to me the nature of the call, that a grandmother stated that she believed something may have happened between her granddaughter and her -- and the granddaughter's cousin.

Q Okay.

A So I went inside and I spoke with -- when I entered the residence, there were so many family members around, I didn't know who was who.

Q Okay.

A So the mother pointed out to who she was, and she got her daughter.

Q Now when you say the mother, you're talking about the---

A The victim's mother.

Q Okay.

A And I asked was there somewhere, you know, we can go more privately so everybody would not be involved in the conversation.

Q Sure.

A And we went into the kitchen area.

Q When you all were in the kitchen area, you took a verbal statement from Victim [redacted]; correct?

A Victim [redacted].

Q At some point later that same day, did you also have occasion to talk with the defendant Justin McBride.

A I did.

Q Tell us where that conversation took place.

A At his residence which is next door.

Q At his residence.

A Right.

Q At the time that the -- you took the verbal statement -- I'm assuming it was a verbal.

A It was.

Q From Mr. McBride, how old was he at the time?

A 16.

Q And was there anyone else present at the time you took the statement from Justin?

A His mother was.

Q Now did, during that statement, did he ever leave from his home?

A Did he leave?

Q Yes.

A No. Not during that time.

Q Now was his mother or father or any parent or person in authority present during the entire statement?

A Correct, his mother was.

Q Prior to the statement, did you place him in handcuffs?

A No, we did not.

Q Prior to the statement, did you tell him that he was under arrest?

A No, I did not.

Q Was he free to leave at any point and time before the statement was given?

A Right.

Q How long did the actual statement take place?

A It probably, 5, 10 minutes if that. Just for clarity.

Q And in terms of actually telling him why you were there and what you wanted.

A Right.

Q Did he have any questions about anything?

A I asked him, well when I first got there,

I explained, I asked him did he know why I was over there. And he was stating that his cousin or someone may yesterday, might have touched his cousin. I spoke to the mom and and I asked the mom if it would be a problem if we spoke to him.

Q You are talking his mother.

A His mother.

Q Okay. What did she say.

A And she said no. Come on in, and she was present during the whole time they were sitting side by side on the couch.

Q Okay. Were there any threats made to him by you---

A No.

Q ---or any other law enforcement official?

A No.

Q How many people were actually in the house from law enforcement when the statement was given?

A Myself and two other males officers.

Q Did anybody promise him anything in order to get him to talk to you all?

A No.

Q Why did he tell you?

A DO you remind if I refer to notes?

Q Sure.

A Would it be a problem if I read what I have here?

Q You may refer to your report, yes, ma'am.

A It states that myself, Officer Dozier, and Officer McClary and the suspect's mother, was present during the interview. I asked the suspect which was Mr. McBride, did he know why we were there. And he stated that they were trying to say that he touched his cousin. I asked him did he have a problem with telling me what happened. He stated he was home. He heard a knock on the door. His cousin was at the door. And he asked why was she there. And she said no one was at home; that her mother wasn't at home. And he allowed her to come in. He said that she looked like she was mad. Sat down on the couch. They watched TV. Do you want me to continue?

Q Please.

A Stated that at some point he got up, and went into the restroom. And then shortly after she came up in and he said he tried to, he was using the restroom, and he tried to conceal himself from her. And yelled at her to, you know, leave out of the bathroom.

Q Now when he indicated he tried to conceal

himself from her, what was he talking about?

A He was using the restroom and she came in on him. That's what he was stating that he was using the restroom. She came in the bathroom on him. He sort tried to hide himself. He motioned his body. You know, I tried to hide myself and yelled at her to get out of the bathroom.

Q And let me just be clear. When he says hide himself, and he indicated as you testified, he indicated as if he were trying to shield himself, is he talking about his genitals? The private part?

A Yes.

Q Please continue.

A He stated a short while later, she was ready to go home. But she didn't want to go out the front door, because a bug was on the door. He went to the back door. She went to the back door, but it was locked. But she unable to lock it, so he unlocked the door for her, and she went home.

Q Okay.

A And I asked him did anything else happen, and he stated, no. Based on her statement prior, she mentioned that he was in the kitchen. So I asked him did he ever go into the kitchen. He

stated no. I asked any other rooms in the residence. He said, no. I asked did she go into any other rooms and he said, no. I asked was there anything else he wanted or needed to say. And he replied no. Of if he had any questions which was, no.

Q Now at any point and time during the statement that he give to you, did his mother try to stop the statement?

A No.

Q What happened from that point on?

A I went back to the residence to speak with the juvenile victim again. Just for some clarity, because of some of the things that she said prior. And he did not say some of the things that he said prior and she did not corroborate on. So I just wanted to hear her statement one more time.

Q So you went back to the victim's residence?

A Right.

Q Where was the defendant when you back to the victim's residence?

A He was still at home with his mom.

Q He was still in his house?

A Uh-huh. (Affirmative.)

Q Even after, and I need you to be clear. You said he was still at his house.

A He was still at his house, yes.

Q So even after you got his statement from him, he was not immediately then put into handcuffs?

A No.

MS. BARR: Ma'am, I believe that's all the questions I have. If you would, please answer any questions that defense counsel may have for you.

MR. MOBLEY: Thank you, Your Honor. May it please the court?

THE COURT: Yes, sir.

Cross Examination by Mr. Mobley:

Q Is it Investigator Hamlet?

A Yes. Well, yes.

Q Are you a commissioned officer?

A I am.

Q You are. Now at the time, it's my understanding when you were answering the questions, that you were assigned as a victim's advocate?

A I was a part that was small. So you sort of wear many hats. So at that time I cannot exactly remember what all I was doing. But I know

specifically during that time, It might have been the victim's advocate, as well as, street, SRO---

Q Okay.

A ---juveniles. It was just so many things.

Q So in essence, you had many hats.

A Right.

Q And you had the power to arrest as well as investigate.

A Correct.

Q Now when you arrived on the scene, were you alone from the Kingstree Police Department?

A No. Other officers were already on the scene, Officer Dozier from the Kingstree Police Department. Officer Gordon from the Kingstree Police Department. Officer McClary of the Kingstree Police Department. And Lieutenant McCrea from the Kingstree Police Department. So all of them were already on the scene. And it was Officer Dozier that called me to the scene.

Q Now where were the officers located? Were they located at Mr. McBride's home? His mother's home?

A The two residents are right next door to each other. So they were standing on the outside. So it was like right between the two residences.

Q Oh, okay between the two residences.

A Right. Because there were so many people there, so they were on the outside.

Q Now to your knowledge, do you know if Mr., excuse me.

A Officer Dozier.

Q Officer Dozier, or any of the other officers, had already spoken with Mr. McBride?

A I have no idea. I am not sure.

Q Now you first go and speak with Victim ?

A Yes, I did.

Q Okay. And then from there you decide to go and interview Mr. McBride; correct?

A Correct.

Q Now the purpose of that interview was an investigation?

A Two sides to every story. So I went to do my field interview.

Q Okay. So a field interview would be synonomous to be an investigation as well; correct?

A Correct.

Q So during this field interview, the intent was to gather information and facts as you may see fit at the time.

A Right.

Q Now when you went there to the home, which two officers went there with you?

A Officer Dozier and Officer, give me just a minute. Dozier and McClary.

Q Are they still employed with the police department now?

A No, not with Kingstree Police Department.

Q I'm sorry?

A No, not with Kingstree Police.

Q And who first went into the home?

A I'm not sure.

Q Were you the first one to speak with Mr. McBride?

A In reference to the incident itself,---

Q Yes.

A ---or once we walked into the home?

Q Once you walked into the home.

A I am not sure. I am really not sure.

Q Okay. In regards to questioning, do you recall questioning Mr. McBride?

A Yeah, I spoke with him.

Q Now you were inside the home; correct?

A We were.

Q And both officers were inside the home;

correct?

A Correct.

Q Where were they located within the home?

A Standing by the door.

Q Okay. Both officers?

A The room is, you know, I would say fairly small, but the way it was positioned so they were just standing to the side.

Q To the side near the door?

A Yeah.

Q And then you began -- you approached Mr. McBride along with his mother there.

A Correct.

Q Now at that particular time, what did you say to her? How did it start?

A I asked him did he know why, you know, we as officers were there. And his comment was, that they were trying to say that he touched his cousin.

Q Now after that particular statement, did you ask him any other statement? Any other questions?

A I asked his mother---

Q Okay.

A ---would it be a problem if I spoke

with -- let me back up. I asked his mother would it be if we speak with him, and she said no, come on in.

Q Okay.

A Once we got inside, and we sat down. She sat down and he sat down beside me on the couch. And I asked if he had a problem talking to me about whatever happened. And we went from there.

Q So at this time you knew that he was a minor.

A Right.

Q Now at any point prior to or even after speaking with Ms. Trena McBride, which is his mother, did you let me him know that we are investigating and offer to give miranda warnings at all?

A I did not because it was not the -- at the time, it was just an incident that we were called out to. So he was not under arrest.

Q Okay.

A We were just trying to sort out who, you know, what happened.

Q Now earlier in your testimony, you state that Mr. McBride was free to leave.

A Correct.

Q In order for him to leave, he would have had to go between the two officers that were in front of the door; correct?

A He could have walked out the door.

Q Was that expressed to him at the time?

A Not verbally.

Q Did they have full uniform on at that particular time?

A Yes.

Q Did they have their belt holster and their guns?

A Yes.

Q Now were you in full uniform or were you in sort of a hybrid?

A Full uniform.

Q So we have three full uniformed officers at that particular time. Now during the course of this interview, you state that Mr. McBride stated that she wanted to go home, referring to Victim .

A Uh-huh. (Affirmative.)

Q But she wasn't able to. Is that correct? And correct me if I am wrong, please do.

A And---

Q Is that what he said?

A I am not exactly sure what you mean when

you said she wanted to go home.

Q Well, at some point and time, did Mr. McBride make a statement to you that due to your questioning; that she wanted to go home, but she wasn't able to.

A She was ready to leave---

Q Ready to leave.

A ---but she did not want go out the front door because a bug was on the door. That's what he said.

Q I apologize about that.

A That's okay.

Q And what other statements were given at this particular time?

A Since she didn't want go out the front door, she went towards the back door. But the back door was locked. And she couldn't get it open, so he opened the back door for her, and let her go, let her out the door.

Q Now you state after taking Justin's initial statement.

A Uh-huh. (Affirmative.)

Q Did he write it down?

A No.

Q Okay. It was just all verbal.

A Right.

Q After taking this initial statement, you stated that you wanted to go back and reinterview Victim ?

A Right.

Q Because of what?

A In reference to the -- just some of the things that she said, and then some of the things that he said. So I just wanted to get clear just to make sure, you know, everything that she said, just to make sure nothing was left out.

Q Is it is safe to say that the statements and version of events were in contrast?

A Yes.

Q Now after going back and interviewing Victi Victim , did you have the occasion to go back and interview Mr. McBride?

A I don't believe I went back, no. Give me just no minute. No, I didn't go back over.

Q Now, I got one last question. The interviews that you conducted with Ms. Victim 1 Victim 1 , were there parts that were inconsistent?

A Yes.

MR. MOBLEY: Nothing further, Your Honor.

THE COURT: Redirect?

MS. BARR: Your Honor, I don't have any questions on redirect.

THE COURT: You can step down. You can take your time.

MS. BARR: And, Your Honor, we would not call any further witnesses on that issue.

THE COURT: Are there any witnesses on this issue, Mr. Mobley?

MR. MOBLEY: I do not, Your Honor.

THE COURT: And, of course, Mr. Mobley, what is your position on it?

MR. MOBLEY: Thank you, Your Honor. May it Please the Court, at this particular time, we would move to strike any reference to Mr. McBride making the initial statement that someone accused me of touching Victim 1 During the first encounter with law information, Detective Hamlet, at that particular time. Your Honor, we make this motion specifically to this particular statement, based off the fact that through testimony, it's revealed that miranda warnings were not given. Three law officers were present at the scene. And they were in a small confined room.

Now, Your Honor, I do not have even go over a lot of the law with you, but just to make

sure the record is clear, under a Jackson v. Denno, an actual arrest and taken into custody, does not have to occur. It's whether a reasonable person thinks that can occur at that particular time, whether they can leave.

Now, Your Honor, someone that is 16-years-old and being there, obviously with the protection of their mother, I would premise to you, Your Honor, that he was not aware he could leave and not come make statements that could be used against him in trial, Your Honor.

So it's one of those things that it is kind of obstructive custodial type of interrogation. Because obviously when an officer went there, she wanted to investigate, to see what the statements were between the two parties. So the intent was there to elicit statements from my client. Three officers in full uniform appear on the actual scene. They go into his home. They have full belts. Full law information uniforms, Your Honor. And I would premise to you that Mr. McBride had no idea that he did not have to answer any questions at that particular point, even in the presence of his mother. It was placed into the record that miranda warnings were not

given at all to anyone. And that as a minor, I think it's one of those things where even a mother would have had to have been given those particular warnings to make sure that her son understood them as well as law enforcement, Your Honor.

So based off of that information and the testimony of detective, Investigator Hamlet, we would move to strike that one statement during this particular encounter.

THE COURT: What's the state's position?

MS. BARR: Your Honor, just to be clear, I want to make sure I understand the motion to strike the one statement. Is that just simply the statement by Mr. McBride to the effect that, someone accused me touching Victim 1 Is that all that defense counsel is asking the court to consider striking?

MR. MOBLEY: That is correct.

MS. BARR: Judge, I would in response to defense counsel's argument, I would just simply assert to the court, that in order to trigger the requirements of miranda, the primary thing has to be that a defendant has to be in custody. There is no question here that this questioning by the officer to the defendant, it occurred in his home.

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The defendant was not in custody at the time. Miranda is not triggered until there is a custodial interrogation. There was none here.

Your Honor, the entire scenario happened in his home, with his mother there. He consented to the statement, as did the mother. Your Honor, he was even made aware through whatever means, what the subject of the investigation was at the time that he agreed to talk with law information. Again, with his mother's knowledge and consent. No promises made him. He was not coerced or forced in any way to make a statement. And, Judge, most telling as to relates to whether or not this defendant was in custody, was the fact that after the officer finish speaking with him, she left him at his house with his mom, and went over to the victim's house.

So, Judge, obviously if there was some ruse as to whether or not this was really a custodial interrogation, seemingly to me, after he gave his statement, he would have immediately been placed in handcuffs. And, Judge, that is not in fact the case.

Your Honor, I would cite a couple of cases. One, State versus Easler, 327, S.C. 121.

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It's a 1997 South Carolina case. And it stands on the proposition that custody requires an arrest or restraint comparable to formal arrest, and is adjudged according to a reasonable person standard -- a reasonable person, being a person in the suspect's shoes. The restraints on a defendant's freedom must be measured by an objective standard, not by the subjective use proffered by either the interrogating officer or the person being questioned.

Judge, I would also cite Yarborough versus Alvarado, 124 Supreme Court, 21, 40. It's a 2004 case. It stands on the proposition that neither a suspect history with law enforcement nor his age, is a factor in the objective determination of whether or not he is custody for miranda warnings. Also, Judge, statements in similar cases have been upheld where a juvenile is questioned in the principal's office by school officials with the police present, actually determined not be a custodial interrogation. That state is in Re: Drolshagen. It's D-R-O-L-S-H-A-G-E-N. That is 280 S.C. 84, 1984. There is another Supreme Court case that stands on the proposition as when the defendant was

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questioned in her bedroom. U.S. Parker, that that did not trigger of miranda.

And also, Judge, I'd cite Oregon versus Mathison. 429, U.S. 492. Which one of the principles holding for that opinion; is that, a voluntary station house interview is admissible where the defendant is allowed to leave soon after. So even the cases where a person is actually at the department center or at the law enforcement complex, if that individual is allowed to leave shortly afterwards, and is not in -- and in that instance has determined not to be a custodial interrogation, the Supreme Court has allowed those particular statements in.

So, I think, if, Your Honor please, if you look at all facts and circumstances surrounding the statement, we would submit that it's clear that the defendant was not in custody, and therefore the requirement of miranda was not triggered.

THE COURT: Tell me again the cases you mentioned about the child in the bedroom.

MS. BARR: Yes, sir. U.S. v. Parker, 262, F. 3rd. It's a 4th Circuit Court opinion. I'm sorry, 262 F. 3rd, 415, 2001, 4th Circuit Court

opinion.

THE COURT: What does it say? I don't have a copy of that. What does it say?

MS. BARR: That was just a case, Judge, where an individual was questioned inside the bedroom, and the state sought to admit those statements that were made inside the bedroom at the trial, and the defense objected, Your Honor. And it was held in that particular case that based on the fact, and I don't know if there were other factors. But based on the fact that the defendant was in the bedroom, but that was not deemed to be custodial arrest. Or for purposes of miranda, it was not required that the individual be mirandized first.

THE COURT: What was the age of the defendant.

MS. BARR: I'm sorry, sir?

THE COURT: What was the age of the defendant?

MS. BARR: I am not sure what the age of the defendant was.

THE COURT: Anything else, Mr. Mobley?

MR. MOBLEY: Briefly, Your Honor. Well looking at the objective standard, there is

nothing more objective than having a young man being accused of sexually touching someone and surrounded by law enforcement in a small room. There is no way he would have known that he didn't have to make any statements at that time. Nor was he given any reason to believe that he would have to make any statements. Thank you, Your Honor.

THE COURT: Well if it was 21 or 41, I would look at it different. But I am going to suppress that one particular statement and not anything else, because you are asking for it because his expectation of the ability of being free to leave in his own house, you should be -- I just don't believe someone should be put in a situation where their option is freedom to leave when they are in a place they have an absolute right to be; that being their own habitation. So I am going to strike that. I'm going to suppress that one part, he's asked of me, and that is to say my cousin says I touched her.

MR. MOBLEY: Thank you, Your Honor.

THE COURT: What else do we have?

MR. MOBLEY: Court's indulgence. Your Honor, we have several motions. I'll try to get the ones that are least involved out of the way.

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First and foremost, Your Honor, we would respectfully ask the court to rule upon and make sure that the prosecution and its witnesses are aware that hearsay is not admissible. Particularly, involving the family members that were there on the scene. We want to just make sure they understand that hearsay is not, cannot be testified to front of the jury. And if someone is to testify into what they heard, because there were only a few people, period. So we would respectfully ask the court to rule upon that and make sure that the prosecution and its witnesses are aware.

THE COURT: Well I've got to assume the prosecution knows that hearsay is not admissible. And I can't rule until I hear the testimony. So if somebody it goes across that line, you need to object at that time, because I can't prospectively do it.

MR. MOBLEY: Absolutely, Your Honor. Now, Your Honor, under this particular line of statutes, specifically, 16-3-750, that particular statute reads in part: request that a victim submit to a polygraph examination. Under that particular statute what it reads is; a law

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enforcement officer, prosecuting officer or other governmental official may request that the victim of an alleged criminal sexual conduct offense, as defined under the Federal or South Carolina law, submit to polygraph examination or other truth telling device as a part of the investigation, charging or prosecution of the offense if the credibility of the victim is at issue.

However the officer or official must not require the victim to submit to a polygraph examination or other telling device as a condition for proceeding with the investigation charging a prosecution of an offense.

Now, Your Honor, previously we had Detective Investigator Hamlet to testify that there was some inconsistencies within Ms. C[redacted] first and second interview. What that does then, it triggers is their credibility issue here. There are some inconsistent statements between the first and second interview itself.

Now, Your Honor, the reason -- one of the reasons why I bring up this particular statute---

THE COURT: Have you got a copy of the statute? We don't use the books anymore, so I don't have the book. I don't the book up here.

MR. MOBLEY: I have an extra one too. May I approach?

THE COURT: Yes, sir. Thank you.

MR. MOBLEY: I bring that to the court's attention.

THE COURT: Go ahead.

MR. MOBLEY: For one thing, Your Honor, is that, unlike the inability to ask a defendant about a polygraph examination results during a trial, would appear on a mistrial. This particular statute has been codified into South Carolina law by the legislature here in South Carolina which made it law. It provides law enforcement with an additional tool to investigate these particular allegations.

Now I'm going to get back to and address it now, under this particular statute, the victim's information need not be corroborated, okay. And I am going to come back to that issue at a later point. But under this particular statute, we wanted the court to rule upon whether it is available to be asked of law enforcement officers as they take the stand as a tool for investigation. Being that it is now a part of law and codified to the law, I see of no reason why we

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should be barred from asking law enforcement, did you take that additional step to verify whether this was an accurate allegation itself.

Your Honor, it is quite an investigative process through law enforcement. You want to the have the option of asking law enforcement did they. If they didn't, why didn't they. Why didn't they think of it. And it's going to go with a larger scheme of things that did not happen in this particular case, Your Honor. We will get to those issues at that time. But I wanted to get a ruling upon this particular statute to make sure that I can at least ask the officers as they take the stand.

THE COURT: State.

MS. BARR: Your Honor, we would, object to that particular motion. I've got two problems with it. Two concerns about it. One, the victim in the case was [redacted] at the time this happened.

THE COURT: I am wondering if there is some -- I don't have enough information about polygraphs to know, and no evidence has been presented in the case there this is reliability after -- there's a certain age of which ones are

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susceptible to accurate information through a polygraph. I just think about that myself, because I just don't -- I don't know. It would seem to me that there would be -- I would have to have more information about the reliability of a polygraph to a 9-year-old, before I could hold that the polygraph would be appropriate under the statute, but go ahead, Ms. Barr.

MS. BARR: And, Judge, that was one of the primary concerns that I would have. Second, Your Honor, the statute states that an officer may request a victim to submit to a polygraph. And the last part is, as a part of the investigation charging for a prosecution of the offense, if the victim, if the credibility of the victim is an issue. Your Honor, there has been no testimony and no evidence before this court that the credibility of the victim was an issue for the officer at the time of the investigation.

Your Honor, I believe that testimony was that the victim who again, was [redacted] at the time, was inconsistent. But there wasn't that next question about what. Your Honor, people can certainly be inconsistent about very minor things that would not effect their credibility.

Particularly, if you are factor in the child's age at the time. There was not the follow up question in terms of what specifically the officer believed---

THE COURT: I hate to cut you off.

MS. BARR: Yes, sir.

THE COURT: You didn't go far enough. It does say oral prosecution.

MS. BARR: Yes.

THE COURT: So I think it's broad enough to cover where we are now, as far as, if there is credibility at issue that It doesn't just stop through investigating. It says investigation, charging, oral prosecution. So I am not with you on that part of your argument.

MS. BARR: Well, Judge, and here's where I don't understand in terms of the statute. Your Honor, when it says, when the credibility of the victim is at issue, my next question would be, well under what circumstances is the credibility of a victim at issue? When the defense says I am not guilty?

THE COURT: The truth of it is, in my opinion, the credibility of a witness is always at issue.

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MS. BARR: That's correct.

THE COURT: So it's kind of strange statute. You're the first lawyer who has ever called it to my attention. I don't know how old it is.

MS. BARR: It looks like it became effective June 2009.

THE COURT: 2009. So it's the first time it's even come before me.

MR. MOBLEY: And It's a novel issue, Your Honor.

THE COURT: I understand.

MR. MOBLEY: I apologize.

THE COURT: Yeah, I didn't think there would be anything on it. Go ahead, I am going still listening.

MS. BARR: Thank you, Judge. The statute would seem to suggest that in order for law enforcement to do it, or the prosecutor to do it, the prosecutor or the law enforcement officer gives them the discretion and asks that it be done; that the victim submit to a polygraph examination. It doesn't require it. And so my question will be if its -- if there is an issue about the victim's credibility, and as Your Honor

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indicated, every witness who potentially could take the stand, his credibility is going to be an issue. It seems to suggest that it's a tool law enforcement could use to further their investigation, to further their prosecution, if they believe the victim's credibility is at issue. Otherwise, I think you can every criminal case possible that a defendant can suggest that the state should make a victim submit to a polygraph.

So whose standard do we use, I guess would be my question.

THE COURT: Well this is particularly asked in criminal sexual conduct cases. And a tool in the defense's toolbox is always, did you take fingerprints. No. Couldn't you have taken fingerprints. Did you DNA swabs. No. It looks to me like this is just another tool in the defense's toolbox. It doesn't -- I don't know the genesis it of it. And but I am going to allow them to ask did they -- is this not -- you know, did you not have the opportunity to.

Well let's go back. I've got to go back a little bit though. I am still hung up on, I guess, this issue of whether or not a polygraph examination is reliable involving a 9-year-old.

And it would not be fair for the defense to be able to ask whether or not this was an option. If it was a hollow option; that is, I think I would have know that a polygraph is available to be administered with reliability to a 9-year-old before I would allow the defense to use, as I say, this tool in their toolbox.

So on the one hand I think you ought to be able to ask it. But under the circumstances of this case, I am going to rule that you cannot.

MR. MOBLEY: Thank you, Your Honor. Well, Your Honor, the piggyback on this particular statute, we're going to go to Statute No. 16-3-657.

THE COURT: All right.

MR. MOBLEY: Okay. Now under this particular statute it specifically states, and I think that's the result -- as a result of this statute. It's the one that came with the one that we were referencing earlier, but I am going to focus on this particular statute. It states that testimony of victim's need not be corroborated. In essence, it's basically saying, anyone can accuse anyone and the actual accusation is enough. When someone is facing a depravation

of a liberty to the extent of 25 years to life, we may have a due process problem here. And that may be why the legislature slid in that last statute that we just referenced.

Now that particular statute specifically applies through Section 16-3-652 through 16-3-658. Two of which my client is actually charged with, Your Honor.

Now by not requiring any corroboration whatsoever, it would be my premise that the actual statute violates the due process of the United States constitution. Okay. Basically what it does, it allows any individual to accuse someone of these accusations without any corroboration. It makes the accused prove that it didn't happen. That's burden shifting. That undermines our entire criminal justice process that we've actually operated on for hundreds of years. The burden of this particular court itself, is upon always the state.

You and I both know as former prosecutors, Your Honor, that we have the burden to prove beyond a reasonable doubt. With this particular statute, naked as it is, with just this particular point, not include the prior statute that we

discussed, the burden has been shifted to my client to prove. That's why he's here today. I'm sorry.

THE COURT: The statute, tell me why, do you know of any case where the testimony of the victim has to be corroborated?

MR. MOBLEY: No, Your Honor.

THE COURT: And due pro -- and they've codified it, which does make it a little different. But isn't that just a codification of?

MR. MOBLEY: It's a codification of the law, Your Honor. That method distinguishes it there. That doesn't make the law enforcement to receive and gather additional information. I think that's why some of the legislature and the general counsel up there, before they finish with the laws and rewrite them during the Omnibus bill act, that they had to slide in that last one about the polygraph examination. That is my argument there. You know, the corroboration may not be a requirement under common law, but we have a complication of the law, that my client is a facing a depravation of his liberties from 25 years to life. And I think it's the one that we need to explore, whether this particular statute

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by itself and alone, especially without the mere mention of whether a polygraph examination can be performed, is a violation of the due process clause of the 14th Amendment, Your Honor.

It's a novel issue again. It's one that I'm looking at. But what I'm really more so concerned about is that it totally shifts the burden. There is no other element within this, other than the accusation itself. Well, excuse me, there have to be -- they have to fit in age categories so on and so forth. Obviously being in the county. But just the accusation itself, Your Honor, I think that smacks in the face of our democracy that we currently have. It gets to a point where, you know, I can point to anyone else, two days ago that person, they molested me. That's all law enforcement needs. There is nothing to make sure that the client has a fundamental process to make sure that it's fair and balanced when he's going through this judicial system.

The mark has been raised beyond a reasonable doubt for a reason, which are actually try to prevent these type of accusations from happening. Otherwise we will going back to, and

no offense to anyone, Your Honor, to some other country that doesn't practice this particular democracy that we have, the criminal justice that we have. Iraq, Afghanistan, where you just get accused for stealing, and you don't go through a judge and trial, jury and trial, you have the judge and jury right there, and you cut off their hand. We don't want to go down that slippery slope at all.

THE COURT: We've still got the jury. Judge and jury. That's what we have juries for.

MR. MOBLEY: Yes, that is correct, Your Honor. It just -- it restraints my client's ability to defend himself. To the point that I think that it violates his due process to a fairness in being accused of a crime. Anyone, basically the way this statute says, anyone can make a crime, that's all law enforcement needs. Excuse me, anyone can make an accusation and that's all law enforcement needs to come and arrest me. Someone back home accused me, whether they talk to me or not, if they come in and swoop in and arrest me for something of that nature, without any other additional investigation.

THE COURT: Well I don't, just because of

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the conversations we've had, but isn't there another element to this? Isn't there something else? Didn't this child go through a forensic interview? So it's not just a bald statement to the officers that they take the ball and run. Anyway, let me hear from the state.

MS. BARR: Your Honor, I am sure I understand what motion is currently before the court at this time.

THE COURT: Well basically we're up to the charge; kind of up to whether or not I will charge this as the law.

MS. BARR: Okay.

THE COURT: Because that's the only time I would -- the jury would even be aware that this, and I presume none of the jurors are here, since we have been talking this length of time, I let them all go home. I don't think any of them came back just to be entertained. This is kind of premature, but I -- because I don't tell the jury this until we get to where if we do, the stage of the trial where we are charging the jury.

MS. BARR: And, Judge, I just want to -- I wasn't sure whether there was a motion.

THE COURT: Some of an in limine motion.

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I guess to protect, actually I don't mean to, I am not trying to belittle it, because I'm not. I think it's very important, but it's kind of a shot across in the bow. This is coming. So....

MR. MOBLEY: And you are absolutely correct, Your Honor. In what -- you are correct on all grounds. We are going to move to quash Count No. 1 of the indictment of the two-count indictment based off of this particular statute violates the due process clause of the United States constitution. It should not be charged to the jury.

THE COURT: Now you know what he is raising, Ms. Barr.

MS. BARR: And, Judge, the only thing that I would say in response to that, I think our general assembly, has recognized that these type of offenses by their very nature, typically occur in private. I don't know of any case that I prosecuted where the defendant rapes a child in the presence of other people. So when you have a person who forces a child to perform oral sex on him or performs oral sex on a minor, how can you ever prosecute that if the law in this state, were the case where you have to have corroborating

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evidence? I mean you could, no one could ever be charged. And I think that the general assembly essentially formed a balancing test, and they have balanced the rights of victims, and balanced the rights of defendants. And made the law what it is.

Judge, you've got criminal domestic violence cases that often occur with just the husband and just the wife. Or just the boyfriend and just the girlfriend. And oftentimes there are no corroborating witnesses. And I certainly think Your Honor, is right, there are many tools. Many arguments can be made by the defense in those type of cases. But ultimately, we would submit it's up to the jury to determine the credibility of this child. And that's within their province to make a decision based on that.

THE COURT: Based on the argument at this point in the motion; that this is an unconstitutional statute, that is 16-3-657, I deny that motion. I do not find it to be unconstitutional or in violation of Mr. McBride's due process.

MR. MOBLEY: Thank you, Your Honor.

MS. BARR: Your Honor, may I consult with

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defense counsel just a second?

THE COURT: Yes, ma'am. Next motion.

MR. MOBLEY: Your Honor, for the court's edification, three of the motions may not be able to go forward today. As based off the information I just received about the the forensic examiner not being available. What we're going to have to do is have a motion in regards to the reliability of the victim's testimony that you are going to have to do in camera, Your Honor. The competency assessment of Ms. Victim 1 [redacted], being that she was of such a young age at that particular time.

Now you may be able to do that one in camera without the need a forensic examiner. I don't -- I am not sure. I just want to make sure that the court is aware. Because those are the motions that we would request the court to rule upon in order for us to know the other motions that we have, which is one under---

THE COURT: Let me stop you again. I hate to do this. I understand the first part about forensic, but what about the competency of the victim?

MR. MOBLEY: And I think that---

THE COURT: A juvenile is competent to

testify. We don't have the old, when I first starting practice, when I went on the bench, I had to make a competency determination. I don't believe think that's the case anymore. That's up to the jury.

MR. MOBLEY: And I don't think that's the case as well. I didn't even know if that was one we was necessarily have to go to. So that may not even be one that we bring up, Your Honor. Now there's going to be a State v. Cromer hearing in regards to making sure that the forensic examiner is only able to testify to certain things. It's got a new line of cases that are coming down from the Supreme Court in regards to the expert testimony of forensic examiners. Unfortunately, she isn't here today. We want to make sure that under that particular case law one, that the written report isn't admitted into evidence as a former vouching or bolstering the actual witness' testimony.

THE COURT: Well you don't plan to do that. She doesn't plan to do that.

MS. BARR: No, sir.

MR. MOBLEY: Okay. Then let me make another one.

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THE COURT: And I am not clairvoyant when I say she doesn't plan to do it. I should have said, I don't think she was.

MR. MOBLEY: I have to put it on the record, Your Honor. In the videotape admission, I am going to challenge the videotape admission, Your Honor. That's going to require, I think, it's Ms. Griggs.

MS. BARR: Griggs.

MR. MOBLEY: Ms. Griggs. Because she is going to be the one to have to -- the solicitor is going to have to lay the foundation in order to get video in, attempt to, by meeting the requirements under the statute with out of court statements. I am going to attempt to actually suppress that. Well ask the court to suppress it, Your Honor. I don't think we can go through that particular one without her here. And the court is more knowledgeable than I am, when it comes to that. But I don't know how we can go forward with it.

THE COURT: I think I'd have to see and hear her testimony before I could make any ruling.

MS. BARR: And, Judge, just to shed some light on it, I had actually let a co-worker in the

office where Robin Griggs works, I let her know either last or the week before, that we wouldn't need her before Tuesday. I thought we actually had the jury coming in this afternoon at 2:30. Normally the first week we have the jury come in at 2:30. We have since changed our practices, and we've had the jury come in at 9:30. So that just kind of delayed my schedule a little bit. She's not available this afternoon as I anticipated.

THE COURT: Yeah, I think this morning you told me you thought she would be available at two.

MS. BARR: Yes, sir.

THE COURT: And that's one reason we let the jury go.

MS. BARR: Yes, sir.

THE COURT: So we could take care of all this.

MS. BARR: Yes, sir.

THE COURT: That's not the case.

MS. BARR: It is not the case.

THE COURT: What else have we got to do today, Mr. Mobley?

MR. MOBLEY: Your Honor, under State v. Groverstein, that particular case

basically comes down to where does an alleged victim possibly get their source of information in regards to sexual activity.

Your Honor, If I may approach along with the solicitor.

THE COURT: Sure.

(Whereupon, the attorneys approach the bench and confer with judge.)

MR. MOBLEY: In light of the conversations at the bench and the motions that we have already been ruled upon, the defendant would rest in regards to pretrial motions at this point.

THE COURT: Ms. Barr, does the state have any?

MS. BARR: No, Your Honor.

THE COURT: We will adjourn in this case. And we have got some other matters to take care of it appears, until 10 in the morning. And I want to talk -- we're going to take a break. If I could see counsel in chambers.

MR. MOBLEY: Yes.

THE COURT: And talk to your client and whatever. So we'll take about a 15-minute-break.

(Whereupon, the trial commences on Tuesday, October 29th 2013, at 10 o'clock a.m.)

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THE COURT: State ready to proceed on the McBride case?

MS. BARR: The state ready.

THE COURT: Is the defense ready?

MR. MOBLEY: Yes, Your Honor.

THE COURT: Anything before we get the jury in?

MR. MOBLEY: Nothing, Your Honor.

THE COURT: Okay, let's bring the jury. I've appointed Mr. Nesmith. Willie Nesmith.

(Whereupon, the following takes place within the presence of the jury.)

THE COURT: Good morning. After you all are all comfortably seated, if you will stand. The clerk will administer your oath.

(Whereupon, the jury is sworn.)

THE COURT: Thank you. You may be seated. I am going to chat with you for just a minute, and then I am going to turn the case over to the attorneys for them to make their opening statements. They have a right but no obligation to make what are called opening statements. Now these opening statements are just that. They are not arguments. They are not trying to convince you of a certain verdicts. Later in the case they

will have the right to come before you, taking the law that they know I will charge, and the facts that are have been presented through the witnesses and any exhibits. They will have the right to argue why your verdict should be a certain verdict. They are not trying to persuade to come to a certain resolution of this case. That's not what they're doing at this time. And they're not witnesses, so they're not giving you testimony. What they will be doing at this time is giving you an outline or a blue print of the trial, so you will know better what this case is about and what to expect.

Now I have three primary jobs in this trial. And I will get to that in just a minute. First, I want to remind you that Mr. McBride has entered a plea of not guilty. His plea of not guilty places on the state the burden of proving his guilt beyond a reasonable doubt. In our system of justice anyone charged with any offense including Mr. McBride, is presumed innocent of that charge. They need not prove their innocence. The state however must their guilt beyond a reasonable doubt. My three primary jobs are one: I am the logistic's person. I make sure we take

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breaks; that one person talks at a time; the mechanical part of the trial. I also rule on questions of evidence. If there is some piece of evidence that one side believes the testimony or exhibit and one side should be allowed for your consideration and based on some evidentiary or other legal reason the other side believes it should not, I have to make a ruling on that. My ruling is binding on both the attorneys and the witness and for you as the trial jury.

My third job is, that I am the sole judge of the law in this case. I give you some legal principals now. At the end of the trial, I will give you a precise and comprehensive charge on the law as you are to apply to the facts as you determine them to be. You are not to infer from anything I say or do at any time during this trial as indicating any finding on the facts. That is solely your job as a trial jury. It is solely up to you to examine the evidence, give to the evidence the effect, the value, the weight and the truth you believe it should have.

In doing this, you may believe one witness as opposed to several. Several witnesses as opposed to one. You may believe all, part or none

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of a witness' testimony. Your common sense, your sense of logic, your sense of reason, use your experiences in life as you analyze the evidence. In objecting to the facts you have to determine the believability, the credibility of the witnesses who testify. Use the things that I have already talked about in accessing believability. You use those things that you in your day to day life find as being indicative as someone being truthful. And you can use certain evaluators, the witness' demeanor, how they act on the stand. Are they hesitant, straightforward. Look at consistencies and inconsistencies in their testimony or when compared with earlier statements that they may have made.

You also can look at the opportunity the witness had to know those things they testified to. And you can look at any bias or prejudice a witness may have. And whether a witness would help -- wish to help or hurt one side or the other. Determine the true facts and apply the law and you can be in a position to return a verdict that speaks the truth.

Mr. Foreman, you will be the liaison between the jury and myself. Preside over the

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jury's deliberations. And at the important time the verdict, a unanimous verdict of the jury. You will occupy that seat during the course of the trial. There is no other assigned seating other than -- where are the alternates? Anyway, other than where Mr. Nesmith's sits, the rest of you just have a seat wherever you have go come in. You have the only assigned seating.

Keep in mind what I've told you and I'm not going to keep repeating it. But I am going to tell you one more time tell you over the breaks, during lunch and overnight, do not discuss the case with anyone outside the courtroom. Don't assess any social media or other electronic tweeters or tweets or whatever, any google or any kind of electronic access. Do not utilize any including, as I said, facebook don't try to make up your own mind. You're not equipped with all the tools you need to make a fair and reasonable decision until I tell you are going to be deliberating and return a unanimous verdict.

So don't discuss the case mind among yourselves or try to make up your own mind until we reach that point. And we breaks about every hour and a half. I find that's a good time to

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take a break. But if any of you need a break at any time, just raise to right hand and no questions asked, and we'll take a break. And I assure you if I feel like I need to take a break, I am going to take one. And I'll give you the same prerogative. And I extend that to counsel and Mr. McBride.

We want to move the case along, but if anybody needs to take a break, please let me know. I know we have someone on the jury who has some back issues. And so if that person or any other needs a break, just raise your hand and we will take a break. I am going to turn it over to the attorneys now. I believe that's everything I wanted to tell you at this time. Ms. Barr.

MS. BARR: Thank Your Honor. May it please the court.

THE COURT: Yes, ma'am.

MS. BARR: Mr. Foreman, Ladies and gentlemen, good morning. I want to thank you all for being here this morning and this week. And when I say thank you, I mean that earnestly and sincerely. We know that probably there are 100 other places you all would rather be at, rather sitting in jury duty on a criminal case. But I

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thank you. And again, I mean sincerely from the bottom of my heart. I believe in our jury system. I believe we have the best jury system in the world. And it's because of people like you, who are willing to serve, who are willing to make sacrifices from your jobs and your families to be here, that's why it works. So again, thank you.

You all were here on yesterday and we selected a jury. And you all saw how that whole process went. There were times when people were coming up and they either excused, or the prosecution didn't seat them or the defense didn't seat them. And let me tell you a little bit about that process. For the most part, the lawyers don't know any of the jurors personally. And so when we have individuals who come up, and they, you know, luckily or unluckily, get called for jury duty, we really have to make a gut decision. And so we have to look at each of you. And the question I always ask myself is, do I think this person can be fair. Do I think this person is going to obey the law.

And when I looked at each and every one of, I said I think this person can be fair. I think this person can obey the law. And I suspect

that Mr. Mobley will agree with me on that. Now that's probably the only thing we are going to agree about in this case. But, folks, what you all are called upon to begin your deliberations. We are satisfied we have a smart jury and an intelligent jury.

Let me tell you a little bit about why you are here. The defendant Justin McBride is charged with criminal sexual conduct with a minor in the first degree. And assault with intent to commit criminal sexual conduct with a minor in the first degree. What does all that mean. That means that the defendant is charged with engaging in sexual battery with a victim who was less than 11 years old at the time.

Now, what do we mean when we say sexual battery. The law actually defines that for us. Sexual battery means intercourse whether it's vaginal intercourse or whether it's anal intercourse. And it also means oral sex. The second part of the criminal sexual conduct with a minor statute requires that the state prove that the child was less than 11-years-old when the incident occurred. The case is tragic, because it involves family members. But that's not really

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what makes it so tragic. What makes it tragic is what happened to this [redacted] girl. And what I submit to you that the evidence is going to show in this case is back on June 21st 2010, Victim 1 Victim 1 who is seated at the prosecution table, was [redacted] She had gotten off the bus coming from summer school. And her mom was not at home.

She is going to tell you that they she went to the defendant's house, her cousin. Her first cousin. At the home he forced her to perform oral sex on him. And he also attempted penetrate her rectum. The folks who were near the residence, because these families live right next door to each other. They will be here, and they will testify as to what they saw and what they observed and what they did on that particular occasion. One of the things that you will not hear in this case, and I'm going to tell you and I am sure my good friend Mr. Mobley is going to tell you, is there is not any DNA evidence in this case.

And I know folks that in this day and age, we want to hear, have that kind of evidence. And I tell you what, it makes my job a whole lot

easier if we had that type of evidence in the case, but we don't have it. We have this young woman, this young lady, who is going to get up on the stand and she's going to tell you what happened. And you all at the appropriate time, will decide whether or not to believe her. And when you all are going through that the process, and right before you deliberate I'll get a chance to stand up and chance to address you again. When you all are going through that process, I am going to point out some things that I will submit to you that will leave you firmly convinced that what this young women told you is true.

Now we're not going to be in it very long. I mean I think the trial of the case will probably take a day or two. So I just kind of wanted to give you all a timeframe of what you are looking at. But I do want you to keep in mind that we need you all to give this case the time and attention that it deserves. It is very important for the family of Victim 1 [redacted]. It is very important for the family of Justin McBride, because this is their day. All of their days. And after everything is said and done, the only thing that these parties expect you all to do, is

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to render a verdict that speaks the truth.

Now again, Mr. Mobley and I aren't going to agree on what that means. But, folks, once you've done that, you've given the case the time it deserves and you have fairly and earnestly deliberate, we are satisfied that you will render a verdict that speaks the truth. I look forward to addressing you again in closing arguments. And I thank you now for your time and attention.

THE COURT: Mr. Mobley.

MR. MOBLEY: Thank Your Honor. May it Please the Court.

THE COURT: Yes, sir.

MR. MOBLEY: Counsel.

MS. BARR: Yes, sir.

MR. MOBLEY: How appropriate that this trial starts during the beginning of a holiday season. We have Halloween this week. We have Christmas. New Year's. Thanksgiving. Valentine's. We have Easter coming up. When we were younger, you and I, we were told of the symbolic things that those particular events would conjure up. And we believed them. We were told about Santa Claus. We were told about vampires, goons and goblins. We were took about this

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mythical Easter bunny that came up and laid eggs. We were told about a tooth fairy that came and placed a dollar up under our pillow.

Now the parents told us these things and we had to believe them. How dare we ask them to provide us truth. We believed those things despite asking them, how can you prove that? Is Santa Claus really real? Or whether we had asked. And what they said was, because I said so. You know, it was nothing further that we had to conjure in or draw from them.

Ladies and gentlemen, we are in a trial; that Mr. Justin McBride stands accused of these awful acts. And what is anticipated in this particular trial; is that someone makes an accusation they want you to believe because they said so. What we need to do is ask the state to prove if this happened, do you have proof that this happened. We do not want to fall back into the same type thing we were doing as young children, when we took someone's word for it, to only find out later in life, it was a lie.

We have perpetuated even to our children. We keep the cycle going, and they perpetuate to their children. The thing is, there is no

consequences to it. We are telling our young children never to lie. But we're perpetrating that because is no consequences to perpetuating that lie. For generations and generations and generations. We are not here bringing gifts. We are not here for any joyous occasion at all. This is a tragic case.

We have someone who is facing being incarcerated. We have a young lady that has to actually take the stand and address these accusations. Now I am not going to be difficult. I don't want to be back doing a goblin today. But what I do intend to do is to defend my client, Mr. McBride, vigorously. I am going to expose some things that happened in this case that are tragic; that should be considered the house of horrors. What I want you to do is listen during the course of the state's presentation. And can they prove it; give us this evidence and make us prove it. They are going to place Ms. Victim 1 [redacted] on the stand, she is going to address that there was a lot of inconsistencies within her statements.

They are going to have to put the officer on the stand. She's going to have to address that

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she had to go back and do s second interview because there were inconsistencies in Ms. Victim 1 [redacted] statements to law enforcement. They are going to have to address that there was some alleged evidence pertaining to DNA, supposedly some sperm, that got on Victi [redacted] [redacted] They can't produce anything. You need to ask them why can't they. Victi [redacted] is going to have to take the stand and say that Justin attempted to penetrate her. The state is going to have to contend and have the testimony of their witnesses state, a doctor examined her and nothing was found. No type of penetration.

This is a real hard. So what we are asking you all to do is to convict my client based off of a statement. How long are we going to allow this to be perpetrated. The consequences are too severe. Make someone finally prove what they tell you. Can't give anyone the benefit of the doubt. And it's going to be very easy to see this young lady take the stand and give her consent; give her the benefit of the doubt. That's not the law. The state must prove beyond a reasonable doubt that my client Mr. Justin McBride, committed these heinous acts. And I

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submit to you that they would not be able to do. Every one of their witnesses will take the stand and contradict something about this case. Something about the statements.

Law enforcement is going to have to get up there in front of you all as residents here, and say we didn't do this. We didn't do that. We lost this. We lost that. We didn't test this and we didn't test that. They have to do it. Somebody needs to be held accountable. My client should not be held accountable by placing some fictitious benefit of the doubt with someone who would want to make an accusation. Just let that marinate for awhile. Just a simple accusation, statement. Go to law information call 911, you get arrested. That's what this case is about, because they don't any physical evidence, contradictory statements, inconsistencies in the statement, lost supposed evidence. Because we don't even know if it was collected or where it is at or anything. Maybe it is what is a mass destruction somewhere. Let that marinate for a little while.

This is going to be a hard case. A trial. I'm defending him. We should not be here today,

but we are. And we're going to demand that the state prove beyond a reasonable doubt that my client committed these two acts. Thank you, Ladies and gentlemen. We look forward to speaking with you during the course of this trial.

THE COURT: Ms. Barr, you may call your first witness.

MS. BARR: The state calls Victim 1 [redacted].

THE COURT: Vict [redacted] you may come up and be sworn.

Victim [redacted], being first duly sworn, testified as follows:

MS. BARR: May it Please the Court.

THE COURT: Yes, ma'am.

DIRECT EXAMINATION by Ms. Barr:

Q Victim [redacted], good morning.

A Good morning.

Q Now you are really soft spoken. So I need you to make sure you speak up for me.

A Yes, ma'am.

Q State your whole name.

A My name is Victim [redacted].

Q And, Victim [redacted], you just put your hand on the bible; right?

A Yes, ma'am.
Q And the court administered you an oath; right?
A Yes, ma'am.
Q And do you understand that when you placed your hand on the bible, you were promising to the judge and to the court that you would tell the truth?
A Yes, ma'am.
Q And when I ask you a question and when the defense lawyer asks you a question, are you going to tell the truth?
A Yes, ma'am.
Q You understand that you can get in trouble if you don't tell the truth.
A Yes, ma'am.
Q Now, Victim , how old are you?
A I am 13.
Q Now I may tend to elevate my voice, but I want you to elevate your voice to make sure the jury hears you, okay.
A Yes, ma'am.
Q You are 13 years old.
A Yes, ma'am.
Q When were you born?

A July 1st 2000.

Q July 1st 2000. Okay, so back on June 21st 2010, you were about a week or so shy of your 10th birthday?

A Yes, ma'am.

Q So you are [redacted] is that right?

A (Nods in the affirmative.)

Q I need you to say yes or no.

A Yes, ma'am.

Q Okay. Very good. Now who are these two folks sitting at the table with me?

A My mom and dad.

Q That's your mother and your father. What's your mother's name?

A Angelica.

Q Angelica. And what's your father's name?

A Benji.

Q Okay. Benji. Do you have any brothers and sisters?

A Yes, ma'am.

Q How many brothers and sisters do you have?

A I have one brother and one sister.

Q Now are they older than you or younger than you?

A They are younger.

THE COURT: Can you speak up just a little bit?

A Yes, sir.

Q Victim 1 do you see the defendant over there; is that right?

A Yes, ma'am.

Q What is his name?

A Justin.

Q And do you know how long he is now?

A 20.

Q 20-years-old. Is that right?

A Yes, ma'am.

Q You believe he is about 20-years-old now?

A Yes, ma'am.

Q And make sure that when I ask you a question, make sure you respond yes or no so the Court Reporter can take down what you are saying, okay?

A Yes, ma'am.

Q And what grade are you in right now?

A 7th.

Q 7th grade. You live here in Kingstree.

A Yes, ma'am.

Q And you've lived here all your life?

A Yes, ma'am.

Q Now on June 21st of 2010, were you going to summer school during that time?

A Yes, ma'am.

Q Tell us about the day when you got off the bus when this incident happened.

A When I got off the bus, everybody told me that my mother wasn't home. So I went---

Q And I'm sorry. What I need you to do is make sure you speak up for me and talk a little slower, okay.

A Yes, ma'am.

Q When you got off the bus, you said everybody was telling you your mom wasn't home.

A Yes, ma'am.

Q When you say everybody, who is everybody?

A The kids.

Q The kids on the bus?

A Yes, ma'am.

Q They told you that your mom wasn't home. So then tell us what happened next.

A I got off the bus. I got mad. I got my stuff and got mad. And then Ms. Gladys came out of her door.

Q Okay. And I'm sorry, Sweetie, I may have to interrupt you from time to time, okay. Tell us

who Ms. Gladys is. We don't know who Ms. Gladys is. Tell us who that is.

A The one that lives by aunt Tina. Her neighbor.

Q Ms. Gladys is one of your neighbor's?

A My aunt Tina's neighbor.

Q She is your aunt Tina's neighbor. Now who is aunt Tina -- who is your aunt Tina to Justin McBride?

A My auntie.

Q Okay she -- okay, how is she related to Justin.

A By my daddy.

Q Is aunt Tina Justin's mother?

A Yes, ma'am.

Q And aunt Tina is your dad's sister; is that right?

A Yes, ma'am.

Q Okay. So you saw Ms. Gladys.

A Yes, ma'am.

Q Then tell us what happened when you saw Ms. Gladys.

A She told me to come in, I said, no, ma'am. Because she had a visitor. I didn't want to interrupt.

Q And I may not have heard you. The record my not have been clear. You said that aunt Gladys -- I mean your neighbor Gladys said what now?

A She said do I want to come in.

Q Okay. And you said what.

A And I said tell her no, ma'am.

Q You said no, ma'am, why?

A Because she had a visitor.

Q She had a visitor?

A (Nods in the affirmative.)

Q Tell us what happened next.

A And then I knock on the door. And he opened the door. I went in.

Q Okay, hold on. Hold on. You knocked on whose door?

A Aunt Tina's house.

Q Okay. You knocked on the door at aunt Tina's house. And he said come in?

A Yes, ma'am.

Q Who is he?

A Justin.

Q Justin McBride? Did you go in?

A Yes, ma'am.

Q Okay, was anybody else in the house?

A No, ma'am.
Q He was there by himself?
A Yes, ma'am.
Q Tell us what happened when you went in.
A I went in and I sit down on the couch. He went in the kitchen messing with some stuff, making noise.
Q Okay. He went in the kitchen messing with some stuff, making noise. And speak up, Sweetie. And what happened after that?
A And then he came beside me. Then I told him to turn the TV, because I wasn't allowed to listen to that.
Q You need to tell me that again. You said that something about the TV. Tell us that again. I need to make sure you speak up. I need to hear you all the way back.
A He was looking at an adult show, and I told him to turn it off.
Q Why did you tell him to turn it off?
A Because bad words were on there.
Q Because bad words were on there?
A Yes, ma'am.
Q And you told him that you couldn't do what?

A I couldn't -- I wasn't allowed to watch it.

Q Tell us what happened next. Speak up for me, okay.

A Then he turned it off. And he took out his manhood. And then he told to jerk it. And he grabbed my hand, and put my hand on his manhood. And I jerk it away from him. And then that's when he is going to grab my head, and pull it down to make me put my mouth on it.

Q You said that he took out his manhood?

A Yes, ma'am.

Q What do you mean when you say his manhood? What is that?

A His dick.

Q And that's a man's private part?

A Yes, ma'am.

Q He took it out and did what?

A He told me to put my mouth on it. He grabbed my head.

Q He grabbed your head?

A Yes, ma'am.

Q And where were you all at in the house? What room were you all in?

A In the living room.

Q Is that where the TV was?
A Yes, ma'am.
Q Now where were you at in the living room?
A On the chair.
Q And where was he?
A Beside me on the chair.
Q You mentioned something about him grabbing your head?
A Yes, ma'am.
Q Show me how he grabbed your head. If you're Justin and I'm Victim 1 show me how he grabbed your head. What did he do?
A He pulled it down to do like that.
Q He pulled it down to where?
A To his manhood and then he grabbed it hard.
Q He grabbed your head hard?
A Yes, ma'am.
Q And pulled it down to his manhood; is that right?
A Yes, ma'am.
Q And then did what?
A He then he grabbed my head. Then he told put my manhood -- my mouth on his manhood. And I put -- I had my hand on his stomach and then

pushed him away from me. And that's when the white stuff and clear stuff came out of his manhood. It was in my mouth and on my shirt. And I ran in the bathroom.

Q You said you saw and white and clear stuff come out of his manhood?

A Yes, ma'am.

Q And it went in your mouth?

A Yes, ma'am, on my shirt.

Q What did that taste like?

A Nasty.

Q And it went on your shirt. Is that a yes?

A Yes, ma'am.

Q Okay. And then you did what?

A Then I ran into the bathroom and wipe it off, and spit it out of my mouth.

Q You spit it out where?

A In the sink.

Q In the sink. Okay. You said you wiped it off?

A Wipe the stuff off my shirt.

Q Okay, what stuff did you wipe off your shirt?

A The stuff that came out of his manhood.

Q What did you use to wipe the stuff off

your shirt that came out of his manhood?

A Tissue.

Q Tissue? Just regular toilet tissue; is that right? Remember I told you, you have to got say yes or no.

A Yes, ma'am.

Q What did you do with the tissue after you wiped it off your shirt?

A I put it in the trash can.

Q Victim 1 [redacted], do you remember what you wearing that day?

A A black shirt and my birthday pants that my grandmother gave me.

Q Do you remember what Justin was wearing that day?

A A green shirt. A muscle shirt with green and the arm out. And he had his black basketball pants on with a green and white lines on it.

Q He had some what kind?

A Basketball short pants.

Q Basketball short pants. And you said it was what colors?

A It was all black and white with green stripes.

Q A green stripe down it. Is that a yes?

A Yes, ma'am.

Q Do you remember what kind of underwear he had on?

A No, ma'am.

Q Now you mentioned earlier something and I neglected to follow up on it. You said something about he wanted you to jerk him. What are talking about, about that?

A Up and down his manhood.

Q He wanted you to do what now?

A Up and down his manhood.

Q And you motioned with your hand kind of like this? Is that right? Remember you got to say yes or no.

A Yes, ma'am.

Q Thank you. When you say that he wanted you to jerk him on his manhood. He wanted you to put your hands where?

A On his manhood.

Q And do what?

A And jerk it.

Q Did you do that?

A No, ma'am.

Q What happened after you came out of the bathroom and you spit the white stuff out of your

mouth?

A He was spraying man's perfume around the living room.

Q He was doing what now?

A Man's perfume.

Q He was spraying man's perfume? Around where?

A Living room.

Q In the living room. Do you know why he was doing that?

A No, ma'am.

Q What happened next?

A Then he is going to pull down -- he pulled down my pants over and over. And I pulled it up. And that's when he pushed me chair trying to get his manhood out.

Q You said he pulled his -- your pants down over and over.

A Yes, ma'am.

Q And you were doing what while he was pulling your pants down?

A Pulling them back up.

Q You were pulling them back up. And he tried to do what?

A Put his manhood behind my butt.

Q Put his manhood in your butt.

A Yes, ma'am.

Q How did that feel?

A Hurt.

Q Ma'am?

A It's hurting.

Q It's hurting. Is that a yes?

A Yes, ma'am.

Q What happened at that point?

A Then I pulled up my pants and hurry. I push him off of me. Then I pulled up my pants, and hurry to get out of the house. He was -- he blocked me in the front door. At then that's when he told me where am I going. Then I ran in the back door. And then he -- then I heard him behind me, I unlocked the door and ran. And that's he was at the door, and he sucked his teeth at me.

Q He did what now?

A He sucked his teeth at me.

Q He sucked his teeth at you?

A Yes, ma'am.

Q And then where did you go?

A Then I went home. Then I knock, I hit -- I kicked the door hard. And my mom told me, who

is that knocking on the door like that. I said me.

Q Okay.

A And then she opened the door and she told me, what's wrong. And I ain't said nothing. She told me, where I come from. I said over there. She said where, over there. And then I said aunt Tina's house.

Q Your mom asked you where you came from. Is that right?

A Yes, ma'am.

Q And you said you came from your aunt Tina's house.

A Yes, ma'am.

Q And she -- when she first asked you what's wrong, you didn't say anything.

A No, ma'am.

Q Why didn't you tell her what had just happened to you?

A Because I scared he might come and get me.

Q You were scared he's going to come and get you?

A Yes, ma'am.

Q Did you eventually tell your mom what happened to you?

A No, ma'am. She came to the door and then she told me to stop right there. And then she smelled man's perfume on me.

Q She smelled the man perfume on you?

A Yes, ma'am.

Q Did she stay in the house or did she leave the house?

A She stay in the house.

Q Did she ever go to Justin's house?

A Yes, ma'am. She went to tell him---

Q Don't tell me what she told you. But you did see her go to Justin's house.

A Yes, ma'am.

Q Do you remember speaking with some of the police officers about what had happened?

A Yes, ma'am.

Q The young lady who is seated by me, was she one of the officers that you spoke to?

A Yes, ma'am.

Q You said you were wearing a black shirt that day?

A Yes, ma'am.

Q Was there anything on that shirt that you know about?

A Deodorant on the back of my shirt.

Q There was deodorant on the back of your shirt?

A Yes, ma'am.

Q How did you get deodorant on the back of your shirt?

A He had his hand around my neck.

Q Say again now.

A He had his hand around my neck. I mean his arm around my neck.

Q Who had his arm around your neck?

A Justin.

Q Justin had his arm around your neck.

A Yes, ma'am.

Q And he got deodorant on the top of your shirt; is that right?

A Yes, ma'am.

Q At what point and time did he have his hand around your neck, where he got deodorant on your shirt? When did that happen?

A When I was still sitting down.

Q What was he doing, and what were you doing when he had his arm around your neck?

A That's when he was telling me to jerk his manhood, and I push him from me.

Q That's when he was telling you to jerk his

manhood.

A Yes, ma'am.

Q And you pushed him away from you.

A Yes, ma'am.

Q Where did you push him at? On what part of his body?

A On his stomach.

Q On his stomach. Did you, you showed your mother the deodorant stain on top of your shirt?

A She saw it.

Q She saw it?

A Yes, ma'am.

Q Victim 1 when you spoke to the police did anybody ask you whether or not you took a bath or you washed?

A No, ma'am.

Q Did anybody ask you whether or not you had tissue paper to wipe anything off?

A I did wipe his white stuff off the front of my shirt.

Q Right. But did anybody ask you that question?

A No, ma'am.

Q When you were running out of the house from Justin's house, what did you do when you

leaving his house to go to your house?

A Say that again.

Q What did you do when you were leaving his house to go to your house after this all happened?

A To get away from him.

Q Did he follow you?

A No, ma'am.

Q How do you know he didn't follow you?

A When I looked back and make sure he wasn't following me, I looked back. He was at the front of the door and he suck his teeth at me.

Q Okay. You mentioned that when he was trying to put his manhood in your rump, you mentioned to us that it hurt.

A Yes, ma'am.

Q Did it hurt anymore either later that day or the next day or the day after?

A No, ma'am.

Q What happened later that night when you talked to your mom.

A I was trying to do a bowel movement, and I couldn't. And I yelled and called my mom.

Q What did you tell your mom?

A I couldn't use the bathroom.

Q Did you tell her why you couldn't use the

bathroom?

A Yes, ma'am.

Q What did you tell her as to why you couldn't use the bathroom?

A He put his manhood in the back of my butt.

Q Because he put his manhood in the back of your butt?

A Yes, ma'am.

Q And when you refer to manhood, Victim 1 are you talking about a man's penis?

A Yes, ma'am.

Q Do you know what happened to the black shirt that you wearing that day?

A No, ma'am.

Q Now before all this happened with Justin, how did the two or you get along?

A We have our ups and downs sometimes. And we talked to each other.

Q When you say you have your ups and downs, tell me what you mean.

A Ups and downs when were arguing over who was watching TV and who is not.

Q Sometimes you all would get in an argument over who is watching TV?

A Yes, ma'am.

Q And did the two of you ever play together or hang out together?

A No, just him -- just me, just me and his sisters.

Q But other than just kind of kid's stuff arguing over who is going to watch what TV channel, other than that you all got along okay?

A Sometimes.

Q Victim 1, have you understood all the questions I asked you?

A Yes, ma'am.

Q Have you answered them honestly?

A Yes, ma'am.

Q At the time this happened, do you know how old Justin was?

A 16.

Q 16-years-old?

A Yes, ma'am.

MS. BARR: That's all the questions that I have. Please answer any questions the defense counsel may have for you, okay.

A Yes, ma'am.

MR. MOBLEY: Thank you, Your Honor. May it Please the Court.

THE COURT: Yes, sir.

Cross Examination by Mr. Mobley:

Q Vict [redacted]

A Hi.

Q Good morning.

A Good morning.

Q Are you missing school today?

A Yes, sir.

Q What grade are you in now?

A 7th.

Q 7th?

A Yes, sir.

Q What type of studies, classes do you have?

A Social studies, math and science and ELE.

Q And ELE?

A Yes, sir.

Q And which one are you the best in?

A Everything except math.

Q Really? I had difficulty with math as well. Y'all get better with it, just keep practicing. I hate that you have to miss class today, but I have some questions that I need to ask you. I'm going to go back to June 21st 2010. The same day that the solicitor was speaking about. Now my understanding is that you were in summer school; correct?

A Yes, sir.
Q And what were you in summer school for?
A Because I didn't understand my -- I was missing -- I stayed back.
Q I'm sorry?
A I stayed back.
THE COURT: You stood back.
A I'm still in the same grade.
Q Okay. So you were basically trying to catch up on your classes.
A Yes, sir.
Q Now on this day, was this your first class that you had attended for summer school?
A Yes, sir.
Q Was this your first time riding the school bus?
A Yes, sir.
Q Now how were you being transported back and forth previously when you would go to school?
A On the car ride.
Q Oh, okay. Who would take you to, as a car ride?
A My mama.
Q Your mom. She couldn't take on this day?
A No, sir. I wanted to ride the bus.

Q Oh, you wanted to ride the bus? So how was the bus experience?

A Fine.

Q It was fine?

A Yes, sir.

Q Now how long does it take for you to get from the school back to your home on the bus?

A I am not sure.

Q You don't recall that day?

A (Nods in the negative.)

Q Now when the school bus was pulling out to your home, when did you notice that your mom wasn't at home?

A The kids told me my mom wasn't home.

Q How did they know?

A They looked over there.

Q Oh, they looked over there?

A Yes, sir.

Q Did they know what type car your mother drove?

A No, sir.

Q How did they know that she wasn't home then? You didn't know?

A They knew I lived there. That's all they know.

Q I'm sorry?

A They knew I lived there. That's all they know.

Q Okay. But they were telling you that your mom wasn't home. Did they---

MS. BARR: And, Judge, I'm sorry.

THE COURT: You've got to answer. You've got to give words, a verbal answer, please, ma'am.

Q If you can speak and provide us with a verbal answer, please ma'am, okay.

A Yes, sir.

Q So they knew where you lived; correct?

A Yes, sir.

Q And they somehow figured out that your mother wasn't home; correct?

A Yes, sir.

Q Were they teasing you about it?

A No, sir.

Q No. Now were you anticipating your mother being home when you got there off the bus?

A No, sir.

Q Oh, so you knew she wasn't going to be home.

A (Nods in the negative.)

Q You need to speak up.

A I don't understand.

Q Did you know whether she was going to home or not?

A No, sir.

Q Okay. So you didn't know.

A No, sir.

Q How did that make you feel?

A Mad.

Q It made you mad? Why did it make you upset?

A Because she usually be home. But she be home all day.

Q Now it's a little scary thinking that no one is home; correct?

A Yes, sir.

Q So you get off the bus and you are a little upset that your mama's not home. And then you proceed to Ms. Gladys' house; correct?

A Yes, sir.

Q Now Ms. Gladys came to the door; correct?

A Yes, sir.

Q And she stated that she had company?

A Yes, sir.

Q Okay. And was that the reason why you didn't go in?

A Yes, sir.

Q If her company wasn't there, would you have gone in?

A Yes, sir.

Q Did that kind of make you feel a little sad?

A Yes, sir.

Q So then you had to, now where is Ms. Gladys' home located in relation to yours? How close is it to your home?

A Between my aunt Tina's house.

Q Between, I'm sorry?

A Between her house.

Q Between whose house?

A My aunt Tina.

Q Okay. So it's real close then.

A (Nods in the affirmative.)

THE COURT: You've got to say yes or no.

A Yes, sir.

Q So then, you proceed to leave from Ms. Gladys' house. And you decide to go to Justin's house; correct?

A Yes, sir.

Q And then he allows you to come in. He comes to the door and then what?

A He opens the door and he allowed me to come in.

Q He allowed you to come in?

A Yes, sir.

Q Then what did he do from there?

A And then I sit down, and then he went in the kitchen. First he go to the door and he went in the kitchen. And that's when I heard a noise. He was messing with the kitchen stuff, making noise. Then that's when he sit beside me. That's when he took out his manhood.

Q No. Where were you all located when he supposedly pulled down -- pulled out his manhood?

A In the living room.

Q In the living room. Okay. So he left the kitchen and came to the living room where---

A Yes, sir.

Q ---you were located?

A Yes, sir.

Q Were you all both standing up at the same time then?

A No, sir.

Q Was the door -- now the door that you went into, was it the back door or the front door when you came into the house?

A The front door.

Q It was the front door. And he pulls down his shorts?

A Yes, sir.

Q And he pulls out his manhood?

A Yes, sir.

Q Then what does he do then?

A He told me to jerk it.

Q Now did you jerk it?

A No, sir.

Q Prior to that, did you see Justin jerking it?

A No, sir.

Q So tell me what happens next. He pulls down his manhood and tells you to jerk it. Are you all still standing up?

A No, sir.

Q Okay. You are sitting down then?

A Yes, sir.

Q So when did you all sit down?

A When I went in, I sit down first and he went in the kitchen.

Q So he went back into the kitchen.

A (Nods in the affirmative.)

Q Okay.

A And then that's when I sit down. Then he came and back in the front room and sit beside me.

Q Now correct me if I'm wrong, but I thought that earlier you stated that you all were standing up.

A No, sir.

Q Okay. So when did he pull his pants down?

A When he tried to put his manhood in my butt.

Q Okay. So what at -- at what point did he ask you to jerk it? Were you standing up?

A We were sitting down.

Q You all were sitting down.

A Yes, sir.

Q Okay. And then what happened?

A And then he told me to jerk it. That's when he grabbed my hand and told me to jerk it. And I told him no. And then I pushed and pushed. My hand was coming, I pushed it.

Q Okay. If I may approach the witness, Your Honor?

THE COURT: You may.

Q Now, Victim 1 [redacted], when you all were sitting down, can you tell me which side Justin is on?

A On this side.

Q He was on this side?
A Yes, sir.
Q And then when he was on this side, you're on the couch or are you standing up?
A The couch.
Q You're on the couch. Okay. So now prior to him sitting down, are his shorts up?
A Yes, sir.
Q Okay. So he sits down on the couch. Okay, the shorts up; correct? He sits down then and you all are right beside each other.
A Yes, sir.
Q Then he asks you to what, he pulls them down?
A No, sir.
Q Who does he pull them down?
A When he put -- that's when he put his manhood in my butt.
Q What I am asking is, when Justin is sitting beside you on the couch, does he then proceed to pull down his shorts?
A No, sir.
Q He doesn't? Well when does he pull down his shorts?
A When he was trying -- that's when he was

trying to put his manhood in my butt.

Q So was that prior to him asking you to jerk it, or after he tried to put it into your butt?

A When he told me to jerk it.

Q Okay. So did he ask you to jerk it first?

A Yes, sir.

Q Okay. Was he sitting or standing?

A Sitting.

Q He was sitting. So when did he pull his shorts down?

MS. BARR: Objection, Judge. That question has been asked and answered repeatedly.

THE COURT: Well this is cross examination. I will allow it.

Q Can you clarify for us when Justin pulled his shorts down? Was he standing or was he sitting?

A Are you talking when he pulled down his pants?

Q Yes, ma'am.

A When he was standing trying to put it in my butt.

Q Okay. Now he asked you to jerk it. Do you place your hands on it?

A No, sir.

Q And isn't it correct based off your testimony that you not see him jerk it.

A No, sir.

Q And you state that he was sitting beside you.

A Yes, sir.

Q Now where -- you state that there was some deodorant on you; correct?

A Yes, sir.

Q Where was it located?

A On the back of my shirt.

Q So you're saying Justin was here on your left side.

A (Nods in the affirmative.)

THE COURT: Let's make sure she answers.

Q Okay. Speak up, please, where the judge and the jury can hear you.

A Yes, sir.

Q So are you saying that he reached over you like this?

A Yes, sir.

Q Okay. And then he -- how did he grab your head.

A Like this.

Q So he grabbed your head like this?
A No, with his hand.
Q With his hand? Where was the rest of his arm?
A Still back here.
Q Okay. So he comes over like this and then pulled -- grabbed your head with his hand like this?
A Yes, sir.
Q And pushes down?
A Yes, sir.
Q Now does it go in your mouth?
A Yes, sir.
Q Now, Victim 1 I am going to remind you about truth ad consequences, okay. You do recall the questioning that the solicitor asked you; correct?
A Yes.
Q Now while the solicitor was asking you earlier, isn't it correct that you stated that it never went in your mouth?
A It went in my mouth. That's when the stuff came out of his manhood and went in my mouth.
Q But isn't it true that on direct

examination from the questions from Ms. Barr, you stated that no, it didn't go in your mouth?

A Yes, sir.

Q So were you telling us a story then?

A No, sir.

Q And why did you say that if it wasn't true? We're going to move on. Now, Victim 1 you state that after this particular point that stuff comes out; correct?

A Yes, sir.

Q Then what does Justin do?

A That's when I ran in the bathroom, to get the stuff, spite the stuff out of my mouth. And wipe, and get the tissue and wipe it off my shirt. That's when I come out. That's when he was spraying man's perfume in the living room.

Q Now at what point, what after the white stuff came out, did he attempt to penetrate your butt?

A Yes, sir.

Q Okay. And he stopped? Did he stop?

A Yes, sir.

Q Then what did you do?

A Then I grabbed my stuff, then I ran out the house. First, that's when he blocked me in

the front door, and I told him where I am going. And that's when I ran to the back door. And that's when I unlocked the back door. That's when I made -- that's when I ran as fast as I can to go home.

Q So you ran to the back door?

A Yes, sir.

Q Okay. And you opened up the back door?

A Yes, sir.

Q And then once you ran out the back door, you ran to your home?

A Yes, sir.

Q And then you went to your mom's home?

A Yes, sir.

Q And you started kicking the door?

A Yes, sir.

Q Now, Victim 1 do you recall when an Investigator Hamlet came to your house?

A Yes, sir.

Q How long after this event occurred that Investigator Hamlet speak to you? How long was it before she saw?

A I'm not sure.

Q You can give a rough estimate if you would like. 10 minutes? 15?

A I would say 10.

Q About 15?

A Uh-huh. (affirmative.)

Q So the events are real fresh in your mind; correct?

A Yes, sir.

Q You had no problem remembering then, correct?

A Yes, sir.

Q Now were there any those officers there with Investigator Hamlet?

A Yes, sir.

Q There was?

A It was two men that was in the kitchen with us.

Q Now do you recall Investigator Hamlet interviewing you twice?

A Yes, sir.

Q Now the first time she interviewed you, was your mom home?

A Yes, sir.

Q Okay. Was your dad home?

A No, sir.

Q He was at work?

A Yes, sir.

Q So it was just you and your mom?
A And my brother and sister.
Q Okay. How old are you brother and sister?
A My brother is 10. And my sister is 8. She will soon be 9 on Friday.
Q Is that now? That's how old they are now, or back then?
A Now.
Q Okay. Now the first interview that you gave Investigator Hamlet, do you recall telling the investigator that Justin's manhood was soft?
A Yes, sir.
Q Do you recall when Investigator Hamlet asked you to describe it; that you said that it looked like a wash cloth?
A No, sir.
Q Okay, you don't recall that?
A No, sir.
Q Now I am only speaking about the first interview here. Isn't it correct that you also told Investigator Hamlet when she asked if he touched you anywhere else, and you say he did not.
A Yes, sir.
Q You recall that; correct?
A Yes, sir.

Q You remember telling her that. You told Investigator Hamlet that he didn't touch you anywhere else.

A No, sir.

Q Okay. Now when you were speaking with Investigator Hamlet, do you recall being upset or were you calm?

A Upset.

Q You were upset?

A Yes, sir.

Q So Investigator Hamlet gets your interview, and then she leaves; correct?

A Yes, sir.

Q How long do you think she leaves?

A 10.

Q 10 minutes or so? Do you now where she went?

A Next to his house.

Q Can you speak up a little?

A Next to his house.

Q Okay. Next to whose house?

A Aunt Tina's house.

Q But you don't know where she went at that point though; correct? Exactly.

A No, sir.

Q Okay. Now while the investigator is gone, has your father come from work yet?

A What do you mean?

Q Between the first and second interview has, your father arrived from work? Come home from work yet?

A No, sir.

Q So who was there at the house with you?

A My grandma, my cousin and my mom. Uncle Orb and my aunt Bert. And my cousin and my brother and sister.

Q Okay. Now while you are waiting for Investigator Hamlet to come back, is anyone asking you questions?

A No, sir.

Q You don't talk about anything with anyone?

A What do you mean?

Q Does anyone that's in the house right then, do they ask you what happened with Justin?

A Yes, sir. What happened in the house.

Q Okay. Did you tell them?

A Yes, sir.

Q What are -- and I don't and you to say what they said, but did they begin to describe things to you?

A I don't, what do you mean?

Q Well, strike that question, Your Honor. Now you all are speaking in the house and waiting for Investigator Hamlet to come back; correct?

A Yes, sir.

Q She comes back and does the second interview; correct?

A Yes, sir.

Q Is your grandmother Emma there?

A Yes, sir.

Q Did you tell her that your bottom was hurting?

A No, my mom. I told my mama last night.

Q You told your mom when?

A Night. At night.

Q Oh, you didn't tell her that day.

A No.

Q Okay. You told her later that night?

A My mama.

Q When did you tell grandma Emma?

A When she came in the house.

Q Oh, so told grandma Emma that day, but you didn't tell your mom until that night.

A No, sir.

Q Now what did grandma Emma do in regards to

that, that your butt was hurting. Your bottom, excuse me.

A She called 911 -- I mean when my mama called, she called 911.

Q Your mom or your grandma?

A My grandma.

Q Did your grandmother check your bottom?

A No, sir.

Q Now during the second interview when Investigator Hamlet, excuse me, was interviewing you, she asked you what is white stuff. Do you remember that? Do you recall shrugging your shoulder and then looking at your mom?

A Yes, sir.

Q Why did you do that?

A Because I didn't know what was it that came out his manhood.

Q Now, the second interview after she asked you what white stuff is, she then asked you, did he place it anywhere else; correct?

A Yes, sir.

Q Isn't that correct that your response was, oh and he put his manhood here. And you pointed to your bottom?

A Yes, sir.

Q Now that's a little different than the first interview you gave to the investigator; correct?

A Yes, sir.

Q Why did it change? Why did the information change from the first interview to the second interview?

A I am not sure.

Q You're not sure?

MR. BARR: Judge, we would object to that question based on lack of foundation. The question assumes facts not in evidence. There is no evidence that her interview changed.

THE COURT: Well, just, it's cross examination, go ahead.

Q Now I am speaking about the second interview again. During that second interview, isn't it correct that you informed Investigator Hamlet that you ran to the back door. It was locked, and Justin came and unlocked the door for you. Do you remember telling Investigator Hamlet---

A No, sir.

Q No? You don't remember telling her that?

A No, sir.

Q So that part is the same as the first interview. You said that remained consistent; correct?

A Yes, sir.

Q Now where did you learn the term manhood?

A From no one.

Q Huh?

A No one.

Q You just picked it up?

A No, sir.

Q So how did you learn that term?

A I didn't know what other way to describe it.

Q Have you ever called it thing?

A Yes, sir.

Q Okay. Did you use thing at any of your interviews?

A Yes, sir.

Q Why did it change from thing to manhood when you are describing it?

A I am not sure.

Q Now, C[redacted], have you ever seen anything that is adult on televisions or magazines?

A No, sir.

Q You haven't?

A No, sir.

Q Prior to this event, you're stating that you've never see anything that may have portrayed someone naked or pornography or anything of that nature?

A No, sir.

Q Now you had a third interview up in Florence; correct?

A Yes, sir.

Q Isn't that where you began to use the term thing, when you would describe Justin?

A Yes, sir.

Q Now during that interview in Florence, I beg the court's indulgence, Your Honor. Now During that interview in Florence, isn't it correct that you describe Justin as having -- well you showed the interviewer what Justin's thing looked like. You describe it.

A Yes, sir.

Q Okay. Did you say it was hard or soft?

A Soft.

Q It was soft? Okay. Isn't it also correct that you told the interviewer that you have seen things of a pornography nature? If that's the correct term. But of some people naked and things

that nature?

A No, sir.

Q You didn't?

A No, sir.

Q You don't recall saying that at all?

A No, sir.

Q Now when do you recall your bottom stop hurting?

A The next day.

Q The next day? Do you recall telling the interviewer that your bottom still hurt?

A No, sir.

Q Was an examination done on you by a medical doctor?

A Yes, sir.

Q It was?

A Yes.

Q Do you know what their findings were?

A What do you mean? I don't understand.

Q Did the doctor note anything being wrong on your bottom?

MS. BARR: Judge, we are going to object to that question.

THE COURT: I sustain the objection.

MS. BARR: Yes, sir.

MR. MOBLEY: I beg the court's indulgence, Your Honor.

THE COURT: Certainly.

Q Okay. We're still thinking about the interview in Florence. Do you remember telling the interviewer that as you tried to go out the back door that Justin blocked it?

MS. BARR: Your Honor, we are going to object. That is a misleading question.

THE COURT: Well he can ask her the question and she can answer.

MS. BARR: Judge, may we approach?

THE COURT: Why we don't take a short break. We've been at it for awhile. So we'll take about a 10-minute break. And let everybody get refreshed, and we will take up this matter outside of your presence. If you will go with the bailiff to the jury room.

(Whereupon, the following takes place outside the presence of the jury.)

MS. BARR: Your Honor, the state is objecting to the two questions that were posed by the defense. Those are questions are, whether it's deliberate or by accident. Or deliberately, well I shouldn't say deliberate. Are misleading

the allegations that are set forth in that report at the forensic interview in Florence. One, the implication to the victim that she told someone in Florence that she had been exposed to pornographic material, is absolutely not true. As a matter of fact, on the forensic interview report, it says Victim 1 denied exposure to pornography. But the impression that is being made to the jury that this child told somebody in Florence that she had seen pornography. And now is in court testifying that she had not. And that she never told anybody that.

Secondly, the question, the last question that was asked by defense counsel to the witness said that, isn't it true that you told the people in Florence that as you tried to leave out the back door, Justin blocked it. That is absolutely not what was in the records from the forensic interview. Says she stated she tried to leave, but Justin blocked the front door. So, you know, Judge, we don't have the ability to call these folks at the Durant Center to clear up any ambiguities that the defense is trying to put forth to the victim.

And, Judge, just to allow him to continue

creating facts, we just object to that.

MR. MOBLEY: Your Honor, I do, stipulate that the last question or form of the question, and the actual contents were incorrect. And I overlooked it. It was not deliberate at all. But it does say that the client blocked the front door, not the back. So I can clarify that. Well maybe the court can clarify that with the actual jury.

THE COURT: Well before I get into that, I'd just assume you clarify that.

MR. MOBLEY: Okay. Yes, Your Honor. I would do so.

THE COURT: What about the other thing about asking questions that have no foundation; as far as, pornography?

MR. MOBLEY: Well, Your Honor, there was some questions during the interviews in regards to exposure to any pornography. I asked the question, she has the right to answer yes or no. Okay. Now my understanding what the jury takes from me asking that, has no bearing upon my ability to ask that. Because now we're getting to where whether to find out where she has possibility had exposure.

THE COURT: Well but apparently she denied any such exposure.

MR. MOBLEY: Okay. And that's why I stopped asking the question. I had to go with the answer at that particular point. That's not deliberate, Your Honor.

THE COURT: Well what kind of leave do you want me to? Just ask him not, direct him not into that anymore? Or do you want me to try to do some sort of clarification? I mean we're at the stage where I'm agreeing with the prosecution; that we shouldn't -- I shouldn't allow that to go forward. And I am not going to. But is there any relief you want other than not going into it again?

MS. BARR: Judge, I would ask the court to instruct the jury to disregard any comments made by defense counsel after the witness denied telling anybody in Florence that she had been exposed to pornography. Because I think the comment was make that are you sure, you don't remember saying that. Which gives the impression to the jury that she said. So we would ask the court to instruct the jury to disregard that statement.

MR. MOBLEY: Well, Your Honor, we may need to watch the video.

MS. BARR: And that's fine with me.

MR. MOBLEY: My understanding is during the interview, during her forensic interview with Ms. Griggs, who is not here to testify about. She states she has seen it before on that video. It's not in this written documents. In that video, and if I am incorrect on it, okay, I can be punished accordingly. But I think at this particular point, it's very important that we determine whether that statement was made for two reasons: to the source of exposure to pornographic material or anything of the sort, with naked bodies, or body parts or anything of that nature. Two, for impeachment purposes.

THE COURT: Well I agree that if it was covered then you've gotten a right to cover it here in open court. But I will be glad to take a look of that portion of the forensic interview that you are referring to.

MR. MOBLEY: And I haven't go through and marked the actual time, Your Honor. I guess what we can do...

THE COURT: It's a little bit early to

break for lunch. Could you finish up with the rest of your examination? And then over lunch, isolate that and let me look at it?

MR. MOBLEY: Yes, Your Honor.

THE COURT: Any objection to that, Ms. Barr?

MS. BARR: No, sir, Judge.

THE COURT: We'll reserve the state's redirect. Why don't we take about a 5-minute break. Because I'm sure everybody here needs a break. We'll take a short break and come back. We will let you finish up your cross and then we will break for lunch.

MR. MOBLEY: Thank you, Your Honor.

THE COURT: You can step down and get some water, use the restroom if you would like. But you can't talk to anybody about your testimony.

A Yes, sir.

(Whereupon, the court takes a short break.)

MS. BARR: The state is ready, Your Honor.

THE COURT: Defense ready.

MR. MOBLEY: Defense is ready.

THE COURT: Bring in the jury.

(Whereupon, the following takes place

within the presence of the jury.)

THE COURT: You may proceed.

Cross Examination by Mr. Mobley:

Q Victim 1 the last question that I asked before we took a break, I asked you whether Justin blocked the back door.

A Yes, sir.

Q You stated no. That was correct; right? He blocked the front door; correct?

A Yes, sir.

Q Not the back.

A No, sir.

MR. MOBLEY: Thank you. Nothing further for this witness, Your Honor.

THE COURT: Do you have any redirect?

MS. BARR: I do, Your Honor. Very briefly.

Redirect Examination by Ms. Barr:

Q Victim 1 can you do me a favor and come down for a minute? Step down?

(Whereupon, the witness steps down from the witness stand.)

Q I want to just pretend like we're sitting in the living room, as you call it; where you and Justin were seated that day. Put me where Justin

would be, and then put yourself where you would be. If this is the sofa, put me Justin was and put me where you was. Make sure you keep your voice up. We don't have the microphone. She needs to hear you. I was where?

A Right here.

Q So you're saying to your left?

A Yes.

Q Let's have a seat.

(Whereupon, the witness resumes the witness stand.)

Q When he sat down, did he have his shorts up or down?

A Up.

Q Okay. You've testified previously that Justin wanted you to jerk him.

A Yes, ma'am.

THE COURT: You need to keep your voice -- make sure she keeps her voice up.

Q If his pants were up, how did you see his penis?

A He pulled his pants and then grabbed it out of his pants. That's when.

Q Okay. So he sitting down with his shorts; right? Is that a yes? And you said he pulled it

out?

A Yes, ma'am. He pulled it up. He pulled his pants up and took it out.

Q And take his penis out? Is that a yes?

A Yes, ma'am.

Q Now you mentioned earlier about him having his arm around your neck. Can you show me how he did that? If you use my arm, how did he do that?

A He did it look this. That's when he grabbed my hair.

Q He grabbed your hair? Your ponytail?

A Yes, ma'am.

Q And did what?

A That's when he pulled it around and he had told---

THE COURT: I can't hear her.

Q I'm sorry, make sure, and I almost need you to kind of like yell, okay. Because we don't have the microphone there, so I need you to of speak up. You said that he took your arm, and go through that process again. Tell me what he did to your arm again. Or his arm.

A He did this to my arm.

Q Okay, I am for the record, I am placing my right arm over your shoulders and around your

neck. Okay. And then tell the court what he did after that.

A And then he put his hand on my ponytail. That's when he pulled down my head to get to his penis.

Q His penis was already out of his shorts?

A Yes, ma'am.

Q Now you mentioned also that there was a stain on your shirt?

A Yes, ma'am.

Q Tell the ladies and gentlemen where was the stain at on your shirt?

A The stain was right on the back of my shirt.

Q Do you remember which side it was on?

A This side.

Q Okay. Have a seat up there.

(Whereupon, witness resumes the witness stand.)

Q Now Mr. Mobley asked you about some statements you gave to the police. And one of the things he asked you about is when the police asked you about what you meant by white stuff; that you kind of shrugged your shoulders. Do you remember him asking you those questions?

A Yes, ma'am.

Q And did you know what grown people call the white stuff that comes out of a man's penis?

A No, ma'am.

Q Have you ever heard the word semen?

A No, ma'am.

Q Now when you went to the place in Florence to give an interview.

A Yes, ma'am.

Q At some point during that interview I think Mr. Mobley asked you if you used the word manhood and used the word thing.

A Yes, ma'am.

Q In reference to Justin's penis. Do you remember him asking you that question?

A Say that again.

Q When he asked you on cross examination about the statement you gave in Florence, he said that you used the word manhood and thing, when you were talking about Justin's penis. Do you remember him asking you some questions?

A Yes, ma'am.

Q In your mind is a man's thing and a man's manhood, is that the the same thing? Are you talking about the same thing?

A Yes, ma'am.

Q Did you tell the people in Florence about your butt hurting?

A Yes, ma'am.

Q Do you remember how long after this happened with Justin that you went and talked to some people in Florence? Do you remember how many days or weeks went by?

A No, ma'am.

MS. BARR: I beg the court's indulgence.

Q And as I understand your testimony, when Mr. Mobley asked you whether or not you've seen any movies with naked people in it, what was your response?

A No, ma'am.

MS. BARR: That's all the questions that I have, Judge. Thank you.

THE COURT: We are going to break for lunch. I know you've just been back, but we kind of wanted to break kind of late. And we're going to break until 1:30. Please be back in the jury room ready to go at 1:30, and we will proceed at that time; keeping in mind what I told you about not discussing the case and trying to make up your own mind or if anyone tried to discuss with this

you. So everyone else remained seated, and let the jury get to lunch. Report back like you did this morning, to the jury room by 1:30. Thank you.

(Whereupon, the jury goes to lunch at 12:00 o'clock.)

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: Victi [redacted] we are going to break for lunch. You, of course, obviously can go have lunch with your family. But we may have to put you back on the stand after lunch, so don't discuss your testimony with anybody over lunch okay?

A Yes, sir.

THE COURT: You can step down. Can the state make arrangements for the defense to view the forensic interview?

MS. BARR: Judge, he has a copy. He's got his own copy.

THE COURT: Well does he have anywhere to play it? Can he play it on his computer?

MS. BARR: Yes, sir.

MR. MOBLEY: Your Honor, all request at this particular point, if we can remain in the

courtroom while it's clear. My client and I and the family were going to review it. We have headphones as well. Isolate the actual portion when it refers to these particular events. But that would call for us to have the courtroom open, because somehow we will go in and out. Because we do want to get lunch also.

THE COURT: So you want to do it now?

MR. MOBLEY: Yes, sir.

THE COURT: Okay, go ahead. Just let me know when you are ready. I mean, I am not understanding what you...

MR. MOBLEY: Oh, well, all we're asking that the courtroom remains open.

THE COURT: Oh, the courtroom remain open.

MR. MOBLEY: We can do it here.

THE COURT: Okay. We can make sure of that. Madam clerk, can we allow that?

THE CLERK: Yes.

THE COURT: We'll make arrangements for that. Let's be back around one. Will that give you enough time to do that and lunch?

MR. MOBLEY: That should.

THE COURT: If you're not here right at one, we won't be that upset because we know that

takes some time. But do what you are going to do and you can have lunch. I'll be back between one 1:30. Maybe we can take this up before it's time for the jury.

MR. MOBLEY: Sounds good then, Your Honor.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: Do I need to come down to see what we talked about? I don't guess I can pop it up on a disk.

MS. BARR: Judge, I don't think it will show up there.

THE COURT: I will come down there.

MR. MOBLEY: Run then and go all the way up to the 13:40, I think with those particular statements.

THE OFFICER: 12:15?

MR. MOBLEY: Yes, sir.

(Whereupon, showing video.)

THE COURT: Going forward with this type

of material. I couldn't understand, like I say, a word she said. But I think she did acknowledge that she had seen naked people and she had movies or programs or at least films involving nudity, and I don't know what else she said.

MR. MOBLEY: Yeah, there is poor quality on it. I think the only way to be able to decipher exactly what she says as if you were to use headphones. However, I don't think it expands it beyond her answer yes. Okay. So I don't think that's going to be an issue at this particular point in regards to the questions I ask her. And maybe not---

THE COURT: Go ahead, I'm listening.

MR. MOBLEY: ---place any words in the mouth rather than solicitor, but I think you may have actually resolved that issue in regards to what she stated and the question I asked.

THE COURT: Right. Because I think the question was, had she ever, I don't know if you used the word pornography. But had she ever seen anything. I can't remember the exact question. But it had to do with whether she seen magazines or films or CD's involving nudes; people in the nude. And she testified here that she had not.

And in this interview she acknowledges that she had. Anything from solicitor?

MS. BARR: No, Your Honor.

THE COURT: So we will put her back on the stand. Do you want to go over that, or you've already asked. It's already been asked and answered. You asked the question, and she didn't object until some later point.

MR. MOBLEY: But the answer to the question itself, Your Honor, the jury, the answer that Victim 1 [redacted] gave says no.

THE COURT: Well I am going to let you, if you want to put her back on the stand and do a recross, which we usually don't allow, I will under these circumstances. I am just wondering if you are satisfied with where we were, or whether you need to put her back on the stand.

MR. MOBLEY: To just that one question.

THE COURT: Okay.

MR. MOBLEY: I just want to ask her that. Also, Your Honor, I think we need to go ahead and have a motion in regards to a possible evidentiary issue that has come to light before the jury comes in. My understanding is that they are two pictures that maybe about to be entered into

evidence. Supposedly these pictures we taken by one of the officers. And I'm supposing that it was Detective Hamlet that took the picture of the back of Victim 1 [redacted] shirt that shows the white markings on the back of her shirt on the left shoulder. Okay.

Now the problem I have with this; is that, during the course of my representation of Mr. McBride, we were provided with a document that was black -- blank. Well it wasn't blank, excuse me. It was black. It was a no color photo. The one that they're looking to place into evidence is a colored photo. Now just for the court's edification, when Mr. McBride retained an attorney, he initially retained Mr. Richard Briebart. Mr. Richard Briebart has been subsequently disbarred.

During the time of Justin McBride's acquisition or representation of the Briebart law firm, I was an associate there. And we sent in a discovery request, okay, from that particular law firm. The law firm was able to acquire documents in regards to the case itself, which included these dark photographic images which you cannot make out.

After Mr. Briebart was disbarred back in June 1st of 2012, I subsequently came down here to represent Mr. McBride, because I felt that was the right thing to do and take it on appointment. Judge Cothran allowed me to actually be the attorney of record on this particular case. Signed off on the letter of appointment. Now I have been subsequently representing him since. Now the letter -- I separately sent a letter of representation and a Rule 5 request and discovery motion as well, Your Honor. If I can beg the court's indulgence, I can bring up that document and tell you the exact date of that. And while I'm looking for it, I am going to continue to talk.

We were -- we have never been provided the colored photos in this particular case that we can actually view. We knew there was an image there. We didn't know what it was. So since the time that Mr. McBride retained Mr. Briebart, right after this, he was charged with this particular charge itself. Even up until now when I subsequently was retained, well, excuse me, was appointed on this case to represent him, we have not received any colored documents.

Your Honor, we would respectfully ask and submit to the court that without us having access to those colored documents, we would object to those photos coming in as a violation of the discovery request that we've submitted. I don't think it was intentional. Just make sure we place that on the record. I don't think it was deliberate. I think it was one of those things that we just get a package together, and run everything through the copier and send it to us. So I don't want to make it as if Ms. Barr deliberately did anything. I know she has high professional standards. But when it comes to my client's rights within trial, Your Honor, we feel as if the introduction of these photos, dynamically changes where we are, our representation of him. His consideration of the case through all these years. This could have been very well have pushed us along the line to actually try to see if there was anything that could have been worked out, Your Honor. So we would vehemently object to these photographs before the jury gets here.

THE COURT: When were they shown to you?

MR. MOBLEY: About 15 minutes ago.

THE COURT: Let me see what you have and the proposed photos.

(Photographs marked State's Exhibit Nos. 1 and 2 for Id.)

MS. BARR: And, Judge, I will just hand you what has been marked for ID as State's Exhibit No. 1 and 2.

MR. MOBLEY: Your Honor if I may approach, and I would bring to you a letter of representation that's dated---

THE COURT: Well I want to see the photographs. I am with you on everything, I just want to see the photographs. No, you what you have. Yeah.

MR. MOBLEY: I'm sorry. I apologize.

THE COURT: See what you've got and what they have. What does the state have to say? These were provided. They show absolutely nothing. They're just two black sheets of paper.

MS. BARR: Yes, sir. And, Judge, those were the copies as they were given to the solicitor's office by the Kingstree Police Department. Your Honor, just so that you know, Mr. ---

THE COURT: Let me stop you there. You

mean the Kingstree Police Department give you two black pages and nobody in your office followed up to see what those black pages were supposed to represent?

MS. BARR: Judge, I knew what they were. Judge, if you will let me explain.

THE COURT: Okay.

MS. BARR: Your Honor, I had actually had communication with Mr. McBride's first lawyer, who was attorney Charles David Barr. He filed a Rule 5 Request. We responded to that request back on October 30th of 2011. In that request, and, Judge, I'll give you a copy of our Rule 5 disclosure. But, Your Honor, essentially it references the incident report. And it also indicates that there are pictures and a disk available for your inspection and duplication upon defense's request.

That was served on counsel on August 30th of 2011. We were notified that Mr. Mobley was representing the defendant. We then duplicated everything. Sent that to him. And also 7 indicated that pictures and disks included but not limited to the video report from Care House interview, available for your inspection and

duplication upon request.

Judge, at some point defense counsel either give us a CD. And I'm not sure how we, whether they give it to us or we simply had to go to the Durant Center in Florence to make a copy. But it was specifically requested; went to Florence, made a copy and provided them with it. Judge, we take the same position. We notified them that there photographs. And, Judge, just so the record is also clear, the incident report which was provided to all of his counsel references a white stain on the shirt. That's throughout the police report.

And so, Judge, we submit that we have complied with Rule 5. Judge, we notified them that there are pictures available. And we take the position that those photographs are not any different than a shotgun. We can't duplicate the shotgun, and so we make physical evidence available for inspection. Judge, I will show you my Rule 5 disclosures. If Your Honor, please.

THE COURT: Well I've looked at and I think he has handed it up.

MS. BARR: Well just so the court knows when they were submitted to Mr. Mobley and

Mr. Barr, but we believe that it was incumbent upon the defense to then request either better copies or request to be permitted to go to the Kingstree Police Department and see the photographs.

THE COURT: Mr. Mobley, the state's response you handed up were to, addressed to Mr. Barr, Charles D. Barr. Item No. 7 is a little different. No. 7 in the one that you handed up, says pictures and disks available for inspection and duplication upon defense request. The one that was directed to you, No. 7, says pictures and disks including but not limited to the video recording of the Care House interview, available for inspection and duplication upon defense's request. So the response to you is a little different than the one you handed up. The one to Mr. Barr is August of 2011. And the one to you is October 2012.

Mr. Mobley, did you make any request to view the extra disk? Did you make any request to see the pictures that supposedly are the two black pages?

MR. MOBLEY: Your Honor, I came down here twice for the video, because they couldn't

duplicate the video from the resident okay, at that particular time. And one of the times when Mr. Tyler Brown, we were attempting to duplicate the video, I had at that particular time, a file. I was going through the discovery. And basically we were looking to see if there was anything else that I could acquire while I was down here. Because I made two specific travels down here for these things when I'm coming from Lexington. Now specifically did I ask for the pictures? No. Did I ask for anything that I may not have had because, Your Honor, to be very candid with you, that file is the only one that I received.

Now if the solicitor can refresh my memory about a new discovery packet being sent out to me other than the cover letter that has been handed up to you, then I respectfully withdraw my statement about that, but that's the only problem that I have which was the assumption of Mr. Barr's file itself. I haven't received any new discovery outside of Mr. Barr's file.

THE COURT: Well this is addressed to Mr. McBride actually. And Mr. Barr, enclosed please find your personal records a copy of the discovery request responses regarding the above.

So what you've handed me is what Mr. Barr sent to Mr. McBride, is also July 27th 2010, at the preliminary hearing proceeding that Mr. Barr sent. The Rule 5 discovery that's addressed to you indicates that it was served on 203 West Main Street. P.O. Box 1378 Lexington, S.C. on October 22, 2012. is that the correct address at that time?

MR. MOBLEY: I am sorry, Your Honor.

THE COURT: It's a Certificate of Service from Linda Woods, who apparently was working for the office of the solicitor because it's under their name. It says that this October 22nd set of disclosures under Rule 5, are sent to you at 203 West Main St. P.O. Box 1378, Lexington, S.C. 29071.

MR. MOBLEY: Yes, that's my mailing address, Your Honor, not my physical.

THE COURT: I understand. But did you -- that's where they sent this. And it doesn't elaborate a whole lot other than it does say pictures of disks available for inspection.

MR. MOBLEY: Your Honor, I do have to, please charge it to my head and not my heart. Okay, I do have the letter and it does duplicate

Mr. Barr's file. But I am going to hand it up. It was postmarked October 22, 2012 from the solicitor's office to my correct P.O. Box. It does have the letter of Rule 5 disclosure from the solicitor's office. And it has the contents very similar, but I'm going to hand it up to the court so you will see the actual pictures are still the same. If I may approach, Your Honor.

THE COURT: You may. It does show the same identical black sheets too, two of them. And your motion is to suppress the colored photographs?

MR. MOBLEY: Yes, Your Honor. We would respectfully ask to request, excuse me, suppress the colored photos in this particular matter due to a violation of the Rule 5 Request and Brady motion. And not allow it into trial at this particular point, Your Honor. Yes, that would would be our motion.

THE COURT: Ms. Barr, briefly.

MS. BARR: Your Honor, I would just simply state that the state complied with Rule 5. We duplicated the pictures as they were given to us. And, Judge, while we had the pictures and the statement we have, I can't answer that. I can

share that we give them what we had. We made it known that there were photographs in the case that were subject to inspection. So we think we have complied, not just with the spirt, but in the letter of Rule 5. And so we would vehemently oppose the motion. Judge, we take the position that the defense was aware of what was depicted in the photographs in terms of what---

THE COURT: Let me stop you. I don't how the defense would be aware of what's depicted in the photographs. Let me ask you, at the time you sent that package to Mr. Mobley, don't worry about Mr. Barr. Did you actually have these colored photographs or was all you had was the black ones?

MS. BARR: Judge, I got the colored photographs this morning.

THE COURT: They haven't had a chance -- if he had come and asked to see them, you wouldn't have had them to show him.

MS. BARR: Judge, I would have had to go to the police department bring his file over. I didn't actually have -- their original police file was brought to me this morning; that contained the original warrant; that contained all the original documents in the case.

THE COURT: The police need to do a better job. If you've got two black sheets of paper in your file, you have no idea what they are. So there is no way the defense can know what they are. And I think the morning at trial is too late to start complying. Even though you didn't have them. I'm not trying to find fault with you. I'm certainly not finding prosecutorial misconduct. But I mean this is an important piece of evidence, and for him just be confronted with it this morning.

MS. BARR: And, Your Honor, respectfully, how would that be any different if this were a murder case and we had the gun or this were a drug case and we had actually dope. And the defense filed a Rule 5 and requested all the evidence in the case. We would have said okay, you want to see the actual dope, let's go see it. You want to see the actual gun, let's go see it. It's not as if they had no idea that there were photographs in the case, then all of a sudden in the morning of trial, I spring 10 photographs on them.

Judge, we gave them notice two years ago that there were photographs in this case. And I think under Rule 5 there is some duty on behalf of

a defendant to come and inspect evidence in the case. The rule specifically talks about inspecting evidence. And, Judge, I'm specifically referring to Rule 5 (C), documents and tangible objects upon request of the defendant, prosecution shall commend to the defendant to inspect copies, books, papers, documents, photographs, tangible objects, buildings and so forth that are within the possession, custody and control of prosecution and which are materials to defense, were intended to be used by prosecution as evidence in chief at trial. Judge,---

THE COURT: You're under A(1)c of Rule 5.

MS. BARR: Yes, sir.

THE COURT: Well you didn't have them within the possession. Well you might have had them in control, but you didn't have them in your possession.

MS. BARR: Judge, when it says the prosecution, we respectfully submit that that means the, not just the solicitor's office, but the police department.

THE COURT: Well he couldn't have gone down to the police department and asked for them. They wouldn't have shown him anything.

MS. BARR: And, Judge, I don't necessarily know if I agreed with that.

THE COURT: Well but anyway the rule doesn't apply the police. The rule applies -- the police have no duty under Rule 5. None, absolutely. They're not officers of the court. They're -- the prosecution, are you wanting to now wanting to wrap all law enforcement in some kind of duty to, if that's the case, then they should have been given a copy of the Rule 5 discovery. If you take that position, then you should have conferred with him at that time, and made them comply with Rule 5. Did you do that? You can't fall back on the police not providing information if they weren't in the loop at the time.

MS. BARR: And, Judge, it's not my intent to fall back on the police. I'm just simply saying that I made the defendant aware of this evidence, which I am required under Rule 5 to do so. And it says that I shall commend him to inspect. And, Judge, that's the same thing we did as it relates to the video.

Mr. Mobley indicated that at some point he came to, he made a trip to the solicitor's office and actually looked at the video on the computer

screen with Mr. Brown there. Judge, we made that available for his inspection, as we did the photographs. And, Your Honor, I have seen in Magistrate's Courts where defense attorneys---

THE COURT: Well let's deflect don't bring Magistrate's Court up here, please. I have nothing against Magistrate, Municipal or any Summary Court judge, but if are going to start trying cases up here like they do in Magistrate's Court, we might as well not have General Sessions.

MS. BARR: Oh, Judge, I definitely wouldn't want to do that. I just was referencing that only because when they send Rule 5 there, they usually serve it on the police officers, because there is full time solicitor there typically. And so my view of the rule is the prosecution was covered not just by the solicitors, but by law enforcement as well; such that, Brady produces an obligation of how the police to let the defendant know about exculpatory evidence. So I guess that covered the whole state side, if you will, with that broad brush in terms of being -- in terms of it being defined as the prosecution.

THE COURT: The bottom line is, the

defense was provided with, they had the opportunity to inspect. But at the time you gave them the right to inspect, all you had were two black sheets of paper. Or knew, not unless the police put them in another basket over here. The people with the duty, which is you, or the person, and I don't know whether you signed that Rule 5 or not. I have given it back now. Did you sign the Rule 5?

MS. BARR: Judge, I have to see to look at the signature.

THE COURT: Well I mean, were you here at that time?

MS. BARR: Yes, sir. I've been here for as 9 years already. That's Tyler Brown's signature, Your Honor. He is employed as the assistant solicitor here with the solicitor's office at the time.

THE COURT: And you were with the solicitor's office also.

MS. BARR: Yes, sir. And, Your Honor, I would agree with counsel. It is an important piece of evidence. And, judge, I would submit that it is no different than the forensic video that we made available for inspection.

MR. MOBLEY: Well, and, Your Honor, I would like to respond to that. Back in May of this year, we had a huge hearing, because this case was up for trial. Apparently, the forensic video at the Durant Center, couldn't be duplicated from the Durant Center. So we went before Judge Newman. We had our pretrial hearings. And we were getting ready to actually do qualifications. We actually began selecting a jury, and my voir dire took out half of the actual jury, so we had to stop there. But we had a motion in regards to me not receiving the forensic interview to view.

I placed on the record that I have been down here and actually viewed it. Those two times I came down to view the video and try to get a copy, and it wasn't duplicatable if that is a word. And the judge made a ruling. He said basically, you have the right to inspection; however, you do have a duty as the prosecutor, he is speaking to the prosecution, to turn it over. Because my client needs to see it. If I come down here and inspect it, it doesn't change his mind. I can tell him all day. You have all kind of stuff across this little girl's shirt, so on and so forth. It doesn't help. I need to be able to

have those documents in my position. The duty is upon the prosecution to turn them over to us. And if they're going to proceed that way, then it's definitely prejudicial.

THE COURT: Well it's hard for the court to even be put in these situations, because what I've got to do is weigh the state's compliance with Rule 5 to the extent they complied. And then the obligation on the defense to say, hey, wait a minute I've got two black sheets of paper here. I need to know what these show. I am sure that they mean something. Let me take a short break, and let me think about it a minute. And we will come back in a minute and I will make a ruling and we will get started. And get the jury in. But let's take a refresher break and we will move forward. Where are we? Are you going to put Victi [redacted] back on the stand?

MR. MOBLEY: Just asking here that one question, Your Honor. Are we going to leave this up?

THE COURT: No, we are going to take that out. That doesn't go in to evidence.

MR. MOBLEY: Okay. I wanted to make sure we did.

THE COURT: Why don't we do that while we take a break, and then I will make a ruling when I come back.

MR. MOBLEY: Thank you, Your Honor.

THE COURT: Go ahead, Ms. Barr.

MS. BARR: Judge, I am a little unclear. What are we doing with the video? Are we putting it into evidence?

THE COURT: No, not unless you want to. He -- I let him review it during lunch, and I reviewed it to see whether or not -- I'll back up. He asked a question that you later objected to, because you said it had no basis on fact. He said it had basis on fact based on the -- you had the incident report and you relying on that. And he said well what's actually on the video is different. So to resolve that, I asked him to find what he was talking about. That was done. It confirmed his recollection.

MS. BARR: Yes, sir.

THE COURT: And based on that, I am ruling that that was not an improper question; that there was foundation for it, and I am going to allow him to follow up on direct -- recross. And what we could do, we probably ought to make it a

record so that if it goes up on appeal. We'll just make a part of the record. Make it a court's exhibit since I looked at it. Court's Exhibit.

MS. BARR: So does that means I get to use it later?

THE COURT: No.

MS. BARR: Well, Judge, how can he impeach her with something that is not in evidence?

THE COURT: He's not going to impeach her with that. I think he's just going to ask her the question. He's not going to use that. What my understanding is, that's just for the court's edification to confirm his recollection of what the response was regarding, have you seen his magazines or otherwise, any pictures of naked people. And I couldn't hear her answer, but she certainly nodded in the affirmative as to everything dealing with naked people. And so I am going to let him ask that. But that's the only relevance has to do with your objections.

So I can make it a court's exhibit for purposes of appeal. But I'm not, unless you put it in record -- unless you put it in somehow, and I don't know how you will without anybody being able to authenticate it, and without me be able to

go through the steps that are required by the statute. Then it's not coming in through the state. And I guess if he wanted to put it in, you wouldn't object. But right now I am going to make it a court's exhibit. Am I clear on that? Apparently not, because everybody is saying huh?

MR. MOBLEY: Well and I tell you the reason why I had to -- my understanding is that, I had come up with this specific part to make sure that the court understood that I wasn't trying to mislead the court.

THE COURT: I understand that. And I understood that, and I agree with you.

MR. MOBLEY: Okay.

THE COURT: So I don't know why we keep going over that. But I am with you on that.

MR. MOBLEY: Yes, sir.

THE COURT: Now I am just confused on what Ms. Barr wants to do with it.

MR. BARR: And, Judge, I thought I just need to be clear as to what that purpose was, because I thought he was going to put her back on the stand. Then ask her the same questions, then play the tape. So that's not going to be done then.

THE COURT: No.

MS. BARR: No.

THE COURT: But I don't guarantee the way this is going, what would happen next. We will take a break. Take that down and make it a Court's Exhibit.

(DVD of forensic interview marked Court's Exhibit No. 1 for id.)

THE COURT: For the record, we had some general housekeeping while we were on break. Nothing that warrants to be part of the record. Is that correct, Ms. Barr?

MS. BARR: That's correct, Your Honor.

THE COURT: Is that correct, Mr. Mobley?

MR. MOBLEY: I am sorry, Your Honor.

THE COURT: I just said before we went back on the record, we had a housekeeping matters. We were on the record with that dialogue earlier. But while we were taking care of moving video, we were not on the record.

MR. MOBLEY: Correct, Your Honor.

THE COURT: So I just wanted to confirm, Ms. Barr already confirmed that nothing of matter that needed to be on the record occurred while we were off the record.

MR. MOBLEY: That's correct, Your Honor.

THE COURT: I am going to under Rule 5, these things bother judges. They bother judges immensely. But I am going to allow the photographs in. I am going to do it with some irritation, but I don't -- no violation of Rule 5, no prosecutorial misconduct. But No. 7 of the response said that there were pictures that could be inspected. Now it's complicated because the state didn't have those pictures at the time, but they apparently knew about them, because they provided two mystery sheets of paper with their response. But the defense was on notice then that some photographs didn't exist. And I believe by complying with Rule 5 that the state has done all it needs to do, or all it could do, or it should do. Maybe not could do, because they could have asked the police to see the file. They could have asked what these black pieces of paper were. But I think that since the state has complied with Rule 5 and given the defense the right to inspect any photographs in the state's possession and that there were no requests made to inspect any photographs; that I am going to allow them in.

And I want to make on the record to clear

that these irritate me to no end where law enforcement pops up with stuff at the last minute. That's all I going to say.

MR. MOBLEY: Your Honor, I have to make a motion, and we are going to move for a mistrial. Your Honor, we would respectfully move for a mistrial, to the prejudicial effect of getting copies of the photos at this very moment, the date of trial, after it had already started after pretrial motions. It's prejudicial to my client. It's prejudicial to the defense. It's prejudicial for preparation. With those particular photographs, we possibly could have had this worked out. And we respect the court's decision in regards to that. And so we want to make sure that that is known. But in the interest of protecting my client's constitutional rights at this particular point, to a fair trial, being able to exam any and all evidence. Because, Your Honor, when I cam down here the two times, I asked was there anything else that I needed to gather while here. And that was with Mr. Tyler Brown.

And, you know, we came down here with the DVD's. We finally got the forensic video not too long ago, and but we never were disclosed with a

picture.

THE COURT: I understand. I am go out on a limb, and I haven't really thought about it. But I am not sure that any constitutional right to discovery other through Brady and exculpatory material, the right of discovery exists under the laws, under the rules of criminal procedure and civil procedure on the civil side. And I do not find there is any manifest necessity to grant a mistrial at this time, and deny that motion.

MR. MOBLEY: Thank you, Your Honor.

THE COURT: Are you ready for the jury?

MS. BARR: Yes, Your Honor.

MR. MOBLEY: Yes, Your Honor.

THE COURT: Bring in the jury.

(Whereupon, the following takes place within the presence of the jury.)

THE COURT: Members of the jury panel, if you look at that clock, you might think I missed that class when they taught you on how to tell time. Or that you thought I had an extra long lunch. Neither one is true. I know how to tell time. But right when we were getting ready to start, something came up. I told you earlier that I have to rule on matters of evidence. Something

came up that I needed to rule on, and rather than you come in 10, 15, 20 minutes and send you back out, I went ahead and took care of it so that we could move along.

So we were here on time. And you all were here on time. And I apologize for infringing on your time, but it is going to help the case going smoother and faster, and it was done when I did it. I am going to ask the witness that was that was on the stand to return, Victi [redacted] Victim [redacted]. And defense has the right to ask a couple more questions. And then the state can follow up if they wish. You are still under oath, Victi [redacted]

Victim [redacted], Being first duly sworn, being previously sworn, retakes the witness stand testified as follows:

Recross Examination by Mr. Mobley:

Q Just a few questions, Victi [redacted] Isn't it correct, that during your interview in Florence, that your informed your interviewer that you had seen naked photos in a magazine; as well as, seeing some people in the nude or naked while flipping through a television?

A No, sir.

MR. MOBLEY: Nothing further. Thank you, Your Honor.

THE COURT: Redirect?

MS. BARR: I don't have anything further.

THE COURT: You can step down, Ms. McBride. Thank you. Call your next witness.

MS. BARR: We would call Trena Hamlet.

THE COURT: Please come up and be sworn.

Trena Hamlet, Being first duly sworn, testified as follows.

Direct Examination Ms. Barr:

Q Ms. Hamlet, please state your full name for the record.

A Wilma Terina Hamlet. W-I-L-M-A, T-E-R-I-N-A.

Q Ma'am, for the record back in June of 2010, would you tell the Court where you were employed?

A Kingstree Police department.

Q And what is it that you do for the Kingstree Police department?

A Victim's advocate. Juvenile officer, and just fill in anywhere they need me.

Q And, ma'am, you are no longer employed there now.

A No.

Q How long have you been in law enforcement, total?

A Since 99.

Q Okay. You were working back on June 21st of 2010?

A I was.

Q And on that particular day, did you respond out to the address located at 1039 Lexington Avenue?

A I did.

Q Here in Kingstree?

A I did.

Q Is that residence or that property located within Williamsburg County?

A It is.

Q Tell us about why you were called out. Approximately what time, and what it is you did once you arrived?

A I was received a call in reference to a female victim on the scene at 1039 Lexington Avenue, which is Frierson Homes. It is an apartment complex within the city limits. Once I got on the scene, several other officers, male officers were on the scene, family members. Once

I arrived, I asked the mom if it would be okay if we found a more secluded room, since so many family members were on the scene; that I could speak with her daughter, and she directed us into the kitchen area.

Q When you say you asked the mom.

A Meaning Ms. Angelica.

Q Okay. Angelica McBride.

A Which is Victim 1 [redacted]'s mother.

Q Were you inside Victim 1 [redacted] residence?

A I was.

Q And you indicated that her mother permitted you all to go in a room that was somewhat private.

A Right.

Q Can you describe Victim 1 [redacted] appearance and demeanor at the time?

A She was dressed like a typical child, with a tee shirt or shirt and jeans or some kind of pants. Fairly calm.

Q Do you recall the color of the shirt that she was wearing?

A It was black.

Q Did you notice anything unusual about the shirt when you arrived?

A Not until she pointed out, you know, some discoloration on the shirt.

Q Once she pointed it out to you, what did you then observe?

A Some white smearing on her left shoulder.

Q On her---

A Yes.

Q On the left shoulder?

A Her left shoulder.

Q Okay. And I have to be careful how I ask you these questions, because I don't want to get into hearsay.

A Right.

Q But did Victim 1 tell you what happened?

A Yes, she did.

Q Based on the information that has gave you at the time, what then did you do?

A After speaking with her, I then went over to Mr. Justin McBride's residence.

Q Okay. When you went there, what was the purpose of going to Justin McBride's residence?

A Just to get his side of the story.

Q Now how old was Victim 1 at the time?

A Nine.

Q How old are you Justin at the time?

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A 16.
Q When you went to his resident, how far were the two residences apart?
A They are side by side. It's just a little -- it's just a little grass area between the two residences.
Q Tell us what happened when you got to Justin's home.
A His mother was there with him, and I asked her would it be a problem, you know, would she mind us coming in and speaking with him. And she had no -- she said yes, come on in.
Q Now at the time when you went over there, was Justin under arrest?
A No.
Q His mother agreed to let him speak with you?
A Yes.
Q And did he agree to talk with you?
A Yes.
Q Was anyone else with you?
A Two other officers walked in the home with me.
Q Okay. And do you recollect who those officers were?

A Officer Dozier and Officer McClary.
Q Do you know whether or not those two officers are still with the -- employed with the Kingstree Police department?
A No, they are not.
Q How long did you actually sit and speak with Justin?
A I'm really not certain.
Q Do you think it was more or less than an hour?
A Oh, less.
Q More or less than 30 minutes?
A Give or take.
Q Give or take 30 minutes. And then what then did you do after you spoke with him?
A I went back to Ms. Victim 1 McBride's residence.
Q And did you threaten him in any way to get him to talk with you?
A No.
Q Did you promise him anything?
A No.
Q Did you tell him why you wanted to talk with him?
A No.

Q Did you ask him what happened between him and Victim 1

A I did.

Q And tell me what he told you.

A In reference to her getting off the bus and coming into the home?

Q Yes, ma'am.

A He stated that there was a knock at the door. And he opened the door. She came in. Do you mind if I refer?

Q You may refer to your report. Just don't read it out loud.

A He opened the door and asked why was she over there. Stated that her mom was not at home. She sat on the couch and they were watching TV. He stated that at one point he got up to go to the restroom. And while he was in there, she came in on him. He concealed, tried to conceal himself from her, because he was in the midst of using the restroom. Yelled at her to get out. And she went back in the living room and sat down. And shortly thereafter, she wanted to leave. He said that she didn't want to go to front door because a bug was on the door, so she went to go out the back. The back door was locked. So he had to unlock it.

She couldn't unlock it, he had to unlock it for her to leave.

Q When he say that he was using the bathroom and he told you he wanted to conceal himself, what do you mean when you say, and you just have to tell us. What do you mean when you say he was using the bathroom, and he tried to conceal himself?

A His motion was, as if he was urinating.

Q Okay.

A And when she came in, he motioned his body like to shield.

Q To shield his penis?

A Right.

Q And you also indicated that he told you that she went and sat down on the couch.

A Yes, sat back down.

Q And then all of a sudden she wanted to leave.

A Right.

Q Now was he was placed under arrest by you after that statement?

A No.

Q Why did you do after you took the statement from him?

A I went back over to Ms. Angelica's and Courtney's residence.

Q And for what reason did you go back there?

A Just to, for clarity and her statement and his statement. Just to see if anything was different.

Q Now in terms of your questions of Courtney, the first time and the second time, I need to ask you about that. Tell me how you questioned her.

A Well I didn't want to leave her. I just asked open ended questions so she could fill in, you know, the blanks as to what happened and things of that nature.

Q And I believe at some point in your written report, you actually referenced asking her to tell me what happened.

A Right.

Q And I think you asked her, did anything else important happen.

A Right.

Q Did you ever ask her the specific question, did he put his penis in your vagina?

A No, no. I didn't want to lead her or give her any ideas.

Q Did you ever ask her specifically the question, did he ever put or try to put his penis in your butt?

A No.

Q Now you indicated that you observed some type of discoloration on Courtney's left shoulder of her shirt. I am going to show what has been marked as State's Exhibit Nos. 1 and 2. I'll ask you if you recognize what's depicted in those photographs.

A Yes.

Q How is it that you recognize it?

A She pointed them out and stated it was deodorant from under his arms.

Q And is that how her shirt would have looked the day you came out?

A Yes.

Q And the photographs were taken, were they at the police department? Were they at Courtney's home?

A No, that's in her residence.

Q And you were there?

A Yes.

MS. BARR: Judge, we would move in State's Exhibits 1 and 2.

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THE COURT: Subject to previous objections. Objections are overruled and they are admitted into evidence.

MR. MOBLEY: And one additional objection, Your Honor. Was the -- who took the picture?

THE COURT: At this point then I will ask for further foundation.

Q Ma'am, do you have an independent recollection of which officer took that picture?

A I really don't know.

Q Are you satisfied based on your memory and based on what the pictures show, it accurately depicted Victim 1 and how her shirt appeared that day?

A It does.

Q Is there any question in your mind about that?

A No.

MS. BARR: Your Honor, we would renew our motion to admit the photographs.

THE COURT: Over the objections that have been stated, including the most recent one, I will allow them in over objections.

MR. MOBLEY: Thank you, Your Honor.

(Photographs marked State's Exhibit Nos. 1

and 2 into evidence.)

Q Ms. Hamlet, can I get you to step down for just a moment?

(Whereupon, the witness steps down from the witness stand.)

Q Do you reference the discolored area on Victim 1 shirt in your police report?

A Yes.

Q And in your police report, where do you reference that discoloration to be?

A On the left shoulder.

Q Touch me where it would be on me.

A On this side.

Q Now imagine if you will, that you are seated or standing to my left, okay. Can you put your arm around my shoulder? Where does your armpit fall in this demonstration with connection to my shoulder?

A Here on the shoulder area.

Q Is it consistent with where the stain---

MR. MOBLEY: Objection, Your Honor.

THE COURT: I sustain the objection on that.

MS. BARR: Now, you can have a seat.

(Whereupon, the witness resumes the

witness stand.)

MS. BARR: Sir, we would move to publish.

THE COURT: You can publish them. They are in the record.

Q After you spoke with Victim 1 the second time, did -- what arrangements if any did you make for her, either herself or her mother?

A After speaking with the chief of police, I called the Durant Center, the Children's Durant Center in Florence to make an appointment for her to be forensically interviewed, as well as the medically examined.

Q When you say forensically interviewed, tell the court what you mean when you say that.

A It just means that there is someone that has better expertise, that has been trained how to question a victim or a juvenile.

Q Now I can imagine if you've been involved in any kind of case like this previously, when you asked the question, is there anything else important you want to tell me, you know what you're asking---

A Right.

Q ---her, right? Do you know whether or not Victim 1 would have known what you meant when you

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say is there anything else important that you want to tell me?

A Right, I am not really sure if she even at that age.

Q When you left out, where was Justin?

A Left out of where?

Q When you left the scene or the area, was he, do you know if he was still at home?

A When I left he was still there.

Q He was still at home?

MS. BARR: That's all the questions that I have, Ms. Hamlet. Please answer any questions that the defense counsel or the court may have for you.

A Thank you.

Cross Examination by Mr. Mobley:

Q Now let me make sure I have this correct. Is it investigator or detective? I would like to address you professionally or appropriately?

A Detective.

Q Detective. I apologize, detective. Detective Hamlet. Detective Hamlet, I am sorry, I have been messing up your name the whole trial so blame it on my head and not my heart, okay. Where are currently employed?

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A I am not working right now.
Q When did you leave the Kingstree Police Department?
A In February.
Q And what was the reason?
A Family issues.
MS. BARR: Object to relevance, Your Honor.
THE COURT: Well I overrule the objection. She says it is family. Move on.
Q And you were commissioned as an officer all the way up until that time. Because you couldn't even be employed there unless---
A Right.
Q ---you were; right?
A Still am.
Q Okay. Now, detective, when you arrived on the scene, you were called there Officer Dozier.
A Dozier.
Q Dozier. And he wanted you to interview Victim 1 correct?
A Correct.
Q And if I am correct, please, let me know, and if I'm incorrect. Because of the fact that she was a female.

A Correct.

Q Okay. Now when you arrived on the scene, you went into the home; correct?

A Yes.

Q Now you testified earlier that Victim 1 seemed calm.

A Yes.

Q She was just sitting?

A I don't remember if was sitting or standing when I walked in.

Q Was she crying or anything?

A No.

Q Now you were here present in the courtroom during the Victim 1 testimony; correct?

A Correct.

Q When I asked Victim 1 this very same question, do you recall what her response was?

MS. BARR: Objection, Judge. He's pitting witnesses?

THE COURT: I sustain the objection.

Q So at this particular point, you have Victim 1 mother there.

A Right.

Q As well as Victim 1 And you began to interview her.

A Correct.

Q You go through a series of questions; correct?

A Correct.

Q In regards to what may or may not have happened.

A Correct.

Q And she gave you some responses.

A She did.

Q Now at any time during the first interview, did she describe -- now I don't want you to say what she said. Did she describe what Justin's genitalia may or may not have looked like?

MS. BARR: Judge, we would object.

THE COURT: Yeah, I sustain that, because of hearsay. I sustain the objection.

Q Okay. Once you went through the interview with her, the first interview, how long do you think you stayed there?

A 15, 30 minutes.

Q Okay. And then from there you went to Justin's house.

A I did.

Q And then you went to speak with Justin and

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his mother. And they were there at the time; correct?

A Right.

Q Now did it seem as if Justin was cooperative?

A Yes, he was.

Q Did he speak to you freely?

A I'm sorry?

Q Did he speak to you freely?

A He did.

Q Did his mother answer any questions in regards to this alleged incident?

A I don't think she did.

Q Now you went through what Justin told you. Isn't it correct that he states that none of this basically happened.

A Basically what he said.

Q He states that he went into the bathroom; correct?

A Correct.

Q Now did he state during his interview with you that Victim 1 came into the house looking mad?

A No.

Q He did not?

A I don't think he did. Can you give me a

minute?

Q I'm sorry.

A Can you give me a second?

MR. MOBLEY: Yeah, yeah. I want to look too, to make sure.

A Yes, she did.

Q Okay. He did. Justin.

A I'm sorry.

Q And she came in, and based off of Justin's statement to you, she came in and sat on the couch.

A Right.

Q He states that he was in the kitchen; correct?

A No.

Q Well tell us exactly what he states.

A That she came in mad because her mom wasn't at home. She sat down on the sofa. They watched TV. A short time after, he went to the restroom. She came in shortly after, you know, the whole incident expired. In which she walked in. He concealed himself. Yelled at her to go sit back down. Shortly thereafter she wanted to go home.

Q Now Justin's statement was, it did not,

the allegations did not match up with what Victim 1 had; correct?

A Correct.

Q Because of that, you then decided to go and speak with Victim 1

A Correct.

Q You spoke with her a second interview; correct? And during that particular second interview. I am not asking what was said. But what I asking you, were there some inconsistencies between her first statement given to you, and second one given to you?

MS. BARR: Objection hearsay, Your Honor.

THE COURT: I am going to allow it. Go ahead.

Q Okay. Do you know exactly how many inconsistencies?

A The only, maybe one, two. Just slight.

Q And how long was it between the two interviews?

A Just the time that I was over at Justin's house.

Q About 30 minutes?

A Or less. Yeah, give or take.

Q During the second interview who was

present?

A Her mother. Victim 1 mother, Victim 1 and myself.

Q So when you walked into the home, who was in the house with Victim 1 at that time?

A Oh, wow, I am not sure because the house was packed with people.

Q So there was a lot of people in there.

A Yes.

Q When you interviewed her the second time, where did you interview her? In front of everyone?

A In the kitchen again.

Q In the kitchen?

A Uh-huh. (Affirmative.)

Q And who was present with her at the time?

A Just her mother and myself in the kitchen.

Q Okay. Now based off the two interviews you then decided to talk to your chief.

A Right.

Q Advise him of the interviews itself. At what point did you secure a warrant for how long after these interviews?

A I spoke with Lieutenant McCrea who was also on the scene at time. And advised him of,

you know, what I gathered from the two and, you know, speaking with the both of them. At some point he was taken down. I know Lieutenant McCrea suggested that maybe because of the crowd, we needed to take him down to the police department.

Q Take who down?

A Justin down to the police department.

Q Okay.

A But at what time all of that, the warrant and stuff transpired, I don't remember.

Q Was he arrested that day?

A Apparently so.

Q Now there was an allegation from Victim 1 during the interviews about inappropriate touching; correct?

A Correct.

Q About some substances that were on her shoulder; correct?

A Correct.

Q There was also an accusation during your interview in regards to her bottom?

A Yes.

Q Okay. And based off all of that information, you all felt it was necessary to secure a warrant; correct?

A Correct.

Q So we got the two statements from Victim 1, a statement from Justin. And then the accusations, and the substances that were supposedly on her shirt; correct?

A Correct.

Q Now prior to going to secure the warrant, was there any DNA swabs taken from any of the evidence?

A I did not.

Q Do you have any personal knowledge that anyone did?

A I do not.

Q Would you being the victim's advocate and the lead -- are you the lead detective on this case at the time?

A I wouldn't consider myself the lead detective. I was asked to come in because it was a juvenile; a female juvenile, so that's why I came in. Any further investigations I had not.

Q Do you have any knowledge whether the shirt was collected?

A I do not.

Q Do you have any knowledge or did you personally order a rape kit?

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A That's what I called the Durant Center for was the -- set the appointment for her to be seen.

Q For a rape kit?

A Just however they perform their services on a juvenile, on a child.

Q Now do you know when the -- at that time did you know when the interview was set up?

A For the June 24th.

Q So 3 days later?

A Right.

Q Now with your experiences in law enforcement, wouldn't you agree that collecting a vital piece of evidence would have been very important at that specific time?

A It would have been, but with her age and the center that we were using, we can only go by what their doctor is available, or whoever is available, so we can go to their services as to what they give us.

Q Okay. So does that mean that the Kingstree Police department does not collect evidence?

A In reference to -- we would not personally swab her.

Q Would you collect a shirt that may have

some biological agents on it?

A Yes, we would have.

Q Would you collect the panties or the undergarments, excuse me, that someone is wearing that may have been violated?

A Probably, but not at that time. I'm not sure how if the Durant Center gave them any instructions as to bagging the clothes and all of that.

Q Okay.

A When to bring them in, you know, when they came in.

Q So you went to secure a warrant without collecting any other evidence, when you wanted to wait for it to be collected three days later. Now is that procedures that you all normally -- at the time when you were with the Kingstree Police Department, are those the procedures that you all normally go by?

A I am not understanding the question.

Q The evidence collection procedures. Do you wait a few days and then collect it after the event?

A No.

Q So this is just a one time event.

A I can't say when or if anything was taken from us, because I didn't follow up any further, so I can't say when her shirt was collected. If any other garments were collected, I don't know.

Q At the time when you interviewed Victi [redacted], was her hair long or short?

A I don't remember.

Q So you have no independent recollection in regards to.

A No.

MR. MOBLEY: Your Honor, we have got a motion.

THE COURT: Let the jury go to the jury room for a few minutes while I take up a matter of law.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right, sir.

MR. MOBLEY: Thank, Your Honor. May it Please the Court. Your Honor, Investigator Detective Hamlet has testified that she does not recall how long Victim 1 [redacted] s hair was at the time. During the introduction of these two pictures that are turned the trial on its head, the person who it is supposed to be Victim [redacted] in that

video, you can't see any hair at all. Well it's a short cut. Detective Hamlet testified that she can say and lay a foundation to have those entered based off the entered based off the appearances of those photos.

If she cannot recall what type of hair Victim has, how can she say that those photos are accurate. That can be anyone. And then---

THE COURT: What's your motion?

MR. MOBLEY: It's to strike the -- exclude the photos out of evidence. Place a curative instruction to the jury not to consider the photos. And any line of questioning from the record as well in regards to the photos from the prosecution.

THE COURT: Well I am going to deny that motion. I think that's a good jury argument, but that's not grounds for any kind of a instruction from the court. That's an excellent jury argument, but it is not grounds for any relief at this time.

MR. MOBLEY: Okay.

THE COURT: We'll take a short break, because I know the jurors will all use the restroom while they are out. So I'll go ahead and

use and step down. And just don't talk about your testimony with anybody. We'll take a 10 minute break. Because I know the jury will be utilizing this time.

(Whereupon, the court takes a short recess.)

THE COURT: Is the state and defense ready?

MR. MOBLEY: Ms. Hamlet, you can come back to the stand. Bring in the jury.

(Whereupon, the following takes place within the presence of the jury.)

MR. MOBLEY: May It Please the Court.

Cross Examination by Mr. Mobley:

Q Now, Detective Hamlet.

A Hamlet.

Q What I have, here I am holding are marked as State's Exhibit No. 1 and State's Exhibit No. 2. Now my last line of questioning to you; is that, whether you knew whether Victim had long or short hair; correct?

A Correct.

Q And you stated that you did not know; correct?

A Correct.

Q You can't recall; correct?
A Correct.
MR. MOBLEY: If I may approach the witness, Your Honor.
THE COURT: Yes, sir.
Q I am handing you State's Exhibit No. 2 and State's Exhibit No. 1. Does that show Victim face?
A No.
Q You can't testify as to whether that's her hairstyle; correct?
A Correct.
Q You don't recall what the inside of her home looked like; do you?
A No.
Q No. So we can't say now, you did not take those photographs either; correct?
A Correct.
Q So you don't where they originated from.
A They were taken that day, but I just don't know which officer took them.
Q Some pictures were taken.
A Right.
Q But you don't even know if that's those.
A Well I know that's the shirt that she had

on.

Q Now tell me how you know that's the shirt?

A Because I remember the stains on the shirt.

Q The stains? Okay. Now what color of shirt did she say it was?

A It was a black shirt.

Q A black. Does that show a black shirt there?

A You don't think about the ink, but that's -- that shows dark.

Q Is that black?

A It looks black to me. I mean if you have got to think about the ink coming out of the print.

Q Well we can't say definitely whether this is black or not; correct?

A Correct.

Q Okay. So we don't know whether this is a black shirt or not. And we don't know if that's Victim or not. We don't know if that's the inside of her home or not.

THE COURT: That's, you need to ask questions.

Q Isn't that correct?

A I am not understanding your question.

Q Isn't it correct that you are not sure, and you can't say definitely whether this is Victim or not.

A Based on the pictures, no.

Q We can't say looking at this photo whether this shirt is black or not; correct? Looking at this photo. Now I am not speaking about when you were at the scene.

THE COURT: When you say this, which one?

MR. MOBLEY: I apologize, Your Honor. On State's Exhibit No. 2 and State's Exhibit No. 1. On either of those, can you definitively state on the record, that those shirts are black?

A It's a dark colored shirt. It looks black.

Q It looks black but you don't know if it is.

A It looks black.

Q Now these markings here, I am going to look at State's Exhibit No. 2 first. If I may approach, Your Honor.

THE COURT: You may.

Q They look light in color or white in color; correct?

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A Correct.
Q We don't know what that is here; do we?
A I know what she said.
Q But you don't know what it is; correct?
A No, sir, without testing it.
Q Leads to another question.
A Not that I know of; put for me to look at.
Q Now, Detective Hamlet, let me get a formal question here. Did you test it?
A I did not.
Q Did you collect that shirt?
A I did not.
Q Did you ask for a rape kit that day?
A And they scheduled it for later.
Q Now let's get to the rape kit. Can you tell me based off your knowledge and experience, as well as your training at the criminal justice academy, as well as your training as a victim's advocate, what is the purpose of a rape kit?
A To collect evidence.
Q Okay. And what is the actual suggested time period to collect a rape kit?
A Preferably as soon as possible.
Q Okay. And why is that?
A To preserve the evidence.

Q Okay. And the longer it takes to preserve that evidence, well, excuse me, the longer it takes to get the rape kit, then what happens to the evidence?

A You know, disappear or be tampered with.

Q So it's very important to go ahead and get it right then to confirm or deny something.

A To collect.

Q To collect.

A Okay.

Q So that wasn't collected.

A Not at that time.

Q Do you know if a medical exam for Victim had been scheduled also?

A That same date on that appointment.

Q Do you know if the medical exam was performed?

A I believe. I am not sure. I haven't seen the report.

Q Have you reviewed your full case file?

A No.

Q No.

A The only case file I have is just my incident report.

Q Well who has the case file? Can

somebody -- do you know whose has the full case file?

A It was either the police department or the Rule 5 from the solicitor's office. I only initiated the incident report.

Q I am not trying to be difficult, I am just trying to find out where some evidence is at. On this date, did you and the Kingstree Police Department, do you all utilize all the skills, excuse me, all the tools that were available to you at the department? During this particular incident before making an arrest?

A I can't say yes or no, because my main goal was just to come and question the juvenile.

Q Now you made the arrest despite inconsistencies between Victi [redacted] statements, and Justin never---

A It was minor.

Q I'm sorry?

A It was minor inconsistencies which she cleared up after the second interview.

Q Okay. Now can you describe for the court what minor means?

A The minor would be in if you don't mind, it was in reference to door situation of her

leaving out of the back door. That was my issue.

Q Okay. So are you saying that she states one thing in her first interview about leaving out the door?

A Correct.

Q And then changes it?

A Not changes it, but elaborates further on it.

Q How so?

A When she said ran out the front door -- ran out of the back door. After speaking with Justin, he stated that he had to unlock the door for her to go out. And on the second interview, I'm sorry, on the second interview, she stated that -- I asked was the door open, and she said no, he had to unlock it for her to leave out.

Q Okay. Was there anything else that was inconsistent, that you feel that was important between the first and second interview?

A I am not sure what you mean.

Q When you asked her if there was anything else she needed to tell you after, she asked about, she informed you about alleged oral sex. During the first interview, what did she say?

MR. BARR: And, Judge, we would object to

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hearsay.

THE COURT: I sustain the objection.

Q During the second interview, was there something additional that was added? You don't have to state what it was.

A Yes.

Q Okay. Did it involve possible penetration?

MS. BARR: Objection, hearsay, Judge.

THE COURT: I overrule the objection.

Q Did the second interview, did it involve possible penetration?

A Yes.

Q Did the first one indicate that at all?

A Orally.

Q Okay. What about on her bottom?

A Not on the first one.

Q So it changed.

A It was added.

Q It was added. Okay. You are correct on that. In these interviews it doesn't take long before they are done; correct? Only about 30 minutes or so.

A There is no time limit on the interview.

Q Now during the second interview, you state

that there are a lot of people in the home; correct?

A They were there the first time too.

Q Oh, they were.

A Yes.

Q So we don't know where those white markings come from on her shirt; do we?

A I know based on what she says.

Q That's right. We can only go by based on what she said. By this time the family was aware of the accusations.

A Whose family?

Q Victim . Victim family. Yes, in her home.

A Correct.

Q They were there to console her?

A I assume; yes.

Q Did you have any opportunity to collect any deodorant from Justin?

A I did not.

Q Well let me, maybe I put the cart before the horse that time. Did you even observe -- now if you need to refer back to your report you can. Did you observe any deodorant on Justin?

A I didn't look.

MR. MOBLEY: I beg the court's indulgence, Your Honor.

Q Now with everything happening that day; specifically, during this time period, not 3 days later, or even just during this time period, were you aware of Statute No. 16-3-750?

A And the title is CSC, is that the one you referencing?

Q No it's part of CSC.

MS. BARR: Judge, we are going to object to that.

THE COURT: I am going to sustain the objection.

Q And all the tools you had available that day were utilized to the best of your knowledge. During these particular types of cases, is it important to continue to follow up with collecting evidence?

A It would be.

Q It would be? Do you have any personal knowledge as to whether there was a follow up on this case?

A I do not.

Q Who is in charge then?

A In reference to what?

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Q Well let's start with listing of the names then. Can we get evidence collection captain? Who was the captain over the department?

A Well we have a chief.

Q Who was the chief?

A And the chief at that time was Robert Ford.

Q Robert Ford.

A I am not sure who was in the investigations, but I know Major Crown and Grant Huckabee. I think he was a sergeant at that time.

Q A sergeant.

A Grant Huckabee.

Q Huckabee. Okay.

A Grant Huckabee I believe was there during that time. I am not sure of the dates. I am sure who all was in investigations. I am not sure with the time frame. I am not sure, because people come and go so I am not sure.

Q Okay. Well let me try to be more poignant then. Who is in charge of the evidence room?

A Whoever was appointed at that time. So I can't say specifically it would have been you that was over evidence on her over evidence. I am not

sure.

Q Do you have any personal knowledge whether any evidence has been collected in this case?

A The fourth time, I never know.

MR. MOBLEY: Nothing further, Your Honor.

THE COURT: You need to give those exhibits back to the court reporter. I think they are on your desk.

MR. MOBLEY: On my desk? Oh, yes, I apologize, Your Honor.

THE COURT: Redirect.

MS. BARR: Yes, sir.

Redirect Examination by Ms. Barr:

Q Ms. Hamlet, just a couple of questions in follow up if I may.

A Yes, sir.

Q If we assume for argument sake that when I say inconsistency, that means somebody said one thing at one point, and said something the complete opposite at another point and time.

A Right.

Q Would you agree or disagree with me that that would be an inconsistent?

A Correct.

Q Now you testified on cross examination

about some minor inconsistencies as you called them. And specifically I believe I heard you say it related to the issue about the back door.

A Right.

Q Okay. And you may feel free to refer to your report. When you first spoke with Victim, and you got that initial statement, as it relates to how she left the house, can you tell me specifically what she told you the first time you talked to her about how she got out of Justin's house.

A She ran out the back door.

Q And if you look on page 2 of your report, did you then follow up and ask her how did get out of the back door, during that first interview.

A She said she ran out the back door.

Q Okay. Did you then ask her well how did you get out the back door? During the first interview.

A I don't believe I did, no.

Q The second interview, this is after you have spoken with Mr. McBride.

A Correct.

Q Correct. You said you interviewed her to get clarification on two points.

A Right.
Q Did you then ask her how did she get out of the back door?
A Yes.
Q Okay. What did she tell you?
A She ran to the back door but the door was locked, and Justin had to unlock it for her.
Q Now if she told you she ran out the front door the first time.
A Ran out the back door.
Q I'm sorry, the back door. Thank you. The first time. And if she told you the second time that she ran out the back door after Justin unlocked it for her.
A Right.
Q Would that be an inconsistency?
A No, that's what I am saying, she corrected it.
Q Now when you were meeting with Victim in the kitchen, you testified that her mother was there.
A Right.
Q During the exchange between you and Victim did her mother interject anything?
A I don't recall that she did.

Q Did she tell Victim to say certain things while you were there?

A No.

Q What about during the second time you talked to her?

A No.

Q Now you were asked about signing the warrant. Did you actually sign a warrant in this case?

A I did not.

Q You weren't the one who signed the warrant.

A Correct.

Q When you left, who all was still at the home or at the scene?

A The originally officers that were there.

Q Mr. McBride was still there?

A He was still there.

Q One last follow up. Other than the clarification about the back door, would there have been anything that Victim told you, that would have been inconsistent in her second interview from what she said in her first interview? Which means the complete opposite of what she said the first time?

A No.

MS. BARR: That's all the questions I have. Thank you.

THE COURT: Recross.

MR. MOBLEY: Yes, Your Honor. May we approach.

THE COURT: Yes, sir.

(Whereupon, the attorneys approach the bench and confer with Judge.)

MS. BARR: I'm sorry, Judge. Can we approach one more time. I'm sorry.

Recross Examination by Mr. Mobley:

Q Detective Hamlet, did Victim state during the first interview that Justin's manhood was soft?

A Yes.

MS. BARR: And, Judge, we would just renew our previously objection.

THE COURT: Based on that conversation here, I believe the appropriate -- this line of questioning is appropriate at this time.

Q During the first interview when you asked Victim was there anything else that happened, what did she say?

A She stated no.

Q During the second interview, when you were asked that same question basically were you touched anywhere else, what did she say?

A On this, I asked her that on the first time.

Q Now during the second interview did you, and you can read it. Take your time, no hurry.

A And what was your question again?

Q In regards to did Justin do anything else to her. Well let's be more direct. On the second interview, isn't that true that Victim stated oh, and he put his manhood here?

A Yes, he did.

Q She did.

A Uh-huh. (Affirmative.)

Q She did not make that statement during the first one; correct?

A Correct.

Q Okay. Did she make any statements in regards to her bottom bothering her; being bothered on the first interview?

A She did not.

Q The second one she did; correct?

A Correct.

Q And during the second interview she

actually makes that statement while pointing to her rear; correct?

A Correct.

Q She did not do that demonstration during them first one; correct?

A Correct.

Q Now are those little small inconsistences there?

A I wouldn't hold it as inconsistencies. I would chalk it up as her being a 9-year-old, and just trying to recollect everything that happened.

Q Well does it bring up a red flag at all; that maybe we need to question her a little further?

A Well that wouldn't be my place to question her a little further. That's why the forensic interview was set up.

Q Were there other tools that may have been used at the time?

MS. BARR: And, Judge, we are going to object to that. I think we're being---

THE COURT: I sustain the objection.

Q Now during the first interview you make an observation that Victim 1 was visibly calm.

MS. BARR: Your Honor, this falls outside

the scope of recross. We would object.

THE COURT: I sustain the objection.

MR. MOBLEY: Nothing further, Your Honor. Thank you.

THE COURT: Thank you, you can step down. Appreciate your time. Call your next witness.

MS. BARR: We would call Angelica McBride.

Angelica McBride, being first duly sworn, testified as follows:

Q Good afternoon, Ms. McBride.

A Good afternoon.

Q I need you to keep your voice up for me, please. And I need you to state your full name for us.

A My name is Angelica Phylishia -- well Cooper McBride.

Q And you are mother of Victim [redacted].

A Yes, ma'am.

THE COURT: Can you spell that name for us.

A A-N-G-E-L-I-C-A.

THE COURT: And the rest of it.

A Well P-H-Y-L-I-S-H-I-A. Well my maiden name is Cooper, c-O-O-P-E-R. McBride, M-C-B-R-I-D-E.

THE COURT: Thank you.

A You're welcome.

Q And, ma'am, where were you living back in the summer of 2010?

A Beside my sister-in-law at [redacted]

Q You lived there with your husband and your children.

A Yes, ma'am.

Q Mrs. McBride, tell me about the early afternoon of June 21st of 2010. Do you remember what day of the week that was on?

A That was a Monday.

Q Okay. And where was [redacted] before 12 noon that day?

A She was at Kenneth Gardner Elementary School in summer school.

Q And what time was she expected to get out of school?

A The bus would always come by around 1:15.

Q Now on that day, tell me what you were doing between I guess 12 and 12:30?

A I was currently enrolled in an online school, which was Phoenix University. I was doing some school work.

Q Did you ever leave the house prior to Victim 1 getting home from school?

A Yes, ma'am.

Q Now typically how would Victim 1 get back and forth to school?

A I would took her and I would pick her up.

Q On the particular day, how did she get to school?

A She started attending, well traveling to school by bus.

Q Now what time did you leave home that day if you remember?

A I would say maybe 12:30.

Q Was there anyone at home who left with you?

A My baby girl, [redacted].

Q How old was [redacted] back then?

A [redacted] would be about 4 and a half.

Q Where did you go?

A I went to IGA, which was Food Lion during the time, I think it was. But I know it was over there at the IGA store, I went to, to get a loaf of bread.

Q What time did you expect me to get back?

A It didn't take me no more maybe about 6 or

7 minutes to run and get the bread and run back out.

Q When you left home that day, did you see any neighbors outside?

A As I was leaving out to go to the store, Ms. Gladys waved me down. And she told me that she would be obliged to look out for Victim 1 and [redacted] when the bus come.

Q Now who is [redacted]?

A [redacted] is Justin's, one of the twin sisters.

Q And Ms. Gladys is a neighbor?

A Yes, ma'am.

Q When you left and came back, what time do you think you got back?

A Well on my way back home, I had to stop by Anderson Primary to pick up [redacted]. from his summer school.

Q That's your other son. That's your son.

A Yes.

Q And what time did you get back home at the place where you were living in the summer of 2010? Approximately. I don't expect you to testify to---

A Sure, I can remember. Because when I got the park, [redacted] wanted to play with my key chain.

I told her we could stay outside for a little while because it was hot. And I asked [redacted] what time it was. And he told me he said, one and and a 10, mama. I said baby that's 1:10. So she played in the middle of van. And the alarm she keep pressing on the van was going off.

Q The van is your vehicle?

A Yes, ma'am.

Q When you got home, was Victim 1 there?

A No, ma'am.

Q When you left to go to the store, was anybody in the house?

A No, ma'am.

Q Where was your husband.

A My husband was at work.

Q So when you get back home you think it's about 1:10 or so, how soon after you get back home does then Victim 1 come home?

A As I said, the bus runs about 1:15.

Q Okay.

A This is her second time riding the bus.

Q Okay. So what time did she get back? Was it about 1:15?

A Well the first day was 1:15.

Q Okay.

A And I didn't see the bus at all. I waited, the bus never came.

Q Okay.

A And I went inside with the kids. And I sat and I thought to myself, that basically this is the last week of summer school. Maybe they drop the kids off first, that they pick up in the morning.

Q Okay.

A And I went outside and stood around and waited. Nothing. I went back inside, and I went to sit back down and I heard a bus blowing. I said, okay, there goes the bus. By my disappointment, it wasn't her bus.

Q Okay.

A It was the middle school. I went back in. I paced around for awhile. And I sat down maybe, I don't think a minute, because I started getting agitated.

Q Why were you getting agitated?

A Because, I mean I don't know where my child is at. And the bus hadn't run yet. They were in middle school, because her bus always be the first bus.

Q Did her bus then come after?

A I never saw her bus. I saw the high school kids.

Q Okay. You saw the high school kids bus come in.

A Yes, ma'am.

Q Then what happened?

A I went outside. I paced around and my nerves had me winding up my shirt. And I started talking to my son. And I was, Lord, where could Victim 1 be. Where could Victim 1 be. Lord Jesus, where is my baby. And then I started thinking over to Ms. Gladys looking over at her house. During that time her daughter was dropping off her kids. And as she was backing out of the park, they was yelling out at her. And with that, I said to myself, well maybe I needed to holler over and ask one of them -- ask their grandma did they saw Victim 1.

Q Okay.

A And then I didn't follow. I figured, okay, she will come. She will come. She will come. So I proceeded in the house. My son said, mama, I will wait outside, it's hot. I said, no baby come inside. By that time I had got back in, I went to go sit found. And during that time I

heard somebody kicking and beating on the door.

Q Okay.

A And before I knew it, I used profanity. Excuse me. I blurted out, who the hell is that knocking on my door like that. And I went to the door. I didn't open it. I just press my face up as far as I could and looked. And it was her.

Q It was her, who?

A Victim 1. It was Victim 1. I just didn't see the side of her face. And I opened the door. And as I opened the door, she was looking at me. And my son's head was peeping in between us. I was still on the threshold. She was trying to come in. I was asking her, where were you. Where are you coming from. And she just wouldn't answer me. She just wanted, she just slide between me and the door. She wanted to get by me.

Q Okay. Once she came into the house, did you continue to ask her what she was?

A Yes, ma'am.

Q Did she tell you where she was?

A No, ma'am, not at first.

Q Okay. Did you notice anything usual about her when she came in the house?

A She normally -- anybody that knows my

kids, they love to hug. They love to tell you about their day. And she was excited about riding the bus. And that first day, she told me all about it. And she had nothing to say. She didn't want to give me a hug. She didn't want to tell me anything. She was just hugging on to her little white notebook. And she proceeded on to try to pass me to go down the hall.

Q What did you do then when she tried to pass you to go down the hall?

A I just wouldn't take the answer. I reached back and grabbed her in her chest and brought her back. And when I brought her back with a little bit of breeze, I could smell of how she reeked of men's cologne.

Q How did she did what now?

A How she smelled of men's cologne.

Q Okay.

A And I asked her, what is that. And she wouldn't answer. And I said, Victim 1, what is that. You smell of men's cologne. And your dad doesn't wear cologne. I don't wear perfume. So where were you. And she wouldn't answer me. And I believe I asked her maybe about -- maybe about three times after that. And I opened up the door

and I asked her again. And then she came up and just looked the other way. And she pointed. And I said where. She said over there. I said over there. She said over there. I said over where. She said Aunt Teeny house. I said Aunt Teeny's house.

Q Who does she refer to as Aunt Teeny?

A Now you've got to forgive me. She had a speech impediment at that time. And it's her Aunt Katrina, Justin's mother.

Q When she pointed and said Aunt Teeny's house, what did you then do?

A I explained to her, that couldn't be because Aunt Teeny work on Mondays. And her van is not in park so she is not home. And she corrected me and said, Justin is there. And that's when I was kind of like, what. She said Justin is there. And I said, so you have been there how long. And she wouldn't answer me. And then she proceeded to continue down the hall, that's when I turned to look at her. And that's when I saw the stain on her shirt.

Q And tell me, describe to me and the jurors, her clothing that day.

A Well she had on an outfit from her

grandmother, my mother, for her birthday. It was a black tee shirt and it was a peach or pink jogging material caprices. Draw string, but it wasn't to draw, just for design. It had a lot of highlighted color, lime, hot pink. It had green and little white highlighted border of it. It was like paint splashes was all over it. If you cut the light off, it would just highlight the room.

Q Okay. You said that you noticed that there was a white stain on her shirt?

A Yes, ma'am.

Q Did you ask her about that?

A Yes, ma'am.

Q And again I have to be careful sort of not to get into hearsay. Based on what she told you, what then did you do?

A Well actually I asked her, what is that on your back. She didn't know it was there.

Q Okay.

A That's when I proceeded towards her and I sniffed it. And I sniffed it. I said got a perfume smell.

MR. MOBLEY: Objection, Your Honor.

THE COURT: I overrule the objection. Go ahead.

A I told her that it doesn't smell like a cologne. I said it smells more like deodorant. And she shrugged her shoulder. And she continued to try to get away from me. She wanted to go down the hall.

Q You continued to try to talk to her?

A Yes, ma'am.

Q At any point and time did you leave the house?

A Right after I spoke to her in a closed room, because I had my two youngest ones there.

Q Where did you go?

A I went, I sent her to my room as I locked the front -- the screen door and the front door.

Q Then where did you go?

A I went to my room where I sent her.

Q Did you actually leave out of the house I mean?

A After I got through talking to her?

Q Right.

A Yes, ma'am.

Q Where did you go?

A I went over to my sister-in-law's house.

Q And for the record, you are talking about the defendant's mother?

A Yes, ma'am.

Q Why did you go over there?

A To ask him actually how long was Victim 1 was there, because I didn't actually see her arrive.

Q When you went there first of all, was Justin McBride actually there?

A Yes, ma'am.

Q Was anybody else at the house?

A I didn't went in, so I don't know if anybody else was in there.

Q Now you have been inside their home before?

A Yes, ma'am.

Q How many bathrooms do they have inside their home?

A Two.

Q Two bathrooms.

A Yes, ma'am.

Q When you talked to him, tell me what you told him.

A Well when I finally got him to come out, I asked him how long Victim 1 was here. And he was like---

MR. MOBLEY: Objection.

THE COURT: I sustain the objection.

Q Let me ask you this. Did you accuse him of doing something inappropriate with your daughter?

A No, ma'am, I asked him.

Q You asked him.

A I asked him what happened between him and Victim 1.

Q Okay. Did you have any concerns when you left your house after having spoken with Victim 1 when you went to go speak with Justin, that something happened that shouldn't have happened? Did you have any concerns about that?

A Yes, ma'am.

Q What did he tell you about that?

MR. MOBLEY: Objection.

THE COURT: I overrule the objection.

A He told me that Victim 1 came in the bathroom and he was using the bathroom.

Q What else did you say to him?

A I asked him I said, I don't -- well I asked him, I said what do you mean coming in the bathroom on you. And he said well I was using the bathroom.

Q Okay.

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A And that was it. That's all he told me.
Q And then what did you say, and what did you do at that point?
A I told him, I don't believe that. I said, I thought, well I knew it was the God I serve. He came over me and said, okay; leave, he is a minor.
THE COURT: I sustain your objection as to that kind of---
A Well---
THE COURT: She can testify she was there, but not the other part.
MS. BARR: Okay.
MR. MOBLEY: Your Honor, we would move to have that stricken from the record.
THE COURT: Okay. We will strike from the record that God overcame her and spoke to her or however -- only that she decided to leave for whatever reason.
Q So at some point you left.
A Yes, ma'am. After that thought came to my mine, and said, it is not.
Q Okay. You decided that it's -- well let me just put it this way. You decided that it was best for you at that point to leave.
A Yes, ma'am.

Q Then did you go back to the house? To---

A No.

Q ---your house?

A Oh, yes, ma'am. I went to my house.

Q Who is the first person you called?

A I called Victim 1 father, my husband.

Q That's Benjamin McBride?

A Yes, ma'am.

Q Who was the second person you called?

A His mother Katrina McBride.

Q Justin's mother?

A Yes, ma'am.

Q Tell me why you thought to call Justin's mother?

A Because basically I mean I am always either picking him up, or his sister up when they was attending school here. And every time I called she always answered herself.

Q But kind of explain to me why you thought to call her as the second person, as opposed to the police?

A Because I mean I just wanted for her to be there because to me, he is a minor. And I wanted some answers. Another adult there basically to help me with that.

Q When you called your husband, did he answer the first time you called?

A It took maybe about a minute because the lady that answered the phone she said he was basically outside the plant.

Q So eventually you did talk to him.

A Yes, ma'am.

Q Okay. Did you actually speak to Justin's mother?

A No, she didn't answer my first call.

Q Okay. Now at some point who in your family called the police?

A My sister Samantha. My mom said it was time to call the police.

Q You came out there, or I'm sorry the police came out, spoke with you.

A Yes, ma'am.

Q Spoke with Victim 1 .

A Yes, ma'am.

Q After they left, the police officers left, later on that night, did you have a conversation with Victim 1

A No, ma'am.

Q What about during the nighttime after everybody had gone to bed, did you have a

conversation with her?

A Nothing other than when she screamed out.

Q Tell me about that.

A Well I was in the middle of trying to finish up my final exam which took me four tries, because of the stress of the day. And I was -- I feel asleep during my test. Then I heard her scream out. And I jumped up and I proceeded down the hall where I heard where the noise came from. And she said, mama. She called me. And I turned and went into the bathroom. I asked her what was the problem. And she said it hurt.

MR. MANNING: Objection, Your Honor.

THE COURT: Let's don't go in to what Victim 1 told her mom.

MS. BARR: Judge, I take the position it is excited utterance.

THE COURT: I am going to let the jury go into the jury room for just a minute while I take up a matter of law.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: What is the rule number?

MS. BARR: Judge, I am looking at however 803(1) and 803(2). And, Your Honor, we

would take the position that the statement is admissible as a present sense impression and or an excited utterance.

THE COURT: Well it couldn't be one, because it did happen while the declarant was proceeding the event or condition or immediately thereafter. Apparently this took place some time thereafter. And there hasn't been any testimony about whether or not she was, under the stress of excitement caused by the event or condition.

MS. BARR: Your Honor, there has some cases in which an excited utterance or presence sense impression statement have come in when it was experienced 24 hours after the event that caused the condition. And so, Judge, the testimony is that this event would have happened at some point after one o'clock. The witness' testimony, as I understand it, indicates that at some time during that night after someone -- everyone had gone to bed, that Victim 1 made the statement that it hurt.

And, Judge, I will happy to proffer the additional statements made by Victim 1 to her mother outside the jury's presence. But we think it comes under one or both of those hearsay

exceptions.

THE COURT: I will let you go ahead and ask the questions. And then I'll have -- Mr. Mobley can ask some.

MR. MOBLEY: I am sorry, Your Honor?

THE COURT: I am going to let her ask, make a proffer. And, of course, let you have a right to ask also.

Direct Examination continues by Ms. Barr:

Q Ma'am, pick up where you left off with a statement regarding you heard her either Victim 1 crying or screaming.

A Well after I heard her scream, I went into the bathroom where she was, and I asked her what was wrong. And she was crying, mom it hurts. And I asked her, what hurts. And she kind of lift her bottom up off the toilet and pointed to her anal part. And I asked her, what's wrong. She said -- that's when she proceeded to tell me that the tried to put it back there.

MS. BARR: Okay. And, Judge, that would be the extent of all we would seek to introduce.

THE COURT: Any cross on this?

MR. MOBLEY: None, Your Honor.

MS. BARR: And, Your Honor, I am

specifically looking at State versus Whisonant, W-H-I-S-O-N-A-N-T, 335 S.C. 148.

THE COURT: Have you got a copy of that for me?

MS. BARR: Judge, I am using my little cheat sheets. I am sorry. But, Your Honor, that is a case where the victim's statement as being admissible, and it was made 9 or 10 hours, I am sorry, a statement made 12 hours, admissible where made under continuous stress by a 5-year-old who stayed with his mother's body all night.

MR. MOBLEY: Your Honor,---

THE COURT: Well I am looking at State vs. Wisner. That's a name we have up in York County. So I think that's the way you pronounce it. And it says under the little annotation under 803, just the opposite. A child's hearsay statement to a stepmother concerning alleged sexual abuse by a defendant, were not admissible as excited utterance. People did not make a statement until he returned to her father's house 9 hours after that the incident in question. And had an opportunity to speak with friends and family or friends of the mother. And did do so. So they're saying that's a time, but also that she has had

conversations with other people including the police in this case.

MS. BARR: Yes, sir.

THE COURT: And did not make that statement.

MS. BARR: And, Judge, I would also in terms in of my attempt to have these statements admitted into evidence, Judge, we would again either submit that it's present sense impression or excited utterance. Or a present state of mind in the alternative when it talks about the statement of a declarant about the then existent state of mind, motions, sensation or physical condition; such as, pain. And I think that is covered under subsection 3 of Rule 803.

And if, Your Honor, determines that the mother is not permitted to say why the child was hurting and what the defendant did, I think she is permitted to testify that the child said that it hurt.

THE COURT: That is 803 (3).

MS. BARR: Yes, sir. And, Your Honor, for the record, I misspoke about the cite for the previous case regarding Wisner. Your Honor is 100 percent correct. I was looking at a different

opinion, and that case was cited afterwards. And I apologize. And I wanted to make sure that I corrected myself on the record.

THE COURT: Well I will allow the question under 803 (3).

THE COURT: Bring the jury back in.

(Whereupon, the following takes place within the presence of the jury.)

Direct Examination continues by Ms. Barr:

Q Ms. McBride, you can't tell me why she said what she said. But you indicated that you heard her scream. Is that your word?

A Yes, ma'am.

Q And you went into the bathroom you asked your daughter why?

A Yes, ma'am.

Q And again, I guess, I have to be careful to make sure you don't say anything that you're not allowed to say. My understanding is you then said she told you that it hurt, mama. Mama, it hurt?

A Yes, ma'am.

Q Do you recall having an officer take photographs of Victim 1 ?

A yes, ma'am.

Q And when those photographs were taken what was she wearing?

A She was wearing the same outfit, the black top and a peach or pink bottom.

Q Do you see any officer in the courtroom who would have taken -- did you see the officer in the courtroom who took that picture?

A Yes, ma'am.

Q Where do you see him at?

A Right there. Sitting right there in front of the guy with the blue tee shirt.

Q Tall, white gentleman with gray hair and glasses?

A Yes, ma'am.

Q I am going to show you State's Exhibits 1 and 2. Do they depict Victim 1 and the shirt that she wearing that day?

A Yes, ma'am.

Q And let me ask you in terms of these photographs, State's Exhibit's 1 and 2. Do you recognize the chair or any of the things in the background in that photograph?

A Yes, ma'am.

Q Tell me how you recognize them and what it is.

A It is basically my kitchen and the drawers and stuff. And, you know, the paper, the newspapers and stuff I had stacked.

Q And this is Victim 1 in the these pictures.

A Yes, ma'am.

Q Now what happened to the clothes that Victim 1 was wearing that day?

A Well my sister and I was instructed after my sister had asked, the question before me, before she got ready, what are we supposed to do with the clothes that they are going to take them into evidence. And she instructed my sister and I to basically, we was able to collect her clothing and put it in a bag. And my sister stopped her two times after the first attempt. And she instructed us twice to do the same, collect them and put them in a bag.

Q And take them where?

A Take them whenever she called and give me a date, to go to coalition place in Florence.

Q To go to the place in Florence?

A Yes.

Q Is that where Victim 1 had the interview and had the medical exam?

A Yes, ma'am.

Q And when you all when there, first of all, did you go with her?

A Yes, ma'am.

Q Okay. When Victim 1 had the interview in Florence---

A Yes, ma'am.

Q ---were you sitting in with Victim 1 and the lady who gave her -- the person who gave her the interview?

A No.

Q They wouldn't permit you to sit in with her?

A First they questioned me. And then, oh, yeah, I'm sorry. The first time when we first got there, the lady questioned me in the room. And then after she got through with me, she went back in the front when Victim 1 was with her two siblings and brought her in. And she told me basically it was Victim 1 that she was going to question, and that's what she did.

Q Now did they take the clothes, the people in Florence?

A Right after they finished questioning Victim 1, they went on ahead and the doctor came

down and got Victim 1 and took her up to the examination. And just before I left, that's when I presented them, because I was instructed to take them there. So I presented them to them. And they got really upset about having them and bringing them there, because she told -- well she got upset that I had them.

Q Okay. The person at the---

A Coalition.

Q What did they tell you to do with the clothes?

A After she got through bagging them and tagging them herself, and calling back to the sheriff's department, she gave them to me and told me and my husband to take them back to the sheriff's department here, and hand deliver them.

Q Now when you say is it was it the sheriff's department or the Kingstree Police Department?

A I think it's where they pay the water bill at. Behind there.

Q Okay. So that be at the town of Kingstree.

A Yes, ma'am.

Q Not the sheriff's, not the -- you see the

lady behind you, she has on the sheriff's uniform. Did you take the clothes to anybody wearing anything like what she had on?

A No, ma'am.

Q Okay. I want to be clear. And so they told you that the clothes needed to be with police department.

A Yes, ma'am.

Q Then you then take it to the police department?

A Yes, ma'am.

Q Who did you give them to?

A I can't remember his name, but he was a Caucasian guy. And he was maybe about I would say about 6 feet. Clean head.

Q He had a bald head.

A Yes, ma'am. And he was dressed in dark pair of slacks with a button up neck shirt, with his gear and stuff on his shoulder. He wasn't in a uniform like him. He had pants on, but he had, his top was different like three button up, busted at the neck, with a collar.

Q And you took those to him at the police department where you pay the water bill.

A Yes, ma'am.

Q Do you know how soon after you and Victim 1 came from the place in Florence that you took the clothes to the---

A Straight on the time we were there.

Q The same day.

A Yes, ma'am.

Q So you had the -- she had the interview set up for June 24th. And medical exam said it was June 24th. You would have taken the clothes to the police department on June 24th.

A Yes, ma'am.

Q Now at any point and time after June 24th, did you ever go back to the police department to find out what had happened with the clothes?

A Yes, ma'am.

Q Do you know who you spoke with on that occasion?

A On that occasion when I basically had a phone conversation with you. And I proceeded to go over there. And I saw the officer right there outside. And I think it was already locked by then. You already closed. The door was locked. And that was basically the last time that I had spoke -- tried to speak to an officer about the clothes.

MS. BARR: Ma'am, that's all the questions I have. Please answer any questions counsel or the court may have for you, okay.

A Yes, sir.

MR. MOBLEY: Your Honor, May it please the Court.

THE COURT: Yes, sir.

Cross Examination by Mr. Mobley:

Q Now, Ms. McBride, you are the aunt of Justin as well; correct?

A Yes, sir.

Q You have known him for a long time; correct?

A Yes, sir.

Q On this particular event itself, on that day, this was the second time that C[redacted] had rode the bus?

A Yes, sir.

Q I apologize about that, because I thought it was the first. So I apologize about that. When [redacted] came into your home that day, did she make mention to anything that occurred on the bus?

A No, sir.

Q Did you know that she was upset coming off

the bus at all?

A At that point; no, sir.

Q Did you ask at any time?

A No, sir.

Q Well did you know at any time that she was upset even coming off that bus?

A After everything was calmed down when she was questioned by the police, then that's when I found out.

Q Okay. Did she make mention to you why?

A Yes, sir.

Q What did she say?

A She told me, mommie, I was upset. The kids on the bus told me that you wasn't home.

Q Now when Victim 1 was walking down the hallway, when you brought her back and you spoke with her. You state that you just had a feeling that something was going on.

A Yes, sir. But she wasn't down the hallway. She was coming past me.

Q Past you. Okay. She was going towards the hallway?

A She was going past me going in the hallway. She have to pass a good bit of the front room in order to get to the hallway.

Q Did she say anything at all about you not being present at home?
A At that moment; no.
Q You made statement that you smelled men's cologne?
A Yes, sir.
Q Now at the point that you felt that there was something wrong after speaking with Victim 1
A No, that was before.
Q No. No.
A Just before I felt that way. Before I even spoke to her.
Q Yeah, I wasn't saying that was the point.
A Oh, okay.
Q I was trying to take you to a point.
A Okay, I am sorry.
Q At that moment, I'm not saying now.
A Okay.
Q But at the moment when you felt something was wrong with Victim 1, your next step was what?
A My next step was that basically I needed to talk with her and find out what's wrong.
Q After speaking to her did you still feel the same way?
A Yes, sir.

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Q Then after that was confirmed, what did you do?

A I felt like I needed to go and talk to Justin.

Q Okay. After speaking with Justin, what did you do?

A I went on home in which I told him I was going to call his uncle.

Q After calling his uncle, what did you do?

A I tried calling his mother.

Q After calling his mother, what did you do?

A I called my husband again.

Q After calling your husband, Mr. McBride, what did you do?

A I called Tracy McBride.

Q Okay. Who is Tracy McBride?

A Catrina McBride's older sister.

Q Okay, Tracy McBride. After calling Tracy McBride, what did you do?

A She told me she would call me once she gets out of the store. And I waited. And I waited maybe about 6 or 7 minutes and then I called her back.

Q After speaking with, I'm assuming, well when you called her back did Tracy answer?

A Yes, sir, she was on the road at that time.

Q Okay. After speaking with Tracy, what do you do?

A I basically hung -- after I hung up from her, because I told her that I thought that something happened between Justin and Victim 1. She said I don't believe it. And I hung up, because I didn't want it, you know, a confrontation with it, so I hung up.

Q After that what did you do?

A I called my husband again, because he -- I felt like he would have should been there by there.

Q After that, what did you do?

A I proceeded and basically paced the floor. And I paced the floor for awhile. And then I thought to myself, okay, I need another head, so I tried calling my mom.

Q Were you able to get in contact with your mother?

A No, sir.

Q Well after that, what did you do?

A I called my sister.

Q After speaking with your sister what did

do?

A I wasn't able to get in contact with her either. It took numerous calls to try to get anybody.

Q After you were not able to get in contact with your sister, what did you do?

A I basically paced the floor. And I tried calling my auntie Dylia.

Q Okay. Again what I am trying to get to, Victi [redacted]---

A Uh-uh. (negative.)

Q ---if you felt something was going on with your daughter---

A Yes, sir.

Q ---why didn't you call 911?

A Because he is a minor to me. And I feel that as a minor if it was my child, I would want his mother or some adult who has authority over him to be present.

Q Now at what point after you attempted to get in contact with his mother, with his aunt, with several family members---

A Uh-huh. (affirmative.)

Q I'm sorry?

A I say I agree with you; yes, sir.

Q When would you have thought was a good time to call 911?

A Basically like I said, I felt like before I could call 911, his mother or another adult that has authority over him needs to be present.

Q So who called 911?

A After my sister got there, and my mom finally got there, my mom decided that 911 needed to be called. And my sister made the phone call.

Q So you didn't feel that 911 needed to be called at that time.

A I felt like it needed to be called, but I needed for him to have an adult present for him.

Q Okay. So the family made the decision to make the 911 call.

A No, I had already had told him I wanted to call, but I wanted someone to be there for him.

Q So they proactively on their own took the initiative to call 911.

A After basically my sister done tell my mom that she saw his mother's van turning in.

Q Okay. So that was prior to anyone taking the opportunity to speak with Vict [redacted] in regards to this?

A Oh, she called back.

Q Okay. Were you all able to discuss this?
A It basically was a disagreement of, she basically said, what is going on. And I told her something happened between Justin and Victim 1.
MS. BARR: Judge, we are going to object to any hearsay---
THE COURT: I sustain the objection.
MS. BARR: ---as to what the defendant's mother might have said.
THE COURT: I sustain the objection.
Q You can continue.
A No, I told her -- she said no, no.
THE COURT: You can tell what you said.
Q You can say what you said.
A I basically her told what happened between -- I had felt something went on between Victim 1 -- well Justin and Victim 1. And the phone call didn't went so good and she hung up. And so after I got her dial tone, I hung up.
Q When you all saw Catrina McBride's car pulling into the driveway, had 911 already been called?
A My sister was on the phone with one right then. My sister was dialing. She was talking to one.

Q Did you convey to your sister and your mother that you wanted to speak with Mr. McBride and make sure a parent is there with Justin so you all can discuss it?

A My mom -- yes, I told them. And I told them I was waiting on Victim 1 father.

Q Okay. So they made the decision.

A No, we made the decision together after we saw Catrina's vehicle turning in.

Q But, Victi I thought it was important to make sure a parent was there.

A His mother was turning in the lane.

Q Okay. So you felt that was appropriate then.

A Yes, sir.

Q Okay. But at no point did you dial 911; correct?

A No, because I basically was on the phone still trying to contact my husband.

Q Now when you were at the Durant Center and you bagged Victim 1 clothes.

A Yes, sir.

Q They did not accept the clothes; correct?

A No, sir.

Q Okay. And they told you to take it to law

enforcement.

A After bagging it; yes, sir. It was taken out of my bag and just placed what I had into their bag.

Q I didn't know. So it was double bagged.

A Yes, sir.

Q Hadn't been tampered with, washed or anything.

A No, sir. Two white lined bags tied in a knot, I did, and they put it inside their bag.

Q Okay. Did it mark anything?

A Yes, sir.

Q Why did they mark on?

A It was a long white strip of paper that was on -- stabled onto the bag. And I didn't look to see what the number. I just listened to the instruction that was given to me, to proceed and turn it in.

Q What items were in the bag?

A The items were a black tee shirt with graffiti that was designed on the front. And her panties as well and her bottom.

Q How many days after this alleged event was it that you were depositing these -- attempting to deposit these things at the Durant center?

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A After the date the police were called to the scene. It was that night when she basically got right after the police left, and we was instructed by the detective to basically bag them ourself. And they was in there until I received that that day I was given. And was basically got it to the Durant Center and my husband drove our vehicle behind the officer there.

Q So they didn't even help you bag the items?

A No, sir.

Q You had to do it yourself?

A Yes, sir.

Q Do you have any training in evidence collection?

A No, sir, I do not.

Q Now the question that I was specifically getting to this interesting here, but how many days was it after the event that these bagged items were taken to the Durant Center?

A I don't know from what date that the police that it happened, until that day that I went there. I don't know -- I can't really think of it in my head how many days that was.

MR. MOBLEY: If I may approach the

witness, Your Honor.

Q I am not asking you to read anything here. Does this look like an entry that was performed that day based off of this title?

A I don't understand what you mean.

Q Does this look like a date that you attended the Durant Center?

A Yes, sir.

Q Is that 3 days later?

A Yes, sir.

Q Let the record reflect that the date that Victi [redacted] is speaking of is June 24th of 2010. So it was 3 days after this alleged event; correct?

A Yes, sir.

Q Does law enforcement come back at all to check on any initial evidence?

A Evidence no, but they came back.

Q Okay. What -- I am sorry.

A Just to inform me on what is going on.

Q Now the person that you supposedly gave this -- these items to, what kind of uniform? Was that the city of the county?

A It was a lady that worked at the Durant Center. The doctors and the counselors.

Q Well I am speaking about once they told you they could not accept it. You stated you gave it to an officer at another location?

A Yes, sir, here.

Q Okay. And when you say here.

A In Williamsburg County.

Q Okay. So was it a county deputy that you give it to? Did they have on a brown?

A No, sir.

Q Okay. So it wasn't county then.

A Oh, well, I am not familiar with warrants.

Q But you know you gave it to an officer.

A Yes, sir.

Q Have you heard anything at all in regards to the testing of those items?

A No, sir. I was informed when I asked, but I wasn't really told anything about any of this.

Q Now you gave some testimony earlier in regards to Victim 1 having an interview. And then she had a medical examination as well; correct?

A Yes, sir.

Q Now you are her mother; correct?

A Yes, sir.

Q And you have -- they actually have to get medical clearance from you before performing

examinations; correct?

A Yes, sir.

Q They have disclose and have you sign any releases as well; correct? Before they do an examination.

A Yes, sir.

Q Additionally being that she is a minor, isn't it correct that they have to provide reports to you as well?

A Yes, sir.

Q Okay. Now did you see a Dr. Luberoff? Well, not you, Victim 1 . Was she examined by a Dr. Luberoff?

A I can't recall the name, but she was examined by a physician. Because she presented as herself as an M.D. and introduced herself. And gave me what her title was.

Q Was there a Dr. Klarks as well? Dr. Klarks. K-L-A-R-K-S?

A As I say, I can't recall any name.

Q I apologize. It doesn't have an S on the end. It's K-L-A-R-K.

A I can't recall the name.

Q How to about a Dr. Townsend?

A Those doctors you are pronouncing is

basically her doctors. Because Dr. Clark, C-L-A-R-K, is her diabetes specialist. And Dr. Townsend doesn't preside over at Black River. She is gone. She was a family doctor for the kids.

Q So they were just for routine medical procedures. Dr. Luberoff was the medical examiner for this particular incident; correct?

A Yeah, if that's her name; yes.

Q Have you ever seen a copy of the medical examination?

A Not a copy of it; no, sir. I can't recall.

Q Okay. As a parent, isn't it correct that didn't have to provide you a copy of the actual findings?

MS. BARR: Judge, we would object to that question. She wouldn't know what their obligation would be.

THE COURT: I sustain. I sustain the objection.

Q Well do you know what the findings were of the doctor?

A Basically what---

MS. BARR: And, Judge, we would object to

hearsay. I think she's permitted to testify whether she knows or not. But anything beyond that, I think would be hearsay.

MR. MOBLEY: If she has knowledge, Your Honor.

A Yes, I have knowledge.

Q In regards to the examination of Victim 1 [redacted] what was the result?

MS. BARR: Objection, hearsay.

THE COURT: I sustain the objection---

MR. MOBLEY: May we approach, Your Honor?

THE COURT: Yes.

Q Now, Victi [redacted], do you have any knowledge of Victim 1 [redacted] viewing any images that shows naked people in a magazine, book or on television?

A No, sir.

Q Vict [redacted], have you ever discussed anything regarding inappropriate acts to an individual, to your daughter?

A No, sir.

Q Do have any knowledge that she was exposed to any?

A No, sir.

MR. MOBLEY: I beg the Court's indulgence,

Your Honor. Nothing further for this witness, Judge.

THE COURT: Any redirect?

MS. BARR: No, Your Honor.

THE COURT: Members of the jury panel, we are going to take a break. You all have had a break, we haven't. So we are going to take about a 10 minutes so we can get refreshed. So we will send for you in about 10 or so minutes.

THE COURT: We will take a break until 4:30.

MS. BARR: Yes, sir, Your Honor.

THE COURT: Is the state ready?

MS. BARR: The state is ready, Your Honor.

THE COURT: The defense?

MR. MOBLEY: Yes, Your Honor.

THE COURT: Just for planning purposes, it is 4:30. We can go another hour or so. How do we look?

MS. BARR: Judge, I want to call two witnesses. The first one, Lieutenant McCrea. He is going to be real quick.

THE COURT: Then we will stop for the day. I can talk to Mr. McBride about his constitutional

rights to remain silent. And we can start back tomorrow and see where we are. Do you think it will be more than an hour?

MS. BARR: Yes, sir.

THE COURT: That will day us to the end of the day. Bring the jury.

(Whereupon, the following takes place within the presence of the jury.)

THE COURT: Call your next witness.

MS. BARR: The state calls Lieutenant Thomas McCrea.

Lieutenant Thomas McCrea, being first duly sworn, testified as follows:

Direct Examination by MS. BARR:

Q Sir, state your full name for the record.

A Thomas Dean McCrea.

Q And, sir, where are you employed?

A In Kingstree.

Q Kingstree Police Department?

A Yes, ma'am.

Q And where is it? Physically where is the Kingstree Police Department located?

A 401 North Long street here in Kingstree.

Q Is it near the water department?

A The same building. We're on the back side

of the water department in the front.

Q Now, sir, how long have you been employed as a police officer?

A 26 years.

Q And you were working with the Kingstree Police Department in June of 2010?

A Yes, ma'am.

Q And, sir, were you one of the many officers who responded out to Lexington Avenue on the 21st of June 2010?

A I was.

Q After you arrived at the scene, to your knowledge, was a rape kit ever requested for Victim 1 [redacted]?

A The rape kit on a juvenile is normally done through the Durant Center.

Q Okay.

A I know they were called and an appointment was made.

Q Now if Mr. McBride had given Victim 1 [redacted] clothes to a Caucasian officer who was bald headed, would that have been somebody, that physical description would that have matched anybody who was employed at the Kingstree Police Department at that time?

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A The only officer that we had that was bald headed was Sergeant Grant Huckabee.

Q Grant Huckabee.

A Yes, ma'am.

Q And I believe that we heard that name earlier through the testimony of Ms. Hamlet. What was sergeant Huckabee's duties with the Kingstree Police department at that time?

A He was an investigator, a K-9 officer and he was evidence custodian.

Q Evidence custodian.

A Yes, ma'am.

Q So he would have been responsible for collecting evidence and making sure it is secured in the evidence locker?

A Yes, ma'am. Also for sending anything that needed to be tested to sled. Any results of testing would have been sent back to him. And he would have been responsible for keeping up with the results that we received back from sled.

Q Did you ever receive any evidence in this case? Any physical evidence?

A No, ma'am, I did not.

Q Would you have been one of the people who would had access to the evidence log in this case?

A No, ma'am. The only two people who would had access to the evidence would have been Grant Huckabee and Chief Ford.

Q Is Grant Huckabee still employed with the Kingstree Police Department?

A No, ma'am, he is not.

Q Chief Ford has retired. He's no longer the chief---

A He's no longer with the department.

Q Do you recall at some point Victi [redacted] the woman who just testified, coming to the police department, asking you about the shirt or the clothes that Victim 1 was wearing?

A Yes, ma'am.

Q At that time, did you know where those clothes were?

A My understanding was they had been sent to sled for testing.

Q Okay.

A I did not have any knowledge of whether we had received any results back from sled or not.

Q And when you say your understanding, would that have been based on what another officer told you, or that's what you assume would have been the protocol to do on a case like this?

A If the proper procedures had been followed, the evidence would have been sent to sled within a couple of days of being received.

Q Okay.

A So unless.

Q Okay, as you sit here on the stand are you aware of any clothes that Victim 1 was wearing that day that was actually sent off to sled and an analysis performed on it? Have you even seen any report or anything related to that?

A No, ma'am, I have not.

Q Do you know as you sit on the stand today, whether or not afternoon the police department has those clothes still?

A I know we do not have them at the department. After she inquired about them, Officer Huckabee was no longer with us. We initiated a search for the clothes or for the report that would have come back from sled. And we were unable to locate either one.

MS. BARR: That's all the questions I have. Please answer any questions counsel or the court may have.

A Yes, ma'am.

Cross Examination by Mr. Mobley:

Q May It Please the Court. Thank you, Lieutenant, for coming in today. You actually provided some clarification that we all have been looking for. Where is Officer Huckabee now?

A He's no longer an officer. I don't know where he lives now, sir.

Q Have you all tried to get in contact with him?

A I haven't sir. I have been out of work on medical leave for the last 3 months. I had a split in my aorta my second weekend off in August. And I have been out since then. The only reason I am back today is because I was subpoenaed to testify in this case.

Q Well I am going to try to not keep you here long. And thank you for showing up, and I hope that you feel a little better coming up here soon. Do you know why Officer Huckabee left the department? Now if you can only state your personal knowledge, so I am going to place you in a position.

A Yes, I know why.

Q Can you disclose to the court why?

MS. BARR: Judge, we would object on relevance grounds.

THE COURT: I sustain the objection.

Q Okay. During Officer Huckabee's tenure with your department, has there been other instances where evidence has been lost?

A Yes, sir.

Q Was it ever recovered?

A No.

Q Who is in charge of the evidence locker now?

A Now it's Sergeant Robert Lee.

Q Okay. Lieutenant did any of your officers inform you that I called approximately 4 or 5 times to your department inquiring about the evidence that was supposedly deposited there?

MS. BARR: Objection. The question calls for facts not in evidence.

THE COURT: Well he can ask him if he talked to this gentleman. But he doesn't know you talked to other people.

MR. MOBLEY: I'll rephrase the question, Your Honor.

Q Did I ever speak to you when I called in regards to the evidence?

A No, sir. You have spoken with the person in charge of evidence. I have no access to

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evidence.

Q Okay. That's fine. I just have to put the record here. So we have simply don't know where this evidence is located.

A No, sir, we don't.

Q And you've inquired with sled to find out if an analysis has been done as well.

A Right, sir.

Q And none has been done.

A They have no record---

Q of being received.

A ---of receiving it.

Q Well let me go back. During the evidence collection, what is your procedures in regards to evidence collection. Is there an in-take sheet?

A No, sir.

Q Okay.

A Wait.

Q I'm sorry.

A What do you mean by in-take sheets?

Q To record that you all have collected some new evidence.

A Oh, yes, sir.

Q Okay.

A Yes, sir, there is.

Q Now has an evidence sheet been located for this case?

A No, sir. It would have been with the evidence. I believe what you are asking about is the chain of custody.

Q Yeah.

A It would have been with the physical evidence itself. And when the evidence was lost, so was the sheet.

Q So there is nothing that exists to even state that these clothing even exist.

A Nothing that I can bring to show; no, sir.

Q No analysis either.

A None to my knowledge.

MR. MOBLEY: Thank you, lieutenant. I hope you feel better soon.

THE COURT: Anything else?

MS. BARR: I asked that the witness be excused.

THE COURT: You can step down to be excused. We appreciate your time.

THE COURT: Call your next witness.

MS. BARR: We call Samantha Cooper.

Samantha Cooper, Being first duly sworn, testified as follows:

Direct Examination by Ms. Barr:

Q May it please the court. Ma'am, state your full name for us.

A Samantha Teresa Cooper.

Q And, Ms. Cooper, are you related to Victim 1?

A Yes.

Q And how are you related?

A I'm her auntie.

Q On her dad or her mom's side?

A Her mom's.

Q And Angelica McBride is your sister?

A Yes, she is.

Q I am going to cut to the chase, and get straight to the day of June 21st 2010, okay.

A Okay.

Q Were you at Victim 1 home at some point that day?

A Well I missed several calls from my sister because she is aggravating. I don't answer her all the time, so I finally called her back.

Q When you say your sister, you're talking about Angelica McBride?

A Yes.

Q You had several calls from her?

A Yes.

Q And you called her back.

A I sure did.

Q And tell me about that conversation.

A When I finally called her back, she was like, she was excited. She was like Sam something happened.

THE COURT: Don't go into what she said.

A Don't go into what she said.

THE COURT: That's right, yes.

A Basically she said you need to come to me.

Q Did you do that?

A Yes, I did.

Q And you went, you met her where?

A At her home.

Q Okay. And did you all continue the conversation at that point?

A I went to the house, and Victim 1 was standing in her room door. And Angelica was catty-corner to her room door. And they were conversating before I got in there. And basically they started telling me what took place.

Q What did you do after they told you what place?

A Of course, being family, I got mad as

well, I went toward the front door and Justin was standing outside the door. And Justin was like, Sam, let me talk to you. Let me talk to you. And I was like what have we got to talk about, Justin, she just told you what happened. He was like---

MR. MOBLEY: Objection, Your Honor.

MS. BARR: Your Honor, a statement against interest.

THE COURT: Well I think she's going to say what somebody else told her. Not what he said.

MS. BARR: She's talking about---

THE COURT: I know but she said, ask the question. I maybe misunderstood what she was saying. Ask the question again.

MS. BARR: Thank you.

Q Ms. Cooper, you indicated that you walked outside.

A Yes.

Q And then you saw Justin.

A Yes.

Q And you're talking about, for the record, you are talking about the defendant Justin McBride.

A Yes, I am.

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Q And he was where when you went outside?

A He was standing actually off the little concrete with the buildings or whatever they have got over there. He was standing on the grass. And he was trying to compromise with me. He was like, Sam, I need to talk to you. And I was like, what do we need to talk about. And I was like telling him what they had already told me. And he said, I didn't mean to do it. He confessed. He was trying to compromise with me. And at this moment, I realized what he was saying to me. And I do have a license to carry a gun. And I had my gun on my hip that day. And I had my cell phone in my hand.

So when I actually went to took off from the platform, my cell phone fell out of my hand, and he went towards his mom's complex, duplex, wherever it is my. And my phone fell and my gun. And he slammed the door. And he was yelling through the little screen thing that got in the buildings or whatever. Trying to tell me, please, calm down. Please talk to me. And I was like, Justin, you just actually told the whole complex that you actually raped my niece. I said, rape. And he was like, talk to me, Sam. Please calm

down. I was like, Justin, calm down for what. But I pursued, I realized that he was a minor as well. And I went back pick up my gun and put it in my trunk. My got my cell phone. My sister had my cell phone in her hand, because she thought it was broken or whatever. And that's when I got really angry and my mom and them came up right after that.

Q Slow down. You talk real fast. Just a second. You said that Justin was telling you, Sam, calm down, I need to talk to you.

A Yes, ma'am.

Q And you said that he told you, I didn't mean to do it.

A He said I did not mean to do it. We need to talk.

Q What did you then say when he said, I didn't mean to do it?

A I told Justin, what do we need to talk about. And that's when he got scared, because he knows the tone in my voice and he saw the facial expression. And that's when he started to retrieve back to his house. And I started running after him, and he ran from me.

Q Did you ever make any statements to him

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about you and him and what he did to your niece?

A Yes, I talked to him through the door.

Q Okay.

A Yes.

Q You told me what he said. What were you saying?

A I was asking him why did he do it. And he said, I didn't mean to do it. We need to talk, just calm down, Sam.

Q Did you say anything else to him?

A I said more when his mom got to the house.

Q Why did you -- what made you -- why did you leave?

A Why did I left his house?

Q Yes.

A Because he ran to the door and locked it. And there was no need for me to, you know, aggravate him anymore because like I said, I realized he was a minor.

Q Did you tell him how you felt about what he did?

A No, I was just too angry. I just wanted to figure out why would he need to talk to me. Why is he telling me that he had done something,

and he knew it was wrong. Why did he need for me to calm down. Well I just didn't understand him at that point.

Q You went back to Angelica's house?

A I sure did.

Q Was there your mom there as well?

A They were coming up in the vehicle, yes.

Q And your mom is the young lady who is seated on the first bench behind the prosecution table in the black?

A Uh-huh. (Affirmative.)

Q Do you recall who called the police that day?

A I called the police.

Q Don't tell me what the substance of your discussion was. But did you have a discussion with Angelica about why she hadn't called at that point?

A Well at that particular time, she was trying to get in contact with Benjamin, her husband.

Q Benjamin, her husband.

A And Benjamin, she -- I don't know what actually Benjamin told her. But I know that Benjamin was like, wait until I get home. I do

know that much.

Q You didn't want to wait?

A Wait for what?

Q You didn't want to wait for Benjamin to get home until the police were called.

A No, I thought the police should have been called.

MS. BARR: Thank you, ma'am. That's all the questions I have. Please answer any questions the defense counsel or the court may have.

MR. MOBLEY: Thank you, Your Honor. May it Please the Court.

THE COURT: Yes, sir.

Cross Examination by Mr. Mobley:

Q Samantha, did you tell Justin you would kill him?

A Yes, I did. I was mad.

Q And you were mad because of what you had been told at that time; correct?

A I sure did.

Q And all you had was information that had been given to you by several different people?

A Several different people?

Q Yes.

A I had information at that particular time

when I got to the home. It was only her mother, which is Angelica and Victim 1. There was no one else there.

Q There was nothing else that had been verified; is it?

A Say that again.

Q There wasn't anything else that had been verified in regards to this; was there?

A Go into details. What do you mean verified?

Q Okay. Anything other than someone saying, I did it? He did it.

A Or from Victim 1?

Q That is correct.

A Actually, no. She said none of that.

Q Well what did you go on to carry on so bad?

A I went on because when I got to the home, she actually told me what he had done to her.

Q And that, you hadn't spoken to Justin at all.

A No.

Q At that particular point then you made the decision you wanted to call 911; correct?

A No, did not.

Q What did you make it then?
A I made the call after my mom got there.
Q Now was that after you were chasing with with a gun?
A Yes, that was after. I called him when my mom got there, yes. Sure.
Q So you were the judge and jury that day.
A No, I was not.
Q I thought he was a minor.
A He is.
Q Okay. Would you treat any minor like that?
A No. But at that particular time, I was mad so I acted out of rage.
Q And rage can you get you in trouble; couldn't it?
A It sure can.
Q And sometimes we act on impulse and sometimes it isn't correct; isn't that correct?
A You're correct.
Q Right now you don't whether you acted on impulse and it was correct; do you?
A I didn't know at the time what was correct.
Q Do you know now?

A I don't know what is going on. All I know is what was told to me.

Q Now do you think it is proper at all to be a judge and jury?

A I never said I was a judge and jury.

Q You had a gun that day; right?

A Of course, I had a license to tote it.

Q Okay. And I think almost 80 percent of South Carolina does at this particular point;----

A You are correct.

Q ---correct? Okay. And you were running after Justin at that particular point correct?

A I sure was.

Q What were you planning on doing to him if had caught him?

A Actually if I did have my gun on me and not to be sarcastic and not be out of place, Judge, I was angry and I was furious. I don't know what would have took place.

Q With no facts.

A No facts. All I knew, I saw my niece was crying. She was upset. And I was told that she was raped. What would you have done if that was your family?

Q Well first and foremost, I want to find

out. But the questions aren't for me.

A Uh-huh. (Affirmative.)

Q They're for you.

A I understand.

Q Okay. Samantha, how old are you?

A I am 31 years of age.

Q Thirty-one years of age. Do you have all stressful situations like this?

A No.

Q No.

A Only something like that, because it was just a little too much that day. That was too much.

Q Have you ever heard of people being wrongfully accused?

A Yes.

Q Would it have been proper for a family member to act the way you did that day?

A Would it have been proper?

Q If you were---

A You ask yourself that question.

MR. MOBLEY: Your Honor, I would like to qualify her a hostile witness and be able to proceed accordingly.

THE COURT: Well you can cross examine her

anyway.

MR. MOBLEY: Okay.

THE COURT: Whether she's hostile or not, you can cross examine her.

Q Now, Samantha, do you want to answer the question for me?

A Repeat it.

Q If someone is wrongfully accused, and a family member acted the way you acted that day, do you think it would have been proper?

MS. BARR: Objection, Your Honor. That question assumes facts not in evidence. And so we would object.

THE COURT: I sustain the objection. That's argumentative.

Q Now you state that Justin made a statement. What did you state that Justin made a statement about?

A When I went to the door, Justin was standing outside on the grass. Justin said, Sam, calm down. Listen to me. I did not mean to do it.

Q Okay. Now, at that point---

A Uh-huh. (Affirmative.)

Q And even now, did Justin make any

statement as to what he was referring to? And you don't need to say it. I'm just asking you a yes or no question, and then I will follow up.

A Repeat one more time.

Q Prior to---

A Uh-huh. (Affirmative.)

Q ---during---

A Uh-huh. (Affirmative.)

Q ---and even now, the statement that you are referencing to at this particular point, do you even know what he was referring to?

A I would guess that he was referring to what she said.

Q So you're guessing now?

A I am not guessing, I know. Because he was just acting out of turn that day. He was just like, you need to calm down, you need to talk to me, because I didn't mean to do it. That's what he said.

Q But he said nothing else.

A No, he didn't.

Q So you were guessing at that particular point what it was about.

A It would have to be that, because there was nothing else going on.

Q Okay. So it was an assumption then.
A No, sir.
Q Okay. It wasn't. Samantha, did you observe anything that allegedly occurred that day?
A Say that one more time.
MR. MOBLEY: May I approach the witness, Your Honor?
THE COURT: You may.
Q Did you observe, personally observe, anything that occurred supposedly between Justin and Victim 1, and when you were at his home at any time when she was over there?
A When Victim 1 was over there?
Q Yes.
A No.
Q So your facts are based off of statements; Is that correct?
A Yes.
Q No personal observations; correct?
A No.
Q It had you mad.
A Yes, It did.
Q So mad to pull out a gun on a minor.
A I never said I pulled out a gun.
Q Where was your gun?

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A My gun was on my side.

Q Now you stated earlier in your testimony that you had to go pick it up?

A Yes, it fell off my side.

Q Oh, ma'am, so you were running with a gun that was in a holster and it fell?

A Yeah.

Q That don't make you mad?

A What don't make me mad?

Q That your gun fell out of your holster as a CWP holder?

A The gun didn't make me mad by falling on the ground. I was angry with him. But I said, I don't what would have took place with the gun because I was just that angry.

Q Isn't it possible that that gun could have gone off and hit someone?

A How could it go off and hit someone?

Q Guns fall all the time.

A It's true, but it was on safety.

Q The safety---

MS. BARR: Judge,---

THE COURT: I sustain the objection to this line of questioning. It happened, so let's don't speculate.

Q All this was done based on what someone told you?

A Yes.

Q Prior to you even talking to the other parties.

A Yes.

MR. MOBLEY: Nothing further, Your Honor.

THE COURT: Redirect?

MS. BARR: No.

THE COURT: You can step down. You are be excused. We appreciate your time. Thank you.

MS. BARR: Judge, I think we want to call it quits at this time.

THE COURT: We'll stop for the day. We'll start back at 10 in the morning. Please have a pleasant evening. Keep in mind not to talk about the case or go on line or read about it. Or do anything or even try to make up your own mind. We're not through yet. So it would be improper for you to try to make to up your own mind. Have a pleasant evening. We'll see you at 10 in the morning?

(Whereupon, the jury is dismissed at 5:03 p.m.)

(Whereupon, the following takes place

outside the presence of the jury.)

THE COURT: Now where are we as far as presentation of the evidence on behalf of the state?

MS. BARR: Judge, I was just thinking about that same issue. I anticipate having no more than two witnesses tomorrow. I just kind of have to sort out in my mind tonight, you know, what I want to do. I don't want to make it cumulative. But I anticipate being able to rest in the morning.

THE COURT: Okay. Without going into your status, Mr. Mobley, so I will know what, I know you have motions to make and I have to talk to your client about his right to remain silent. Do you think y'all be presenting any defense?

MR. MOBLEY: Your Honor, at this particular point, I don't think so, however, not including my client it may be one. But I haven't decided. That's going to be thought for tonight. The chances of that happening is about 25 percent.

THE COURT: Well that brings me to my next item. And that is, if you would, I know you have got a lot of other things to do. But sort of be getting together your request to charge. I don't

know that there would be any lesser included in this. I don't have any expert. I will use the boiler plate charge, presumption of innocence, judge of the facts, judge of the law, circumstantial and direct evidence. And we'll have to talk about the lack of need for corroboration, because that's already been raised, and we'll have to talk about that as far as the charge. But if you can have it kind on your mind, ready in the morning, my clerk and I can be looking at it.

MS. BARR: Yes, sir.

MR. MOBLEY: Your Honor, I am going to be fine with the boiler plate. The usual charges that you will place here, I just have one request which I have prepared now. And you can have it with you and your law clerk.

THE COURT: All right.

MR. MOBLEY: For you to review it. I need to make a copy of it as well.

MS. BARR: We'll make a copy. You can just -- I'll get it for you.

THE COURT: I will get it in the morning.

MR. MOBLEY: Okay.

THE COURT: I'm going to take a couple of

quick pleas. Real quick.

MR. MOBLEY: Okay.

THE COURT: If there is nothing else, we will stop this today and start back at 10 in the morning.

MS. BARR: Yes, sir.

MR. MOBLEY: Thank you, Your Honor.

(Whereupon, the trial commences on Wednesday October 30th 2013 at 10 o'clock a.m.)

(Whereupon, the following takes place outside

the presence of the jury.)

THE COURT: In the in camera conference, I understand the state is not presenting any further -- not calling any further witnesses with or presenting any evidence of any type and is resting.

MS. BARR: That is correct, Your Honor, the state would rest.

THE COURT: And I will let you do that in front of the jury.

MS. BARR: Yes, sir.

THE COURT: Now, Mr. McBride, we have reached the part in the trial where you right, I'm talking to you, Mr. Justin McBride. You have a right to present a defense, if you wish. You don't have to present a defense, because you are presumed innocent of the two charges against you. But you can call witnesses to testify on your behalf if you wish.

If you call witnesses, or if you do not call any witnesses or do not testify and I will get to that in just a moment, your attorney will have the right to make a closing argument. If you present any evidence then the state would have the right to make a closing argument. That is the

last argument to the jury. But you can call witnesses if you wish. You can testify or exercise your constitutional right to remain silent.

Does he have any -- he wouldn't have any impeachable offenses; would he?

MS. BARR: He would not.

THE COURT: If you testify you will under oath. And just like the witnesses you have seen for the last of couple of days, you would have to ask questions -- answer questions that were asked by your attorney and the state. If you exercise your constitutional right to remain silent, I will tell the jury that you have done that.

And you have exercised your right to remain silent, but they cannot use that against you in any way whatsoever. They cannot discuss it or factor it into their consideration in determining whether or not, what verdict to return. And I will remind them that you are presumed innocent. And that you do have to prove your innocence, but the state must prove your guilt beyond a reasonable doubt.

Have you explained all that to him, Mr. Mobley?

MR. MOBLEY: Yes, Your Honor.

THE COURT: Do you understand that, Mr. McBride?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions whatsoever you want to ask me about that?

THE DEFENDANT: No, sir.

THE COURT: Have you determined whether you are going to exercise your right to remain silent and testify?

THE DEFENDANT: I am going to exercise my rights and remain silent.

THE COURT: You may have a seat then. And, Mr. Mobley, I understand from our conference, that you don't plan to call any witnesses. So after the state rests, I will call on you and you will rest. But, why don't, so the jury doesn't have to go in and out, the state is resting, I am going to let you do that on the record. But why don't we go ahead and consider the state having rested and hearing the motions that would be appropriate at this juncture in the trial.

MR. MOBLEY: Thank you, Your Honor. May it Please the Court, the defense first and foremost, would like to move to renew and preserve

all and any objections, motions, and any issues that were brought before the court in the state's case in chief, Your Honor, at this particular point. Additionally, we would like to move for a directed verdict on Count No. 1, that alleges that oral sex occurred.

Your Honor, there is no testimony. And specifically from the actual Victim 1 [redacted] stating that the actual penis entered her mouth. The way the actual indictment is written, It says oral sex. And as you may or may not recall, during Ms. Barr's direct examination of Victim 1 [redacted], she stated that, well Ms. Barr asked her did the penis go into your mouth, she stated no. Then during my subsequent cross examination, I asked her, did you place your hands on it. She said no. Did it go into your mouth. She said no.

Your Honor, there is no evidence especially from the most important witness in this particular case saying that there is any existence of oral sex in this particular case, Your Honor. Therefore we would respectfully move for a directed verdict on Count No. 1, due to the nonexistence of evidence in that regard. I understand under the rule for a directed verdict,

it's not the weight of the evidence, it's the existence thereof. Unless I am totally missing something, Your Honor, I don't recall any statements other than hearsay from other witnesses then that there was oral sex.

We do have any actual forensic examiner that testified that there was oral sex. It did not show up. Did have a medical doctor that showed up to say that there was oral sex. The victim, Victi [redacted], did not place anything on the record, Your Honor, that said that there was oral sex.

Therefore, we would submit to the jury, excuse me, to the court that there is no existence of oral sex. In fact, what she stated was that it shot out of his penis. When I asked her, did it go to -- did it -- did it go into your mouth. Meaning a penis. And she said no. She also gave that on the state's direct of her also, Your Honor.

THE COURT: What does the state have to say about that? As far as any contact with the defendant's penis and the lips or mouth of the alleged victim.

MS. BARR: And, judge, obviously I don't want to reply on my own memory of the evidence and testimony. Judge, I would, I guess to some extent to argue against the motion, I have to. But I recall that -- I recall the testimony differently. Specifically, I thought I recalled the victim mentioning that the defendant's penis went into her mouth. I could be wrong about that. And, Judge, I would obviously refer to the record in the case.

In addition, I thought I also remembered the Investigator Hamlet saying that the victim told her that as well. And again, I would ask the court to rely on the testimony based on what's in the record and based on the transcript of the court reporter as to what specifics of that testimony was on that issue.

THE COURT: Well I would, and I have to ask the court reporter to have to find it. But let's go back to her testimony, and that is her, Victim 1, about that. I listened and I did not recall any testimony that it entered her mouth, his penis. But I thought there was there testimony that there was at least physical contact between her mouth and the penis. Let's see what

we can find. So let's no talking, because she has to look and she can't take it down while we chatter.

(Whereupon, playing testimony to the court of Victim 1 [redacted].)

THE COURT: She pushed him away. He ejaculated.

MR. MOBLEY: And, Your Honor, we would---

THE COURT: Go ahead.

MR. MOBLEY: And, Your Honor, we would submit that under this particular statute an intrusion ever so slight must occur. That testimony does not reveal that. It doesn't say anything about the mouth touching his penis. It says that she pushes him away. Then he ejaculates. Nothing there at all in regards to the penis touching her mouth.

THE COURT: What does the state have to say?

MS. BARR: Your Honor, if certainly if there is no evidence in the record at all, from which jury could consider, whether or not the defendant is guilty of Count 1 of the indictment, then a directed verdict should be granted.

Your Honor, I would ask the court just out

of an abundance of caution, if we could hear the portion of the cross examination of Victim 1 wherein Mr. Mobley indicates that he asked her the specific question.

And also, Judge, I would want to satisfy myself based on the testimony of Investigator Hamlet, that she did not reflect that Victim 1 told her that the defendant put his penis in her mouth.

THE COURT: Can you find the cross?

(Whereupon, cross examination is played to the court.)

THE COURT: I deny the motion as to Count 1. I find there is direct evidence and substantial circumstantial evidence. Anything else?

MR. MOBLEY: I beg the court's indulgence, Your Honor.

THE COURT: Yes, sir.

MR. MOBLEY: Nothing on the directed verdict motion, Your Honor. We respect the court's ruling. We heard the testimony as well during cross examination.

However, at this particular time, Your Honor, based upon the pretrial motion that we have

regarding the constitutionality of the actual statute, of the constitutionality of the statute in combination with no corroboration needed, we would respectfully renew those grounds at this particular point, Your Honor.

My client's constitutional rights were to due process, are actually then denied by the way statute is written. And especially in light of the fact that the actual statute number 16 -- 16-3-750 was omitted from and barred from the defense asking law enforcement about that particular tool for law enforcement. It seems to me as if the intent of the legislature by writing that, which is an odd statute within itself, wrote that, because they saw a possible constitutional problems with the criminal sexual conduct statutes without a legal corroboration being codified.

Now we understand that, you know, a lot of crimes do not have to codified. This is one of the first ones I have seen myself personally. And I have nowhere near as to the experience as you, Your Honor. But I've never seen it codified into law through a state legislature. And I think that that statute was sort of a balancing test to help to protect a defendant's constitutional rights to

due process, because that's one of the most important rights that a defendant has when they are facing a criminal, you know, a criminal action.

THE COURT: Well I deny the motion. I don't know that there has been a constitutional attack on that particular code section. And that is part of the legislature. They did not -- there is nothing -- your position that the statute dealing with polygraph, may have been a balancing to the code section involving no corroboration. But I don't know the legislative history of those. And I think each stands independent of the other. So I am going to deny your motions. I do not find that is any constitutional infringement under section 16-3-657.

And again, I find that here is no violation of due process by ruling that the defense could not use a polygraph section as part of its defense in this case.

MR. MOBLEY: Thank, Your Honor. And just one last motion. My understanding is that the court's reasoning for not allowing that particular statute to be questioned through law enforcement from the defense was that there was is no

liability standard that you may have been able to rely upon by the court; would not be able to rely upon when allowing defense to question law enforcement in regards to it, Your Honor.

The defense's position would be if there was a reliability standard I think that the court would have to then go through the reliability approach and analysis if one had been given. But simply questioning them about whether they utilized that statute, we are in the position that it would not have required a liability standard to have been established and written within that statute nor even analyze at that particular time, Your Honor. So we would respectfully like to place that motion on the record in regards to that statute. And we feel as if we should have been allowed to question law enforcement in regards to it.

THE COURT: Well I thank you for that. My ruling was a little bit, I think, meant to be a little bit broader than that. I do have concern about the reliability. I find it a little bit of confusing section without why it was put in the legislation. I see it as a more of an investigative tool where there is an issue from

the state as to whether to proceed with the prosecution, as opposed to it being a tool that could be a used by the defense.

Although in fairness, I think your argument carries a lot of weight quit candidly. But the sort of trade off, well not the trade off, but the balancing is, if the state had used it statute and had a polygraph taken to court, and that it was considered something to be reliable and it shows he was telling the truth, the state couldn't use it. Because the state could not get in the polygraph test. So I see it more as the legislature providing it as an investigative tool as opposed to whatever need for tool. I may be wrong. I think it is a very interesting point. The first time I've seen it. I think you've raised it well. I think the record is protected.

Quite candidly, I hope that of course if Mr. McBride is found not guilty then the matter is over. But if he is found guilty, I feel confident this will go up on appeal. And I'm not saying that Mr. McBride ought to be again to be able to find out what this says. I am not saying that at all, because I firmly believe that my analysis is correct. But maybe your analysis is correct. I

understand that too. So I think the point is well made. Maybe some of my gray hair is a little grayer trying to figure it out myself. So but I stand by the ruling that I made, and did not allow it. And I will pass that point in the trial, but you made that motion. And to the extent that it's a motion I can rule on at this point, I deny whatever motion. Whatever relief you are seeking, which I guess would be at this point -- what kind of relief are you seeking at this point?

MR. MOBLEY: Your Honor, at this point we are respectfully...

THE COURT: Well you're not really asking for particular relief at this point. You're just noting for the record that that is an issue in the case.

MR. MOBLEY: Yes, Your Honor. We feel as if, not being able to utilize it, definitely hampers my client's ability to effectively cross examine our law enforcement as it's built within the statute. And we feel that maybe it could be a possibility for a mistrial based off of that.

THE COURT: I would take this as a motion for a mistrial. That being my earlier ruling was incorrect. I have revisited, and I still stand by

that ruling. And so I find there is no manifest necessity for granting a mistrial and I deny that motion.

MR. MOBLEY: Thank you, Your Honor. Nothing further.

THE COURT: I am going to let the clerk show you the two verdict forms. You can take those back to your desks. That's both sides indicate they have no problem with it. We will bring in the jury and have the state rest. And then I will call on defense and you can rest also. And then go to closing argument.

MS. BARR: Your Honor, if Your Honor, with regard to exfoliation charge by the defense, Judge, I pulled a case of State vs. Breeze. And I will hand a copy to Your Honor. In that case for the record, the cite is 379 S.C. 538. A 2008 opinion. In that case, Judge, the defendant was charged with possession with intent to distribute marijuana and resisting arrest.

Subsequent to his arrest, the highway patrol analyzed the drugs in the case. He had apparently absconded. Never reported back to court. A bench warrant was issued. The highway patrol thought that the case was disposed of, so

they destroyed the drugs in the case. The defendant was later found. Called the case for trial.

Prior to trial, the solicitor informed the defense counsel that the drugs had been destroyed. The defense counsel asked the court to give a charge to the jury. And, Judge, I am looking on page 3, of the opinion, paragraph 6 where it says that...

THE COURT: It says the state does not have an absolute duty to safeguard potential use for evidence. And it sets forth a two-prong analysis for the court. And that requires the court find that the state destroyed the evidence in bad faith, or the evidence possessed exculpatory value apparent before the evidence was destroyed.

MS. BARR: And, Your Honor, now also specifically, I'm sorry, page 1. The last paragraph states that prior to trial the state informed the reason marijuana had been destroyed, the reason trial jury charged the jury with the following: When a party loses or destroys evidence, the inference maybe drawn that the destroyed or lost evidence would have been adverse

to that party. The trial court in that case denied the requested instruction.

And also in the -- later in the opinion, and I believe that's probably where I was getting to on page 4, that last paragraph talks about how in that particular case, the defense counsel cited a civil case. And the Court of Appeals in this opinion stated that the civil case was clearly distinguishable on the grounds that this was a criminal case. And that the requested instruction by inference would only apply in a civil case.

Later on in that same paragraph, the Court of Appeals stated even greater caution should be exercised by the court in committing an adverse inference comment in a criminal proceeding than in a civil proceeding. And the Court of Appeals upheld the trial court's refusal to charge the requested instruction by the defense.

THE COURT: Mr. Mobley.

MR. MOBLEY: Thank you, Your Honor. May it Please the Court, ironically this is one of the cases I used to use when I was a prosecutor in Lexington County.

Additionally, ironically State v. Cheeseboro was filed by my former boss, Donnie V.

Myers. What differentiates this case from the current case that we are in today, Your Honor, those drugs were tested. There were results that could have been actually been referred to. There was an analysis done at sled. Here we have no analysis. We have no -- we don't even have a record of someone taking the alleged clothing. Your Honor, we have absolutely nothing.

In this particular case, you know, it does fit in here that the drugs were tested. I mean that's a question for the jury to place the weight on that. Because obviously the defense's motion is going to be where is the tangible object at. Then they are going to test the reliability of the actual standards by which sled tests these drugs and weighs them at particular point. That is going to end up in a jury issue of whether it's reliable for the court for their analysis. Here we don't have any of it.

MS. BARR: Judge, we assume that that argument is in fact, correct. Your Honor, I will note it that on page 3 of this opinion, that the court has to conduct an analysis as to whether or not the particular evidence is at issue in this case; that the failure of state to have that

evidence preserved, essentially the court has to make a finding that the state did that in bad faith. Or the court has to made a finding that the evidence possessed an exculpatory value that would have been apparent before the evidence was destroyed.

Now the testimony---

THE COURT: Well I am hate to cut you short, but based on Breeze, I am not going to charge correlation. I cannot find any bad faith. And there is no evidence that these lost clothing possessed any exculpatory value. Kind of converse of the Cheeseboro case where there was -- were tests and the evidence was destroyed. Here there has been no tests, so we know of no value that -- there is no, any value that we know of exculpatory or inculpatory. It's just a wash. So I think you can certainly argue to jury that this was lost. And again using my analogy to the tool box, I think you can use that as part of your argument, that this was lost.

But I don't think you are entitled to inference that It would be adverse to your client. You can certainly raise the issue as to whether or not, we don't know, and would been helpful to you

and those kind of arguments. But I am not going to charge correlation.

MR. MOBLEY: And, Your Honor, just to protect the record, at this particular point, we will not object to it not being charged to the jury, Your Honor. Thank you.

THE COURT: And just to make sure and you will do this, I am sure to be on the safe side, just renew that after I do my charge.

MR. MOBLEY: Yes, Your Honor.

THE COURT: Anything else before we get the jury in? Do you all need a refresher break before we get the jury in? Let's take about 5 minutes, so that when we come in, we can come, we can go.

MR. MOBLEY: Just for reasons, Your Honor, when the jury comes in, are we going right to close with the state's close and defense and right into closing arguments?

THE COURT: Yes, I'm going to let them rest on the record. Tell them it's your turn, and you can rest on the record. And then I will tell them it is time to argue and charge. Let's take a short refresher break.

(Whereupon, the court takes a short

recess.)

THE COURT: Is the state ready?

MS. BARR: The state's ready.

THE COURT: The defense ready?

MR. MOBLEY: Yes, Your Honor.

THE COURT: Bring in the jury.

(Whereupon, the following takes place within the presence of the jury.)

THE COURT: Good morning.

THE JURY: Good morning.

THE COURT: I want to assure you we have not just been drinking coffee and doing crossword. We have been doing some work, and we are now ready to go forward. Ms. Barr.

MS. BARR: Your Honor, at this time the state rests.

THE COURT: The state has rested. The state is telling us they presented their evidence. So the case now, the defense has an opportunity to proceed if it wishes.

MR. MOBLEY: Thank you, Your Honor. May it Please the Court, we would like to renew all motions and objections previously state was would took rest that point particular point.

THE COURT: And the defense is resting

also. So now we will reach that point in the trial where the state will make their make closing statements. Unlike the opening statements where they were outlining what they expected the trial to show.

At this point, the attorneys both the state and Mr. McBride will be telling you why the evidence should lead to a certain conclusion. They may while they are arguing say the judge will charge or the law is, and we've already gone over that. That is one of the things we did this morning. And they will, I am sure be correct in what they say. However if you hear an attorney say something is law and you don't hear me say it, you rely on what I say. I don't think anyone will mischaracterize the law. And the same goes with the evidence. If an attorney inadvertently states the evidence was such and such and your recollection is, it was not, it was something different, I am sure been it would have been inadvertent. But you rely on your recollection of the evidence presented during the trial.

So we will hear the closing arguments of the state. And then on behalf of Mr. McBride.

Madam Solicitor, Ms. Barr.

MS. BARR: Thank you, Your Honor. May it Please the Court, Mr. Mobley, Mr. Foreman, and Ladies and gentlemen of the jury, good morning.

THE JURY: Good morning.

MS. BARR: If you all could give me about a half an hour to go through my closing argument, I would certainly appreciate it. Or as my preacher would say, give me 30 minutes of preaching time. Again, I am not going to do like my preacher do over that if I can help it.

When we are this stage in a trial, the whole process is a journey and search for the truth. You all after you have heard the lawyers and after you have heard the judge, you will take the verdict sheet back into the deliberation room, and you will with that verdict sheet, issue a judgment in this case. Issue a verdict. And it is interesting because that word comes from a Latin phrase that literally means to speak the truth. Do you all remember on yesterday morning when the Clerk of Court sworn you all in. And what she asked you to do, and what you agreed to do by your oath, is to well and truly try the case of the State of South Carolina versus Justin McBride under Indictment 2010-GS-45-283, and

render a true verdict according to the law and according to the evidence so help you God. That was the pledge you all gave to this court and this case when you took your oath.

And I want you remember that, because I am going to refer to that periodically. I am going to talk about the law first, and then I am going to talk about the facts. And then I am going to sit down. The defendant has two counts in this indictment. The first count is criminal sexual conduct with a minor in the first degree. Remember I told you all yesterday what that means. That means that the defendant committed a sexual battery on the victim. And the victim was under the age of 11 at the time it happened. Clearly based on the evidence we have seen in the case, the victim Victim 1, was [redacted] at the time. So we satisfied the prong of that particular count. And you have to find by your verdict that the defendant committed a sexual battery on her.

Now Count 1 of the indictment, relates to the testimony regarding oral sex. Count 2, is assault and battery or assault with intent to commit criminal sexual conduct in the first degree.

You all also may also recall on yesterday, I told the law actually defines what sexual battery is. Sexual battery can mean oral sex. It can mean anal sex or anal intercourse. I shouldn't used the word sex, because it implies that it was consensual. But anal intercourse, vaginal intercourse. Count 2, specifically relates to testimony by Victim 1 that the defendant attempted to put his penis in her behind. So if you find that the defendant committed both of these acts, then your verdict should be that of guilty on both counts.

Now a couple of things that the judge will tell you further as it relates to the law in this case. The judge will tell you that testimony of a victim in a criminal sexual assault case doesn't have to be corroborated. And some of them, you know, I understand maybe if there is some hesitation about about that. Some of you may not agree with that. Some of you may say, well no, there needs to be more than what she says. But that isn't what the law says. And you remember when I told you about your oath. You shall well and truly try this case and render a true verdict according to the law and the evidence.

Some people may not agree with the law. But the law is the law, and we have to uphold the law. And quite frankly, I would submit to you that when our legislators in Columbia drafted this law, they understood. They understood what we understand every day. For the most part, people don't commit sexual assault on children in the company of a bunch of witnesses. I mean the very nature of that crime means that in order for the perpetrator to get away with it, he has got to have no witnesses. He has got isolate the victim. It has got to be done behind closed doors. But we have corroboration in this case. And I will talk to you about that in just a moment. It dawned on me in the middle of the night that, because I always try to imagine what a jury -- what a jury is going to think when they go back when they deliberate, and what is going to go through their minds. And, you know, sometimes you have an idea of what is going to go through their minds and sometimes you don't.

It dawned on me in the middle of the night that, because I always try to imagine what a jury, what a jury is going to think and when they go back to deliberate and what is going to go through

their minds. And, You know, sometimes you have an idea of what is going to go through your mind and sometimes you don't. Well what if some of the jurors are saying, well the guy was 16 at the time. So does that makes a difference. Under the law it does not. You're not going to hear the judge say that the defendant has to be a certain age at the time. You will hear the judge tell you the victim has to be under the age of 11. I thought I said well, what if the jury says well what if I actually believe that he actually did those things, but I believe that she consented to that. Well she doesn't have the legal capacity to consent as a 9-year-old. She doesn't have the legal capacity to consent as a 13-year-old.

So if that is this something that is floating in the back of your mind, we submit that is not the law. She can't consent legally. Let me go ahead address this huge elephant in the room, and that is the lost clothes of Victim 1 [redacted] Let me just go ahead and tell you all the fact that the police department whoever handled those clothes did not keep them; is absolutely 100 percent inexcusable. It was a momentous blow. No excuse for it. And, folks, I

am going to offer one. That person did a disservice to his job, to the victim in this case, to the defendant in this case. Maybe that is why he is no longer employed there. But I am going to ask you, folks, I am sorry. I am putting him in your lap.

My next question to you all, knowing all that, knowing that the person didn't keep the evidence, it's gone. Now what. Now what. If a trial is the search for the truth, and if you all took an oath to render a true verdict according to the law and the evidence what do you do now. Do you say well, I believe that girl. I believe everything she said. I believe the defendant did it. But the state shouldn't have lost the evidence. Does that now mean that he's not held to account for his actions. Does that mean that at the end of the day this family and the State of South Carolina, doesn't seek justice. Does that now mean that you don't render a true verdict in the case. Folks, I urge you all not to do that.

You know, DNA is a wonderful tool. I love it when we have it. Absolutely love it when we have it. But, you know, folks, people were committing sexual assaults and other kind of

crimes way before we ever heard the three letters, DNA. And people were getting convicted of those crimes because they were guilty. In this case, if you are firmly convinced that the defendant is guilty, then you should find him guilty. Now when we talk about a true verdict, what does that mean. What is the truth in this case.

Let me tell you what I submit to you the truth is. Victim 1 gets off the school bus. It's the middle of June. Probably hot outside. She gets off the school bus. Her mom is not home. She's mad because she has to got to stand around outside in the hot sun and wait on her mom to come. So she then goes to her cousin Justin's house. Knocks on the door. He lets her in. She sits down and watches television in the living room on the sofa.

The defendant is messing around with something in the kitchen. He comes out and sits beside her. Pulls out his penis. Tells her that he wants her. And I believe she used the term, to jerk him. That's an important piece of evidence. I'll tell you why in a minute. That's an important piece of evidence. She says, no. He then forces her head by her ponytail down on -- to

his penis and forces her to perform oral sex on him. She then describes the taste that, as nasty. And she describes the clear substance that comes out of his penis as being a white clear substance. Didn't know what you call it. That is an important detail, and I will tell you why in a minute.

She says after she does all this, she pushes him off of her. She then runs into the bathroom. She spits the clear substance out in the sink. That's an important detail. She says that some of the white stuff that came out of his penis, gets on her shirt. So she takes a piece of toilet paper, and she wipes it off of her, off of her shirt. And then puts the piece of toilet paper into the trash. That's an important. She says that when she comes out of the bathroom, the defendant then tries to pull her pants down. She kept pulling them back up. He kept pulling them back up down. She kept pulling them back up. That is an important detail. He then tries to put his penis into her rectum. She says it hurts. She runs to the front door first. He blocks her. She then runs to the back door. He opens the door for her. She runs out. And then she runs right

next door to her mama's house. She's kicking on the door to get in.

Mom then says, and she was candid. What the hell is this. Who is kicking on my door like this. So she opens the door. She says Victim 1 then looks as if something is wrong. She knows that something is not right with her child. She says as Victim 1 goes by her, she gets this whiff of Victim 1 and she said Victim 1 reeked of men's cologne. Now that's an important detail. Do you all remember when she testified when she came out of that bathroom after wiping herself off, that the defendant was spraying cologne in the air. That's an important detail.

So she asked Victim 1 what happened. Victim 1 wouldn't tell her what happened. And she kept asking, what happened. Where have you been. Where were you coming from. Why weren't you on the bus. All these different questions. And then she notices that Victim 1 has a little white stain upon her left shoulder, on her black shirt. And she asked Victim 1 where did you get that from. What happened. The reason why I went through her testimony, I am not talking about important details. Because I want you all to remember that

when she is telling her mom and the police from Florence and so forth about what happened to her, she is [redacted]

And I don't know how many of you have children, but I would submit to you the level of detail in which she described sexual assaults that happened to her, those things are real. That kid didn't imagine that stuff happened to her. She didn't make up that stuff that happened to her. You don't make up somebody ejaculated in my mouth, and I spit it out. You don't hear a 9-year-old making that stuff up. You don't hear a 9-year-old saying well I came out of the bathroom, and he was spraying cologne in the air.

Now, folks, the nature of this crime is graphic. And there is sometimes there is no way other way to say things than to say them. But you all every grown person in this courtroom knows why the defendant was spraying men's cologne in the front room. He didn't want somebody to come in there and actually smell what he did to that girl. He was trying to mask the odor of his sexual assault on that girl. He didn't want anybody coming in there smelling what he did to her. That's what all that was about.

When Victim 1 testified and told the police that when he grabbed her while they were sitting on the couch and forced her head down on to his penis. I thought about that which is the reason I asked her on cross examination, come down and show me and show the jurors exactly where he was seated and what he was doing. Do you all remember that. She told took my arm, had me seated on the her left, put my arm over her shoulder just as the defendant did. And, folks, what did you all see. Under the defendant's arm, which is where people use deodorant under the arms, fell right in line with where that stain was on that girl's shirt.

Do you think this girl just went around and made all this stuff up and pulled this out of the air. That's corroboration. When her mother said that she came in that house and she reeked of men's cologne, that's corroboration. When that little girl got up in the middle of the night and screamed for her mama because her butt was hurting, that's corroboration.

Folks, we cannot, we cannot believe that a 9-year-old would testify as to that level of detail. And we suggest that well she just through

that part in about waking up in the middle of the night and complained about her behind hurting. Because she was trying to make this story look good. She was just trying to say something good to help her case. We can't believe that. We cannot believe that. What is interesting I think about what she testified about, and what the defendant told the police that day; is that, for all the small details that Victim 1 said, the defendant agreed with a lot of the small details. That's important because Victim 1 was talking about getting off the bus. Her mom wasn't home. The defendant said yeah. I asked her what she was doing there, she said her mom wasn't home. He said Victim 1 came in and she looked like she was mad about something. Victim 1 got up there, absolutely said, yeah, I was mad because my mama wasn't home. Said she came in there and started watching TV. He said that yeah that happened. Said that at some point they were both sitting on a sofa. On a sofa or separate sofas or whatever, watching TV. Corroborated all that. Said that all of sudden he goes to the bathroom. And this is where the statements differ.

He says he goes to the bathroom. He is

urinating. And Victim 1 then comes right behind him in the bathroom. Folks, I got a problem with that. What are the chances that he gets up, goes straight to the bathroom, and this girl is going to come walking in on him in the bathroom, right after he gets up now, when there is another separate bathroom in the house. The reason why he told the police that is because when they came over there, they went to Victim 1 house first.

Justin didn't know what Victim 1 had told them. Justin already knew that he was likely in trouble because the mama -- because Victim 1 mom already came over there fussing about it. So he knew that Victim 1 probably told her mama, and probably told the police that she saw his penis. So what he had to do is offer some kind of innocent or accidental explanation for how a 9-year-old girl would have seen his penis. So that was undercover. And that was him trying to create a story. Well this is probably going to come out so let me offer an explanation for it.

When he told the police that she went to the front door first. And then to the back door, that's him offering an innocent explanation to that. Because I wouldn't imagine that Victim 1

said she came in the front door when she first came to the house. The fact that she then she's trying to get out and goes to the front door, that suggests to me that, you know, that household usually had people coming in and out the front door. I think there was also testimony that the defendant had unlocked the back door. So perhaps that was the door that was normally kept locked. But see when Victim 1 ran out of that house, Justin didn't know who all saw Victim 1 running out the back door.

So some people thought it was unusual for her to go out the back door. So again, he had to come up with this story that there was a bug on the front door, so that's why Victim 1 went out the back door. That's him covering. When he agrees with her on little stuff but disputes all the big stuff, that's significant. And the reason why that is significant is because when people tell big lies, they generally tell little lies too. Because when a person tells a big lie they then have to tell little follow up lie to cover the big lie.

I don't care how you slice it, I don't care how many times that defense lawyer asked that

girl questions on the witness stand, how many ways he asked her, Victim 1 testimony did not change. I know a whole bunch of grown folks that can't keep their stories straight. But you know when you are telling the truth, when you are telling the truth, it's not hard to keep your story straight because it's going to stay the same.

The defendant would have you believe that all of a sudden when he comes out of that bathroom, and I believe at some point he went to that bathroom because he had to clean up. So he would have you believe at some point when he came out of the bathroom all of a sudden, and I used the word all of a sudden. He didn't say all of a sudden. But all of a sudden, Victim 1 is ready to go home. Now mind you now, Victim 1 got off the bus. Her mom wasn't home. She's mad. Okay. That's why she got to his house to begin with. Now Victim 1 didn't even know that her mom had gotten home by that point. Don't you think it's a little bit odd that if nothing sexual happened, he didn't do anything to her, why all of a sudden she would be ready to go home. And not even knowing if she can get in the house, because she hasn't seen her mama. She didn't know if her mama was

home or not.

Folks, there is a reason why that girl ran out that back door when she did. There is a reason why she almost tore down her mama's door, kicking on the door the way she did. Because the defendant did exactly to her what she told you that he did. One of the things that I always -- one of the many things that is frustrating in the case was the implication that Victim 1 was misleading or inconsistent. When the defense asked Investigator Hamlet if, you know, Victim 1 said one thing at one point and said another thing at another point, as if to imply that she lying or something. I started I was like, wait a minute, hold up. What did you ask her. Because I wanted to be clear. What did you ask her. She asked her questions like, what happened next. Did anything else important happen.

Now that's a 9-year-old. A 9-year-old doesn't know what's important. Okay. If you all have got -- if anybody has got a 9-year-old kid, your 9-year-old comes home early one day, and you ask the kid, what are you doing home early, why aren't you in school. Mom, dad, I got suspended from school. Well what did you get suspended from

school for. Me and John Doe were fighting. You know, you are not going to end the inquiry there. You are not going to say well you all got suspended for fighting. Okay. You are going to be asking questions. What did you get suspended for. Who were you fighting. Why were you fighting. Well who hit who first. Well where was the teacher. Did you tell anybody. Where does this kid. Where is his mama. What happened. Why didn't you call me from school. It's going to be some follow up questions.

Now don't get me wrong, I understand why Investigator Hamlet didn't ask her questions a certain type of way, because she didn't want to put ideas in her head or words in her mouth. She wanted her to tell her what happened in her own words. I understand that. But Victim 1 didn't lie. She told her the truth. But she didn't press for details. She didn't ask the questions that I asked. If the question had asked well Victim 1, you said that you had white stuff came out. How did it, you know, what happened to the white stuff. Did you spit it out. Did it go on the floor. Did the defendant have a condom. Did he change his shirt. Because if she had asked

Victim 1 what happened, Victim 1 would have said, well I wiped it off with a piece of toilet paper and I put the toilet paper in the trash.

And if that question had been asked of that girl, maybe they could have gone back to the house and got a search warrant and saw the tissue paper in the trash. But it's not as if Victim 1 is lying or making stuff up. She's answering what is being asked of her. And, folks, now what about this process. What in the world about this entire process would give her a motive to lie about her own flesh and blood. I mean is it the experience of 9-year-old person telling all these complete strangers probably the details of some of the most embarrassing and despicable things that happened to her. Probably the worse day of her life. I mean, is that something to look forward to; a 13-year-old girl coming up here in this court telling a jury, a judge, court reporters and lawyers all those people in the courtroom, spectators, strangers, that this happened to her. What about this process would have somebody sign up and volunteer for this kind of reason. Makes no sense. It mean it makes no sense.

And if you want to do brouhaha if you

will, in terms of corroboration, you look at what Justin McBride told Samantha Cooper. Now Samantha you already recall was the sister of Angelica McBride, Victim 1 mother. And candidly when you, when I reflect back on her testimony, it's almost hard to believe that she and Angelica are sisters. They couldn't be more different. And I tell you that Samantha is, she is authentic and she is real, if nothing else.

Let me be clear, I don't condone her going over to the defendant's house. Whether she had a concealed weapons permit, a gun. Because when people get hot headed, and people get upset and angry about stuff, all kind of horrible things happen. You make a bad situation worse. I want to be clear, I don't condone that. And she recognizes that her behavior was wrong. She recognizes that. But, folks, she was honest. She said that was my niece. And I go over there and I tell Justin. And you all saw when she was on the stand, she looked him in dead in the eye. She said you told me you were sorry. You didn't mean to do it.

When Mr. Mobley asked her, you told him you were going to kill him. And that on the girl

stand said yes, I did tell him that. Does that sound like a person who is lying to you. And you all I suspect that it will be suggested to you that, you know, she made all this stuff up. Justin didn't tell really her he was sorry. Or Justin didn't really say he didn't mean to do it. And you know what, if she is going to make up a story, I mean if you all are told that she is just making this up to help her -- we need some help in the case better. Folks, I tell you she could have done a whole lot better if she wanted to make a story. She could have said, yeah, he told me that he raped my niece. And he told me that he was sorry he raped he. He didn't mean to hurt her bottom. I mean, she could have just sealed it up for us. If she were embellishing in lying and creating another case. That woman told the truth as it was, I would submit to you.

And what's interesting about that is, despite the fact that that happened, and she told him that she was going to kill him, nobody in his house made a complaint to the police. That's interesting to me. That's interesting to me because, I started to wonder well maybe it won't to get to come out, and they didn't want her to

tell the police what he told her. I just ask you all to think about that just for a moment. When you know more thing, and I am going to sit down. When Victim 1 first goes back to the house she doesn't tell her mom what happens initially. Her mom doesn't call the police initially. Some of you may wonder why that's the case.

I think as far as Angelica is concerned, Angelica at some point wanted to defer to her husband. Her husband told her to wait until I get there. I think that there was an instance where she wanted to defer to him. And I think she may not admit that, but I think that she may have been conflicted, because Justin is her family too. I think the mother in her, that mother instinct, when she heard Victim 1 say what happened; runs to the defendant's house and confronted him. I think that kicked in. And I think at some point a cooler head prevailed.

But, folks, let's not be naive. People are victims of crimes by their family members all the time, and they don't necessarily want to get the person in trouble and get the police involved. How many times have you heard about some woman being beat by her husband or by her boyfriend and

doesn't want to call the police because she doesn't want to get them in trouble. And these are adults mind you, not kids.

How many times have you heard about somebody stealing a family members credit card, and running a bunch of charges. And then, you know, the person finds out that this happened, and they don't want to press charges, because they don't want to get to the other person in trouble. If somebody steals, or breaks in your house or somebody takes your car for a joy ride without your permission, folks, that kind of stuff happens every day. And there may be some people in this courtroom who believes that because the victim and the defendant are related, we shouldn't be here today.

I grew up hearing a lot of older folks say, you know, what happens in the house stays in the house. What happens in the family, stays in the family. You keep people out of your business. You keep -- stay out of your business. I'm sorry. I am sorry, everything that happens in the house, don't necessary need to stay in the house. That girl should not be forced to keep private about what happened to her like she did something wrong.

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She should not be forced to keep silent like she did something wrong, while he goes on about his life. That's not right.

I had a former prosecutor to tell me one time that he was trying a case, and he had lost the case. And after it over, he went and he talked to some of the jurors, and he kind of wanted to just get some insight about the the case. You know, If I had done things a little bit better or if I had presented the evidence a little bit better, if I had done this or I had done that. And I just wanted to know, you know, why you found the person not guilty. And one of jurors said, of, well, I believe the defendant was guilty. But I don't think the state proved it. And so they exchanged some more niceties and he went on about his life. And he said, he thought about this thing over and over and over. And he said, wait a minute now, if the jury believed that defendant was guilty, the only way they could have believed that is based on the evidence. Right. He said so if they believe that defendant was guilty based on the evidence in the case, then that means that the state has met its burden.

A trial is a search for the truth not a

search for reasonable doubt. Mr. Foreman, when you sign your name on that verdict form, after all to you jurors have deliberated and voted on it, what you are signing your name to and what you are voting on is the truth of the case. Just the truth. It's not whether or not law enforcement did something wrong or whether or not this happened or that happened, you all are voting on just the truth. I want once the case is over, I want the truth to be known, and that's all I want. That's all I want is the truth to be known. I don't want jurors saying, you know, the state didn't meet its burden. But and, you know, I just a got a thing against somebody that would do this to a child. I am going to find him guilty anyway, because I don't like these kind of crimes. I don't want that. But at the same time, at the same time, I don't want a juror saying, you know, I don't believe that girl. I don't believe that he did that. You know the police, when they get there, they get stuff like, you know, that just ain't right. I am going to turn him loose. We should find him not guilty. I don't want that either, folks. I want you to be fair and just.

The defendant was 16-years-old at the

time. And he was old enough to know better. He was old enough to know right from wrong. And he did know right from wrong. The victim in this case didn't have a choice. She had people all around her making choices. He made a choice to put his penis in her mouth. He made a choice to try to put his penis in her behind. He made choices. Had people making choices about call the police and not calling the police. People making choices about gathering evidence and not gathering evidence. She's the only one in all of this that didn't have a choice about what happened to her. The only one.

But I don't want you to find the defendant guilty, because you feel sorry for Victim 1. Victim 1 mom and dad didn't want you to find the defendant guilty because you feel sorry for her. We don't sympathy when you come to court. Folks, we came to court for justice. We want justice. That's all. We want justice. Ladies and gentlemen, I would submit to you that justice in this case can only be rendered by a vote, a unanimous vote, and a signature by the foreman on that verdict form, that the defendant is guilty of both counts.

And I urge you all to do just that. Thank you.

THE COURT: Thank you, ma'am. Mr. Mobley.

MR. MOBLEY: Thank you, Your Honor. May It Please the Court. Ladies and gentlemen of the jury, Mr. Foreman, mom and dad is Santa Claus real. Yes, son he is. Well how do you know. Because I said so. You know those toys that you get around the Christmas tree, Santa Claus brought those. That's evidence that he exists. You know those candy canes that hang near the chimney, that's additional evidence that it exists. But most importantly because I told you that he exists. Well what about the tooth fairy. Well you know if that dollar is up under the pillow. What about the Easter bunny. What about those colored eggs that you find when you go out searching for them. And, remember it's all because I told you so.

The moment those jurors start asking for the proof, we then have to get into an all, an all encompassing period of lie after lie. We have to build upon it. We have to continue in order to make it believable. These particular figures or symbols have become synonymous with these

particular dates. Special dates that is totally taken away from the true meaning of those dates. Okay. The children have gotten to the point where they don't -- they are not connected to. They totally commercialized and look for gifts and things of that nature.

Now we're here the day before Halloween. We are going to dress up. Put masks on. Going to look for candy. You are going to do all these other things. We have to continue to lie to them about vampires. We've never corrected them. Never told them the truth. Now they have to believe it. Because we have to continue to tell them lies. And what does that mean. That let's them know when they can find out that these aren't real, that they have to tell the same children the same thing. They are continuously perpetuated. Okay.

Now ladies and gentlemen, this wasn't a pretty case, to be very honest with you. It was a difficult case. One that I am sure had everyone's stomach in knots at times. It had mine in knots, to be very honest with you. And I've tried these as a prosecutor, as well as defended them. And one thing that has remained consistent

even with the ones I've tried as a prosecutor, there are certain things that remain the same throughout the testimony of an alleged victim. Things don't mysteriously get added after breaks during the actual statements. Those things do not happen. They may change a little, but things don't get added and changed.

Now, ladies and gentlemen, on this day, Victim 1 came to Justin's house. But if you remember the testimony, because what it's going to really boil down to at the end of the day is her testimony. Okay. Her testimony when she was on the stand being direct examination from Ms. Kimberly Barr and my cross examination, one of the most important things that I think everyone picked up on, was when on direct examination from Ms. Kimberly Barr, if you recall, Ms. Barr asked Victim 1, did it go in your mouth. Victim 1 said no. That was on direct examination, not from me. That wasn't from me, Ladies and gentlemen, I can't make that up. The record reflects that.

On cross examination, I asked her, did you touch it. She said no. During the course of the direct as well as being cross examination, you remember there was this testimony about it

ejaculating first. But let me take you back to Investigator Hamlet's first interview of Victim 1 what we finally had to get into the record. Okay. There was a point when Detective Hamlet asked what did it look like. Victim 1 said it looked like a washcloth. Okay. Now, Ladies and gentlemen, I am not going to be a sensationalist or anything of that nature. We are all adults here. We realize that ejaculation is not going to occur this way. We realize this here would not cause any harm to anyone. Okay. No matter where they're trying to place it. That's testimony. I'm not making these things up. If this can harm someone, let me know. If it can ejaculate, let me know. That doesn't come from me. That came from the actual person who was on the stand under the cross examination.

I said I was going to take it easy, and I meant that, because I did not want to have this young lady up here squirming. I wanted you all to see her testimony and not be distracted by me. Can I be over the top at times, yes. At times, is it intentional, yes. Did I have to turn it down then. Yes, because I needed you all just to hone in. During that entire sequence of direct examination, cross examination then another

redirect, I think each of you saw times where the story just didn't add up. It didn't make sense.

Now they are talking about there is no need for corroboration to bring into the law. But, Ladies and gentlemen, one thing that would not be able to say and they didn't say; is that, reasonable doubt isn't in the law. That's one thing that's in the law. This case comes down to the credibility of this young lady. When she got off that bus, she was supposed to have been going to Ms. Gladys' house. She was upset. She told you that. She went into that house, over to Justin's house. She wasn't supposed to be there. Justin told her to come in. He was in the kitchen. She came into the living room. Then went to an exchange where at one point, I didn't know where she was at. So I am sure that you all didn't know. And where Justin was at, was he in the kitchen or were you in the kitchen. Were both of you in the living room. Where were you at. Eventually it ended up being that they were sitting on the couch. Okay, so now I am asking, are you all standing up or are sitting up. Standing up or sitting down.

I thought that was going to be important,

because I wanted to find out at that particular point, did you grab it. Did you see. Was it hard. No mention of that at all in the entire testimony. The only thing mentioned about his genitalia is this, and I'll tell you why that is very important. Because that substantiates what Justin says happened when he was in the bathroom. He tried to cover up. She saw it. She was upset that her mom wasn't home. That's the second day there. She's normally been picked up by her mother at all times. Gladys isn't there which is a back up plan for her stay at. Then she goes into and busts in on Justin. Probably inadvertently, but she sees Justin. Saw it, see his thing. She's afraid at particular point that Justin is going to tell his mom. Tell her mom. Maybe even tell Samantha. That's why she saw that. Ladies and gentlemen, this whole case should not have been brought. From the very beginning, I've never seen a lack of incompetence a day in my life more so than this particular case. So are so many other things that should have been done in this case. There should have been more investigation in this case before an arrest was done. It was not. It should have been

evidence that was collected. It was not. There should have been evidence that could have been presented today. It was not. Do we penalize my client because of that. The greatest joy that we have in America is our liberty. And they're asking you to convict this young man off a case that from the very beginning started off wrong. That's a travesty. Those are the real drones at that particular point. They're asking a spartan case that has cracks all the way through it, for you to actually convict this young man and have him imprisoned for years.

MS. BARR: Objection, Your Honor. Judge, we move to strike that.

THE COURT: Yeah, whatever his sentence may be if he's found guilty is for the court, not for the jury.

MS. BARR: Your Honor, may we have a curative instruction that the jury is to disregard counsel's comments?

THE COURT: Disregard the statement regarding his -- that he will be incarcerated. That's up to the state. That's up to the court, not the jury.

MR. MOBLEY: Ladies and gentlemen, the

state proceeded with this case. They lost evidence. We're just talking about the panties, the underwear. Undergarments and the shirt. We don't know what was on the shirt. We don't know who the source was. The law enforcement officer stated she didn't even know whether Justin had any deodorant on at that particular time. Well first and foremost, we don't know if that was deodorant on the shirt. There is no test to prove that was.

She just got off the bus, got out of school. Okay. She just had a point where she was at the house with a lot of family members there. And I asked the officer on the stand, so she was being consoled there, yes. And little children being consoled at that particular point, what is going on. Okay. We don't know what the source of that is. They got to do better than this. Where was the rape kit. None. What was the DNA swab. None. But you know what wasn't mentioned and why you didn't see some of the witnesses on the stand, those added together.

We're talking about this mythical interview in Florence. Where was that witness. We talked about Dr. Luberoff. She did the medical exam. She wasn't placed up. And if there

were allegations that her bottom hurt, don't you think the state would have done that; knowing that they've got to met the burden of proof that resembles okay, beyond a reasonable doubt. Why didn't they do it. Think about that and let it marinate. Who is next. Just an accusation to do it. We should demand more. We should have been doing it as children. Demand more proof about what people are telling us. Then we would not be misled, spending unnecessary money, staying up at night, for no reason, getting lack of sleep, for all these things that not are important to the actual holiday itself.

Are we going to allow that. We need to demand more. My client is asking you all to look at the evidence. Look at the lack thereof. There is no one in here that deserves sympathy okay, and a benefit of the doubt other than that my client. Because the burden is on the state to prove beyond a reasonable doubt that he did this. They are too many inconsistencies in this particular case to prove anything beyond a reasonable doubt. They can't even prove that was her in the photo. They can't prove there it was some deodorant from Justin on shirt.

They can't prove that there was any ejaculation, semen on her shirt at all. There is a number of ways that some type of white substance or deodorant could have actually been transferred to Victim 1 shirt. They need to narrow it down. We need to demand more from our law enforcement. We need to find out is this going to be the norm. No requirement of anything other than I said so. I said you did it. That's not the standard by which our criminal justice system operates on. They have not met that burden at all.

Let me go back again. Where is forensic interviewer. Okay. Was it adverse to the state. Why didn't they put her up. Why didn't she appear. More importantly than that, where is the doctor. We know her name, Dr. Luberoff. If I needed Dr. Luberoff of the state's prosecution case, through my case, I will have them in. See the pro -- the thing is, with the state prosecution, they can call up any witness they that want. They don't have to call up all of the witnesses. So of course there is going to be some cherry picking going on.

And isn't it ironic after Victim 1 was on the stand and I was asking her so many questions,

and the story just did not seem right, it just didn't make logical sense, physical sense, anything of that nature; that they wanted to end with a boom with Samantha. She served no purpose. She didn't see anything. She didn't know anything. When she came around that corner right there, she was running up here. So their case was taken, the bones that were there, those cracks were exposed. They needed to try to come with a bone. Did it help. It didn't help at all. If this event allegedly occurred while she was chasing Justin, I think I would run too. If I know she carries a firearm, she had a firearm after a 16-year-old not knowing any other evidence. That sounds like law enforcement. I am sorry. They made an arrest without consulting with everyone.

In fact, Detective Hamlet did two interviews of Victim 1, why. Inconsistencies. Things that were added at a later time. Then there was another interview up in Florence. A forensic interview. They didn't use that. No. Okay. Well let's refer to the interview that I had while I was on the stand with her, the direct examination and cross examination. Okay. We all

heard what she said. See the thing about 9 years old, they don't understand some things aren't possible. One of them is ejaculation while something is like a washcloth. You know, they can look in magazines and television and pick up some things, but they don't understand functions, bodily functions. They can piece some things together. Once you make that first step, and you tell your first lie, you've got to follow it up. You've got to build it up. Who's been talking to over here. Who was upset. Who had something that they had to make sure that she said it. The word, D-I-C-K came out of her mouth. Where is she getting this stuff from. There is exposure somewhere. It's not from my client. And if it was, it was because of the fact that she walked in on the bathroom just like he said to law enforcement. He had no problem talking to law enforcement. The same story that he give to law enforcement. He give to her mom.

If I am going to make up something or I'm going to get caught up in lies, it's going to be the very person whose mother it is. Victi [redacted] got on the stand and said the same exact thing that Detective Hamlet said that Justin told me the

statement. We've got to ask for more. We are going down a dangerous path. The burden of proof in this case is on the state and I submit, Ladies and gentlemen, they have missed it by far.

Justin stands accused of two crimes that are heinous. Okay. And the state knew from the very beginning from the first investigation to the second, that it's inconsistencies in this girl's story and she's adding things later. They still go get an arrest warrant. And instead of getting an arrest warrant, why didn't they go to the Durant Center over in Florence first, before they get an arrest warrant, to see what accusations may be. Could the forensic examiner have helped before seeking an arrest warrant. We never know, because they did the actual forensic interview after the arrest warrant. And then they didn't put up the interview today or this week. If someone's bottom is hurt and then examined by a medical doctor, what should we expect. You should expect a medical doctor to get on the stand and say these abrasions, bruises and stitches or whatever may be the case. They didn't. That didn't occur. We've got to ask for more. Demand more if we expect more from our justice system.

Who is it going to be next that they bring into courtroom with a bare accusation. Give us something else. We the people demand that. That's the only way to keep this great system great. Otherwise we're taking a wrong, a downhill climb. We're going down a wrong path.

The overreaching power of government. The all mighty power of government. Once you're in their grasp, it's hard to get out. You have to have someone to defend you. Basically what the way this is occurring, they're trying to make Justin prove that he didn't to it. That's not the law. The state must prove that he did do this beyond a reasonable doubt. How many of us will fall victim. We don't know. How many times will we make a clown of someone. Kind of befitting at this particular point.

Ladies and gentlemen, I ask that you consider all testimony in this case. They are going to look at -- the judge is going to read the law and say there is no corroboration needed. But he's going to also going to read reasonable doubt. He's going to tell you what reasonable doubt means. He's going to go over credibility. And what credibility means as well, okay. There is a

number of things he's going to go over. He's going to go over the actual accusation itself, it says oral sex. Okay. Ladies and gentlemen, we, my client deserves better when it comes to actual evidence. He deserves better when it comes to an accusation. And it's going to be very easy for each one of you to give the benefit of the doubt to Victim 1. And the law is not set up like that.

If the state didn't prove their case, they didn't prove their case. They couldn't. Their hands were tied on certain things. But my client does not suffer for that. If a true and full investigation had been performed from the very beginning, we may not have been here. We could have been doing other meaningful and productive things this last few days of the week. Now this is very meaningful. Okay. I am sure that each one of you don't want to have to sit here and listen to us go over witness after witness. And then we're placing a very difficult decision within your hands. Very difficult. Just go back to the actual testimony of all of the witnesses. It doesn't add up. They haven't proven their case. Ladies and gentlemen, then you have to give the benefit of the doubt to my client. If this

symbolizes reasonable doubt, beyond a reasonable doubt, then there is parts that are missing. I'm talking about a DNA kit, clothes, witness testimony, statements given to law enforcement contradictory, cross examination on the stand that she impeached herself on both cross and direct from the state. This is reasonable doubt. This is not guilty to you. Thank you.

THE COURT: Members of the jury panel, before I charge, we will take a short break. So go to the jury room for a minutes and then when you come back in, I'll charge you the law. Don't try to make up your mind yet, because I haven't charged you the law. And we will do that in just a little bit. And also we are going to be ordering lunch. Do we need to take orders, or how do we do that Madam Clerk, or do we just order pizzas or something?

THE CLERK: Probably KFC.

THE COURT: Do they need to place orders or?

THE CLERK: No, usually I just get a variety.

THE COURT: Okay. We'll take a short break.

(Whereupon, the Court Breaks.)

THE COURT: You can be seated. We will take a short. I do want to say, tell counsel, on the verdict form on Count 2, I made a slight change, because I looked at the statute and I looked at the indictment, and I wanted to conform to the indictment and to the statute. And instead of when I said attempted anal penetration, I changed that to say that the defendant attempted to commit anal intercourse, because that's what the statute says, and that's what in essence, the indictment says.

And so I have made that slight change.

MS. BARR: Yes, sir, Your Honor.

THE COURT: We will take a short break, and then we will come back and we will bring the jury back in and do closing -- the charge on the law.

MR. MOBLEY: Thank you, Your Honor.

(Whereupon, the Court Breaks.)

THE COURT: Is the state ready to proceed?

MS. BARR: The state is ready, Your Honor.

THE COURT: The defense.

MR. MOBLEY: Yes, sir, Your Honor.

THE COURT: Okay. Find somebody to get

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the jury in.

(Whereupon, the following takes place within the presence of the jury.)

THE COURT: Members of the jury panel, I appreciate your patience and your attention to this point. I am going now to take a few minutes and charge you the law that you are to apply to the facts that you are to determine in this case. The fact that Mr. McBride is charged with these charges, which is first degree criminal sexual conduct with a minor, and assault with intent to commit first degree criminal sexual conduct with a minor, the fact that he has been arrested, the fact that he was charged, the fact he was indicted and the fact that he is on trial, is no evidence that Mr. McBride committed these offenses. That's just the way our system works.

If it's believed by law enforcement that an individual has committed an offense, that's the process. They're arrested, charged, indicted in the trial. But that is not any indication that he committed these offenses. That's just the charge set for in the indictment. You will have the indictment in the jury trial room with you and it is not evidence. It is the paperwork by way of

which this case is processed through our court system. And it is the place where the verdict will ultimately be enrolled and kept as a record of court. The fact that there are two charges are not to be held against Mr. McBride also.

The state has determined that to charge him with these two, and the fact that he is charged with two, is not to be weighed against him in any whatsoever. And each is be looked at on its own merits; that is, the verdicts do not have to be the same as to each charge. You may believe that the state has proven his guilt beyond a reasonable doubt as to one and not the other or vice versa. Or you may believe that the state failed to carry its burden of proof and failed on both charges to prove his guilt. And therefore you can determine that the state, that he is entitled to a not guilty verdict on one or both or each of them.

Now you have heard it mentioned and I will emphasize at this point that Mr. McBride is presumed under the laws of our state to be innocent of these two charges. Anyone charged with an offense in our system is presumed innocent of that charge, and is so presumed until the state

proves that person's guilt beyond a reasonable doubt. This presumption of innocence is not a legal theory or a legal -- just a legal theory or a mere legal phrase. The presumption of innocence is a substantial right. The presumption of innocence in an individual's favor attaches at the time they are arrested. It remains with them as their case is processed through our court system. And this presumption of innocence remains with Mr. McBride at this very instant as I talk with you. And it remains with him as you deliberate. The presumption of innocence in his favor is removed if and when and only, if and when you unanimously decide that the state has proven his guilt beyond a reasonable doubt.

Now the state does not have to prove his guilt beyond all or beyond every doubt. That is not required. Proof beyond a reasonable doubt is described by our courts as follows: Reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. If based on your consideration of the evidence you are firmly convinced that Mr. McBride is guilty of one or both or either of the crimes charged, you will find him guilty.

On the other hand if you think there is a real possibility that he is not guilty, you would give him the benefit of that doubt and find him not guilty. Mr. McBride is entitled to the benefit of any reasonable doubt you have as to any issue in this case. I remind you that I am the sole judge of the law in this case and you must take and accept and apply the law as I charge it. This is true even if you think I charge the law in error or even if you think the law should be different. Your oath requires you to apply the law as I charge it. You are not to infer from anything I have said or done, or anything I now say or do as indicating an opinion of mine on the facts. Our law does not allow a trial judge to formulate or express to a jury any opinion on the facts. That's solely your job.

As the trial jury in this case, it's solely up to you to examine the evidence, give to the evidence the effect, the value, the weight and the truth you believe it should have. In doing this you may believe one witness as opposed to several. Several witnesses as opposed to one. You may all, part or none of a witness' testimony. Use your common sense, your sense of logic, use

your sense of reason and your experiences in life in analyzing the evidence.

As judges of the facts, you necessarily must judge the credibility; that is, the believability of the witnesses who testified. In accessing believability, use those things I've just talked about. And you can use certain evaluators, how a witness acts on the stand. What you believed to -- what the criteria you use to determine whether or not someone is telling the truth or not, their demeanor on the stand. Are they hesitant or straightforward. Consistencies and inconsistencies within their testimony or compared with earlier statements.

You can consider the opportunity a witness had to know those things the witness testified to. And you can consider any bias or prejudice; that is, whether a witness will help or hurt one side or the other. All of these things you consider to determine the true facts, apply the law, and you will be in a position to return a verdict that speaks the truth. In these cases, there are generally two types of evidence that are presented, direct and circumstantial evidence. Direct evidence is the testimony of someone who

asserts or claims to have actual knowledge of a fact; such as, an eye witness.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. Our law makes absolutely no distinction between the weight or value to be given either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. What you should do is weigh all of the evidence. After doing so if you're not convinced of Mr. McBride's guilt, you would give him the benefit of reasonable doubt and find him not guilty. I charge you and I emphasize to you the fact that Mr. McBride exercised his constitutional right to remain silent cannot be used against him in any way whatsoever. Anyone in our system charged with an offense has an absolute right to remain silent.

He is presumed innocent. I told you that several times. He does not have to prove his innocence. The fact that he chose to exercise his constitutional right to remain silent, cannot be used against him in any way whatsoever. You cannot discuss it in the jury room. You cannot

factor it into your own determination. He has exercised that right. And as I told you, the state must prove his guilt beyond a reasonable doubt. He does have to prove his innocence. And his exercise of his right cannot be used against him in any whatsoever.

He is charged with criminal sexual conduct with a minor. That's the first count. It's alleged that he committed this offense by engaging in oral sex with a minor. Here the state must prove beyond a reasonable doubt that Mr. McBride engaged in sexual battery with the victim. The term sexual battery which is includes fellatio, which is oral sex. The state must prove beyond a reasonable doubt the the victim was less than 11 years old at the time of the sexual battery and that the sexual battery of course occurred.

Consent, willingness, indifference or ignorance on the part of the minor if any as to what was taken place, does not in any way effect the charge of criminal sexual conduct with a minor, because an unmarried woman under the age of 14 cannot legally consent to sexual relations. The testimony of victims in criminal sexual conduct cases need not be corroborated under the

laws of this state.

So as to the first charge, the state must prove that a sexual battery occurred. Mr. McBride committed a sexual battery and that the victim, if you find it occurred, was less than 11 years of age. The second charge is assault with intent to commit first degree criminal sexual conduct with a minor by engaging in anal intercourse with the victim. Here the state must prove beyond a reasonable doubt that Mr. McBride committed an assault on the victim with the intent to commit first degree criminal sexual conduct. Here the state must prove beyond a reasonable doubt that defendant Mr. McBride committed an assault on the victim. An assault occurs when a person violenting or forcefully attempts to hurt or injure another person and has the present ability to complete the attempted injury. Assault is the intentional creation of fear of immediate bodily harm.

Next the state must prove beyond a reasonable doubt that Mr. McBride intended to engage in a sexual battery with the victim. Intent means intending the results which occurred. Something that is intentional or something that is

not accidental or involuntary. Intent may be shown by acts and conducts of an individual and other circumstances from which you may naturally and reasonably infer intent.

The term sexual battery includes anal intercourse or any intrusion however slight of any part of a person's body or any object into the genital or anal openings of another person's body except when that intrusion is accomplished for medically recognized treatment or diagnosis. In addition to proving the attempt of a sexual battery, the state must prove as to this offense, beyond a reasonable doubt the alleged victim was under the age of 11. Again the testimony of the victim need not be corroborated under the laws of this state.

Now your verdict in this case must be unanimous. All 12 jurors must agree on your verdict. Once you have agreed, Mr. Foreman, you will be authorized once the jury has unanimously agreed on the verdict to enrolling the verdict on the form I will go over with you in just a moment. And there is a place for you to sign and there is a place for the date and today is the 30th.

If you have any questions while you are

deliberating, knock on the door and tell the bailiff that you have a question. First write it down. There should be paper and a pencil in the jury room. So write down any questions. Knock on the door. Give them to the bailiff. And the bailiff will bring it them to me. And I will confer with the attorneys. And I will respond. It may be that I can write a note. Write an answer on the note, and return the note to you. If I do that, keep the note and return it with the exhibits which are the two photographs. Because it has to be part of the record.

If you need to have testimony reheard, we can play testimony for you. If you wish to have the charge gone over, we do not in South Carolina send in the written charge on the law. If you wish for me to go over any part or all of my charge on the law, let me know and I bring you out and here in open court, recharge you. When you reach a verdict, knock on the door and tell the bailiff. We may be doing some other work in here, but we will get to you as properly as we can. Keep in mind that your verdict must unanimous. It cannot be based on passion, sympathy, public opinion, prejudice or matters

outside the record.

Your lunch will be coming, and you can work while you are having lunch or you can take a break while you're having lunch. That's up to you. But all 12 of you need to be working, or all 12 of you need to be on break, because your verdict must be unanimous. Now when you first go in this jury room, everybody but Mr. Cooper and Ms. Wheeler will go into the jury room for just a minute. They are two alternates and they will remain with us. Do not start deliberating yet, because I have to go over with the attorneys my charge on the law. I've told you, you have to follow my law to the letter. And so I have to make sure that I have not made an error. If I have not made an error, I will send in the verdict form and the two photographs in just a few minutes, and the bailiff will tell you to start deliberating. If I have made an error, I will bring you back in and correct it before I authorize you to start deliberating.

Now the verdict form in this case, there are two charges as I've said, Count 1 and Count 2. Count 1, is first degree criminal sexual conduct with a minor. There are two options. The order

they are in, the fact that one proceeds the another is or no importance. It will be No. 1, being first of second is of no importance. I have to put them in some order. And I always put then in this order so as to indicate any preference for one or the other. It's up to you to determine what the verdict should be. And whether the state has carried its burden of proof, to one or both these charges.

But Count 1, has two options. One, one for finding him guilty and one not guilty. The one dealing with guilt, it says we find the defendant guilty of first degree criminal sexual conduct with a minor by having the victim perform oral sex on the defendant. The second says we find the defendant not guilty of first degree criminal sexual conduct with a minor. Whatever the verdict unanimously chosen by the jury is, Mr. Foreman, you would put an x in front of that sentence.

As to Count 2, there are also two options. The first being, a finding of guilt. We find the defendant guilty of assault with intent to commit criminal sexual conduct; in that, the defendant attempted to commit anal intercourse with the

victim. Secondly, we find the defendant not guilty of assault with intent to commit criminal sexual conduct.

Again, your verdict must be unanimous. And, Mr. Foreman, after you put an x or a check in front of unanimous verdict, you will sign, date and let us know. I am going to let you go to your jury room, everybody but Mr. Cooper and Ms. Wheeler. Don't start deliberating yet.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: Any exceptions from the state?

MS. BARR: No, Your Honor.

THE COURT: Any from defense?

MR. MOBLEY: We renew our motion in regards to the other jury charge. The request to charge that we passed up earlier in regards to exfoliation.

THE COURT: And that motion was denied to charge that, and I did not charge it. And you are on the record as excepting to that.

MR. MOBLEY: Thank you, Your Honor.

THE COURT: Are you Myrtle Wheeler?

MS. WHEELER: Yes, sir.

THE COURT: The two of you can just have a

seat. We can send in by the bailiffs, there will be no exceptions other than the one noted by the defense. The bailiff can take in the verdict form, and the two photographs. And tell the jury to start deliberating.

(Whereupon, the jury commences deliberations at 12:48 p.m.)

(Whereupon, alternates excused.)

THE COURT: We will be at ease.

MR. MOBLEY: Your Honor, my client has to go back while they are deliberating?

THE COURT: I think we ought now it is in the jury's hands, he will remain incarcerated.

MR. MOBLEY: Okay. Thank you.

THE COURT: Let me go back on the record, on Mr. McBride, I have already done this in chambers. But I want to thank the attorneys for their -- the way they have handled themselves and the courtesies they have shown me during the trial. I think they very well tried the case by both sides. And I enjoyed working with you. And I appreciate the way you handled yourselves and the courtesies you have shown me. And I want to make sure to record reflected that.

(Whereupon, at 2:12 p.m. jury reached

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verdict.)

THE COURT: Anything from the state before the jury is brought in?

MS. BARR: No, Your Honor.

THE COURT: Anything from the defense before the jury is brought in.

MR. MOBLEY: No, Your Honor.

THE COURT: Let's bring in the jury.

THE COURT: Whatever the verdict is though, the court cannot tolerate any sort of outburst. If you don't think you can control your emotions, please leave the courtroom now, because if there is any outbursts involving the verdicts, I have to hold anyone who does that in contempt.

(Whereupon, the following takes place within the presence of the jury.)

THE COURT: Mr. Foreman, I understand the jury has reached a verdict.

THE FOREMAN: Yes, we have.

THE COURT: Please hand them to the bailiff, she will hand them to me.

THE COURT: Madam Clerk.

THE CLERK: In case No. 2010-GS-45-283, the State versus Justin McBride, we the jury find the defendant guilty of first degree of criminal

sexual conduct with a minor by having the victim perform oral sex on the defendant. As of Count 2, assault with intent to commit criminal sexual conduct, we find the defendant not guilty of assault with intent to commit criminal sexual conduct. It's signed by the foreman, Mr. Willie Nesbitt on October 30th 2013.

THE COURT: If this be your verdict so say you all by raising your right hand. Let the record all 12 do. Anything from the state before the jury is dismissed?

MS. BARR: No, Your Honor.

THE COURT: Anything from the defense before the jury is dismissed?

MR. MOBLEY: Yes, Your Honor, please poll the jury.

THE COURT: Members of the jury, the check is going to give you some instructions and ask you to affirm your verdict.

THE CLERK: Just when I call out your number, I just need you to say whether this is your verdict and whether it is still your verdict. Juror No. 7, is this your verdict and still your verdict?

THE JUROR: Yes.

THE CLERK: Juror No. 94, is this your verdict, is this still your verdict?

THE JUROR: Yes.

THE CLERK: Juror No. 138, is this your verdict and is it still your verdict?

THE JUROR: Yes.

THE CLERK: Juror No. 143, is this your verdict and is this still your verdict?

THE JUROR: Yes.

THE CLERK: Juror No. 4, is this your verdict and still your verdict?

THE JUROR: Yes.

THE CLERK: Juror 118---

THE COURT: Mr. Nesbitt, I didn't hear your answer.

THE JUROR: Yes.

THE CLERK: Jury 118, is this your verdict and still your verdict. Mr. McCray, I need you to answer in the affirmative. You have verbally answer.

THE JUROR: I can't hear you.

THE CLERK: I need you to answer in the affirmative. You have verbally answer yes or no.

THE JUROR: Yes.

THE CLERK: Juror 132, is this your

verdict and still your verdict?

THE JUROR: Yes.

THE CLERK: Juror 119, is this your verdict and still your verdict?

THE JUROR: Yes.

THE CLERK: Juror No. 162, is this your verdict, is it still your verdict?

THE JUROR: Yes.

THE CLERK: Juror No. 13, is this your verdict, is it still your verdict?

THE JUROR: Yes.

THE CLERK: Juror No. 190, is this your verdict, is this still your verdict?

THE JUROR: Yes.

THE CLERK: Juror No. 15, is this your verdict and still your verdict?

THE JUROR: Yes.

THE CLERK: Okay. Juror No. 49, is this your verdict, is it still your verdict?

Mr. Cooper. I'm sorry, those were the alternates.

THE COURT: Has that covered everyone? Has everyone got covered? Okay.

THE CLERK: Yes.

THE COURT: Anything before the jury is dismissed?

MS. BARR: No, Your Honor. Not on behalf of the state.

MR. MOBLEY: Nothing, Your Honor.

THE COURT: I am going to allow you to leave at this time. And thank you so much for your help. You can just go out this back way and they'll show you how to exit just like you've been coming in and out while you are serving on the jury panel. And call back tonight after 6. I haven't been told there are any more trial, but just to be on the safe side, please call back tonight after 6 and follow whatever instructions you receive. Thank you so much, and everyone remain seated while the jury is dismissed.

(Whereupon, jury is excused.)

THE COURT: The jury has been dismissed. Anything from the state?

MS. BARR: Yes, sir, judge. I wanted to give you the sentencing sheet.

THE COURT: Anything from the defense now that the jury has been dismissed?

MR. MOBLEY: Yes, Your Honor. We have several motions. First and foremost, we would like to renew and preserve any and all motions, objections, issues that were brought before the

court during the state's case in chief during the pretrial motions, during the directed verdict motion portion, and after the close of the state's case itself.

Additionally, Your Honor, we would respectfully ask for a new trial under Rule 29 of the South Carolina Criminal Code, due to the insufficiency of the evidence to support this verdict. Your Honor, we just don't see, we respect the jury's verdict, but we totally disagree according to the evidence itself. What was presented if anything, you know, the one we were worried about Count No. 2. If they would had anything that we could have grasped upon. But Count No. 1, there just wasn't -- there was not a sufficient amount of evidence to convict my client under this particular statute itself.

Your Honor, we are going to continue to raise that issue in regards to the constitutionality of the statute itself. But more importantly, we would respectfully ask for a new trial in this particular case based on the issues have been raised, as well as the sufficiency of the evidence as we see fit in this case.

THE COURT: Those motions are denied. I

think the record is preserved as to your -- the issues involving evidence, the constitutionality of the statute, and motions made during the trial. But I do find that, as I did at directed verdict stage, that there is sufficient direct evidence, and substantial, circumstantial evidence in which a jury could find. And did find Mr. McBride guilty as they did. And it's a credibility question whether they believed particularly the young victim or not. And they obviously believed her. So I deny all post-trial motions.

Now, If you will bring Mr. McBride around for sentencing. And I be glad to hear from anyone on behalf of the victim. First from the state. Does the state have any further presentation?

MS. BARR: Your Honor, please.

THE COURT: While she is doing that, did Mr.---

MS. BARR: Your Honor, we have to my right, C[Victim 1] McBride's mother, Angelica McBride. And she wanted to address the court prior to sentencing.

THE COURT: Victi [redacted].

MS. MCBRIDE: At this time, I would like to let you know that basically the family, and my

first priority is to my daughter. And the family know basically that I love him, because I pick up him and care for him just like he was mine along with his other siblings.

And it hurt me a whole lot that basically that took place between him and my daughter. And It hurt me more that basically this is the first time that I can say that really I have seen him. And what my daughter had to go through these 3 and half years, not having grandparents to visit her. No phone calls like it had been, birthday calls. And, you know, how your school went and stuff like that. I had to endure those questions that she had for me.

I attempt to mediate between them to try to make sure that connection was still there. I mean that didn't work out. She go into a store and see, and she take out and run. And that's hurtful. And this is not only family events and what have you that she had to endure, not only her but her siblings. I want Justin to know I love him, but I hate what took place. But I honestly, Judge, I appreciate everything that you all did here today. And I know if it has to be basically evidence or what have you this or what, but I'm

her mother. And she is with me day in and day out. And I feel like if I didn't, I wouldn't have done her a justice as her mother. So I appreciate you listening to me and the court.

THE COURT: Thank you, Victi [redacted]

Anything else from the state?

MS. BARR: Yes, Your Honor. Just very brief remarks. Judge, this has been a very tough case. It's been an emotional case, a draining case. There are no winners here. I hope that one day, and I've hoped this all along, that regardless of how this case comes out, that this family can find a way to heal. I remember being in this courtroom not long ago where a defendant was charged with beating his first cousin to death. And the defendant's mother and the victim's mother, were sisters. And, Judge, it was the most remarkable thing. The victim's mother came in holding hands with the defendant's mother. And the victim's mother told her nephew, the defendant, that she will always love him; that this doesn't change anything; that their family is always going to be a family. And they believe in prayer. And it was one of most incredible things that I have seen. And I think it's a testament to

power of forgiveness.

Judge, I have always believed Victim 1, whatever that is worth. I've always believed that these things happened to her. Judge, the defendant does not have a prior record. And as Your Honor may know, the state and the defense attempted to try to do something, because we do something short of what happened in terms of the conviction on the CSC with a minor in the first degree, because we know what the repercussions would be. We knew what the repercussions would be. And I asked to meet this young man and his mom and his lawyer. And I wanted to look him in the face, and tell him, and I knew that his lawyer had already explained to him what the penalty was. But I don't know, there's something in me that I guess, wanted to make that an additional effort. But, judge we, but there are no winners here. This is not a victory for anybody.

But, judge, we thank the lawyers for our courtesies. Your Honor, we thank you for your courtesies. And we hope that in some form or fashion this will be bring some degree of closure for some of the folks involved in this case.

THE COURT: Thank you.

MS. BARR: Judge, also Victim 1 had written some letters. She had been in counseling for about a year or year and a half. She talked about in her letters how this despicable act was done to her. And, you know, of course she's a little older than she was when this happened. A little more mature. And she talks about this sense of being hurt and missing her family. Her paternal family. And you can tell in reading the letters that she loves her grandparents. She loves her aunts. And this hurts her. And I hope she will understand that she did the right thing in telling what happened to her. And I hope she will find some healing in it as well. And that's all.

THE COURT: Mr. Mobley, I will hear from you and anyone on his behalf. Did he serve any time in jail already?

MR. MOBLEY: Yes, Your Honor. And the exact amount I beg the court's indulgence. Your Honor, I have been informed it was 3 or 4 days. And I am not quite sure. And I can figure that out by pulling the first file here shortly so the court will be aware. Your Honor,---

MS. BARR: Judge, and I may be able to

help on that. It looks like because he was 16 at the time, he was detained as a juvenile. And it appears that he was released, I believe, on June 23rd, is what the detention release forms indicate. At 7:37. I am not sure if it was a.m. or p.m. But it reflects June 23rd of 2010.

THE COURT: And this happened on the 20th.

MS. BARR: 21st of June.

MR. MOBLEY: Two days collectively.

THE COURT: Three.

MR. MOBLEY: Three. Your Honor, this has been a difficult case for all sides. I could have placed Justin on the stand, Your Honor. The reason why I make that statement, because as you all well know, that if any client tells me anything different than what was told to law enforcement through his statement, I could not place him on the stand and cross him. Excuse me, and question him at all at because I would subordinate perjury. He has maintained his innocence through this entire thing, Your Honor.

The case has been troubling. But we are going to respect the jury's verdict although we disagree in regards to it. This is a young man

that is going to be incarcerated anywhere between 25 years to life. It makes my stomach hurt. We went over a possible Alford plea. We went over a possible reduction, a plea agreement to a lewd act or something of that nature. He said Derrick, I can't get up there and admit to anything. I explained to him what an Alford plea was. Your Honor, this has torn up the family. And all of them are going to have actually, the two main people that are more so concerned are going to be definitely my client and Victim 1.

It hurt me to have to cross examine her on this stand. Justin didn't make much of the motions or look or anything of that nature, because he didn't want to hear it or see it either. That's his first cousin. This young man has absolutely no record. Never been arrested. There should have been a lot more investigation on the front end of this, and we wouldn't -- I would submit we would not be standing here, Your Honor, but now we are. At the bare minimum being that he's 20 years old now, he will get out around 43, maybe 44 years old. He will still have some life. But, man, will he miss a big junk of it. He has a bright future. He had a bright future in front of

him. He was a student at Greenville Tech majoring in marketing. He is working. He was doing all the things that were required of him. He hasn't been home or set foot in his own house, his mother's house in 3 years. I give him a directive not to go near there. Never violated it. He didn't want to. He didn't want to go and disturb something that had been placed upon him, Your Honor.

Victim 1 hasn't been able to go over there. They live right next door. But it wasn't anything that his mother, aunt or anyone of that nature were trying to isolate Victim 1 I told everybody keep calm and don't disturb anything. And that's what they have done. At one point, Justin was working two jobs. He's currently working now. Well before he had take leave before this trial. He's always been to court whenever he was asked. Your Honor, obviously he has a loving family. The ones that are here to support him. Others wanted to be here as well. He has a loving girlfriend. They attend school together. He was on the right track. Now we are faced with the reality, which is 25 years to life.

Your Honor, I attempted to protect this

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record as vehemently as I could. Because with the things that occurred in this case, I don't see how a court may not review it going up, because it's some very novel new issues. That's the thing about it, Your Honor. And we want those to be analyzed. We do want those. And that's why I was trying very forcefully to make sure I preserve that record. And we respect your rulings. We think that you make the proper rulings at the time. And we're not trying to undermine that at all, Your Honor. But I think you can appreciate, what I am not trying not to do is let anything slip through the cracks so that maybe Justin will one day, may be able to appeal, and see what the court holds.

Your Honor, I would like to say for Justin, because I don't want him to speak directly to Victim 1 [redacted] nor Victi [redacted] or Mr. McBride. But I would like to let them know, that we're sorry that they have to go through this particular event. And I think you can appreciate the reason why I am not allowing my client to directly address them at this particular point, Your Honor.

Your Honor, in light of they verdict, we know that he is facing 25 years to life, we would

respectfully ask that you give the minimum bare sentence on the case. And I haven't and I need to look back at it. But I am, if at all, State v. Thompson is applicable to this case where it will allow the actual sentence to be suspended. We would respectfully ask for that to be the case.

And, Your Honor, I don't have the statute in front of me, so I can't independently state whether State vs. Thompson would be applicable to it. Where in that particular case it states that if it is not specifically written in the law---

THE COURT: It is.

MR. MOBLEY: It is. Okay. Well we would respectfully ask that 25 years be the sentence that is imposed at this particular point, Your Honor.

THE COURT: There's no part of which may be suspended or probation granted.

MR. MOBLEY: So State v. Thompson isn't applicable.

THE COURT: Right. Now anyone want to speak on Victi [redacted] behalf?

MR. MOBLEY: Ms. Catrina McBride, which is Justin's mother, would like to address the court.

THE COURT: Yes, ma'am.

MS. MCBRIDE: Your Honor, I'm Catrina McBride, his mother. And like attorney Derrick said, this is a terrible situation that was put upon our family. I love my son dearly. He's my oldest. And he never gave me any trouble, never. Honor student. Worked, helped me out, you know. And I love him dearly as well as my niece. And I just wanted the court to know that I just don't -- I still have faith that one day he will be able to step his foot back into my home. I missed 3 years of him being home with me.

I missed his prom. I never took pictures in my own home. I missed his graduation in my own home to take pictures. And I did everything I could to make sure that he was safe as in not being able to have contact with the other side of my other family. Even though I am right there in the middle of them, I still saw them, but I couldn't -- he couldn't set foot back home. And like Mr. Derrick said, he is a great kid. He never give me no trouble. He's an honor student. Music, talented. Make his music, and I just hate that all of them got, you know, had go through this. It's something that no family should have to go through. I love my brother. I miss him.

We all used to have Sunday dinner together every Sunday. And for this past three years, my brother haven't set foot in my parent's house to have that Sunday meal that we always have after church every Sunday. But I just let them know I still love them. And I am hurting right now because I looking to face that my son would not be with me and his girlfriend. They are in school together. He has a great future ahead of him. So I just wanted the court to know.

THE COURT: Thank you so very much. Anyone else?

MR. MOBLEY: No, Your Honor. We have one person and then my client may want to.

THE COURT: Yeah, I am going to ask if Mr. Justin McBride in a moment, I will conduct with him. But if there some other family member or friend.

MR. MOBLEY: His aunt, Ms. Eva Chapman.

THE COURT: Yes, ma'am.

MS. CHAPMAN: Good afternoon. Your Honor.

THE COURT: Yes, ma'am.

MS. CHAPMAN: My name is Eva Chapman, I am the grand aunt of Justin McBride and also Victim -- I mean Victim 1 [redacted]e. I'm sorry, there are so

many nieces and nephews. I stand before you today to give you a little insight on Justin. When he was a little boy, I kept him many, many days. And I've never seen Justin disobedient or unloyal to anybody that I know of. If you ask him to do something, if It was right he would do it. Justin have the demeanor of the face remaining. If you let him know something he doesn't react to things. This has affected him. But he is not going to let you show his emotion. He's very, very I've heard things that he has written concerning this. And things that he put, have to put the music how if affected him. And I have heard him also stated that this is nothing that he would to do to anybody; taking into consideration of his own little sisters, because he wouldn't want nothing like that happening to them.

And also I heard stated that this is something that the family tried to keep hidden, but this is why we came to court; not me, but they decided to come to court, because Justin has always stated that if he is not guilty of doing anything, he is not going to say that he is guilty of it, accept responsibility for being guilty when he not. So that is why the family end up here.

And that is why the family decide to get this particular lawyer, because the first lawyer just wanted to disregard him whatsoever. And that's all I wanted to put on this thing.

THE COURT: Thank. I appreciate your time and your remarks.

MS. CHAPMAN: Thank you.

THE COURT: Justin McBride, is there anything you want to say?

THE DEFENDANT: I just want to say despite what anybody thinks, I know what I didn't do. And I don't know if I want call it, proving myself innocent, because that is what you all spoke on. That is not what I should have had to do. But there was words that the solicitor said I said, that I didn't say. It was the way she worded it, wasn't the way I said it. So I don't know if that took a toll on the jury's decision or whatever. But the way things were presented wasn't exactly the way they occurred. And I tell you I just wanted you to know that. Despite what anyone could do about it, I just wanted to make sure someone heard it.

THE COURT: What was the last thing you said?

THE DEFENDANT: It didn't happen like that. The way they worded it, is not what I said.

THE COURT: Thank you. Well I have been doing this 20 years, and it doesn't get any easier. This appears to be an aberration, a young man who has a lot going on. With everything I have heard, even those who were adversely effected by this, the statute is clear. I am limited as to what I my alternates are. So Mr. Justin McBride, my sentence is the the minimum; that is, a sentence of 25 years in prison. With 3 days credit thank you. Thank you.

MR. MOBLEY: Thank you, Your Honor.

-----End of Requested Transcript of Record----

396

C-E-R-T-I-F-I-C-A-T-E

I, Margaret T. Sullivan, Court Reporter, for the Third Judicial Circuit of the State of South Carolina, do hereby Certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced on October 28th-30th, 2014, in the General Sessions Court in Williamsburg County, Kingstree, South Carolina.

I do further that I am neither kin, counsel nor interest to any party hereto.

8.16.14
DATE

Margaret T. Sullivan
COURT REPORTER
My Commission expires: 9/7/2021

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE FIRST DEGREE AND ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE FIRST DEGREE

At a Court of General Sessions, convened on March 1, 2012, the Grand Jurors of WILLIAMSBURG County present upon their oath:

COUNT ONE - CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE FIRST DEGREE

That **JUSTIN MCBRIDE** did in Williamsburg County on about June 21, 2010, the Defendant did engaged in oral sex with the victim, a child who was less than eleven (11) years of age, in violation of Section 16-3-655, Code of Laws of South Carolina, (1976), as amended.

COUNT TWO - ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE FIRST DEGREE

That **JUSTIN MCBRIDE** did in Williamsburg County on about June 21, 2010, violate Section 16-3-656 of the Code of Laws of South Carolina (1976), as amended, in that the said Justin McBride did attempt to engage in sexual intercourse with the victim, a child less than eleven (11) years of age.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

ERNEST A. FINNEY, III, SOLICITOR

FILED
12 FEB 30 AM 11:56
CAROLYN F. WILLIAMS
CLERK OF COURT
KINGSTREE, S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF Williamsburg)
STATE VS.)
Justin McBride)
AKA:)
Race: [redacted] Sex: [redacted] Age: [redacted])
DOB: [redacted] SS#: [redacted])
Address: [redacted])
City,State,Zip: [redacted])
DL#: SID#:)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS **398**

INDICTMENT/CASE#: 2010-GS-45-0283
A/W#: M-170386
Date of Offense: 6/21/2010
S.C. Code § : 16-03-0655(A)(1)
CDR Code #: 0385

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE FIRST DEGREE

in violation of § 16-03-0655(A)(1) of the S.C. Code of Laws, bearing CDR Code # 0385
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☒ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☒ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Kimberly V. Barr 8443

Barr, Kimberly V	SC Bar#	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 25 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. Three (3) days John C. Hayes III
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

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DEC 0 2 2013
SC Court of Appeals

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$
3% to County (if paid in installments)		$
TOTAL		$

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ A CERTIFIED TRUE COPY beginning _____
$ _____ paid to Public Defender Fund
Other: _____
SHARON W. STAGGERS
CLERK OF COURT
WILLIAMSBURG COUNTY

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Sharon W. Staggers
Court Reporter: Margaret Sullivan
Presiding Judge: John C. Hayes III
Judge Code: 2044
Sentence Date: 10/30/13

SCCA/217 (03/2011)

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of General Sessions

HONORABLE JOHN C. HAYES, CIRCUIT COURT JUDGE

Case No.: 2010-GS-45-0283

The State,.....Respondent.

V.

Justin McBride,.....Appellant.

NOTICE OF APPEAL

Justin McBride, appeals his trial and sentence in this case. The trial was commenced on October 28, 2013 and concluded on October 30, 2013. The Honorable John C. Hayes presided over the trial and imposed sentence. The court reporter was Margaret T. Sullivan, 504 Henderson Street, Sumter, SC 29150.

Derrick E. Mobley, Esq
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NOV 07 2013
SC Court of Appeals

OTHER COUNSEL OF RECORD:
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of General Sessions

HONORABLE JOHN C. HAYES, CIRCUIT COURT JUDGE

Case No.: 2010-GS-45-0283

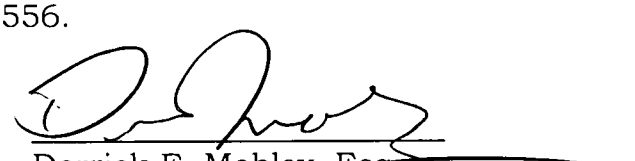
The State,.....Respondent.

V.

Justin McBride,.....Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Kimberly Barr by depositing a copy of it in the United States Mail, postage prepaid, on November 1, 2013, addressed to Kimberly Barr, Assistant Solicitor, Williamsburg County Solicitors Office , 125 West Main Street, Kingstree, SC 29556.



Derrick E. Mobley, Esq.
203 W. Main Street, Suite F-5
Lexington, SC 29072

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUN 26 2015
SC Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

Case No. 2013-002391

The State of South Carolina, ... Respondent,

v.

Justin McBride, ... Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT LACK SUBJECT MATTER JURISDICTION IN THIS MATTER INVOLVING A DEFENDANT WHO WAS SIXTEEN AT THE TIME OF THE ALLEGED CRIME OR, DO THE RELEVANT STATUTES PERMITTING THE EXERCISE OF SUCH JURISDICTION, WITHOUT A CASE-SPECIFIC ANALYSIS, FAIL TO ENSURE APPROPRIATE CONSTITUTIONAL PROTECTIONS FOR DEFENDANT MCBRIDE?

II. ASSUMING THE CIRCUIT COURT HAD JURISDICTION, DID THE CIRCUIT COURT'S EVIDENTIARY RULINGS AND CONFUSING AND ERRONEOUS JURY INSTRUCTIONS VIOLATE MCBRIDE'S DUE PROCESS RIGHTS?

A. Did Law Enforcement's Losing Key and Potentially Exculpatory Evidence Without Explanation and Contrary to Admitted Investigatory Norms, Violate Due Process, or At a Minimum, Require That a Spoliation Charge Be Given to the Jury?

B. Did Due Process, or Rule 5, Require Exclusion of the Photograph of the Victim Where The "Photograph" Was Provided to Defense Counsel as a Black Sheet of Copy Paper, Not as the Color Photograph Introduced Into Evidence, and Where the Actual Color Photograph Was Not Even in the Solicitor's File to be Reviewed by Defense Counsel Prior to Trial?

C. Did The Circuit Court Err in Prohibiting Defense Counsel from Cross-Examining Law Enforcement Witnesses on Their Investigation of This Matter, Specifically as Relates to the Investigatory Tools Provided to Law Enforcement by S.C. Code § 16-3-750?

D. Were McBride's Due Process Rights Violated When The Court Instructed the Jury That No Corroboration Was Required to Support the Alleged Victim's Testimony, Where Such Instruction Had The Effect of Impermissibly Shifting The Burden of Proof, Confusing the Jury, and Elevating the Importance of One Witness' Testimony Over Others In Contravention of McBride's Right Against Self-Incrimination?

III. WAS THE EVIDENCE PRESENTED BY THE STATE LEGALLY INSUFFICIENT TO PROVE THE REQUIRED ELEMENTS OF THE CRIME CHARGED UNDER S.C. CODE § 16-3-655(A)(1)?

IV. WERE DEFENDANT'S MIRANDA RIGHTS VIOLATED, REQUIRING EXCLUSION OF ALL EVIDENCE OF STATEMENTS MADE BY MCBRIDE TO LAW ENFORCEMENT?

STATEMENT OF THE CASE

Appellant Justin McBride ("McBride") was indicted on charges of first degree criminal sexual conduct with a minor and assault with intent to commit first degree criminal sexual conduct with a minor by return of a true bill on December 2, 2010.[1] McBride pled not guilty to both charges. A jury trial was held before the Honorable John C. Hayes, III on October 28-30, 2013. The jury returned a verdict of guilty as to Count 1, first degree criminal sexual conduct with a minor. (R. Vol. II pp. 365-366.) The jury returned a verdict of not guilty on Count 2, assault with intent to commit criminal sexual conduct. (R. Vol. II p. 366.)

Following the verdict, McBride's counsel renewed previously made requests for directed verdict, renewed various objections to the Court's evidentiary rulings during trial, and made an oral motion for a new trial. (R. Vol. II pp. 367-368.) Those motions were denied. (R. Vol. II pp. 368-369.) On October 30, 2013, McBride was sentenced to 25 years imprisonment. (R. Vol. II p. 378.) Notice of McBride's Intent to Appeal was filed on that same date. The Notice of Appeal was then filed with the lower court on November 1,

[1] This matter was never pending in Family Court. Rather, the solicitor, in her sole discretion, chose to file these charges against 16 year old McBride in Circuit Court under S.C. Code § 63-19-20(1). McBride contends this statute improperly vests this discretion in the prosecutor by defining who constitutes a "child" or "juvenile" by the crime allegedly committed instead of any analysis of the true maturity or best interests of the minor involved or justice itself.

2013 and this Court on November 7, 2013, challenging both McBride's conviction and sentence.

STATEMENT OF THE BASIC FACTS

McBride is the cousin of the alleged victim in this case. (R. Vol. I p. 72, lines 9-11.) At the time of the alleged incident that gave rise to the charges, McBride was 16 years old; his cousin was 9. (R. Vol. I p. 82, lines 9-12; R. Vol. I p. 170-171; R. Vol. I p. 80, lines 23-24; R. Vol. I p. 81, lines 2-6.)

After returning from school on the school bus, the alleged victim found her mother was not at home. (R. Vol. I p. 83, lines 1-20.) She then either went to a neighbor's house, but did not stay because the neighbor had company, or went directly to McBride's house. (R. Vol. I pp. 83-85.) In any event, she ended up at McBride's house. (R. Vol. I p. 85, lines 13-24.) They all lived in very close proximity to one another.

The testimony from this point gets very unclear and confusing as to actual events. What is clear is that at some point the alleged victim left to return home. (R. Vol. I p. 93, lines 23-24.) At some point after returning home – again the timeline is not clear -- she disclosed some incident with McBride, her cousin. (R. Vol. I pp. 94, line 24 through 95, line 10; R. Vol. I p. 99, lines 3-8.) After some unspecified period of time, and with the alleged victim's mother wanting to wait until her husband (the alleged victim's father) got home, family members called the police. (R. Vol. I p. 95; R. Vol. II p. 249, line 20 to 250, line 19.)

Several police officers arrived, including a female officer who was called in to speak with the female alleged victim. (R. Vol. I pp. 168-169.) After getting the alleged victim's statement, that officer spoke with McBride. (R. Vol. I p. 170, lines 18-22.) This conversation occurred in McBride's home. (R. Vol. I p. 171, lines 2-20.) Two additional uniformed officers[2] were also present during the questioning of McBride. (R. Vol. I pp. 34-35; R. Vol. I p. 171, line 21 to p. 172, line 1.) And, testimony revealed that, though not technically under arrest, officers stood essentially between McBride and the door to his home, as well as outside McBride's home. (R. Vol. I p. 33, lines 3-10; R. Vol. I pp. 30-31, R. Vol. I pp. 171-172.)

McBride denied the actions described by the alleged victim. (R. Vol. I pp. 37, 173-174.) His version of events was, at all times, different from the alleged victim and consisted of no wrongdoing. (R. Vol. I pp. 173-174.) A portion of his statement – provided without being informed of his Fifth Amendment rights – was used against him at trial. (R. Vol. II pp. 320-323.)

Only a handful of witnesses testified at trial, including the alleged victim. The alleged victim's own testimony was confusing and conflicting. (R. Vol. I pp. 87, 91, 94-96, 122-124, 139-140.) She appears to assert that McBride attempted to force her to perform oral sex and attempted to penetrate her anally. (R. Vol. I pp. 87, 92-93.) She indicated that semen ended up on the shirt she was wearing, as well as on a tissue she used to wipe it off. (R. Vol. I p. 89, line 19 to p. 90, line 9.)

---

[2] The police department no longer employs either the investigator or the two officers present during the questioning of McBride. (R. Vol. I pp. 32, 181.)

Other witnesses included the alleged victim's mother and aunt and two of the police officers who responded to the original complaint. (R. Vol I p. 167; R. Vol. II pp. 213, 259.) The only physical evidence introduced included a color photograph of the alleged victim on the day of the incident. (R. Vol. I pp. 143-145, 177; R. Vol. II pp. 261-63.) The photograph purported to show a deodorant stain on the shoulder of the alleged victim's shirt. (R. Vol. I p. 176.)

Disturbingly, responding officers did not collect the shirt worn by the alleged victim. (R. Vol. II pp. 190, 237.) Instead, after at least several days, the alleged victim's mother brought the shirt to the police department. (R. Vol. II pp. 237-240.) The shirt was never tested to determine the presence either of semen or deodorant. (R. Vol. I p. 72, lines 18-22; R. Vol. II pp. 189-191, 260-261, 341.) In fact, the shirt was never sent to SLED for any testing and was lost. (R. Vol. II pp. 265-266.) At no time was the shirt available to the defense; nor was it tested and results of such testing provided. (R. Vol. II pp. 266-267.) The police also never tested any materials from McBride, such as his deodorant. (R. Vol. II pp. 203, 341.) Even the police department's evidence sheet, completed with all evidence submissions, was missing. (R. Vol. II p. 267, lines 1-14.)

Despite this lack of evidence, the jury returned a guilty verdict on the charge of first degree criminal sexual conduct with a minor based on the State's claim that oral sex occurred. (R. Vol. II pp. 365-366.) This verdict was unsupported by the evidence and followed several erroneous evidentiary decisions of the Circuit Court, along with confusing jury charges, violating

McBride's Due Process rights. McBride, only sixteen at the time of the incident, was sentenced to 25 years without parole.

The facts in this case, discussed in greater depth as relevant to the issues raised below, and the legal errors committed at trial, require reversal of McBride's conviction.

ARGUMENT

This appeal raises a number of serious issues. First, this case involves significant legal questions regarding the proper treatment of juveniles in our criminal justice system. Moreover, the issues regarding the handling of evidence in this matter and treatment of those deficiencies at trial, if upheld, would only serve to encourage negligent investigation and handling of evidence. Specifically, when taken together, these errors made it impossible for McBride to defend himself absent taking the witness stand. A criminal defendant simply cannot be forced to undergo a process that would require such testimony. Even where no one error, alone, may mandate reversal, the totality of these circumstances – involving lost evidence, permitting introduction of surprise and incomplete evidence, excluded cross examination, and dangerously confusing jury charges -- hindered the defense to such an extent that the process provided simply cannot meet constitutionally required standards.

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION IN THIS MATTER INVOLVING A DEFENDANT WHO WAS SIXTEEN AT THE TIME OF THE ALLEGED CRIME OR, IF THE RELEVANT STATUTES PERMITTED THE EXERCISE OF SUCH JURISDICTION WITHOUT A CASE-SPECIFIC ANALYSIS, THOSE STATUTES FAIL

TO ENSURE APPROPRIATE CONSTITUTIONAL PROTECTIONS FOR DEFENDANT MCBRIDE.

It is undisputed that McBride was only sixteen (16) years old at the time of the alleged crime. Current South Carolina law provides, in relevant part, that the Family Courts of South Carolina "shall have exclusive original jurisdiction and shall be the sole court for initiating action: (1) Concerning any child living or found within the geographical limits of its jurisdiction: . . . . (d) who is alleged to have violated or attempted to violate any state or local law or municipal ordinance . . . ." S.C. Code § 63-3-510 (emphasis added). In accordance with this grant of exclusive jurisdiction, the law further provides that "a case involving a child must be transferred or retained as follows:"

> (1) If, during the pendency of a criminal or quasi-criminal charge against a child in a circuit court of this State, it is ascertained that the child was under the age of seventeen at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case, together with all papers, documents, and testimony connected with it, to the family court of competent jurisdiction, except in those cases where the Constitution gives to the circuit court exclusive jurisdiction or in those cases where jurisdiction has properly been transferred to the circuit court by the family court under the provisions of this section. . . .

S.C. Code § 63-19-1210 (emphasis added).

After initiation of a case in family court, where the case involves murder or criminal sexual conduct, the prosecuting authority "may request in writing that the case be transferred to the court of general sessions with a view to proceeding against the child as a criminal rather than as a child . . ." S.C. Code § 63-19-1210(6). Various procedures are established for this transfer. Id. "If the circuit judge elects to exercise the jurisdiction of the

general sessions court for trial of the case, he shall issue an order to that effect . . ." Id.

No constitutional provision could be located that provides for exclusive jurisdiction in the circuit court for this case. Indeed, exclusive jurisdiction for trials involving the violation of laws by a child of sixteen, like McBride, lies in the Family Court. Once initiated in that court, the case may be transferred but only in accordance with S.C. Code § 63-19-1210. Review of the Circuit Court docket entries shows no evidence this case was transferred from any Family Court. Rather, the matter appears to have been initiated in Circuit Court.

Moreover, the circuit judge electing to exercise jurisdiction over a trial like this one is required to "issue an order to that effect." S.C. Code § 63-19-1210(6). The Circuit Court Judge entered no such order.

This procedure intentionally and rationally provides great discretion to the Family Court – the court vested with exclusive jurisdiction over juveniles. It is the Family Court that first determines a request to transfer an otherwise juvenile prosecution to the circuit court. S.C. Code § 63-19-1210(6) ("The judge of the family court is authorized to determine [the prosecution's] request [to transfer]."). But in all instances – in the absence of a constitutional grant of exclusive jurisdiction to the circuit court – the original subject matter jurisdiction lies in the Family Court.

Absent a transfer from the Family Court, no jurisdiction exists in the circuit court. "The jurisdiction of a court over the subject matter of a proceeding is fundamental." State v. Guthrie, 352 S.C. 103,107, 572 S.E.2d

309 (Ct. App. 2002) (citation omitted). "The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." Id. (citations omitted). "The acts of a court with respect to a matter as to which it has no jurisdiction are void." Id. (citations omitted).

Here the Circuit Court lacked subject matter jurisdiction in the absence of a family court's determination that transfer to that court was appropriate and the Circuit Court's order that it elected to accept that transfer of jurisdiction. Statutory provisions defining "child" or "juvenile" to the contrary simply cannot enlarge or restrict a court's jurisdiction contrary to those legal provisions granting such jurisdiction. See S.C. Code § 63-19-20(1) (in which the Juvenile Justice Code defines "child" or "juvenile" to exclude minors who are charged with certain crimes carrying sentences of fifteen years or more). Indeed, to define whether an individual is a child based on the acts committed, or solicitor preference, rather than the mental capacity and development of that individual runs counter to the entire body of law intended to protect and rehabilitate children. To leave discretion solely to the solicitor fails to protect the children of this State.

The basing of jurisdiction on definitions of "child" and "juvenile" that base those definitions on alleged crimes and then gives unfettered discretion to the solicitor to file charges in the Circuit Court, runs counter to the process due McBride.

To the extent that the overall statutory scheme intends to permit blanket and unchecked prosecutorial discretion to decide to try minors as adults, it runs afoul of Kent v. United States, 383 U.S. 541 (1966) and general constitutional protections afforded children based on their reduced capacity. See generally Miller v. Alabama, 132 S. Ct. 2455 (2012) (determining that due to the different psychology and development between juvenile and adult minds a life sentence without parole imposed for a non-homicide crime ran afoul of the Eight Amendment); see also Graham v. Florida, 560 U.S. 48 (2010). Such a statutory scheme also runs afoul of the general treatment afforded children and the duties of a criminal prosecutor. It encourages charging offenses with more severe penalties to trigger the discretion of the solicitor.

It is simply inconceivable that whether a minor receives some formal consideration of the prudence of his facing charges as an adult simply rests with the solicitor. Vesting of such discretion invariably results in a failure to treat one minor similarly to another; and potentially violates the Equal Protection Clause of the United States Constitution. U.S. Const. amend. XIV. For example, where charges are originally filed in Family Court, a minor is entitled to review of the Kent factors, which factors include the following:

> (1) The seriousness of the alleged offense.
> (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
> (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
> (4) The prosecutive merit of the complaint.

(5) The desirability of trial and disposition of the entire offense in one court.
(6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
(7) The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions.
(8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available.

State v. Jones, 392 S.C. 647, 652-653, 709 S.E.2d 696 (Ct. App. 2011) (citing the Kent factors and addressing whether the family court properly waived jurisdiction over a juvenile with a prior history of violent crime[3]). No consideration was given to any of these factors. Moreover, it seems counter to the purpose of the special code provisions aimed at children to leave the determination of one's childhood to whether a prosecutor charges the child with an offense serious enough to result in a serious sentence. In other words, where a child faces a minimum sentence of 25 years, the constitutional procedural safeguards should be greater, not lesser, when determining whether he shall face charges as an adult.

Moreover, as an officer of the court, the solicitor "represents all the people, including [the] accused, and [he] occupies a quasi-judicial position, whose sanctions and traditions he should preserve. It is his duty to see that

[3] Where someone charged with armed robbery and manslaughter, as in Jones, and with a prior criminal history of armed robbery gets the benefit of family court consideration prior to transfer to the circuit court, a child such as McBride, with no criminal history is entitled to equal protection and process under the laws.

justice is done. He must see that no conviction takes place except in strict conformity with the law, and that [the] accused is not deprived of any constitutional rights or privileges." State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244, 248-249 (2006) (emphasis added). Contrary to these duties, no explanation is required of a solicitor utilizing her sole discretion to remove the trial of a child from Family Court to Circuit Court. The solicitor, here, failed to consider or represent any interest of the accused minor child.

The statutes addressing the treatment of children should be read together to provide some required analysis that trial as an adult is appropriate. Some procedure is required before the circuit court can exercise jurisdiction over a child who would otherwise be governed by the children's code, juvenile justice and the specialized family courts.

II. ASSUMING THE CIRCUIT COURT HAD JURISDICTION, THE CIRCUIT COURT'S EVIDENTIARY RULINGS AND CONFUSING AND ERRONEOUS JURY INSTRUCTIONS VIOLATED MCBRIDE'S DUE PROCESS RIGHTS.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; see also S.C. Const. Art. I § 3. As part of that guaranteed Due Process, the Confrontation Clause provides that a defendant in criminal cases "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; S.C. Const. Art. I § 14. Inherent in the process due such a defendant, the State cannot be permitted both to rely on selective, surprise

photographs of missing evidence, while depriving the defendant access to that evidence. And, inherent in the Confrontation Clause's protections is the right to relevant and thorough cross-examination of witnesses.

In this case, struggling with difficult facts, the Circuit Court unfortunately erred in a number of evidentiary rulings and decisions, resulting in insufficient procedural safeguards and violations of due process.

A. Where Law Enforcement Lost Key and Potentially Exculpatory Evidence Without Explanation and Contrary to Admitted Investigatory Norms, Due Process Was Violated, or At a Minimum, Required That a Spoliation Charge Be Given to the Jury.

This case presents the disturbing situation of law enforcement's failure to investigate to the detriment of McBride's ability to defend himself. First, law enforcement, aware of the alleged victim's claims that semen ended up on the shirt she was wearing, failed to collect that shirt as evidence. (R. Vol. II pp. 189-190.[4]) Rather, they merely told the alleged victim's mother to bring this critical evidence with her several days later to a forensic interview. (R. Vol. II pp. 237-241, 250-254.) At the forensic interview, the alleged victim's

[4] No dispute can exist that the shirt and any evidence on it was important. Detective Hamlet agreed that they would (or should) have collected a shirt that may have some biological agents on it. (R. Vol. II pp. 189-190.) She also testified that collection procedures generally would not be to wait a few days to collect such evidence. (R. Vol. II p. 191.) She further stated that the longer it takes to collect evidence the higher risk of tampering or disappearance of that evidence. (R. Vol. II p. 199.) Lieutenant McCrea expressly testified that "[i]f proper procedures had been followed, the evidence would have been sent to sled [sic] within a couple of days of being received." (R. Vol. II p. 263, lines 1-3.) But he was not aware of any clothes being sent to SLED, SLED had no record of any such submissions, and no testing results were ever received by law enforcement investigating this matter. (R. Vol. II p. 263.) And, now the shirt is simply gone.

mother was then told to take the evidence to the police station, which she did. (R. Vol. II pp. 237-241, 250-254.)

Somehow, with no explanation whatsoever, this evidence went missing. (R. Vol. II pp. 260-263.) Also without explanation – and, indeed, with the Court's sustaining an objection to defense counsel's questions about this issue – the solitary officer in charge of evidence at the time was no longer employed by the Kingstree Police Department. (R. Vol. II pp. 260-263.) A clear inference existed that this may not have been the first time evidence went missing under this officer's care. (R. Vol. II pp. 260-263.) Where the alleged victim clearly states that physical evidence should be present on a piece of clothing, the disappearance of that clothing, especially when no care was taken to preserve it by law enforcement, eliminates the defendant's ability to mount a defense to the charges against him. This failure amounts to a violation of his Due Process rights under the United States and South Carolina Constitutions.

"To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, **or** (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001) (emphasis added). It is clear from the testimony that if the claims

made by the alleged victim were true, semen would be found on the shirt the alleged victim was wearing at the time.[5]

The value of the shirt to this case was obvious. Indeed, the Solicitor relied on a photograph of the shirt to show that deodorant appeared to be present on one shoulder. No photographs show the presence of any other substance on the shirt.

Without access to the shirt, potentially exculpatory and key evidence, McBride could not properly cross-examine any of the State's witnesses. The exculpatory value the shirt presented would be obvious to anyone aware of the allegations and McBride's denials. Disputing the source, origination of, or existence of the visual markings was made impossible by only permitting photographs showing a single angle or view of the shirt. And, no other means exist to obtain this evidence.

The Circuit Court erred in its attempt to distinguish this case from Cheeseboro by inventing the concept that exculpatory or inculpatory value cannot be determined without some forensic test. (R. Vol. II p. 305.) No dispute can exist that testing the shirt for the presence of semen likely would have provided a definitive answer to whether the victim's allegations were true.

To require some forensic test unfairly places the burden on the defendant to establish the exculpatory nature of evidence to which the

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[5] In addition to stating clearly that semen ended up on her shirt, the alleged victim also stated that she attempted to wipe some off with a tissue she then threw in the bathroom trashcan. Law enforcement failed even to look in that trashcan to see if the tissue could be found. (R. Vol. II pp. 189-191, 326.)

defendant can never gain access because law enforcement lose or destroyed it. Such a test creates an incentive for the spoliation of evidence. Here, forensic investigation of the shirt could have revealed no semen on it at all, raising serious doubts about the alleged victim's credibility.

Moreover, the Court's refusal to allow defense counsel to question law enforcement as to the reason for the evidence officer's separation from employment to determine if his handling of evidence played a role, (R. Vol. II pp. 264-265), denied McBride even the ability to attempt to show bad faith in the handling of this evidence. This line of questioning, contrary to the Solicitor's sustained objection, was clearly relevant to the circumstances surrounding the disappearance of key evidence.

In an attempt to address this serious evidentiary issue, defense counsel requested a jury charge on spoliation of evidence intended to allow the jury properly to consider the significance of the missing evidence.[6] The requested charge explained that the state had "the burden of safeguarding evidence it possessed that could establish that the defendant is innocent or that could raise issues of doubt about his guilt." (R. Vol. I p. 6.) The charge further would have explained to the jury that if the jurors found the evidence "could help establish the innocence of the defendant or create doubt about whether or not he is guilty" they could consider those facts in determining whether the State met its burden. (R. Vol. I p. 6.) The Court refused the

[6] Defense counsel renewed his request for the spoliation charge and objected to the failure to so instruct the jury. (R. Vol. II p. 363.)

requested instruction and did not provide any instruction on spoliation. (R. Vol. II pp. 301-306.)

"To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial." State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302-03 (2002). Under the circumstances of this case, the refusal to instruct the jury on the spoliation issue was erroneous. Moreover, the failure properly to instruct the jury on this issue was prejudicial. The State's case rested entirely on the assertions of the alleged victim. The loss of physical evidence to clearly determine the veracity of those assertions prejudiced McBride.

Unlike Breeze, this case does not involve evidence (narcotics) that the defendant admitted existed. And, contrary to most cases involving the unavailability of evidence to the defendant, the evidence, here, was not disposed of in the ordinary course of the relevant law enforcement department's policies. See, e.g., State v. Breeze, 379 S.C. 538, 546, 665 S.E.2d 247 (Ct. App. 2008). In addition, these cases involve evidence that was not clearly crucial to the case. See, e.g., State v. Adams, 304 S.C. 302, 304, 403 S.E.2d 678, 680 (Ct. App. 1991) (where defendant claimed a due process violation based on lost breathalyzer results that deprived him of the ability to challenge the validity – not the results – of the test).

The Sixth Amendment to the Constitution of the United States guarantees a criminal defendant the right to a trial by jury. U.S. Const. amend. VI. "[T]rial by jury has been understood to require that 'the truth of

every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . " Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)) (emphasis in Apprendi).

Where the missing evidence reasonably could be expected either to prove or disprove the events reported by the alleged victim, there can be no clearer deprivation of Due Process and the very Sixth Amendment right to a jury trial where such evidence is lost. Due to the loss of the shirt, McBride was deprived of the opportunity to have the truth of every accusation determined by the jury. At a minimum, a jury charge permitting a negative inference against the State would have been required.

Under circumstances such as these, the State simply cannot be permitted to mishandle evidence so egregiously and then claim no Due Process violation because the defendant cannot prove the exculpatory character of that evidence. Prosecutors have a constitutional duty, even absent a request by a defendant, "to give the defendant evidence which would raise a reasonable doubt about his guilt." State v. Jackson, 302 S.C. 313, 314-15, 396 S.E.2d 101, 101 (1990) (citing United States v. Agurs, 427 U.S. 97 (1976)).

This duty is completely ignored and elusive if the State can simply choose not to determine or to ignore the exculpatory nature of evidence that obviously carries a strong likelihood of physical evidence – or lack of

evidence that would be exculpatory – lose that evidence and then proceed to trial against the defendant. To permit this verdict to stand, would simply encourage law enforcement to act recklessly or in bad faith to the detriment of the jury trial system and the constitutional protections afforded criminal defendants.

Based on the conduct of the State, McBride is entitled to have his conviction vacated and this charge dismissed. In the alternative, McBride is entitled to a new trial during which he can be permitted a proper opportunity to mount a defense through full cross-examination (as required by the Sixth Amendment to the U.S. Constitution, U.S. Const. amend. VI) of the State's witnesses and with an appropriate jury instruction as to the jury's ability to consider this missing evidence or, at a minimum, complete exclusion of any reference to the shirt or anything that may or may not have been present on it.

B. Due Process and Rule 5 Required Exclusion of the Photograph of the Victim Where The "Photograph" Was Provided to Defense Counsel as a Black Sheet of Copy Paper, Not as the Color Photograph Introduced Into Evidence, and Where the Actual Color Photograph Was Not Even in the Solicitor's File to be Reviewed by Defense Counsel Prior to Trial.

In addition to completely losing the shirt itself, the State also came to trial with a color photograph purportedly of the alleged victim wearing the missing shirt. (R. Vol. I pp. 150-151.) That photo, according to the contentions of the witnesses and the Solicitor, showed deodorant stains

(presumably from McBride) on the shoulder.[7] Defense counsel did not see this photograph until the first day of trial. (R. Vol. I pp. 147-148, 151.) Indeed, the Solicitor stated that she "got the color photographs this morning." (R. Vol. I p. 151, lines 11-19.) Not only did permitting use of this photo violate McBride's due process rights, the failure to produce it until trial violated South Carolina Rules of Criminal Procedure 5(a) and 5(c). SCRCrimP 5.

During arguments on McBride's motion to exclude the photo, it became clear that when the State copied and provided its file materials to the defense, this photo appeared merely as a black sheet of paper with no photo visible. (R. Vol. I pp. 150-151.) The Solicitor responded to this motion by stating that defense counsel could have come to review the file, but later acknowledged that she did not even have the photograph in her file until that morning. (R. Vol. I p. 151.) And, the Circuit Court correctly understood the situation:

> The bottom line is, the defense was provided with, they had the opportunity to inspect. But at the time you gave them the right to inspect, all you had were two black sheets of paper. (R. Vol. I pp. 155-156.)

The Circuit Court described a duty to weigh the prosecutor's duty to produce against the defense's duty to inspect. Here, McBride contends that not only should that balancing have come out in his favor, but that at any time prior to the first day of trial, the prosecution had nothing to inspect, just "two black sheets of paper."

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[7] The photos did not show, nor did anyone claim they showed, any evidence of semen on the shirt.

The Circuit Court admitted that things like the previously undisclosed photograph "bother judges immensely." (R. Vol. I p. 163, lines 2-4.) The judge elaborated as follows: "I want to make the record to clear that these irritate me to no end where law enforcement pops up with stuff at the last minute." (R. Vol. I pp. 163, line 25 to p. 164, line 2.) Nonetheless, the judge allowed the photo. (R. Vol. I p. 163.)

The United States Supreme Court recognizes a defendant's "area of constitutionally guaranteed access to evidence." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). "[D]efendants have the right to request and obtain from the prosecution evidence that is material to the guilt of the defendant or relevant to the punishment to be imposed." State v. Jackson, 315, 396 S.E.2d 101 (1990) (citing Brady v. Maryland, 373 U.S. 83 (1963) (emphasis added)). Here, the Solicitor introduced, over the objection of defense counsel, a photograph that was not provided to McBride prior to trial. Used to corroborate at least part of the alleged vicitm's testimony, this evidence was clearly material to the guilt of the defendant. Having not been provided at any point prior to trial, it should have been excluded.

Moreover, the State was permitted to use this photograph showing only a portion of the shirt the alleged victim was wearing. Without the availability of the shirt, or at least photographs showing the entire shirt, allowing this evidence is akin to permitting one side to play selected parts of a recording or read selected parts of a statement or transcript into the record without the ability of the defendant to demand the entirety of the evidence be

included in order to provide the jury completeness and context. See, e.g., S.C. Rule of Evidence 106. The State simply cannot be permitted to select a portion of an item of evidence to introduce in an attempt to bolster one of its witness' credibility while denying to the defendant access to the rest of that item to determine if it actually supports or contradicts the witness.

The State used this surprise evidence selectively to bolster the alleged victim's testimony.[8] This use was improper and violated McBride's fundamental Due Process rights. Not only was he unable to examine the actual shirt – lost by law enforcement – but he was now forced to respond to a photograph not seen until the day of trial and, indeed, not even in the Solicitor's file for review by defense counsel.

The Circuit Court determined that the proper evaluation of this issue was a balancing of state compliance with Rule 5 and McBride's rights. (R. Vol. I p. 158, lines 5-15.) Rule 5(g), however, expressly addresses this evaluation and permits waiver of the rule's production requirements only upon a showing of good cause. SCRCrimP 5(g); see also Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012). No good cause was argued or shown. The Circuit Court erred in permitting the introduction of this photograph, prejudicing McBride, and requiring a new trial.

C. The Circuit Court Erred in Prohibiting Defense Counsel from Cross-Examining Law Enforcement Witnesses on Their Investigation of This Matter, Specifically as Relates to the Investigatory Tools Provided to Law Enforcement by S.C. Code § 16-3-750.

[8] Had law enforcement kept and tested the shirt for all substances, as was normal procedure, no photo would have been necessary.

Crimes like criminal sexual conduct often come down to the veracity of the parties. Physical evidence is not always available and direct evidence, such as third party witnesses, rarely exists. For that reason, the South Carolina General Assembly recognized existing common law that defendants could be convicted on these charges even in the absence of corroborating testimony to support the accuser's allegations. See S.C. Code § 16-3-657. That said, in further recognition of the issues created in such uncorroborated cases, the legislature clearly set out to provide appropriate tools for law enforcement to evaluate the truthfulness of these serious allegations.

> A law enforcement officer, prosecuting officer, or other governmental official may request that the victim of an alleged criminal sexual conduct offense as defined under federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

S.C. Code § 16-3-750. Admittedly, this statute does not require law enforcement to administer a polygraph; nor does it appear to require an alleged victim to submit to such a test. But it does specifically provide a useful investigative tool to determine the truthfulness of an accuser in situations like this one.

Particularly given the other issues surrounding the police department's handling of this investigation, McBride was entitled to have his counsel question the State's investigative witnesses about their knowledge of this statute, the availability of a polygraph for use during their investigation, and to

determine whether use of this tool was ever considered and the reasons why or why not. Defense counsel was prohibited from even asking generically whether any means existed to determine the validity of the allegations. (R. Vol. II p. 204.) There appears to be no evidentiary basis on which the Court excluded this questioning. (R. Vol. II pp. 204, 212, 296-300.)

The Circuit Court, ruling on the defense motions for directed verdict and/or mistrial, itself realized the significance of this issue. "Quite candidly, I hope that of course if Mr. McBride is found not guilty then the matter is over. But if he is found guilty, I feel confident this will go up on appeal." (R. Vol. II p. 299, lines 18-21.) This realization stems from the obvious discomfort with a statutory scheme that permits a no corroboration instruction, but prevents the defendant from inquiring of law enforcement if they used the tools available to them to verify the alleged victim's statements.

D. McBride's Due Process Rights Were Violated When The Court Instructed the Jury That No Corroboration Was Required to Support the Alleged Victim's Testimony, Where Such Instruction Had The Effect of Impermissibly Shifting The Burden of Proof, Confusing the Jury, and Elevating the Importance of One Witness' Testimony Over Others In Contravention of McBride's Right Against Self-Incrimination.

It is correct that the current law of South Carolina provides that "[t]he testimony of the victim need not be corroborated in prosecutions" for criminal sexual conduct. S.C. Code § 16-3-657. The common law previously recognized this principle. Including this concept in instructions to the jury in this case, however, unconstitutionally shifts the burden of proof away from the

State and to the defendant.[9] Given the totality of the circumstances, prior case law considering similar instructions but lacking the other issues present in this case, is not dispositive. See generally, State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

As the Court in Rayfield noted, at least one purpose of the no corroboration statute was to recognize

> that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator . . . .

Rayfield, 631 S.E.2d at 249 (emphasis added). Here, however, physical evidence should have existed; and absent the deficient investigation and loss of evidence, that physical evidence likely would have provided an answer to whether the crime was committed as described by the victim. In the light of the admission of some evidence (e.g., photographs of the missing shirt), and the exclusion of other evidence (e.g., lack by investigators of their full set of investigatory tools), adding on the no corroboration instruction virtually ensured confusion of the jury. Given the lack of other evidence, repetition of

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[9] As defense counsel argued, the statute is "basically saying, anyone can accuse anyone and the actual accusation is enough. When someone is facing a depravation of a liberty to the extent of 25 years to life, we may have a due process problem here." (R. Vol. I pp. 46-57.)

the no corroboration charge, and the lack of other safeguards, the Circuit Court violated McBride's Due Process rights by including this jury charge.[10]

Even if facially constitutional to the extent that juries in determining credibility are rarely required to find corroborating evidence in order to believe a witness' testimony, that the law provides this no-corroboration rule does not mean that instructing the jury of this legal standard is proper under these circumstances. See S.C. Const. Art. V § 21; see also State v. Simmons, 209 S.C. 531, 41 S.E.2d 217 (1947).

The jury charges, as given, were confusing to a reasonable juror in terms of the jury's assessment of the alleged victim's testimony. The Supreme Court of Indiana perhaps described the problem with such instructions best:

> The challenged instruction is problematic for at least three reasons. First, it unfairly focuses the jury's attention on and highlights a single witness's testimony. Second, it presents a concept used in appellate review that is irrelevant to a jury's function as fact-finder.[11] Third, using the technical term

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[10] To the extent one reads the existing precedent as supporting the jury charge given, which McBride contends is incorrect given the totality of the circumstances, the best approach is the one proffered by Justice Pleicones in his separate opinion in Rayfield, including the following propositions: "Some principles of law, however, are not to be charged to a jury. [citation omitted] . . . . we did not hold in Schumpert that this no-corroboration charge was proper. Rather, '[t]aking the charges as a whole, we [found] no reversible error.' [citation omitted] . . . I would hold that it is error for a trial court to charge the jury that an alleged victim's testimony needs no corroboration." Rayfield, 631 S.E.2d at 249. Like the court in Indiana, Justice Pleicones further recognized that the no-corroboration was more a standard for courts to apply in considering directed verdicts or on appeal. Id.

[11] That corroboration is not necessary is a legal principle to be used by courts in determining sufficiency of verdicts. Its inclusion in jury charges confuses the already appropriate charges that the jury is the decider of witness veracity generally. Unless instructed that corroboration is required, as is the case is

> "uncorroborated," the instruction may mislead or confuse the jury.

Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003). In Ludy, the jury was instructed that "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." Id. at 460. Similarly, the jury in McBride's case was charged that "[t]he testimony of victims in criminal sexual conduct cases need not be corroborated under the law of this state." (R. Vol. II p. 357, line 24 to p. 358, line 1.)

"A jury instruction must be viewed in the context of the overall charge." State v. Hughey, 339 S.C. 439, 458, 529 S.E.2d 721, 730 (2000) (overruled on other grounds) (citations omitted). "The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." Id. Where one witness' testimony is highlighted as not requiring corroboration, a reasonable juror would be confused and have difficulty determining what that means for evaluation of the other witnesses and the evidence as a whole. Moreover, it seems to infer a greater credibility for the victim witness, a presumed credibility, that is counter to the general law regarding the jury's role in assessing witness credibility and to confuse the State's burden of proof.

"[C]harging this rule carries a strong possibility of biasing the jury against the defendant. No witness's testimony need be corroborated. By

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some limited cases, it is unreasonable to assume a jury would require corroboration.

specifically charging that the alleged victim's testimony need not be corroborated, the trial court singles out the alleged victim and 'appears to express an opinion on her credibility.'" Rayfield, 631 S.E.2d at 251-252 (Pleicones, concurring in part, dissenting in part) (citing State v. Schumpert, 312 S.C. 502, 510, 435 S.E.2d 859, 864 (1993) (Finney, J., dissenting)).

When the giving of this instruction is viewed in the light of the related ruling that did not permit defense counsel to cross-examine law enforcement on the statutorily permitted use of a polygraph, it becomes even more constitutionally troubling. The case now presents a situation where a number of methods of corroboration existed – the shirt, the polygraph – but McBride could point to none of them, or their absence. Clearly, this type of information is relevant, having the potential of creating reasonable doubt in the minds of the jurors and should have been available to be considered by them. Exclusion, particularly when paired with this instruction to the jury, was highly prejudicial to McBride.

Providing an instruction that no corroboration was necessary also casts a shadow on McBride's right not to testify. See U.S. Const. amend. V. The instruction suggests that nothing more than an allegation by a victim is necessary. This inference easily creates a perception on the part of reasonable jurors that unless that testimony is contradicted it is enough. To contradict what allegedly happened in the home when only the alleged victim and McBride were present would require McBride himself to testify. A jury

provided this instruction may, indeed, require a defendant's testimonial denial to reach a verdict of not guilty.

The no-corroboration instruction improperly emphasizes one witness. Such an instruction is not required accurately to charge the jury on the law, given the more general instructions concerning the jury's ability to consider the credibility of all witnesses and to rely on their testimony to establish the facts in a case. As recognized by various judges, the continued use of no-corroboration instructions in cases involving sexual crimes provides no legitimate benefit and serves only to confuse jurors. See People v. Gammage, 828 P.2d 682, 702-704 (Cal. 1992) (Mosk, J., concurring).

III. THE EVIDENCE PRESENTED BY THE STATE WAS LEGALLY INSUFFICIENT TO PROVE THE REQUIRED ELEMENTS OF THE CRIME CHARGED UNDER S.C. CODE § 16-3-655(A)(1).

The jury convicted McBride of first degree criminal sexual conduct with a minor in violation of S.C. Code § 16-3-655(A)(1). That statute, in relevant part, provides the following:

> (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:
> (1) the actor engages in sexual battery with a victim who is less than eleven years of age ....

Based on the facts in this case, "sexual battery" requires evidence of "fellatio . . . or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." S.C. Code § 16-3-651(h). No definition of fellatio exists in the statute. Thus, its ordinary, dictionary definition must be used. Smith v. United States, 508 U.S. 223, 228 (1993). Fellatio is defined as "oral stimulation of the penis."

Merriam-Webster online dictionary (http://www.merriam-webster.com/medical/fellatio). Thus, to have committed this crime, there must be evidence of oral stimulation – contact – between the defendant's penis and the alleged victim's mouth. The alleged victim's testimony does not reveal any fellatio actually occurred. In describing the events for which McBride was charged, she testified as follows:

> Q And then did what?
>
> A He then he grabbed my head. Then he told put my manhood – my mouth on his manhood. And I put – I had my hand on his stomach and then pushed him away from me. And that's when the white stuff and clear stuff came out of his manhood. . . .

(R. Vol. I p. 88, line 22 to p. 89, line 3; see also R. Vol. I p. 113.) Though she testifies that the "white and clear stuff" then went in both her mouth and on her shirt, she never says there was actually any contact between her mouth and the defendant's penis. Nor is any such evidence elicited on cross-examination as to that fact.[12]

Defense counsel moved for directed verdict on this issue at the close of the State's case. (R. Vol. II pp. 309-314.) That motion was renewed at the close of the case and prior to submission to the jury. (R. Vol. II p. 326.) A

---

[12] On cross-examination, the alleged victim did state that "it" went in her mouth, but there is no reference to McBride's penis and, thus, no way to infer the "it" referenced on cross-examination is anything other than the semen she testified to on direct. (R. Vol. I p. 113, line 19 to p. 114, line 3.) Indeed, her testimony reflects that whatever went in her mouth was not McBride's penis or his "manhood" but the stuff that came out of it: "It went in my mouth. That's when the stuff came out of his manhood and went in my mouth." It refers to the stuff – what went in her mouth.

ruling on a directed verdict motion based on insufficient evidence is concerned with the existence or nonexistence of evidence, not its weight. See State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002). Nonetheless, there must be either "direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused" to the crime charged and to be submitted to the jury. State v. Morgan, 352 S.C. 359, 364, 574 S.E.2d 203, 205 (Ct. App. 2002) (emphasis added); see also State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002). Here, no direct evidence exists as to contact or stimulation; rather, the evidence is only that the "white and clear stuff" made contact with the alleged victim's mouth and shirt. Contact with the penis must have occurred for McBride to commit the sexual battery required for the offense for which he was charged.[13]

The State chooses the charges to bring against a defendant. And, the jury is charged and returned a verdict on that charge. Regardless whether the evidence could support some other charge – some crime that did not require evidence of actual contact[14] – in this case a showing of contact is required. "Penal statutes are strictly construed against the State and in favor of the defendant." Morgan, 352 S.C. at 367 (citation omitted). "Words must

---

[13] Defense counsel moved for a new trial under Rule 29 based on this insufficiency of evidence and on other grounds. (R. Vol. II p. 368.)

[14] No request was made by the State to include lesser offenses that may not have required contact. Indeed, charging a lesser offense may have eliminated the solicitor's statutory discretion to charge McBride in Circuit Court and require a filing in Family Court. Having charged McBride under this statute, the State was required to prove every element of that charged offense.

be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." Id.

Here, strictly construing the statute against the State requires an interpretation that fellatio, as used in S.C. Code § 16-3-651(h)'s definition of sexual battery, requires actual contact between the alleged victim's mouth and the defendant. See Morgan, 352 S.C. at 372-73 (making it clear that for the sexual battery of cunnilingus to occur – the female equivalent of fellatio – contact between the mouth and the genitals is, by definition, required). For sufficient evidence to exist it must be direct, which it is not, and if circumstantial, it must be substantial, which it is not. McBride was entitled to, and the district court erred in not granting, directed verdict in this matter and on this charge.

"[A] trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254 (2001).

IV. DEFENDANT'S MIRANDA RIGHTS WERE VIOLATED REQUIRING EXCLUSION OF ALL EVIDENCE OF STATEMENTS MADE BY MCBRIDE TO LAW ENFORCEMENT.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself . . ." U.S. Const. amend. V. A very brief Jackson v. Denno, 378 U.S. 368 (1964) hearing was held before the Circuit Court. (R. Vol. I pp. 18-46.) The Circuit Court did exclude a portion of McBride's statement, but no legal reason exists to exclude only a portion of such a statement while permitting

introduction of other portions. The statement was either given freely and voluntarily or it was not.

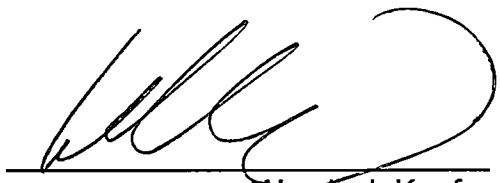
As the Circuit Court explained, "I just don't believe that someone should be put in a situation where their option is freedom to leave when they are in a place they have an absolute right to be; that being their own habitation." (R. Vol. I p. 45, lines 14-17.) This case does not present the situation of a student in the principal's office, In re Dolshagen, 280 S.C. 84, 310 S.E.2d 927 (1984). Nor is the situation of police questioning at the scene of an accident or at the police station. This case involved a minor, in his home being questioned by uniformed officers with multiple other units outside. (R. Vol. I pp. 18-45.)

Even if technically free to leave, McBride's only option was to leave his home and go to some other location. Especially a child of sixteen, with no prior criminal history, cannot reasonably have been expected to know he had a choice not to speak to the officers. Just as the Circuit Court excluded a portion of the statement, the entire statement should have been excluded, as well as any reference to it.

CONCLUSION

For the foregoing reasons, Appellant Justin McBride respectfully requests this Honorable Court reverse his conviction and order either dismissal of the charge on which he was convicted or a new trial.

Respectfully Submitted,



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June 22, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

Case No. 2013-002391

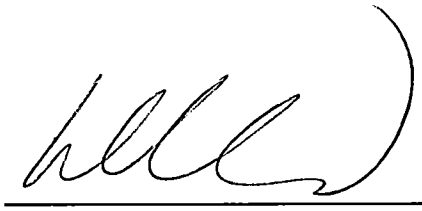
The State of South Carolina, ... Respondent,

v.

Justin McBride, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief and Final Reply Brief on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on 6-25-15, 2015, addressed to attorneys of record, David Spencer and Alan McCrory Wilson at the S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211 and Ernest Adolphus Finney, III at 215 N. Harvin Street, Sumter, South Carolina 29150:



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Williamsburg County
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Appellate Case No. 2013-002391

THE STATE,

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Appellant.

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

Appellant McBride was indicted for first-degree criminal sexual conduct with a minor and assault with intent to commit first-degree criminal sexual conduct with a minor in December 2010. McBride was tried by jury before the Honorable John C. Hayes, III, on October 28-30, 2013. McBride was found guilty of criminal sexual conduct with a minor in the first degree and acquitted of assault with intent to commit criminal sexual conduct with a minor in the first degree. Judge Hayes sentenced McBride to twenty-five years' imprisonment.

STATEMENT OF FACTS

Victim was just shy of her tenth birthday when she was sexually assaulted by Appellant McBride. She was thirteen years old at the time of the trial. ROA. p. 81. McBride was sixteen years old at the time he sexually assaulted Victim, who was his cousin. ROA. p. 100.

Victim was attending summer school. For the first time, she was riding the bus, which she was excited about. It was her second day of summer school and her second day riding the bus. The other children on her bus told Victim that her mom was not home, which made Victim upset. She went to a neighbor's house, but when she saw the neighbor had company, she went to her Aunt Tina's house instead. Aunt Tina is McBride's mother. She knocked on the door and McBride answered and let her in.[1] She was alone in the house with McBride. McBride was watching television. Victim commented that it was a show with bad words, so they should turn the television off. That prompted McBride to begin a violent sexual assault. ROA. pp. 82-86.

McBride took out his penis and told Victim to "jerk it." ROA. p. 87, lines 5-6. He grabbed Victim's hand and put it on his penis. McBride grabbed Victim's head and pulled her toward his penis. ROA. pp. 87-88. Victim testified as follows on this point:

> Q: He grabbed your head hard?
>
> A: Yes, ma'am.
>
> Q: And pulled it down to his manhood; is that right?
>
> A: Yes, Ma'am.

[1] Detective Trena Hamlet noted that McBride's and Victim's houses were side by side with nothing but a small patch of grass between them. ROA. p. 171, lines 4-6.

> Q: And then did what?
>
> A: He then he grabbed my head. Then he told put . . . my mouth on his manhood. And I put – I had my hand on his stomach and then pushed him away from me. And that's when the white stuff and clear stuff came out his manhood. It was in my mouth and on my shirt. And I ran in the bathroom.
> Q: You said you saw and white and clear stuff come out of his manhood?
>
> A: Yes, ma'am.
>
> Q: And it went in your mouth?
>
> A: Yes, ma'am, on my shirt.
>
> Q: What did that taste like?
>
> A: Nasty.
>
> Q: And it went on your shirt. Is that a yes?
>
> A: Yes, ma'am.
>
> Q: Okay. And then you did what?
>
> A: Then I ran into the bathroom and wipe it off, and spit it out of my mouth.

ROA. p. 89, lines 5-16. Victim testified she spit out in the bathroom sink and wiped the semen off her shirt with a tissue. She put the tissue in a trash can. ROA. pp. 89-90.

When Victim came out of the bathroom, McBride was spraying perfume all around the living room. ROA. p. 92. McBride tried to pull down her pants; he would pull them down, and Victim would pull them back up. ROA. p. 92. Victim testified that McBride tried to put his penis in her butt. Victim testified it hurt. ROA. p. 92. line 25 – p. 93, line 8.

Victim pushed McBride off her, and she ran to the front door. McBride blocked

her and "sucked" his teeth. She instead ran for the back door and ran out of the house. She went home and kicked on the door. Her mother (Mother) was there. When Mother asked what was wrong, Victim did not reply. She was scared McBride would come over to the house. But Mother smelled "man perfume" and went next door. Victim testified she had deodorant on her shirt. She testified it was from when McBride had his arm around her neck. She hurt the next day when she was making a bowel movement. ROA. pp. 93-100. Specifically, Victim testified she yelled to her mother she could not use the bathroom because "[h]e put his manhood in the back of my butt." ROA. p. 99, lines 3-8.

On cross-examination, Victim explained the following:

> Q: So he grabbed your head like this?
>
> A: No, with his hand.
>
> Q: With his hand? Where was the rest of his arm?
>
> A: Still back here.
>
> Q: Okay. So he comes over like this and then pulled – grabbed your head with his hand like this?
>
> A: Yes, sir.
>
> Q: And pushes down?
>
> A: Yes, sir.
>
> Q: Now does it go in your mouth?
>
> A: Yes, sir.

ROA. p. 113, lines 1-13. Victim verified her answer upon further cross-examination:

> Q: Now while the solicitor was asking you earlier, isn't it correct that you stated that it never went in your mouth?
>
> A: It went in my mouth. That's when the stuff came out of

his manhood and went in my mouth.

ROA. p. 113, lines 19-24.

Detective Trena Hamlet responded to a call regarding a female victim at Victim's residence. Several other officers and family members were already present. While speaking with Victim and her family, Detective Hamlet noticed a white smear on the shoulder of Victim's shirt. After she spoke with Victim, Detective Hamlet spoke with McBride to hear his side of the story. ROA. pp. 168-171.

Detective Hamlet testified that McBride gave the following statement:

> He opened the door and asked why was she over there. Stated that her mom was not at home. She sat on the couch and they were watching TV. He stated that at one point he got up to go to the restroom. And while he was in there, she came in on him. He concealed, tried to conceal himself from her, because he was in the midst of using the restroom. Yelled at her to get out. And she went back in the living room and sat down. And shortly thereafter, she wanted to leave. He said that she didn't want to go to front door because a bug was on the door, so she went to go out the back. The back door was locked. So he had to unlock it. She couldn't unlock it, he had to unlock it for her to leave.

ROA. p. 173, line 13 – p. 174, line 2. Detective Hamlet testified to the statement without objection from McBride.

On cross-examination, McBride elicited the following testimony from Detective Hamlet:

> **Q: Did the second interview [with Victim], did it involve possible penetration?**
>
> **A: Yes.**
>
> **Q: Did the first one indicate that at all?**

A: Orally.

Q: Okay. What about on her bottom?

A: Not on the first one.

Q: So it changed.

A: It was added.

ROA. p. 202, lines 11-19 (emphasis added).

Mother testified she arrived at home on time for the bus, or at least she thought so. However, Mother did not hear the bus. She became agitated when her daughter did not come home – more so when the middle school and then high school buses came (Victim's bus should have arrived first). But after a while, she was startled by Victim kicking and beating on the door. Mother became concerned because Victim was not talking, even after she asked Victim where she had been. Victim was excited to ride the bus the day before. But now Victim walked by Mother without discussion. Mother grabbed Victim and smelled the cologne. Victim pointed to her Aunt's house when Mother inquired about where she had been. Mother testified Victim also had a stain on her shirt that smelled like deodorant. ROA. pp. 217-224.

Mother went next door and asked McBride what happened. McBride claimed Victim walked in the bathroom on him. Mother told McBride that she did not believe him. Mother decided it was best to leave at that point, since McBride's mother was not home. Another of Mother's sisters (not McBride's mother) called police. ROA. pp. 226-229.

Later that night, Mother was trying to finish her school work – she was having trouble due to the stress of the day – when she heard Victim scream from the bathroom.

Victim told Mother it hurt when she was trying to go to the bathroom. ROA. pp. 229-230; p. 235.

Law enforcement failed to take Victim's clothing during the interview. Mother and her sister put Victim's clothing in a bag and were told to bring the bag with them to the Durant Center in Florence when they brought Victim for her appointment. The Durant Center told them to take the bag of clothes to the police. She left the clothes with an officer at the Kingstree police station. ROA. pp. 237-240; p. 250.

Lieutenant Thomas Dean McCrea testified that the officer described by Mother as the officer receiving the clothes must have been Sergeant Grant Huckabee, who was an investigator, K-9 handler, and evidence custodian at the time. The only other person with access to the evidence room was Chief Ford. Both Huckabee and Ford are no longer employed with the Kingstree Police Department. Lieutenant McCrea was under the impression the clothing was sent to SLED for testing, but no record of this exists, and it appears the clothing was lost. This was not the first instance of Huckabee losing evidence before. No evidence intake sheet was located. ROA. pp. 261-26.

Samantha Cooper, Victim's aunt, testified she confronted McBride with Victim's allegations, and he told her he did not mean to do it. Cooper understood McBride's comments to be a confession. Cooper was enraged. She went running after McBride, and he ran inside his house. Cooper collected herself sufficiently enough to walk away rather than act on violent urges. Thereafter, she called the police. ROA. pp. 267-274.

ARGUMENT

I.

Appellant's argument that the Circuit Court lacked jurisdiction was never raised below, and by statute, jurisdiction was in General Sessions, and the argument that prosecution of Appellant in General Sessions violated his constitutional rights is both incorrect and not preserved for review.

McBride claims the trial court did not have subject matter jurisdiction over him for criminal sexual conduct with a minor in the first degree and assault with intent to commit criminal sexual conduct with a minor in the first degree. Of course, General Sessions has the power to hear criminal trials for those charges. Further, McBride bases his argument on a statutory argument that is contradicted by case law and the plain meaning of the applicable statutes. McBride, for the first time on appeal, argues alternatively that if there is jurisdiction, then it is unconstitutional. This claim also lacks merit.

Appellant relies on S.C. Code Ann. § 63-19-1210 to argue the trial court should have remanded the matter to family court. Section 63-19-1210 requires the following:

> (1) If, during the pendency of a criminal or quasi-criminal charge against **a child** in a circuit court of this State, it is ascertained that **the child** was under the age of seventeen years at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case . . . to the family court of competent jurisdiction, except in those cases where the Constitution gives to the circuit court exclusive jurisdiction or in those cases where jurisdiction has properly been transferred to the circuit court by the family court under the provisions of this section.

(Emphasis added). "Child" is defined as follows under S.C. Code Ann. § 63-19-20(1):

> (1) "Child" or "juvenile" means a person less than seventeen years of age. "Child" or "juvenile": does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen year or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

Criminal sexual conduct with a minor in the first degree is a felony with a penalty of twenty five years' imprisonment or life imprisonment. S.C. Code Ann. §16-3-655(D)(1). Therefore, under the plain language of the statute, McBride was not a child when he sexually assaulted his cousin.

While McBride suggests uncertainty on the issue of jurisdiction in his brief, the question was already soundly answered. The Supreme Court found that a sixteen year old charged with A, B, C, or D felonies is not a "child" as defined by statute and, therefore, may be charged in circuit court without first bringing the charges in family court. State v. Graham, 340 S.C. 352, 532 S.E.2d 262 (2000).

Additionally, McBride conflates an issue of personal jurisdiction with an issue of subject matter jurisdiction. Subject matter jurisdiction is merely the power for a court to hear a certain class of cases. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). General Sessions has the power over criminal charges such as criminal sexual conduct with a minor in the first-degree and assault with intent to commit criminal sexual conduct with a minor in the first-degree. On the other hand, the applicability of the Children's Code to a particular person is a matter of personal jurisdiction. Shedden v. State, 265 S.C. 334, 338, 218 S.E.2d 421, 422 (1975) ("It has been held that a juvenile may waive

his right to be treated as such either by his failure to plead his age or by entering a guilty plea."); Ex parte Cannon, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009) ("Personal jurisdiction may be waived, but subject matter jurisdiction may not be waived.").

In the instant case, no objection to having the matter heard in General Sessions, including any accompanying constitutional infirmities, was raised to the trial court. Accordingly, this whole argument is not preserved for this Court's review. An argument not raised to and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Even constitutional issues must be raised below to be preserved. State v. Byram, 326 S.C. 107, 112-13, 485 S.E.2d 360, 362-63 (1997) (a constitutional issue must be presented to the trial court to be preserved for review); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998) (holding failure to raise constitutional issue at trial precluded its consideration on appeal). Accordingly, this Court should not review this issue.

Further, the statute is undoubtedly constitutional. The protection of family court to juveniles is provided by our legislature as a privilege, and not as a matter of right. State v. Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980); see also C.J.S.2d Constitutional Law § 1432 ("Courts have upheld statutes divesting a juvenile court of jurisdiction of

proceedings against children of a specified age for particular violations or crimes . . . ."). No constitutional infirmity exists where a state has determined a class of offenses requires the juvenile to be treated as an adult. See Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) (noting "several of our sister circuits have upheld the constitutionality of statutes similar to Florida's which permit juveniles to be treated as adults without a hearing in certain instances"). In the instant case, McBride committed an offense the legislature ranks high in terms of severity. It is one of the few non-homicide crimes to be punishable by up to life imprisonment. McBride violently assaulted a cousin living right next door to him in such a manner that evidences his danger to society and requires long-term incarceration. No constitutional issue exists in the legislative determination that sixteen-year-olds who rape children under the age of eleven should be prosecuted as adults. General Sessions had jurisdiction under due process of the law over McBride's charges.

II.

The trial court did not err in declining a spoliation charge and Appellant was not entitled to dismissal based on lost evidence where no evidence indicates law enforcement acted in bad faith or the lost evidence had exculpatory value. (Appellant's Issue II. A.)

McBride argues that his due process rights were violated because the Victim's shirt was lost by law enforcement and that he was entitled to a spoliation instruction. McBride does not allege bad faith on the part of law enforcement and no evidence of bad faith exists. Further, the lost evidence did not have apparent exculpatory value. Finally, the requested charge is an unconstitutional charge on the facts and was improper.

McBride was not entitled to dismissal of the charge or exclusion of the photograph of the shirt. The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 702 S.E.2d 395, 404 (Ct. App. 2010) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991)). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Moses, 702 S.E.2d at 403.

Youngblood is factually on point with this matter. In Youngblood, clothes from the child-victim in a sexual assault case were not properly refrigerated. Id. at 53. Experts for Arizona and the defendant confirmed that semen on the clothes could have been

tested if refrigerated properly. Id. at 54. In that case, unlike the present case, identity was an issue. The Arizona Court of Appeals reversed, finding, "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process." Id. (citation and internal quotation marks omitted). Note the Arizona Court of Appeals holding closely tracks McBride's argument. Further note, as explained below, the Arizona Court of Appeals decision was reversed.

Youngblood held as follows:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interest of justice most clearly requires it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of the law.

Id. at 58.

In the instant case, no evidence suggests law enforcement acted in bad faith. Additionally, it is speculative at best that the shirt contained exculpatory evidence. See United States v. Agurs, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."). Accordingly, the issue lacks merit.

Additionally, McBride sought a spoliation instruction. Such an instruction is tantamount to a prohibited charge on the facts. S.C. Const. Art. V, §21 ("Judges shall not

charge juries in respect to matters of fact, but shall declare the law."). In that vein, the trial court properly refused to charge the jury on "adverse inference." South Carolina case law indicates that in criminal cases, jury charges of this nature, on behalf of the State or the defense, are "not warranted except in the most unusual of circumstances." State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) ("[W]e entertain grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness."); see also State v. Simmons, 267 S.C. 479, 482, 229 S.E.2d 597, 598 (1976) ("Even greater caution should be exercised by the courts in permitting an adverse inference comment in criminal proceedings than in civil proceedings.") (citations omitted); see also State v. Breeze, 379 S.C. 538, 547, 665 S.E.2d 247, 252 (Ct. App. 2008) (citing Simmons favorably but declining to decide whether a spoliation charge was warranted; instead this Court found no prejudice from any error in declining spoliation charge). Accordingly, the trial court did not err in declining to instruct the jury as McBride requested.

III.

Since no discovery violation occurred, the subject photographs were available for inspection, and there was no prejudice from the imagined violation, the trial court did not err in allowing the photographs to be admitted into evidence and in declining to grant a mistrial (Appellant's Issue II. B.).

McBride complains the prosecution violated Rule 5, SCRCrimP, by not making a better copy of the photographs depicting Victim wearing the shirt bearing the deodorant stain. McBride also makes a vague due process claim. The prosecution complied with Rule 5, McBride was not denied due process, and further, McBride was not prejudiced by the perceived violation.

Prior to the photographs' admission and out of the presence of the jury, McBride objected to the photographs. McBride remonstrated: "we were provided with a document that was black – blank. Well it wasn't blank, excuse me. It was black. It was a no color photo. The one that they're looking to place into evidence is a colored photo." ROA. p. 141, lines 9-13. McBride's counsel confirmed his law firm received discovery: "The law firm was able to acquire documents in regards to the case itself, which included these dark photographic images which you cannot make out." ROA. p. 141, lines 22-25.

McBride's counsel provided further explanation making clear he was aware of the existence of photographs he needed to inspect: "We have never been provided the colored photos in this particular case that we can actually view. We knew there was an image there. We didn't know what it was." ROA. p. 142, lines 16-19. Despite the fact counsel knew there were photographic images that were apparently difficult to make out, counsel never attempted to contact the prosecution or law enforcement to seek

information about the photographs or arrange an opportunity to view the photographs.

McBride's counsel was candid that he did not believe the perceived violation was intentional on the prosecution's part. McBride's counsel refreshingly noted the prosecutor's "high professional standards." ROA. p. 143, lines 1-13. McBride's counsel did not complain he needed further preparation due to his belated viewing of the photographs. Instead he complained the photographs might have helped him work out a plea deal with the prosecution. ROA. p. 143, lines 13-23.

The prosecutor noted in both a discovery response to McBride's first attorney, and then to the present counsel, there was reference both to a disk and pictures available for inspection and duplication. ROA. p. 145. Further, the incident report provided to counsel also indicated a white stain on Victim's shirt. ROA. p. 146, lines 8-13. As the prosecutor noted: "It's not as if they had no idea that there were photographs in the case, then all of a sudden in the morning of trial, I spring photographs on them. Judge, we gave them notice two years ago that there were photographs in this case." ROA. p. 152, lines 19-24.

Rule 5 was complied with. Under Rule 5(a)(1)(C):

> (C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

In the instant case, it is apparent that McBride's counsel was made aware there were photographs available for inspection. It is further clear McBride was aware he was

in possession of less than perfect copies of photographs and yet made no attempt to attain better copies or see the originals. Accordingly, the trial court correctly found the State complied with Rule 5. State v. Newell, 303 S.C. 471, 401 S.E.2d 420 (Ct. App. 1991) (where solicitor had open file policy, the defense attorney was allowed to inspect the file, and the defense attorney admitted that he probably inspected the file, the solicitor substantially complied with Rule 5).

Further, the trial court has discretion to determine what remedy, if any, is necessary to protect the defendant's rights. Rule 5(d)(2), SCRCrimP, states that if a party fails to comply with Rule 5, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or it may enter such other order as it deems just under the circumstances. Rule 5(d)(2), SCRCrimP; State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996).

The remedy, or determination that no remedy is required, will not be reversed absent an abuse of discretion. See Newell, 303 S.C. at 476, 401 S.E.2d at 423 (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 261 at 16 (2d ed. 1982) (adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial court abused its discretion)).

In the instant case, McBride was unable to demonstrate actual prejudice from the purported violation. "A violation of Rule 5 is not reversible unless prejudice is shown." State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). McBride did not seek a continuance, did not state the need for further investigation or preparation, and failed to note the need for any additional witnesses. Indeed, McBride failed to indicate how the time he already had prior to the photograph being admitted was not sufficient to view the

photographs. It was just two photographs, all counsel had to do was look at them. See State v. Lunford, 318 S.C. 241, 456 S.E.2d 918 (Ct. App. 1995) (finding no reversible error where defense counsel did not seek additional time to study materials and prepare for further cross-examination); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (finding no abuse of discretion in trial court's denial of motion to suppress following late disclosure where defendant was permitted to view and copy the State's file and defendant never requested a recess in order to review the file); State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (subsequent history omitted) (finding the state's failure to produce discovery material consisting of a taped interview with the prosecution witness until the morning jury selection began did not warrant a dismissal or a mistrial where the trial court allowed defense counsel to listen to the tape before the witness took the witness stand and the trial court delayed cross-examination until the next day); Gorham v. Wainwright, 588 F.2d 178 (5th Cir.1979) (denying the defendant's mistrial motion and holding the defendant was not prejudiced by the prosecution's failure to turn over certain reports prior to trial because, although defense counsel requested and received a ten minute recess to review the new evidence, he did not request a continuance); 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 19.5, at 545-46 (1984) (a defendant's failure to request a continuance when a disclosure of exculpatory evidence is first made at trial "is often viewed as automatically negating any claim of actual prejudice.").

As to McBride's ambiguous Brady or due process argument, it simply lacks substance. The evidence is not exculpatory. See State v. Anderson, 407 S.C. 278, 287, 754 S.E.2d 905, 909 (2014) ("Favorable evidence is either favorable exculpatory

evidence or favorable impeachment evidence."); State v. Carlson, 363 S.C. 586, 609, 611 S.E.2d 283, 295 (Ct. App. 2005) ("Exculpatory evidence is that which creates a reasonable doubt about the defendant's guilt.") (citation omitted). The "violation" did not leave McBride with inadequate time to prepare. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998) ("In a Brady analysis, information is not deemed 'material' if the defense discovers the information in time to adequately use it at trial.").

In the instant case, there was no Rule 5 violation, the trial court did not err in denying the motion for mistrial, and there is no prejudice accruing from the perceived Rule 5 violation. Further, no due process violation occurred. Rule 5 was available as a matter of procedural due process, and a remedy short of dismissal or suppression of the photographs might have been available if McBride sought anything other than a windfall.

IV.

The trial court did not err in not allowing Appellant to cross-examine law enforcement regarding whether law enforcement requested Victim to submit to a polygraph examination (Appellant's Issue II.C.).

McBride claims the trial court erred in not allowing him to cross-examine law enforcement about whether law enforcement requested Victim to submit to a polygraph examination. McBride makes this claim based on S.C. Code Ann. § 16-3-750, which allows law enforcement in some cases to request a victim of a sexual assault submit to a polygraph examination. However, the statute does not provide for the admissibility of the request or results of a polygraph examination at a criminal trial, and it would be poor policy for law enforcement to subject child victims of sexual assault to a polygraph examination in all but the most extreme cases. Such a proposed line of questioning was properly excluded by the trial court.

Under S.C. Code Ann. § 16-3-750:

> A law enforcement officer, prosecuting officer, or other governmental official may request that the victim of an alleged criminal sexual conduct offense as defined under federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

Notably, this provision allows law enforcement to request a polygraph examination of the victim only if the credibility of the victim is at issue, which would necessarily be due to the subjective view of the law enforcement agency. Further, no part

of the statute provides for the request, failure to request, or failure to submit to a polygraph be admitted into evidence. Of course, the statute does not provide that the results of the polygraph are admissible.

The right to present a defense is not unlimited, but must "bow to accommodate other legitimate interests in the criminal trial process." Rock v. Arkansas, 483 U.S. 44, 55 (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence regardless of its admissibility under the rules of evidence. State v. Hamilton, 344 S.C. 344, 534 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240, 244 (2001).

Our Supreme Court has held that evidence of the results of a polygraph "or the defendant's willingness or refusal to submit to one is inadmissible." State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999). In Johnson, the Supreme Court found no error in denying a mistrial motion made when a detective testified that he asked the defendant if he would be willing to submit to a polygraph examination, but before the detective testified about the defendant's reply to the detective's request. Id. The Supreme Court, however, found no error because the reference to the polygraph was inadvertent and a curative instruction was provided. Id. at 90, 512 S.E.2d at 801. The Supreme Court has also opined that "the results of polygraph examinations are generally inadmissible because the reliability of the test is questionable." State v. McHoney, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001).

In State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996), Wright argued the results of his polygraph examination, which showed deception, should be allowed to prove his subsequent confession was involuntary. The Supreme Court found the trial court did not abuse its discretion in finding the test was inadmissible "considering the authority against admitting evidence of polygraph examinations and the potential prejudice to appellant." Id. at 256, 471 S.E.2d at 702.

In State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (1985), which was a joint appeal by co-defendants Merriman and Mazzell, Mazzell argued that the trial court erred when it redacted a sentence from the immunity agreement of a cooperating co-defendant, Hogg, that required him to submit to a polygraph examination. Mazzell also sought to introduce the results of the examination that showed deception on the question of whether Hogg killed the victim. Id. at 85-87, 337 S.E.2d at 225-26. The Supreme Court found no error in the trial court's decision to redact the agreement. Id. at 87, 337 S.E.2d at 226.

For evidence to be admissible, it must be relevant. Rule 402, SCRE. Relevant evidence is "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. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004).

Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C.

201, 210, 631 S.E.2d 262, 266 (2006). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App.2004).

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). Thus, a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

"A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71 (Ct. App. 2012).

Whether law enforcement could have requested Victim take a polygraph test has no bearing on Victim's credibility. Of course, the results of a polygraph would not be admissible, which may have some bearing on why law enforcement would not want to conduct such a test. Further, subjecting a child-victim to a polygraph test in all but the most exceptional circumstances would be poor policy. The environment of a polygraph test would likely inhibit disclosure, plus the leading questions inherent in a polygraph

examination run counter to a format that should include non-leading questions in an interview conducted by skilled forensic interviewers. See State v. Michaels, 642 A.2d 1372, 1379 (N.J. 1994) (noting "a sufficient consensus exists within the academic, professional, and law enforcement communities, confirmed in varying degrees by courts, to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.").

Instead, the child was brought to a trained professional for a proper forensic interview. The Legislature's preference for this approach is evidenced by S.C. Code Ann. § 63-11-310, which provides for the establishment of Child Advocacy Centers that in addition to various therapeutic services, are required to provide "(1) a neutral, child-friendly facility for forensic interviews" as a response to child maltreatment. A polygraph examination, which sends a clear message to a victim that they are not believed, is antithetical to this objective.

In the instant case, the trial court did not abuse its discretion in not allowing McBride to cross-examine law enforcement about whether a polygraph examination was attempted because it was not relevant and was far more prejudicial than probative. Pagan, supra.

Further, McBride is unable to show prejudice, since he failed to proffer what testimony would have been provided. State v. Simmons, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004) (finding the failure to raise argument against exclusion of testimony and to proffer witness's testimony, had it been allowed, resulted in the issue not being

preserved for review). A likely answer is that law enforcement did not polygraph the Victim because they believed her.

V.

The trial court did not err in instructing the jury on the legal principle that the testimony of a victim need not be corroborated and the trial court did not unduly emphasize this correct statement of law to the jury. Appellant was not prejudiced due to the extensive instructions on credibility, the jurors' role as finders of fact, and the State's burden of proving guilt beyond a reasonable doubt. (Appellant's Issue II.D.).

McBride argues the trial court should not have instructed the jury on the correct principle of law that the testimony of a victim need not be corroborated. This principle of law is useful for the jury to understand in sexual assault cases, does not diminish the State's burden of proof, and does not mislead the jury. The trial court properly instructed the jury and did not unduly emphasize the lack of a requirement for corroboration. Appellant was not prejudiced by the trial court's instructions.

S.C. Code Ann. § 16-3-657 provides: "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." McBride was charged under S.C. Code Ann. §§ 16-3-655 and 656. In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), the South Carolina Supreme Court found it was not error to charge § 16-3-657 as long as the charge as a whole comports with the law. Relying on Schumpert, the Supreme Court subsequently ruled:

> A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law.

State v. Rayfield, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006).

Noting Rayfield, this Court, in State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011), reviewed a jury instruction on §16-3-657 like the one provided in this case. In Hill, the court's charge consisted simply of the one-sentence statute followed by a charge on credibility. The instruction in the instant case was also one sentence, repeated once more at a later point in the instruction, following the instructions on the elements of the offense. Likewise, in State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011), this Court found the single-sentence charge was proper and not unduly emphasized.

In the instant case, the trial court advised the jury: "The testimony of victims in criminal sexual conduct cases need not be corroborated under the laws of the state." Tr. p. 367, line 24 – p. 368, line 1. After charging the elements of the offenses, the trial court stated: "Again the testimony of the victim need not be corroborated under the laws of this state." Tr. p. 369, lines 14-16. As in Rayfield, Hill, and Orozco, the no-corroboration instruction was not unduly emphasized.

As noted in Rayfield, the instruction serves an important purpose during the jury trial:

> It is not always necessary, of course, to charge the contents of a current statute. Section 16-3-657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated. However, § 16-3-657 does much more. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical and forensic evidence identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear – **not only to the judge but also to the jury** – that a

> defendant may be convicted solely on the basis of a victim's testimony.

Rayfield, 369 S.C. at 117, 631 S.E.2d at 250 (emphasis added). Note the legislature has not corrected Rayfield's interpretation of its statute, despite meeting eight times since the decision was rendered.

As in Rayfield, Hill, and Orozco, the jury in the instant case was charged extensively on reasonable doubt and the State's burden of proof. ROA. pp. 352-354. Like those cases, the jury was also instructed extensively on their role in determining credibility of witnesses and their role as finders of fact. ROA. pp. 354-355. The trial court did not err in the instant case in instructing the correct law.

VI.

The trial court did not err in denying the motion for directed verdict as sufficient evidence of a sexual battery was presented for a reasonable juror to find Appellant guilty. (Appellant's Issue III).

McBride argues there was insufficient evidence of a sexual battery to find him guilty. However, in the light most favorable to the State, evidence was sufficient for a reasonable juror to find McBride guilty of a sexual battery based on evidence of fellatio.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

"A person is guilty of criminal sexual conduct with a minor in the first degree if . . . the actor engages in sexual battery with a victim who is less than eleven years of age . . . ." S. C. Code Ann. § 16-3-655. Sexual battery is defined as "sexual intercourse,

cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." S.C. Code Ann. § 16-3-651(h).

The battery element has been interpreted broadly to cover even the slightest sexual contact. For instance, in State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986), the South Carolina Supreme Court found the six year-old victim's testimony that the defendant touched her with his penis, but could not remember whether he put it inside her body, sufficient to survive directed verdict where she also testified it hurt. The Supreme Court found this was sufficient evidence of an intrusion to survive directed verdict. See also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir. 1989) (opining "neither Mathis nor the statute [section 16-3-651(h)] requires that there be evidence of penetration or intrusion of the victim's body. There must merely be evidence of intrusion by one person into another person's body.").

In State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), the Supreme Court similarly found evidence of an intrusion sufficient to survive directed verdict on the element of sexual battery as to the victim named Betty where Betty testified that Johnson touched Betty and it hurt, and the physical examination revealed an injury inside Betty's vagina. Id. at 85-86, 512 S.E.2d at 799.

In State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002), this Court considered the proper definition of "cunnilingus" as defined by section 16-3-651(h) and ultimately rejected a restrictive definition that would require penetration. This Court observed that the act of cunnilingus is a statutorily enumerated type of sexual battery. In reaching that conclusion, this Court quoted a substantial portion of State v. Ludlum, 281

S.E.2d 159 (N.C. 1981). However, a particularly relevant passage quoted is the following:

> We are satisfied the Legislature did not intend that the vulva in its entirety or the clitoris specifically must be stimulated in order for cunnilingus to occur. To adopt this view would saddle the criminal law with hypertechnical distinctions and the prosecution with overly complex and in some cases impossible burdens of proof. We think, rather, that given the possible interpretations of the word as ordinarily used, the Legislature intended to adopt that usage which would avoid these difficulties.

Morgan, 352 S.C. at 371, 574 S.E.2d at 370-71 (quoting Ludlum at 162-63).

The Nebraska Supreme Court, in interpreting a provision similar to our own, found "where defendant has engaged the victim's mouth with the defendant's penis, the defendant has committed fellatio and thus been guilty of 'sexual penetration.'" State v. Gonzales, 366 N.W.2d 775, 777 (Neb. 1985).

The Minnesota Court of Appeals adopted a dictionary definition which defined fellatio as "oral stimulation of the penis" and determined oral stimulation would mean any stimulation by the mouth, tongue or lips. State v. Ptacek, 766 N.W.2d 355 (Minn. Ct. App. 2009).

In State v. Johnson, 413 S.E.2d 562 (N.C. Ct. App. 1992), two female children testified that the defendant inserted his penis into their mouth, but their lips never touched his penis. The court cited its state supreme court precedent defining fellatio as "contact between the mouth of one party and the sex organs of another." Id. at 563 (internal quotation marks and citation omitted). The court further explained: "The case law clearly holds that fellatio is any touching of the male sexual organ by the lips, tongue, or mouth of another person." Id. at 564. The North Carolina Court of Appeals found evidence to

support conviction, opining "it is logical to infer that when the penis of an adult male is placed in the mouth of a five year old child, a touching of some part of that child's mouth, however slight, will occur." Id. The court concluded as follows:

> Finally, we note that it would be an absurdity under the facts of this case to overturn defendant's convictions for first degree sexual offense. All the evidence points to an unwarranted and unwelcomed invasion by the defendant's penis into the mouths of these little children. The jury found that such activity occurred.

Id.; see Beltz v. State, 980 P.2d 474, 476 (Alaska Ct. App. 1999) (rejecting dictionary definitions advanced by appellant suggesting requirement of sexual stimulation and approving a dictionary definition defining fellatio as "a sexual activity involving oral contact with the penis"); State v. McParlin, 422 A.2d 742, 743 n.2 (R.I. 1980) (noting definition of fellatio as "the offense committed with the male sexual organ and the mouth" cited in Black's Law Dictionary 743 (4th ed. Rev. 1968)); Travis v. State, 98 A.3d 281, 287 (Md. Ct. Spec. App. 2014) (finding "[f]or the appellant to place his penis inside the lips and in contact with the teeth of the victim qualifies as oral-genital contact within the contemplation of the term 'fellatio'").[2]

In the instant case, McBride contends there is no evidence of oral contact or stimulation with his penis. On cross-examination, Victim explained the following:

> Q: So he grabbed your head like this?
>
> A: No, with his hand.

[2] Nor should actual penetration of the mouth be required to constitute fellatio. See In re S.M., 666 A.2d 177, 181 (N.J. Super. Ct. App. Div. 1995) ("We conclude that placing one's mouth on the penis of a male victim without inserting the victim's penis into the mouth falls within the legislature's proscription of prohibited acts. We conclude that the public is reasonably apprised of the legislative intent based upon concepts of common intelligence and ordinary human experience." (citation omitted)).

Q: With his hand? Where was the rest of his arm?

A: Still back here.

Q: Okay. So he comes over like this and then pulled – grabbed your head with his hand like this?

A: Yes, sir.

Q: And pushes down?

A: Yes, sir.

Q: Now does it go in your mouth?

A: Yes, sir.

ROA. p. 113, lines 1-13. Obviously, from context, McBride was referring to his penis when asking if "it" went into his mouth. His intention was verified when he tried to argue to Victim that this was inconsistent with her direct examination. However, Victim verified her answer as follows:

Q: Now while the solicitor was asking you earlier, isn't it correct that you stated that it never went in your mouth?

A: It went in my mouth. That's when the stuff came out of his manhood and went in my mouth.

ROA. p. 113, lines 19-24.

Additionally, cross-examination of Detective Hamlet confirmed that Victim reported oral penetration. ROA. p. 202, lines 11-15. Finally, the jury could logically infer that oral stimulation caused McBride to ejaculate absent evidence of another form of contact at that moment. Put in the light most favorable to the State, direct evidence supports the conviction, and the trial court did not err in denying the motion for directed verdict.

VII.

McBride was not subject to custodial interrogation and therefore did not need to be advised of his rights, and further, McBride received the only relief he requested, so no issue remains for this Court to review. Additionally, McBride did not renew any objection to his statement before the jury and any error is harmless beyond a reasonable doubt. (Appellant's Issue IV).

McBride dedicates little more than a page of his brief to argue that his Miranda[3] rights were violated. The reason for his truncated analysis may lie in the fact that the issue is clearly unpreserved. McBride successfully convinced the trial court to strike a portion of the statement and did not object when the remainder was published to the jury. This Court should not review the issues. Further, the statement was not the result of custodial interrogation, so Miranda does not apply.

During the pre-trial hearing, Detective Hamlet testified she went to McBride's house after speaking with Victim. ROA. p. 23. She spoke with McBride after getting permission from McBride's mother. ROA. pp. 33-34. Detective Hamlet explained she did not read McBride Miranda rights because he was not under arrest and because "[w]e were just trying to sort out who, you know, what happened." ROA. pp. 33-34 (direct quote, ROA. p. 34, lines 21-22). She testified that McBride's mother was present the whole time. Detective Hamlet testified McBride was not under arrest, not placed in handcuffs, and free to leave at any time. ROA. pp. 23-25. Detective Hamlet testified the conversation took place for roughly five to ten minutes. ROA. pp. 24-25.

Detective Hamlet testified she asked McBride if he knew why law enforcement was there and McBride responded "that they were trying to say that he touched his

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

cousin." ROA. p. 36, lines 3-9. Detective Hamlet next asked what happened and McBride gave his version of events. McBride admitted he let Victim inside the house and no one else was home. McBride told her they watched television. At some point, McBride went to the restroom. Victim came into the restroom while he was still using the restroom and he tried to conceal himself. He yelled at her to leave the bathroom. A short time thereafter she left to go home. ROA. pp. 26-27.

Following Detective Hamlet's in camera testimony, McBride specifically asked for only the initial statement – about the reason Detective Hamlet was interviewing McBride – to be suppressed. ROA. p. 38, lines 12-23. When given the opportunity to respond to McBride's argument, the solicitor asked for clarification that only the initial statement about why law enforcement was there was being challenged. McBride confirmed that was correct. ROA. p. 40, lines 11-17. **The trial court ruled in McBride's favor**, suppressing the answer to the initial question of whether McBride knew why law enforcement was there. ROA. p. 45, lines 8-21. When the remainder of McBride's statement to Detective Hamlet was published to the jury, **there was no objection.** ROA. pp. 172-173.

The issue raised now on appeal is not preserved for review. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373 628 S.E.2d 902, 919 (Ct. App. 2006). "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142,

587 S.E.2d 691, 693-94 (2003).

In the instant case, the trial court struck only a portion of the statement, **per McBride's request**. Therefore, McBride received the relief he asked for, leaving no issue for this Court to review. State v. Parris, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010) (finding there is no issue for the appellate court to decide if a defendant receives the relief requested from the trial court).

Further, McBride waived further objection since he did not renew any remaining objection he might have when the statement was published to the jury. A ruling *in limine* is not a final ruling on the admissibility of evidence. State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. See State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). A pre-trial ruling on the admissibility of evidence is preliminary and subject to change based on developments at trial. Id. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

McBride's argument fails on the merits as well. The warnings were not required as the statement was not the product of a custodial interrogation. Under Miranda v. Arizona, 384 U.S. 436, 444 (1966), prior to custodial interrogation, a suspect must be warned he has a right to remain silent, any of his statements may be used against him, and he has a right to an attorney. However, these requirements only apply to situations involving custodial interrogation. Id. at 477.

Custodial interrogations are made up of two key components: custody and

interrogation. State v. Whitner, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008). "Miranda warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997) (quoting Miranda, 384 U.S. at 444). In the present case, McBride was not in custody and indicated willingness to engage in what was clearly non-confrontational questioning lasting a mere five to ten minutes. Accordingly, Miranda would not apply in the present case.

In support of admission of the statement, the solicitor cited United States v. Parker, 262 F.3d 415 (4th Cir. 2001). In Parker, in support of the finding that the statement was admissible, the Fourth Circuit noted that Parker was in her own home during questioning. The Fourth Circuit also noted that a relative was allowed to enter the interview room twice during questioning. Further, Parker was never told that she was not free to leave. Id. at 419. In the instant case, the fact that McBride was in his own home and his mother was present weighs heavily in favor of admissibility. Detective Hamlet testified she even asked McBride's mother for permission to question McBride, which she provided. ROA. p. 25, lines 4-11.

Under the totality of circumstances, McBride was not in custody, and therefore, Miranda would not apply. State v. Kerr, 330 S.C. 132, 146, 498 S.E.2d 212, 219 (Ct. App. 1998) (finding DUI suspect not in custody under totality of circumstances) (citation omitted); see also In re Drolshagen, 280 S.C. 84, 310 S.E.2d 927 (1984) (finding juvenile questioned by school officials in the principal's office while police officers were present was not in custody for purposes of Miranda).

The reason, of course, McBride's counsel sought admission of the remainder of

the statement, as opposed to suppression, was that the statement constituted about the best defense possible. Therefore, it is not surprising that trial counsel did not object to the portion of the statement published to the jury. Therefore, any conceivable error is harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 575 S.E.2d 77, 83 (2003). In the instant case, the statement did not provide much of a defense, but it was the only defense or alternate explanation, so therefore it was not prejudicial – it was just not terribly helpful for McBride. Accordingly, the conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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June 29, 2015

RECEIVED
JUN 29 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Williamsburg County
John C. Hayes, III, Circuit Court Judge

THE STATE, Respondent,

v.

JUSTIN MCBRIDE, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Andrew B. Greenlee, Esquire, P.O. Box 2047, Winter Park, Florida 32790-2047, Wendy J. Keefer, Esquire, 1643B Savannah Hwy., Suite 226, Charleston, SC 29407 and Adam Owensby, Esquire, P.O. Box 21043, Charleston, SC 29043.

I further certify that all parties required by Rule to be served have been served.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

Case No. 2013-002391

The State of South Carolina, ... Respondent,

v.

Justin McBride, ... Appellant.

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT LACK SUBJECT MATTER JURISDICTION IN THIS MATTER INVOLVING A DEFENDANT WHO WAS SIXTEEN AT THE TIME OF THE ALLEGED CRIME OR, DO THE RELEVANT STATUTES PERMITTING THE EXERCISE OF SUCH JURISDICTION, WITHOUT A CASE-SPECIFIC ANALYSIS, FAIL TO ENSURE APPROPRIATE CONSTITUTIONAL PROTECTIONS FOR DEFENDANT MCBRIDE?

II. ASSUMING THE CIRCUIT COURT HAD JURISDICTION, DID THE CIRCUIT COURT'S EVIDENTIARY RULINGS AND CONFUSING AND ERRONEOUS JURY INSTRUCTIONS VIOLATE MCBRIDE'S DUE PROCESS RIGHTS?

A. Did Law Enforcement's Losing Key and Potentially Exculpatory Evidence Without Explanation and Contrary to Admitted Investigatory Norms, Violate Due Process, or At a Minimum, Require That a Spoliation Charge Be Given to the Jury?

B. Did Due Process, or Rule 5, Require Exclusion of the Photograph of the Victim Where The "Photograph" Was Provided to Defense Counsel as a Black Sheet of Copy Paper, Not as the Color Photograph Introduced Into Evidence, and Where the Actual Color Photograph Was Not Even in the Solicitor's File to be Reviewed by Defense Counsel Prior to Trial?

C. Did The Circuit Court Err in Prohibiting Defense Counsel from Cross-Examining Law Enforcement Witnesses on Their Investigation of This Matter, Specifically as Relates to the Investigatory Tools Provided to Law Enforcement by S.C. Code § 16-3-750?

D. Were McBride's Due Process Rights Violated When The Court Instructed the Jury That No Corroboration Was Required to Support the Alleged Victim's Testimony, Where Such Instruction Had The Effect of Impermissibly Shifting The Burden of Proof, Confusing the Jury, and Elevating the Importance of One Witness' Testimony Over Others In Contravention of McBride's Right Against Self-Incrimination?

III. WAS THE EVIDENCE PRESENTED BY THE STATE LEGALLY INSUFFICIENT TO PROVE THE REQUIRED ELEMENTS OF THE CRIME CHARGED UNDER S.C. CODE § 16-3-655(A)(1)?

IV. WERE DEFENDANT'S MIRANDA RIGHTS VIOLATED, REQUIRING EXCLUSION OF ALL EVIDENCE OF STATEMENTS MADE BY MCBRIDE TO LAW ENFORCEMENT?

ARGUMENT

Appellant, Justin McBride, provides this reply brief to address issues raised by the Respondent and to clarify the arguments provided in Appellant's Initial Brief. To the extent Appellant believes the issues were thoroughly addressed in his Initial Brief, he does not repeat or rehash those issues here, but relies on the Initial Brief for his position on the same.

This appeal raises a number of serious issues that are at the core of the process due to those who face criminal charges in our judicial system. Appellant's Initial Brief addressed legal questions regarding the proper treatment of juveniles in our criminal justice system. This case also raises significant issues regarding the handling of evidence and the fact that the State was permitted to introduce a photograph of evidence that was lost by the State, that was not available to Appellant, and which evidence could have exculpated him. This case does not present a mere loss of evidence, or a mere inability of a defendant to access evidence that may have excluded him as the perpetrator. On the contrary, this case presents a situation where evidence was photographed, eventually received by but then badly handled by law enforcement, and then lost while in the care of an officer who previously lost evidence. Then at trial – despite the inability of Appellant ever to see or analyze the evidence – a photograph of that very same piece of evidence was admitted into evidence, with testimony making speculative

statements as to what appeared in the photograph. This testimony and the photograph were admitted despite the State's actions depriving Appellant access to the shirt depicted in the photograph. This situation is even more egregious when it is clear that the entirety of the State's case rested on the credibility of the accuser and that the missing evidence – based on that accuser's own statements – would either show that the accuser was or was not accurately relaying what happened.

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION IN THIS MATTER INVOLVING A DEFENDANT WHO WAS SIXTEEN AT THE TIME OF THE ALLEGED CRIME OR, IF THE RELEVANT STATUTES PERMITTED THE EXERCISE OF SUCH JURISDICTION WITHOUT A CASE-SPECIFIC ANALYSIS, THOSE STATUTES FAIL TO ENSURE APPROPRIATE CONSTITUTIONAL PROTECTIONS FOR DEFENDANT MCBRIDE.

It is undisputed that McBride was only sixteen (16) years old at the time of the alleged crime. As explained in Appellant's Initial Brief, this matter should have been initiated in the Family Courts of this State. In any event, if the Circuit Court was going to retain jurisdiction, the circuit judge electing to exercise jurisdiction over a trial like this one is required to "issue an order to that effect." S.C. Code § 63-19-1210(6). The Circuit Court Judge entered no such order.

The failure of the Court to consider whether a trial in the Circuit Court was appropriate for this minor defendant, deprived McBride of the protections our statutory scheme provides to him as a minor facing these serious charges. The statutes addressing the treatment of children should be read together to provide some required analysis that trial as an adult is

appropriate. Some procedure is required before the circuit court can exercise jurisdiction over a child who would otherwise be governed by the children's code, juvenile justice and the specialized family courts.

II. ASSUMING THE CIRCUIT COURT HAD JURISDICTION, THE CIRCUIT COURT'S EVIDENTIARY RULINGS AND CONFUSING AND ERRONEOUS JURY INSTRUCTIONS VIOLATED MCBRIDE'S DUE PROCESS RIGHTS.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; see also S.C. Const. Art. I § 3. As part of that guaranteed Due Process, the Confrontation Clause provides that a defendant in criminal cases "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; S.C. Const. Art. I § 14. Inherent in the process due such a defendant, the State cannot be permitted both to rely on selective, surprise photographs of missing evidence, while depriving the defendant access to that evidence. And, inherent in the Confrontation Clause's protections is the right to relevant and thorough cross-examination of witnesses.

In this case, the Circuit Court erred in a number of evidentiary rulings and decisions, resulting in insufficient procedural safeguards and violations of due process. Those errors are addressed in Appellant's Initial Brief and are further discussed, as necessary, here.

A. Where Law Enforcement Lost Key and Potentially Exculpatory Evidence Without Explanation and Contrary to Admitted Investigatory Norms, Due Process Was Violated, or At a Minimum, Required That a Spoliation Charge Be Given to the Jury.

In a case such as this one – a case that turns on the credibility of the accuser -- the failure of law enforcement even to collect the shirt the victim was wearing when they arrived on the scene created an impossible situation for Appellant. (R. Vol. II pp. 189-191.) The alleged victim's statement made it clear that if the events happened as she claimed, semen would be found on the shirt she was wearing. Critical to the defense of any offense such as this one – which pits one person's statement over another's – is any evidence that could bolster or disprove one of those statements. If the shirt was available for Appellant and no semen was present on the shirt, the likelihood that a jury would have taken the word of the alleged victim is incredibly low. This conclusion is particularly clear when considering the standard of proof by which an accused guilt must be determined.

Admittedly, the standards governing lost evidence create some frustration for Appellant where Appellant may be required to show either that the State acted in bad faith or that the lost evidence had exculpatory value. State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001). This standard, however, was developed as one means of determining whether the State failed to fulfill its constitutional duty to preserve evidence.[1] "[T]hat duty is limited to evidence that might be expected to play a significant role in the suspect's defense." California v. Trombetta, 467 U.S. 479 (1984). This materiality standard is met where the evidence possesses "an

[1] Though addressing post-conviction relief proceedings, the statutory scheme of this State fully recognizes the importance of preserving physical evidence in cases where it may serve to prove one's innocence. See, e.g., S.C. Code §§ 17-28-30, 17-28-70, 17-28-300 *et seq.*

exculpatory value that was apparent before the evidence was destroyed," and where the evidence is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. (citations omitted). In South Carolina, if either of these tests is met, the defendant should have had access to the now lost evidence in order to comport with due process and to provide a level of fundamental fairness required in criminal trials. See, e.g., Cheeseboro, 346 S.C. at 538-39, 552 S.E.2d at 307.

The key distinction between earlier cases discussing lost evidence and the situation that unfolded during the trial of Appellant is this: the State did not merely lose the evidence such that neither side had access, the State photographed the evidence, admitted that photograph into evidence, was permitted to introduce testimony as to what substance appeared on the shirt in the photograph (deodorant) all in an attempt to bolster the accuser's credibility while Appellant remained unable to provide any defense to that testimony or to effectively cross-examine the witness as to what did and did not exist on the shirt.

The State, in its Initial Brief, relies in part on Arizona v. Youngblood, 488 U.S. 51 (1988). Though that case does discuss the general standard for addressing lost evidence, key factual distinctions exist. First, the trial court in Youngblood actually gave a spoliation instruction to the jury, providing some guidance to them for their consideration of the government's failure to preserve the evidence. This spoliation charge permitted the jury in that case

to consider the circumstances of the lost evidence under the proper legal standard. Youngblood, 488 U.S. at 60-61 (Stevens, J., concurring) (wherein Justice Stevens makes it clear he is concurring in the Court's decision in large part due to the spoliation instruction and the jury's ability to consider this issue). Here, the jury was not given that option as the request for a spoliation charge was denied.

At its most basic level, due process includes the right to defend one's self and to confront one's accuser. Fundamental fairness requires that a defendant "be afforded a meaningful opportunity to present a complete defense." Trombetta, 467 U.S. at 485. The State simply cannot be permitted to refer to and rely on photographs of physical evidence without ever giving the defense that actual physical evidence. The lack of access to this evidence not only prevented Appellant from having it analyzed for the presence of any substances – deodorant, semen or otherwise – but also limited his ability to cross-examine his accuser on her accusations.

The facts of this case are akin to a murder trial where the knife allegedly used to commit the murder is photographed and then lost. The defendant is denied access to the knife. The prosecutor then introduces a photograph of the knife (a photo not seen by defense counsel until trial) and presents testimony that a dark substance on the knife is blood. Not having had access to the knife, the defendant has little or no opportunity to cross-examine the witness on the purported substance on the knife or to present evidence in his defense that the substance is not blood or is not either his or

the victim's blood. It is difficult to conceive how one can defend himself under such circumstances. But even this troubling hypothetical lacks the added problems of a no corroboration jury instruction in the absence of an instruction on spoliation.

With absolutely no explanation, the shirt evidence in this case went missing. (R. Vol. II pp. 260-263.) Also without explanation – and, indeed, with the Court's sustaining an objection to defense counsel's questions about this issue – the solitary officer in charge of evidence at the time was no longer employed by the Kingstree Police Department. (R. Vol. II pp. 260-263.) And, that same officer, who was the evidence custodian, admittedly lost evidence before. (Respondent's Brief at 9.) The jury, at a minimum, should have been instructed on and been permitted to consider whether this history of evidence handling and the handling of the evidence in this case rose to the level that an inference should've been drawn against the State given the total and unexplained disappearance of the accuser's shirt.

It is true, as the State claims, that spoliation charges should be limited to "the most unusual of circumstances." (Respondent's Brief at 16 (citing State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973)). This case presents this most unusual of cases: police did not collect key evidence but instead relied on the accuser's family to maintain it, bring it to a forensic interview, then the same family transported it to the police, who then failed to send it for testing and lost it, all while the prosecutor relied on a photograph of just part of the shirt. This is certainly a most unusual of circumstances. The

Supreme Court also understands, in serious circumstances like this, that spoliation charges may be the only avenue to address lost evidence to ensure a fair trial for the defendant. See Youngblood, 488 U.S. at 60-61 (Stevens, J., concurring).

This is also not the typical lost evidence case. The value of the shirt to this case was obvious. The Solicitor relied on a photograph of the shirt to claim that deodorant appeared to be present on one shoulder. No photographs show the presence of any other substance on the shirt and the photograph did not encompass the entire shirt such that Appellant himself could have relied on it; nor was there any way for Appellant to cross-examine witnesses on what substance actually appeared (or didn't appear) on the shirt.

Moreover, the Court's refusal to allow defense counsel to question law enforcement as to the reason for the evidence officer's separation from employment to determine if his handling of evidence played a role, (R.Vol. II pp. 264-265), denied McBride even the ability to attempt to show bad faith in the handling of this evidence. This line of questioning, contrary to the Solicitor's sustained objection, was clearly relevant to the circumstances surrounding the disappearance of key evidence.

It is the combination of the loss of the evidence, the permitted introduction of speculation that a photograph of that same lost evidence showed Appellant's deodorant, and the failure of the trial court to give a spoliation instruction that together violated the guaranteed fundamental

process the Due Process Clauses of the federal and state constitutions require.

Based on the totality of these circumstances, McBride is entitled to have his conviction vacated and this charge dismissed. In the alternative, McBride is entitled to a new trial during which he can be permitted a proper opportunity to mount a defense through full cross-examination (as required by the Sixth Amendment to the U.S. Constitution, U.S. Const. amend. VI) of the State's witnesses and with an appropriate jury instruction as to the jury's ability to consider this missing evidence[2] or, at a minimum, complete exclusion of any reference to the shirt or anything that may or may not have been present on it.

B. Due Process and Rule 5 Required Exclusion of the Photograph of the Victim Where The "Photograph" Was Provided to Defense Counsel as a Black Sheet of Copy Paper, Not as the Color Photograph Introduced Into Evidence, and Where the Actual Color Photograph Was Not Even in the Solicitor's File to be Reviewed by Defense Counsel Prior to Trial.

In addition to completely losing the shirt itself, the State also came to trial with a color photograph purportedly of the alleged victim wearing the missing shirt. (R. Vol I p. 150-152.) That photo, according to the contentions of the witnesses and the Solicitor, showed deodorant stains (presumably from

[2] Further review of the jury instructions in their totality, in the light of the lost evidence, demonstrates that the combination of the refusal to instruct on spoliation while providing instructions on the fact that an accuser's statement does not require corroboration, an issue discussed further in Appellant's Initial Brief, gave the benefit of the doubt to the State and the accuser. This situation is counter to the fundamental fairness required by the Due Process Clause and afforded to all criminal defendants.

McBride) on the shoulder.[3] Defense counsel did not see this photograph until the first day of trial. (R. Vol. I pp. 150-151.) Indeed, the Solicitor stated that she "got the color photographs this morning." (R. Vol. I p. 151, lines 11-19.) Not only did permitting use of this photo violate McBride's due process rights, the failure to produce it until trial violated South Carolina Rules of Criminal Procedure 5(a) and 5(c). SCRCrimP 5.

The Circuit Court admitted that things like the previously undisclosed photograph "bother judges immensely." (R. Vol. I p. 163, lines 2-5.) The judge elaborated as follows: "I want to make the record to clear that these irritate me to no end where law enforcement pops up with stuff at the last minute." (R. Vol. I p. 163, line 25 to p. 164, line 2.) Nonetheless, the judge allowed the photo. (R. Vol. I p. 163.)

The State used this surprise evidence, a photograph of evidence the State previously lost, selectively to bolster the alleged victim's testimony.[4] This use was improper and violated McBride's fundamental Due Process rights.

III. THE EVIDENCE PRESENTED BY THE STATE WAS LEGALLY INSUFFICIENT TO PROVE THE REQUIRED ELEMENTS OF THE CRIME CHARGED UNDER S.C. CODE § 16-3-655(A)(1).

The jury convicted McBride of first degree criminal sexual conduct with a minor in violation of S.C. Code § 16-3-655(A)(1). "Sexual battery" in this case required evidence of "fellatio," S.C. Code § 16-3-651(h), or "oral

---

[3] The photos did not show, nor did anyone claim they showed, any evidence of semen on the shirt.

[4] Had law enforcement kept and tested the shirt for all substances, as was normal procedure, no photo would have been necessary.

stimulation of the penis." Merriam-Webster online dictionary (http://www.merriam-webster.com/medical/fellatio). The alleged victim's own recitation of events involved insufficient evidence of oral stimulation of Appellant's penis. (R. Vol. I pp. 88-89; see also R. Vol. I pp. 113-114.)

Defense counsel moved for, and should have been granted, directed verdict on this issue.

IV. DEFENDANT'S MIRANDA RIGHTS WERE VIOLATED REQUIRING EXCLUSION OF ALL EVIDENCE OF STATEMENTS MADE BY MCBRIDE TO LAW ENFORCEMENT.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself . . ." U.S. Const. amend. V. A very brief Jackson v. Denno, 378 U.S. 368 (1964) hearing was held before the Circuit Court. (R. Vol. I pp. 18-45.) The Circuit Court excluded a portion, but not the entirety of McBride's statement. This ruling is legally perplexing. The statement was either given freely and voluntarily or it was not.

As the Circuit Court explained, "I just don't believe that someone should be put in a situation where their option is freedom to leave when they are in a place they have an absolute right to be; that being their own habitation." (R. Vol. I p. 45, lines 14-17.)

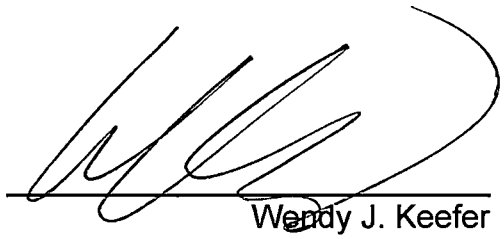
McBride, a minor at the time, had only one option -- to leave his home and go somewhere else. A sixteen year old, with no prior criminal history, cannot reasonably have been expected to know he could refuse to speak to

the officers. Just as the Circuit Court excluded a portion of the statement, the entire statement should have been excluded, as well as any reference to it.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Appellant's Initial Brief, Appellant Justin McBride respectfully requests this Honorable Court reverse his conviction and order either dismissal of the charge on which he was convicted or a new trial.

Respectfully Submitted,



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June 22, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUN 26 2015
SC Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

Case No. 2013-002391

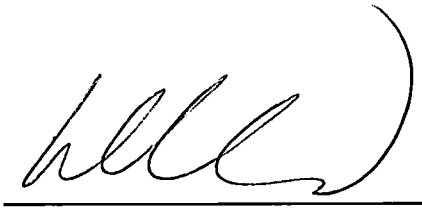
The State of South Carolina, ... Respondent,

v.

Justin McBride, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief and Final Reply Brief on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on 6-25-15, 2015, addressed to attorneys of record, David Spencer and Alan McCrory Wilson at the S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211 and Ernest Adolphus Finney, III at 215 N. Harvin Street, Sumter, South Carolina 29150:



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Justin McBride, Appellant.

Appellate Case No. 2013-002391

Appeal From Williamsburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5381
Heard November 10, 2015 – Filed February 17, 2016

AFFIRMED

Wendy Raina Johnson Keefer, of Keefer & Keefer, LLC, Joshua Preston Stokes, of McCoy & Stokes, LLC, and Adam Owensby, of Carolina Firm, LLC, all of Charleston, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, and Solicitor Ernest Adolphus Finney, III, of Sumter, for Respondent.

SHORT, J.: Justin McBride appeals his conviction for first-degree criminal sexual conduct with a minor, arguing the following: (1) the trial court lacked subject matter jurisdiction over McBride because he was a juvenile[1]; (2) numerous

[1] McBride was sixteen years old at the time of the alleged assault.

evidentiary and jury charge issues; (3) the evidence presented was insufficient to prove the required elements of the crime; and (4) the trial court erred in excluding only a portion of McBride's statement. We affirm.[2]

BACKGROUND FACTS

The victim[3] testified that on June 21, 2010, she was attending summer school. When she arrived home on the school bus, her mother was not there. The victim went to her aunt's house next door.[4] The victim testified her cousin, McBride, was home alone and let her in. The victim sat on the couch while McBride went into the kitchen. When McBride returned, the victim asked him to turn the television off. The victim testified McBride turned the television off, then "took out his manhood. And then he told [me] to jerk it. And he grabbed my hand, and put my hand on his manhood. And I jerk it away from him. And then that's when he is going to grab my head, and pull it down to make me put my mouth on it." The victim next testified she pushed McBride away from her, "[a]nd that's when the white stuff and clear stuff came out of his manhood. It was in my mouth and on my shirt. And I ran in the bathroom." The victim spit into the sink, wiped her shirt with tissue, and threw the tissue away. The victim testified she was wearing a black shirt and her "birthday pants that [her] grandmother gave [her]." According to the victim, when she returned to the living room, McBride was spraying the room with "man's perfume." The victim testified she ran to the front door, was blocked by McBride, ran to the back door, and went home.

The victim's mother was home by then and opened the door when the victim knocked. The victim originally denied anything was wrong. The mother smelled the "man's perfume" on the victim and saw a deodorant stain on the victim's shirt. According to the victim, she had deodorant on the back of her shirt from where McBride had his arm around her neck when he forced her to touch him. The victim testified she spoke to Detective Wilma Trena Hamlet of the Kingstree

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[2] By letter received November 5, 2005, McBride requested the court delay disposition of his case and remove counsel. McBride stated, "Elizabeth Tisdale has abandoned me and my issues . . . ." During oral argument, McBride's private counsel informed the court that Tisdale was McBride's girlfriend and not an attorney, and McBride was prepared to go forward.

[3] The victim was nine years old at the time of the assault and thirteen years old at the time of trial.

[4] McBride's mother is the victim's father's sister.

Police Department and two other officers within ten to fifteen minutes of returning home.

Hamlet testified minor inconsistencies between the victim's first and second statements included which door she ran out of when exiting McBride's house. Hamlet also admitted that no deodorant was collected from McBride.

The victim's mother testified that on the day in question, when she arrived home, the victim was not there, but she arrived shortly thereafter. As the victim passed her in the entryway, the mother smelled men's cologne and saw the stain on the victim's shirt. After questioning the victim, the mother went next door and questioned McBride. She returned home and called her husband, her sister (the sister), and McBride's mother. The sister eventually called the police.

The sister testified she arrived at the victim's house after receiving the telephone call and confronted McBride after the victim told her what happened. According to the sister, McBride said he did not mean to do it, and "tr[ied] to compromise with [her]." The sister described it as McBride's confession.

At the close of the evidence, McBride moved for a directed verdict, arguing there was no testimony of penetration of the victim's mouth. The court reporter replayed the testimony of the victim's cross-examination, and the trial court denied the motion, finding direct and circumstantial evidence. The jury convicted McBride of first degree criminal sexual conduct. This appeal follows.

STANDARD OF REVIEW

In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

I. Subject Matter Jurisdiction

McBride argues the circuit court lacked subject matter jurisdiction to hear the case because he was sixteen at the time of the alleged crime and the case was not properly transferred to the court of general sessions. We disagree.

The State argues this issue is not preserved for our review and is a matter of personal jurisdiction, not subject matter jurisdiction. We agree. This issue was not raised to the trial court; thus, unless it involves subject matter jurisdiction, it must have been raised to and ruled upon by the trial court to be preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (stating an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review); *Ex parte Cannon*, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009) ("Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court."). Because the circuit court has the power to hear criminal cases, we find the issue was not one of subject matter jurisdiction. *See State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) (explaining issues relating to subject matter jurisdiction may be raised at any time and clarifying a court's subject matter jurisdiction is that court's power "to hear and determine cases of the general class to which the proceedings in question belong"). Thus, McBride has not preserved the issue for appellate review.

II. Evidentiary Rulings and Jury Charges

McBride argues numerous evidentiary and jury charge errors relating to the loss of the victim's clothing by the investigating police department, the admission of photographs, and the limitation of his cross-examination regarding the Department's investigation of the victim. We find no reversible errors.

A. The Victim's Shirt

McBride argues the trial court erred in limiting his ability to cross-examine witnesses regarding the victim's shirt, which law enforcement lost. Further, McBride maintains his due process rights were violated by the loss of the victim's shirt. McBride also argues the trial court erred in denying his motion for an adverse inference jury charge on the issue. We affirm.

The mother testified she bagged the victim's clothing and three days later, she took it with the victim to the victim's forensic and medical examination. The facility double-bagged the clothing, labeled the bag, and instructed the mother to deliver it

to the police department, which she did later that day. The mother testified she gave it to a bald man at the department.

Lieutenant Thomas McCrea, of the Kingstree Police Department, testified the only bald employee of the department was the evidence custodian, Sergeant Grant Huckabee. McCrea testified only Huckabee and the Chief of Police had access to evidence at the department and both had left the department. McCrea testified the mother came to the department to retrieve the clothing and, at that time, McCrea's understanding based on protocol was that the clothing would have been at the South Carolina Law Enforcement Division (SLED) for testing. However, he had never seen a report indicating the clothing was sent to SLED. He admitted the department did not have the clothing, an intake sheet reporting receiving it, or an analysis from SLED, and that SLED had no record of receiving it. He also admitted other evidence in the department had been lost during Huckabee's tenure with the department.

The allegedly improper limitation of cross-examination arose during McCrea's cross-examination. McBride asked, "Do you know why Officer Huckabee left the department? . . . . Can you disclose to the court why?" The State objected on the ground of relevance, and the trial court sustained the objection. McBride made no further attempt to cross-examine McCrea regarding the lost shirt. Furthermore, McBride did not raise the due process argument arising from the limitation of cross-examination that he now raises on appeal. Thus, the issue is not preserved for appellate review. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94 (stating an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review).

McBride argues his due process rights were violated because the shirt was lost. We disagree.

Relying on *State v. Breeze*, 379 S.C. 538, 665 S.E.2d 247 (Ct. App. 2008), the trial court found no due process violation because there was no bad faith by the State and no evidence the lost clothing possessed any exculpatory value. In *Breeze*, the defendant was convicted of possession of marijuana with intent to distribute. *Id.* at 542, 665 S.E.2d at 249. Prior to trial, the State informed the defendant the marijuana had been destroyed. *Id.* Breeze argued the trial court erred in finding the lost marijuana was not a due process violation and did not entitle him to an adverse inference jury charge. *Id.* at 545, 665 S.E.2d at 251. This court disagreed, finding the State did not have an absolute duty to safeguard potentially useful evidence that might vindicate a defendant. *Id.*

The court in *Breeze* stated, "'To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.'" *Id.* (quoting *State v. Cheeseboro*, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001)). The court found no bad faith by the State where the marijuana was inadvertently destroyed because the status of the case listed it as disposed and the policy of the department was to destroy drugs when a case was disposed. *Id.* at 546, 665 S.E.2d at 251; *see State v. Reaves*, 414 S.C. 118, 129, 777 S.E.2d 213, 218 (2015) (finding no bad faith despite acknowledging "deeply troubling aspects" of the police investigation, including lost clothing, jewelry, and documents). *But see Reaves*, 414 S.C. at 129, 777 S.E.2d at 218 (noting that although the defendant was disadvantaged by the lost evidence, he forcefully cross-examined the police and the trial court instructed the jury on adverse inference).

The trial court in this case likewise found McBride did not show bad faith by the State in the loss of the shirt. We agree. Appellate courts give the trial court's finding great deference on appeal and review the findings under a clearly erroneous standard. *See e.g., State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013) (reviewing factual findings regarding purposeful discrimination during jury selection in a pre-trial hearing).

As to whether the shirt possessed exculpatory value, we agree with the State that "it is speculative at best that the shirt contained exculpatory value." *See Breeze* 346 S.C. at 546, 665 S.E.2d at 251-52 (finding the evidence was inculpatory rather than exculpatory because it field tested for marijuana, an officer opined it was marijuana, and an expert tested it prior to its destruction and testified it was marijuana). Because McBride failed to meet either prong necessary to establish a due process violation arising from evidence lost by the State, we find no due process violation in the lost shirt.

We also find no error by the trial court in denying McBride's request for an adverse inference jury charge. Prior to the trial court's jury charge, McBride requested the following charge:

> In evaluating a case, you may consider the lack of evidence presented by the State. Th[e]re are allegations that evidence has been lost or destroyed by the State in this case. We refer to this concept as spoliation or

> destruction of evidence. The State not only has the burden of proof of guilt, but it also has the burden of safeguarding evidence it possessed that could establish that the defendant is innocent or that could raise issues of doubt about his guilt.
>
> When evidence is lost or destroyed by a party, you may infer that the evidence that was lost or destroyed 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 or create doubt about whether or not he is guilty, you may then consider those facts in deciding whether or not the State has met its burden of proof.

The trial court declined to instruct the jury as requested. The trial court in *Breeze* likewise denied Breeze's request to instruct the jury that an adverse inference could be drawn from the State's failure to produce the marijuana. *Id.* at 545-48, 665 S.E.2d at 251-53.

In this case, we find there was no error by the trial court in declining the charge. "In general, the trial judge is required to charge only the current and correct law of South Carolina." *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 302-03 (2002). To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial. *Id.* The requested charge in this case included an instruction that permitted the jury to "infer that the evidence that was lost or destroyed would have been adverse to that party."

Adverse inference charges are rarely permitted in criminal cases. *See Reaves*, 414 S.C. at 128 n.5, 777 S.E.2d at 218 n.5 (noting "adverse inference charge[s] based on missing evidence . . . ha[ve] been limited to civil cases in South Carolina"); *State v. Batson*, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) (entertaining "grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness"); *id.* (stating "a charge of this proposition to a jury on . . . behalf of either the State or the defense is not warranted except under most unusual circumstances"). We find no error by the trial court in denying the request for the jury charge.

In summary, we find McBride failed to preserve the issue regarding his inability to cross-examine McCrea. We also find no due process violation by the State.

Finally, we affirm the trial court's denial of McBride's request for an adverse inference jury charge.

B. Missing Photographs

McBride next argues the trial court erred in admitting two color photographs of the victim's shirt, which he did not receive prior to trial. We disagree.

During redirect examination of the victim, she testified she got a stain on her shirt after McBride pulled her head to his penis. Without the jury present, McBride moved to exclude two color photographs of the shirt the State was preparing to enter into evidence. McBride's counsel argued the documents produced by the State prior to trial were dark and illegible, but during trial, the State was attempting to introduce legible, color photographs. McBride's counsel explained he took this case on appointment after McBride's original counsel was disbarred. Trial counsel made a separate Rule 5, SCRCrimP, request and discovery motion and was never provided the color photographs. Trial counsel did not see the color photographs until just prior to making the motion. Trial counsel acknowledged he did not believe it was an intentional act by the State; rather, he accepted it was due to a copy machine. However, trial counsel argued it "dynamically change[d]" his representation of McBride, and it "could have . . . very well have pushed us along the line to . . . see if there was anything that could have been worked out."

The solicitor informed the court that the illegible copies were given to the solicitor's office by the Kingstree Police Department, but she knew what they depicted. In the State's discovery responses, the solicitor "duplicated the pictures as they were given" to her. She also notified McBride's first counsel that there were pictures and a disk available for inspection. She stated the incident report provided to McBride referenced a white stain on the shirt. She argued, "it was incumbent upon the defense to . . . request better copies or request to be permitted to go to the Kingstree Police Department and see the photographs." The solicitor argued the State had complied with Rule 5. Finally, she informed the trial court she also received the color photographs the morning of trial.

The court weighed the extent of the State's compliance with Rule 5 with the obligation of the defense to investigate further when it received illegible photographs. Although "bother[ed] . . . immensely[,]" the court admitted the photographs, finding that the State did not violate Rule 5 and there was no prosecutorial misconduct. The court relied on the State's discovery Response 7, stating there were photographs that could be inspected.

Subject to McBride's previous objections, the State introduced the color photographs during Hamlet's testimony, and she testified the photographs depicted the victim's shirt and the discoloration on the left shoulder, which the victim claimed was McBride's deodorant. On appeal, McBride argues the trial court erred in balancing the State's compliance with Rule 5 and McBride's rights, stating the proper test for violations of Rule 5 is whether good cause has been shown.

Rule 5, SCRCrimP, governs disclosure in criminal cases. Rule 5(a)(1)(C), SCRCrimP, provides in part: "Upon request of the defendant the prosecution shall permit the defendant to inspect and copy . . . photographs . . . which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution . . . ." The decision by the trial judge regarding the admissibility of evidence for failure to comply with disclosure rules will not be reversed absent an abuse of discretion. *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). *See State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) ("Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion.").

We find no reversible error in the trial court's ruling regarding McBride's motion to suppress the color photographs because the solicitor notified McBride that there were pictures and a disk available for inspection. *See State v. Newell*, 303 S.C. 471, 475-76, 401 S.E.2d 420, 423 (Ct. App. 1991) (finding the State substantially complied with Rule 5 by making its file available for inspection by the defendant); *see also State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) (finding no abuse of discretion in trial court's denial of a motion to suppress following the late disclosure of defendant's statements where defendant "was permitted to view and copy the State's file" and defendant "never requested a continuance or recess in order to review the file").

C. Investigation of the Victim

McBride argues the trial court erred in refusing to allow him to cross-examine law enforcement witnesses regarding whether they requested the victim submit to a polygraph examination. We disagree.

During the pre-trial hearing, McBride moved to be permitted to cross-examine law enforcement regarding its ability, under section 16-3-750 of the South Carolina Code, to request a victim submit to a polygraph examination. McBride argued he

was entitled to ask law enforcement officers if they took "that additional step to verify whether this was an accurate allegation." The court denied the motion. During cross-examination of Hamlet, McBride questioned her regarding section 16-3-750. The court sustained the State's objection. At the close of evidence, McBride moved for a mistrial based on the issue. The court denied the motion.

Section 16-3-750 provides as follows:

> A law enforcement officer, prosecuting officer, or other governmental official may request that the victim of an alleged criminal sexual conduct offense as defined under federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

S.C. Code Ann. § 16-3-750 (2015).

"The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion." *State v. Johnson*, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015). "The general rule is that no mention of a polygraph test should be placed before the jury." *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007). We find no error by the trial court. McBride presented no evidence challenging the credibility of the victim; thus, the statute did not apply.

D. Section 16-3-657

McBride also argued the trial court erred in charging section 16-3-657 of the South Carolina Code, maintaining the jury charge shifted the burden of proof and violated his due process rights. At the pre-trial hearing, the court found the statute was not unconstitutional or in violation of McBride's due process rights. McBride also included the issue in his motion for a mistrial, which the court denied. The court charged the jury, stating "[t]he testimony of victims in criminal sexual conduct cases need not be corroborated under the laws of this state."

Section 16-3-657 of the South Carolina Code provides, "The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658." S.C. Code Ann. § 16-3-657 (2015). "These criminal statutes generally encompass the prohibition of various forms and degrees of criminal sexual conduct, and include criminal sexual misconduct with a minor." *State v. Hill*, 394 S.C. 280, 298-300, 715 S.E.2d 368, 378-79 (Ct. App. 2011). The court in *Hill* continued:

> In *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244 (2006), the appellant asserted that the trial judge erred in charging section 16-3-657 to the jury because the charge constituted an impermissible comment on the facts of the case, it improperly emphasized the testimony of one witness, and it carried a strong possibility of unfairly biasing the jury against the defendant. Our supreme court noted the trial court had charged the jury that the State had the burden of proving the defendant was guilty of the charged offenses beyond a reasonable doubt, and further instructed the jurors that they were the sole and exclusive judges of the facts of the case, that the trial court was prohibited from commenting on or having an opinion about the facts of a case, and that it was the responsibility of the jury to assess the credibility of the witnesses who testified in the case. The supreme court then stated as follows:
>
> > It is not always necessary, of course, to charge the contents of a current statute. Section 16-3-657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated. However, § 16-3-657 does much more. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not

> reveal physical or forensic evidence identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear—*not only to the judge but also to the jur*y—that a defendant may be convicted solely on the basis of a victim's testimony.

The court then concluded, while a trial judge is not required to charge section 16-3-657, when the judge chooses to do so, giving the charge does not constitute reversible error when "this single instruction is not unduly emphasized and the charge as a whole comports with the law." The court determined, because the jury in that case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses, the trial judge fully and properly instructed the jury on those principles.

Here, the sole instruction the trial judge charged the jury on corroboration was as follows: "The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence." Notably, the judge immediately followed that statement with, "Necessarily you must determine the credibility of witnesses who have testified in this case." The judge also included in her charge several instructions regarding the State having the burden to prove Hill guilty beyond a reasonable doubt, and further charged the jury that it was the exclusive judge of the facts and was not to infer that the trial judge had any opinion about the facts. Thus, this jury was thoroughly instructed on the State's burden of proof and the jury's duty to find facts and judge credibility of witnesses, as well as admonished not to infer that the trial judge had any opinion about the facts. Accordingly, the single instruction on "no corroboration," was not unduly emphasized, and the charge as a whole comported with the law, such that

> there was no reversible error in the "no corroboration" charge.

Id. at 298-99, 715 S.E.2d at 378-79 (internal citations omitted). Like the court in *Hill*, the trial court in this case instructed the jury on "no corroboration" in a one-sentence charge, stating, "[t]he testimony of victims in criminal sexual conduct cases need not be corroborated under the laws of this state." The jury charge as a whole included numerous references to the State's burden of proof and notified the jury that it was the judge of witness credibility. Like the court in *Hill*, we find no error in the "no corroboration" charge.

In summary, we find no reversible errors in McBride's allegations of numerous evidentiary and jury charge errors.

III. Directed Verdict

McBride argues the trial court erred in denying his motion for a directed verdict. We disagree.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this court must find the case was properly submitted to the jury. *State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d 267, 273 (2002).

At the close of the evidence, McBride argued there was no testimony of penetration of the victim's mouth. The court reporter replayed the testimony of the victim's cross-examination, and the trial court denied the motion, finding direct and circumstantial evidence. Our own review of the victim's testimony indicates the victim testified to penetration. We find no merit in this issue and affirm.

IV. Admission of McBride's Statement

McBride argues the trial court erred in admitting his statement to Hamlet. We disagree.

Prior to trial, the court held a *Jackson v. Denno*[5] hearing to determine the admissibility of a statement McBride made to Hamlet, the investigator for the Kingstree Police Department. McBride moved to strike the initial portion of his statement. The court suppressed "that one particular statement and not anything else. . . ."

On appeal, McBride argues the circuit court erred in suppressing only a portion of the statement. This issue is not preserved for our review. *See State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (finding when "the appellant obtained the only relief he sought, this court has no issue to decide"); *State v. Parris*, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010) ("When the defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide.").

CONCLUSION

For the foregoing reasons, McBride's conviction is

AFFIRMED.

GEATHERS and LOCKEMY, JJ., concur.

[5] 378 U.S. 368 (1964).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
FEB 24 2016
SC Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

Case No. 2013-002391

The State of South Carolina, ... Respondent,

v.

Justin McBride, ... Appellant/Petitioner.

APPELLANT/PETITIONER'S PETITION FOR REHEARING

Appellant/Petitioner, Justin McBride (hereinafter "McBride") respectfully requests this Honorable Court rehear and reconsider its decision, filed February 17, 2016, in the above-captioned appeal.

On appeal, McBride raised a number of issues, particularly as it relates to the admission of evidence and inability of McBride fully to cross-examine witnesses.

The Court's February 17th opinion correctly the states the law on these issues but fails to consider the totality of the circumstances and the overall impact of the trial court's erroneous decisions in determining whether McBride's Due Process rights were violated.

This is a unique case. Specifically as it relates to the missing shirt of the alleged victim, this is not merely a case where the State has destroyed, lost or misplaced evidence. Instead, the State lost evidence that "possessed an exculpatory value apparent," State v. Cheeseboro, 552 S.E.2d 300, (S.C. 2001), to any reasonable person (i.e., the shirt either had or did not have the evidence of the crime that the alleged victim claimed would be found there) **AND** was able to use a photo of that very same evidence **AND** to elicit testimony about what was physically shown on that piece of evidence.

"A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." State v. Hornsby, 484 S.E>2d 869 (S.C. 1997) (citing 21 Am.Jur.2d, Criminal Law § 640 (1981)). As explained in McBride's original briefing to this Court, contrary to the straightforward missing evidence case, this case involves an additional step by the State and permitted by the trial court that requires the conclusion that fundamental fairness was lacking during the trial:

> The facts of this case are akin to a murder trial where the knife allegedly used to commit the murder is photographed and then lost. The defendant is denied access to the knife. The prosecutor then introduces a photograph of the knife (a photo not seen by defense counsel until trial) and presents testimony that a dark substance on the knife is blood. Not having had access to the knife, the defendant has little or no opportunity to cross-examine the witness on the purported substance on the knife or to present evidence in his defense that the substance is not blood or is not either his or the victim's blood. It is difficult to conceive how one can defend himself under such circumstances. But even this troubling hypothetical lacks the added problems of a no corroboration jury instruction in the absence of an instruction on spoliation.

McBride Final Reply Brief, pp. 7-8. The trial court's decision to permit any reference to the shirt, especially the introduction of a photograph of that shirt, was a clear error rising to an abuse of discretion and violating McBride's Due Process rights.

Similarly, the Court failed fully to appreciate the totality of the circumstances surrounding the statement of McBride. McBride was under the age of 18 and was questioned by officers in his home with no alternative location to which to retreat should he have desired to do so. Nor were the circumstances such that he would have believed he had any option but to speak with officers. And, McBride disagrees that this issue was not preserved.

For the foregoing reasons, McBride respectfully requests a rehearing in this matter to fully consider whether he was granted the Process he is constitutionally Due and fully to reconsider the issues raised in this appeal.

February 23, 2016

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RECEIVED
FEB 24 2016
SC Court of Appeals

February 23, 2016

Via UPS 2-Day
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: The State of South Carolina v. Justin McBride
Appellate Case No. 2013-002391

Dear Clerk:

Enclosed for filing please find an original and six copies of Appellant/Petitioner's Petition for Rehearing, along with Proof of Service of same, in the above-referenced case.

By copy of this letter I am serving same on counsel for the Respondent.

I would greatly appreciate your returning filed copies to me in the enclosed, stamped return envelope. Should you have any questions, please do not hesitate to contact me.

Sincerely,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
FEB 24 2016
SC Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

Case No. 2013-002391

The State of South Carolina, ... Respondent,

v.

Justin McBride, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant/Petitioner's Petition for Rehearing, by depositing a copy of it in the United States Mail, postage prepaid, on February 23, 2016, addressed to attorneys of record, David Spencer and Alan McCrory Wilson at the S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
APR 25 2016
SC Court of Appeals

Appeal from Williamsburg County
John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2013-002391

THE STATE,

Respondent,

vs.

JUSTIN MCBRIDE,

Appellant.

RETURN TO PETITION FOR REHEARING

The Respondent now makes this return in opposition to Appellant McBride's petition for rehearing. Respondent only responds to arguments raised in Appellant's petition and would crave reference to Respondent's previous arguments in its brief and at oral argument. Respondent respectfully submits the following:

(1) McBride argues his case is unique and also falsely claims the lost evidence possesses apparent exculpatory value. In the instant case, the shirt, if not lost, most likely would possess inculpatory value for the State. However, no evidence indicates it likely would possess exculpatory value.

The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or

2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 702 S.E.2d 395, 404 (Ct. App. 2010) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991)). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Moses, 702 S.E.2d at 403.

As discussed in Respondent's final brief, McBride's case is not unique, but factually similar to Youngblood, where DNA evidence that was not preserved might have been helpful or might not have been helpful. McBride fails to distinguish this case from Youngblood. See United States v. Agurs, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."). Additionally, McBride does not argue in the petition for rehearing that the evidence was destroyed in bad faith.

Admitting a photograph of the shirt does not alter analysis of the issue. Both sides were free to argue the evidentiary value of the shirt and whether the absence of the shirt amounts to the failure of the State to meet its burden of proof.

(2) McBride also argues that this Court erred in finding that the trial court did not err in suppressing McBride's statement to law enforcement, primarily based on McBride's age.

First, McBride advises the Court that McBride disagrees with the Court's holding

that the issue is not preserved, but is at a loss to explain why. Case law is clear that an objection to the admission of evidence needs to be renewed before the jury. Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. See State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). A pre-trial ruling on the admissibility of evidence is preliminary and subject to change based on developments at trial. Id. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

Further, the trial court did not err in admitting the statement as McBride simply was not in custody. Custodial interrogations are made up of two key components: custody and interrogation. State v. Whitner, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008). "Miranda warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997) (quoting Miranda, 384 U.S. at 444). In the present case, McBride was not in custody and indicated willingness to engage in what was clearly non-confrontational questioning lasting a mere five to ten minutes. Accordingly, Miranda would not apply in the present case. See In re Drolshagen, 280 S.C. 84, 310 S.E.2d 927 (1984) (finding juvenile questioned by school officials in the principal's office while police officers were present was not in custody for purposes of Miranda).

Accordingly, the State respectfully requests the petition for rehearing be denied.

Respectfully Submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar #68571

BY: _____
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ATTORNEYS FOR RESPONDENT

April 25, 2016

RECEIVED
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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Williamsburg County
The Honorable John C. Hayes, III, Circuit Court Judge

THE STATE

Respondent,

v.

JUSTIN MCBRIDE,

Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return To Petition For Rehearing, has been served upon the applicants by mailing two (2) copies in the United States mail, postage prepaid, addressed to:

Andrew B. Greenlee, Esquire
P.O. Box 2047
Winter Park, Florida 32790-2047

Wendy J. Keefer, Esquire
1643B Savannah Hwy., Suite 226
Charleston, SC 29407

Adam Owensby, Esquire
P.O. Box 21043
Charleston, SC 29043

This 25th day of April, 2016.

NORMA BIGBEE
LEGAL ASSISTANT
FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Justin McBride, Appellant.

Appellate Case No. 2013-002391

Appeal From Williamsburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5381
Heard November 10, 2015 – Filed February 17, 2016
Withdrawn, Substituted and Refiled May 25, 2016

AFFIRMED

Wendy Raina Johnson Keefer, of Keefer & Keefer, LLC, Joshua Preston Stokes, of McCoy & Stokes, LLC, and Adam Owensby, of Carolina Firm, LLC, all of Charleston, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, and Ernest Adolphus Finney, III, of Sumter, for Respondent.

SHORT, J: Justin McBride appeals his conviction for first-degree criminal sexual conduct with a minor, arguing the following: (1) the trial court lacked subject

matter jurisdiction over McBride because he was a juvenile[1]; (2) numerous evidentiary and jury charge issues; (3) the evidence presented was insufficient to prove the required elements of the crime; and (4) the trial court erred in excluding only a portion of McBride's statement. We affirm.[2]

BACKGROUND FACTS

The victim[3] testified that on June 21, 2010, she was attending summer school. When she arrived home on the school bus, her mother was not there. The victim went to her aunt's house next door.[4] The victim testified her cousin, McBride, was home alone and let her in. The victim sat on the couch while McBride went into the kitchen. When McBride returned, the victim asked him to turn the television off. The victim testified McBride turned the television off, then "took out his manhood. And then he told [me] to jerk it. And he grabbed my hand, and put my hand on his manhood. And I jerk it away from him. And then that's when he is going to grab my head, and pull it down to make me put my mouth on it." The victim next testified she pushed McBride away from her, "[a]nd that's when the white stuff and clear stuff came out of his manhood. It was in my mouth and on my shirt. And I ran in the bathroom." The victim spit into the sink, wiped her shirt with tissue, and threw the tissue away. The victim testified she was wearing a black shirt and her "birthday pants that [her] grandmother gave [her]." According to the victim, when she returned to the living room, McBride was spraying the room with "man's perfume." The victim testified she ran to the front door, was blocked by McBride, ran to the back door, and went home.

The victim's mother was home by then and opened the door when the victim knocked. The victim originally denied anything was wrong. The mother smelled the "man's perfume" on the victim and saw a deodorant stain on the victim's shirt. According to the victim, she had deodorant on the back of her shirt from where McBride had his arm around her neck when he forced her to touch him. The

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[1] McBride was sixteen years old at the time of the alleged assault.

[2] By letter received November 5, 2005, McBride requested the court delay disposition of his case and remove counsel. McBride stated, "Elizabeth Tisdale has abandoned me and my issues . . . ." During oral argument, McBride's private counsel informed the court that Tisdale was McBride's girlfriend and not an attorney, and McBride was prepared to go forward.

[3] The victim was nine years old at the time of the assault and thirteen years old at the time of trial.

[4] McBride's mother is the victim's father's sister.

victim testified she spoke to Detective Wilma Trena Hamlet of the Kingstree Police Department and two other officers within ten to fifteen minutes of returning home.

Hamlet testified minor inconsistencies between the victim's first and second statements included which door she ran out of when exiting McBride's house. Hamlet also admitted that no deodorant was collected from McBride.

The victim's mother testified that on the day in question, when she arrived home, the victim was not there, but she arrived shortly thereafter. As the victim passed her in the entryway, the mother smelled men's cologne and saw the stain on the victim's shirt. After questioning the victim, the mother went next door and questioned McBride. She returned home and called her husband, her sister (the sister), and McBride's mother. The sister eventually called the police.

The sister testified she arrived at the victim's house after receiving the telephone call and confronted McBride after the victim told her what happened. According to the sister, McBride said he did not mean to do it, and "tr[ied] to compromise with [her]." The sister described it as McBride's confession.

At the close of the evidence, McBride moved for a directed verdict, arguing there was no testimony of penetration of the victim's mouth. The court reporter replayed the testimony of the victim's cross-examination, and the trial court denied the motion, finding direct and circumstantial evidence. The jury convicted McBride of first degree criminal sexual conduct. This appeal follows.

STANDARD OF REVIEW

In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

I. Subject Matter Jurisdiction

McBride argues the circuit court lacked subject matter jurisdiction to hear the case because he was sixteen at the time of the alleged crime and the case was not properly transferred to the court of general sessions. We disagree.

The State argues this issue is not preserved for our review and is a matter of personal jurisdiction, not subject matter jurisdiction. We agree. This issue was not raised to the trial court; thus, unless it involves subject matter jurisdiction, it must have been raised to and ruled upon by the trial court to be preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (stating an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review); *Ex parte Cannon*, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009) ("Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court."). Because the circuit court has the power to hear criminal cases, we find the issue was not one of subject matter jurisdiction. *See State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) (explaining issues relating to subject matter jurisdiction may be raised at any time and clarifying a court's subject matter jurisdiction is that court's power "to hear and determine cases of the general class to which the proceedings in question belong"). Thus, McBride has not preserved the issue for appellate review.

II. Evidentiary Rulings and Jury Charges

McBride argues numerous evidentiary and jury charge errors relating to the loss of the victim's clothing by the investigating police department, the admission of photographs, and the limitation of his cross-examination regarding the Department's investigation of the victim. We find no reversible errors.

A. The Victim's Shirt

McBride argues the trial court erred in limiting his ability to cross-examine witnesses regarding the victim's shirt, which law enforcement lost. Further, McBride maintains his due process rights were violated by the loss of the victim's shirt. McBride also argues the trial court erred in denying his motion for an adverse inference jury charge on the issue. We affirm.

The mother testified she bagged the victim's clothing and three days later, she took it with the victim to the victim's forensic and medical examination. The facility double-bagged the clothing, labeled the bag, and instructed the mother to deliver it

to the police department, which she did later that day. The mother testified she gave it to a bald man at the department.

Lieutenant Thomas McCrea, of the Kingstree Police Department, testified the only bald employee of the department was the evidence custodian, Sergeant Grant Huckabee. McCrea testified only Huckabee and the Chief of Police had access to evidence at the department and both had left the department. McCrea testified the mother came to the department to retrieve the clothing and, at that time, McCrea's understanding based on protocol was that the clothing would have been at the South Carolina Law Enforcement Division (SLED) for testing. However, he had never seen a report indicating the clothing was sent to SLED. He admitted the department did not have the clothing, an intake sheet reporting receiving it, or an analysis from SLED, and that SLED had no record of receiving it. He also admitted other evidence in the department had been lost during Huckabee's tenure with the department.

The allegedly improper limitation of cross-examination arose during McCrea's cross-examination. McBride asked, "Do you know why Officer Huckabee left the department? . . . . Can you disclose to the court why?" The State objected on the ground of relevance, and the trial court sustained the objection. McBride made no further attempt to cross-examine McCrea regarding the lost shirt. Furthermore, McBride did not raise the due process argument arising from the limitation of cross-examination that he now raises on appeal. Thus, the issue is not preserved for appellate review. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94 (stating an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review).

McBride argues his due process rights were violated because the shirt was lost. We disagree.

Relying on *State v. Breeze*, 379 S.C. 538, 665 S.E.2d 247 (Ct. App. 2008), the trial court found no due process violation because there was no bad faith by the State and no evidence the lost clothing possessed any exculpatory value. In *Breeze*, the defendant was convicted of possession of marijuana with intent to distribute. *Id.* at 542, 665 S.E.2d at 249. Prior to trial, the State informed the defendant the marijuana had been destroyed. *Id.* Breeze argued the trial court erred in finding the lost marijuana was not a due process violation and did not entitle him to an adverse inference jury charge. *Id.* at 545, 665 S.E.2d at 251. This court disagreed, finding the State did not have an absolute duty to safeguard potentially useful evidence that might vindicate a defendant. *Id.*

The court in *Breeze* stated, "'To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.'" *Id.* (quoting *State v. Cheeseboro*, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001)). The court found no bad faith by the State where the marijuana was inadvertently destroyed because the status of the case listed it as disposed and the policy of the department was to destroy drugs when a case was disposed. *Id.* at 546, 665 S.E.2d at 251; *see State v. Reaves*, 414 S.C. 118, 129, 777 S.E.2d 213, 218 (2015) (finding no bad faith despite acknowledging "deeply troubling aspects" of the police investigation, including lost clothing, jewelry, and documents). *But see Reaves*, 414 S.C. at 129, 777 S.E.2d at 218 (noting that although the defendant was disadvantaged by the lost evidence, he forcefully cross-examined the police and the trial court instructed the jury on adverse inference).

The trial court in this case likewise found McBride did not show bad faith by the State in the loss of the shirt. We agree. Appellate courts give the trial court's finding great deference on appeal and review the findings under a clearly erroneous standard. *See e.g., State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013) (reviewing factual findings regarding purposeful discrimination during jury selection in a pre-trial hearing).

As to whether the shirt possessed exculpatory value, we agree with the State that "it is speculative at best that the shirt contained exculpatory value." *See Breeze* 346 S.C. at 546, 665 S.E.2d at 251-52 (finding the evidence was inculpatory rather than exculpatory because it field tested for marijuana, an officer opined it was marijuana, and an expert tested it prior to its destruction and testified it was marijuana). Because McBride failed to meet either prong necessary to establish a due process violation arising from evidence lost by the State, we find no due process violation in the lost shirt.

We also find no error by the trial court in denying McBride's request for an adverse inference jury charge. Prior to the trial court's jury charge, McBride requested the following charge:

> In evaluating a case, you may consider the lack of evidence presented by the State. Th[e]re are allegations that evidence has been lost or destroyed by the State in this case. We refer to this concept as spoliation or

> destruction of evidence. The State not only has the burden of proof of guilt, but it also has the burden of safeguarding evidence it possessed that could establish that the defendant is innocent or that could raise issues of doubt about his guilt.
>
> When evidence is lost or destroyed by a party, you may infer that the evidence that was lost or destroyed 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 or create doubt about whether or not he is guilty, you may then consider those facts in deciding whether or not the State has met its burden of proof.

The trial court declined to instruct the jury as requested. The trial court in *Breeze* likewise denied Breeze's request to instruct the jury that an adverse inference could be drawn from the State's failure to produce the marijuana. *Id.* at 545-48, 665 S.E.2d at 251-53.

In this case, we find there was no error by the trial court in declining the charge. "In general, the trial judge is required to charge only the current and correct law of South Carolina." *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 302-03 (2002). To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial. *Id.* The requested charge in this case included an instruction that permitted the jury to "infer that the evidence that was lost or destroyed would have been adverse to that party."

Adverse inference charges are rarely permitted in criminal cases. *See Reaves*, 414 S.C. at 128 n.5, 777 S.E.2d at 218 n.5 (noting "adverse inference charge[s] based on missing evidence . . . ha[ve] been limited to civil cases in South Carolina"); *State v. Batson*, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) (entertaining "grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness"); *id.* (stating "a charge of this proposition to a jury on . . . behalf of either the State or the defense is not warranted except under most unusual circumstances"). We find no error by the trial court in denying the request for the jury charge.

In summary, we find McBride failed to preserve the issue regarding his inability to cross-examine McCrea. We also find no due process violation by the State.

Finally, we affirm the trial court's denial of McBride's request for an adverse inference jury charge.

B. Missing Photographs

McBride next argues the trial court erred in admitting two color photographs of the victim's shirt, which he did not receive prior to trial. We disagree.

During redirect examination of the victim, she testified she got a stain on her shirt after McBride pulled her head to his penis. Without the jury present, McBride moved to exclude two color photographs of the shirt the State was preparing to enter into evidence. McBride's counsel argued the documents produced by the State prior to trial were dark and illegible, but during trial, the State was attempting to introduce legible, color photographs. McBride's counsel explained he took this case on appointment after McBride's original counsel was disbarred. Trial counsel made a separate Rule 5, SCRCrimP, request and discovery motion and was never provided the color photographs. Trial counsel did not see the color photographs until just prior to making the motion. Trial counsel acknowledged he did not believe it was an intentional act by the State; rather, he accepted it was due to a copy machine. However, trial counsel argued it "dynamically change[d]" his representation of McBride, and it "could have . . . very well have pushed us along the line to . . . see if there was anything that could have been worked out."

The solicitor informed the court that the illegible copies were given to the solicitor's office by the Kingstree Police Department, but she knew what they depicted. In the State's discovery responses, the solicitor "duplicated the pictures as they were given" to her. She also notified McBride's first counsel that there were pictures and a disk available for inspection. She stated the incident report provided to McBride referenced a white stain on the shirt. She argued, "it was incumbent upon the defense to . . . request better copies or request to be permitted to go to the Kingstree Police Department and see the photographs." The solicitor argued the State had complied with Rule 5. Finally, she informed the trial court she also received the color photographs the morning of trial.

The court weighed the extent of the State's compliance with Rule 5 with the obligation of the defense to investigate further when it received illegible photographs. Although "bother[ed] . . . immensely[,]" the court admitted the photographs, finding that the State did not violate Rule 5 and there was no prosecutorial misconduct. The court relied on the State's discovery Response 7, stating there were photographs that could be inspected.

Subject to McBride's previous objections, the State introduced the color photographs during Hamlet's testimony, and she testified the photographs depicted the victim's shirt and the discoloration on the left shoulder, which the victim claimed was McBride's deodorant. On appeal, McBride argues the trial court erred in balancing the State's compliance with Rule 5 and McBride's rights, stating the proper test for violations of Rule 5 is whether good cause has been shown.

Rule 5, SCRCrimP, governs disclosure in criminal cases. Rule 5(a)(1)(C), SCRCrimP, provides in part: "Upon request of the defendant the prosecution shall permit the defendant to inspect and copy . . . photographs . . . which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution . . . ." The decision by the trial judge regarding the admissibility of evidence for failure to comply with disclosure rules will not be reversed absent an abuse of discretion. *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). *See State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) ("Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion.").

We find no reversible error in the trial court's ruling regarding McBride's motion to suppress the color photographs because the solicitor notified McBride that there were pictures and a disk available for inspection. *See State v. Newell*, 303 S.C. 471, 475-76, 401 S.E.2d 420, 423 (Ct. App. 1991) (finding the State substantially complied with Rule 5 by making its file available for inspection by the defendant); *see also State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) (finding no abuse of discretion in trial court's denial of a motion to suppress following the late disclosure of defendant's statements where defendant "was permitted to view and copy the State's file" and defendant "never requested a continuance or recess in order to review the file").

C. Investigation of the Victim

McBride argues the trial court erred in refusing to allow him to cross-examine law enforcement witnesses regarding whether they requested the victim submit to a polygraph examination. We disagree.

During the pre-trial hearing, McBride moved to be permitted to cross-examine law enforcement regarding its ability, under section 16-3-750 of the South Carolina Code, to request a victim submit to a polygraph examination. McBride argued he

was entitled to ask law enforcement officers if they took "that additional step to verify whether this was an accurate allegation." The court denied the motion. During cross-examination of Hamlet, McBride questioned her regarding section 16-3-750. The court sustained the State's objection. At the close of evidence, McBride moved for a mistrial based on the issue. The court denied the motion.

Section 16-3-750 provides as follows:

> A law enforcement officer, prosecuting officer, or other governmental official may request that the victim of an alleged criminal sexual conduct offense as defined under federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

S.C. Code Ann. § 16-3-750 (2015).

"The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion." *State v. Johnson*, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015). "The general rule is that no mention of a polygraph test should be placed before the jury." *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007). We find no error by the trial court. McBride presented no evidence challenging the credibility of the victim; thus, the statute did not apply.

D. Section 16-3-657

McBride also argued the trial court erred in charging section 16-3-657 of the South Carolina Code, maintaining the jury charge shifted the burden of proof and violated his due process rights. At the pre-trial hearing, the court found the statute was not unconstitutional or in violation of McBride's due process rights. McBride also included the issue in his motion for a mistrial, which the court denied. The court charged the jury, stating "[t]he testimony of victims in criminal sexual conduct cases need not be corroborated under the laws of this state." In light of our supreme court's recent opinion in *State v. Stukes*, Op. No. 27633 (S.C. Sup. Ct.

filed May 4, 2016) (Shearouse Adv. Sh. No. 18 at 25), we agree the charge was erroneous. However, we find the error was harmless.

In *Stukes*, the victim testified she had been sexually assaulted and a DNA profile matched Stukes. *Id.* at 26. Stukes claimed he had consensual sex with the victim. *Id.* At trial, Stukes objected to the trial court charging the jury pursuant to section 16-3-657. *Id.* at 27; *see* S.C. Code Ann. § 16-3-657 (2015) ("The testimony of the [criminal sexual conduct] victim need not be corroborated . . . ."). On appeal, our supreme court found the "charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case." *Id.* at 29. The court found the error was not harmless beyond a reasonable doubt because the case "hinged on credibility. Victim said it was rape; [Stukes] said it was consensual." *Id.* at 30.

Here, although we find the jury charge was error, we find it was harmless beyond a reasonable doubt. Unlike the situation in *Stukes*, there was corroborating evidence in this case. 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[ied] to compromise with [her]." The sister described it as McBride's confession. Thus, although the jury was erroneously charged section 16-3-657, we find the error was harmless beyond a reasonable doubt.

III. Directed Verdict

McBride argues the trial court erred in denying his motion for a directed verdict. We disagree.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this court must find the case was properly submitted to the jury. *State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d 267, 273 (2002).

At the close of the evidence, McBride argued there was no testimony of penetration of the victim's mouth. The court reporter replayed the testimony of the victim's cross-examination, and the trial court denied the motion, finding direct and

circumstantial evidence. Our own review of the victim's testimony indicates the victim testified to penetration. We find no merit in this issue and affirm.

IV. Admission of McBride's Statement

McBride argues the trial court erred in admitting his statement to Hamlet. We disagree.

Prior to trial, the court held a *Jackson v. Denno*[5] hearing to determine the admissibility of a statement McBride made to Hamlet, the investigator for the Kingstree Police Department. McBride moved to strike the initial portion of his statement. The court suppressed "that one particular statement and not anything else. . . ."

On appeal, McBride argues the circuit court erred in suppressing only a portion of the statement. This issue is not preserved for our review. *See State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (finding when "the appellant obtained the only relief he sought, this court has no issue to decide"); *State v. Parris*, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010) ("When the defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide.").

CONCLUSION

For the foregoing reasons, McBride's conviction is

AFFIRMED.

GEATHERS and LOCKEMY, JJ., concur.

[5] 378 U.S. 368 (1964).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 24 2016
SC Court of Appeals

Appeal from Williamsburg County
John C. Hayes, III., Circuit Court Judge

Opinion No: 5381
Filed 02/17/16, Withdrawn, Substituted and Refiled 05/25/16

THE STATE,

Respondent,

VS.

JUSTIN McBRIDE,

Petitioner.

Appellate Case No: 2013-002391

AMENDED PETITION FOR WRIT OF CERTIORARI

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for respondent.

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QUESTIONS FOR REVIEW

I. Did the Court of Appeals err in holding Law Enforcement losing key and exculpatory evidence without explanation and contrary to admitted investigatory norms, violating due process or at a minimum required that a spoliation charge be given to the jury?

II. **Did the Court of Appeals err in finding no reversible error in the trial Court's ruling regarding petitioner's Motion to Suppress the color photographs?**

III. **Did the Court of Appeals err in affirming the trial court's charge that a victim's testimony need not be corroborated?**

STATEMENT OF CASE

December 2010, the Williamsburg County Grand Jury indicted Petitioner Mr. McBride for one count of criminal sexual conduct (CSC) with a minor in the first degree and assault with intent to commit criminal sexual conduct with a minor in the first degree.

March 1, 2012, the williamsburg County Grand Jury reindicted with the same charges: indictment no.: 2010-GS-45-0283.

October 28, 2013, Mr. McBride proceeded to jury trial before the Honorable John C. Hayes III. Attorney Derrick Mobley represented Mr. McBride at trial. Solicitor Kimberly Barr prosecuted the case for the state. The jury returned verdicts of guilty of criminal sexual conduct with a minor in the first degree and not guilty of assault with intent to commit criminal sexual conduct with a minor in the first degree.

STATEMENT OF FACTS

McBride is the cousin of the alleged victim in this case (Tr. 80) At the time of the alleged incident that gave rise to the charges, McBride was 16 years old; his cousin was 9. (Tr. 91)

After returning from school on the school bus, the alleged victim found her mother was not at home. (Tr. 91) She then either went to a neighbor's house, but did not stay because the neighbor had company, or went directly to McBride's house. (Tr. 91-93) In any event, she ended up at McBrides's house. (Tr. 93) They all lived in very close proximity to one another.

The testimony from this point gets very unclear and confusing as to actual events. What is clear is that at some point the alleged victim left to return home. (Tr. 101) At some point after returning home - again the timeline is not clear — she disclosed some incident with McBride, her cousin. (Tr. 103, 107) After some unspecified period of time, and with the alleged victim's mother wanting to wait until her husband (the alleged victim's father) got home, family members called the police. (Tr. 103, 259-260)

Several police officers arrived, including a female officer who was called in to speak with the female alleged victim. (Tr. 178-179) After getting the alleged victim's statement, the officer spoke with McBride. (Tr. 180) This conversation occurred in McBride's home. (Tr. 181) Two additional uniformed officers were also present during the questioning of McBride. (Tr. 181-182) And, testimony revealed that, though not technically under arrest, officers stood essentially between McBride and the door to his home, as well as outside McBride's home. (Tr. 35-36, 181-182) The police department no longer employs either the investigator or the two officers present during the questioning of McBride. (Tr. 37, 191)

McBride denied the actions described by the alleged victim. (Tr. 42, 183-184) His version of events was, at all times, different form the alleged victim and consisted of no wrongdoing. (Tr. 183-184) A portion of his statement - provided without being informed of his Fifth Amendment rights - was used against him at trial. (Tr. 330-333)

Only a handful of witnesses testified at trial, including the alleged victim. The alleged victim's own testimony was confusing and conflicting. (Tr. 95, 99, 102-104, 130-132, 149) She appears to assert that McBride attempted to force her to perform oral sex and attempted to penetrate her anally. (Tr. 95, 100-101) She indicated that semen ended up on the shirt she was wearing, as well as on a tissue she used to wipe it off. (Tr. 97-98)

Other witnesses included the alleged victim's mother and aunt and two of the police officers who responded to the original complaint. (Tr. 177, 223, 269) The only physical evidence introduced included a color photograph of the alleged victim on the day of the incident. (Tr. 153-155, 187, 271) The photograph purported to show a deodorant stain on the shoulder of the alleged victim's shirt. (Tr. 186)

Disturbingly, responding officers did not collect the shirt worn by the alleged victim. (Tr. 200, 247) Instead, after at least several days, the alleged victim's mother brought the shirt to the police department. (Tr. 247-248) The shirt was never tested to determine the presence either of semen or deodorant. (Tr. 80, 199-200, 270, 351) In fact, the shirt was never sent to SLED for any testing and was lost. (Tr. 275) At no time was the shirt available to the defense; nor was it tested and results of such testing provided. (Tr. 161, 276) The police also never tested any materials from McBride, such as his deodorant. (Tr. 213, 251) Even the police department's evidence sheet, completed with all evidence submissions, was missing. (Tr. 277) Despite this lack of evidence, the jury returned a guilty verdict on the charge of first degree criminal sexual conduct with a minor based on the State's claim that oral sex occurred. (Tr. 375-376.) This verdict was unsupported by the evidence and followed several erroneous evidentiary decisions of the Circuit Court, along with confusing jury charges, violating McBride's Due Process rights. McBride, only sixteen at the time of the incident, was sentenced to 25 years without parole.

ARGUMENT

I. Did the Court of Appeals err in holding Law Enforcement losing key and exculpatory evidence without explanation and contrary to admitted investigatory norms, violating due process or at a minimum required that a spoliation charge be given to the jury?

This case presents the disturbing situation of law enforcement's failure to investigate to the detriment of McBride's ability to defend himself. First, law enforcement, aware of the alleged victim's claims that semen ended up on the shirt she was wearing, failed to collect that shirt as evidence. (Tr. 199-200) Rather, they merely told the alleged victim's mother to bring this critical evidence with her several days later to a forensic interview. (Tr. 247-51, 260-64) At the forensic interview, the alleged victim's mother was then told to take the evidence to the police station, which she did. (Tr. 247-51, 260-64)

Somehow, with no explanation whatsoever, this evidence went missing. (Tr. 270-73) Also without explanation -- and, indeed, with the Court's sustaining an objection to defense counsel's questions about this issue -- the solitary officer in charge of evidence at the time was no longer employed by the Kingstree Police Department. (Tr. 270-73) A clear influence existed that this may not have been the first time evidence went missing under this officer's care. (Tr. 270-73) Where the alleged victim clearly states that physical evidence should be presented on a piece of clothing, the disappearance of that clothing, especially when no care was taken to preserve it by law enforcement, eliminates the defendant's ability to mount

a defense to the charges against him. This failure amounts to a violation of his Due Process rights under the United States and South Carolina Constitutions.

"To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value by other means." State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001) (emphasis added). It is clear from the testimony that if the claims made by the alleged victim were true, semen would be found on the shirt the alleged victim was wearing at the time.

The value of the shirt to this case was obvious. Indeed, the Solicitor relied on a photograph of the shirt to show that deodorant appeared to be presented on one shoulder. No photographs show the presence of any other substance on the shirt.

Without access to the shirt, potentially exculpatory and key evidence, McBride could not properly cross-examine any of the State's witnesses. The exculpatory value the shirt presented would be obvious to anyonr aware of the allegations and McBride's denials. Disputing the source, origination of, or existence of the visual markings was made impossible by only permitting photographs showing a single angle or view of the shirt. And, no other means exist to obtain this evidence.

The Circuit Court erred in its attempt to distinguish this case from Cheeseboro by inventing the concept that exculpatory or inculpatory value cannot be determined without some forensic

test. (Tr. 315) No dispute can exist that testing the shirt for the presence of semen likely would have provided a definitive answer to whether the victim's allegations were true.

To require some forensic test unfairly places the burden on the defendant to establish the exculpatory nature of evidence to which the defendant can never gain access because law enforcement lose or destroyed it. Such a test creates an incentive for the spoliation of evidence. Here, forensic investigation of the shirt could have revealed no semen on it at all, raising serious doubts about the alleged victim's credibility.

Moreover, the Court's refusal to allow defense counsel to question law enforcement as to the reason for the evidence officer's separation from employment to determine if his handling of evidence played a role, (Tr. 274), denied McBride even the ability to attempt to show bad faith in the handling of this evidence. This line of questioning, contrary to the Solicitor's sustained objection, was clearly relevant to the circumstances surrounding the disappearances of key evidence.

In an attempt to address this serious evidentiary issue, defense counsel requested a jury charge on spoliation of evidence intended to allow the jury properly to consider the significance of the missing evidence. The requested charge explained that the state had 'the burden of safeguarding evidence it possessed that could establish that the defendant is innocent or that could raise issues of doubt about his guilt'. (Defense Request to Charge #1 Spoliation). The charge further would have explained

to the jury that if the jurors found the evidence "could help establish the innocence of the defendant or create doubt about whether or not he is guilty', they could consider those facts in determining whether the State met its burden. (Id). The Court refused the requested instructions and did not provide any instruction on spoliation. (Tr. 311-316)

"To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial". State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302-03 (2002). Under the circumstances of this case, the refusal to instruct the jury on the spoliation issue was erroneous. Moreover, the failure to properly instruct the jury on this issue was prejudicial. The State's case rested entirely on the assertions of the alleged victim. The loss of physical evidence to clearly determine the veracity of those assertions prejudicial McBride.

Unlike State v. Breeze, this case does not involve evidence (narcotics) that the defendant admitted existed. See State v. Breeze, 379 S.C. 538, 546, 665 S.E.2d 247 (Ct. App. 2008). And, contrary to most cases involving the unavailability of evidence to the defendant, the evidence, here, was not disposed of in the ordinary course of the relevant law enforcement department's policies. See, e.g., Breeze. In addition, these cases involve evidence that was not clearly crucial to the case. See, e.g., State v. Adams, 304 S.C. 302, 304, 403 S.E.2d 678, 680 (Ct. App. 1991) (where defendant claimed a due process violation based on lost breathalyzer results that deprived him of the ability to challenge the validity -- not the results -- of the

test).

The Sixth Amendment to the Constitution of the United States guarantees a criminal defendant the right to a trial by jury. U.S. Const. amend. VI. "[T]rial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ". **Apprendi v. New Jersey**, 530 U.S. 466, 477 (2000) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)) (emphasis in **Apprendi**).

Where the missing evidence reasonably could be expected either to prove or disprove the events reported by the alleged victim, there can be no clearer deprivation of Due Process and the Sixth Amendment right to a jury trial where such evidence is lost. Due to the loss of the shirt, McBride was deprived of the opportunity to have the truth of every accusation determined by the jury. At a minimum, a jury charge permitting a negative inference against the State would have been required.

Under circumstances such as these, the State simply cannot be permitted to mishandle evidence so egregiously and then claim no Due Process violation because the defendant cannot prove the exculpatory character of that evidence. Prosecutors have a constitutional duty, even absent a request by the defendant, "to give the defendant evidence which would raise a reasonable doubt about his guilt." **State v. Jackson**, 302 S.C. 313, 314-15, 396 S.E.2d 101 (1990) (citing **United States v. Agurs**, 427

U.S. 97 (1976)).

This duty is completely ignored and elusive if the State can simply choose not to determine or to ignore the exculpatory nature of evidence that obviously carries a strong likelihood of physical evidence - or lack of evidence that would be exculpatory - lose that evidence and then proceed to trial against the defendant. To permit this verdict to stand, would simply encourage law enforcement to act recklessly or in bad faith to the detriment of the jury trial system and the constitutional protections afforded criminal defendants.

Based on the conduct of the State, McBride is entitled to have his conviction vacated and this charge dismissed. In the alternative, McBride is entitled to a new trial during which he can be permitted a proper opportunity to mount a defense through full cross-examination (as required by the Sixth Amendment to the U.S. Constitution, U.S. Const. amend. VI) of the State's witnesses and with an appropriate jury instruction as to the jury's ability to consider this missing evidence or, at a minimum, complete exclusion of any reference to the shirt or anything that may or may not have been present on it.

The South Carolina Court of Appeals affirmed writing "As to whether the shirt possessed exculpatory value, we agree with the State that "it is speculative at best that the shirt contained exculpatory value." See Breeze 346 S.C. at 546, 665 S.E.2d at 251-52 (finding the evidence was inculpatory rather than exculpatory because it field tested for marijuana, an officer opined it was marijuana, and an

expert tested it prior to its destruction and testified it was marijuana). Because McBride failed to meet either prong necessary to establish a due process violation arising from evidence lost by the State, we find no due process violation in the lost shirt."

"Adverse inference charges are rarely permitted in criminal cases. See Reaves, 414 S.C. at 128 n.5, 777 S.E.2d at 218 n.5 (noting "adverse inference charge[s] based on missing evidence... ha[ve] been limited to civil cases in South Carolina"); State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517,522 (1973) (entertaining "grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness"); id. (stating "a charge of this proposition to a jury on... behalf of either the State or the defense is not warranted except under most unusual circumstances"). We find no error by the trial court in denying the request for the jury charge.

The Court of Appeals erred. There are substanctial factual differences between the present case and the Breeze case relied upon by the Court of Appeals. The reliance on Breeze on the facts of the present case constitutes an error of law. In Breeze, the evidence was found inculpatory rather than exculpatory because it tested for marijuana, an officer opined it was marijuana, and an expert tested it prior to its destruction and testified it was marijuana. In McBride's case, no substance on the shirt had the ability to be tested once it was lost. A picture was taken as evidence of what

appeared to be deodorant on the shirt. Had a picture of what appeared to be semen was enter as evidence also, it would be speculative at it's best that the lost evidence is inculpatory. Law Enforcement photographed a stain that appears to be deodorant. If anything appeared to be a semen stain as alleged victim claims got on her shirt, law enforcement would have no reason not to photograph the apparent stain also. Due to the allegations and the lost shirt, petitioner could not effectively present a defense. Had the shirt been confiscated and tested as admitted procedural norms it is speculative at it's best, the results could have completely exonerated petitioner. If the shirt was tested then lost, the Breeze case could have been correctly applied. The South Carolina Court of Appeals also erred in finding there was no error by the trial court in declining the charge. The refusal to give the requested charge was both erroneous and prejudicial because of the circumstances of this case.

The alleged victim made claims that semen got on her shirt. Law Enforcement only took photograph of a stain that is claimed to be deodorant. The State then loses this shirt which is exculpatory evidence.

The evidence is exculpatory because unlike what appeared to be a deodorant stain, there are no substances that resembles a semen stain. The petitioner abrasively denies the allegations are true and can not prove that these allegations are untrue by any comparable means. Had the shirt been preserved and tested, the results would indicate why there

was not a photograph taken of an alleged semen stain; because there was not one, ultimately raising a serious question about the credibility of the alleged victim. For the above reasons this case should be reversed and remanded to the lower courts.

II. Did the Court of Appeals err in finding no reversible error in the Trial Court's ruling regarding petitioner's motion to suppress the color photographs?

In addition to completely losing the shirt itself, the State also came to trial with a color photograph purportedly of the alleged victim wearing the missing shirt. (Tr. 160-61.) That photo, according to the contentions of the witnesses and the Solicitor, showed deodorant stains (presumably from McBride) on the shoulder. Defense counsel did not see this photograph until the first day of trial. (Tr. 157-158, 161.) Indeed, the Solicitor stated that she "got the color photographs this morning." (Tr. 161, lines 11-19.) Not only did permitting use of this photo violate McBride's due process rights, the failure to produce it until trial violated South Carolina Rules of Criminal Procedure 5(a) and 5(c). SCRCrimP 5.

During arguments on McBride's motion to exclude the photo, it became clear that when the State copied and provided its file materials to the defense, this photo appeared merely as a black sheet of paper with no photo visible. (Tr. 160-61.) The Solicitor responded to this motion by stating that defense counsel could have come to review the file, but later acknowledged that she did not even have the photograph in her file until that morning. (Tr. 161) And, the Circuit Court correctly

understood the situation:

> The bottom line is, the defense was provided with, they had the opportunity to inspect. But at the time you gave them the right to inspect, all you had were two black sheets of paper. (Tr. 165-66)

The Circuit Court described a duty to weigh the prosecutor's duty to produce against the defense's duty to inspect. Here, McBride contends that not only should that balancing have come out in his favor, but that at any time prior to the first day of trial, the prosecution had nothing to inspect, just "two black sheets of paper."

The Circuit Court admitted that things like the previously undisclosed photograph "brother judges immensely." (Tr. 173.) The judge elaborated as follows: "I want to make the record to clear that these irritate me to no end where law enforcement pops up with stuff at the last minute." (Tr. 174.) Nonetheless, the judge allowed the photo. (Tr. 173.)

The United States Supreme Court recognizes a defendant's "area of constitutionally guaranteed access to evidence." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). "[D]efendants have the right to request and obtain from the prosecution evidence that is material to guilt of the defendant or relevant to the punishment to be imposed." State v. Jackson, 315,396 S.E.2d 101 (1990) (citing Brady v. Maryland, 373 U.S. 83 (1963) (emphasis added)). Here, the Solicitor introduced, over the objection of defense counsel, a photograph that was not provided to McBride prior to trial. Used to corroborate at least part of the alleged victim's testimony, this evidence was clearly material to the guilt of the defendent. Having not

been provided at any point to trial, it should have been excluded.

Moreover, the State was permitted to use this photograph showing only a portion of the shirt the alleged victim was wearing. Without the availability of the shirt, or at least photographs showing the entire shirt, allowing this evidence is akin to permitting one side to play selected parts of a recording or read selected parts of a statement or transcript into the record without the ability of the defendant to demand the entirety of the evidence be included in order to provide the jury completeness and context. See, e.g., S.C. Rule of Evidence 106. The State simply cannot be permitted to select a portion of an item of evidence to introduce in an attempt to bolster one of its witness' credibility while denying to the defendant access to the rest of that item to determine if it actually supports or contradicts the witness.

The State used this surprise evidence selectively to bolster the alleged victim's testimony. This use was improper and violated McBride's rights. (Tr. 168.) Rule 5(g), however, expressly addresses this evalution and premits waiver of the rule's production requirements only upon a showing of good cause. SCRCrimP 5(g): see also Hyman v.State, 397 S.C. 35, 723 S.E.2d 375 (2012). No good cause was argued or shown. The Circuit Court erred in permitting the introduction of this photograph prejudicing McBride, and requiring a new trial.

The South Carolina Court of Appeals Affirmed by saying "We find

no reversible error in the trial court's ruling regarding McBride's motion to suppress the color photographs because the solicitor notified McBride that there were pictures and a disk available for inspection. See State v Newell, 303 S.C. 471, 475-76, 401 S.E,2d 420, 423 (Ct. App. 1991) (finding the State substantially complied with Rule 5 by making its file available for inspection by the defendant); see also State v Davis, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) (finding no abuse of discretion in trial court's denial of a motion to suppress following the late disclosure of defendant's statements where defendant "was permitted to view and copy the State's file" and defendant "never requested a continuance or recess in order to review the file").".

The South Court of Appeals erred. Indeed the solicitor notified petitioner's trial counsel that there were pictures available for inspection, but the color photographs introduced into evidence were not the photographs available for inspection. Petitioner's trial counsel admitted at trial that he did not specifically ask for pictures when he specifically inspected a disk that was a part of the discovery but he did specificslly ask for anything he could acquire pertaining to the case. (Tr. 158) Had trial counsel inspected the photographs he still would not have been permitted to view and copy the photographs introduced as evidence at trial, solely because the solicitor admitted she received color photographs that morning of trial. Which means the trial court would have ruled in petitioner's favor. Trial Counsel's failure to specifically seek or inspect

photographs does not mean the solicitor complied with Rule 5 because she did not make available the particular files introduced at trial as evidence. For the above reasons, this case should be reversed and remanded to the lower courts.

III. Did the Court of Appeals err in affirming the trial court's charge that a victim's testimony need not be corroborated?

It is correct that the current law of South Carolina provides that "[t]he testimony of the victim need not be corroborated in prosecutions" for criminal sexual conduct. S.C. Code § 16-3-657. The common law previously recognized this principle. Including this concept in instructions to the jury in this case, however, unconstitutionally shifts the burden of proof away from the State and to the defendant. Given the totality of the circumstances, prior case law considering similar instructions but lacking the other issues present in this case, is not dispositive. See generally, State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

As the Court in Rayfield noted, at least one purpose of the no corroboration statute was to recognize

> that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator...

Rayfield, 631 S.E.2d at 249 (emphasis added). Here, however physical evidence should have provided an answer to whether the crime was committed as described by the victim. In light of the admission of some evidence (e.g., photographs of the missing shirt), and the exclusion of other evidence (e.g., lack by investigators of their full set of investigatory tools), adding on the no corroboration instruction virtually ensured confusion of the jury. Given the lack of other evidence, repetition of the no corroboration charge, and the lack of other safeguards, the Circuit Court violated McBride's Due Process Rights by including this jury charge.

Even if facially constitutional to the extent that juries in determining credibility are rarely required to find corroborating evidence in order to believe a witness' testimony, that the law provides this no-corroboration rule does not mean that instructing the jury of this legal standard is proper under these circumstances. See S.C. Const. Art. V §21; see also State v. Simmons, 209 S.C. 531, 41 S.E.2d 217 (1947).

The jury charges, as given were confusing to a reasonable juror in terms of the jury's assessment of the alleged victim's testimony. The Supreme Court of Indiana perhaps described the problem with such instructions best:

> The challenged instruction is problematic for at least three reasons. First, it unfairly focuses the jury's attention on and highlights a single witness's testimony. Second, it presents a concept used in appellate review that is irrelevant to a jury's function as fact-finder. Third, using the

> technical term "uncorroborated," the instruction may mislead or confuse the jury.

Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003). In Ludy, the jury was instructed that "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." Id. at 460. Similarly, the jury in McBride's case was charged that "[t]he testimony of victims in criminal sexual cases need not be corroborated under the laws of this State." (Tr. pp. 367-68.)

"A jury instruction must be viewed in the context of the overall charge." State v Hughey, 339 S.C. 439, 458, 529 S.E.2d 721, 730 (2000) (overuled on other grounds)(citations omitted). "The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." Id. Where one witness' testimony is highlighted as not requiring corroboration, a reasonable juror would be confused and have difficulty determining what that means for evaluation of the other witnesses and the evidence as a whole. Moreover, it seems to infer a greater credibility for the victim witness, a presumed credibility, that is counter to the general law regarding the jury's role in assessing witness credibility and to confuse the State's burden of proof.

"[C]harging this rule carries a strong possibility of biasing the jury against the defendant. No witness's testimony need not be corroborated, the trial court singles out the alleged victim and 'appears to express an opinion on her credibility.'"

Rayfield, 631 S.E.2d at 251-252 (Pleicones, concurring in part, dissenting in part) (citing State v. Schumpert, 312 S.C. 502, 510, 435 S.E.2d 859, 864 (1993) (Finney, J., dissenting)).

When the giving of this instruction is viewed in the light of the related ruling that did not permit defense counsel to cross-examine law enforcement on the statutorily permitted use of a polygraph, it becomes even more constitutionally troubling. The case now presents a situation where a number of methods of corroboration existed - the shirt, the polygraph - but McBride could point to none of them, or their absence. Clearly, this type of information is relvant, having the potential of creating reasonable doubt in the minds of the jurors and should have been available to be considered by them, Exclusion particularly when paired with this instruction to the jury, was highly prejudicial to McBride.

Providing an instruction that no corroboration was necessary also casts a shadow on McBride's right not to testify. See U.S. Const. amend. V. The instruction suggests that nothing more than an allegation by a victim is necessary. This inference easily creates a perception on the part of reasonable jurors that unless that testimony is contradicted it is enough. To contradict what allegedly happened in the home when only the alleged victim and McBride were present would require McBride himself to testify. A jury provided this instruction may, indeed require a defendant's testimonial denial to reach a verdict of not guilty.

The no-corroboration instruction improperly emphasizes

one witness. Such an instruction is not required accurately to charge the jury on the law, given the more general instruction concerning the jury's ability to consider the credibility of all witnesses and to rely on their testimony to establish the facts in a case, As recognized by various judges, the continued use of no-corroboration instructions in cases involving judges, the continued use of no-corroboration instructions in cases involving sexual crimes provides no legitimate benefit and serves only to confuse jurors. See People v. Gammage, 828 P.2d 682, 702-704 (Cal. 1992) (Mosk, J., concurring).

The South Carolina Court of Appeals affirmed writing "McBride also argued the trial court erred in charging section [16-3-657] of the South Carolina Code, maintaining the jury charge shifted the burden of proof and violated his due process rights. At the pre-trial hearing, the court found the statute was not unconstitutional or in violation of McBride's due process rights. McBride also included the issue in his motion for a mistrial, which the court denied. The court charged the jury, stating "[t]he testimony of victims in criminal sexual conduct cases need not be corroborated under the laws of this state." In light of our supreme court's recent opinion in State v. Stukes, Op. No. 27633 (S.C. Sup. Ct. filed May 4, 2016) (Shearouse Adv. Sh. No. 18 at 25), we agree the charge was erroneous, However, we find the error was harmless.

In Stukes, the victim testified she had been sexually assaulted and a DNA profile matched Stukes. Id. at 26. Stukes claimed

he had consensual sex with the victim. Id. at 27; see S. Code Ann. § 16-3-657 (2015) ("The testimony of the [criminal sexual conduct] victim need not be corroborated..."). On appeal, our supreme court found the "charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case." Id. at 29. The court found the error was not harmless beyond a reasonable doubt because the case "hinged on credibility. Victim said it was rape; [Stukes] said it was consensual." Id. at 30.
Here, although we find the jury charge was error, we find it was harmless beyond a reasonable doubt. Unlike the situation in STukes, there was corroborating evidence in this case, 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[ied] to compromised with [her]." The sister described it as McBride's confession. Thus, although the jury was erroneously charged section 16-3-657, we find the error was harmless beyond a reasonable doubt."

The South Carolina Court of Appeals erred. Petitioner's case is also amenable to a harmless error analysis such as Stukes. The South Carolina Supreme Court review of the record in Stukes indicates Stuke's case hinged on credibility. [According to The South Carolina Court of Appeals], the "corroborated" evidence in petitioner's case was the testimonies of the witnesses that testifies at trial.

These particular testimonies, including the victim's, are

the sole reason petitioner's case is also hinged on credibility. The evidence in this case is not overwhelming, there's testimonies which boils down to he-say she-say and there's a photograph of a shirt which appears to have a stain not tested present on the shoulder claimed to be deodorant. The testimonies in this case resulted in the witnesses perception of alleged victim.

Therefore, the error in charging section 16-3-657 can not be saved by the witness credibility instruction or the charge as a whole. For the above reasons, this case should be reversed and remanded to the lower courts.

CONCLUSION

For the above reasons, petitioner's Writ of Certiorari should be granted and his sentence and conviction should be reversed and remanded to the lower court.

This 22 day of August, 2016.

Justin McBride, SCDC #357684
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC. 29010

PETITIONER, Pro Se.

RECEIVED
AUG 24 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Williamsburg County
John C. Hayes, III., Circuit Court Judge

Opinion No: 5381
Filed 02/17/16, Withdrawn, Substituted and Refiled 05/25/16

THE STATE,

Respondent,

VS.

JUSTIN McBRIDE,

Petitioner.

Appellate Case No: 2013-002391

CERTIFICATE OF SERVICE

I, Justin McBride, the Petitioner in the above action, hereby declare under the penalty of perjury, that on this date I have served a true copy of Petitioner's AMENDED PETITION FOR WRIT OF CERTIORARI, upon the Respondent and all other parties to this matter, by placing a copy of same in the prison mailroom officials hands for depositing in the United States Mail and addressed as indicated below:

Mr. Alan McCrory Wilson
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State of South Carolina
P.O. Box 11549
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COUNSEL FOR RESPONDENT

DATE: 08/22/2016

Justin McBride
SCDC No: 357684
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PETITIONER, Pro Se.

RECEIVED
OCT 11 2016
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Williamsburg County
John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2016-001335

THE STATE,

Respondent,

vs.

JUSTIN MCBRIDE,

Petitioner.

RETURN TO AMENDED PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in declining a spoliation charge, and Petitioner was not entitled to dismissal based on lost evidence where no evidence indicates law enforcement acted in bad faith or the lost evidence had exculpatory value.

II.

Since no discovery violation occurred, the subject photographs were available for inspection, and there was no prejudice from the purported violation, the trial court did not err in allowing the photographs to be admitted into evidence and in declining to grant a mistrial.

III.

Petitioner was not prejudiced by the no-corroboration instruction. Any error was harmless due to the corroborating evidence and admissions by Petitioner to a relative.

STATEMENT OF THE CASE

Petitioner McBride was indicted for first-degree criminal sexual conduct with a minor and assault with intent to commit first-degree criminal sexual conduct with a minor in December 2010. McBride was tried by jury before the Honorable John C. Hayes, III, on October 28-30, 2013. McBride was found guilty of criminal sexual conduct with a minor in the first degree and acquitted of assault with intent to commit criminal sexual conduct with a minor in the first degree. Judge Hayes sentenced McBride to twenty-five years' imprisonment.

McBride appealed and was represented by Wendy Keefer, Esquire, and Adam Owensby, Esquire, on briefs and Joshua Stokes, Esquire, on argument. Following briefs and oral argument, the Court of Appeals affirmed the conviction and sentence in an opinion dated February 17, 2016. In particular, relying on then-existing precedent, the Court of Appeals found no error by the trial court charging the no-corroboration instruction found in S.C. Code § 16-3-657.

McBride's counsel petitioned for rehearing on February 23, 2016, on only two of the seven issues raised: (1) McBride was denied due process due to evidence, victim's shirt, lost by the Kingstree Police Department; and (2) McBride's statement to law enforcement was involuntary due to his age. At the Court of Appeals' request, the State addressed these two issues in a return dated April 25, 2016.

On May 4, 2016, this Court issued its opinion in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). On May 25, 2016, the Court of Appeals withdrew its opinion and substituted a new opinion finding error for the no-corroboration instruction based on Stukes, but finding error harmless. No petition for rehearing was filed as to the substituted opinion.

McBride's various attorneys were relieved and McBride proceeded pro se, filing an

amended petition for writ of certiorari. The State's return follows.

STATEMENT OF FACTS

Victim was just shy of her tenth birthday when she was sexually assaulted by Petitioner McBride, her cousin. ROA. p. 81. Victim was attending summer school. For the first time, she was riding the bus, which she was excited about. It was her second day of summer school and her second day riding the bus. The other children on her bus told Victim that her mom was not home, which made Victim upset. She went to a neighbor's house, but when she saw the neighbor with company, she went to her Aunt Tina's house instead. Aunt Tina is McBride's mother. She knocked on the door and McBride answered and let her in.[1] Victim commented that it was a show with bad words, so they should turn the television off. That prompted McBride to begin a violent sexual assault. ROA. pp. 82-86.

McBride took out his penis and told Victim to "jerk it." ROA. p. 87, lines 5-6. He grabbed Victim's hand and put it on his penis. McBride grabbed Victim's head and pulled her toward his penis. ROA. pp. 87-88. Victim testified as follows on this point:

> Q: He grabbed your head hard?
>
> A: Yes, ma'am.
>
> Q: And pulled it down to his manhood; is that right?
>
> A: Yes, Ma'am.
>
> Q: And then did what?
>
> A: He then he grabbed my head. Then he told put . . . my mouth on his manhood. And I put – I had my hand on his stomach and then pushed him away from me. And that's when the white stuff

[1] Detective Trena Hamlet noted that McBride's and Victim's houses were side by side with nothing but a small patch of grass between them. ROA. p. 171, lines 4-6.

> and clear stuff came out his manhood. It was in my mouth and on my shirt. And I ran in the bathroom.
>
> Q: You said you saw and white and clear stuff come out of his manhood?
>
> A: Yes, ma'am.
>
> Q: And it went in your mouth?
>
> A: Yes, ma'am, on my shirt.
>
> Q: What did that taste like?
>
> A: Nasty.
>
> Q: And it went on your shirt. Is that a yes?
>
> A: Yes, ma'am.
>
> Q: Okay. And then you did what?
>
> A: Then I ran into the bathroom and wipe it off, and spit it out of my mouth.

ROA. p. 89, lines 5-16. Victim testified she spit out in the bathroom sink and wiped the semen off her shirt with a tissue. She put the tissue in a trash can. ROA. pp. 89-90.

When Victim came out of the bathroom, McBride was spraying perfume all around the living room. ROA. p. 92. McBride tried to pull down her pants; he would pull them down, and Victim would pull them back up. ROA. p. 92. Victim testified that McBride tried to put his penis in her butt. Victim testified it hurt. ROA. p. 92, line 25 – p. 93, line 8.

Victim pushed McBride off her and ran to the front door. McBride blocked her and "sucked" his teeth. She instead ran for the back door and ran out of the house. She went home and kicked on the door. Her mother (Mother) was there. When Mother asked what was wrong, Victim did not reply. She was scared McBride would come over to the house. But Mother

smelled "man perfume" and went next door. Victim testified she had deodorant on her shirt. She testified it was from when McBride had his arm around her neck. She hurt the next day when she was making a bowel movement. ROA. pp. 93-100. Specifically, Victim testified she yelled to her mother she could not use the bathroom because "[h]e put his manhood in the back of my butt." ROA. p. 99, lines 3-8.

Detective Trena Hamlet responded to a call regarding a female victim at Victim's residence. Several other officers and family members were already present. While speaking with Victim and her family, Detective Hamlet noticed a white smear on the shoulder of Victim's shirt. After she spoke with Victim, Detective Hamlet spoke with McBride to hear his side of the story. ROA. pp. 168-171.

Detective Hamlet testified that McBride gave the following statement:

> He opened the door and asked why was she over there. Stated that her mom was not at home. She sat on the couch and they were watching TV. He stated that at one point he got up to go to the restroom. And while he was in there, she came in on him. He concealed, tried to conceal himself from her, because he was in the midst of using the restroom. Yelled at her to get out. And she went back in the living room and sat down. And shortly thereafter, she wanted to leave. He said that she didn't want to go to front door because a bug was on the door, so she went to go out the back. The back door was locked. So he had to unlock it. She couldn't unlock it, he had to unlock it for her to leave.

ROA. p. 173, line 13 – p. 174, line 2.

Mother testified she arrived at home on time for the bus, or at least she thought so. However, Mother did not hear the bus. She became agitated when her daughter did not come home – more so when the middle school and then high school buses came (Victim's bus should have arrived first). But after a while, she was startled by Victim kicking and beating on the door.

Mother became concerned because Victim was not talking, even after she asked Victim where she had been. Victim was excited to ride the bus the day before. But now Victim walked by Mother without discussion. Mother grabbed Victim and smelled the cologne. Victim pointed to her Aunt's house when Mother inquired about where she had been. Mother testified Victim also had a stain on her shirt that smelled like deodorant. ROA. pp. 217-224.

Mother went next door and asked McBride what happened. McBride claimed Victim walked in the bathroom on him. Mother told McBride she did not believe him. Mother decided it was best to leave since McBride's mother was not home. Another of Mother's sisters (not McBride's mother) called police. ROA. pp. 226-229.

Later that night, Mother was trying to finish her school work – she was having trouble due to the stress of the day – when she heard Victim scream from the bathroom. Victim told Mother it hurt when she was trying to go to the bathroom. Victim said, "It hurt Mama." ROA. pp. 229-230; p. 235, lines 17-22.

Law enforcement failed to take Victim's clothing during the interview. Mother and her sister put Victim's clothing in a bag and were told to bring the bag with them to the Durant Center in Florence when they brought Victim for her appointment. The Durant Center told them to take the bag of clothes to the police. She left the clothes with an officer at the Kingstree police station. ROA. pp. 237-240; p. 250.

Lieutenant Thomas Dean McCrea testified the officer described by Mother as the officer receiving the clothes must have been Sergeant Grant Huckabee, who was an investigator, K-9 handler, and evidence custodian at the time. The only other person with access to the evidence room was Chief Ford. Both Huckabee and Ford are no longer employed with the Kingstree

Police Department. Lieutenant McCrea was under the impression the clothing was sent to SLED for testing, but no record of this exists, and the clothing was lost. This was not the first instance of Huckabee losing evidence. No evidence intake sheet was located. ROA. pp. 261-26.

Samantha Cooper, Victim's aunt, testified she confronted McBride with Victim's allegations, and he told her he did not mean to do it. Cooper testified McBride attempted to "compromise" with her. Cooper was enraged. She went running after McBride, and he ran inside his house. She yelled at McBride through the door. ROA. pp. 290-92. She testified, "I was asking him why did he do it. And he said, I didn't mean to do it. We need to talk, just calm down, Sam." ROA. p. 292, lines 7-9. Cooper collected herself sufficiently enough to walk away rather than act on violent urges. Thereafter, she called the police. ROA. pp. 267-274.

ARGUMENT

I.

The trial court did not err in declining a spoliation charge, and Appellant was not entitled to dismissal based on lost evidence where no evidence indicates law enforcement acted in bad faith or the lost evidence had exculpatory value.

McBride argues his due process rights were violated because the Victim's shirt was lost by law enforcement and he was entitled to a spoliation instruction. McBride does not allege bad faith on the part of law enforcement and no evidence of bad faith exists. Further, the lost evidence did not have apparent exculpatory value. Finally, the requested charge is an unconstitutional charge on the facts and was improper.

McBride was not entitled to dismissal of the charge or exclusion of the photograph of the shirt. The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 702 S.E.2d 395, 404 (Ct. App. 2010) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991)). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Moses, 702 S.E.2d at 403.

Youngblood is factually on point with this matter. In Youngblood, clothes from the child-victim in a sexual assault case were not properly refrigerated. Id. at 53. Experts for Arizona and the defendant confirmed that semen on the clothes could have been tested if

refrigerated properly. Id. at 54. In that case, unlike the present case, identity was an issue. The Arizona Court of Appeals reversed, finding, "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process." Id. (citation and internal quotation marks omitted). Note the Arizona Court of Appeals holding closely tracks McBride's argument. Further note, as explained below, the Arizona Court of Appeals decision was reversed.

Youngblood held as follows:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interest of justice most clearly requires it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of the law.

Id. at 58.

In the instant case, no evidence suggests law enforcement acted in bad faith. Additionally, it is speculative at best that the shirt contained exculpatory evidence. See United States v. Agurs, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."). Accordingly, the issue lacks merit.

Additionally, McBride sought a spoliation instruction. Such an instruction is tantamount to a prohibited charge on the facts. S.C. Const. Art. V, §21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). In that vein, the trial court properly refused to charge the jury on "adverse inference." South Carolina case law indicates that in

criminal cases, jury charges of this nature, on behalf of the State or the defense, are "not warranted except in the most unusual of circumstances." State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) ("[W]e entertain grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness."); see also State v. Simmons, 267 S.C. 479, 482, 229 S.E.2d 597, 598 (1976) ("Even greater caution should be exercised by the courts in permitting an adverse inference comment in criminal proceedings than in civil proceedings.") (citations omitted); see also State v. Breeze, 379 S.C. 538, 547, 665 S.E.2d 247, 252 (Ct. App. 2008) (citing Simmons favorably but declining to decide whether a spoliation charge was warranted; instead this Court found no prejudice from any error in declining spoliation charge). Accordingly, the trial court did not err in declining to instruct the jury as McBride requested.

II.

Since no discovery violation occurred, the subject photographs were available for inspection, and there was no prejudice from the imagined violation, the trial court did not err in allowing the photographs to be admitted into evidence and in declining to grant a mistrial.

McBride complains the prosecution violated Rule 5, SCRCrimP, by not making a better copy of the photographs depicting Victim wearing the shirt bearing the deodorant stain. McBride also makes a vague due process claim. The prosecution complied with Rule 5, McBride was not denied due process, and further, McBride was not prejudiced by the perceived violation.

First, though, this Court should not review the issue because although vaguely referenced in the petition for rehearing, it was not actually raised as an issue to the Court of Appeals that the Court of Appeals overlooked or misapprehended. Kleckley v. Northwestern National Casualty Company, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (quoting Rule 226(d)(2), SCACR as follows: "Only those questions raised in the Court of Appeals *and* in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." (emphasis in the opinion)).

Even if reviewable, by this Court, the trial court correctly found no violation occurred. Prior to the photographs' admission and out of the presence of the jury, McBride objected to the photographs. McBride remonstrated: "we were provided with a document that was black – blank. Well it wasn't blank, excuse me. It was black. It was a no color photo. The one that they're looking to place into evidence is a colored photo." ROA. p. 141, lines 9-13. McBride's counsel confirmed his law firm received discovery: "The law firm was able to acquire documents

in regards to the case itself, which included these dark photographic images which you cannot make out." ROA. p. 141, lines 22-25.

McBride's counsel provided further explanation making clear he was aware of the existence of photographs he needed to inspect: "We have never been provided the colored photos in this particular case that we can actually view. We knew there was an image there. We didn't know what it was." ROA. p. 142, lines 16-19. Despite the fact counsel knew there were photographic images that were apparently difficult to make out, counsel never attempted to contact the prosecution or law enforcement to seek information about the photographs or arrange an opportunity to view the photographs.

McBride's counsel was candid that he did not believe the perceived violation was intentional on the prosecution's part. McBride's counsel refreshingly noted the prosecutor's "high professional standards." ROA. p. 143, lines 1-13. McBride's counsel did not complain he needed further preparation due to his belated viewing of the photographs. Instead he complained the photographs might have helped him work out a plea deal with the prosecution. ROA. p. 143, lines 13-23.

The prosecutor noted in both a discovery response to McBride's first attorney, and then to the present counsel, there was reference both to a disk and pictures available for inspection and duplication. ROA. p. 145. Further, the incident report provided to counsel also indicated a white stain on Victim's shirt. ROA. p. 146, lines 8-13. As the prosecutor noted: "It's not as if they had no idea that there were photographs in the case, then all of a sudden in the morning of trial, I spring photographs on them. Judge, we gave them notice two years ago that there were photographs in this case." ROA. p. 152, lines 19-24.

Rule 5 was complied with. Under Rule 5(a)(1)(C):

> (C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

In the instant case, it is apparent that McBride's counsel was made aware there were photographs available for inspection. It is further clear McBride was aware he was in possession of less than perfect copies of photographs and yet made no attempt to attain better copies or see the originals. Accordingly, the trial court correctly found the State complied with Rule 5. State v. Newell, 303 S.C. 471, 401 S.E.2d 420 (Ct. App. 1991) (where solicitor had open file policy, the defense attorney was allowed to inspect the file, and the defense attorney admitted that he probably inspected the file, the solicitor substantially complied with Rule 5).

Further, the trial court has discretion to determine what remedy, if any, is necessary to protect the defendant's rights. Rule 5(d)(2), SCRCrimP, states that if a party fails to comply with Rule 5, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or it may enter such other order as it deems just under the circumstances. Rule 5(d)(2), SCRCrimP; State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996).

The remedy, or determination that no remedy is required, will not be reversed absent an abuse of discretion. See Newell, 303 S.C. at 476, 401 S.E.2d at 423 (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 261 at 16 (2d ed. 1982) (adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial

court abused its discretion)).

In the instant case, McBride was unable to demonstrate actual prejudice from the purported violation. "A violation of Rule 5 is not reversible unless prejudice is shown." State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). McBride did not seek a continuance, did not state the need for further investigation or preparation, and failed to note the need for any additional witnesses. Indeed, McBride failed to indicate how the time he already had prior to the photograph being admitted was not sufficient to view the photographs. It was just two photographs, all counsel had to do was look at them. See State v. Lunsford, 318 S.C. 241, 456 S.E.2d 918 (Ct. App. 1995) (finding no reversible error where defense counsel did not seek additional time to study materials and prepare for further cross-examination); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (finding no abuse of discretion in trial court's denial of motion to suppress following late disclosure where defendant was permitted to view and copy the State's file and defendant never requested a recess in order to review the file); State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (subsequent history omitted) (finding the state's failure to produce discovery material consisting of a taped interview with the prosecution witness until the morning jury selection began did not warrant a dismissal or a mistrial where the trial court allowed defense counsel to listen to the tape before the witness took the witness stand and the trial court delayed cross-examination until the next day); Gorham v. Wainwright, 588 F.2d 178 (5th Cir.1979) (denying the defendant's mistrial motion and holding the defendant was not prejudiced by the prosecution's failure to turn over certain reports prior to trial because, although defense counsel requested and received a ten minute recess to review the new evidence, he did not request a continuance); 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL

PROCEDURE § 19.5, at 545-46 (1984) (a defendant's failure to request a continuance when a disclosure of exculpatory evidence is first made at trial "is often viewed as automatically negating any claim of actual prejudice.").

As to McBride's ambiguous Brady or due process argument, it simply lacks substance. The evidence is not exculpatory. See State v. Anderson, 407 S.C. 278, 287, 754 S.E.2d 905, 909 (Ct. App. 2014) ("Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence."); State v. Carlson, 363 S.C. 586, 609, 611 S.E.2d 283, 295 (Ct. App. 2005) ("Exculpatory evidence is that which creates a reasonable doubt about the defendant's guilt.") (citation omitted). The "violation" did not leave McBride with inadequate time to prepare. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998) ("In a Brady analysis, information is not deemed 'material' if the defense discovers the information in time to adequately use it at trial.").

In the instant case, there was no Rule 5 violation, the trial court did not err in denying the motion for mistrial, and there is no prejudice accruing from the perceived Rule 5 violation. Further, no due process violation occurred. Rule 5 was available as a matter of procedural due process, and a remedy short of dismissal or suppression of the photographs might have been available if McBride sought anything other than a windfall.

III.

Petitioner was not prejudiced by the no-corroboration instruction. Any error was harmless due to the corroborating evidence and admissions by Petitioner to a relative.

The trial court, pursuant to this Court's decision in State v. Rayfield, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006), instructed the jury that a rape victim's testimony need not be corroborated.[2] While McBride's petition for rehearing was pending, this instruction was found improper by this Court in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). McBride never petitioned for rehearing on this issue, even after the Court of Appeals issued a substituted opinion finding the instruction was harmless based on the new authority of Stukes.

Accordingly, this Court should not review the issue since McBride failed to petition for rehearing on the issue as required by our appellate court rules. Kleckley v. Northwestern National Casualty Company, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (quoting Rule 226(d)(2), SCACR as follows: "Only those questions raised in the Court of Appeals *and* in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." (emphasis in the opinion)).

Further, the error in this case is harmless. The facts of this case stand in stark contrast to the prosecution in Stukes. In Stukes, the trial court instructed the jury on the no-corroboration requirement. While deliberating, the jury sent the trial court a note, asking: "[T]he South Carolina law that the victim's testimony in CSC . . . does not need to be corroborated, . . . does that law imply that the victim's testimony must be accepted as being true?" Rather than respond

[2] S.C. Code Ann. § 16-3-657 provides: "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." McBride was charged under S.C. Code Ann. §§ 16-3-655 and 656.

directly to the jury's question, the trial court recharged the general law on credibility. The jury immediately returned a guilty verdict. Stukes, 787 S.E.2d at 482. This Court observed "it is inescapable that this charge confused the jury" as "illustrated by the jury's query as to whether our law implies a victim's testimony must be accepted as being true." Id. at 483.

Turning to the trial court's reaction to the jury note, this Court lamented, "In our view the trial court's decision to merely recharge credibility, as opposed to answer the question in the negative, did nothing to inform the jury on this issue." Id. Reviewing for harmless error, this Court found the instruction was prejudicial because the case hinged on credibility: the victim claimed to be raped, the defendant claimed it was consensual. Id.

In contrast to Stukes, in which the defendant testified and claimed a consensual sexual encounter, the instant case did not involve a consent defense and Victim's testimony was corroborated. The Court of Appeals found:

> Here, although we find the jury charge was error, we find it was harmless beyond a reasonable doubt. Unlike the situation in Stukes, there was corroborating evidence in this case. The victim's mother testified she smelled men's cologne and saw the stain on victim's shirt. The mother's sister testified she confronted McBride and he said he did not mean to do it, and "tr[ied] to compromise with [her]." The sister described it as McBride's confession. Thus, although the jury erroneously charged section 16-3-657, we find the error was harmless beyond a reasonable doubt.

State v. McBride, 416 S.C. 379, 394, 786 S.E.2d 435, ___ (Ct. App. 2016).

Contrary to McBride's claims, this is not a so called she said/he said case. Instead, this is a she said, he apologized case. When confronted by his aunt, McBride claimed he did not intend to do it and shut himself away from the understandably mad relative. When interviewed by law enforcement, McBride gave a nonsensical explanation that victim walked in on him while he was

going to the bathroom and was compelled to explain why she went out the back door instead of the front door (there was a bug). Further, the evidence in this case far exceeded more than bare allegations of an assault. Mother smelled cologne on victim (Mother testified Victim reeked of men's cologne), who acted strangely. ROA. p. 240, lines 11-17. Mother also noticed the stain on Victim's shirt, smelled it, and noted it smelled like deodorant. A photograph of the shirt with a stain was introduced into evidence. ROA. pp. 233-34. Later victim cried out in pain when she had a bowel movement, which corroborated her allegation of anal penetration. Accordingly, the corroborations and McBride's admissions render any error harmless, as aptly noted by the Court of Appeals.

Accordingly, certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the writ, Respondent respectfully requests this Court to allow Respondent to more fully brief the issues herein.

Respectfully submitted,

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October 11, 2016

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S.C. SUPREME COU

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
In the Supreme Court

John C. Hayes, II, Circuit Court Judge

Appellate Case No. 2016-001335

THE STATE,

RESPONDENT,

v.

JUSTIN McBRIDE,

PETITIONER.

AFFIDAVIT OF SERVICE

The undersigned hereby certifies that I have served a copy of the Return to Amended Petition for Writ of Certiorari on the Petitioner in the above-referenced case by depositing one copy of the same in the United States mail, postage prepaid, addressed to the Mr. Justin McBride, SCDC No. 357684, Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 11th day of October, 2016.

Anne Mueller

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RECEIVED
OCT 24 2016
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY
JOHN C. HAYES, III., CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2016-001335

THE STATE,

RESPONDENT,

VS.

JUSTIN McBRIDE,

PETITIONER.

REPLY TO THE STATE'S RESPONSE

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QUESTIONS FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN HOLDING, LAW ENFORCEMENT LOSING KEY AND EXCULPATORY EVIDENCE WITHOUT EXPLANATION AND CONTRARY TO ADMITTED INVESTIGATORY NORMS, VIOLATING DUE PROCESS OR AT A MINIMUM REQUIRED THAT A SPOLIATION CHARGE BE GIVEN TO THE JURY?

II. **Did the Court of Appeals err in finding no reversible error in the trial Court's ruling regarding petitioner's Motion to Suppress the color photographs?**

III. **Did the Court of Appeals err in affirming the trial court's charge that a victim's testimony need not be corroborated?**

STATEMENT OF CASE

December 2010, the Williamsburg County Grand Jury indicted Petitioner Mr. McBride for one count of criminal sexual conduct (CSC) with a minor in the first degree and assault with intent to commit criminal sexual conduct with a minor in the first degree.

March 1, 2012, the williamsburg County Grand Jury reindicted with the same charges: indictment no.: 2010-GS-45-0283.

October 28, 2013, Mr. McBride proceeded to jury trial before the Honorable John C. Hayes III. Attorney Derrick Mobley represented Mr. McBride at trial. Solicitor Kimberly Barr prosecuted the case for the state. The jury returned verdicts of guilty of criminal sexual conduct with a minor in the first degree and not guilty of assault with intent to commit criminal sexual conduct with a minor in the first degree.

STATEMENT OF FACTS

McBride is the cousin of the alleged victim in this case (Tr. 80) At the time of the alleged incident that gave rise to the charges, McBride was 16 years old; his cousin was 9. (Tr. 91)

After returning from school on the school bus, the alleged victim found her mother was not at home. (Tr. 91) She then either went to a neighbor's house, but did not stay because the neighbor had company, or went directly to McBride's house. (Tr. 91-93) In any event, she ended up at McBrides's house. (Tr. 93) They all lived in very close proximity to one another.

The testimony from this point gets very unclear and confusing as to actual events. What is clear is that at some point the alleged victim left to return home. (Tr. 101) At some point after returning home - again the timeline is not clear — she disclosed some incident with McBride, her cousin. (Tr. 103, 107) After some unspecified period of time, and with the alleged victim's mother wanting to wait until her husband (the alleged victim's father) got home, family members called the police. (Tr. 103, 259-260)

Several police officers arrived, including a female officer who was called in to speak with the female alleged victim. (Tr. 178-179) After getting the alleged victim's statement, the officer spoke with McBride. (Tr. 180) This conversation occurred in McBride's home. (Tr. 181) Two additional uniformed officers were also present during the questioning of McBride. (Tr. 181-182) And, testimony revealed that, though not technically under arrest, officers stood essentially between McBride and the door to his home, as well as outside McBride's home. (Tr. 35-36, 181-182) The police department no longer employs either the investigator or the two officers present during the questioning of McBride. (Tr. 37, 191)

McBride denied the actions described by the alleged victim. (Tr. 42, 183-184) His version of events was, at all times, different form the alleged victim and consisted of no wrongdoing. (Tr. 183-184) A portion of his statement - provided without being informed of his Fifth Amendment rights - was used against him at trial. (Tr. 330-333)

Only a handful of witnesses testified at trial, including the alleged victim. The alleged victim's own testimony was confusing and conflicting. (Tr. 95, 99, 102-104, 130-132, 149) She appears to assert that McBride attempted to force her to perform oral sex and attempted to penetrate her anally. (Tr. 95, 100-101) She indicated that semen ended up on the shirt she was wearing, as well as on a tissue she used to wipe it off. (Tr. 97-98)

Other witnesses included the alleged victim's mother and aunt and two of the police officers who responded to the original complaint. (Tr. 177, 223, 269) The only physical evidence introduced included a color photograph of the alleged victim on the day of the incident. (Tr. 153-155, 187, 271) The photograph purported to show a deodorant stain on the shoulder of the alleged victim's shirt. (Tr. 186)

Disturbingly, responding officers did not collect the shirt worn by the alleged victim. (Tr. 200, 247) Instead, after at least several days, the alleged victim's mother brought the shirt to the police department. (Tr. 247-248) The shirt was never tested to determine the presence either of semen or deodorant. (Tr. 80, 199-200, 270, 351) In fact, the shirt was never sent to SLED for any testing and was lost. (Tr. 275) At no time was the shirt available to the defense; nor was it tested and results of such testing provided. (Tr. 161, 276) The police also never tested any materials from McBride, such as his deodorant. (Tr. 213, 251) Even the police department's evidence sheet, completed with all evidence submissions, was missing. (Tr. 277) Despite this lack of evidence, the jury returned a guilty verdict on the charge of first degree criminal sexual conduct with a minor based on the State's claim that oral sex occurred. (Tr. 375-378.) This verdict was unsupported by the evidence and followed several erroneous evidentiary decisions of the Circuit Court, along with confusing jury charges, violating McBride's Due Process rights. McBride, only sixteen at the time of the incident, was sentenced to 25 years without parole.

ARGUEMENT 1

DID THE COURT OF APPEALS ERR IN HOLDING LAW ENFORCEMENT, LOSING KEY AND EXCULPATORY EVIDENCE WITHOUT EXPLANATION AND CONTRARY TO ADMITTED INVESTIGATORY NORMS, VIOLATING DUE PROCESS OR AT A MINIMUM REQUIRE THAT A SPOLIATION CHARGE BE GIVEN TO THE JURY?

PETITIONER CONTINUES TO MAINTAIN CERTAINTY THAT A CONSTITUTIONAL ERROR WAS RENDERED IN NOT ALLOWING A SPOLIATION CHARGE TO BE GIVEN TO THE JURY, AND DENYING THE PETITIONER'S DISMISSAL BASED ON LOST EVIDENCE THAT HAD EXCULPATORY VALUE. "THE PROPER STANDARD OF MATERIALITY OF UNDISCLOSED EVIDENCE, AND THE STANDARD APPLIED BY THE TRIAL JUDGE, IN THIS CASE, IS THAT, IF THE OMITTED EVIDENCE CREATES A REASONABLE DOUBT OF GUILT THAT DID NOT OTHERWISE EXIST, CONSTITUTIONAL ERROR HAS BEEN COMMITTED." (SEE UNITED STATES V. AGURS, 427 US 97, 112-114 (1976). THE MISSING SHIRT CREATES A REASONABLE DOUBT OF GUILT BECAUSE THERE WAS NO SEMEN STAIN IN ANY OF PHOTOGRAPHIC EVIDENCE AS ALLEGED.

CALIFORNIA V. TROMBETTA, 467 U.S. 479, 967 US. 488 (1984), "DUTY TO PRESERVE EVIDENCE MUST BE LIMITED TO EVIDENCE THAT MIGHT BE EXPECTED TO PLAY A SIGNIFICANT ROLE IN THE SUSPECT'S DEFENSE.

IN YOUNGBLOOD, SAMPLES WERE COLLECTED, THEN LOST. THE EVIDENCE WAS DEEMED MOST LIKELY INCULPATORY. IN PETITIONER'S CASE, THE SHIRT THAT WENT "MISSING" WAS EXPECTED TO PLAY A MAJOR AND SIGNIFICANT ROLE IN THE DEFENSE OF THE PETITIONER. TO RISE TO THE LEVEL OF PLAIN ERROR, THE CLAIMED ERROR MUST NOT SERIOUSLY AFFECT A DEFENDANT'S SUBSTANTIAL RIGHTS, BUT IT MUST ALSO HAVE AN UNFAIR PREJUDICIAL IMPACT ON THE JURY'S INSTRUCTIONS. (EMPHASIS ADDED). ARIZONA V. YOUNGBLOOD 488 U.S. 51, 58 (1998).

THE PREJUDICIAL EFFECT FAR OUTWEIGHED ANY PROBATIVE VALUE. THE JURY MUST HAVE SUFFICIENT EVIDENCE TO HAVE PROVE PETITIONER'S GUILT BEYOND A REASONABLE DOUBT. LAW ENFORCEMENT WAS NEGLIGENT BECAUSE THEY FAILED TO PRESERVE EVIDENCE THAT WAS CRUCIAL IN DEFENDANT'S EXONERATION. PETITIONER DID NOT ALLEGED BAD FAITH BECAUSE LAW ENFORCEMENT'S NEGLIGENCE WAS FAR GREATER, THAN JUST THAT. AT THE VERY LEAST THE TRIAL COURT SHOULD HAVE GIVEN THE JURY A SPOLIATION CHARGE, SO THAT THE JURY WOULD NOT BE MISLEAD DURING PETITIONER'S TRIAL.

ARGUEMENT II

DID THE COURT OF APPEALS ERR IN FINDING NO REVERSIBLE ERROR IN THE TRIAL COURT'S RULING REGARDING PETITIONERS MOTION TO SUPPRESS THE COLOR PHOTOGRAPHS?

THE TRIAL COURT, IN PETITIONERS TRIAL, ERR IN FAILING TO WEIGH THE PROBATIVE VALUE AGAINST THE PREJUDICIAL EFFECT OF MISLEADING THE JURY TO BELIEVE THE "JUNK SCIENCE" OF WHAT THE STAIN WAS ALLEGED TO HAVE BEEN. THE HOLDING IN BRADY V. MARYLAND, 373 U.S. 83, 83 S.CT. 1194, 10 L.Ed.2d 245 (1963), REQUIRES DISCLOSURE ONLY OF EVIDENCE THAT IS BOTH FAVORABLE TO THE ACCUSSED AND "MATERIAL" EITHER TO GUILT OR TO PUNISHMENT, REGARDLESS OF WHETHER THE DEFENDANT MAKES A SPECIFIC REQUEST.

THE BRADY DISCLOSURE RULE IS GROUNDED IN THE DEFENDANTS FUNDAMENTAL RIGHT TO A FAIR TRIAL MANDATED BY THE DUE PROCESS CLAUSE OF THE (5th) FIFTH AND (14th) AMENDMENTS. IT ALSO REQUIRES THE PROSECUTION TO DISCLOSE EVIDENCE THAT IS; 1.) IN ITS POSSESSION; 2.) FAVORABLE TO THE ACCUSED; AND 3.) MATERIAL TO GUILT OR PUNISHMENT. UNITED STATES V. BAGLEY, 473 U.S. 667, 105 S.CT. 3375, 87 L.Ed.2d 481 (1985).

THIS RULE EXTENDS TO EVIDENCE THAT IS NOT IN THE ACTUAL POSSESSION OF THE PROSECUTION, BUT KNOWN BY OTHERS ACTING ON THE

GOVERNMENTS BEHALF IN THE PARTICULAR CASE, INCLUDING, LAW ENFORCEMENT.

KYLES V. WHITLEY 514 U.S. 419, 115 S.CT. 1555, 131 L.Ed.2d 490 (1995). "FAVORABLE" EVIDENCE INCLUDES BOTH EXCULPATORY AND IMPEACHMENT EVIDENCE. EVIDENCE WITHHELD BY GOVERNMENT IS "MATERIAL" AS WOULD REQUIRE REVERSAL OF THE CONVICTION, THERE IS PROBABILITY THAT, HAD THE EVIDENCE BEEN DISCLOSED TO DEFENSE, RESULT OF PROCEEDING WOULD HAVE BEEN DIFFERENT. BAGLEY SUPRA. THE STATE'S FAILURE TO ASSIST PETITIONER BY DISCLOSING INFORMATION THAT MIGHT HAVE BEEN HELPFUL IN CONDUCTING CROSS-EXAMINATIONS, AMOUNTS TO CONSTITUTIONAL VIOLATION. ONLY IF IT DEPRIVES DEFENDANT OF A FAIR TRIAL, CONSTITUTIONAL ERROR OCCURS AND CONVICTION MUST BE REVERSED. IN PETITIONER'S CASE THE EVIDENCE IS MATERIAL IN SENSE THAT ITS SUPPRESSION UNDERMINES CONFIDENCE IN OUTCOME OF TRIAL.

THE PROPER STANDARD IS ONE OF REASONABLE PROBABILITY AND THAT THE FAILURE TO APPLY THIS STANDARD NECESSITATES REVERSAL; IF DISCLOSED AND USED EFFECTIVELY IT MAY MAKE THE VERY DIFFERENCE BETWEEN CONVICTION AND ACQUITTAL. NAPUE V. ILLINOIS 360 U.S. 264, 269, 79 S.CT. 1173, 1177, 3 L.Ed.2d 1217

ARGUEMENT III

DID THE COURT of APPEALS ERR IN AFFIRMING THE TRIAL COURT'S CHARGE THAT A VICTIM'S TESTIMONY NEED NOT BE CORROBORATED?

"FAILURE TO BRING AN ISSUE ON DIRECT APPEAL BARS RAISING THAT ISSUE IN A § 2254 MOTION UNLESS GREAT CAUSE FOR NOT RAISING THAT MATTER ON DIRECT APPEAL IS DEMONSTRATED," (SEE) U.S. V. GRIFFIN 765 F.2d 1177 (7th Cir. 1985) & KAUFMAN v. U.S. 394 US 217, 22 L.E.2d 227. 89 (1969)

THE INEFFECTIVENESS of PETITIONERS APPELLATE COUNSEL CAUSED THIS ISSUE TO NOT BE INCLUDED IN THE PETITION FOR REHEARING. PETITIONER, UNDER THE IMPRESSION HE WAS PRO SE, BECAUSE HIS COUNSEL WROTE AND EXPRESSED THAT SHE NO LONGER WORKS FOR HIM. THEREFORE, THE PETITIONER ATTEMPTED TO AMEND THE PETITION FOR REHEARING TO ADD STATE V. STUKES. 416 S.C. 493, 787 SE.2d 480 (2016).

IN STUKES, AS CORROBORATING EVIDENCE, MUITIPLE WITNESSES TESTIFIED TO THE ASSAULT'S PHYSICAL AND EMOTIONAL IMPACT ON THE VICTIM. A WITNESS, TESTIFIED THERE WAS A HANDPRINT ON THE VICTIM'S FACE OR NECK AFTER THE ATTACK, MATCHING THE VICTIM'S VERSION OF THAT SAID ATTACK. DESPITE THE EVIDENCE of ASSAULT THE SUPREME COURT RULED THAT THE ERROR IN THE

CHARGING OF THE NO-CORROBORATION RULE TO THE JURY IS NOT A HARMLESS ERROR.

IN PETITIONER'S CASE, DURING THE CLOSING ARGUEMENT, THE STATE EXPLAINED TO THE JURY THAT THE "COLOGNE" WAS USED TO MASK THE SCENT OF THE ALLEGED ANAL RAPE, A CHARGE IN WHICH PETITIONER, WAS ACQUITTED OF. ANY TYPE REFERENCE TO THE "COLOGNE" CAN NOT POSSIBLY BE USED AS CORROBORATING EVIDENCE <ROA pg 338 L's (15-25)> AFTER SPEAKING TO THE VICTIM, DETECTIVE HAMLET, SPOKE WITH PETITIONER, TO HEAR HIS SIDE OF THE ALLEGED EVENTS <ROA pg 1168-1717. AT ALL TIMES PETITIONER'S STATEMENT WAS CONTRARY TO THE VICTIMS. NOT ONCE WAS A CONFESSION MADE TO LAW ENFORCEMENT NOR VICTIM'S MOTHER.

ON, MAY 25, 2016, THE COURT of APPEALS WITHDREW ITS OPINION AND SUBSTITUTED A NEW ONE FINDING ERROR FOR THE NO-CORROBORATION JUSTRUCTION IN PETITIONER'S CASE, BASED ON STOKES, BUT FINDING THAT SAID ERROR HARMLESS, BY ITSELF.

INADVERTENTLY, DUE TO THE ERROR IN LOSING KEY AND EXCULPATORY EVIDENCE, AND THE TRIAL COURT'S RULING TO ADMIT THE COLOR PHOTOGRAPHS of A SHIRT THAT THE PROSECUTOR CLAIMED, EXPLAINED TO THE JURY, HAD DEODORANT ON IT WITHOUT ANY TESTS TO PROVE THAT ALLEGATION, IT IS NOT HARMLESS TO CHARGE THAT A VICTIMS TESTIMONY NEED NOT BE CORROBORATED, ESPECIALLY WHEN OTHER PREJUDICIAL ERRORS ARE INVOLVED. ACCORDINGLY, CERTIORARI SHOULD BE GRANTED.

CONCLUSION

THIS PETITION FOR WRIT of CERTIORARI SHOULD BE GRANTED, BECAUSE THE DECISION of THE COURT of APPEALS IS IN CONFLICT WITH A PRIOR DECISION of THE SUPREME COURT, AND ONCE GRANTED, PETITIONER ASK THE COURT FOR A NEW TRIAL.

RESPECTFULLY SUBMITTED,

Justin McBride, #357684
SCDC (L.C.I.) FSD 228
990 Wisacky Highway
Bishopville, SC 29010

OCTOBER 20, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 24 2016
S.C. SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY
In the Supreme Court

John C. Hayes, II, Circuit Court Judge

Appellate Case No. 2016-001335

THE STATE,

RESPONDENT,

v.

JUSTIN McBRIDE,

PETITIONER.

AFFIDAVIT OF SERVICE

I, CERTIFY THAT I HAVE SERVED A COPY OF THE "REPLY TO THE STATE'S RESPONSE" ON THE RESPONDENT IN THE ABOVE-REFERENCED CASE BY DEPOSITING ONE COPY OF THE SAME IN THE SCDC. (L.C.I.) MAILROOM, ADDRESSED TO THE FOLLOWING:

Office of Attorney General
C/O Asst. David Spencer
P.O Box 11549
Columbia, SC 29211

THE HONORABLE DANIEL E. SHEARHOUSE
CLERK of COURT (S.C. SUPREME COURT)
P.O. Box 11330
Columbia, SC 29211

This 20th Day of October, 2016

Justin McBride

Justin McBride, #357684
SCDC (L.C.I.) F50228
990 Wisacky Highway
Bishopville, S.C. 29010

The Supreme Court of South Carolina

The State, Respondent,

v.

Justin McBride, Petitioner.

Appellate Case No. 2016-001335
Lower Court Case No. 2010-GS-45-00283

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

June 16, 2017

cc:
David A. Spencer, Esquire
Alan McCrory Wilson, Esquire
Ernest Adolphus Finney, III, Esquire
Wendy Raina Johnson Keefer, Esquire
Adam Owensby, Esquire
Joshua Preston Stokes, Esquire
Justin McBride, 357684
The Honorable Sharon W. Staggers
The Honorable Jenny Abbott Kitchings

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211

1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 30, 2017

The Honorable Sharon W. Staggers
125 W Main St
Kingstree SC 29556-3343

REMITTITUR

Re: The State v. Justin McBride
Lower Court Case No. 2010GS4500283
Appellate Case No. 2013-002391

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Wendy Raina Johnson Keefer, Esquire
Adam Owensby, Esquire
David A. Spencer, Esquire
Alan McCrory Wilson, Esquire
Ernest Adolphus Finney, III, Esquire
Joshua Preston Stokes, Esquire

611

STATE OF SOUTH CAROLINA)
)
COUNTY OF Williamsburg)

IN THE COURT OF COMMON PLEAS

Justin McBride # 357684)
Plaintiff(s))

vs.

The State of South Carolina)
Defendant(s))

CIVIL ACTION COVERSHEET

2018 -CP- 45 - 107

FILED
2018 FEB 22 PM 12:53
CLERK OF COURT
KINGSTREE, S.C.

Submitted By: Tristan M. Shaffer
Address: P.O. Box 1027
Chapin, SC 29036

SC Bar #: 77565
Telephone #: 803-941-7614
Fax #:
Other:
E-mail: tristan@shafferlawsc.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. **This form is NOT required to be filed in E-Filed Cases.**

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☐ **JURY TRIAL** demanded in complaint. ☒ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-NI-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions
- ☒ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Incapacitated Adult Settlement (790)
- ☐ Other (799) _____

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)
- ☐ Permanent Restraining Order (680)
- ☐ Interpleader (690)

Submitting Party Signature: _____ **Date:** 2/20/18

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	THE THIRD JUDICIAL CIRCUIT
COUNTY OF WILLIAMSBURG	
	Case No.: 2018-CP-45-107
JUSTIN MCBRIDE #357684,	APPLICATION FOR POST-CONVICTION RELIEF
Applicant,	
vs.	
THE STATE OF SOUTH CAROLINA,	
Respondent.	

2018 FEB 22 PM 12:53
CLERK OF COURT
KINGSTREE, S.C.

1. Place of detention: Lee Correctional Institution

2. Name and location of Court which imposed sentence: Williamsburg County Court of General Sessions, the Hon. John C. Hayes, III presiding.

3. Name(s) of co-defendant(s) (if any): None.

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: 2010-GS-45-0283

   a. Count 1- Criminal Sexual Conduct with a Minor in the First Degree- 25 years;

5. The date upon which sentence was imposed and the terms of the sentence: October 30, 2013.

6. A finding of guilty was made: after a plea of not guilty.

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed: South Carolina Court of Appeal and South Carolina Supreme Court.

(b) the result in each such Court to which you appealed: Affirmed by the Court of Appeals; Cert. denied by the Supreme Court of South Carolina.

(c) the date of each such result: Court of Appeals May 25, 2016; Supreme Court June 16, 2017.

(d) if known, citations of any written opinion or orders entered pursuant to such results: Court of Appeals - 2016 Opinion No. 5381.

9. If you answered "no" to (7), state your reasons for not so appealing:

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

a. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to challenge the jurisdiction of the court of General Sessions to hear the case.

b. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to move for Applicant's case to be remanded to the Family Court.

c. Given the fact that Applicant was 16 at the time of the alleged offense, the twenty-five year sentence is cruel and unusual and violates the Eighth Amendment of the United States Constitution.

d. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the mandatory minimum sentence pursuant to the Eighth Amendment of the United States Constitution.

e. Given the fact that Applicant was 16 at the time of the alleged offense, the twenty-five year sentence is cruel and unusual and violates the Article I Section 15 of the South Carolina Constitution as applied to Applicant.

f. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the mandatory minimum sentence pursuant to Article I Section 15 of the South Carolina Constitution.

g. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the entirety of his statement pursuant to *Jackson v. Denno*.

h. To the extent that Trial Counsel properly objected to the mandatory minimum sentence, Applicant submits that he was denied his Sixth Amendment right to effective assistance of Appellate Counsel for failing to brief this issue on appeal.

i. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly review discovery documents and advise Applicant of the evidence against him.

j. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately impeach the alleged victim with inconsistencies in her statements.

k. Applicant was denied his Sixth Amendment effective assistance of counsel when Trial Counsel failed to call Dr. Luberoff to testify.

l. Applicant was denied his Sixth Amendment right to effective assistance of appellate counsel when Appellate Counsel failed to brief the trial court's erroneous ruling that prohibited Applicant from presenting evidence of why Officer Huckabee had left the police department.

m. Alternative to l, Applicant was denied his Sixth Amendment right to effective assistance of counsel when his trial counsel failed to adequately preserve the issue raised in subsection l.

n. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel allowed the jury to be charged that Applicant could be found guilty of criminal sexual conduct

o. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to burden statements in the State's closing argument.

p. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the State's closing argument that was designed to inflame the passion and the prejudice of the jury.

q. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the State's argument that anal or vaginal sex was sufficient to result in a finding of guilty for count I of the indictment.

r. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Samantha Cooper's testimony pursuant to Rule 5.

s. Applicant was denied his Sixth Amendment right to effective assistance of Counsel When Trial Counsel failed to adequately investigate and called witnesses to contradict Samantha Cooper.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

a. Applicant was 16 years old at the time of the alleged offense, Trial Counsel never challenged the jurisdiction of the Court of General Sessions to hear the case.

b. Applicant was 16 years old at the time of the alleged offense, Trial Counsel did not move to remand the case to family court.

c. Applicant was 16 years old at the time of the offense. S.C. Code 16-3-655(d)(1) puts a mandatory minimum sentence of twenty-five years for Criminal Sexual Conduct with a Minor in the First Degree. As applied to Applicant this mandatory minimum violates the Eighth Amendment because it did not allow the Court to consider Applicant's age at the time of the alleged offense. *Cf. Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455 (2012) ("[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

d. Trial Counsel never argued that the mandatory minimum twenty-five-year sentence violated the Eighth Amendment as applied to Applicant.

e. Applicant was 16 years old at the time of the offense. S.C. Code 16-3-655(d)(1) puts a mandatory minimum sentence of twenty-five years for Criminal Sexual Conduct with a Minor in the First Degree. As applied to Applicant this mandatory minimum violates Article I Section 15 of the South Carolina Constitution because it did not allow the Court to consider Applicant's age at the time of the alleged offense.

f. Trial Counsel never argued that the mandatory minimum twenty-five-year sentence violated Article I Section 15 of the South Carolina Constitution.

g. Trial Counsel only objected to part of Applicant's statement to law enforcement.

h. If Trial Counsel adequately raised a constitutional objection to the mandatory minimum sentence, Appellate Counsel was ineffective for failing to brief this issue.

i. Prior to trial, Trial Counsel received a photo copy of a picture. The photo copy appeared black and Trial Counsel was unable to view what was on the picture.

Trial Counsel did not get a corrected copy of picture. This failure lead Trial Counsel to misadvise Applicant about the evidence the State would use against him. Based on this erroneous advice, Applicant's decision to reject the plea offer was not knowingly and intelligently made.

j. While Trial Counsel did point out that the alleged victim had made inconsistent statements, Trial Counsel was ineffective by failing to introduce evidence showing the prior inconsistencies.

k. Trial Counsel did not present evidence from Dr. Luberoff's examination of the alleged victim.

l. The Trial Court sustained the State's objection concerning Officer Huckabee, this error was not raised on direct appeal.

m. In the event that the Court finds that the issue in subsection l was not adequately preserved, Applicant asserts that trial counsel was ineffective for failing to adequately preserve this issue.

n. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Coul

o. Trial Counsel failed to object to the following statements:

   i. I had a former prosecutor to tell l me one time that he was trying a case, and he had lost the case. And after it over, he went and he talked to some of the jurors, and he kind of wanted to just get some insight about the case. You know, If I had done things a little bit better or if I had presented the evidence a little bit better, if I had done this or I had done that. And I just wanted to know, you know, why you found the person not guilty. And one of jurors said, of, well, I believe the defendant was guilty. But I don't think

the state proved it. And so they exchanged some more niceties and he went on about his life. And he said, he thought about this thing over and over and over. And he said, wait a minute now, if the jury believed that defendant was guilty, the only way they could have believed that is based on the evidence. Right. He said so if they believe that defendant was guilty based on the evidence in the case, then that means that the state has met its burden. A trial is a search for the truth not a search for reasonable doubt.

ii. Mr. Foreman, when you sign your name on that verdict form, after all to you jurors have deliberated and voted on it, what you are signing your name to and what you are voting on is the truth of the case. Just the truth. It's not whether or not law enforcement did something wrong or whether or not this happened or that happened, you all are voting on just the truth. I want once the case is over, I want the truth to be known, and that's all I want. That's all I want is the truth to be known . I don't want jurors saying, you know, the state didn't meet its burden.

iii. Do you all remember on yesterday morning when the Clerk of Court sworn you all in and what she asked you to do, and what you agreed to do by your oath, is to well and truly try the case of the State of South Carolina versus Justin McBride under Indictment 2010-GS-45-283, and render a true verdict according to the law and according to the evidence so help you God. That was the pledge you all gave to this court and this case when you took your oath... Now a couple of things that the judge will tell you further as it relates to the law in this case. The judge will tell you that testimony of a victim in a criminal sexual assault case doesn't have to be

corroborated. And some of them, you know, I understand maybe if there is some hesitation about that. Some of you may not agree with that. Some of you may say, well no, there needs to be more than what she says. But that isn't what the law says. And you remember when I told you about your oath. You shall well and truly try this case and render a true verdict according to the law and the evidence. Some people may not agree with the law. But the law is the law, and we have to uphold the law. And quite frankly, I would submit to you that when our legislators in Columbia drafted this law, they understood. They understood what we understand every day. Tr. 319, l. 20—Tr. 322, l. 5.

iv. If a trial is the search for the truth, and if you all took an oath to render a true verdict according to the law and the evidence what do you do now. Do you say well, I believe that girl. I believe everything she said. I believe the defendant did it. But the state shouldn't have lost the evidence. Does that now mean that he's not held to account for his actions. Does that mean that at the end of the day this family and the State of South Carolina, doesn't seek justice. Does that now mean that you don ' t render a true verdict in the case. Folks, I urge you all not to do that.

p. Trial Counsel failed to object to the following statements:

i. Do you all remember on yesterday morning when the Clerk of Court sworn you all in and what she asked you to do, and what you agreed to do by your oath, is to well and truly try the case of the State of South Carolina versus Justin McBride under Indictment 2010-GS-45-283, and render a true verdict according to the law and according to the evidence so help you

God. That was the pledge you all gave to this court and this case when you took your oath.

ii. If a trial is the search for the truth, and if you all took an oath to render a true verdict according to the law and the evidence what do you do now. Do you say well, I believe that girl. I believe everything she said. I believe the defendant did it. But the state shouldn't have lost the evidence. Does that now mean that he's not held to account for his actions. Does that mean that at the end of the day this family and the State of South Carolina, doesn't seek justice. Does that now mean that you don't render a true verdict in the case. Folks, I urge you all not to do that.

q. Trial Counsel failed to object when the State informed the jury that Defendant could be convicted of Count I if there was vaginal or anal intercourse.

r. Trial Counsel failed to properly object to Samantha Cooper's testimony.

s. Trial Counsel did not call witnesses which would give contradictory evidence related to Samantha Cooper.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No.

(b) any petition in State or Federal Courts for habeas corpus or post-conviction relief? No.

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any already specified in (8)? No.

(d) any other petitions or applications in this or any other Court? No.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or Application:

14. Has any ground set forth in (10) been previously presented to this or any other State or Federal Court, in any petition, motion or application which you have filed? No.

15. If you answered "yes" to (14) identify: Not Applicable.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: First collateral review.

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes.

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Derrick Mobley- 203 W. Main St. (Suite F-5), Lexington, SC 29072.

ii. Wendy Keefer- 1643B Savannah Hwy, Ste. 226, Charleston, SC 29407

iii. Joshua P. Stokes- 145 King Street, Suite 407, Charleston, SC 29401

iv. Adam Owensby- PO Box 21043 Charleston, SC 29413

(b) the proceedings at which each such attorney represented you:

i. Trial

ii. Appeal to the Court of Appeals

iii. Appeal to the Court of Appeals.

iv. Appeal to the Court of Appeals.

19. State clearly the relief you seek in filing this application: the belated appeal that was previously ordered. The belated direct appeal that was not perfected by my previous PCR counsel.

20. Are you now under sentence from any other court that you have not challenged? No.

RESPECTFULLY SUBMITTED,

Tristan M. Shaffer (SC Bar 77565)
225 Columbia Ave.
Chapin, SC 29036
(803) 941-7514
tristan@shafferlawsc.com
Attorney for Applicant

Date: 2/20/18

STATE OF SOUTH CAROLINA)
County of _____) VERIFICATION
)

I, Justin McBride, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

_____

SWORN to and subscribed before me this _____ day of _____, 2____.

_____ (L.S.)
Notary Public

My Commission Expires: _____

iv. Appeal to the Court of Appeals.

19. State clearly the relief you seek in filing this application: the belated appeal that was previously ordered. The belated direct appeal that was not perfected by my previous PCR counsel.

20. Are you now under sentence from any other court that you have not challenged? No.

RESPECTFULLY SUBMITTED.

Tristan M. Shaffer (SC Bar 77565)
225 Columbia Ave.
Chapin, SC 29036
(803) 941-7514
tristan@shafferlawsc.com

Attorney for Applicant

Date: 2/20/18

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Williamsburg)

I, Justin McBride, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Justin M Bride

SWORN to and subscribed before me this 12th day of January, 2018.

Uniqua Greene (L.S.)
Notary Public

My Commission Expires: 9-29-2027

FILED
2018 FEB 22 PM 12:53
CLERK OF COURT
KINGSTREE, S.C.

STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Justin McBride, #357684, Applicant, v. State of South Carolina, Respondent.	)	Case No.:2018-CP-45-107 **RETURN**

2018 JUN 27 PM 3:03

In response to the application for post-conviction relief filed by Justin McBride (Applicant) on February 22, 2018, Respondent would show this Court:

I.

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Applicant was indicted at the March 2012 term of the Williamsburg County Grand Jury for first-degree criminal sexual conduct with a minor and assault with intent to commit first-degree criminal sexual conduct with a minor (Amended 2010-GS-45-0283). The charges stem from an incident on June 21, 2010, in which Applicant, who was sixteen years old, forced his nine-year-old cousin to perform oral sex on him. Immediately afterwards, Applicant attempted to penetrate the victim's rectum. Tr. 90-101.

Derrick Mobley, Esquire, represented Applicant, and Assistant Solicitor Kimberly Barr, Esquire, prosecuted the case. On October 28-30, 2013, Applicant proceeded to a jury trial before the Honorable John C. Hayes, III, and was found guilty of first-degree criminal sexual conduct with a minor. Applicant was acquitted of assault with intent to commit criminal sexual conduct with a minor in the first degree. Judge Hayes sentenced Applicant to imprisonment for twenty-five years.

Applicant filed a timely notice of appeal, and appeal was perfected by Wendy J. Keefer, Esquire, and Adam Owensby, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction in an opinion dated February 17, 2016. Applicant petitioned for rehearing on February 23, 2016, and Respondent filed a return dated April 25, 2016. On May 25, 2016, the Court of Appeals withdrew its opinion and substituted a new opinion affirming the convictions. Applicant's appellate attorneys were relieved as counsel, and Applicant proceeded *pro se*, filing an amended petition for writ of certiorari to the South Carolina Supreme Court. Respondent filed a return on October 11, 2016. The Supreme Court denied certiorari on June 16, 2017. The remittitur was issued on June 30, 2017.

II.

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
    a. Failure to challenge the jurisdiction of the court of General Sessions
    b. Failure to move for case to be remanded to Family Court
    c. Failure to object to mandatory minimum sentence as cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution
    d. Failure to object to mandatory minimum sentence as cruel and unusual punishment in violation of Article 1 Section 15 of the South Carolina Constitution
    e. Failure to object to the entirety of his statement pursuant to Jackson v. Denno
    f. Failure to properly review discovery documents and advise Applicant of the evidence against him
    g. Failure to adequately impeach the alleged victim with inconsistencies in her statements
    h. Failure to call Dr. Luberoff to testify
    i. Failure to preserve for appeal the issue of trial court's erroneous ruling that prohibited Applicant from presenting evidence of why Office Huckabee left the police department

j. Failure to object to the jury charge that Applicant could be found guilty of criminal sexual conduct
k. Failure to object to burden statements in the State's closing argument
l. Failure to object to the State's closing argument that was designed to inflame the passion and prejudice of the jury
m. Failure to properly object to the State's argument that anal or vaginal sex was sufficient to result in a finding of guilty for count I of the indictment
n. Failure to object to Samantha Cooper's testimony pursuant to Rule 5
o. Failure to adequately investigate and call witnesses to contradict Samantha Cooper

2. Ineffective Assistance of Appellate Counsel
   a. Failure to brief the issue of mandatory minimum sentence as cruel and unusual punishment on appeal
   b. Failure to brief the trial court's erroneous ruling that prohibited Applicant from presenting evidence of why Officer Huckabee left the police department
3. United States Constitution Violation
   a. The twenty-five year sentences was cruel and unusual punishment for a sixteen year old offender in violation of the Eighth Amendment.
4. South Carolina Constitutional Violation
   a. The twenty-five year sentences was cruel and unusual punishment for a sixteen year old offender in violation of Article 1 Section 15 as applied to Applicant.

Attached to and incorporated herein are the records of the Williamsburg County Clerk of Court regarding the subject convictions, the trial transcript, the direct appeal records, and the current application for relief. Applicant's records from the South Carolina Department of Corrections will be supplemented upon receipt. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

Applicant's claims as allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined

the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not

conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. *See* Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not

conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Respondent asserts Applicant's allegations of Constitutional violations are without merit. An applicant may allege constitutional violations in a post-conviction relief application unless the issue could have been raised on direct appeal. Gibson v. State, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998); S.C.Code Ann. § 17-27-20(a)(1) (1976). Applicant asserts his rights under the Eight Amendment of the United States Constitution and under Article 1 Section 15 of the South Carolina Constitution were violated by the imposition of the twenty-five year mandatory minimum sentence for the crime of which he was convicted. He states that this sentence was cruel and unusual punishment for a sixteen year old offender.

The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions, which flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense. Miller v. Alabama, 567 U.S. 460, 469 (2012). Applicant compares his assertion to the United States Supreme Court's decision in Miller, which held that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment. However, Applicant's circumstances differ greatly from the circumstances criticized in Miller. Applicant was not given a mandatory sentence of life without parole from which he could never be released, but rather was given twenty-five years for a violent sexual assault on a nine-year-old child. Applicant will be released from prison in October of 2038, and he will be approximately forty-four years old. He will have the opportunity to continue on to live a lengthy life outside of confinement for

potentially decades after his release. His circumstance cannot compare to the mandatory life confinement without parole that Miller forbids.

Although he asserts he was a sixteen year old child at the time of the crime, Applicant was properly charged with the crime as an adult in General Sessions court. "Child" is defined as follows under S.C. Code Ann. § 63-19-20(1):

> (1) "Child" or "juvenile" means a person less than seventeen years of age. "Child" or "juvenile": does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen year or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

Criminal sexual conduct with a minor in the first degree is a felony with a penalty of twenty five years' imprisonment or life imprisonment. S.C. Code Ann. §16-3-655(D)(1). Therefore, under the plain language of the statute, Applicant was not a child when he sexually assaulted his cousin.

While McBride suggests uncertainty on the issue of jurisdiction in his application, the question was already soundly answered. The Supreme Court found that a sixteen year old charged with A, B, C, or D felonies is not a "child" as defined by statute and, therefore, may be charged in circuit court without first bringing the charges in family court. State v. Graham, 340 S.C. 352, 532 S.E.2d 262 (2000).

Accordingly, because Applicant was properly charged as an adult in General Sessions court, and because there is no legal support for his assertion that his sentence was unconstitutional in light of his age, Respondent submits these arguments are meritless. However,

they probably raise issues of fact which cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve the issue.

VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP; Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017). All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

V.

Respondent denies each allegation not expressly admitted, qualified, or explained.

VIII.

WHEREFORE, Respondent respectfully requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel.

Respectfully suhmitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JULIE A. COLEMAN.
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

June 25, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF WILLIAMSBURG	)	
	)	
	)	2018-CP-45-0107
JUSTIN MCBRIDE, #357684	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Tristan M. Shaffer, Esquire
Post Office Box 1027
Chapin, SC 29036

DATED this 25th day of June, 2018.

Chandra E. Squirewell
Legal Assistant For Respondent

RECEIPT FOR EXHIBITS

CASE NO. 2018-cp-45-0107 JUDGE: Kristi Curtis

PLAINTIFF: Justin McBride PLTF'S ATTY: Tristan Shaffer

DEFENDENT: State DEF'S ATTY: Janell Gregory

DATE TRIAL STARTED: 3/26/19 DATE TRIAL ENDED: 3/26/19

Received of Kayatana Grice, Court ~~Reporter~~ monitor for the above case, these exhibits:

		This space for Clerk of Court's Use
1.	Court - Application for PCR	✓
2.		
3.		
4.		
5.	Plaintiff 1 - photo	✓
6.	Plaintiff 2 - photos	✓
7.	Plaintiff 3 - rejection of plea	✓
8.	Plaintiff 4 - witness list	✓
9.		
10.		
11.		
12.		
13.		
14.		
15.		
16.		
17.		
18.		
19.		
20.		

This 26th day of March, 2019 Page 1 of 1

SUMTER COUNTY CLERK OF COURT

By: [signature]

THE CLERK OF COURT WILL RETAIN THE WHITE COPY OF THIS RECEIPT IN CIVIL CASE.

THE CLERK OF COURT WILL RETAIN THE YELLOW COPY OF THIS RECEIPT IN CRIMINAL CASE.

STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG	) IN THE COURT OF COMMON PLEAS) THE THIRD JUDICIAL CIRCUIT)
JUSTIN MCBRIDE #357684, Applicant, vs. THE STATE OF SOUTH CAROLINA, Respondent.	) Case No.: AMENDED APPLICATION FOR POST-CONVICTION RELIEF

1. Place of detention: Lee Correctional Institution

2. Name and location of Court which imposed sentence: Williamsburg County Court of General Sessions, the Hon. John C. Hayes, III presiding.

3. Name(s) of co-defendant(s) (if any): None.

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: 2010-GS-45-0283

   a. Count 1- Criminal Sexual Conduct with a Minor in the First Degree- 25 years;

5. The date upon which sentence was imposed and the terms of the sentence: October 30, 2013.

6. A finding of guilty was made: after a plea of not guilty.

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed: South Carolina Court of Appeal and South Carolina Supreme Court.

STATE'S EXHIBIT COURT 1

(b) the result in each such Court to which you appealed: Affirmed by the Court of Appeals; Cert. denied by the Supreme Court of South Carolina.

(c) the date of each such result: Court of Appeals May 25, 2016; Supreme Court June 16, 2017.

(d) if known, citations of any written opinion or orders entered pursuant to such results: Court of Appeals - 2016 Opinion No. 5381.

9. If you answered "no" to (7), state your reasons for not so appealing:

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

a. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to challenge the jurisdiction of the Court of General Sessions to hear the case.

b. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to move for Applicant's case to be remanded to the Family Court.

c. Given the fact that Applicant was 16 at the time of the alleged offense, the twenty-five year sentence is cruel and unusual and violates the Eighth Amendment of the United States Constitution.

d. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the mandatory minimum sentence pursuant to the Eighth Amendment of the United States Constitution.

e. Given the fact that Applicant was 16 at the time of the alleged offense, the twenty-five year sentence is cruel and unusual and violates the Article I Section 15 of the South Carolina Constitution as applied to Applicant.

f. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the mandatory minimum sentence pursuant to Article I Section 15 of the South Carolina Constitution.

g. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the entirety of his statement pursuant to *Jackson v. Denno*.

h. To the extent that Trial Counsel properly objected to the mandatory minimum sentence, Applicant submits that he was denied his Sixth Amendment right to effective assistance of Appellate Counsel for failing to brief this issue on appeal.

i. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly review discovery documents and advise Applicant of the evidence against him.

j. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately impeach the alleged victim with inconsistencies in her statements.

k. Applicant was denied his Sixth Amendment effective assistance of counsel when Trial Counsel failed to call Dr. Lubcroff to testify.

l. Applicant was denied his Sixth Amendment right to effective assistance of appellate counsel when Appellate Counsel failed to brief the trial court's erroneous ruling that prohibited Applicant from presenting evidence of why Officer Huckabee bad left the police department.

m. Alternative to l, Applicant was denied his Sixth Amendment right to effective assistance of counsel when his trial counsel failed to adequately preserve the issue raised in subsection l.

n. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel allowed the jury to be charged that Applicant could be found guilty of criminal sexual conduct for unindicted conduct.

o. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to burden shifting statements in the State's closing argument.

p. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the State's closing argument that was designed to inflame the passion and the prejudice of the jury.

q. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the State's argument that anal or vaginal sex was sufficient to result in a finding of guilty for Count I of the indictment.

r. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Samantha Cooper's testimony pursuant to Rule 5 and *Brady*.

s. Applicant was denied his Sixth Amendment right to effective assistance of Counsel When Trial Counsel failed to adequately investigate and call witnesses to contradict Samantha Cooper.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

a. Applicant was 16 years old at the time of the alleged offense, Trial Counsel never challenged the jurisdiction of the Court of General Sessions to hear the case.

b. Applicant was 16 years old at the time of the alleged offense, Trial Counsel did not move to remand the case to family court.

c. Applicant was 16 years old at the time of the offense. S.C. Code 16-3-655(d)(1) puts a mandatory minimum sentence of twenty-five years for Criminal Sexual Conduct with a Minor in the First Degree. As applied to Applicant this mandatory minimum violates the Eighth Amendment because it did not allow the Court to consider Applicant's age at the time of the alleged offense. *Cf. Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455 (2012) ("[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

d. Trial Counsel never argued that the mandatory minimum twenty-five-year sentence violated the Eighth Amendment as applied to Applicant.

e. Applicant was 16 years old at the time of the offense. S.C. Code 16-3-655(d)(1) puts a mandatory minimum sentence of twenty-five years for Criminal Sexual Conduct with a Minor in the First Degree. As applied to Applicant this mandatory minimum violates Article I Section 15 of the South Carolina Constitution because it did not allow the Court to consider Applicant's age at the time of the alleged offense.

f. Trial Counsel never argued that the mandatory minimum twenty-five-year sentence violated Article I Section 15 of the South Carolina Constitution.

g. Trial Counsel only objected to part of Applicant's statement to law enforcement.

h. If Trial Counsel adequately raised a constitutional objection to the mandatory minimum sentence, Appellate Counsel was ineffective for failing to brief this issue.

i. Prior to trial, Trial Counsel received a photo copy of a picture. The photo copy appeared black and Trial Counsel was unable to view what was on the picture.

Trial Counsel did not get a corrected copy of picture. This failure lead Trial Counsel to misadvise Applicant about the evidence the State would use against him. Based on this erroneous advice, Applicant's decision to reject the plea offer was not knowingly and intelligently made.

j. While Trial Counsel did point out that the alleged victim had made inconsistent statements, Trial Counsel was ineffective by failing to introduce evidence showing the prior inconsistencies.

k. Trial Counsel did not present evidence from Dr. Luberoff's examination of the alleged victim.

l. The Trial Court sustained the State's objection concerning Officer Huckabee, this error was not raised on direct appeal.

m. In the event that the Court finds that the issue in subsection l was not adequately preserved, Applicant asserts that trial counsel was ineffective for failing to adequately preserve this issue.

n. Trial Counsel did not object to the state being allowed to consider unindicted conduct.

o. Trial Counsel failed to object to the following statements:

   i. I had a former prosecutor to tell l me one time that he was trying a case, and he had lost the case. And after it over, he went and he talked to some of the jurors, and he kind of wanted to just get some insight about the case. You know, If I had done things a little bit better or if I had presented the evidence a little bit better, if I had done this or I had done that. And I just wanted to know, you know, why you found the person not guilty. And one of jurors said, of, well, I believe the defendant was guilty. But I don't think

the state proved it. And so they exchanged some more niceties and he went on about his life. And he said, he thought about this thing over and over and over. And he said, wait a minute now, if the jury believed that defendant was guilty, the only way they could have believed that is based on the evidence. Right. He said so if they believe that defendant was guilty based on the evidence in the case, then that means that the state has met its burden. A trial is a search for the truth not a search for reasonable doubt.

ii. Mr. Foreman, when you sign your name on that verdict form, after all to you jurors have deliberated and voted on it, what you are signing your name to and what you are voting on is the truth of the case. Just the truth. It's not whether or not law enforcement did something wrong or whether or not this happened or that happened, you all are voting on just the truth. I want once the case is over, I want the truth to be known, and that's all I want. That's all I want is the truth to be known . I don't want jurors saying, you know, the state didn't meet its burden.

iii. Do you all remember on yesterday morning when the Clerk of Court sworn you all in and what she asked you to do, and what you agreed to do by your oath, is to well and truly try the case of the State of South Carolina versus Justin McBride under Indictment 2010-GS-45-283, and render a true verdict according to the law and according to the evidence so help you God. That was the pledge you all gave to this court and this case when you took your oath... Now a couple of things that the judge will tell you further as it relates to the law in this case. The judge will tell you that testimony of a victim in a criminal sexual assault case doesn't have to be

corroborated. And some of them, you know, I understand maybe if there is some hesitation about that. Some of you may not agree with that. Some of you may say, well no, there needs to be more than what she says. But that isn't what the law says. And you remember when I told you about your oath. You shall well and truly try this case and render a true verdict according to the law and the evidence. Some people may not agree with the law. But the law is the law, and we have to uphold the law. And quite frankly, I would submit to you that when our legislators in Columbia drafted this law, they understood. They understood what we understand every day. Tr. 319, l. 20—Tr. 322, l. 5.

iv. If a trial is the search for the truth, and if you all took an oath to render a true verdict according to the law and the evidence what do you do now. Do you say well, I believe that girl. I believe everything she said. I believe the defendant did it. But the state shouldn't have lost the evidence. Does that now mean that he's not held to account for his actions. Does that mean that at the end of the day this family and the State of South Carolina, doesn't seek justice. Does that now mean that you don ' t render a true verdict in the case. Folks, I urge you all not to do that.

p. Trial Counsel failed to object to the following statements:

i. Do you all remember on yesterday morning when the Clerk of Court sworn you all in and what she asked you to do, and what you agreed to do by your oath, is to well and truly try the case of the State of South Carolina versus Justin McBride under Indictment 2010-GS-45-283, and render a true verdict according to the law and according to the evidence so help you

God. That was the pledge you all gave to this court and this case when you took your oath.

ii. If a trial is the search for the truth, and if you all took an oath to render a true verdict according to the law and the evidence what do you do now. Do you say well, I believe that girl. I believe everything she said. I believe the defendant did it. But the state shouldn't have lost the evidence. Does that now mean that he's not held to account for his actions. Does that mean that at the end of the day this family and the State of South Carolina, doesn't seek justice. Does that now mean that you don't render a true verdict in the case. Folks, I urge you all not to do that.

q. Trial Counsel failed to object when the State informed the jury that Defendant could be convicted of Count I if there was vaginal or anal intercourse.

r. Trial Counsel failed to properly object to Samantha Cooper's testimony.

s. Trial Counsel did not call witnesses which would give contradictory evidence related to Samantha Cooper.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No.

(b) any petition in State or Federal Courts for habeas corpus or post-conviction relief? No.

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any already specified in (8)? No.

(d) any other petitions or applications in this or any other Court? No.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or Application:

14. Has any ground set forth in (10) been previously presented to this or any other State or Federal Court, in any petition, motion or application which you have filed? No.

15. If you answered "yes" to (14) identify: Not Applicable.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: First collateral review.

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes.

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Derrick Mobley- 203 W. Main St. (Suite F-5), Lexington, SC 29072.

ii. Wendy Keefer- 1643B Savannah Hwy, Ste. 226, Charleston, SC 29407

iii. Joshua P. Stokes- 145 King Street, Suite 407, Charleston, SC 29401

iv. Adam Owensby- PO Box 21043 Charleston, SC 29413

(b) the proceedings at which each such attorney represented you:

i. Trial

ii. Appeal to the Court of Appeals

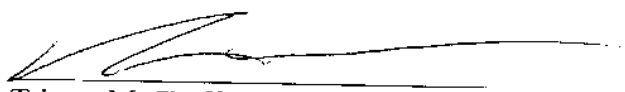
iii. Appeal to the Court of Appeals.

iv. Appeal to the Court of Appeals.

19. State clearly the relief you seek in filing this application: a new trial or any other relief this court finds fair and just.

20. Are you now under sentence from any other court that you have not challenged? No.

RESPECTFULLY SUBMITTED,



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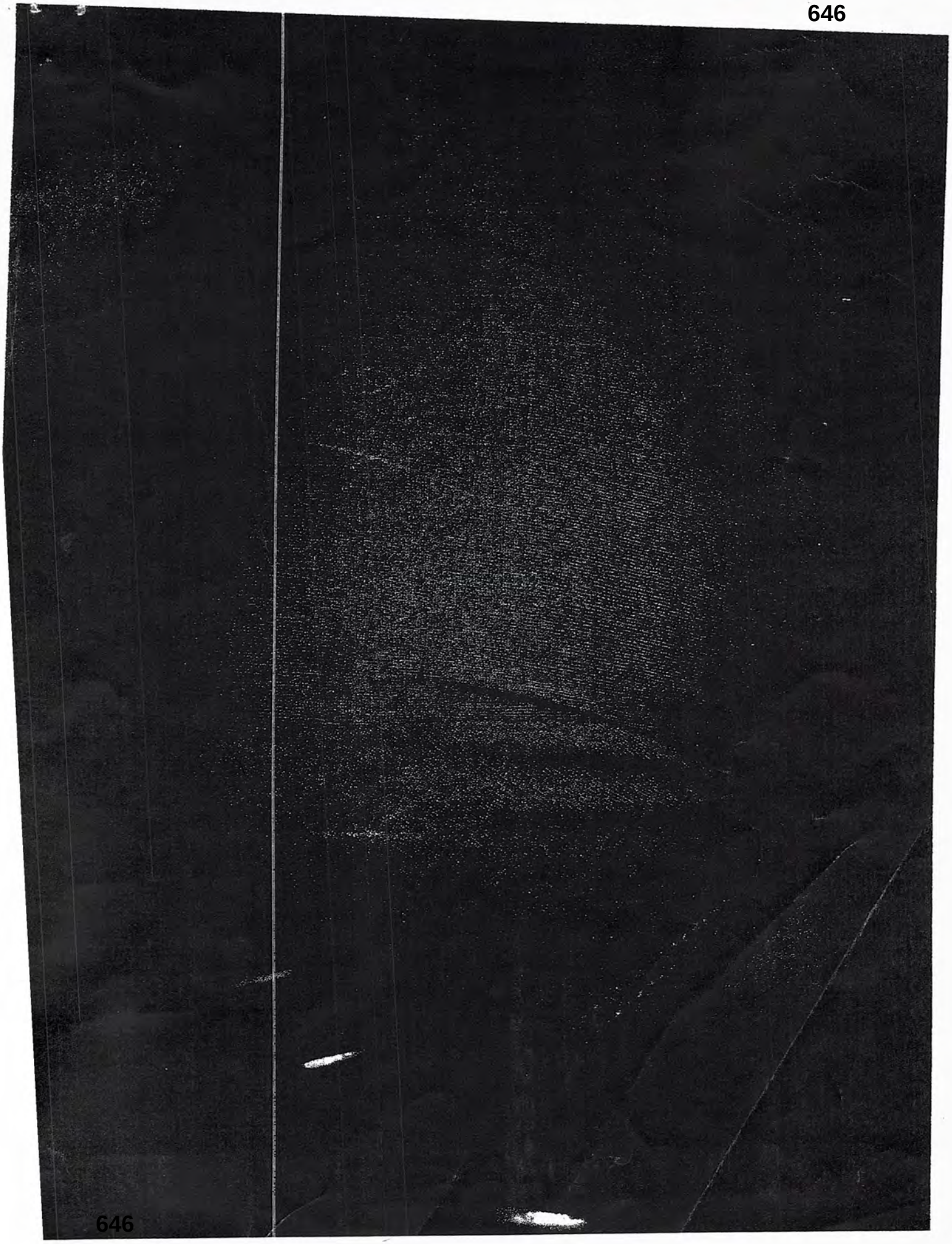
Attorney for Applicant

Date: 3/25/19



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STATE'S EXHIBIT
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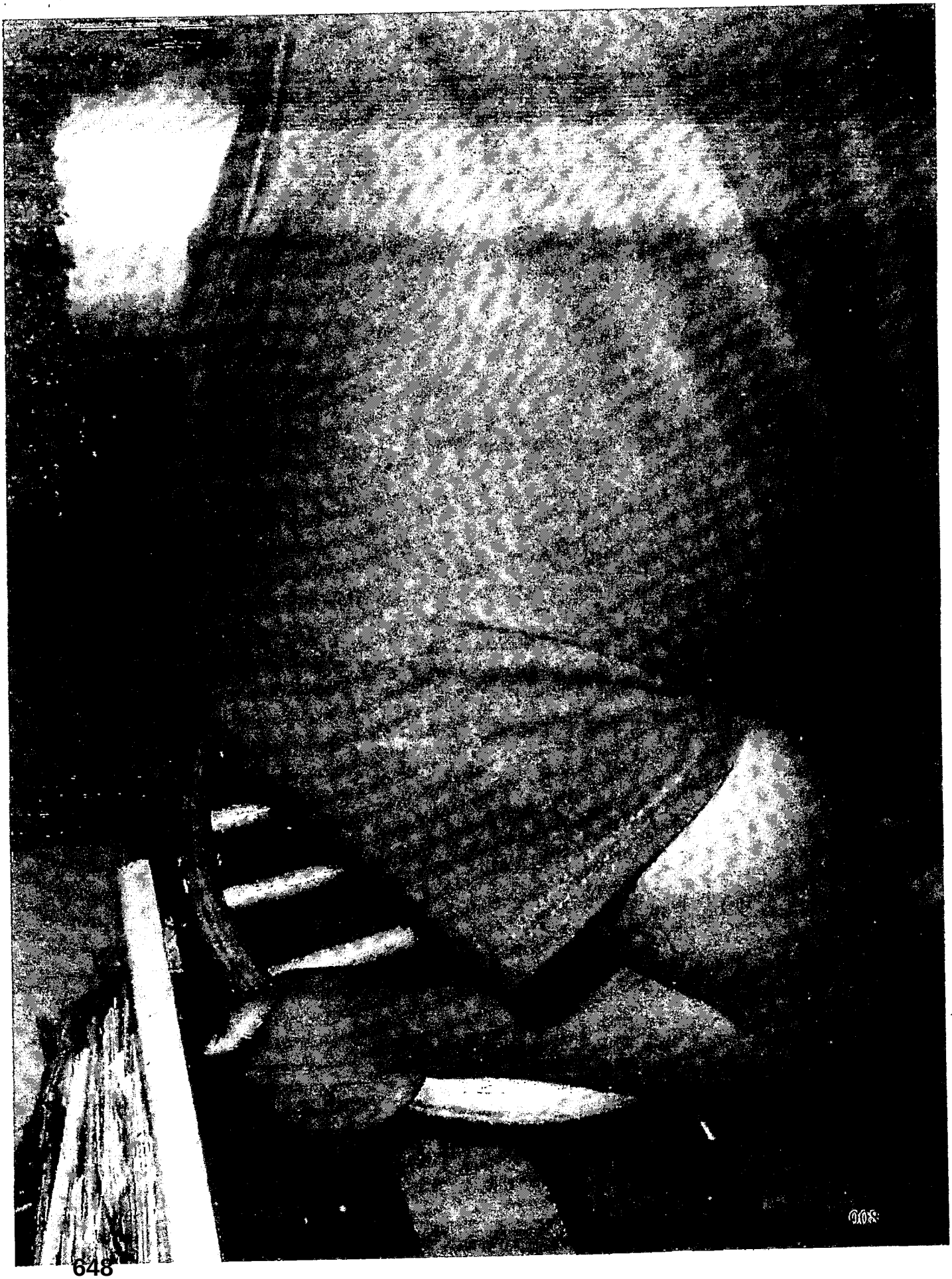

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STATE'S EXHIBIT

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Rejection of plea offer/Proceed to trial

I, Justin McBride, have been provided with adequate access to all evidence, statements, and statutes within my current case. My attorney, Derrick E. Mobley, has advised me of all my constitutional rights to trial, examination of evidence, cross-examination of witnesses, and my right to testify. Additionally, Mr. Mobley has provided me with a thorough review of the pros and cons of my case, and pointed out potential problems. Contrary to the advice of my attorney, Derrick E. Mobley, I have chosen to proceed to trial, despite facing the possibility of 25 years to life for each count of the indictment (i.e. 2 counts). Additionally, I have rejected a plea offer of Lewd Act with a minor (0-15 years; GPS monitoring, sex offender registry, DNA database) that has been offered by the Asst. Solicitor (Kimberly Barr) against the advice of my attorney. I do this voluntarily, with full knowledge of the potential consequences, and without any pressure, coercion or threats from my attorney.

Justin McBride

October 29, 2013

PLAINTIFF'S EXHIBIT NO. 3

STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG	)	IN THE COURT OF GENERAL SESSIONS THIRD JUDICIAL CIRCUIT
State of South Carolina, vs. Justin McBride, Defendant.	)	INDICTMENT NO.: 2010-GS-45-0283 **LIST OF WITNESSES PROPOSED TO BE CALLED BY THE STATE**

The State of South Carolina proposes to call the following witnesses at the trial of this case:

1. Sgt. Trina Hamlet, Kingstree Police Department;
2. Lt. Thomas Dean McCrea, Kingstree Police Department;
3. Robin Griggs, Durant Children Center;
4. Dr. Susan Luberoff, Durant Children Center;
5. Sheree Dennis, Durant's Children Center;
6. Angelica McBride;
7. Benjamin McBride;
8. [redacted]
9. Emma Cooper;
10. Samantha Cooper;
11. Gladys M. Evans;
12. Katie Brown, Durant Children's Center;
13. Officer Ron Dozier;
14. _____;

September 4, 2012

OFFICE OF THE SOLICITOR
THIRD JUDICIAL CIRCUIT

Ernest A. Finney, III
Kimberly V. Barr
Tyler B. Brown

PLAINTIFF'S EXHIBIT NO. 4

State of South Carolina	)	Court of Common Pleas
County of Williamsburg	)	Third Judicial Circuit
Justin McBride,	)	Transcript of Record
Plaintiff,	)	2018-CP-45-00107
vs.	)	
State of South Carolina,	)	
Defendant.	)	

March 26, 2019
Sumter, South Carolina

B E F O R E:

The Honorable Kristi F. Curtis, Judge

A P P E A R A N C E S:

Tristan M. Shaffer, Esquire
On behalf of the Plaintiff

Janell H. Gregory, Assistant Attorney General
On behalf of the State of South Carolina

Proceedings recorded by DCRP

Transcribed by: Stacy S. Johnson,
Circuit Court Reporter

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(The following proceedings were held March 26, 2019, beginning at 10:39 AM.)

THE COURT: Ms. Gregory.

MS. GREGORY: Good morning, Your Honor. May it please the Court?

Before you is Justin McBride. During the March 2012 term, the Williamsburg County Grand Jury indicted Applicant for first degree criminal sexual conduct with a minor and assault with intent to commit first degree criminal sexual conduct with a minor.

On October 28, 2013, Applicant proceeded to a jury trial before Judge John C. Hayes and was found guilty of first degree criminal sexual conduct with a minor and was found not guilty of assault with intent to commit first degree criminal sexual conduct with a minor. Applicant was sentenced to imprisonment for twenty-five years.

Applicant filed a timely notice of appeal and an appeal was perfected by Wendy Keefer and Adam Owensby. In an opinion dated February 17, 2016, the South Carolina Court of Appeals affirmed Applicant's conviction. On February 23, 2016, Applicant petitioned for a rehearing. On March -- I'm sorry. On May 25, 2016, the Court of Appeals withdrew its opinion and substituted a new opinion, again, affirming Applicant's conviction.

Applicant's appellate attorney -- attorneys were

relieved as counsel and Applicant filed a pro se petition for writ of certiori to the South Carolina Supreme Court, which was denied June 16, 2017. The remittitur was issued June 30, 2017.

Applicant did file a timely PCR application on February 22, 2018, and Applicant, through counsel, sent me an amended application on March 15, 2019, which we received an updated copy of this morning.

Applicant is present today and represented by Mr. Shaffer and it's my understanding they're going forward on all allegations in the amended application other than Letter K.

THE COURT: Mr. Shaffer.

MR. SHAFFER: Yes, Your Honor.

And that would be correct. Letter K in the amended application we're actually not going forward on and respectfully withdraw.

Your Honor, before we begin, because the amended application has not been filed, I would like to make it a -- a Court's exhibit for the record.

THE COURT: That will be fine. If you want to mark that as Court's Exhibit 1.

(Court's Exhibit Number 1, an amended PCR application, was marked for identification.)

MR. SHAFFER: Your Honor, we'd like to pass this

up to you.

THE COURT: Actually I've got a copy.

MR. SHAFFER: Okay.

THE COURT: Thank you.

MR. SHAFFER: Thank you.

Your Honor, I think briefly I told you the facts of the case and I -- I don't think that I need to necessarily do an opening on this. You know, I -- and I apologize. I'm not sure -- this is my first time in one of the courtrooms without a court reporter, so if -- if -- I don't think that I was on the record, but I believe that we can go forward without it because there will briefing afterwards, I think, that we talked about, correct?

THE COURT: Yes.

Just to put on the record, we did discuss leaving the record open for a period of time, thirty days, sixty days, whatever you think is appropriate --

MS. GREGORY: That would -- that would be great.

THE COURT: -- so that either side can submit additional briefs.

MR. SHAFFER: Okay. Thank you, Your Honor.

Applicant would call Mr. Mobley then.

THE CLERK: Place your left hand on the Bible, raise your right and state your name.

THE WITNESS: Derrick Mobley.

(Whereupon, Derrick Mobley was duly sworn by the Clerk of Court.)

THE CLERK: Thank you.

State your name for the record and spell your last name.

THE WITNESS: Okay. Derrick Mobley, M-O-B-L-E-Y.

DERRICK MOBLEY,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAFFER:

Q. Mr. Mobley, I apologize for mispronouncing your name a minute ago. You -- you were the trial counsel for -- for my client, Mr. McBride, correct?

A. That's correct.

Q. And could you tell us just briefly how you came about getting on the case and --

A. Okay.

Q. -- the background. I -- I know that you worked for a law firm that he had retained, correct?

A. That's correct. So initially I was working for the Richard Breibart Law Firm, which is located in Lexington county. The family had come in to retain the firm of Mr. Richard Breibart. They paid a retainer fee. I was an associate along with a few other attorneys. I think there

was twelve of us, thirteen total I think it was, and we were retained to represent Mr. McBride on this case. Then what subsequently happened, I can't remember the exact date, I think it was 2012 -- 2012 or 2013, June 5, 2012 or 2013, the law firm closed abruptly.

Q. Yeah.

A. The attorney, Mr. Breibart, was accused of embezzling --

Q. And you -- you don't have to go into all that.

A. Okay.

Q. I'm not --

A. Okay.

Q. I was just wondering. At some point you ended up disassociating yourself from the Breibart Law Firm and then this case went with you, correct?

A. That -- that's correct. What I ended up doing, I wanted to try to help the family out because they had paid a substantial amount of money, so I wanted to help them out by representing him in this case basically with a pro -- as a no fee-type arrangement and then continue to represent Mr. McBride and keep his best interest at heart. So when I opened up my law office, I submitted a substitution of counsel to the Williamsburg county -- county courthouse, the administrative judge signed off on it, then I retained the file at that time.

Q. Okay. Now prior to you getting involved -- or I guess prior to you leaving and becoming the primary attorney in the case, you -- you were somewhat involved in the case beforehand, correct?
A. I was.
Q. Okay.
A. I was.
Q. So you believe that you can speak fairly adequately to everything that happened pretrial?
A. Yes --
Q. Okay.
A. -- as I can recall it.
Q. Okay. So you filed a motion for discovery, correct?
A. That's correct.
Q. And you engaged in plea discussions?
A. I did.
Q. Okay. And at the time that you engaged in plea discussions, you had received discovery from Ms. Barr, correct?
A. That's correct.
Q. And you had also gone up to Williamsburg and actually looked at their open file, correct?
A. Yes. As I recall, I actually drove from my office in Lexington I would say at least -- I think it was around three times to go to the office to view the open file,

the discovery that was in there and obtain a copy of the forensic interview that was noted in -- on the cover sheet. I wanted to ensure that I had everything.

Q. Okay. And those -- the -- you ended up providing what you had obtained from the State to Mr. McBride even, correct?

A. Yes.

Q. You made him -- actually you handed him a copy and made him recognize the fact that he had received one, correct?

A. Correct.

Q. And that was during plea discussions, correct?

A. Correct.

Q. And that would have been a complete copy of everything that was obtained in discovery, correct?

A. Yes. Everything that I received I turned over to he and his family.

Q. Now during the -- or on the date of trial, there was an issue involving a picture.

A. Yes.

Q. Can you briefly tell the Court what that issue was?

A. The issue was that there was a photo that was being introduced by the State that was color. The copy that I had was simply a -- it was darkened, it was almost black, and there -- there were some tracings of white coloring

within that photo that was within my discovery, and when I traveled to Williamsburg county as well within their discovery of the same photo, which was black in color, and so when they attempted to introduce that color photo I objected and asked for a mistrial at that particular point.

Q. Okay.

MR. SHAFFER: Your Honor, may I approach?

THE COURT: Yes, sir.

(Plaintiff's Exhibit Number 1, a photograph, was marked and admitted into evidence.)

BY MR. SHAFFER:

Q. I'm showing you what's been marked Plaintiff's Exhibit 1. Is that -- is that a true and accurate depiction of the photo that we're talking about that you would have provided -- or the copy of the photo that we're talking about that you would have provided to Mr. McBride?

A. Yes.

Q. Okay. And would you have any reason to disagree with me if I told you that that was the actual piece of paper that you provided to Mr. McBride?

A. I wouldn't have any reason to disagree with that.

Q. Okay. Now -- and that was a fair depiction of what you had received from the State in discovery, correct?

A. That is correct.

Q. Okay. But during trial there was a different photo,

correct?
A. That's correct.
Q. Okay. And that photo was actually introduced, correct?
A. It was, over my objection.
Q. Okay. And the Court's file has the original color photo.
MR. SHAFFER: And, Your Honor, if I reference -- because this is a PCR hearing and -- and the original is actually in the clerk's file, I'd like to make the original State's 1 and 2 from the trial, which were exhibits viewed by the Court of Appeals, I'd like to make them part of the record in this case. They're exhibits obviously in the trial at the Clerk of Court's office, but I do have a slightly better photo that I was gonna introduce as well.
THE COURT: What's the current location of those exhibits?
MR. SHAFFER: I believe the Clerk of Court's office.
THE COURT: The Williamsburg Clerk of Court's office --
MR. SHAFFER: That's correct, Your Honor.
THE COURT: -- would currently be in possession of those?

MR. SHAFFER: Yes, Your Honor. They should be. There's no reason they wouldn't be.

THE COURT: And they were originally marked as what? What would they be showing in that?

MR. SHAFFER: State's Exhibit 1 and 2. And I have a somewhat better photocopy, black and white photocopy, of those pictures that were taken at the time of the appeal and are part of the appellate record in the case.

THE COURT: Okay.

(Plaintiff's Exhibit Number 2, photographs, was marked and admitted into evidence.)

BY MR. SHAFFER:

Q. I'm showing you what's been marked Plaintiff's Exhibit 2. Does that -- does that appear to be a somewhat better black and white copy of the photos that were provided -- or that were introduced into evidence as State's 1 and 2 at the trial?

A. A somewhat better copy of what?

Q. State's 1 and 2. The trial exhibits 1 and 2.

A. So it's a black and white copy of what was introduced at trial?

Q. Yeah. Does that appear to be a black and white copy of what was introduced at trial?

A. It appears to be.

Q. Okay.

A. And I -- it's been six years since, so from what I recall, yes.
Q. Okay. And obviously the -- if the Court's making the State's 1 and 2 an exhibit for the purposes of the PCR as well, obviously the Court can view what --
A. Okay.
Q. -- the original looked like.
So when did you actually get a -- get to view those two color photos? Was it during the trial?
A. During the trial right before introduction.
Q. Okay. And to that -- up until that time, the best copy you had would be Plaintiff's Exhibit 1?
A. Correct.
Q. Okay. And you made that an objection, correct?
A. I did.
Q. Now whenever you reviewed the discovery with Mr. McBride and discussed plea offers --
A. Uh-huh.
Q. -- there was some indication that -- or he had said that he did not want to plead guilty, correct?
A. Correct.
Q. And you made -- you made him sign something, correct --
A. Correct.
Q. -- saying he had viewed everything that you had?

A. Yes.
Q. Do you have a copy of that document?
A. I do. Let me see if I can find it. Bear with me a moment, please.
Yes, I do have a copy of it. I think this may be the original though.
MR. SHAFFER: And, Your Honor, may I approach?
THE COURT: Sure.
BY MR. SHAFFER:
Q. Would you mind if we actually made this an exhibit for the purposes of this hearing or would you -- do you need this copy? Because I can get a photocopy of it made, if you'd like.
A. If the Court will allow me to get a copy and I retain the original.
MR. SHAFFER: Your Honor, is there a -- may we approach briefly?
THE COURT: Uh-huh.
(Plaintiff's Exhibit Number 3, plea rejection document, was marked and admitted into evidence.)
BY MR. SHAFFER:
Q. I'm showing you Plaintiff's Exhibit 3.
A. Yes.
Q. Does that appear to be a copy of your original form?
A. It does.

Q. And, if you could, read that briefly.
A. It says I, comma, and then it has an under -- a blank line where Justin McBride signs his name, have been provided with adequate access to all evidence, statements and statutes within my current case. My attorney, comma, Derrick E. Mobley, comma, has advised me of all my constitutional rights to trial, examination of evidence, cross-examination of witnesses and my right to testify. Additionally, Mr. Mobley has provided me with a thorough review of the pros and cons of my case and pointed out potential problems. Contrary to the advise of my attorney, Derrick E. Mobley, I have chosen to proceed to trial despite facing the possibility of twenty-five years to life for each count of the indictment; i.e., in parentheses, two counts. Additionally, I have rejected a plea offer of lewd act with a minor, and in parentheses it says zero to fifteen years, semicolon, GPS monitoring, sex offend -- comma, sex offender registry, comma, DNA database, close the parentheses, that has been offered by the assistant solicitor, Kimberly Barr, against the advise of my attorney. I do this voluntarily with full knowledge of the potential consequences and without any pressure, coercion or threats from my attorney. Then he signs Justin McBride and then it's dated October the 29th, 2013.
Q. Now at the time that he signed Plaintiff's Exhibit 3,

this would have been before you had ever seen the color photo, correct?
A. That -- that is correct.
Q. Okay. And you would have provided him a copy of Plaintiff's Exhibit 1 before he signed Plaintiff's Exhibit 3, correct?
A. Yes.
Q. Okay. And this would have been in advance of anything that occurred at trial?
A. Yes.
Q. Okay.
A. It was before trial started, the signing of the document.
Q. Now what was the defense that you -- at the time that you had advised him of that, what was the plan for the defense that you-all talked about?
A. The defense on this particular case, we didn't have any affirmative defenses, okay? What we had was where essentially they didn't have any tangible evidence that was presented that we saw through discovery that was gonna be able to be used by the Court at that time -- by -- by the State. Excuse me. So the plan was to essentially impeach the testimony of the victim and anyone else that were to testify. There had been some inconsistencies that I picked up within the discovery that I felt that was gonna be --

where I would be able to question them on it and then lay enough of a foundation where a jury would see that there's enough reasonable -- not -- not enough evidence based off the impeachment and inconsistent statements to convict Mr. McBride.

Q. Okay. And your plan was not to put him up, correct?

A. No.

Q. Okay. And so your plan was essentially to impeach her version of the facts?

A. Yes.

Q. And she was the only person saying what had happened. Is that fair to say?

A. That's correct. Because allegedly she and he were the only ones in the home at the time of the event.

Q. And you had no DNA in the case?

A. None.

Q. No real physic -- at the time at least at that point, you had no real physical evidence corroborating anything; right?

A. That's correct.

Q. Now Mr. McBride had given a statement to police which you had at that time, correct?

A. That's correct.

Q. But that statement wasn't really inculpatory, was it?

A. No.

Q. Okay. And in your view the -- it was basically her word against --
A. His.
Q. -- his --
A. Yes.
Q. -- through this statement from the -- from the police, correct?
A. Correct.
Q. So he had given -- at the time that he turned down the plea offer, he'd given no inculpatory statements, correct, that you were aware of?
A. That was -- no. That's correct that I wasn't aware. I wasn't aware of any inculportive -- inculpative statements that he given to law enforcement at that time.
Q. Okay. And during the course of the trial -- well, prior to the trial beginning, you filed a Jackson v. Denno hearing?
A. Correct.
Q. Or you made a Jackson v. Denno objection, right?
A. Correct.
Q. And you said that you objected to -- or at least in the transcript, would it be fair to say that you objected to only part of the statement that he had given to police, right?
A. That's correct.

Q. And you objected to that under the Jackson v. Denno case and other Federal case law involving minors, correct?
A. Correct.
Q. And the judge, if I recall correctly, around page 50 of the transcript essentially agreed to -- with you, right?
A. Correct.
Q. But you did not object to the entire -- the entire statement coming in, right?
A. That's correct.
Q. And why was that?
A. I'm having to think back. I think the thought, and I'm -- I'm thinking back to the time when it was occurring with trial strategy, is that he's already been placed at the scene by one of the neighbors saying that he did not come out until law enforcement arrived, so I thought trying to get that entire statement thrown out would not be helpful. I wanted the part that would place him in there with the young lady thrown out and I think I was successful with that.
Q. Okay. And I -- and I think that the -- and obviously you can -- the Court can read the transcript for herself, but would you -- would I -- would you disagree with me if I said that you wanted the part about him saying you're questioning me because of the fact that she's saying I touched her?

A. Yes, where he -- I didn't want anything come out of his mouth that would potentially have the accusation coming from him because the other part of the statement though allows him to tell his side of the story without him taking the stand because that's always the trial strategy. Don't place your client up. Somehow get his statement in to tell his story without him taking the stand.
Q. Okay. And the -- the initial part -- had part that initial part came in, the part about you're questioning me because she's claiming I touched her --
A. Yes.
Q. -- would you have -- what would have been your argument around that if that would have came in?
A. That -- that --
Q. And I guess I'm -- that's an unfair question.
A. Yeah, that's --
Q. I'm gonna withdraw that question because it really is sort of unfair. But your -- your goal was essentially to keep out anything that he said that would say yeah, I did it, right?
A. That's correct.
Q. Okay. And at the time that you made that Jackson v. Denno argument, were you aware of any statement that he'd given to Samantha Cooper?
A. Absolutely not.

Q. Okay. Did you find that out during the course of trial whenever she testified?
A. While I'm sitting at the table while she was being directed, yes.
Q. Okay. And Samantha Cooper ends up giving a statement that in Samantha Cooper's words was he confessed to me, right?
A. I don't know if that was exactly what she states during the trial. I'd have to go back directly to that transcript.
Q. Yeah, I'll -- I'll point you in the right direction if you just give me one second.
A. I think it was something to the effect that I didn't mean to do it.
Q. Okay.
MR. SHAFFER: Court's indulgence.
BY MR. SHAFFER:
Q. Can I direct you to page 282.
A. Okay. I'm -- I'm there.
Q. Okay. Now if you look at line 15, around there, she's saying essentially that he confessed, correct?
A. Yes. The verbiage is he said I did not mean to do it. We need to talk.
Q. Okay. And you had objected to that statement and -- you objected what appears to be a hearsay objection on 280,

right, and Ms. Barr responded it was a statement against interest?
A. Okay. I don't see that in the transcript, but that sounds about right because there's no way for me keep that statement out.
Q. Okay. And I -- and I apologize. I'm -- if you could look at page 280.
A. 280. Okay.
Q. You objected saying that -- you said objection and Ms. Barr said a statement against interest, right?
A. Okay.
Q. Did you make any sort of Rule 5 or Brady objection to that?
A. I did not.
Q. Okay. And that was the first time you had heard it, correct?
A. That was the first time I had heard it.
Q. Okay. Now if I could direct you to page 272, and I'm sort of changing subjects here. I had asked you about -- or I had -- at 272 you -- you had -- you were questioning about Officer Huckabee.
A. Yes.
Q. Can you explain that situation for the Court?
A. Okay. So Officer Huckabee was a former officer at the Kingstree police department and I think he was the evidence

custodian for this -- this case and for the department itself, so are you asking me what -- what --

Q. Yeah. The -- what information did you have about Huckabee? Why were you asking the questions about why he was no longer there?

A. I had heard that he had been terminated or no longer with the department due to some issues with evidence keeping.

Q. Okay. And what particular piece of evidence was missing in this case?

A. The shirt itself.

Q. Okay. So the shirt that's in the -- supposedly Plaintiff's Exhibit 1 is a picture of --

A. Yes.

Q. -- went missing?

A. Correct.

Q. And as a result they couldn't test anything on it?

A. Correct.

Q. Okay. There was like a poten -- or a white spot on the shirt and they never tested it?

A. Correct.

Q. And I believe that at one point they said it was deodorant; is that right?

A. That's correct. That's what they were alleging at the time.

Q. Okay. But it was never to be tested so no one really could say definitively whether it was that or --
A. Anything else.
Q. Okay. So you ended up -- the State ended up objecting to you asking about Officer Huckabee, correct?
A. Correct.
Q. And the judge sustained that objection, correct?
A. Correct.
Q. Now did that end up being -- do you think you adequately objected to it?
A. I did.
Q. Okay.
A. I ended up getting the answer that I wanted though.
Q. Okay. And what was the answer that you wanted?
A. I wanted the jury to know that that officer, once again, had lost evidence in a -- a critical piece of evidence in this case.
Q. Okay. Now I'm gonna switch topics again a little bit. The jury charge --
A. Okay.
Q. -- and you may want to turn to page -- I think it's 320 --
A. Okay.
Q. -- in the transcript.
A. Yes.

Q. Now do you recall under -- under Count I of the indictment, the count that he was convicted of, he was only -- they had only indicted him for alleged oral sex, correct?
A. Correct.
Q. So they didn't use the term "sexual battery" in the indictment; is that fair to say?
A. Correct.
Q. Okay. And I can refresh your recollection, if you'd like.
A. And I think I have a copy of the indictment, too, so I think you -- you are correct though.
Q. Okay. And in Count II of the indictment, which he was not convicted of, they basically said sexual intercourse, correct?
A. Correct.
Q. Okay.
A. Well, attempt.
Q. Or attempted sexual intercourse, yes.
A. Yes.
Q. If -- now the judge ended up giving an instruction about the definition of sexual battery around 320 in the transcript. Do you recall that?
A. I do.
Q. Okay. With that, did you object to that instruction

about sexual battery, like the full definition of everything that it could have been?
A. No, not at that time.
Q. Okay. And --
MR. SHAFFER: I'll actually move on to a different argument or different issue, Your Honor.
BY MR. SHAFFER:
Q. Now if you could turn to page 341 through 342, I'm gonna ask you about the closing argument that Ms. Barr gave.
A. Yes.
Q. In that argument do you recall her saying that a trial is not a search for -- is a search for the truth, not a search for probable cause?
A. I don't specifically remember that based off my memory, but looking at the transcript, yes.
Q. Okay. Is it fair to -- you did not object to that, correct?
A. No.
Q. Okay. And if you could turn to the next page, that last paragraph of the closing argument, you didn't object to that as well, correct? You didn't object during her closing argument?
A. What line are you --
Q. The last paragraph. It would have been -- it's page

343.
A. Okay.
Q. It would have been 14 through 25.
A. No, I did not object to that.
Q. Okay. Now I'm gonna talk to you about another issue that actually happened before -- or not really an issue, but the general atmosphere before trial. Mr. McBride's family was very active --
A. Yeah.
Q. -- in this and very concerned. Is that fair to say?
A. Absolutely.
Q. Okay. And they had spoken with you about the case themselves. Is that fair to say?
A. Numerous times, yes.
Q. Okay. So they knew what was going on with the case as well, right?
A. That's correct. And apparently they had a copy of the discovery as well.
Q. Okay. And they were ready, willing and able to do whatever you wanted to do. Wouldn't that be fair to say?
A. Yes.
Q. Okay. Or at least that's the feeling you probably would have gotten?
A. Yeah.
Q. Okay. Now did you know anything -- had you spoken at

all with a lady named Gladys Evans prior to trial?
A. No.
Q. Okay. Did you have any particular reason to think that you would need to speak to a Gladys Evans prior to trial?
A. No. And, in fact, I -- I didn't think I would need to talk to her because what's indicated -- the only mention of her name in the incident report is from [redacted] the alleged victim in this particular case, where she recounts to -- I think it's the forensic center, the evaluation center, that she was gonna go over to Gladys' house, but she saw a car in the yard or something of that nature and she thought the lady had company, so she went over to her aunt's house. So based off of the incident report, [redacted] actually didn't have any contact with her and that's -- that's -- that's all I had in regards to a Gladys Evans.
Q. Okay.
MR. SHAFFER: Court's indulgence.
BY MR. SHAFFER:
Q. Okay. Now obviously you had advised him that there was a mandatory minimum, twenty-five, in either of the counts if he was found guilty, correct?
A. Correct.
Q. And I believe that to some degree you had said that

he's a young man -- at sentencing that he's a young man and there's a lot of good things about him, right?
A. Yes.
Q. Is that fair to say?
A. Yeah.
Q. And if I remember correctly, the judge even says something like that, right?
A. During sentencing, yes.
Q. Yeah. During sentencing do you recall the -- what he had said about the -- the client sort of toward the end? I guess it would be 395.
A. I don't recall independently, but I can look back at it. 395. Yes, I've read it now.
Q. And what did -- what basically is the judge saying?
A. That his hands are tied based off the statute where he cannot sentence less than the twenty-five years.
Q. Okay.
A. And that he's a -- a good young man.
Q. Had the judge been under the impression that -- or had this not been a mandatory minimum case or had he not been required by law to follow the mandatory minimum, would you have argued for less time?
A. Absolutely.
Q. Okay. But you didn't argue -- you didn't make any Eighth Amendment objection --

A. No.
Q. -- under the South Carolina constitution --
A. No.
Q. -- saying it's cruel and unusual? You never made that objection?
A. No, I didn't.
Q. Okay.
MR. SHAFFER: Court's indulgence.
No further questions at this time. Thank you, Your Honor.
THE COURT: Yes, ma'am.
MS. GREGORY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. GREGORY:
Q. Let me know if you can't hear me, Mr. Mobley.
A. Okay.
Q. I'm gonna try not to be too repetitive, but I want to make sure we get some things out from what Mr. Shaffer had asked you. But, first of all, how long have you been practicing law?
A. Since 2007.
Q. And how much of that has been in criminal law?
A. I would say 90 percent.
Q. Okay.
A. 85 to 90 percent.

Q. And was Mr. McBride out pending trial?
A. He was.
Q. And how -- how often do you think you met with him either on the phone or in person?
A. If we're including over the phone, it's over two dozen times --
Q. Okay.
A. -- between he, as well as his family.
Q. Were they always present when you met with him or did you ever meet with him alone?
A. When I met with him, they were present. When I would talk to him sometimes over the phone, they weren't --
Q. Okay.
A. -- because he was working towards the latter part before the trial.
Q. Okay. Why wasn't this case handled in family court?
A. Well, I specifically asked Ms. -- the assigned assistant solicitor, Ms. Barr, to remand it to family court so that we can handle it that way and she rejected that plea for me to -- for us to handle it in family court. The reasoning, I don't know.
Q. Okay. So you even talked to the solicitor and she declined. Was there any way for you to force that?
A. No, not by statute.
Q. Okay.

A. Apparently the statute gave discretionary authority to the solicitor to elect whether it's handled in general sessions or family court, so there wasn't even a hearing that I could force and attempt to force the solicitor to do so.

Q. Okay. And, just briefly, what are the facts of this case?

A. The factual is that Ms. -- Ms. [redacted] had gotten off the school bus. She had gone over to her Aunt Tina's house, which would be the mother of Mr. McBride, Mr. Justin McBride. During her stay there it's alleged -- her allegations were initially that Justin had taken his hand and forced her head down onto his penis and then subsequently through another statement to law enforcement, who arrived to the scene, it was alleged that Justin had pulled down her purple shorts and attempted to place his penis in between her buttocks.

Q. Did you discuss his version of the facts?

A. Yes.

Q. And what was that?

A. That she -- she came in, she was upset because her mother wasn't home and he -- he allowed her into -- into the house. They were watching television, he goes to the restroom. While he's in the restroom, [redacted] attempts to open the door and look at his private area. He -- he

attempts to cover up and then she leaves and -- and goes back to the couch, continues to watch television, he and her, then she attempts to leave. She goes to try to leave through the front door. There's a -- according to his version, there's a bug near the front door, then she exited -- exits the residence through the back door.

Q. Okay. Now the allegations regarding discovery --

A. Uh-huh.

Q. -- pretty much go around the photograph --

A. Yes.

Q. -- that Mr. Shaffer talked to you about.

A. Yes.

Q. And you did object to the photograph coming in?

A. I did.

Q. You did move for a mistrial based on that?

A. I did.

Q. And over your objection the photograph comes in?

A. Yes.

Q. Why didn't you ask for a continuance at that time?

A. Well, you know, it's a -- at the moment, at that time, well, we don't have -- I've already laid the foundation during this particular point of the trial that law enforcement was gonna be questioned about their inability to effectively investigate a crime and collect evidence, okay, so then we have a photo that comes in that shows a

mark. I cross-examined the investigator who the photo comes through and is admitted into and I impeach her on the stand where she simply could not even identify who was in the photo, who was the person that's back there, so I began to undermine her at the time, but I did not ask for a continuance because then my fear is when I sit back at the table after I consult with my client is if we ask for a continuance, they find that shirt, we don't know what that shirt is gonna reveal. That shirt could reveal deodorant that can somehow be connected back to the client or it can reveal -- because you've got to remember one of the allegations is that there -- there was semen -- ejaculation of semen by the victim and this was the shirt that was allegedly worn by the victim. So I was -- I was fearful that they will find -- based off my continuance they will find the shirt, send it off for testing and then either DNA or deodorant will track back to my client and that will make their -- the State's case stronger. So it was a trial strategy at that time that was done at the -- at that very moment.

Q. Okay. So you didn't need a continuance because the photograph as it was provided nothing?

A. It provided -- it wasn't -- it wasn't material.

Q. Was it the most compelling evidence against Mr. McBride at trial?

A. Absolutely not. Now if it had came back where without the testimony with me impeaching that officer on the stand and coming back with DNA evidence and deodorant that somehow connected to my client, then it would have been the most compelling evidence in the case at that point.
Q. Was the State ever able to provide any testing whatsoever in this case on any of the victim's clothing?
A. None. I was able to really thoroughly question the officers at that time and their witnesses about their inability to get any testing.
Q. So they were not able to prove even the white stain was even his own deodorant; is that correct?
A. No, they were not.
Q. So they just got a photograph of a person they couldn't even say was the victim with a white stain on it that they couldn't even say it was deodorant?
A. Correct.
Q. Okay. And you explained that you cross-examined Detective Hamlet on that?
A. Yes.
Q. So the discovery that you did have, did it include the forensic interview?
A. It did.
Q. Did Mr. McBride watch that?
A. He did.

Q. Did that correlate with the statement the victim gave to law enforcement?
A. Yes.
Q. Did his family also get to view the discovery and the forensic interview?
A. Yes, I think I actually sent them copies of it or either hand-delivered it, I can't recall which one, but they did have a copy of those.
Q. And he would have saw all of that prior to the plea offer; is that correct?
A. Yes.
Q. And was Mr. McBride aware of your trial strategy going forward in this case?
A. Well, not only Mr. McBride, his family as well, because one of the things I -- I vividly remember telling them is that my job is to vigorously defend Justin and what my strategy is gonna be is I'm gonna have to call into question everyone's testimony and -- and one of the things I said, when I will leave Williamsburg or Kingstree, I don't care if buildings are burned down or not, and if your family is torn apart because of what I have to question these people on that stand, so be it. I have one job to do and that's to defend Justin. I could care less about the family dynamic then.
Q. And that was you explained that you were gonna

vigorously cross-examine the victim?
A. Yes.
Q. Okay. Now Mr. Shaffer asked you about Sergeant Huckabee.
A. Yes.
Q. Now that was one of the allegations that you did not, I suppose, preserve that issue when the State objected to your test -- or to your questioning. You did not preserve that issue for appeal?
A. No.
Q. Why didn't you preserve that for appeal?
A. I didn't need to.
Q. Why is that?
A. Because I got out exactly what I wanted, which was the -- Detective Hamlet, once again, lost evidence in a case and he has a history of it. So the objection was to keep me from getting that information into court. I asked a few more questions and go back to it and then the State did not object and I was able to get that out on the stand.
Q. Okay. Going to the Jackson v. Denno hearing --
A. Yes.
Q. -- if you look at page 31 to 32 in the transcript, that is Mr. McBride's statement to law enforcement, correct?
A. Which line, 4? No.

Q. I've got it.
A. 31 and 32?
Q. Yes. It's going to be line 8 starting with "and".
A. Okay.
Q. That was -- that is the section you were trying to prevent from coming in; is that correct?
A. Yes. Yes.
Q. Can you read that out loud, please.
A. And he stated that they were trying to say that he touched his cousin.
Q. Why were you trying to keep that out?
A. Because I didn't want any inkling or any words to be placed upon the Court and the jury to hear from my client's mouth anything involving the accusation other than his version of events.
Q. Okay. If you'd keep reading.
A. I asked him did -- do you want me to read it out loud?
Q. Yes, sir. You can start with "he" on line 10 --
A. Okay.
Q. -- and then continue.
A. He stated that -- he stated he was home, he heard a knock on the door. His cousin was at the door and he asked why -- why was she there and she said no one was at home, that her mother wasn't at home, and he allowed her to come in. He said that she looked like she was mad, sat down on

a couch, they watched TV.

Do you want me to continue?

Q. Yeah, you can skip to line 19. I'm sorry.

A. Okay. Stated that at some point he got up and went to the restroom and then shortly after she came up and he said he tried to -- he was using the restroom and he tried to conceal himself from her and yelled at her to, you know, leave out the bathroom.

Q. Okay. So that is a portion of the statement you did not want to suppress because that's his version of the facts?

A. That's his version of the facts.

Q. And if that came in, it prevented you from putting him on the stand while still getting his information out there; is that right?

A. That's correct. I didn't have to place him on the -- on the stand then. It's a trial strategy to get as much as -- of his story to the Court and the jury without placing my client on the stand.

Q. So you got what you wanted out of the Denno hearing; is that correct?

A. Absolutely. Yeah.

Q. Okay. Now looking at Samantha Cooper, what was the gist of her testimony? And that can be found on page 282, which we already discussed on direct a bit, but I want to

talk to you a little bit more about it.
A. The gist of her -- her statement without me reading through the transcript, as I recall it, is that she came over there after the allegation was made. I think the same day. She confronts -- she's upset. She confronts Justin. A gun is present at the time, somehow it either falls out or something of that nature, and how she was upset about what allegedly occurred.
Q. And she said that she had a brief conversation with Justin at that time?
A. Yes, during -- during this direct.
Q. Okay. And if you'll -- at page 15, which we've looked at on direct, but he basically just says I did not mean to do it, we need to talk. Is that correct?
A. On page 15?
Q. No, page -- I'm sorry. Line 15, page 282.
A. 282?
Q. Yes, sir.
A. That's correct. She does state that.
Q. So -- but he never defines what "it" is, correct?
A. No.
Q. So he never actually confesses?
A. No.
Q. He just says I didn't mean to do it and she assumes it's the victim's recounting of the story, not his?

A. That's correct.
Q. Okay. And he didn't make that to law enforcement, did he?
A. No.
Q. Samantha Cooper is not a law enforcement officer?
A. No.
Q. Is she with the solicitor's office?
A. No.
Q. Okay. And did he tell you about that encounter with her?
A. Never.
Q. Okay. Did they give you any leads or witnesses to investigate?
A. No, not -- no.
Q. And you were able to cross-examine Ms. Cooper, correct?
A. Yes.
Q. Was there any objection you could have made that would have prevented that statement from coming in?
A. No. Even if I had objected hearsay, objection, hearsay, Your Honor, it would have been the same thing that Ms. Barr said. A statement against party interest.
Q. Okay. And during your cross-examination do you believe you were able to -- did she come off credible during your cross-examination?

A. No, she did not. She -- I had already heard that she was one prior to trial that had a hot head. My intentions were with her that when she gets on the stand I was gonna continue to poke her until the State objected and stopped me from treating her as a hostile witness to get a reaction so that the jury can see.
Q. Okay.
A. And if the jury were able to see that she had a hot head and she sometimes jumped to con -- conclusions, it can possibly undermine her testimony at the time where the jury doesn't put as much emphasis in her testimony.
Q. Okay. If you had been given her statement in discovery, would that have changed any of your trial strategy going forward?
A. No.
Q. Why is that?
A. I don't think it would have been material to the -- to the most important aspect of this trial.
Q. Which was?
A. The victim's testimony. And surprisingly it was the mother of the victim who was surprisingly very convincing in regards to disclosure and things of that nature.
Q. Because she had immediate disclosure, correct?
A. Yes. It was the same day.
Q. And she -- the mother corroborated a large portion of

the victim's --
A. So, yes, we have the mother corroborating, then you have the victim who corroborates during the forensic examination what allegedly occurred. This forensic examination occurs about three days later. She almost verbatim recites the same thing again.
Q. And you had said that Mr. McBride had not given you any leads -- leads or witnesses to investigate. Was there anybody that you were aware of -- did you have any reason to be investigating for a rebuttal witness for the Samantha Cooper testimony?
A. I had --
Q. Did you have any reason to be investigating?
A. I had no idea.
Q. Because you had no idea the statement was made --
A. I had no idea of that statement.
Q. -- because the defendant never told you that he made the statement to Samantha Cooper?
A. No.
Q. Is that correct?
A. Not that statement at all.
Q. Did you feel after her testimony that you needed a rebuttal?
A. I didn't because she got so flustered on the stand that it was very apparent to the jury and then even when I

left from the court that day at the conclusion of the court, one of the bailiffs came up and -- and basically told me man, she didn't do well on the stand.

Q. Okay. Now looking at the plea offers, how did those come about? Was there one plea offer or multiple plea offers?

A. It was only one and --

Q. Okay.

A. -- and -- and that came with some prodding and a little begging at the time because Ms. -- Ms. Barr was -- she was firm. She's -- she's been fair, but she was firm.

Q. Okay.

A. I think she had some of the victim's family who was adamant that this go forward and I think that prevented her from going to family court and even attempting to offer us any semblance of a plea offer, and she subsequently did and it was that one plea offer, which was a lewd act, was zero to fifteen.

Q. Okay. And at the time that that was provided, the only piece of evidence that you didn't have in discovery was the photograph; is that correct?

A. Correct. Well, now going back to that time --

Q. Yes.

A. -- I had a photograph.

Q. Okay. You didn't have the color copy. I'm sorry.
A. That's correct.
Q. Good enough.
A. And then I had already gone separately to the solicitor's office from my office in Lexington, drove two hours --
Q. Right.
A. -- to get there to view her file and it's the same photo that I have.
Q. Okay. So he was aware there was a photo that existed?
A. Yes.
Q. Okay. At the time of the plea offer he was aware the photo existed, he just didn't know what the color copy looked like?
A. That's correct.
Q. Okay.
A. And we had no -- we had no reason to believe that there was a -- a color copy because I was thinking as well that this was the copy that they had --
Q. Okay.
A. -- because I -- they opened up their file for me.
Q. Okay.
A. And I looked and I checked. Well, okay.
Q. And the solicitor did not have it until the day of

trial; is that correct?
A. Until the day of trial.
Q. And she indicated that that was actually in the police's possession?
A. That's correct.
Q. And she got it that morning of trial?
A. That's correct.
Q. So even if you had -- when -- when you went to go and look at the file, it just was not there?
A. That's correct.
Q. Okay.
A. And, furthermore, I even -- with the discovery issues we were having, I called to the Kingstree police department multiple times trying to get them to return a call and they never did. I sent an e-mail to Ms. Barr letting her know that I'm having problems contacting -- having the Kingstree police department --
Q. Right.
A. -- call me back about the discovery issues and evidence issues and let her know as well.
Q. Okay. And I'm looking at the plea offer only.
A. Okay.
Q. Did the solicitor also meet with you and Mr. McBride and his family regarding the plea offer?
A. I don't think it was his whole family. I think it was

Mr. McBride and Ms. Katrina McBride.
Q. His mother?
A. His mother.
Q. Okay. And so it was you -- sorry. It was you, the Applicant, mom and Ms. Barr?
A. That's what I recall.
Q. Okay. And in those conversations did you believe it was in his best interest to plead guilty?
A. I did.
Q. Why is that?
A. I felt what -- okay. So I'm going back in time. He's very young at this -- this point. The risk of going to trial and being convicted off of statements alone without physical evidence was too high. When the statements had been corroborated through the forensic exam -- evaluation and what Ms. [redacted] said, I let him know that a young child taking the stand is gonna get a lot more sympathy from the jury as opposed to someone else. So I felt that with him coming from a good family -- a good family, okay, I believed in them, I believed in him, he continued to work, a good young man, I just felt that with me being able to package everything up together and go before the Court with a zero to fifteen sentence, that I would be able to get a very lenient sentence, okay, before a judge. I felt that I had enough information in his background, the

family's background, they were willing to support him in any court proceeding, I was gonna pack that court and ask the judge to give him probation, okay, but the thing we could not get around was the GPS monitoring -- the sex offender registry, excuse me, the sex offender registry.

Q. Okay. So that was a deal breaker for him was the sex offender registry?

A. Yeah, sex offender registry.

Q. Okay. Was he aware of the potential sentence he faced, the mandatory minimum --

A. Yes.

Q. -- when he rejected the plea offer?

A. Yes.

Q. Do -- now they have alleged that you did not impeach the victim on her inconsistent statements. Do you recall cross-examining the victim during the trial?

A. Very thoroughly. Normally -- and I actually did it quite different than I normally would do with a child victim. See, the -- the risk you take as a defense attorney, you don't want to have your questioning of a jury -- excuse me -- of a victim to backfire on your client because you're treating a child victim a certain way in -- in trial, so normally I don't go as aggressively as I did with Ms. [redacted] but I knew that's the only thing the State had to rely upon.

Q. Okay. And did you also cross-examine Detective Hamlet on the inconsistent statements of the victim?
A. Absolutely.
Q. And do you recall the State's closing argument? This is another allegation. That you should have objected to the State's closing argument.
A. Yeah.
Q. Okay. You did not object?
A. No.
Q. Do you recall any objectionable statements that -- that were made?
A. I don't. I don't.
Q. Okay. Do you believe that the closing shifted the burden at all?
A. No.
Q. Was the jury then after the closing arguments -- you got the last closing argument, right?
A. Yes.
Q. So after the State's closing argument, then you addressed the -- the jury and then did the Court properly instruct the jury on burden of proof, presumption of innocence and the defendant's Fifth Amendment right to remain silent?
A. Yes.
Q. Okay. Now regarding the unindicted conduct

allegation, Count I is regarding the oral sex.
A. Yes.
Q. Do you recall the jury being properly charged regarding Count I by the trial court? Now that's page 368, line 2 and 6 -- 2 through 6 I should say.
A. Okay. 2 through 6, yes.
Q. Okay. And if you'd turn to page 372, if you'd read page -- or line 10 through 15. Is it clear that the defendant could be found guilty on Count I for oral sex?
A. Yes. That's line 10 through 15, yes.
Q. 15. Okay. And do you believe the Court properly instructed the jury on Count I?
A. I do.
Q. Would you have objected if it was not clear?
A. Absolutely.
Q. Okay. Do you think your trial strategy for having last argument was effective?
A. I do.
Q. Why is that?
A. I felt that it was effective because I was able to rebut anything that the State had put in their closing argument. Furthermore, I was able to highlight the inconsistent statements, the -- the horrible job that the Kingstree police department had done in regards to collection of evidence, and I was able to provide the jury

with the last thing because typically they remember what they hear last.
Q. Correct.
A. I was able to provide them with those statements and take back to the jury room to consider. So it obviously had to work some because one of those were not guilty. One of those charges were not guilty.
Q. Was the jury instructed that their verdict could not be based on passion, sympathy, public opinion, prejudice or matters outside the record?
A. Yes.
Q. And you stated that he was found not guilty on Count II?
A. On Count II, that's correct.
Q. Okay. And in that -- his sentence was the minimum, twenty-five?
A. Yes.
Q. And you did not object?
A. I did not object.
Q. Did you have a reason to object? Did you have an appropriate challenge for that?
A. I -- I did not at the time. Now if he had received a life sentence, then I would have immediately objected to that due to the age; however, due to the fact that we have a statute that specifically states that someone who is

charged, a sixteen-year-old, allows a solicitor, one, to determine whether they go to family court or general sessions. Then the statute for that particular offense, Count Number I, CSC with a minor under eleven years old, specifically states someone found guilty and/or pleads guilty, they're penalized with a mandatory minimum of twenty-five up to life. Now I had no reason to think that that was an unconstitutional statute because -- now I was looking for case law that I may have had in my file and I can't see anything, but somehow I recall that at the time it either had been litigated something similar, but I don't want to say affirmatively because I -- I've been looking through my file for the case law and I can't find it.

Q. That's okay. But you did not believe that --

A. I did not. Especially at twenty-five --

Q. -- because it's statutorily prescribed that a defendant of his age that commits this crime is eligible for the twenty-five to life and he was aware of that?

A. Yeah, that's correct.

MS. GREGORY: A moment's indulgence, Your Honor.

THE COURT: Yes, ma'am.

BY MS. GREGORY:

Q. Did the Kingstree PD lose more than the shirt?

A. I think they lost the pants, the shirt and any other clothing.

MS. GREGORY: No further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. SHAFFER:

Q. Ms. Gregory had asked you about trial strategy. It's fair to say that your trial strategy was that -- to impeach her and then introduce the exculpatory statement from -- or the statement from the client saying he didn't do it?

A. Yes.

Q. And then it's the he said, she said, right?

A. It is a he-say, she-say.

Q. Okay. And at the time you formulated that strategy, you would have conveyed that to the client, right?

A. Yes.

Q. And at the time you formulated that strategy, you did not have any statement made by Samantha Cooper about him saying it was an accident?

A. No. No.

Q. Okay. Had you had that information, you would have discussed that information with the client, correct?

A. Yeah, I have an obligation to do so.

Q. Okay. And you would have consulted with him about that, right?

A. Yes.

Q. And he may have been able to tell you stuff about that, right?

A. Correct.
Q. And he may have been able to make decisions based off of that information, right?
A. Yes.
Q. Like whether or not to try -- go to trial or plead guilty, correct?
A. Correct.
Q. And -- but obviously you didn't have that information until you were in trial, right?
A. That is correct.
Q. Okay. And even today, you do know -- do you know Mrs. Evans?
A. No.
Q. Do you know what she would have to say about this case?
A. No. I just have a summary after your meeting with her in regards to what she would say.
Q. Okay. And you never spoke with her personally, correct?
A. No. I had no reason to.
Q. Okay. And you said that -- well, let me back up. Whenever you -- whenever you decide whether or not to implement a specific trial strategy, you consult with the defendant about that, right?
A. I consult with them and let them know what -- based

off my knowledge and experience what probably would be most effective.

Q. And even though that you have the ultimate say in what gets called and who gets called and who does not get called --

A. Yeah.

Q. -- you consult with them ahead of time about who you plan on calling, right?

A. Yes. I provide a witness list, which I have.

Q. And then he can make decisions about representation based off of that -- those discussions, correct?

A. He can help, yes.

Q. And he can make decisions -- or he can help give you guidance on potential defenses, correct?

A. Correct.

Q. Because you weren't there, right?

A. No.

Q. So to some degree you're relying on your client and client's family to provide you facts --

A. Yes.

Q. -- that help you formulate a defense, right?

A. Yes.

Q. And the -- at the time you formulated your defense, you did not know about Samantha Cooper, right?

A. I had no idea.

Q. Okay.
A. Not about her statement.
Q. And would that have been helpful to know beforehand?
A. I would say yes instead of me getting caught flatfooted from -- while I'm questioning her and that -- well, on direct examination I would be aware of it.
Q. Okay. Generally do solicitors provide you with statements made by your client?
A. By my client, yes.
Q. Okay. Now I'm gonna ask you specifically about one question that Ms. Gregory asked you. I think she was talking about the time that you had gotten Mr. McBride to sign that form. She said that the only piece of evidence that you did not have at the time was that -- the color photo, right?
A. Correct.
Q. And I think that that's how you testified, right?
A. Yes.
Q. And you meant the only physical piece because you wouldn't have had the statement either, right?
A. That -- that -- that's correct.
Q. Okay. I just wanted to --
A. I stand corrected.
Q. -- clarify that.
A. That's correct.

Q. Had Mr. McBride said to you -- you know about that statement and Mr. McBride said to you something along the lines of hey, why don't you go talk to my neighbor, she'll say that I never ran around that building and this gun incident never happened and this confession couldn't have happened, would you have talked to her?
A. I -- yes --
Q. Okay.
A. -- I would have, but I was never given that information because I never knew he -- that he confessed to anything.
Q. No, I mean, I -- I know you didn't, but if you would have known before trial you would have talked to her, right?
A. I would have talked to her.
Q. And then you would have consulted with the client on whether or not you were gonna call her as a witness, right?
A. Yes.
Q. And then you -- after consultation, you would have made a final decision at that point whether or not you were gonna call her as a witness, right?
A. Yes. I would have made that determination, yes.
Q. Okay. But sitting here now you haven't consulted with Mr. McBride about saying that you would not have -- whether you should or should not call Ms. Evans as a witness,

right? That -- that discussion never happened, right?
A. No.
Q. Because you didn't know anything about it, right?
A. Ms. Evans or Ms. Cooper?
Q. I'm saying Ms. Evans.
A. Okay. Yeah, that's correct.
Q. Okay. So you've never and at the time of trial you couldn't really make -- you couldn't really consult with him because you didn't know about it, right?
A. That's correct.
Q. And can you definitively say right now based off -- without consulting with Mr. McBride and without having ever talked to Ms. Evans yourself, can you definitively say that you would not have called her as a witness in this case?
A. I can't definitively say that.
Q. Okay. Now I know you had researched some issues related to this and you said that if he had gotten a life sentence you would have -- you would have --
A. Objected.
Q. -- objected to that, right?
A. Yes.
Q. And that would have been under Graham versus Florida, right, saying you can't do that for non-homicide, right?
A. That's correct.
Q. And prior to this trial, I believe a case called

Miller versus Alabama came out which said that you need to make individualized statements for life sentences for juveniles who have committed homicide, right?

A. Did that come out before this case was tried?

Q. I believe it was 2012, so this would have been 2013 you tried this, correct?

A. Yes.

Q. Okay.

A. Okay.

Q. All right. Do you think you did an adequate job of impeaching the -- the alleged victim?

A. I did.

Q. Okay. And had it not been for the picture and had it not been for Ms. Cooper's statement, the trial basically would have gone consistent with your trial strategy, correct, which is impeach the witness, get in the defendant's statement and try to argue to the jury that -- that basically it's her word against his?

A. Yes.

Q. Okay.

MR. SHAFFER: No further questions.

MS. GREGORY: Very briefly, Your Honor.

RECROSS EXAMINATION

BY MS. GREGORY:

Q. When Ms. Samantha Cooper was testifying, did you talk

to Mr. McBride about what she was testifying to at that time?
A. Yeah.
Q. What did he say? Did he admit that he'd talk to her?
A. I don't recall that and we're saying it's almost six years ago, but I don't recall him saying I said what she said on the stand.
Q. Okay. So he did not tell you first -- like prior to trial that he had talked to her that day of the incident, right?
A. I recall the family informing me that she caused a scene the day of the incident, but not that Justin and her had talked and I was never informed by Justin that he made this alleged statement to her.
Q. Okay. So even during the trial --
A. He did not say he made that statement to her.
Q. Okay. Had you had known about the statement ahead of time, what would you have done about it? What could you have done about it? How would it have changed anything?
A. Nothing. And if Justin had told me, I probably -- that even more-so would have limited me from placing him on the stand at the time as well because if he testifies differently from what he's telling me, then that's suborning perjury.
Q. Correct. So -- and you would call his statement to

Samantha Cooper a confession?
A. No. And the reason why I didn't -- and so, okay, with this statement that she says, if you notice I don't ask a lot of questions about that statement --
Q. Right.
A. -- because I don't want it to be highlighted by the jury. I wanted to kind of gloss over it after the initial shock so it doesn't get stuck in their head.
Q. But you wouldn't categorize it as a confession? He never told Samantha Cooper what he allegedly did to the victim?
A. No, and that's why I was not gonna continue to highlight it and hammer on it because then that -- that falls into the -- the State's strategy of using that as an effective piece.
MS. GREGORY: No further questions, Your Honor.
THE COURT: Thank you.
THE WITNESS: Thank you, Your Honor.
(Witness excused.)
THE COURT: Yes, sir.
MR. SHAFFER: Thank you. Applicant would call Kimberly Barr.
Actually, Your Honor, I -- I may switch up the order because I'm gonna do one of the witnesses fairly quick and I'm not sure -- we'll actually call Ms. Wendy

Keefer at this point.

THE COURT: Okay.

THE CLERK: Place your hand on the Bible, raise your right and state your name.

THE WITNESS: Wendy Keefer.

(Whereupon, Wendy Keefer was duly sworn by the Clerk of Court.)

THE CLERK: State your name for the record and spell your last name, please.

THE WITNESS: Wendy Keefer, K-E-E-F-E-R.

WENDY KEEFER,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAFFER:

Q. Ms. Keefer, you were the appellate counsel for Mr. McBride, right?

A. That's correct.

Q. And there was actually another attorney on there as well, right?

A. Yes. Adam Owensby, who assisted me.

Q. Okay. You were the primary one making decisions, right?

A. Yes.

Q. Okay. So any decision would have ultimately -- you would have -- the buck stopped with you, right?

A. It did.
Q. Okay. Now if -- as an appellate counsel, if there's a meritorious issue on appeal, is there any reason not to raise that issue?
A. If it's not preserved for appeal, unless I can find some legitimate reason to argue that preservation in some unusual cases isn't necessary, I can't raise it unless it's preserved. But, otherwise, I would raise all meritorious issues.
Q. So every meritorious issue that was preserved you believe you raised, correct?
A. That's correct.
Q. Okay. And obviously the transcript and the record on appeal will speak for itself about what issues were raised and what were not, right?
A. Right. And with the appeal, of course, we're lucky because we're stuck with the record. We can't look to outside things.
Q. And are you familiar with the -- the application for post-conviction relief in this case?
A. I am.
Q. Okay.
A. Not the one that was filed this morning.
Q. No, but the one that was --
A. Previously.

Q. -- or the one that was filed earlier?
A. Yes.
Q. And if I represented that there's no issue involving appellate counsel that was -- well...
MR. SHAFFER: The Court's indulgence.
BY MR. SHAFFER:
Q. I'm showing you Court's Exhibit 1, which is the application that was filed this morning. If you can, briefly review the allegations in there.
A. Okay.
Q. All right. And you've had a chance to review Court's Exhibit 1, correct?
A. Yes.
Q. Related to any of the allegations concerning ineffective assistance of appellate counsel, I'm not asking you whether you think they're meritorious or if you think that they're -- they were preserved properly, but what I'm asking you is was there any strategic reason that you would not have raised any of those issues?
A. No. I -- I only saw two issues related to the appeal. There is not a strategic reason that I looked at them and discarded them not be included, if that's what you're asking.
Q. All right.
MR. SHAFFER: Thank you very much. No further

questions.

CROSS-EXAMINATION

BY MS. GREGORY:

Q. Good afternoon, Ms. Keefer.

A. Good afternoon.

Q. One of the allegations is that you failed to brief the issue of mandatory minimum sentences. Did you not brief that issue because it was not preserved? Is that correct?

A. That's correct.

Q. Do you believe the Court of Appeals would have believed that sentence is cruel and unusual?

A. Given what they've decided --

MR. SHAFFER: Objection, Your Honor. I don't think she can testify as to what the Court of Appeals would or would not believe.

THE COURT: Well, she can testify as to what her strategy was in not raising the issue, so I'm gonna allow it.

THE WITNESS: I didn't raise it because it wasn't preserved. I did, if you look at the appeal, try to get around some of the preservation issues on some of the other issues. With this one I didn't. I didn't see a way around it not being preserved. It's not a subject matter jurisdiction issue and the cruel and unusual punishment issue had not really been applied

in our state or our circuit other than for life sentences and death penalties.

MS. GREGORY: Thank you. No further questions, Your Honor.

THE COURT: Thank you. You can step down.

THE WITNESS: May I be excused?

MS. GREGORY: Yes.

THE COURT: Do you-all have any objection to her being excused?

MR. SHAFFER: No objection, Your Honor.

THE COURT: Thank you.

(Witness excused.)

THE COURT: Okay. It's ten after twelve. I know we have a number of different witnesses still to hear from. I do need to let my court personal, et cetera, take a lunch break at some point.

MS. GREGORY: Sure.

THE COURT: So we can either take a short break now -- and I know Ms. Barr has travelled from Kingstree to come here and probably would prefer that we go ahead and get her in before the lunch break, but let's go ahead and take ten minutes and get -- get Ms. Barr's testimony in full and we take a little bit longer break for lunch.

MS. GREGORY: Okay.

MR. SHAFFER: Thank you.

(Recess taken at 12:11 PM.)

(Back on the record at 12:25 PM.)

THE CLERK: Raise your right hand and place your left hand on the Bible.

State your name, please.

THE WITNESS: Kimberly Barr.

(Whereupon, Kimberly Barr was duly sworn by the Clerk of Court.)

THE CLERK: State your name for the record and spell your last name, please.

THE WITNESS: Kimberly Barr, B-A-R-R.

KIMBERLY BARR,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAFFER:

Q. Ms. Barr, you were the prosecutor on this case, right?

A. I was.

Q. To the best of your recollection, were you the prosecutor the entire time it was pending?

A. That's correct.

Q. Okay. What went into the decision to charge Mr. McBride in adult court versus family court?

A. He was initially charged under an arrest warrant --

Q. Okay.
A. -- rather than a juvenile petition, so when the case came into my office he had already been charged as an adult because of his age and the classification of -- of the alleged crime.
Q. Okay.
A. So it was not a -- an instance where it -- it started in family court and we asked to have it transferred to general sessions court. It started in general sessions court.
Q. Okay. And now -- at no time did anyone ever petition to have it like lowered back to -- or send it to family court or anything like that or --
A. No, it was never --
Q. -- ask the judge to do anything?
A. Correct. It was never remanded to family court.
Q. Okay. Now in this case -- and you're gonna see Plaintiff's Exhibit 1 in front of you.
A. Okay.
Q. Do you -- do you recall what Plaintiff's Exhibit 1 is?
A. I believe this is a copy of the picture of the victim's shirt.
Q. And -- and that would have been similar to the -- the picture -- the copy of the picture of the victim's shirt that was in your original discovery file, correct?

A. That is correct.
Q. So that's how you received it from the police?
A. That's correct.
Q. Okay. And you would have provided that to defense counsel, correct?
A. Correct.
Q. Okay. Now the color photo, do you recall when you received the color photo?
A. It would have been either right before the trial or right during the trial.
Q. Okay. Is it safe to say that the color photo would have been substantially more detailed than the Plaintiff's Exhibit 1?
A. That's a safe bet.
Q. Okay. And it -- it would be fair to say that Plaintiff's Exhibit 1 didn't really show much of anything other than a black page and maybe a couple of white lines in it; is that right?
A. I think that's a fair assessment.
Q. Now there was a witness that you had talked to in preparation of the case, which is Samantha Cooper. Could you tell us a little bit about Samantha Cooper?
A. Samantha Cooper is the sister of the victim's mother.
Q. Okay.
A. The victim's mother is Angelica, Samantha Cooper is

Angelica's sister, and it was my information based on conversations with the mother and the victim that the victim talked with Samantha, her aunt, that night -- or that afternoon after the assault took place.

Q. Did you also find out that she had -- well, let me ask you this, I guess. Is -- was Samantha Cooper's testimony consistent or inconsistent with the -- with the information you discovered by talking with Ms. Cooper?

A. With -- with -- was Samantha's testimony consistent with who?

Q. With -- with your discussions. Did she testify to the same information that she provided you?

A. Yes.

Q. Okay. She didn't ever falter in her story or tell any different stories or anything like that, right?

A. She -- she did not.

Q. Okay. That information was not disclosed to defense counsel, correct?

A. I don't have any recollection of me telling defense counsel about what Samantha told me.

Q. Okay. Was there ever any written statement produced or written report produced related to what defense counsel told -- I mean, what Samantha Cooper told you?

A. Written statement meaning my notes of that conversation?

Q. Yeah, or -- they would have been in your notes?
A. I likely would have taken notes of what she told me.
Q. Okay. Would those notes have been in the open file? I know that you-all have an open file policy, but do you-all -- do you-all separate work product from the rest of the file?
A. We do.
Q. Okay. So they wouldn't have been in the open file --
A. Correct.
Q. -- which has all the discovery that you-all have, correct?
A. Correct.
Q. Okay. And that open file would have contained everything that the police gave to you, right?
A. That is correct.
Q. Okay. The -- do you recall the plea negotiations in this case?
A. I do.
Q. Okay. What was the plea offer?
A. Essentially I offered to reduce the charge from criminal sexual conduct in the first degree with a minor to lewd act on a minor, which carried a possible sentence range of zero to fifteen. I'd had the conversation both in person and over the phone with Mr. Mobley, who was representing the defendant, and had various conversations

with Ms. McBride, the victim's mom. The -- as a result of those conversations, Mr. Mobley came back to me and told me that the defendant had rejected the plea offer and I asked him with his permission if I could speak with the defendant in his presence and he asked his client if -- if that was permissible, they allowed me to do that, and the three of us met in the grand jury room at the courthouse and I explained to Mr. McBride again and I told him that I -- I knew that his counsel had already talked about the possible penalties for a conviction for CSC in the first degree, but I wanted to reiterate to him, and so I told him that the offer was lewd act on a minor, that although I couldn't recommend probation I wouldn't stringently oppose it and I didn't think Angelica would either. He responded back to me that he would still have to register as a sex offender and if he had to register as a sex offender for life, he might as well go to prison and serve the time, and so I explained to him that that's easy to say in isolation when -- when you're sitting in a room, but, you know, if you were to be convicted and you're on your way to SCDC for twenty-five years, you'll have a different thought. And so it -- it weighed on me to the point where I asked if I could go get his mother to ask -- ask him if he had any questions of her and -- and also take the time to explain to her what the plea offer was and so I -- he -- with his

permission I got her out of the courtroom, brought her into the grand jury room with -- with her son and Mr. Mobley. I left the grand jurors' room and let them talk in private. I think Mr. Mobley may have given me some indication that they were ready for me to come back into the room. I explained that again to the mother what I had told her son and she told me that it was his decision to make, that he was an adult and -- and he -- his decision -- he explained to me that that was his decision, was to reject the offer.

Q. Okay. So the offer was officially zero to fifteen?

A. Correct. Well, lewd act on a minor and the Court would decide the sentence. I knew that Mr. Mobley would -- would ask for probation and I told Mr. McBride that I wouldn't stringently oppose a probationary sen -- sentence should the Court determine that that was appropriate.

Q. Okay. Do you think that would have been a fair resolution to this case?

A. I think a plea to lewd act on a minor child, had he accepted it, would have been a fair resolution.

Q. Okay. Do you think the fifteen -- either probation or a fifteen year sentence in the discretion of the judge would be a fair resolution?

A. I would say at that moment I was satisfied that whatever the Court deemed appropriate and just would be appropriate and just. It was a difficult case because it

involved family members. The victim and the defendant are first cousins. There was a lot of -- a lot of tense moments during those negotiations and those discussions, but at the end of the day it was family who loved each other, but I had a mother who was going to fight for her child and I certainly admired her for doing that.

Q. So that offer expired when he -- upon him rejecting it, right?

A. I don't know that we had an expiration date on it because my recollection was that Mr. Mobley and I had had discussions about that informally by phone or however we were communicating. I believe that the meeting in the grand jurors' room may have occurred either the week prior to trial or -- or right when we were about to pull a jury. Typically my practice would have been that if a plea offer is made in advance of trial that it expires maybe the Friday before before we have to pull a jury because I need to know what I'm gonna be working on that weekend, but if -- if my memory is correct in this case and those discussions in the grand jury room occurred, it likely would have occurred that Monday when we were selecting the jury.

Q. Okay. And to some degree you were trying to obviously avoid having to put a child victim on the stand, but also you were trying to avoid some harsh result for Mr. McBride

to some degree. Is that fair to say?
A. Those two things and I was trying to do what I thought was right in that instance.
Q. Okay. Had they came to -- to you like mid trial -- well, did they come to you mid trial to discuss plea offers?
A. I don't remember if they did or did not.
Q. Okay. Had they done that, would you generally have increased the offer because you were in the middle of a trial?
A. That's typically my rule --
Q. I mean --
A. -- but obviously about more than just having a fast and hard rule, again, you want to do what's right. So there have been circumstances under which we -- I've negotiated pleas after the victim has testified, after the State has rested, after the case has been submitted to the jury and they're deliberating. So I like to kind of keep that as a rule, but I have deviated from that rule if you want to call it that when -- when circumstances warrant it.
Q. Okay. And generally if there was a plea while you're in trial, that would be coming from the defense counsel saying let's plead guilty, correct? I mean, do you go in the middle of trial and say hey, I'm going to change my offer to this?

A. I have done it. Not -- it's not typical.
Q. Okay.
A. It's -- it usually comes from the defense.
Q. Okay. Did you do it in this case to the best of your recollection?
A. I don't have a recollection of doing that. I -- and I likely wouldn't have only because I believe the testimony was solid.
Q. Okay.
MR. SHAFFER: Court's indulgence.
No further questions.

CROSS-EXAMINATION

BY MS. GREGORY:
Q. Good afternoon, Ms. Barr.
A. Good afternoon.
Q. Do you recall Mr. Mobley coming to you and asking for this case to be moved down to family court?
A. Yes.
Q. Why did you say no?
A. A couple of reasons. Primarily it was because in my discussions with the victim about the case and about the facts of the case, she disclosed to me that this was not the first time that something inappropriate had happened with Justin and so my concern was because of that history that he may be -- may be a predator and that it was

appropriate to have some more options in terms of -- of trying to deal with that if that -- if that were an issue. And obviously they're close family members. They would continue to have contact with each other by nature -- the very nature of their familial relationship and so I thought it was appropriate to handle it in general sessions court.

Q. And then general sessions has jurisdiction to hear these kinds of cases; is that correct?

A. Right. He -- he's charged with a Class A felony and he was sixteen years old at the time and so under the statute he would not -- under the juvenile justice statute, he would not be defined as a child within the meaning of that statute.

Q. Okay. Mr. McBride has raised several constitutional issues on the Eighth Amendment, cruel and unusual punishment. You said he was sixteen at the time and there's a statute that allows him to face a twenty-five to life sentence; is that correct?

A. Correct. That's -- Title 63-19-20 defines what a child is and a child is not someone who's sixteen years of age or older and is classified as a Class -- I'm sorry, charged with a Class A, B or C felony.

Q. Which CSC with a minor was --

A. A Class A felony.

Q. -- first degree?

A. Yeah.
Q. Okay. Are there -- and what was he sentenced to, twenty-five years, correct?
A. Correct.
Q. Are there any constitutional issues with that sentence?
A. Not that I'm aware of.
Q. Okay. What was the evidence that the State had against Mr. McBride?
A. The victim's testimony that she had gone -- she had gotten off the school bus. She was attending summer school, had gotten off the bus to go home. Her mother, who's a stay-at-home mom was not at home. She was upset about that. She had either went to a neighbor's house or passed by a neighbor, I think her name was Gladys, and saw that or assumed that Gladys had company and so she went to her aunt -- I think she called her Tina -- her Aunt Tina's house, who's -- who's the defendant's mother. The defendant was there by himself. They started watching television and the program -- whatever was airing on television at the time, the characters were using profanity, and so she asked him to turn the TV down or turn it to another channel because she wasn't allowed to listen to profanity. She says that he came and sat by her, pulled out his penis, forced her head onto his penis,

ejaculated in her mouth. She ran into the bathroom to spit out the semen in the sink and to wipe the semen off of her shirt.

Now I'm using the word "semen". She didn't describe it that way.

Q. Right.

A. And that she had taken a piece of tissue to wipe it off of her shirt and put it in the trash, he had come into the bathroom and pulled her toward a chair and tried to anally penetrate her. She screamed and ended up trying to run out the front door. She says that he blocked her from leaving out of the front door, so she ran to the back door and the door was locked and he unlocked it for her and she then runs back home. She was not aware at the time, of course, whether or not her mother had gotten home, but she'd ran back home and she starts kicking on the front door of her home. Her mother hears someone kicking at the door and actually said at -- at trial the first thought came to her was, you know, who the hell is that kicking at my door like that, and so she opens the door. Because she had been worried that her daughter hadn't made it home off the bus yet and that was unlike her, she opens the door. Her daughter immediately walks past her. The mother says that when she walked past her she noticed the smell of men's cologne. That was important because the victim had

testified that after the defendant sexually a assaulted her, he sprayed -- she called it men's perfume, but she sprayed cologne -- he sprayed cologne in the air. And so she -- Angelica then asked [redacted] where have you been, you know, where are you coming from, you know, trying to figure out what was going on and why her daughter came in smelling like men's cologne. And [redacted] did not initially disclose to the mother what happened. She said nothing happened. The mother knew something was not right. I think [redacted] did tell her mom that she was at her cousin's house, so the mother then goes to the defendant's house, confronts him. He says that while he was using the bathroom the victim had come into the bathroom and he tried to shield his penis from view and that she just all of a sudden left the home.

The victim's mom is -- is deeply religious. She's very conservative, understated and unassuming and very humble, and so her first thought was to call her husband because I believe her husband is the sister -- is the brother of the defendant's mother. I think that's how they're related. And she tried to call him several times. She didn't want to, to me, appear as if she was going outside the family by calling the police at first and so she wanted to defer to her husband, could not reach her husband. I think she called her mom, had called her

sister, Samantha Cooper, several times and I think finally Samantha called her back and she told Samantha, you know, I think something happened with [redacted] and Justin and Samantha comes over and then that's when everything is disclosed and the police are called. And so based on the timing of when the 9-1-1 call is made and the time when the mother testified that her daughter would have gotten off the bus was probably a difference of maybe an hour or two.

Q. Okay. And the mom testified at trial?

A. Yes.

Q. And the victim testified at trial?

A. Yes.

Q. Okay. And was there a forensic interview done as well?

A. Correct.

Q. And what did the forensic interview show?

A. It was consistent with the mother's testimony. I don't believe -- I don't have a memory of introducing the forensic interview at trial, but it was consistent with what she -- what the victim told me and what the victim told the jury.

Q. In your opinion, was that a strong case?

A. In terms of what the vic -- the victim disclosed?

Q. Correct.

A. So -- so here's how I would answer that. Child rape cases are very difficult to prosecute. It's actually rare to -- in my experience, it's actually rare for the prosecution to have DNA evidence. That's generally a gift if you have that in those kind of cases. Children are much more likely to disclose -- much less likely to disclose assault if they know the person who -- who committed the crime and so in those type cases where there's not DNA evidence, where it's not an eyewitness -- you typically don't have eyewitnesses on assault cases, that's the kind of crime that typically occurs in private, but in those kind of cases I have to look for small details to tell me whether or not the child is being truthful and in some instances to find out whether or not there's reason to not believe that the child is being truthful and so when I looked at all of the small details with that -- within this case, I one hundred percent believed [redacted] She was a compelling witness, but I think the most compelling witness in the case would had to have been her mother.

Q. And Mr. Shaffer brought up the photograph. Did that end up being a compelling piece of evidence against Mr. McBride?

A. I wouldn't call it compelling. It -- during this period of time, the law enforcement agency that was responsible for investigating this case had some really

horrible things happen and as a result evidence was lost and/or destroyed and so I think that the initial -- the colored photograph was probably the only piece of evidence that they kept I'm sad to say or that we can find. What we -- we do when we get an arrest warrant in, we open up a case in the office. My administrative assistant would send a request to the law enforcement agency for a copy of everything in the file and so this is what we got when we sent that request in. We also would send a request in to the Durant Center for a copy of the videotape of the child's forensic interview and the interviewer's notes and so I -- I just recall being very frustrated during either the eve of trial or during the trial when I get the case file and there are colored photographs in the case file.

Q. Were you able to produce the actual shirt for the jury to see?

A. No. What happened, the -- the officer who initially responded to the scene took a statement from [redacted] took a statement from the defendant and set up a forensic interview at the Durant Center in Florence. It's a child advocacy in Florence. I believe this is alleged to have happened on the 20th or the 21st of June. The forensic interview was set up for two or three days later. The child was not instructed -- or the mother was not instructed to take the child to the hospital to get a rape

kit done, the law enforcement agency did not take the child's clothing at the time, and so the -- and -- and the mom didn't know to do those things --

Q. Right.

A. -- obviously and so when she goes for the forensic interview she has the presence of mind to bring the child's -- the clothing that she was wearing at the time with her and so the person at the Durant Center questioned her as to why she still had those objects and those are things that should have been turned over to the police, the mother said she didn't realize that and so she immediately after the forensic interview drove to the Kingstree police department and gave that item or those items to an unknown person. Based upon how she described that interview, we determined or we believed that that person would have been the person in charge of evidence, would have been the evidence custodian, during the time this was believed to have happened.

Q. Is that Sergeant Huckabee?

A. Correct.

Q. Okay.

A. And he -- my understanding was he was either terminated or asked to resign.

Q. Okay. And were there any testing done of her clothing or anything like that prior to it being lost that you

presented to the trial -- or presented to the jury during trial?
A. No. It -- it was within two or three days after this happened --
Q. Okay.
A. -- when the mother would have turned the clothing over to the police department. One of the officers who testified indicated that he had conducted a search of SLED and the items were never turn over to SLED for testing.
Q. So the photograph wasn't able to be backed up with either physical evidence that you could present to the jury or testing of that physical evidence prior to it being lost; is that correct?
A. That is correct.
MS. GREGORY: A moment's indulgence.
BY MS. GREGORY:
Q. Now one of the -- now one of the allegations regarding Samantha Cooper's statement -- you had Samantha Cooper's statement that you obtained. How did you get that?
A. It was an oral statement.
Q. Okay.
A. It was never a written statement. In reviewing the file in preparing for this hearing, I saw that I had compiled a witness list at some point I think in the fall of 2012, which would have been a year before the case was

filed, and she was listed on the -- on the witness list.
Q. Okay.
A. When we tried this -- and I -- I do recall vaguely noticing the case for trial about a year earlier and there was an issue related to Mr. Breibart, who formerly represented Mr. McBride before Mr. Mobley took over, but I had prepared the witness list a year before and it included her name and I prepared the -- an identical witness list in 2013 when we tried the case. I'm not sure when in that sequence, whether it was early on after we got the case file or some point later, when I spoke with -- with Ms. Cooper. I know that I had probably in excess of twenty conversations with Ms. Mc -- Ms. McBride, the victim's mom, about the case and the progress of the case and so forth between 2010 and 2013 when we tried it, and I know that I -- I had a conversation obviously with Ms. Cooper. I don't remember if that conversation was on -- over the phone or in person, but I remember talking with her and I remembered her telling me about what the victim told her and what Mr. McBride, the defendant, told her.
Q. Okay. And were you required to provide that to defense counsel?
A. No. Under Rule 5, the State is required to turn over statements of the defendant, written and recorded statements of the defendant. That statement, again, was

neither written or recorded. The State is required to produce the substance of any oral statements that the defendant gave to a law enforcement officer or somebody that the defendant knows to be an agent of the State and, of course, I was neither. And obviously, you know, you don't know how many -- law enforcement would have no way of knowing how many people a defendant spoke with about a crime or an alleged crime unless someone told them and -- and so under a Rule 5 we were not required to disclose that. And -- and not to say that we were -- or I was intentionally trying to hide it, but there's not a requirement under Rule 5 that -- that we disclose that.

Q. Was -- moving onto the jury instructions, do you recall the jury being adequately addressed by the judge during the jury instructions on Count I relating to oral sex?

A. Yes.

Q. Did you also observe that on the indictment when it went back to the jury for deliberations --

A. Correct.

Q. -- all of the statements indicated Count I pertains to oral sex?

A. Correct.

Q. Okay. Were you aware of any statements made to law enforcement by Gladys Evans? Was she part of your file at

all?
A. No. The only reference to Gladys Evans, I think, was the mother's statements that if she was not back by the time her daughter got off the bus that Gladys agreed that the child could stay at her house until her mother got back home.
Q. Okay. But that was the only statement that you're aware of from Ms. Evans. Did you ever talk to Ms. Evans prior to trial?
A. No, and I don't believe -- I don't believe that the statement necessarily came from Gladys. I believe that that statement about Gladys came from the mother, the mother telling me or telling law enforcement that she had gone to the store or gone somewhere and she had arranged it or had asked Gladys that -- you know, to look out for her daughter in case she got off the bus and she hadn't gotten back home yet, that she would allow her daughter, the victim, to stay at her house until she returned.
Q. Did you have anything in the police report that indicated law enforcement had talked to Gladys Evans?
A. I -- I don't think so.
Q. And you didn't talk to Ms. Evans prior to trial?
A. I did not.
MS. GREGORY: No further questions, Your Honor.
THE COURT: Mr. Shaffer.

REDIRECT EXAMINATION

BY MR. SHAFFER:

Q. Ms. Barr, if your factual recount or recollection of the facts that were testified at trial differs from the transcript, you'd rely on the transcript, right?

A. For the most part, yes.

Q. Okay. So anything that -- and I -- I don't mean stuff outside the transcript, but stuff that was actually testified to by the -- by the -- in open court during the trial is actually probably accurately captured in the transcript.

A. I understand. I understand.

Q. Okay. I mean, you don't have any reason to doubt that the court reporter got anything wrong, correct?

A. So here's my hesitancy.

Q. Okay.

A. One, I have not read the entire transcript and I heard earlier during one of your statements to Mr. Mobley about my closing argument and a statement that -- that you indicated reflected in the transcript that I said during closing argument that a trial is not a search -- a trial is a search for the truth, that trial is not a search for probable cause.

Q. Yes.

A. And so when I heard that, those words, I -- I wouldn't

have said that and so when I looked into the -- my -- the copy of the transcript that I have I saw that it was different, it was a trial is -- is not a search for reasonable doubt is what's stated in there.

Q. And did I say -- did I say probable cause?

A. You did.

Q. I'm so sorry. I meant reasonable doubt.

A. No, no, no. That's fine.

Q. I wasn't trying to mislead anybody.

A. No, no, no. That's fine. That's fine.

Q. But you agree you would have said that part of it, right?

A. Correct.

Q. So barring that, is there any reason in your mind to think that the transcript may be more accurate than your recollection of the testimony?

A. No.

Q. Okay. And the only reason I -- I say that is just because of the fact that whenever the judge looks at it I don't want, you know, them solely -- the judge solely relying on your testimony there's something different. I'm not -- I don't know of any specific inconsistencies. I'm not trying to --

A. No, no, no.

Q. -- insinuate that.

A. No, no, no. And I didn't take it that way.
Q. Okay. So did you believe that the photograph was inculpatory? Did it tend to show that he was guilty or at least -- did it assist you in -- in your prosecution?
A. So the -- the photograph in and of itself was not inculpatory in my view. Did it help? Sure.
Q. Okay.
A. Because all -- all of the -- the other items that we could potentially use as evidence was lost, but the photograph to me just -- it corroborated a portion of the victim's testimony that the stain was there. The mother had told law enforcement on the scene that the stain was there and pointed to it and that is reflected in the police report that the mother mentioned or showed Officer Hamlet that there was a stain on her daughter's shirt that she believed was deodorant and the officer testified at trial that -- that she remembered seeing the stain. So a photograph of the stain, obviously it -- you know, it helps when you're talking about credibility, it helps corroborate a point, but the case -- I'm satisfied the case didn't fall or rise on that photograph.
Q. Okay. But it corroborated her?
A. It corroborated that portion of her testimony.
Q. Okay. And part of your theme during your closing argument would have been that various things, including the

defendant's statement, corroborated testimony, right?
A. Correct.
Q. And the photograph was one piece of that. So do you think that the statement made by Samantha was inculpatory?
A. If I remember correctly, Samantha's testimony was that the defendant told her I didn't mean to do it or something along those lines, if my recollection serves me.
Q. Would it be helpful if I provided you a copy of the -- the relevant portion of the testimony?
A. That would be great. I have, I think, a copy of the transcript. If you'll tell me the page number, I can find it up here.
Q. 281 and I'm starting at line 2.
A. Okay. My eyesight is bad and so it's hard to see sometimes on the iPads. 281?
Q. Yeah, 281, line 2. Now Samantha testified that he was standing on the grass and was trying to compromise with him, right -- with her?
A. Okay. I'm sorry. I was looking at the record --
Q. Oh, you have the record on appeal?
A. -- the page number for the record on appeal rather than the transcript, so --
Q. It would be 271 then.
A. -- give me just a second. I'll -- I'll get there with you.

Q. It's -- it's just ten pages behind.
A. Yeah, I see it.
Q. So she said that he was standing on the grass and was trying to compromise with her?
A. Yes, I see that.
Q. Okay. And she said that he claimed I didn't mean to do it and he confessed. Is that correct?
A. Yes, that's what it says.
Q. Okay. And he was trying to compromise me, correct -- with me, correct?
A. Correct. That's what it says.
Q. And then I'm skipping down to that line 22, which says, and I was like, Justin, you just actually told the whole complex that you actually raped my niece. Is that correct?
A. That -- that's correct. That's what it says.
Q. Okay. Now on the next page, if you could turn to 282 or 272 --
A. Okay.
Q. -- and it's -- starting on line 22 it says he -- he started to retreat -- retrieve back to his house?
A. Yes.
Q. And I started running after him and he ran from me. Is that correct?
A. Yes.

Q. And then on 273 it said that she left because -- 273, line 17, it says she left because he locked the door. He ran inside and locked the door.
A. I'm sorry, you said page 273?
Q. I'm sorry, 283 and 273. It's 283 in the transcript, 273 in the record on appeal.
A. Okay.
Q. And at line 17 it said that she left because he ran through the door and locked it and there was no need for me no more to, you know, aggravate him anymore.
A. Right.
Q. Okay. And that's consistent with what she would have told you, correct?
A. Correct.
Q. Okay. That witness list, do you have a copy of that witness list?
A. I do. I'm sorry. Give me just a moment to get that in order. It's taking me just a moment to find it.
Q. Okay.
A. If you -- if you hadn't asked me for it, I could have laid my hands right on it.
Q. Okay.
A. I'm sorry. I can't find it right now, but I saw it this morning. I wonder what I did with that? I think I found it. And this would be the one from 2012 and then

I'll find the one from 2013.
Q. Okay. And this is the only one I needed.
A. Okay. And that -- and that's the only copy that I have.
MR. SHAFFER: Your Honor, can we get another copy made?
THE COURT: Sure.
(Pause in proceedings.)
(Plaintiff's Exhibit Number 4, a witness list, was marked and admitted into evidence.)
BY MR. SHAFFER:
Q. Now, Ms. Barr, I've showed you Plaintiff's Exhibit 4. Is that your witness list from the first time this was on the trial roster in 2012?
A. Correct.
Q. Okay.
MR. SHAFFER: Court's indulgence.
BY MR. SHAFFER:
Q. Now I just noticed Ms. Evans is actually on that witness list, Gladys Evans.
A. Uh-huh.
Q. Had you spoken with her prior to -- prior to that?
A. I had not.
Q. Okay. Do you know what she would have testified to or what you were planning on calling her to testify to?

A. So I don't necessarily know that I would have called her to testify. My general practice is anyone who's named in the incident report or who is referenced in any manner in the case to put them on the witness list so that I don't have a situation where mid trial they become of importance and then the judge has to then re-qualify the jury to find out whether or not any of the persons serving on the jury knows that individual and that could create all kinds of problems for me in terms of having a mistrial or -- or any sort of thing. So my practice is to put everybody on the -- the witness list who could possibly come to court and testify knowing that I've never tried a case where I've had everybody who's on the witness list to testify.

Q. Okay. Do you -- are you familiar -- are you aware of any law enforcement or investigator from the solicitor's office or anything like that that spoke to Ms. Evans?

A. We don't have an investigator in the solicitor's office.

Q. Okay. Did any law enforcement agency personnel speak to them to your knowledge?

A. I'd be real surprised, but I don't think so.

Q. Okay. All right. Now real briefly you had said -- I think you were -- you had mentioned that the definition of a child is -- the definition you were using for child was defined in Title 16, Chapter 19, Section 20; is that

correct?
A. If I said 16, I misspoke. It should be 63.
Q. Actually I miswrote it.
A. Oh, okay.
Q. So Title 63, Chapter 19, Section 20, correct?
A. Right.
Q. Do you have a copy of that statute?
A. I don't.
Q. I'm gonna hand one up to you.
A. Okay.
Q. And -- and, if you could, above the definition of child, could you read the -- the very first sentence of that definition in the statute?
A. The text of this becomes effective -- is effective until July 1, 2019, but it says a child or juvenile means a person less than seventeen years of age. Child or juvenile does not mean a person sixteen years of age or old who's charged with a Class A, B, C or D felony as defined in 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more.
Q. Okay. So this is an A, B, C or D felony. I think it's an A felony --
A. Correct.
Q. -- if I remember correctly, but that definition, if you look above when it says it becomes effective, could

you read that sentence? The very first sentence of the statute.
A. I'm -- I'm sorry. Tell me again.
Q. If you look at the very first above this it says -- I can --
A. Are you talking about where it says text of Subsection 1 effective until July 1, 2019, or are you talking about above that?
Q. No, the sentence above that or the --
A. Yeah. When used in this chapter and unless otherwise defined or the specific context indicates otherwise, and then that's when it goes on to define what a child is.
Q. So everything in Chapter 19 should be considered a -- if they use the term "child", it doesn't apply to someone charged with an A, B, C or D felony, correct?
A. Who's sixteen years of age or older.
Q. Now I'm gonna hand you South Carolina Code 63-1-40 --
A. Uh-huh.
Q. -- and, if you wouldn't mind, read that highlighted portion or that --
A. Do you want me to read it aloud?
Q. Yes, please.
A. When used in this title and unless otherwise defined or the specific context indicates otherwise, one, child means a person under the age of eighteen.

Q. Okay. So in -- in all Title 63, except Chapter 19, a child means someone under the age of eighteen according to that. Is that fair to say?
A. Right. Unless otherwise defined, correct.
Q. All right. Now I'm gonna hand you 63-3-510 and is it fair to say that 63-5-510 {sic} is in Chapter 3 of Title 63?
A. I'm sorry. Is it fair to say what again?
Q. That this -- this code section I gave you, 63-3-510 is in Chapter 3 of Title 63?
A. You're asking me is it -- is it true that 63-3-510 is incorporated into 63-19-20?
Q. No, I'm asking you if 63-3-510 is in Title 63, Chapter 3 of the South Carolina Code -- Code of Laws?
A. It appears to be in that same chapter, yes, sir.
Q. Could you read the highlighted sections?
A. Except as otherwise provided herein, the Court shall have original exclusive jurisdiction and shall be the sole court for initiating action, one, concerning any child living or found within the geographical limits of its jurisdiction and, D, who's alleged to have violated or attempted to violate any state or local law or municipal ordinance regardless of whether the violation -- where the violation occurred except as provided in 63-3-520.
Q. Okay. And the Court that it's talking about, would

you agree -- or do you have any reason to disagree that it's the family court?
A. I don't have any reason to disagree with that.
Q. Okay. Is it -- I guess whenever you looked at 63-19-20, you were using that definition of child for applying whether or not family court would have jurisdiction. Is that fair to say?
A. In looking at 63-19-20, if a person is sixteen years of age or older and is accused of committing either one of those class of felonies, then they would not be considered a child under the other portions of the code.
Q. Okay.
A. That's -- that's the way I read it.
Q. Yeah. And I'm sorry to ambush you with all this --
A. No, no, no. You're fine.
Q. -- because I really don't --
A. You're fine.
MR. SHAFFER: That's all my questions, Your Honor. Thank you.
THE WITNESS: Yes, sir.
THE COURT: Ms. Gregory.
MS. GREGORY: Thank you, Your Honor.

RECROSS EXAMINATION

BY MS. GREGORY:
Q. Ms. Barr, did Justin confess to Samantha Cooper? Did

he tell her in detail what had happened in his home?
A. That wasn't my understanding of the testimony. My understanding of the testimony is that she came over upset about a conver -- a call she got from her sister regarding her daughter and what happened between the victim and -- and the defendant at the time. She came over -- and I used the word "upset". That's probably a polite way to put it. She was angry, very brash at trial, acknowledged that she exercised poor judgment, but I believe on cross-examination she was asked whether or not Justin specifically admitted to raping or fondling or forcing the victim to do anything inappropriate sexually and she candidly said that she did not, that she did not essentially get any of the specifics about what he was apologizing for.
Q. Right. He just said I didn't mean to do it, but he never defined what it is; is that correct?
A. Correct.
Q. And looking at your witness list, just because Ms. Evans is on that witness list, does that indicate that you did have a statement from her in the police report or would you have put her on that witness list because of the victim's mother's statement to you that she was potentially gonna be getting her off the bus or going to meet there?
A. Yeah, and -- yes, and -- and that's correct. And just by referencing, I put the victim's dad's name on the list

as well and -- and I did not expect that I'd have a reason to call him, he's Benjamin McBride, but oftentimes -- again, I put everybody on there in case I need to call a rebuttal witness I don't have to go through that whole qualification process again.

Q. But the indication that she's on there doesn't indicate she was in the police report?

A. No, it does not.

Q. Okay. Do you know if she was on your 2013 witness list? I know you said you didn't -- you couldn't locate it, but would you have put her on the 2013?

A. Yeah, I think -- I think I found -- yeah, I believe she was on the 2013 list. I sim -- I essentially copied and pasted the 2013 list from the 2012 list.

Q. Okay. But, again, it doesn't mean that you have any statements from her or that you talked to her prior to trial, it's just a way of protecting you in case you -- they become necessary during the trial; is that right?

A. That -- that's correct. Because you never know if timing of the crime is gonna be an issue, whether or not the victim's presence in a certain location is gonna be a contested issue. You don't know what's gonna hit you once you're in the middle of trial and so you try to avoid problems by listing these individuals in the beginning at the outset, but I never spoke to Gladys and I don't -- and

I never had any information that law enforcement spoke to her.

MS. GREGORY: Thank you very much, Ms. Barr. No further questions.

MR. SHAFFER: Your Honor, may I recross -- I mean, redirect just -- or come back with one more question on a topic that was fairly new?

THE COURT: Just briefly, yes, sir.

MR. SHAFFER: Okay.

FURTHER REDIRECT EXAMINATION

BY MR. SHAFFER:

Q. And if you could turn to 336 in the transcript or 326 in the record on appeal real quick.

A. Page 326?

Q. Yeah.

A. Okay.

Q. And if you could look at that line 25 and -- and just look over that and the next two pages.

A. Starting at line 25?

Q. Yes.

A. Okay. And how far do you want me to go?

Q. Just review the next two pages.

A. All right.

Q. Would you agree that during your closing argument you essentially used Ms. Samantha -- Samantha Cooper's

testimony to say that it's corroboration because she was telling the truth?
A. Absolutely I did.
Q. Okay. And --
A. And -- and lawyers are allowed to argue not only the evidence, but reasonable inferences from the evidence.
Q. Okay. And specifically you said if you want to do the brouhaha, if you will, in terms of corroboration, you look at what Justin McBride told Samantha Cooper. So you're essentially saying that Justin McBride corroborated the statement by the victim based off of what he told Samantha Cooper; is that correct?
A. I did say that, yes.
Q. Okay.
A. Raised more inferences from the evidence.
MR. SHAFFER: Thank you very much. I appreciate it.
THE WITNESS: You're welcome. Thank you.
THE COURT: Okay. Anything further, Ms. Gregory?
MS. GREGORY: No, ma'am.
THE COURT: All right. You can step down, ma'am.
THE WITNESS: Thank you, Your Honor.
(Witness excused.)
THE COURT: Okay. If we can go ahead and take a break. Can we reconvene at 2:30?

MS. GREGORY: That's fine with me, Your Honor.

THE COURT: I just want to make sure we get through everything today, so we'll be in recess until 2:30.

MR. SHAFFER: Thank you, Your Honor.

MS. GREGORY: Thank you, Your Honor.

(Whereupon, a luncheon recess was taken at 1:31 PM.)

(Back on the record at 2:43 PM.)

MR. SHAFFER: Your Honor, can we --

THE CLERK: There's a microphone right here.

MR. SHAFFER: Okay.

THE COURT: Yeah, that's perfectly fine. Whatever's -- whatever's easiest.

THE CLERK: Place your left hand on the Bible. State your name.

THE WITNESS: My name is Gladys M. Evans.

(Whereupon, Gladys M. Evans was duly sworn by the Clerk of Court.)

THE CLERK: State your name for the record and spell your last name, please.

THE WITNESS: My name is Gladys M. Evans and mine is E-V-A-N-S, Evans.

GLADYS M. EVANS,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAFFER:
Q. All right. Ms. Evans --
A. Yes.
MR. SHAFFER: Do you mind? I just wanted to be able to see her.
THE COURT: Do you just want --
THE CLERK: I can turn her around.
THE WITNESS: Can I turn around?
THE COURT: Maybe kind of sideways so I can --
MR. SHAFFER: And it's okay. I can --
THE COURT: I want to be able to see her, too.
THE CLERK: I'll tell you what --
MR. SHAFFER: Your Honor, I can -- I can move to the witness stand and talk in that mic.
THE CLERK: Wait a minute. I'll pull all this out.
THE COURT: Well -- we're just gonna move you all around.
THE CLERK: Sorry about that.
THE WITNESS: That's okay. I'm good.
BY MR. SHAFFER:
Q. All right, Ms. Evans. Tell us a little bit about your background. Where are you from?
A. I'm from Kingstree, South Carolina. I live in 1041 Lexington Avenue, Apartment A, in Kingstree.
Q. Okay. And how long have you known Mr. McBride?

A. Thirteen years.
Q. Okay. How did you get to know him or how do you know him?
A. When I moved to 1041 Lexington Avenue, where I'm living now, I moved next door to them. My apartment's A, and her apartment was 1039, and I met Ms. Trina and the children and we began to talk and she asked me where I was from, I talked to her, and she was working at that time and the kids were very small and she asked me would I keep an eye out to look out for her children, but I was a school teacher also because I was teaching school at the time, and I did that. I lived by her. We were neighbors for almost thirteen years and I know them, the McBride family.
Q. Okay. And Trina's his mom, right?
A. Yes.
Q. So you -- you're at 1041 A. About how far is that from their -- their place?
A. Not even -- I'd say not even ten feets away from me. We're right next door to each other.
Q. Okay. And the buildings are pretty close, aren't they?
A. Yes, they are.
Q. Okay. And so you would -- you would watch Justin McBride, right?
A. Yes.

Q. And the other kids, his siblings?
A. Right. Yes.
Q. Would you ever watch [redacted] or his cousins?
A. No, I never watched [redacted] neither the sister or brother because they lived two houses down from me and I didn't -- I met Angelica through Ms. McBride, Trina, but I didn't have any connection with her or her children.
Q. Okay. Now the day of this incident, the day that they're saying that this incident occurred, were you ever asked to take care of [redacted] or any of the other kids?
A. No, I was not.
Q. Okay. Do you recall that day?
A. Yes, I do.
Q. What do you recall about that day?
A. I -- it was in June I know, I don't know the exact day, but due to the fact of my age because I'm seventy-one now, but I was about sixty something, I suffer with arthritis real bad and the house was a, you know, totally air-conditioned unit and when it gets too cold my bones begin to hurt, so that particular day I decided to walk to my door and open my door and to go outside on the porch to get some sunshine and when I opened my door, [redacted] was sitting on Ms. Trina McBride's porch, on the flat porch, and I said to her, I said [redacted] why are you sitting in the hot sun, it's too hot, would you like to come and sit

with Ms. Evans till your mother come, but she was already upset because her mother was not at home when she got off the bus, and she looked at me and sucked her teeth and said something and mumbled and I said to her, I said well, since you don't want to come and stay with me, knock on the door and see whether any of Ms. McBride's children is there and maybe you could go in and sit with them until she come, and [redacted] got up when I said that and went to Trina McBride's door, which is Justin and them door, and she began to just beat -- bombing and beating on the door like somebody was in distress. And Ms. -- Justin was in there sleeping at the time, but he heard and he came to the door and he asked her why are you beating on my door like you crazy and I said to Justin, I said Justin, I asked her to come stay with me till her mom come, but she don't want to, so I asked her to knock on your door to see whether you were home and would she stay with y'all and he said okay and he opened the door and she went in the house. I went back in my house and sat down and do what I was doing, watching TV, and closed my door.

Q. Okay.

A. And that was it.

Q. Now did you ever see -- or when's the next time you saw Justin outside?

A. I didn't see him outside no more. When I came out two

hours later on my porch, I didn't know what was happening. And I saw all the people in the neighborhood, they was all in the street around there, and I asked my neighbor what was going on and she told me something had happened between Justin and [redacted] and I stand on my porch, you know, talking and I didn't see Justin anymore until the police brought him out. That's -- that's the last time I saw him.

Q. Okay. And now -- because the Court's never been to your place, the judge has never been to your place --

A. No.

Q. -- you said that your buildings are about ten feet away from each other or so?

A. That's about it.

Q. Do you generally hear -- or can you generally hear what's going on like on the front porch of their building from inside your place?

A. Yes, I can.

Q. Okay. If someone's screaming on the front porch or yelling or yelling inside that apartment, you think you would have heard it?

A. Yes, I would.

Q. Okay. And did you hear anything like that that day?

A. No, I didn't hear anything.

Q. Okay. Now I'm gonna ask you specifically about a -- a couple of things. Well, first of all, have you ever given

a statement to anybody, law enforcement or anybody else?
A. Yes, I did.
Q. And when was that?
A. The same day the incident happened. The two police, which was a lady officer and a man officer, came to my house and knocked on my door and I went to the door and I asked them -- they said are you Ms. Gladys Evans, I said yes, I am. He said I need to talk to you and ask you some questions about [redacted] I said okay, what is it? And then he said to me that his mother -- her mother said that [redacted] said she came to your house but you had company and she didn't knock on your door and she went back and sat on Ms. McBride's porch. I said I was in my house, I had no company, nobody knocked on my door. I said but I can tell you what really happened. I said when I went out and looked outside of my door, [redacted] was sitting on Ms. Trina McBride's porch upset because her mother wasn't home and I asked her to come and sit with me until her mom come and she refused to do that and I asked her would you like to go knock on Ms. McBride's door and see whether anybody's at your aunt's house and I see she jumped right up and went to that door and she just beat on that door and was beating that door till Justin come and I told Justin that I told her to knock on the door because she refused to stay with me and he let her in the house. And I told them

that, both of them, but they did not record no statement from me. They just asked me and then they went on.
Q. Okay. Did you ever speak to anybody else before the trial about the case?
A. Nobody ever came to me to ask me anything else about the case.
Q. Okay. Now I'm gonna -- I'm going to -- you -- you don't have a transcript in front of you --
A. Unh-unh.
Q. -- but 280 --
MR. SHAFFER: And, Your Honor, it's 281 through 283 really is what I'm referring to.
BY MR. SHAFFER:
Q. Do you -- well, first of all, do you know who Ms. -- Ms. Samantha Cooper is?
A. I don't know her personally, but I do know she's Angelica's sister, but I have never met her personally.
Q. Okay. Now Ms. -- Ms. Cooper had testified at the -- this -- at the trial of this case originally that -- that basically she had a discussion where Justin confessed outside the apartment and then she chased him sort of into the apartment and then he was yelling through the door at her -- through his apartment door at them -- her. Do you know anything about that happening?
A. No, I did not heard that happen and if it would have

happened, I would have heard it --
Q. Okay.
A. -- but I don't hear it. Anytime there are any kind of noise, and we live close, across the street or by me you can find -- you've got to get up and hear what's going on. And I'm a very (unintelligible) person. I look out to see whether it's children or something is going on and I always have been doing that since I've been there, I just check to see what, and if that was going on, I would have sure been out there to see it.
Q. Okay.
A. But it didn't happen.
Q. Is it fair to say that the windows on your apartment aren't real soundproof?
A. They're not.
Q. Okay. Now I know that you have -- you've known the -- Justin for a long time and took care of him and things like that. Would you lie here for him today?
A. Yes.
Q. You'd lie for him?
A. No, I would not. I thought you said "why". I'm sorry.
Q. That's okay.
A. I didn't -- I didn't understand what you said.
Q. Okay.

A. No, I would not lie for him or nobody else. I'm here to tell the truth --
Q. Okay.
A. -- and that's all I can tell is the truth.
Q. And did anyone force you to make this statement or anything like that?
A. No.
MR. SHAFFER: No further questions.

CROSS-EXAMINATION

BY MS. GREGORY:
Q. Ms. Evans, thank you for being here today. My voice is really awful --
A. Okay.
Q. -- so if you can't hear me, you let me know, okay? I just have a couple of questions for you. Would you recognize Samantha Cooper if you were to see her?
A. I really don't know that because I had not had any connection with her.
Q. Okay. So you don't know what she looks like?
A. I know she -- I've seen maybe sometime that her and Angelica are out, but I didn't know who she was.
Q. Okay.
A. I just saw a lady standing maybe talking to her, but I don't know who she was.
Q. Okay. Is it possible during that day that something

occurred that you did not see in front of your house or in front of Mr. McBride's home?

A. No.

Q. You were sitting at your door all that day and time?

A. Yes. If it would have happened, I would hear it.

MS. GREGORY: No further questions, Your Honor.

MR. SHAFFER: Your Honor, just a couple redirect questions.

REDIRECT EXAMINATION

BY MR. SHAFFER:

Q. You said that there was people standing next to -- or there was a lady standing next to Angelica. Was that when the cops were there?

A. Well, yeah, that's when I saw the cops. When I came out, the two cops was in the yard. There were neighbors out at all the houses around looking in cars and stuff and I didn't know what was going on and so I asked my other neighbor and she told me what was going on.

Q. Okay.

A. But they were -- she was down there at Angelica's house.

Q. Okay. But if you would have heard Justin yelling -- or if Justin was yelling in his apartment, do you think you would have heard it?

A. I would have heard it.

Q. Okay.
A. And if he was standing in the door, I would have heard it more better.
Q. Okay.
MR. SHAFFER: No further questions. Thank you, Your Honor.
MS. GREGORY: No questions, Your Honor.
THE COURT: Okay. Thank you, ma'am.
MR. SHAFFER: Your Honor, I believe she's free to go; is that correct?
MS. GREGORY: Yes. Absolutely.
THE COURT: Yes, she can be -- she can leave whenever she's ready.
(Witness excused.)
MR. SHAFFER: Applicant would call Justin McBride.
THE CLERK: Place your left hand on the Bible, raise your right hand and state your name.
THE WITNESS: Justin McBride.
(Whereupon, Justin McBride was duly sworn by the Clerk of Court.)
THE CLERK: State your name for the record and spell your last name, please.
THE WITNESS: Justin McBride, M-C-B-R-I-D-E.

JUSTIN McBRIDE,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAFFER:

Q. All right, Mr. McBride. How old are you?

A. I'm twenty-five.

Q. How long have you been locked up at the South Carolina Department of Corrections?

A. Almost six years.

Q. And what's your projected release date?

A. I believe it's October 21, 2038.

Q. Okay. How old will you be then?

A. Forty-five.

Q. Okay. You have been -- how old were you when this allegedly occurred?

A. Sixteen.

Q. So you were initially locked up, I guess, in DJJ, but did you bond out soon thereafter?

A. Yes, it was about three days after.

Q. Okay. Have you ever been in any other trouble with the law, any other criminal charges?

A. Never.

Q. Okay. Any juvenile charges?

A. None.

Q. So this is the one offense that you have, correct?

A. Yes, sir.

Q. Okay. Now I know we've heard a lot and I'm not gonna

recap every -- every issue that we have going in this case, okay? I'm gonna -- I want you to look at that picture that's Plaintiff's Exhibit 1 in front you. Plaintiff's Exhibit 1, do you -- do you recognize that?

A. I've seen it before.

Q. Was that one of the things in your discovery packet?

A. Yes.

Q. Okay. And did you ever until trial see the color picture of that?

A. To be honest, I don't think like I've ever seen a color photograph unless Mr. Mobley had it at the time of trial. That may have been the only time I've seen it, if he had it, but other than that I think the first time I seen it it had to have been in the appeal packet.

Q. Okay. But it was presented at your trial, right?

A. Yes.

Q. Now Plaintiff's Exhibit 3, that's your signature there, right?

A. Right.

Q. And it said that you reviewed all the discovery in the case, right?

A. Right.

Q. Did that discovery include a color copy of the photo that's in Plaintiff's Exhibit 1?

A. It didn't.

Q. Okay. Did it include anything related to you confessing to Samantha Cooper and saying this was an accident?
A. No, sir.
Q. Okay. So at the time you decided that you were going to go to trial, you didn't have those two pieces of information, did you?
A. No, sir.
Q. What was the trial strategy that Derrick told you about that he was gonna do?
A. It's been a while. I need to think about it.
Q. And it's okay if you don't remember. I don't want you making anything up because obviously -- do you have any reason to doubt the trial strategy that was testified here today?
A. Yes.
Q. Okay. What's your -- why do you doubt that?
A. As far as this is concerned?
Q. No, no. I -- I'm talking about prior to trial did Derrick tell you that he was going to argue that, you know, the victim was lying?
A. No, sir.
Q. Okay. Do you recall your conversations with Derrick before trial?
A. Yeah, we had a few conversations.

Q. Okay. Do you recall what you-all talked about?
A. We talked about -- we talked about going to trial and we talked about certain pleas. From my memory, I -- I believe there was more than one plea offer.
Q. Okay. Well, why did you turn down the plea offer?
A. Because based off what my attorney at the time was telling me, there was really nothing that could -- there was no evidence really, that there was nothing really against me, and -- and I just felt like at the time it was the right thing to do.
Q. Now you said that there was no real evidence against you. Do you mean physical evidence?
A. I mean, anything. My consideration of the case all these years I've been under the assumption there wasn't anything.
Q. Okay. Did you know that -- that your cousin [redacted] was claiming that you actually sexually assaulted her?
A. When?
Q. At trial. Did you know that she was gonna get on the tes -- witness stand and say that you assaulted -- that you assaulted her?
A. I didn't know what she was gonna say.
Q. Okay. Did you know that she had told police that?
A. Yes, I knew she told police that.
Q. And Derrick gave you a copy of the incident report,

right?
A. Yes.
Q. Okay. Now did you know that -- do you recall telling the police that -- that nothing sexual happened?
A. Yes, I told the police that.
Q. Okay. Did you know that the police were -- prior to going to trial, did you know that they were going to say that you said nothing sexual happened?
A. Could you repeat the question?
Q. Okay. Did Derrick tell you that the police were likely to get on the stand and say that you told them that nothing sexual happened?
A. Yes.
Q. Okay. Before trial did you know anything about Samantha Cooper claiming that you had confessed to her?
A. No, I didn't know anything about that.
Q. Okay. When did that -- when did you first learn of that?
A. The very -- when she -- when she was on the stand and she said that, that's when I first learned about it.
Q. Okay. If she had -- if you had known about that beforehand, what would you -- if Derrick came to you before trial and said that Samantha Cooper's gonna say you confessed to her, what would you have done at that point?
A. Before trial?

Q. Yes.
A. I probably -- most likely I know would have taken one of the pleas they offered --
Q. Okay.
A. -- and -- and --
Q. Why would -- well, why would you have done that?
A. Because I know -- well, he discussed the Alford plea with me and I didn't -- even after he explained it to me, I wasn't very clear on what it was and I just know that based off what they could say at court or -- or because he said trial strategy was to not put me on the stand, I would have gotten on the stand had he put me up there, but he said that was trial -- his trial strategy, so I knew likely I probably wouldn't take the stand and I can't combat anything said against me if I exercise my right to remain silent.
Q. Did that conversation involving the gun and you saying that -- was that confession that Samantha Cooper testified about, was that true or not?
A. Not true.
Q. Okay. Did you have a shouting match where you ran around the apartment that day?
A. No, sir.
Q. Would you have asked your -- asked Derrick to -- if you had heard that they were claiming that, would you have

ever asked Derrick to contact Ms. Evans?
A. Of course. Yes, sir.
Q. And why do you -- why would you have asked him that?
A. Because, again, I knew that with the trial strategy he probably -- most likely wouldn't have put me on the stand and it would have been important that I had some way to build a defense and to combat anything that was said and she would have definitely helped me with proving everything I needed to.
Q. Why do you know she would have helped you?
A. Because she would tell the truth.
Q. Okay. Tell me about the house you lived in. How close would you say your front door is to her front door?
A. Relatively close. Not far at all. Probably from -- from here to where everyone's sitting.
Q. That's how close your-all's front doors were?
A. Oh, our front door? It's about -- it would probably be closer, if that.
Q. Okay. Did you generally hear -- or could you hear someone yell from inside your apartment over at -- if someone was yelling at Ms. Evans' place?
A. Yes, sir.
Q. So that running around the house thing and you confessing never happened?
A. It never happened.

Q. Okay.

MR. SHAFFER: The Court's indulgence.

No further questions. Thank you.

CROSS-EXAMINATION

BY MS. GREGORY:

Q. Good afternoon, Mr. McBride.

A. Good afternoon.

Q. I'm sorry for my voice, so if you can't hear me or understand me, let me know, please.

When you went over discovery with Mr. Mobley, did you watch the forensic interview of [redacted]

A. Yes.

Q. Okay. So you were aware that she -- what she was going to basically be testifying to; is that correct?

A. I -- I was aware of what she would be in court for testifying to, but not to exactly what she would say.

Q. Okay. Did her testimony fall in line with what she told the forensic interviewer?

A. There were a few inconsistencies, but from my memory I don't think nothing was too too different.

Q. But not too too different. So you understood the summary basically, the gist of what she was gonna be telling in court?

A. Yes.

Q. Okay. In looking at those plea negotiations, do

you -- did you hear the testimony earlier of Ms. Barr and Mr. Mobley when we were discussing the plea offers and they indicated that you were pretty adamant about not taking the plea offer because you would have to register as a sex offender? Do you recall that? Was that part of the reason you declined the plea offer?

A. Well, for the most part the main reason why I declined it at that time was because we couldn't come to an agreement on what would that be that, you know --

Q. What do you mean?

A. -- I plead to.

Q. Well, the plea would be to lewd act. Do you mean you couldn't come to an agreement on like a sentence or -- or what do you mean?

A. On what I'd plead to.

Q. Okay. On what you would plead to. Did it have anything to do with being -- you'd have to register on the sex offender registry? Was that a portion of why?

A. That was a portion, right.

Q. Okay. But had you known about the Samantha Cooper statement, it wouldn't have mattered that you had to register as a sex offender, you would have taken the plea?

A. See, with a lewd act I'm not sure if that comes with it.

Q. It does.

A. It does?
Q. Yes, sir.
A. Then -- then probably, yes, ma'am, most definitely.
Q. So you would have taken -- you would have taken the plea even though you had to register as a sex offender?
A. Because I -- I -- yes, because either way it goes -- like I said, had I known what they was gonna say or had I known what would be used against me because what I was talk -- I mean, what I was told was different from that then.
Q. What do you mean what you were told was different?
A. As far as the evidence.
Q. Okay. So had you known about this Samantha Cooper statement, it would not have mattered that you had to register as a sex offender in order to take advantage of the plea? Is that what I'm understanding you saying?
A. Yeah, it wouldn't have mattered.
Q. It wouldn't have mattered. Okay.

MS. GREGORY: No further questions, Your Honor.

MR. SHAFFER: I have nothing further, Your Honor.

THE COURT: You can step down, sir.

(Witness excused.)

MR. SHAFFER: Applicant rests.

THE COURT: Okay.

MS. GREGORY: Your Honor, the State would recall Derrick Mobley to the stand.

DERRICK MOBLEY,

having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MS. GREGORY:

Q. Hi, Derrick. You heard the testimony of the Applicant and Ms. Evans?

A. Yes.

Q. Regarding Ms. Evans' testimony, would her testimony have changed anything with your trial strategy?

A. No, it would have still been in the same line of impeaching Samantha with her testimony today and when I got a summary yesterday of Ms. Evans' proposed testimony, that was the first time hearing of it, so to prepare for it I would not have been able to because I didn't have that information prior to trial and the only mention of Ms. Evans prior to trial was a one -- one sentence that came from [redacted] to the evaluators I think it was that she was thinking of going to Ms. Evans' house, but she saw a car there and Ms. Evans -- she didn't -- she thought Ms. Evans had company, so she -- she went to Justin's house. So, no, it would not have changed anything.

Q. Okay. And after that testimony with Samantha Cooper, did Mr. McBride's family or Mr. McBride tell you to talk to Ms. Evans?

A. Not that I recall.

Q. Okay. And when Samantha Cooper testified, do you feel you were successful on impeaching her?
A. Yes.
Q. And looking at the plea offers, the lewd act would have had him register as a sex offender; is that correct?
A. That's correct.
Q. How -- do you feel like that was the main reason he declined the plea offer at that time? Did he communicate anything to you about that?
A. Yes, he -- he -- at the time we would discuss it and it -- it wasn't just the sex offender registry, but it was the possibility of actually going to prison because as I explained the sentences are up to the Court in the judge's discretion. With a zero to fifteen plea, I can't promise anything at all because it's within the discretion of the judge --
Q. Uh-huh.
A. -- to make a determination as far as sentencing, so I can't promise him any type of years, but I would certainly be going for probation. Now what could not be negotiated and within the judge's discretion would have been the sex offender registry, DNA and everything else, all the other collateral consequences that go along with pleading guilty to that.
Q. And that upset him?

A. I wouldn't say upset him. It's rare that I saw Justin upset.
Q. Okay.
A. Justin's a very even tempered young man, so I didn't see him -- him get upset per se, no.
Q. Maybe upset's the wrong word, but that was a hesitation?
A. Yes. It created hesitation, yes.
Q. Okay.
MS. GREGORY: No further questions, Your Honor.

CROSS-EXAMINATION

BY MR. SHAFFER:
Q. Ms. Cooper was the last witness from the State, correct?
A. I assume so, yes. I will --
Q. Okay. You -- you have no reason to disagree with me?
A. I have no reason to question that.
Q. Okay. And if I told you that on page 294 of the transcript, it indicates that after Ms. Cooper got off the stand the Court basically recessed -- the State rested and the Court recessed at 5:03 PM until the next morning, would you have any reason to disagree with that?
A. No.
Q. Okay. And during that time period you wouldn't have had a whole lot of time to go investigate witnesses or

anything like that, would you?
A. No.
Q. Okay. Would you have had more time had they disclosed it to you before trial?
A. Absolutely.
Q. Would you have consulted with him -- with Mr. McBride about the possibility of whether or not to call her as a witness if they had disclosed it to you before trial?
A. Call Ms. Evans?
Q. Evans.
A. Yes.
Q. And after discussing it with him, you would have made a determination on whether or not you would have called her as a witness at trial at that point?
A. Would have made a determination, yes.
Q. Okay. And he would have had a better picture of the case against him had they disclosed it to you before trial, right?
A. I -- I would say so. If we were provided with that information, yes.
Q. Okay.
A. I think they did a hor -- a horrible job and I'm -- I'm not -- I hold no qualms of saying that at all about the Kingstree police department. That's one of the worst cases that have been investigated I've ever seen and I've been a

former prosecutor.

MR. SHAFFER: Thank you very much. No further questions.

THE COURT: Anything further?

MS. GREGORY: No. No, ma'am.

THE COURT: You can step down.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

MS. GREGORY: The State rests, Your Honor.

THE COURT: What do you think is a sufficient period of time for us to hold the record open? Is thirty days sufficient?

MR. SHAFFER: Thirty days is fine.

MS. GREGORY: Thirty days is fine. Yes, ma'am.

THE COURT: Okay. Well, then we'll hold the record open for thirty days and then I'll certainly consider any additional briefs submitted during that time before I make any ruling.

MR. SHAFFER: Thank you, Your Honor.

MS. GREGORY: Thank you, Your Honor.

(Whereupon, the proceedings were concluded at 3:22 PM.)

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in the Court of Common Pleas on the 26th day of March, 2019, recorded by the Digital Court Reporter Program, and transcribed by me to the best of my ability.

This transcript may contain quoted material. Such material is reproduced as read by the speaker. This transcript may also contain inaudible portions due to issues such as inadvertent microphone blocking and unintelligible crosstalk of the parties during the recording.

I do further certify that I am neither of kin, counsel, nor have an interest to any party hereto.

October 15, 2020

/s/ Stacy S. Johnson
STACY S. JOHNSON

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE THIRD JUDICIAL CIRCUIT
COUNTY OF WILLIAMSBURG	)	
	)	Case No.: 2018-CP-45-0107
JUSTIN MCBRIDE #357684,	)	MEMORANDUM IN SUPPORT OF APPLICATION FOR POST-CONVICTION RELIEF
Applicant,	)	
vs.	)	
THE STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

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In addition the other arguments in the record, Applicant respectfully submits the following *additional*[1] arguments in support of his Application for Post-Conviction Relief:

BACKGROUND

On June 21, 2010, Justin McBride was a 16 year old kid from Kingstree. That summer his nine year-old cousin accused him of sexually assaulting her. There was no physical evidence of the alleged assault. There were pictures of an unknown white substance on the cousin's clothing that was believed to have been deodorant. However, the clothing was lost by police. Justin was arrested and charged as an adult with Criminal Sexual Conduct with a Minor in the First Degree.

On October 28, 2013, Justin was called to trial before the Honorable John C. Hayes, III and a jury. Justin was represented by Derrick Mobley and the State was represented by Kimberly Barr. Justin was sentenced to the mandatory minimum of 25 years.

[1] This Memorandum is meant to supplement rather than alter any of the arguments raised in the PCR Application or at the evidentiary hearing. Several of the issues are addressed together, however, this does not mean Applicant is waiving his right to assert each issue in the Application separately. Moreover, Applicant does not mean this Memorandum to address every issue raised.

Justin appealed his conviction. For the appeal, Justin was represented by Wendy Keefer. The Court of Appeals affirmed Justin's conviction in *State v. McBride*, 416 S.C. 379, 786 S.E.2d 435 (2016). Justin filed a *pro se* petition for writ of certiorari. Certiorari was denied on June 16, 2017.

The present post-conviction relief action was filed on February 22, 2018.

DISCUSSION

I. Issues 10a and 10b- Family Court Jurisdiction

South Carolina Code states:

> "The [family] court shall have exclusive original jurisdiction and shall be the sole court for initiating action...(1) Concerning any child living or found within the geographical limits of its jurisdiction:..(d) who is alleged to have violated or attempted to violate any state or local law or municipal ordinance, regardless of where the violation occurred except as provided in Section 63-3-520"

S.C. Code § 63-3-510 (emphasis added) ("hereinafter referred to as the "Exclusive Original Jurisdiction Statute").

Title 63 generally defines "child" as "a person under the age of eighteen." S.C. Code § 63-1-40. This is the definition of child that should be used throughout title 63, unless there is specific definition that controls a specific chapter or section.

There is no specific definition that controls Chapter 3 of Title 63. Therefore, the Exclusive Original Jurisdiction Statute should be read as follows:

> "The [family] court shall have exclusive original jurisdiction and shall be the sole court for initiating action...(1) Concerning any ["person under the age of eighteen"] living or found within the geographical limits of its jurisdiction:..(d) who is alleged to have violated or attempted to violate any state or local law or municipal ordinance, regardless of where the violation occurred except as provided in Section 63-3-520"

S.C. Code § 63-3-510.

Many of the issue were addressed adequately at the evidentiary hearing and therefore, are not included in this memorandum.

Based on the clear and unambiguous language of the statute in affect at the time of Justin's arrest and conviction, charges should have originated in Family Court. This did not happen in Justin's case. Had it happened Justin would have been subject to waiver;[2] however, if the matter stayed in Family Court, Justin would not have been subject to the 25 year mandatory minimum sentence. Therefore, Trial Counsel was ineffective in failing to assert that jurisdiction lies with the Family Court or moved for remand.

Respondent's argument against this issue lies in the pre-Title 63 case of *State v. Graham* and the definition of "child" used only in Chapter 19 of Title 63.

At the time of Justin's arrest and conviction, Title 63, Chapter 19, Section 20 stated the following:

> *When used in this chapter*[, Chapter 19,] and unless otherwise defined or the specific context indicates otherwise:
> (1) "Child" or "juvenile" means a person less than eighteen years of age. "Child" or "juvenile" does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor. An additional or accompanying charge associated with the charges contained in this item must be heard by the court with jurisdiction over the offenses contained in this item.

S.C. Code § 63-19-20 (emphasis added). Therefore, under the plain language of the statute, "child" is defined differently in Chapter 19 of Title 63 than it is in every other chapter of Title 63.

If the Exclusive Original Jurisdiction Statute was contained in Chapter 19 of Title 63, then Respondent would be correct that Justin's case could have originated in General Sessions. However, the Exclusive Original Jurisdiction Statute is located in Chapter 3 of Title 63.

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[2] Prior to waiver, the Family Court would have had to investigate and determine if waiver is appropriate under several factors. *See Kent v. United States*, 383 U.S. 541, 566-67, 86 S.Ct.

Therefore, the definition of "child" found in S.C. Code § 63-19-20 does not control how child is defined in the Exclusive Original Jurisdiction Statute.

Respondent also relies upon *State v. Graham*, 340 S.C. 352, 532 S.E.2d 262 (2000). This case addresses this issue prior to the enactment of the South Carolina Children's Code in Title 63. *See* 2008 Act No. 361. At the time relevant to *Graham*, S.C. Code § 20-7-390 stated the following:

> When used in this *article*, unless the context otherwise requires, "child" means a person less than seventeen years of age, where the child is dealt with as a juvenile delinquent. "Child " does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16–1–20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16–1–20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

S.C. Code § 20-7-390 (repealed 1996) (emphasis added). Additionally, the family court jurisdiction statute concerning juveniles was located at S.C. Code § 20-7-400(A). Based on the 1996 code, persons sixteen years of age or older and accused of an A, B, C, or D felony were not defined as juveniles. However, since 1996 the children's code has been revamped and recodified. As such the holding in *Graham* has been superseded by the recodification, and is not longer binding on this Court.

Therefore, Applicant respectfully submits that the Court follow the plain language of Title 63 and find that Counsel was ineffective in failing to object to the case originating in General Sessions.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the General Sessions jurisdiction or move for Applicant's case to be remanded to the Family Court.

1045, 1060 (1966).

II. Issues 10c, 10d, 10e, 10f and 10h- Mandatory Minimums for Juvenile Offenders are Cruel and Unusual Punishment.

The Eighth Amendment to the United States Constitution bars "cruel and unusual punishments." U.S. Const. amend VIII. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. ... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham v. Florida*, 560 U.S. 48, 58 (2010) (*quoting Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). This cruel and unusual punishment also violates Article I, Section 15 of the South Carolina Constitution.

In 2005, the Supreme Court established a categorical ban on the death penalty for juveniles relying on social science research suggesting that young people have a lessened culpability. *Roper v. Simmons*, 543 U.S. 551, 569-75 (2005). The Court found that young people are different from fully developed adults because of the following: (1) they are immature and have "an underdeveloped sense of responsibility;" (2) they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3) their characters are "not as well formed" as adults. *Id.* at 569-70 (internal citations omitted). "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.

Five years later, the United States Supreme Court held life sentences for non-homicide crimes committed while the defendant was under the age of eighteen violated the Eighth Amendment to the United States Constitution. *Graham*, 560 U.S. at 74-76. The *Graham* Court

found that juvenile non-homicide offenders must be given a meaningful opportunity to obtain release. *Id.* at 82.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court continued the evolution of Eighth Amendment jurisprudence. The Court extended the reasoning of *Roper* and *Graham* by holding that a mandatory sentence of life without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. However, *Miller*, did not create a categorical prohibition, but instead, found that the hallmarks of youth should be considered as mitigating when sentencing. In fact, the *Miller* opinion recognized that the chronological age is not the sole mitigating factor to be considered. "'[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful Appellant be duly considered' in assessing his culpability." *Miller*, 567 U.S. at 476 (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). While "A juvenile is not absolved of responsibility for his actions," his transgressions are "not as morally reprehensible as that of an adult." *Graham*, 560 U.S. at 68 (internal citations omitted).

"[Y]outh is more than a chronological fact." *Miller*, 567 U.S. at 476 (quoting *Eddings*.). Young people lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." *See id.* at 471. Therefore, in considering the appropriate sentences for young people the courts should look at the following:

> In addition to the chronological age of an individual, Court must examine their emotional development and the "hallmarks of youth." (1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence; (2) the family and home environment that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth—for example, the offender's inability to deal with police officers or prosecutors (including on a plea agreement) or the

> offender's incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.

Aiken, 410 S.C. at 544, 765 S.E.2d at 577 (internal quotations omitted). Young People have "diminished culpability and greater prospects for reform," and therefore, "they are less deserving of the most severe punishments." *See Graham*, 560 U.S. at 68.

If courts are required to examine the characteristics of youth for mandatory life without parole sentencing schemes, the same should be examined for a mandatory minimum sentence of 25 years. Justin at 16 should not receive the same mandatory minimum punishment for CSC-1st with a Minor as an adult.

Based on the issues raised in 10c, 10d, 10e, 10f and 10h of the PCR Application, this Court should grant PCR and allow sentencing which is conducted after considering the hallmarks of youth.

III. Issues 10r- Samantha Cooper and Gladys Evans

Relevant Facts

Prior to trial, the minor's Aunt, Samantha Cooper, spoke with law enforcement and the prosecution. Samantha Cooper told the prosecution that Justin confessed to her during an exchange where she was chased him around the building with a gun. This information was not disclosed to Trial Counsel, because the Solicitor did not believe she was under any obligation to disclose the substance of the oral statement. However, Samantha Cooper did testify to the statement and exchange. Tr. 270-274.

At the PCR hearing, Trial Counsel testified it would have been better to know about the statement before trial, and that had he known about it he would have spoken to Justin about it. Had this discussion taken place, it is likely that Justin would have told his attorney that Gladys Evans could rebut the story given by Samantha Cooper.

Gladys Evans lived in the apartment next to Justin. She testified that had it actually occurred, she would have heard the alleged confrontation between Samantha Cooper and Justin. However, she did not hear it. Justin's attorney never heard of or spoke to Gladys Evans prior to the PCR hearing.

Argument

A *Brady* claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. *See Kyles v. Whitley*, 514 U.S. 419, 432–42, 115 S.Ct. 1555, 1565–69, 131 L.Ed.2d 490, 505–10 (1995); *Brady v. Maryland*, 373 U.S. at 87, 83 S.Ct. at 1196, 10 L.Ed.2d at 218; *State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985). Whether evidence is material under *Brady* depends on whether it deprives the defendant of a fair trial rather than on whether the evidence was willfully withheld. *See United States v. Agurs*, 427 U.S. 97, 110, 96 S. Ct. 2392, 2400, 49 L. Ed. 2d 342 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor.").

Due to the nature of Samantha Cooper's statement to prosecutors, this information should have been disclosed to the defense. Samantha Cooper's statement was the only evidence outside the minor which established that Justin was guilty. Samantha claimed to have chased Justin with a gun while threatening to kill him. The circumstances surrounding this alleged confession makes it material for the purposes of impeachment. Moreover, failing to disclose this alleged confession violated Justin's right to a fair trial.

Therefore, PCR should be granted as to Issue 10r of the PCR Application.

CONCLUSION

Based on the foregoing, as well as, the arguments made in the PCR Application and at the evidentiary hearing, this Court should grant PCR in this case.

RESPECTFULLY SUBMITTED,

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Date: 7/21/19

STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Justin McBride, #357684, Applicant, v. State of South Carolina, Respondent.	2018-CP-45-107 **BRIEF IN SUPPORT OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed on February 22, 2018, by Justin McBride (Applicant) and amended on March 15, 2019. The State (Respondent) filed a Return on June 27, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on March 26, 2019, at the Sumter County Courthouse. Applicant was present at the hearing and represented by Tristan Shaffer, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf and presented testimony from his neighbor, Gladys Evans. Derrick Mobley (Counsel), Assistant Solicitor Kimberly Barr (Barr), and Appellate Counsel Wendy J. Keefer (Appellate Counsel), also testified. After the hearing, this Court allowed thirty days for briefing from both parties. This brief follows.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Applicant was indicted at the March 2012 term of the Williamsburg County Grand Jury for first-degree criminal sexual conduct with a minor and assault with intent to commit first-degree criminal sexual conduct with a minor (Amended 2010-GS-45-0283). The charges stem from an incident on June 21, 2010, in which

Applicant, who was sixteen years old, forced his nine-year-old cousin to perform oral sex on him. Immediately afterwards, Applicant attempted to penetrate the victim's rectum. Tr. 90-101.

Counsel represented Applicant and Barr prosecuted the case. On October 28-30, 2013, Applicant proceeded to a jury trial before the Honorable John C. Hayes, III, and was found guilty of first-degree criminal sexual conduct with a minor. Applicant was acquitted of assault with intent to commit criminal sexual conduct with a minor in the first degree. Judge Hayes sentenced Applicant to imprisonment for twenty-five years.

Applicant filed a timely notice of appeal, and appeal was perfected by Wendy J. Keefer, Esquire, and Adam Owensby, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction in an opinion dated February 17, 2016. Applicant petitioned for rehearing on February 23, 2016, and Respondent filed a return dated April 25, 2016. On May 25, 2016, the Court of Appeals withdrew its opinion and substituted a new opinion affirming the convictions. Applicant's appellate attorneys were relieved as counsel, and Applicant proceeded *pro se*, filing an amended petition for writ of certiorari to the South Carolina Supreme Court. Respondent filed a return on October 11, 2016. The Supreme Court denied certiorari on June 16, 2017. The remittitur was issued on June 30, 2017.

II. SUMMARY OF FACTS

Victim was just shy of her tenth birthday when she was sexually assaulted by Appellant McBride. She was thirteen years old at the time of the trial. (Trial Tr. 89.) Applicant was sixteen years old at the time he sexually assaulted Victim, who was his cousin. (Trial Tr. 108.)

Victim was attending summer school. For the first time, she was riding the bus, which she was excited about. It was her second day of summer school and her second day riding the bus. The other children on her bus told Victim that her mom was not home, which made Victim upset.

She went to a neighbor's house, but when she saw the neighbor had company, she went to her Aunt Tina's house instead. Aunt Tina is Applicant's mother. She knocked on the door and Applicant answered and let her in.[1] She was alone in the house with Applicant. Applicant was watching television. Victim commented that it was a show with bad words, so they should turn the television off. That prompted Applicant to begin a violent sexual assault. (Trial Tr. 90-94.)

Applicant took out his penis and told Victim to "jerk it." (Trial Tr. 95, lines 5-6.) He grabbed Victim's hand and put it on his penis. Applicant grabbed Victim's head and pulled her toward his penis. (Trial Tr. 95-96.) Victim testified as follows on this point:

> Q: He grabbed your head hard?
>
> A: Yes, ma'am.
>
> Q: And pulled it down to his manhood; is that right?
>
> A: Yes, Ma'am.
>
> Q: And then did what?
>
> A: He then he grabbed my head. Then he told put . . . my mouth on his manhood. And I put – I had my hand on his stomach and then pushed him away from me. And that's when the white stuff and clear stuff came out his manhood. It was in my mouth and on my shirt. And I ran in the bathroom.
> Q: You said you saw and white and clear stuff come out of his manhood?
>
> A: Yes, ma'am.
>
> Q: And it went in your mouth?
>
> A: Yes, ma'am, on my shirt.
>
> Q: What did that taste like?
>
> A: Nasty.

[1] Detective Trena Hamlet noted that McBride's and Victim's houses were side by side with nothing but a small patch of grass between them. ROA. p. 171, lines 4-6.

Q: And it went on your shirt. Is that a yes?

A: Yes, ma'am.

Q: Okay. And then you did what?

A: Then I ran into the bathroom and wipe it off, and spit it out of my mouth.

(Trial Tr. 97, lines 5-16.) Victim testified she spit out in the bathroom sink and wiped the semen off her shirt with a tissue. She put the tissue in a trash can. (Trial Tr. 97-98.)

When Victim came out of the bathroom, Applicant was spraying perfume all around the living room. (Trial Tr. 100.) Applicant tried to pull down her pants; he would pull them down, and Victim would pull them back up. (Trial Tr. 100.) Victim testified that Applicant tried to put his penis in her butt. Victim testified it hurt. (Trial Tr. 100 line 25 – 101, line 8.)

Victim pushed Applicant off her, and she ran to the front door. Applicant blocked her and "sucked" his teeth. She instead ran for the back door and ran out of the house. She went home and kicked on the door. Victim's mother was there. When her mother asked what was wrong, Victim did not reply. She was scared Applicant would come over to the house. But Victim's mother smelled "man perfume" and went next door. Victim testified she had deodorant on her shirt. She testified it was from when Applicant had his arm around her neck. She hurt the next day when she was making a bowel movement. (Trial Tr. 101-108.) Specifically, Victim testified she yelled to her mother she could not use the bathroom because "[h]e put his manhood in the back of my butt." (Trial Tr. 107, lines 3-8.)

Detective Trena Hamlet responded to a call regarding a female victim at Victim's residence. Several other officers and family members were already present. While speaking with Victim and her family, Detective Hamlet noticed a white smear on the shoulder of Victim's shirt.

After she spoke with Victim, Detective Hamlet spoke with Applicant to hear his side of the story. (Trial Tr. 176-179.)

Detective Hamlet testified that Applicant gave the following statement:

> He opened the door and asked why she was over there. Stated that her mom was not at home. She sat on the couch and they were watching TV. He stated that at one point he got up to go to the restroom. And while he was in there, she came in on him. He concealed, tried to conceal himself from her, because he was in the midst of using the restroom. Yelled at her to get out. And she went back in the living room and sat down. And shortly thereafter, she wanted to leave. He said that she didn't want to go to front door because a bug was on the door, so she went to go out the back. The back door was locked. So he had to unlock it. She couldn't unlock it, he had to unlock it for her to leave.

(Trial Tr. 181, line 13 – 182, line 2.) Detective Hamlet testified to the statement without objection from Applicant.

Victim's mother testified she arrived at home on time for the bus, or at least she thought so. However, Victim's mother did not hear the bus. She became agitated when her daughter did not come home – more so when the middle school and then high school buses came (Victim's bus should have arrived first). But after a while, she was startled by Victim kicking and beating on the door. Victim's mother became concerned because Victim was not talking, even after she asked Victim where she had been. Victim was excited to ride the bus the day before. But now Victim walked by Victim's mother without discussion. Victim's mother grabbed Victim and smelled the cologne. Victim pointed to her Aunt's house when Victim's mother inquired about where she had been. Victim's mother testified Victim also had a stain on her shirt that smelled like deodorant. (Trial Tr. 225-232.)

Victim's mother went next door and asked Applicant what happened. Applicant claimed Victim walked in the bathroom on him. Victim's mother told Applicant that she did not believe

him. Victim's mother decided it was best to leave at that point, since Applicant's mother was not home. Samantha Cooper, another sister of Victim's mother, (not Applicant's mother) called police. (Trial Tr. 234-237.)

Later that night, Victim's mother was trying to finish her school work – she was having trouble due to the stress of the day – when she heard Victim scream from the bathroom. Victim told her mother it hurt when she was trying to go to the bathroom. (Trial Tr. 237-238, 243.)

Law enforcement failed to take Victim's clothing during the interview. Victim's mother and her sister put Victim's clothing in a bag and were told to bring the bag with them to the Durant Center in Florence when they brought Victim for her appointment. The Durant Center told them to take the bag of clothes to the police. She left the clothes with an officer at the Kingstree police station. (Trial Tr. 245-248, 258.)

Lieutenant Thomas Dean McCrea testified that the officer described by Victim's mother as the officer receiving the clothes must have been Sergeant Grant Huckabee, who was an investigator, K-9 handler, and evidence custodian at the time. The only other person with access to the evidence room was Chief Ford. Both Huckabee and Ford are no longer employed with the Kingstree Police Department. Lieutenant McCrea was under the impression the clothing was sent to SLED for testing, but no record of this exists, and it appears the clothing was lost. This was not the first instance of Huckabee losing evidence before. No evidence intake sheet was located. Trial Tr. 269-270.)

Samantha Cooper, Victim's aunt, testified she confronted Applicant with Victim's allegations, and he told her he did not mean to do it. Cooper understood Applicant's comments to be a confession. Cooper was enraged. She went running after Applicant, and he ran inside his

house. Cooper collected herself sufficiently enough to walk away rather than act on violent urges. Thereafter, she called the police. (Trial Tr. 275-282.)

III. ALLEGATIONS RAISED

During the evidentiary hearing, Applicant proceeded on the following allegations:

1. Ineffective Assistance of Counsel:
   a. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to challenge the jurisdiction of the Court of General Sessions to hear the case.
   b. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to move for Applicant's case to be remanded to the Family Court.
   c. Given the fact that Applicant was 16 at the time of the alleged offense, the twenty-five year sentence is cruel and unusual and violates the Eighth Amendment of the United States Constitution.
   d. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the mandatory minimum sentence pursuant to the Eighth Amendment of the United States Constitution.
   e. Given the fact that Applicant was 16 at the time of the alleged offense, the twenty-five year sentence is cruel and unusual and violates Article I Section 15 of the South Carolina Constitution as applied to Applicant.
   f. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the mandatory minimum sentence pursuant Article I Section 15 of the South Carolina Constitution.
   g. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the entirety of his statement pursuant to Jackson v. Denno.
   h. To the extent that Trial Counsel properly objected to the mandatory minimum sentence, Applicant submits that he was denied his Sixth Amendment right to effective assistance of Appellate Counsel for failing to brief the issue on appeal.
   i. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly review discovery documents and advise Applicant of the evidence against him.
   j. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately impeach the alleged victim with inconsistencies in her statements.

k. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to call Dr. Luberoff to testify.

l. Applicant was denied his Sixth Amendment right to effective assistance of appellate counsel when Appellate Counsel failed to brief the trial court's erroneous ruling that prohibited Applicant from presenting evidence of why Officer Huckabee had left the police department.

m. Alternative to l, Applicant was denied his Sixth Amendment right to effective assistance of counsel when his Trial Counsel failed to adequately preserve the issue raised in subsection l.

n. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel allowed the jury to be charged that Applicant could be found guilty of criminal sexual conduct for unindicted conduct.

o. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to burden shifting statements in the State's closing argument.

p. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the State's closing argument that was designed to inflame the passion and the prejudice of the jury.

q. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the State's argument that anal or vaginal sex was sufficient to result in a finding of guilty for Count I of the indictment.

r. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Samantha Cooper's testimony pursuant to Rule 5 and Brady.

s. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately investigate and call witnesses to contradict Samantha Cooper.

An evidentiary hearing was held on March 26, 2019. Prior to the hearing, Applicant expressly waived the allegation pertaining Counsel's failure to call Dr. Luberoff to testify during the trial. As such, that allegations should be denied and dismissed. At the conclusion of the hearing, counsel for each side was allowed time to provide a brief in support of their case. This brief follows.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

Ineffective Assistance of Counsel

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to challenge the jurisdiction of the Court of General Sessions to hear the case and failed to have the case remanded to Family Court.[2]

Applicant alleges his case should not have been heard in General Sessions because Applicant was sixteen years old at the time of the incident.

Counsel testified he approached Assistant Solicitor Barr a couple of times requesting Applicant's case be moved to Family Court. Counsel testified Barr declined his request and Counsel testified there was no hearing or proceeding he could request to force the case be remanded to Family Court.

Barr testified Applicant was not a child based on the definition set forth in §63-19-20 S.C. Code Ann. Barr testified she did not move the case to Family Court because Victim's mother told her this was not the first time something of this nature occurred between Applicant and Victim, and Barr was concerned he was a predator. Barr testified it was within her discretion whether the case was heard in Family Court of General Sessions.

Applicant's argument is contradicted by the plain meaning of the applicable statutes and case law. "Child" is defined as follows under S.C. Code Ann. §63-19-20(1):

> (1) "Child" or "juvenile" means a person less than seventeen years of age. "Child" or "juvenile": does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen year or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

[2] Allegations a and b in Applicant's amended application.

Criminal sexual conduct with a minor in the first degree is a felony with a penalty of twenty five years' imprisonment or life imprisonment. S.C. Code Ann. §16-3-655(D)(1). Therefore, under the plain language of the statute, Applicant was not a child when he sexually assaulted Victim. The Supreme Court found that a sixteen year old charged with A, B, C, or D felonies is not a "child" as defined by statute and, therefore, may be charged in circuit court without first bringing the charges in family court. State v. Graham, 340 S.C. 352, 532 S.E.2d 262 (2000).

Additionally, the statute is undoubtedly constitutional. The protection of family court to juveniles is provided by our legislature as a privilege, and not as a matter of right. State v. Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980); see also C.J.S.2d Constitutional Law § 1432 ("Courts have upheld statutes divesting a juvenile court of jurisdiction of proceedings against children of a specified age for particular violations or crimes . . . ."). No constitutional infirmity exists where a state has determined a class of offenses requires the juvenile to be treated as an adult. See Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) (noting "several of our sister circuits have upheld the constitutionality of statutes similar to Florida's which permit juveniles to be treated as adults without a hearing in certain instances"). In the instant case, Applicant committed an offense the legislature ranks high in terms of severity. It is one of the few non-homicide crimes to be punishable by up to life imprisonment. Applicant violently assaulted Victim in such a manner that evidences his danger to society and requires long-term incarceration. No constitutional issue exists in the legislative determination that sixteen-year-olds who rape children under the age of eleven should be prosecuted as adults. General Sessions had jurisdiction under due process of the law over Applicant's charges.

Applicant's twenty-five year sentence is cruel and unusual and violates the Eighth Amendment of the United States Constitution and Article I Section 15 of the South Carolina Constitution. Applicant was denied effective assistance of counsel when Counsel failed to object to the mandatory minimum sentence pursuant to the Eighth Amendment of the United States Constitution and Article I Section 15 of the South Carolina Constitution.[3]

Applicant alleges his sentence violates the United States Constitution and the South Carolina Constitution because it imposes a mandatory minimum sentence on Applicant and does not allow the Court to consider Applicant's age at the time of the offense. Applicant cites Miller v. Alabama, 567 U.S. 460 (2012), in support of this allegation.

Counsel testified he did not object to Applicant's twenty-five year sentence because he did not believe he had grounds to object as a twenty-five year sentence for a juvenile is not unconstitutional. Counsel testified if Applicant had received a life sentence he would have objected.

In criminal cases, a trial judge has broad discretion in imposing a sentence within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974); see State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed."). Generally, appellate courts will only interfere with the discretion of a judge in the imposition of a sentence in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952). "Absent partiality, prejudice, oppression, or corrupt motive, [the appellate court] lacks jurisdiction to disturb a sentence that is within the limits prescribed by statute." State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997).

[3] Allegations c, d, e, and f of Applicant's amended application.

Notwithstanding a trial judge's authority to impose a sentence falling within the statutory limits, the Eighth Amendment of the United States Constitution prohibits the imposition of cruel and unusual punishment. See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Likewise, the Constitution of the State of South Carolina prohibits the imposition of cruel and unusual punishment. See S.C. Const. Art. I, §15 ("Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained."). Pursuant to the Eighth Amendment, punishments must not be "inherently barbaric" and must be graduated and proportioned to the offense. Graham v. Florida, 560 U.S. 48, 59 (2010); see Atkins v. Virginia, 536 U.S. 304, 311 (2002) (instructing it is a precept of justice the punishment for a crime should be graduated and proportioned to the offense). However, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). Instead, "it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. (citations omitted).

Here, Applicant alleges his twenty-five year sentence for criminal sexual conduct with a minor in the first-degree is violative of the United States and South Carolina constitutional prohibition against cruel and unusual punishment. However, both the United States Supreme Court and the South Carolina Supreme Court have recognized even a sentence of life without parole is constitutionally permissible for a juvenile convicted of homicide. See Montgomery, __ U.S. __, 136 S. Ct. 718, 733 (2016) (recognizing a sentencing judge may encounter a rare juvenile offender for whom a life without parole sentence is justified); Miller v. Alabama, 567 U.S. at 479 ("the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders."); Aiken v. Byars, 410 S.C. 534, 545, 765 S.E. 2d 572,

578 (2014) (recognizing a sentencing judge "[w]ithout question" could still properly determine life without parole was an appropriate sentence for a juvenile murderer following an individualized hearing in which "the mitigating hallmark features of youth" were fully explored and noting the legislature's decision authorizing life without parole sentences for juveniles who committed murder would be honored on appeal).

On April 3, 2019, the South Carolina Supreme Court issued an opinion addressing the practices of juvenile sentencing. State v. Slocumb, S.C. Sup. Ct. Order dated April 3, 2019 (Shearouse Adv. Sh. No 14). The petitioner, Conrad Slocumb, was thirteen years old at the time he incurred charges that led to a thirty year prison sentence. Three years after that conviction, the petitioner escaped from custody and in the forty-five minutes he was free, he forced his way into the victim's residence, claimed he was armed and forced the victim to give him money, keys, cigarettes, clothes, jewelry, and beer. The petitioner then raped the victim. After he was recaptured, the petitioner was eventually convicted of 1st degree burglary, first-degree criminal sexual conduct, robbery, and escape. The petitioner was sentenced to an aggregate term of 130 years because the sentences were run consecutively. The petitioner appealed on the basis that he received a *de facto* life sentence in violation of the Eighth Amendment of the United States.

In the Slocumb opinion, the Court identifies three cases – Roper v. Simmons [4], Graham v. Florida [5], and Miller v. Alabama[6] - that have addressed juvenile sentencing practices and conducts an extensive analysis of those cases. At the conclusion of their lengthy analysis, the Court held, "Neither Graham nor the Eighth Amendment, as interpreted by the Supreme Court, currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a *de facto* life

[4] 543 U.S. 551 (2005).
[5] 560 U.S. 48 (2010).
[6] 567 U.S. 460 (2012).

sentence on a juvenile nonhomicide offender." Slocumb, Op. No. 27877 (S.C. Sup. Ct. filed April 3, 2019).

Applicant's argument that his sentence was unconstitutional based on the Court's holding in Miller is a non-starter as Applicant was sentenced to twenty-five years imprisonment, not a life sentence. Applicant's sentence cannot even be classified as a *de facto* life sentence as he received an individual sentence of twenty-five years and will only be approximately forty-four years old upon his release. Applicant's argument that the holding in Miller should apply to a juvenile sentenced to twenty-five years is wholly without merit.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the entirety of his statement pursuant to Jackson v. Denno.[7]

Applicant alleges Counsel should have challenged his entire statement to law enforcement during the pre-trial Denno hearing.

Counsel testified he only challenged Applicant's initial statement to law enforcement at the hearing because the remaining portions of Applicant's statement was his version of the facts. Counsel testified this statement would have been consistent with Applicant's testimony had he testified at trial. Counsel testified the remaining portions of the statement coming in gave them the opportunity to get Applicant's side of the story out before the jury without Applicant having to testify at trial. Counsel testified he moved to suppress Applicant's initial comment to law enforcement because he did not want the jury to hear anything from Applicant regarding Victim's allegations. Counsel testified he was successful in getting the initial statement suppressed.

The initial statement Applicant made to Det. Hamlet was in response to her asking Applicant if he knew why law enforcement was at his residence. Det. Hamlet testified during the Denno hearing that Applicant responded, "[T]hey were trying to say that [I] touched [my] cousin."

[7] 378 U.S. 368 (1964)

(Trial Tr. 31.) Counsel was successful in getting that statement suppressed. Det. Hamlet testified to the remaining portion of Applicant's statement to law enforcement was as follows:

> He stated he was home. He heard a knock on the door. His cousin was at the door. And he asked why she was there. And she said no one was at home; that her mother wasn't at home. And he allowed her to come in. He said that she looked like she was mad. Sat down on the couch. They watched TV. [A]t some point he got up, and went into the restroom. And then shortly after she came up . . . and he said he tried to, he was using the restroom and he tried to conceal himself from her. And yelled at her to, you know, leave the bathroom. He stated a short while later she was ready to go home. But she didn't want to go out the front door because there was a bug on the door. . . . She went to the back door, but it was locked. She was unable to lock it, so he unlocked the door for her, and she went home.

(Trial Tr. 31-32.)

Applicant has failed to meet his burden on this allegation as Counsel testified it was part of his trial strategy to allow Applicant's statement in so the jury could hear his version of the facts. Applicant has also failed to show how Counsel was deficient for not moving to suppress Applicant's entire statement or how suppression of his statement would have changed the outcome of his trial. As such, this allegation should be denied and dismissed.

To the extent that Trial Counsel properly objected to the mandatory minimum sentence, Applicant submits that he was denied his Sixth Amendment right to effective assistance of Appellate Counsel for failing to brief this issue on appeal.

Appellate Counsel, Wendy Keefer, testified that she was lead counsel on the appeal and Adam Owensby was assisting her to get appellate experience. Appellate Counsel testified she made all of the decisions on what issues to raise on appeal and she was the proper attorney to respond to the issues raised by Applicant in his post-conviction relief application.

Appellate Counsel testified she briefed all meritorious issues that were preserved for appeal. On cross-examination, Appellate Counsel testified she did not brief the issue regarding Applicant's twenty-five year sentence because it was not preserved for appeal, and the appellate

courts in South Carolina do not recognize a sentence being cruel and unusual for juveniles unless it is a life sentence.

Applicant was sentenced to twenty-five years by the trial court, which is clearly not tantamount to a life sentence as Applicant will be approximately forty-four years old upon his release. Applicant's allegation that Appellant Counsel was deficient for failing to brief this issue is without merit as Appellant Counsel testified it was not preserved, nor would it have been a meritorious claim to raise on appeal.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly review discovery documents and advise Applicant of the evidence against him.

Applicant argues Counsel was ineffective for failing to obtain the color copy of a photograph showing a white stain on Victim's shirt that was introduced by the State during the trial. Applicant further argues his rejection of the plea offer was not knowingly and intelligently entered because Applicant had not had the opportunity to view the color photograph prior to rejecting the offer.

Applicant testified he did not see the color photograph unless Counsel had it at trial. Applicant testified he reviewed discovery with Counsel but it did not include a color copy of the photograph of anything about his statement to Samantha Cooper. Applicant testified he turned down the plea offer because he was under the assumption that there was no evidence against him. Applicant testified Counsel gave him a copy of the police report and he recalled telling police nothing sexual happened. Applicant testified had he known about the color photograph he most likely would have plead. On cross-examination, Applicant testified he viewed the forensic interview of Victim prior to trial.

Counsel testified he drove to the solicitor's office two or three times in order to review the solicitor's file and obtain a copy of the forensic interview of Victim. Counsel testified the color photograph was not in the file on any of the occasions when he viewed the file. Counsel testified he had a photocopy of the photograph in his file that was mostly black with a white stripe across it. Counsel testified when the color photograph was introduced during the trial he objected. (Trial Tr. 153.) Counsel testified when the trial court allowed the photograph to come in he moved for a mistrial. (Trial Tr. 174.) Counsel testified he later moved to exclude the photograph after Det. Hamlet could not identify Victim in the photograph or lay proper foundation for its admission. (Trial Tr. 202-203) Counsel testified he did not ask for a continuance when the color photograph was introduced because he was able to cross-examine law enforcement on their inability to collect evidence and was able to impeach Det. Hamlet on the stand. Counsel testified he was also worried if he requested a continuance the shirt would be found and tested and he believed if the results would have been detrimental to Applicant. Counsel testified the photograph was "absolutely not" the most compelling evidence against Applicant at trial.

Counsel testified prior to trial the State provided a plea offer to Applicant. Counsel testified he advised Applicant to take the plea offer. Counsel testified Applicant rejected the plea offer and Counsel had Applicant sign a waiver form indicating he was rejecting the offer contrary to Counsel's advice. Counsel testified at that time of the rejection Applicant had not seen the color photograph that was introduced at trial. Counsel testified Applicant had viewed all of the evidence against him that Counsel possessed including Victim's forensic interview. Counsel testified he, Barr, Applicant's mother, and Applicant discussed the plea offer prior to trial and Counsel explained it was in his best interest to take the offer. Counsel testified he told Applicant he was young and the risk of going to trial was too high. Counsel testified the Victim's allegations against

Applicant were corroborated during the forensic interview, which Applicant viewed. Counsel testified he believed Applicant came from a good family and believed if Applicant took the plea offer that he could go before the court and ask for probation. Counsel testified Applicant did not want to take the plea offer because it was not negotiated and he did not want to accept an offer where he would possibly go to prison and have to register as a sex offender.

Barr testified she provided a copy of the photograph in her file to Counsel prior to trial. Barr testified her copy of the photograph was not in color and was similar to what Counsel had received. Barr testified that is how she received the photograph from police. Barr testified she received the color copy either right before trial or during trial. Barr testified the color photograph provided more detail. Barr testified the photograph was not a compelling piece of evidence against Applicant because the law enforcement agency had lost all of the evidence and the photograph was the only piece of evidence they kept. Barr testified her administrative assistant sends a request to the law enforcement agency for a copy of everything in their file. Barr testified the photograph was not inculpatory in her view. Barr testified the photograph helped only because all of the other evidence was lost. Barr testified the pbotograph corroborated a portion of Victim's testimony, but the case did not rise or fall on the photograph.

Barr testified she offered Applicant a reduced charge to Lewd Act with a possible sentence range of 0-15 years. Barr testified she had a conversation over the phone and in person with Counsel regarding the offer. Barr testified she met with Applicant and Counsel about the plea offer and explained the penalties Applicant faced if he went to trial. Barr testified if he took the plea offer she could not recommend probation but would not be oppose it. Barr testified she told Applicant if he took the plea offer he would still have to register as a sex offender and Applicant told her he might as well be in prison if he has to register as a sex offender. Barr testified she told

Applicant that was easy for him to say now, but on his way to SCDC he would feel differently. Barr testified she asked Applicant if his mother could come into their meeting and he agreed. Barr testified she let Counsel, Applicant, and Applicant's mother discuss the plea offer outside of her presence. Barr testified when she went back into the room, Applicant's mom told her it was Applicant's decision and he wants to reject the offer. Barr testified the plea offer would have been a fair resolution to the case. Barr testified she does not recall the offer expiring. Barr testified she may have increased the offer had Applicant wanted to accept a plea during the trial. Barr testified she does not recall Counsel coming to her during the trial for a plea offer and she would not have extended another plea offer because she believed the testimony of Victim and her mother.

In Strickland, the Supreme Court held, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Strickland, 466 U.S. at 670. Here, although Counsel was not deficient with regards to this allegation, this allegation can be easily disposed of on a prejudice analysis alone. In order for Applicant to prevail on this allegation he must show "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 695.

Applicant has failed to show how Counsel obtaining the color photograph prior to trial would have changed the outcome of the trial. Both Counsel and Barr testified the photograph was not the most compelling evidence against Applicant at trial. Barr testified specifically that the case did not rise or fall on the photograph. Additionally, Counsel testified he was able to impeach Det. Hamlet regarding the photograph during his cross-examination. Counsel testified during cross-examination Det. Hamlet could not even identify whether the person in the picture was Victim. Counsel further testified his trial strategy would not have changed had he had the color photograph

ahead of trial. Counsel and Barr testified Victim and Victim's mother testified at trial and Victim's mother was the most compelling witness against Applicant.

Applicant claims if he had seen the color photograph prior to trial he would have changed his mind and accepted the plea offer from the State. First, Applicant was aware the photograph existed as Counsel had a black and white copy of the color photograph – although poor quality- in his file. Applicant also had a copy of the incident report, which referenced the photograph. Second, Applicant testified he viewed the forensic interview of the Victim prior to declining the plea offer. It is unreasonable to believe the photograph – which was an insignificant piece of evidence- would have swayed Applicant's decision to accept the plea offer when viewing Victim's forensic interview, which is arguably of much more significance in this case, did not have that affect. Finally, Counsel advised Applicant to take the plea offer and explained to Applicant it was in his best interest to plead guilty. Counsel and Barr testified they both met with Applicant and discussed the plea offer with Applicant and his mother and Applicant was hesitant about the plea offer because he did not want to register as a sex offender or go to prison. Again, it is unreasonable to believe a color photograph showing a black shirt with a white mark on it would have been a great motivator for Applicant to take a plea offer that would have required him to register as a sex offender, especially since the State could not provide the shirt any additional evidence regarding the shirt in the photograph as it had been lost prior to trial and no testing was ever conducted on the shirt or other clothing submitted by Victim.

Applicant cannot show the outcome of his trial would have been different had Counsel obtained the color copy of the photograph prior to trial as Counsel was effective in impeaching Det. Hamlet regarding the photograph. Counsel was also successful in getting testimony from other witnesses showing the State lacked any evidence derived from the shirt in the photograph

because the shirt and other such evidence was lost by law enforcement and never tested. As Barr testified, the trial did not rise or fall on the color photograph. Therefore, Applicant has failed to meet his burden to show how he was prejudiced by Counsel's alleged deficiency and this allegation should be denied and dismissed.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately impeach the alleged victim with inconsistencies in her statements.

Counsel testified his trial strategy was to impeach Victim and show the jury the State had no DNA or physical evidence corroborating Victim's story. Counsel testified he believed he handled the cross-examination of Victim well during the trial. Counsel testified during cross-examination he confronted Victim on inconsistent statements and also cross-examined Det. Hamlet on Victim's inconsistent statements. The record also supports Counsel's testimony that he cross-examined Victim and Det. Hamlet on Victim's inconsistent statements. (Trial Tr. 121-122, 130, 134, 209-210, 212.)

Applicant has failed to meet his burden on this allegation as Counsel's testimony and the record show Counsel did cross-examine Victim on her inconsistent statements and Applicant has failed to show what Counsel should have or could have done differently to change the outcome of his trial.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to call Dr. Luberoff to testify.

This allegation was expressly waived by Applicant prior to the evidentiary hearing.

Applicant was denied his Sixth Amendment right to effective assistance of appellate counsel when Appellate Counsel failed to brief the trial court's erroneous ruling that prohibited Applicant from presenting evidence of why Officer Huckabee had left the police department.

Appellate Counsel testified she raised every preserved meritorious issue she could in her appeal.

Applicant's allegation is meritless as this issue was not preserved for appeal during the trial and, therefore, could not have been raised by Appellate Counsel on appeal. This allegation should be denied and dismissed.

Alternative to l, Applicant was denied his Sixth Amendment right to effective assistance of counsel when his Trial Counsel failed to adequately preserve the issue raised in subsection l.

Counsel testified Officer Huckabee was the evidence custodian at Kingstree Police Department during the case. Counsel testified he had learned Officer Huckabee was terminated because he lost evidence while in that position. Counsel testified during the trial the State objected to a question he asked Lt. McCrea regarding the reason Officer Huckabee left the Kingstree Police Department. Counsel testified he did not believe he needed to preserve that issue for appeal because he got the answer he wanted in a follow up question from Lt. McCrea. Counsel testified he was able to get Lt. McCrea to testify that Officer Huckabee had lost evidence.

During the cross-examination of Lt. McCrea, the following exchange occurred:

> Counsel: . . . Do you know why officer Huckabee left the department?
>
> Lt. McCrea: Yes, I know why.
>
> Counsel: Can you disclose to the court why?
>
> State: Judge we would object on relevance grounds.
>
> Court: I sustain the objection.
>
> Counsel: Okay. During officer Huckabee's tenure with your department, has there been other instances where evidence has been lost?
>
> Lt. McCrea: Yes, sir.
>
> Counsel: Was it ever recovered?
>
> Lt. McCrea: No.

(Trial Tr. 274-275.)

The record establishes Counsel was able to elicit the testimony he wanted the jury to hear from Lt. McCrea regarding Officer Huckabee and therefore Counsel did not need to preserve this issue for appeal. Additionally, the inference was clearly noted by the South Carolina Court of Appeals as the opinion states, "[Lt. McCrea] admitted other evidence in the department had been lost during Huckahee's tenure with the department." State v. McBride, 416 S.C. 379, 786 S.E.2d 435 (2016).

Counsel was not deficient for failing to preserve this issue for appeal as he got the testimony he wanted from Lt. McCrea despite the State's objection. Applicant has failed to meet his burden on this allegation and it should be denied and dismissed.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel allowed the jury to be charged that Applicant could be found guilty of criminal sexual conduct for unindicted conduct.

Applicant alleges Counsel was ineffective for allowing the jury to be charged that Applicant can be found guilty of criminal sexual conduct for unindicted conduct.

Counsel testified he did not object to the court providing a full description of sexual battery in the jury charge. Counsel testified the jury was properly instructed as to what each count required for Applicant to be found guilty. Counsel testified he believed the jury was properly instructed and would have objected if they were not. Barr also testified the jury was properly instructed regarding Count 1 of Applicant's indictment.

The trial court properly explained to the jury that Applicant was charged with first-degree criminal sexual conduct with a minor. The trial court instructed the jury as follows:

> It's alleged that he committed this offense by engaging in oral sex with a minor. Here the state must prove beyond a reasonable doubt that [Applicant] engaged in sexual battery with the victim. The term sexual battery which is includes [sic] fellatio, which is oral sex. The

> state must prove beyond a reasonable doubt the victim was less than 11 years old at the time of the sexual battery and that the sexual battery of course occurred.

(Trial Tr. 367, line 7-17.)

Barr and Counsel both addressed Count 1 of Applicant's charges during their closing arguments. Barr stated, "Now Count 1 of the indictment, relates to the testimony regarding oral sex. Count 2, is assault and battery or assault with intent to commit criminal sexual conduct in the first degree. . . . Sexual battery can mean oral sex." (Trial Tr. 320-321.) Counsel stated, "[The trial judge] is going to go over the actual accusation itself, it says oral sex." (Trial Tr. 358.) Additionally, the jury had the indictment and the verdict form during deliberations, both explain Count 1 of Applicant's charges pertains to the victim performing oral sex on Applicant.

Applicant's allegation that Counsel failed to object to the jury being instructed that they could find Applicant guilty of unindicted conduct is meritless. The testimony of Barr and Counsel and the record clearly refute this allegation as the jury was properly instructed that Count 1 pertained to oral sex and Counsel testified he would have objected had the jury been instructed otherwise. Therefore, this allegation should be denied and dismissed.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to burden shifting statements in the State's closing argument.

Counsel testified he did not recall any objectionable comments made by Barr during her closing arguments. Counsel testified he did not believe Barr's closing argument shifted the burden of proof to Applicant. Barr testified she is allowed to argue evidence and reasonable inferences from evidence during her closing argument.

The allegation that the State's closing argument shifted the burden to Applicant is meritless. Counsel stated in his closing argument that the State has to meet their burden of proof beyond a reasonable doubt. (Trial Tr. 352, 356, 357, 359) Additionally, the trial court properly

instructed the jury on the State's burden of proof and that Applicant was entitled to the benefit of any reasonable doubt. (Trial Tr. 362-363, 364, 367, 368, 372.)

Based on the foregoing, Applicant has failed to show how Counsel was deficient or how he was prejudiced by any alleged deficiency. As such, this allegation should be denied and dismissed.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the State's closing argument that was designed to inflame the passion and the prejudice of the jury.

Counsel testified he recalled Barr talking about searching for the truth during her closing argument but did not object. Counsel testified he did not believe any of Barr's statements were objectionable. Counsel testified it was part of his trial strategy to have the last closing argument and he believed it was effective since Applicant was found not guilty on Court 2. Counsel also testified the trial judge instructed the jury that their verdict cannot be based on passion, sympathy, public opinion, prejudice, or matters outside the record. (Trial Tr. 370-371.) Counsel testified the jury was properly instructed on burden of proof and presumption of innocence.

Barr testified that in her closing she is allowed to argue the evidence she presented during trial and any reasonable inferences from the evidence.

An appellate court will review the alleged impropriety of a solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. State v. Rudd, 355 S.C. 543, 586 S.E.2d 153 (2003). "A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "A solicitor

has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)). "Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Applicant highlights two statements from Barr's closing argument that he alleges were objectionable as they were designed to "inflame the passion and prejudice of the jury." Those two statements are as follows:

1. Do you all remember on yesterday morning when the Clerk of Court sworn you all in and what she asked you to do, and what you agreed to do by your oath, is to well and truly try the case of the State of South Carolina versus Justin McBride under Indictment 2010-GS-45-283, and render a true verdict according to the law and according to the evidence so help you God. That was a pledge you all gave to this court and this case when you took your oath.

2. If a trial is the search for the truth, and if you all took an oath to render a true verdict according to the law and the evidence what do you do now. Do you say well, I believe that girl. I believe everything she said. I believe the defendant did it. But the state shouldn't have lost the evidence. Does that now mean that he's not held to account for his actions. Does that mean that at the end of the day this family and the State of South Carolina, doesn't seek justice. Does that now mean that you don't' render a true verdict in the case. Folks, I urge you all not to do that.

In the first statement, Barr is referring to the juror's oath that they took the day before when they were sworn in by the clerk. This statement in no way was prejudicial to the Applicant as the jurors were instructed regarding rendering a verdict according to the law and according to the evidence by the clerk and the judge prior to opening statements. After being sworn in, the judge addressed the jury and explained opening statements, closing arguments, his role as the judge, and

told the jurors their role is to, "[d]etermine the true facts and apply the law and you can be in a position to return a verdict that speaks the truth."[8] (Trial Tr. 73-75.) Barr's comments, especially when viewed in light of the entire record, are in no way objectionable or prejudicial to Applicant.

In her second statement, Barr properly argues the inferences the jury could draw from the evidence presented in this case. "A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." (State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999) (internal citations omitted). Here, Barr does not urge the jury to find Applicant guilty on any improper grounds. Barr even states, ". . . I don't want you to find [Applicant] guilty because you feel sorry for Victim. Victim's mom and dad didn't want you to find [Applicant] guilty because you feel sorry for her." (Trial Tr. 343.) Barr's closing, especially when viewed in light of the entire record, does not inflame the passions or prejudice of the jury nor does it "so infect the trial with unfairness as to make the resulting conviction a denial of due process." DeChristoforo, 416 U.S. at 643.

Additionally, Counsel had the last closing argument at trial and, as Counsel testified, the jury was properly instructed by the trial court prior to deliberations. The jury was clearly not so swayed by Barr's allegedly inappropriate comments as they found Applicant not guilty on one of his charges. Applicant has failed to show how Counsel was deficient for failing to object to Barr's closing argument or how he was prejudiced by this alleged deficiency. As such, this allegation should be denied and dismissed.

[8] This case was tried in October of 2013, which is well before the South Carolina Supreme Court's decision in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), which instructed trial judges to omit language like "just verdict" and "search for the truth" from their comments to the jury.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the State's argument that anal or vaginal sex was sufficient to result in a finding of guilty for Count I of the indictment.

Applicant alleges Counsel was ineffective for failing to object when the State informed the jury that Applicant could be convicted of Count 1 if there was vaginal or anal intercourse.

Both Counsel and Barr testified that the jury was properly instructed regarding Applicant's charges and what was required in order to find Applicant guilty of each charge.

During Barr's closing argument she states,

> Now Count 1 of the indictment, relates to the testimony regarding oral sex. Count 2, is . . . assault with intent to commit criminal sexual conduct in the first degree. You all also may also recall on yesterday, I told the law actually defines what sexual battery is. Sexual battery can mean oral sex. It can mean anal sex or anal intercourse. I shouldn't use the word sex, because it implies that it was consensual. But anal intercourse, vaginal intercourse. Count 2, specifically relates to testimony by Victim that the defendant attempted to put his penis in her behind. So if you find [Applicant] committed both of these acts, then your verdict should be that of guilty on both counts.

(Trial Tr. 320-321.)

Barr's comments during closing clearly state Count 1 of the indictment relates to oral sex and Count 2 of the indictment relates to the allegation that Applicant attempted "put his penis in her behind." Additionally, the jury was properly instructed by the trial court on both counts, and the verdict form also states Count 1 relates to oral sex and Count 2 relates to "anal intercourse" with Victim. Applicant has failed to show how Counsel was deficient or how he was prejudiced by any alleged deficiency. As such, this allegation should be denied and dismissed.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Samantha Cooper's testimony pursuant to Rule 5 and Brady.

Applicant testified had he known about Cooper's testimony prior to trial he most likely would have taken the plea offer.

Counsel testified he was not aware of any statement Applicant made to Samantha Cooper (Cooper) prior to trial. Counsel testified he is not sure the statement was a confession. Counsel testified the gist of Cooper's testimony was, "[Applicant] said I did not mean to do it. We need to talk." (Trial Tr. 282.) Counsel testified Cooper's testimony never defined what Applicant meant by "it." Although Counsel did object to Cooper's statement at trial, Counsel testified it was a statement against interest and he was not able to keep it out. (Trial Tr. 280.) Counsel testified Cooper's testimony was that she came over to confront Applicant after she talked to Victim and was in possession of a gun at the time. Counsel testified it would have been better to know about the statement prior to trial rather than being caught flatfooted. Counsel testified Applicant never told him he had a conversation with Cooper prior to his arrest. Counsel testified if he had been aware of the statement it would not have changed his trial strategy. Counsel testified he cross-examined Cooper and did not believe Cooper came off credible in her testimony. Counsel testified a deputy told him after court that Cooper did not do very well. Counsel testified Cooper's testimony was not material to Victim's testimony. Counsel testified the Victim's mother's testimony was very convincing because she corroborated part of the Victim's story.

Barr testified Cooper is the sister of Victim's mother. Barr testified she did not disclose the statement to Counsel prior to trial. Barr testified Cooper's statement was separate from what Counsel reviewed in her file because it was work product. Barr testified her file contained everything she received from law enforcement. Barr testified Cooper's statement was oral and not written and was not given to law enforcement officers or to an agent of the solicitor's office. Barr

testified Cooper was on her witness list she provided for trial. Barr testified she was not required to provide the statement to Counsel.

"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 asses his credibility." State v. Dinkins, 339 S.C. 597, 529 S.E.2d 557 (2000) (citation omitted). "The Brady disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments. It requires the prosecution to disclose evidence that is: 1) in its possession; 2) favorable to the accused; **and** 3) material to guilt or punishment." State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 219-220 (1998) (emphasis added) (citing United States v. Bagley, 473 U.S. 667 (1985), United States v. Agurs, 427 U.S. 97 (1976), Brady v. Maryland, 373 U.S. 83 (1963)). "Rule 5(a)(1)(A), S.C.R. Crim.P., provides . . . upon the request of the defendant, the State must disclose the substance of any oral statement made by the defendant in response to interrogation. However, where a defendant does not make an oral statement in response to interrogation, the State is not required to disclose the statement, and no error is committed by allowing testimony regarding it." Clark v. State, 311 S.C. 314, 428 S.E.2d 870 (1993) (citing State v. Hoffman, 285 S.C. 130, 328 S.E.2d 631 (1985)).

Here, the statement Applicant made to Cooper prior to his arrest is not favorable to Applicant and was not made to law enforcement or an agent acting on behalf of law enforcement. Barr did not in violate Brady or Rule 5, S.C. R. Crim.P. by not disclosing this statement to Counsel. Further, Counsel testified he was able to cross-examine Cooper and did not believe she came off credible to the jury. Counsel testified he felt he was effective in his cross-examination of Cooper. Counsel also addressed Cooper's testimony during his closing argument. Counsel argued, ". . .

they wanted to end with a boom with [Cooper]. She served no purpose. She didn't see anything." (Trial Tr. 354.)

Applicant testified he most likely would have accepted the plea offer had he known about Cooper's statement prior to trial. Counsel testified he advised Applicant numerous times that it was in his best interest to accept the plea offer. Counsel testified he felt confident he could provide mitigation on Applicant's behalf and would request probation. Barr testified she told Applicant she could not recommend probation, but would not oppose it. Applicant, even after observing Victim's forensic interview, meeting the Counsel, Barr and his mother, decided to reject the offer. Barr and Counsel both testified Applicant did not want an offer that would require him to register as a sex offender or serve jail time. Both Counsel and Barr testified Applicant was aware of the mandatory minimum sentence of twenty-five years prior to rejecting the plea offer. It is unreasonable to believe Applicant would have changed his mind about the plea offer had he been aware of Cooper's testimony, which Counsel and Barr testified was not the most persuasive evidence against Applicant. It is evident from the testimony at the post-conviction relief hearing that Applicant was thoroughly warned about proceeding to trial, was informed of the risks and potential sentence he faced if convicted and yet chose to proceed to trial despite those warnings. It is unreasonable to think he would have changed his mind had he been aware of Cooper's statement.

Applicant has failed to show how Counsel was deficient regarding this allegation or how he was prejudiced by any alleged deficiency. As such, this allegation should be denied and dismissed.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately investigate and call witnesses to contradict Samantha Cooper.

Applicant alleges Counsel was deficient for failing to call Gladys Evans (Evans) to rebut Cooper's testimony at trial.

Evans testified on behalf of Applicant at the post-conviction relief hearing. Evans testified she has known Applicant for thirteen years. Evans testified she lived next door to Applicant. Evans testified her door is about ten feet from Applicant's door. Evans testified she did not watch Victim or her siblings. Evans testified she was never asked by Victim's mother to watch Victim on the date of the incident. Evans testified she has arthritis and on the date of the incident decided to walk to her door to get some sunshine. Evans testified she saw Victim sitting on Applicant's porch and invited her in, but Victim refused. Evans testified she told Victim to knock on Applicant's door and she did. Evans testified Applicant opened the door and asked Victim why she was beating on the door. Evans testified Victim went into Applicant's house and she went back inside her house, shut the door, and watched television. Evans testified she did not see Applicant anymore until two hours later when she saw all of the people in the neighborhood outside. Evans testified she did not see Applicant again until law enforcement brought him out. Evans testified she would have heard someone screaming and she did not hear anything that day. Evans testified she made a statement to police officers who came to her residence that day. Evans testified she told the officers she did not have company that day. Evans testified she never spoke to anyone else regarding the incident. Evans testified she did not hear Applicant's "confession" to Cooper and if it had happened she would have heard it. Evans testified she has known Applicant for a long time, but would not lie for him. On cross-examination, Evans testified she does not know Cooper, but knows she is Victim's mother's sister. Evans testified she does not know what Cooper looks like.

Counsel testified he was not aware prior to trial what Cooper would be stating in her testimony. Counsel testified he met with Applicant and his family prior to trial and they did not provide him any leads or witnesses to investigate. Counsel testified the only mention of Evans in the police report was one sentence where Victim states she went to Evans' residence prior to going to Applicant's residence. Counsel testified again after hearing Evans' testimony at the post-conviction relief hearing and Counsel testified Evans' testimony would not have changed his trial strategy. Counsel testified he would have consulted with Applicant and his family about whether to call Evans had they known about Cooper's testimony. Counsel testified he did not feel a rebuttal witness was necessary after Cooper's testimony because he felt his cross-examination was effective. Counsel testified his trial strategy was to show the jury the terrible job Kingstree Police Department did handling this case.

"The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements." Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). In Thornes, the petitioner alleged his counsel was ineffective for failing to interview the victim. Id. at 308, 426S.C.2d at 765. At the post-conviction relief hearing, Thornes and the victim testified to demonstrate that the victim's testimony would have been sufficient to sway the outcome of the trial or Thornes' decision to pled *nolo contendere*. Id. at 309, 426 S.C.2d at 765. Thornes argued his counsel did not interview victim prior to his plea, and as a result, failed to have a realistic appraisal of Thornes' chances at trial. Id. The Court held, "This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Id. at 309-310, 426 S.C.2d at 765. "The attorney, in the case at bar, unless clairvoyant, could not have reasonably known that any benefit would accrue to his client." Id. at 310, 426 S.E.2d at 766.

Here, Counsel could not have known to call Evans as a rebuttal witness because he did not know about Cooper's testimony prior to trial. Counsel testified Applicant did not give him any witnesses or leads to investigate in this case. Counsel testified the law enforcement report had one sentence about Evans and it only pertained to the Victim contacting her prior to Victim going to Applicant's residence. As in Thornes, Counsel here cannot be found deficient as he could not have reasonably known Evans' testimony would be necessary to rebut Cooper's testimony as he did not know what Cooper was going to say at trial. Applicant and his family did not provide any witnesses or leads for Counsel to pursue prior to trial. Applicant's own statement to law enforcement puts him in the house with Victim at the time of the incident. Counsel was not investigating an alibi defense and did not have an affirmative defense in this case. As the parties stated numerous times in the record, this case came down to the credibility of Victim. Counsel had no reason to believe Evans would have provided any assistance to the defense since, even by Applicant's own statement, only Applicant and Victim were in the residence at the time of the incident.

Applicant has also failed to show how he was prejudiced by Counsel's alleged deficiency. Evans' testimony at the post-conviction relief hearing was not persuasive on the issue of whether Applicant was confronted by Cooper. First, Evans testified she did not know Cooper and did not know what she looked like. Second, Evans testified after Victim went into Applicant's residence, she went back inside, shut the door, and watched television. Evans testified she did not come back to the door until two hours later when she observed all of the people in the neighborhood outside. Based on Cooper's testimony, her confrontation occurred after she talked to Victim shortly after the incident took place and prior to her calling the police. (Trial Tr. 278-284.) At that time, according to Evans' testimony, she would not have seen Applicant or Cooper as she was back

inside of her residence watching television. Cooper's testimony also indicated the confrontation did not take place inside Applicant's residence or on his porch. Cooper testified Applicant was standing on the grass when she confronted him. (Trial Tr. 281) Cooper also testified Applicant ran to his door and locked it and she did not pursue him because he was a minor. (Trial Tr. 283.) Based on Evans' testimony at the post-conviction relief hearing, it is entirely possible for the confrontation to have occurred outside of her presence, thus making Evans' testimony inconsequential to Applicant's case.

Lastly, Counsel testified he was effective in his cross-examination of Cooper and testified she did not come off credible at trial. Counsel testified he did not believe a rebuttal witness would have been necessary at trial. As the trial judge stated when he denied Counsel's motion for a new trial, "[I]t's a credibility question whether they believed particularly the young victim or not. And they obviously believed her." (Trial Tr. 381.) This case did not hinge on Cooper's testimony or a color photograph, it came down to the credibility of Victim and her mother. As both Counsel and Barr testified, Victim's mother was the most compelling witness at trial.

Applicant has failed to show how Counsel was deficient on this allegation or how he was prejudiced by any alleged deficiency. As such, this allegation should be denied and dismissed.

V. CONCLUSION

Consequently, Applicant has failed to meet his burden to show how Counsel was deficient in his representation or any prejudice resulting from the alleged deficiencies. Therefore, this application should be denied and dismissed with prejudice.

Respectfully submitted,

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April 23rd, 2019

STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG JUSTIN MCBRIDE, #357684, Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	)	IN THE COURT OF COMMON PLEAS 2018-CP-45-0107 AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Brief in Support of Dismissal** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

The Honorable Kristi F. Curtis
Presiding Judge, Third Judicial Circuit
215 North Harvin Street
Sumter, South Carolina 29150

Tristan M. Shaffer, Esquire
Tristan M. Shaffer, Attorney at Law
Post Office Box 1027
Chapin, South Carolina 29036

DATED this the 23rd day of April 2019.

Kaitlyn S. Slice, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Justin McBride, #357684, Applicant, v. State of South Carolina, Respondent.	2018-CP-45-107 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed on February 22, 2018, by Justin McBride (Applicant) and amended on March 15, 2019. The State (Respondent) filed a Return on June 27, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on March 26, 2019, at the Sumter County Courthouse. Applicant was present at the hearing and represented by Tristan Shaffer, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf and presented testimony from his neighbor, Gladys Evans. Derrick Mobley (Counsel), Assistant Solicitor Kimberly Barr (Barr), and Appellate Counsel Wendy J. Keefer (Appellate Counsel), also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Applicant was indicted at the March 2012 term of the Williamsburg County Grand Jury for first-degree criminal sexual conduct with a minor and assault with intent to commit first-degree criminal sexual conduct with a minor

(Amended 2010-GS-45-0283). The charges stem from an incident on June 21, 2010, in which Applicant, who was sixteen years old, forced his nine-year-old cousin to perform oral sex on him. Immediately afterwards, Applicant attempted to penetrate the victim's rectum. Tr. 90-101.

Counsel represented Applicant and Barr prosecuted the case. On October 28-30, 2013, Applicant proceeded to a jury trial before the Honorable John C. Hayes, III, and was found guilty of first-degree criminal sexual conduct with a minor. Applicant was acquitted of assault with intent to commit criminal sexual conduct with a minor in the first degree. Judge Hayes sentenced Applicant to imprisonment for twenty-five years.

Applicant filed a timely notice of appeal, and appeal was perfected by Wendy J. Keefer, Esquire, and Adam Owensby, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction in an opinion dated February 17, 2016. Applicant petitioned for rehearing on February 23, 2016, and Respondent filed a return dated April 25, 2016. On May 25, 2016, the Court of Appeals withdrew its opinion and substituted a new opinion affirming the convictions. Applicant's appellate attorneys were relieved as counsel, and Applicant proceeded *pro se*, filing an amended petition for writ of certiorari to the South Carolina Supreme Court. Respondent filed a return on October 11, 2016. The Supreme Court denied certiorari on June 16, 2017. The remittitur was issued on June 30, 2017.

SUMMARY OF FACTS

Victim was just shy of her tenth birthday when she was sexually assaulted by Applicant. She was thirteen years old at the time of the trial. (Trial Tr. 89.) Applicant was sixteen years old at the time he sexually assaulted Victim, who was his cousin. (Trial Tr. 108.)

Victim was attending summer school. For the first time, she was riding the bus, which she was excited about. It was her second day of summer school and her second day riding the bus.

The other children on her bus told Victim that her mom was not home, which made Victim upset. She went to a neighbor's house, but when she saw the neighbor had company, she went to her Aunt Tina's house instead. Aunt Tina is Applicant's mother. She knocked on the door and Applicant answered and let her in.[1] She was alone in the house with Applicant. Applicant was watching television. Victim commented that it was a show with bad words, so they should turn the television off. That prompted Applicant to begin a violent sexual assault. (Trial Tr. 90-94.)

Applicant took out his penis and told Victim to "jerk it." (Trial Tr. 95, lines 5-6.) He grabbed Victim's hand and put it on his penis. Applicant grabbed Victim's head and pulled her toward his penis. (Trial Tr. 95-96.) Victim testified as follows on this point:

> Q: He grabbed your head hard?
>
> A: Yes, ma'am.
>
> Q: And pulled it down to his manhood; is that right?
>
> A: Yes, Ma'am.
>
> Q: And then did what?
>
> A: He then he grabbed my head. Then he told put . . . my mouth on his manhood. And I put – I had my hand on his stomach and then pushed him away from me. And that's when the white stuff and clear stuff came out his manhood. It was in my mouth and on my shirt. And I ran in the bathroom.
> Q: You said you saw and white and clear stuff come out of his manhood?
>
> A: Yes, ma'am.
>
> Q: And it went in your mouth?
>
> A: Yes, ma'am, on my shirt.
>
> Q: What did that taste like?

[1] Detective Trena Hamlet noted that McBride's and Victim's houses were side by side with nothing but a small patch of grass between them. (Trial Tr. 181)

A: Nasty.

Q: And it went on your shirt. Is that a yes?

A: Yes, ma'am.

Q: Okay. And then you did what?

A: Then I ran into the bathroom and wipe it off, and spit it out of my mouth.

(Trial Tr. 97, lines 5-16.) Victim testified she spit out in the bathroom sink and wiped the semen off her shirt with a tissue. She put the tissue in a trash can. (Trial Tr. 97-98.)

When Victim came out of the bathroom, Applicant was spraying perfume all around the living room. (Trial Tr. 100.) Applicant tried to pull down her pants; he would pull them down, and Victim would pull them back up. (Trial Tr. 100.) Victim testified that Applicant tried to put his penis in her butt. Victim testified it hurt. (Trial Tr. 100 line 25 – 101, line 8.)

Victim pushed Applicant off her, and she ran to the front door. Applicant blocked her and "sucked" his teeth. She instead ran for the back door and ran out of the house. She went home and kicked on the door. Victim's mother was there. When her mother asked what was wrong, Victim did not reply. She was scared Applicant would come over to the house. But Victim's mother smelled "man perfume" and went next door. Victim testified she had deodorant on her shirt. She testified it was from when Applicant had his arm around her neck. She hurt the next day when she was making a bowel movement. (Trial Tr. 101-108.) Specifically, Victim testified she yelled to her mother she could not use the bathroom because "[h]e put his manhood in the back of my butt." (Trial Tr. 107, lines 3-8.)

Detective Trena Hamlet responded to a call regarding a female victim at Victim's residence. Several other officers and family members were already present. While speaking with

Victim and her family, Detective Hamlet noticed a white smear on the shoulder of Victim's shirt. After she spoke with Victim, Detective Hamlet spoke with Applicant to hear his side of the story. (Trial Tr. 176-179.)

Detective Hamlet testified that Applicant gave the following statement:

> He opened the door and asked why she was over there. Stated that her mom was not at home. She sat on the couch and they were watching TV. He stated that at one point he got up to go to the restroom. And while he was in there, she came in on him. He concealed, tried to conceal himself from her, because he was in the midst of using the restroom. Yelled at her to get out. And she went back in the living room and sat down. And shortly thereafter, she wanted to leave. He said that she didn't want to go to front door because a bug was on the door, so she went to go out the back. The back door was locked. So he had to unlock it. She couldn't unlock it, he had to unlock it for her to leave.

(Trial Tr. 181, line 13 – 182, line 2.) Detective Hamlet testified to the statement without objection from Applicant.

Victim's mother testified she arrived at home on time for the bus, or at least she thought so. However, Victim's mother did not hear the bus. She became agitated when her daughter did not come home – more so when the middle school and then high school buses came (Victim's bus should have arrived first). But after a while, she was startled by Victim kicking and beating on the door. Victim's mother became concerned because Victim was not talking, even after she asked Victim where she had been. Victim was excited to ride the bus the day before, but now Victim walked by her mother without discussion. Victim's mother grabbed Victim and smelled the cologne. Victim pointed to her Aunt's house when Victim's mother inquired about where she had been. Victim's mother testified Victim also had a stain on her shirt that smelled like deodorant. (Trial Tr. 225-232.)

Victim's mother went next door and asked Applicant what happened. Applicant claimed Victim walked in the bathroom on him. Victim's mother told Applicant that she did not believe him. Victim's mother decided it was best to leave at that point, since Applicant's mother was not home. Samantha Cooper, Victim's aunt, called the police. (Trial Tr. 234-237.)

Later that night, Victim's mother was trying to finish her school work – she was having trouble due to the stress of the day – when she heard Victim scream from the bathroom. Victim told her mother it hurt when she was trying to go to the bathroom. (Trial Tr. 237-238, 243.)

Law enforcement failed to take Victim's clothing during the interview. Victim's mother and her sister put Victim's clothing in a bag and were told to bring the bag with them to the Durant Center in Florence when they brought Victim for her appointment. The Durant Center told them to take the bag of clothes to the police. She left the clothes with an officer at the Kingstree police station. (Trial Tr. 245-248, 258.)

Lieutenant Thomas Dean McCrea testified that the officer described by Victim's mother as the officer receiving the clothes must have been Sergeant Grant Huckabee, who was an investigator, K-9 handler, and evidence custodian at the time. The only other person with access to the evidence room was Chief Ford. Both Huckabee and Ford are no longer employed with the Kingstree Police Department. Lieutenant McCrea was under the impression the clothing was sent to SLED for testing, but no record of this exists, and it appears the clothing was lost. This was not the first instance of Huckabee losing evidence before. No evidence intake sheet was located. (Trial Tr. 269-270.)

Samantha Cooper, Victim's aunt, testified she confronted Applicant with Victim's allegations, and he told her he did not mean to do it. Cooper understood Applicant's comments to be a confession. Cooper was enraged. She went running after Applicant, and he ran inside his

house. Cooper collected herself sufficiently enough to walk away rather than act on violent urges. Thereafter, she called the police. (Trial Tr. 275-282.)

ALLEGATIONS RAISED

During the evidentiary hearing, Applicant proceeded on the following allegations:

1. Ineffective Assistance of Counsel:
    a. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to challenge the jurisdiction of the Court of General Sessions to hear the case.
    b. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to move for Applicant's case to be remanded to the Family Court.
    c. Given the fact that Applicant was 16 at the time of the alleged offense, the twenty-five year sentence is cruel and unusual and violates the Eighth Amendment of the United States Constitution.
    d. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the mandatory minimum sentence pursuant to the Eighth Amendment of the United States Constitution.
    e. Given the fact that Applicant was 16 at the time of the alleged offense, the twenty-five year sentence is cruel and unusual and violates Article I Section 15 of the South Carolina Constitution as applied to Applicant.
    f. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the mandatory minimum sentence pursuant Article I Section 15 of the South Carolina Constitution.
    g. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the entirety of his statement pursuant to Jackson v. Denno.
    h. To the extent that Trial Counsel properly objected to the mandatory minimum sentence, Applicant submits that he was denied his Sixth Amendment right to effective assistance of Appellate Counsel for failing to brief the issue on appeal.
    i. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly review discovery documents and advise Applicant of the evidence against him.
    j. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately impeach the alleged victim with inconsistencies in her statements.

k. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to call Dr. Luberoff to testify.

l. Applicant was denied his Sixth Amendment right to effective assistance of appellate counsel when Appellate Counsel failed to brief the trial court's erroneous ruling that prohibited Applicant from presenting evidence of why Officer Huckabee had left the police department.

m. Alternative to l, Applicant was denied his Sixth Amendment right to effective assistance of counsel when his Trial Counsel failed to adequately preserve the issue raised in subsection l.

n. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel allowed the jury to be charged that Applicant could be found guilty of criminal sexual conduct for unindicted conduct.

o. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to burden shifting statements in the State's closing argument.

p. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the State's closing argument that was designed to inflame the passion and the prejudice of the jury.

q. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the State's argument that anal or vaginal sex was sufficient to result in a finding of guilty for Count I of the indictment.

r. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Samantha Cooper's testimony pursuant to Rule 5 and Brady.

s. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately investigate and call witnesses to contradict Samantha Cooper.

APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, direct appeal records, and Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the post-hearing briefs submitted by the attorneys and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to challenge the jurisdiction of the Court of General Sessions to hear the case and failed to have the case remanded to Family Court.[2]

Applicant alleges his case should not have been heard in General Sessions because Applicant was sixteen years old at the time of the incident.

Counsel testified he approached Assistant Solicitor Barr a couple of times requesting Applicant's case be moved to Family Court. Counsel testified Barr declined his request and Counsel testified there was no hearing or proceeding he could request to force the case be remanded to Family Court.

Barr testified Applicant was not a child based on the definition set forth in §63-19-20 S.C. Code Ann. Barr testified she did not move the case to Family Court because Victim's mother told her this was not the first time something of this nature occurred between Applicant and Victim, and Barr was concerned Applicant was a predator. Barr testified it was within her discretion whether the case was heard in Family Court or General Sessions.

[2] Allegations a and b in Applicant's amended application.

Applicant's argument is contradicted by the plain meaning of the applicable statutes and case law. "Child" is defined as follows under S.C. Code Ann. §63-19-20(1):

> (1) "Child" or "juvenile" means a person less than seventeen years of age. "Child" or "juvenile": does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen year or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

Criminal sexual conduct with a minor in the first degree is a felony with a penalty of twenty five years' imprisonment or life imprisonment. S.C. Code Ann. §16-3-655(D)(1). Therefore, under the plain language of the statute, Applicant was not a child when he sexually assaulted Victim. The Supreme Court found that a sixteen year old charged with A, B, C, or D felonies is not a "child" as defined by statute and, therefore, may be charged in circuit court without first bringing the charges in family court. State v. Graham, 340 S.C. 352, 532 S.E.2d 262 (2000).

Additionally, the statute is undoubtedly constitutional. The protection of family court to juveniles is provided by our legislature as a privilege, and not as a matter of right. State v. Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980); see also C.J.S.2d Constitutional Law § 1432 ("Courts have upheld statutes divesting a juvenile court of jurisdiction of proceedings against children of a specified age for particular violations or crimes . . . ."). No constitutional infirmity exists where a state has determined a class of offenses requires the juvenile to be treated as an adult. See Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) (noting "several of our sister circuits have upheld the constitutionality of statutes similar to Florida's which permit juveniles to be treated as adults without a hearing in certain instances"). In the instant case, Applicant committed an offense the legislature ranks high in terms of severity. It is one of the few non-homicide crimes to be

punishable by up to life imprisonment. Applicant violently assaulted Victim in such a manner that evidences his danger to society and requires long-term incarceration. No constitutional issue exists in the legislative determination that sixteen-year-olds who rape children under the age of eleven should be prosecuted as adults. General Sessions had jurisdiction under due process of the law over Applicant's charges.

This Court finds the testimony of Counsel and Barr as to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing to have his case remanded to Family Court as jurisdiction was proper in General Sessions. Applicant has also failed to establish any resulting prejudice from Counsel's alleged deficiency. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

Applicant's twenty-five year sentence is cruel and unusual and violates the Eighth Amendment of the United States Constitution and Article I Section 15 of the South Carolina Constitution. Applicant was denied effective assistance of counsel when Counsel failed to object to the mandatory minimum sentence pursuant to the Eighth Amendment of the United States Constitution and Article I Section 15 of the South Carolina Constitution.[3]

Applicant alleges his sentence violates the United States Constitution and the South Carolina Constitution because it imposes a mandatory minimum sentence on Applicant and does not allow the Court to consider Applicant's age at the time of the offense. Applicant cites Miller v. Alabama, 567 U.S. 460 (2012), in support of this allegation.

Counsel testified he did not object to Applicant's twenty-five year sentence because he did not believe he had grounds to object as a twenty-five year sentence for a juvenile has not been

[3] This section addresses allegations c, d, e, and f of Applicant's amended application.

declared unconstitutional by the courts. Counsel testified if Applicant had received a life sentence he would have objected.

In criminal cases, a trial judge has broad discretion in imposing a sentence within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974); see State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed."). Generally, appellate courts will only interfere with the discretion of a judge in the imposition of a sentence in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952). "Absent partiality, prejudice, oppression, or corrupt motive, [the appellate court] lacks jurisdiction to disturb a sentence that is within the limits prescribed by statute." State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997).

Notwithstanding a trial judge's authority to impose a sentence falling within the statutory limits, the Eighth Amendment of the United States Constitution prohibits the imposition of cruel and unusual punishment. See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Likewise, the Constitution of the State of South Carolina prohibits the imposition of cruel and unusual punishment. See S.C. Const. Art. I, §15 ("Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained."). Pursuant to the Eighth Amendment, punishments must not be "inherently barbaric" and must be graduated and proportioned to the offense. Graham v. Florida, 560 U.S. 48, 59 (2010); see Atkins v. Virginia, 536 U.S. 304, 311 (2002) (instructing it is

a precept of justice the punishment for a crime should be graduated and proportioned to the offense). However, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). Instead, "it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. (citations omitted).

Here, Applicant alleges his twenty-five year sentence for criminal sexual conduct with a minor in the first-degree is violative of the United States and South Carolina constitutional prohibition against cruel and unusual punishment. However, both the United States Supreme Court and the South Carolina Supreme Court have recognized even a sentence of life without parole is constitutionally permissible for a juvenile convicted of homicide. See Montgomery, __ U.S. __, 136 S. Ct. 718, 733 (2016) (recognizing a sentencing judge may encounter a rare juvenile offender for whom a life without parole sentence is justified); Miller v. Alabama, 567 U.S. at 479 ("the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders."); Aiken v. Byars, 410 S.C. 534, 545, 765 S.E. 2d 572, 578 (2014) (recognizing a sentencing judge "[w]ithout question" could still properly determine life without parole was an appropriate sentence for a juvenile murderer following an individualized hearing in which "the mitigating hallmark features of youth" were fully explored and noting the legislature's decision authorizing life without parole sentences for juveniles who committed murder would be honored on appeal).

On April 3, 2019, the South Carolina Supreme Court issued an opinion addressing the practices of juvenile sentencing. State v. Slocumb, S.C. Sup. Ct. Order dated April 3, 2019 (Shearouse Adv. Sh. No 14). The petitioner, Conrad Slocumb, was thirteen years old at the time he incurred charges that led to a thirty year prison sentence. Three years after that conviction, the petitioner escaped from custody and in the forty-five minutes he was free, he forced his way into

the victim's residence, claimed he was armed and forced the victim to give him money, keys, cigarettes, clothes, jewelry, and beer. The petitioner then raped the victim. After he was recaptured, the petitioner was eventually convicted of 1st degree burglary, first-degree criminal sexual conduct, robbery, and escape. The petitioner was sentenced to an aggregate term of 130 years because the sentences were run consecutively. The petitioner appealed on the basis that he received a *de facto* life sentence in violation of the Eighth Amendment of the United States.

In the Slocumb opinion, the Court identifies three cases – Roper v. Simmons [4], Graham v. Florida [5], and Miller v. Alabama[6] - that have addressed juvenile sentencing practices and conducts an extensive analysis of those cases. At the conclusion of their lengthy analysis, the Court held, "Neither Graham nor the Eighth Amendment, as interpreted by the Supreme Court, currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a *de facto* life sentence on a juvenile nonhomicide offender." Slocumb, Op. No. 27877 (S.C. Sup. Ct. filed April 3, 2019).

This Court finds Counsel's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing to object to Applicant's sentence since the sentence was constitutional. Applicant's argument that his sentence was unconstitutional based on the Court's holding in Miller is a non-starter as Applicant was sentenced to twenty-five years imprisonment, not a life sentence. Applicant's sentence cannot even be classified as a *de facto* life sentence as he received an individual sentence of twenty-five years and will only be approximately forty-four years old upon his release. Applicant's argument

[4] 543 U.S. 551 (2005).
[5] 560 U.S. 48 (2010).
[6] 567 U.S. 460 (2012).

that the holding in Miller should apply to a juvenile sentenced to twenty-five years is wholly without merit.

This Court finds Applicant has also failed to establish any resulting prejudice from Counsel's alleged deficiency. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of counsel and, therefore, this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the entirety of his statement pursuant to Jackson v. Denno.[7]

Applicant alleges Counsel should have challenged his entire statement to law enforcement during the pre-trial Denno hearing.

Counsel testified he only challenged Applicant's initial statement to law enforcement at the hearing because the remaining portions of Applicant's statement were his version of the facts. Counsel testified this statement would have been consistent with Applicant's testimony had he testified at trial. Counsel testified the remaining portions of the statement coming in gave them the opportunity to get Applicant's side of the story out before the jury without Applicant having to testify at trial. Counsel testified he moved to suppress Applicant's initial comment to law enforcement because he did not want the jury to hear anything from Applicant regarding Victim's allegations. Counsel testified he was successful in getting the initial statement suppressed.

The initial statement Applicant made to Det. Hamlet was in response to her asking Applicant if he knew why law enforcement was at his residence. Det. Hamlet testified during the Denno hearing that Applicant responded, "[T]hey were trying to say that [I] touched [my] cousin."

[7] 378 U.S. 368 (1964)

(Trial Tr. 31.) Counsel was successful in getting that statement suppressed. Det. Hamlet testified to the remaining portion of Applicant's statement to law enforcement was as follows:

> He stated he was home. He heard a knock on the door. His cousin was at the door. And he asked why she was there. And she said no one was at home; that her mother wasn't at home. And he allowed her to come in. He said that she looked like she was mad. Sat down on the couch. They watched TV. [A]t some point he got up, and went into the restroom. And then shortly after she came up . . . and he said he tried to, he was using the restroom and he tried to conceal himself from her. And yelled at her to, you know, leave the bathroom. He stated a short while later she was ready to go home. But she didn't want to go out the front door because there was a bug on the door. . . . She went to the back door, but it was locked. She was unable to lock it, so he unlocked the door for her, and she went home.

(Trial Tr. 31-32.)

This Court finds Counsel's testimony as to this allegation very credible. Applicant has failed to meet his burden on this allegation as Counsel testified it was part of his trial strategy to allow Applicant's statement in so the jury could hear his version of the facts. Applicant has failed to show how Counsel was deficient for not moving to suppress Applicant's entire statement. Applicant has also failed to show how he was prejudiced by this alleged deficiency since he has failed to show how the suppression of his statement would have changed the outcome of his trial. Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

To the extent that Trial Counsel properly objected to the mandatory minimum sentence, Applicant submits that he was denied his Sixth Amendment right to effective assistance of Appellate Counsel for failing to brief this issue on appeal.

Appellate Counsel testified that she was lead counsel on the appeal and Adam Owensby was assisting her to get appellate experience. Appellate Counsel testified she made all of the decisions on what issues to raise on appeal and she was the proper attorney to respond to the issues raised by Applicant in his post-conviction relief application.

Appellate Counsel testified she briefed all meritorious issues that were preserved for appeal. On cross-examination, Appellate Counsel testified she did not brief the issue regarding Applicant's twenty-five year sentence because it was not preserved for appeal, and the appellate courts in South Carolina have not found a sentence cruel and unusual for juveniles unless it was a life sentence.

This Court finds Appellate Counsel's testimony as to this allegation very credible. Applicant has failed to meet his burden on this allegation as Applicant was sentenced to twenty-five years by the trial court, which is clearly not tantamount to a life sentence as Applicant will be approximately forty-four years old upon his release. Applicant's allegation that Appellant Counsel was deficient for failing to brief this issue is without merit as Appellant Counsel testified it was not preserved, nor would it have been a meritorious claim to raise on appeal. Applicant has also failed to show how he was prejudiced by Appellate Counsel's failure to brief this issue as he has failed to establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013). Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly review discovery documents and advise Applicant of the evidence against him.

Applicant argues Counsel was ineffective for failing to obtain the color copy of a photograph showing a white stain on Victim's shirt that was introduced by the State during the trial. Applicant further argues his rejection of the plea offer was not knowingly and intelligently entered because Applicant had not had the opportunity to view the color photograph prior to rejecting the offer.

Applicant testified he did not see the color photograph unless Counsel had it at trial. Applicant testified he reviewed discovery with Counsel but it did not include a color copy of the photograph or anything about his statement to Samantha Cooper. Applicant testified he turned down the plea offer because he was under the assumption that there was no evidence against him. Applicant testified Counsel gave him a copy of the police report and he recalled telling police nothing sexual happened. Applicant testified had he known about the color photograph he most likely would have pled. On cross-examination, Applicant testified he viewed the forensic interview of Victim prior to trial.

Counsel testified he drove to the solicitor's office two or three times in order to review the solicitor's file and obtain a copy of the forensic interview of Victim. Counsel testified the color photograph was not in the file on any of the occasions when he viewed the file. Counsel testified he had a photocopy of the photograph in his file that was mostly black with a white stripe across it. Counsel testified when the color photograph was introduced during the trial he objected. (Trial Tr. 153.) Counsel testified when the trial court allowed the photograph to come in he moved for a mistrial. (Trial Tr. 174.) Counsel testified he later moved to exclude the photograph after Det. Hamlet could not identify Victim in the photograph or lay proper foundation for its admission. (Trial Tr. 202-203) Counsel testified he did not ask for a continuance when the color photograph was introduced because he was able to cross-examine law enforcement on their inability to collect evidence and was able to impeach Det. Hamlet on the stand. Counsel testified he was also worried if he requested a continuance the shirt would be found and tested and he believed the results would have been detrimental to Applicant. Counsel testified the photograph was "absolutely not" the most compelling evidence against Applicant at trial.

Counsel testified prior to trial the State provided a plea offer to Applicant. Counsel testified he advised Applicant to take the plea offer. Counsel testified Applicant rejected the plea offer and Counsel had Applicant sign a waiver form indicating he was rejecting the offer contrary to Counsel's advice. Counsel testified at that time of the rejection Applicant had not seen the color photograph that was introduced at trial. Counsel testified Applicant had viewed all of the evidence against him that Counsel possessed, including Victim's forensic interview. Counsel testified he, Barr, Applicant's mother, and Applicant discussed the plea offer prior to trial and Counsel explained it was in his best interest to take the offer. Counsel testified he told Applicant he was young and the risk of going to trial was too high. Counsel testified the Victim's allegations against Applicant were corroborated during the forensic interview, which Applicant viewed. Counsel testified he believed Applicant came from a good family and believed if Applicant took the plea offer that he could go before the court and ask for probation. Counsel testified Applicant did not want to take the plea offer because it was not negotiated and he did not want to accept an offer where he would possibly go to prison and have to register as a sex offender.

Barr testified she provided a copy of the photograph in her file to Counsel prior to trial. Barr testified her copy of the photograph was not in color and was similar to what Counsel had received. Barr testified that is how she received the photograph from police. Barr testified she received the color copy either right before trial or during trial. Barr testified the color photograph provided more detail. Barr testified the photograph was not a compelling piece of evidence against Applicant because the law enforcement agency had lost all of the evidence and the photograph was the only piece of evidence they kept. Barr testified her administrative assistant sends a request to the law enforcement agency for a copy of everything in their file. Barr testified the photograph was not inculpatory in her view. Barr testified the photograph helped only because all of the other

evidence was lost. Barr testified the photograph corroborated a portion of Victim's testimony, but the case did not rise or fall on the photograph.

Barr testified she offered Applicant a reduced charge to Lewd Act with a possible sentence range of 0-15 years. Barr testified she had a conversation over the phone and in person with Counsel regarding the offer. Barr testified she met with Applicant and Counsel about the plea offer and explained the penalties Applicant faced if he went to trial. Barr testified if he took the plea offer she could not recommend probation but would not oppose it. Barr testified she told Applicant if he took the plea offer he would still have to register as a sex offender and Applicant told her he might as well be in prison if he has to register as a sex offender. Barr testified she told Applicant that was easy for him to say now, but on his way to SCDC he would feel differently. Barr testified she asked Applicant if his mother could come into their meeting and he agreed. Barr testified she let Counsel, Applicant, and Applicant's mother discuss the plea offer outside of her presence. Barr testified when she went back into the room, Applicant's mom told her it was Applicant's decision and he wants to reject the offer. Barr testified the plea offer would have been a fair resolution to the case. Barr testified she does not recall the offer expiring. Barr testified she may have increased the offer had Applicant wanted to accept a plea during the trial. Barr testified she does not recall Counsel coming to her during the trial for a plea offer and she would not have extended another plea offer because she believed the testimony of Victim and her mother.

In Strickland, the Supreme Court held, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Strickland, 466 U.S. at 670. Here, although Counsel was not deficient with regards to this allegation, this allegation can be easily disposed of on a prejudice analysis alone. In order for Applicant to prevail

on this allegation he must show "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 695.

Applicant has failed to show how Counsel obtaining the color photograph prior to trial would have changed the outcome of the trial. Both Counsel and Barr testified the photograph was not the most compelling evidence against Applicant at trial. Barr testified specifically that the case did not rise or fall on the photograph. Additionally, Counsel testified he was able to impeach Det. Hamlet regarding the photograph during his cross-examination. Counsel testified during cross-examination Det. Hamlet could not even identify whether the person in the picture was Victim. Counsel further testified his trial strategy would not have changed had he had the color photograph ahead of trial. Counsel and Barr testified Victim and Victim's mother testified at trial and Victim's mother was the most compelling witness against Applicant.

Applicant claims if he had seen the color photograph prior to trial he would have changed his mind and accepted the plea offer from the State. First, Applicant was aware the photograph existed as Counsel had a black and white copy of the color photograph – although poor quality- in his file. Applicant also had a copy of the incident report, which referenced the photograph. Second, Applicant testified he viewed the forensic interview of the Victim prior to declining the plea offer. It is unreasonable to believe the photograph – which was an insignificant piece of evidence- would have swayed Applicant's decision to accept the plea offer when viewing Victim's forensic interview, which is arguably of much more significance in this case, did not have that affect. Finally, Counsel advised Applicant to take the plea offer and explained to Applicant it was in his best interest to plead guilty. Counsel and Barr testified they both met with Applicant and discussed the plea offer with Applicant and his mother and Applicant was hesitant about the plea offer because he did not want to register as a sex offender or go to prison. Again, it is unreasonable

to believe a color photograph showing a black shirt with a white mark on it would have been a great motivator for Applicant to take a plea offer that would have required him to register as a sex offender, especially since the State could not provide the shirt or any additional evidence regarding the shirt at trial because it had been lost prior to trial and no testing was ever conducted on the shirt or other clothing submitted by Victim.

This Court finds the testimony of Counsel and Barr with respect to this allegation very credible whereas the testimony of Applicant is not credible. This Court finds Applicant has failed to show that the outcome of his trial would have been different had Counsel obtained the color copy of the photograph prior to trial as Counsel was effective in impeaching Det. Hamlet regarding the photograph. Counsel was also successful in getting testimony from other witnesses showing the State lacked any evidence derived from the shirt in the photograph because the shirt and other such evidence was lost by law enforcement and never tested. As Barr testified, the trial did not rise or fall on the photograph. Based on the standard set forth in Strickland, this Court finds Applicant has failed to meet his requisite burden and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately impeach the alleged victim with inconsistencies in her statements.

Counsel testified his trial strategy was to impeach Victim and show the jury the State had no DNA or physical evidence corroborating Victim's story. Counsel testified he believed he handled the cross-examination of Victim well during the trial. Counsel testified during cross-examination he confronted Victim on inconsistent statements and also cross-examined Det. Hamlet on Victim's inconsistent statements. The record also supports Counsel's testimony that he cross-examined Victim and Det. Hamlet on Victim's inconsistent statements. (Trial Tr. 121-122, 130, 134, 209-210, 212.)

This Court finds Counsel's testimony as to this allegation very credible. This Court also finds Applicant has failed to meet his burden on this allegation as Counsel's testimony and the record shows Counsel did cross-examine Victim on her inconsistent statements and Applicant has failed to show what Counsel should have or could have done differently to change the outcome of his trial. As such, this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to call Dr. Luberoff to testify.

This allegation was expressly waived by Applicant during the evidentiary hearing. As such, this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of appellate counsel when Appellate Counsel failed to brief the trial court's erroneous ruling that prohibited Applicant from presenting evidence of why Officer Huckabee had left the police department.

Appellate Counsel testified she raised every preserved meritorious issue she could in her appeal.

This Court finds Appellate Counsel's testimony with regards to this allegation very credible. This Court also finds Applicant's allegation is meritless as this issue was not preserved for appeal during the trial and, therefore, could not have been raised by Appellate Counsel on appeal. This Court finds this allegation is denied and dismissed with prejudice.

Alternative to l, Applicant was denied his Sixth Amendment right to effective assistance of counsel when his Trial Counsel failed to adequately preserve the issue raised in subsection l.

Counsel testified Officer Huckabee was the evidence custodian at Kingstree Police Department during the case. Counsel testified he had learned Officer Huckabee was terminated because he lost evidence while in that position. Counsel testified during the trial the State objected to a question he asked Lt. McCrea regarding the reason Officer Huckabee left the Kingstree Police Department. Counsel testified he did not believe he needed to preserve that issue for appeal

because he got the answer he wanted in a follow up question from Lt. McCrea. Counsel testified he was able to get Lt. McCrea to testify that Officer Huckabee had lost evidence.

During the cross-examination of Lt. McCrea, the following exchange occurred:

> Counsel: . . . Do you know why officer Huckabee left the department?
>
> Lt. McCrea: Yes, I know why.
>
> Counsel: Can you disclose to the court why?
>
> State: Judge we would object on relevance grounds.
>
> Court: I sustain the objection.
>
> Counsel: Okay. During officer Huckabee's tenure with your department, has there been other instances where evidence has been lost?
>
> Lt. McCrea: Yes, sir.
>
> Counsel: Was it ever recovered?
>
> Lt. McCrea: No.

(Trial Tr. 274-275.)

The record establishes Counsel was able to elicit the testimony he wanted the jury to hear from Lt. McCrea regarding Officer Huckabee and therefore Counsel did not need to preserve this issue for appeal. Additionally, the inference was clearly noted by the South Carolina Court of Appeals as the opinion states, "[Lt. McCrea] admitted other evidence in the department had been lost during Huckabee's tenure with the department." State v. McBride, 416 S.C. 379, 786 S.E.2d 435 (2016).

This Court finds Counsel's testimony as to this allegation very credible. This Court also finds Counsel was not deficient for failing to preserve this issue for appeal as he got the testimony he wanted from Lt. McCrea despite the State's objection. Applicant has also failed to show how

he was prejudiced by Counsel's failure to preserve this issue as he has failed to establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013). Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel allowed the jury to be charged that Applicant could be found guilty of criminal sexual conduct for unindicted conduct.

Applicant alleges Counsel was ineffective for allowing the jury to be charged that Applicant can be found guilty of criminal sexual conduct for unindicted conduct.

Counsel testified he did not object to the court providing a full description of sexual battery in the jury charge. Counsel testified the jury was properly instructed as to what each count required for Applicant to be found guilty. Counsel testified he believed the jury was properly instructed and he would have objected if they were not. Barr also testified the jury was properly instructed regarding Count 1 of Applicant's indictment.

The trial court properly explained to the jury that Applicant was charged with first-degree criminal sexual conduct with a minor. The trial court instructed the jury as follows:

> It's alleged that he committed this offense by engaging in oral sex with a minor. Here the state must prove beyond a reasonable doubt that [Applicant] engaged in sexual battery with the victim. The term sexual battery which is includes [sic] fellatio, which is oral sex. The state must prove beyond a reasonable doubt the victim was less than 11 years old at the time of the sexual battery and that the sexual battery of course occurred.

(Trial Tr. 367, line 7-17.)

Barr and Counsel both addressed Count 1 of Applicant's charges during their closing arguments. Barr stated, "Now Count 1 of the indictment, relates to the testimony regarding oral

sex. Count 2, is assault and battery or assault with intent to commit criminal sexual conduct in the first degree. . . . Sexual battery can mean oral sex." (Trial Tr. 320-321.) Counsel stated, "[The trial judge] is going to go over the actual accusation itself, it says oral sex." (Trial Tr. 358.) Additionally, the jury had the indictment and the verdict form during deliberations, both explain Count 1 of Applicant's charges pertains to the victim performing oral sex on Applicant.

This Court finds Applicant's allegation that Counsel failed to object to the jury being instructed that they could find Applicant guilty of unindicted conduct is meritless. This Court finds Barr and Counsel's testimony as to this allegation very credible. The record before this Court also clearly refutes this allegation as the jury was properly instructed that Count 1 pertained to oral sex and Counsel testified he would have objected had the jury been instructed otherwise.

This Court finds Counsel was not deficient for failing to object to the jury instruction because the jury was properly instructed. This Court finds Applicant has also failed to establish any resulting prejudice from this alleged deficiency. Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to burden shifting statements in the State's closing argument.

Counsel testified he did not recall any objectionable comments made by Barr during her closing arguments. Counsel testified he did not believe Barr's closing argument shifted the burden of proof to Applicant. Barr testified she is allowed to argue evidence and reasonable inferences from evidence during her closing argument.

The allegation that the State's closing argument shifted the burden to Applicant is meritless. Counsel stated in his closing argument that the State has to meet their burden of proof beyond a reasonable doubt. (Trial Tr. 352, 356, 357, 359) Additionally, the trial court properly

instructed the jury on the State's burden of proof and that Applicant was entitled to the benefit of any reasonable doubt. (Trial Tr. 362-363, 364, 367, 368, 372.)

This Court finds Applicant's allegation that Counsel failed to object the State's closing argument is meritless. This Court finds Barr and Counsel's testimony as to this allegation very credible. This Court finds Counsel was not deficient for failing to object to the State's closing argument as the comments highlighted by Applicant were not objectionable. Applicant has also failed to establish any resulting prejudice from this alleged deficiency. Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the State's closing argument that was designed to inflame the passion and the prejudice of the jury.

Counsel testified he recalled Barr talking about searching for the truth during her closing argument but did not object. Counsel testified he did not believe any of Barr's statements were objectionable. Counsel testified it was part of his trial strategy to have the last closing argument and he believed it was effective since Applicant was found not guilty on Count 2. Counsel also testified the trial judge instructed the jury that their verdict cannot be based on passion, sympathy, public opinion, prejudice, or matters outside the record. (Trial Tr. 370-371.) Counsel testified the jury was properly instructed on burden of proof and presumption of innocence.

Barr testified that in her closing she is allowed to argue the evidence she presented during trial and any reasonable inferences from the evidence.

An appellate court will review the alleged impropriety of a solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. State v.

Rudd, 355 S.C. 543, 586 S.E.2d 153 (2003). "A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)). "Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Applicant highlights two statements from Barr's closing argument that he alleges were objectionable as they were designed to "inflame the passion and prejudice of the jury." Those two statements are as follows:

1. Do you all remember on yesterday morning when the Clerk of Court sworn you all in and what she asked you to do, and what you agreed to do by your oath, is to well and truly try the case of the State of South Carolina versus Justin McBride under Indictment 2010-GS-45-283, and render a true verdict according to the law and according to the evidence so help you God. That was a pledge you all gave to this court and this case when you took your oath.

2. If a trial is the search for the truth, and if you all took an oath to render a true verdict according to the law and the evidence what do you do now. Do you say well, I believe that girl. I believe everything she said. I believe the defendant did it. But the state shouldn't have lost the evidence. Does that now mean that he's not held to account for his actions. Does that mean that at the end of the day this family and the State of South Carolina, doesn't seek justice. Does that now mean that you don't' render a true verdict in the case. Folks, I urge you all not to do that.

In the first statement, Barr is referring to the juror's oath that they took the day before when they were sworn in by the clerk. This statement in no way was prejudicial to the Applicant as the jurors were instructed regarding rendering a verdict according to the law and according to the evidence by the clerk and the judge prior to opening statements. After being sworn in, the judge addressed the jury and explained opening statements, closing arguments, his role as the judge, and told the jurors their role is to, "[d]etermine the true facts and apply the law and you can be in a position to return a verdict that speaks the truth."[8] (Trial Tr. 73-75.) Barr's comments, especially when viewed in light of the entire record, are in no way objectionable or prejudicial to Applicant.

In her second statement, Barr properly argues the inferences the jury could draw from the evidence presented in this case. "A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." (State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999) (internal citations omitted). Here, Barr does not urge the jury to find Applicant guilty on any improper grounds. Barr even states, ". . . I don't want you to find [Applicant] guilty because you feel sorry for Victim. Victim's mom and dad didn't want you to find [Applicant] guilty because you feel sorry for her." (Trial Tr. 343.) Barr's closing, especially when viewed in light of the entire record, does not inflame the passions or prejudice of the jury nor does it "so infect the trial with unfairness as to make the resulting conviction a denial of due process." DeChristoforo, 416 U.S. at 643.

Additionally, Counsel had the last closing argument at trial and, as Counsel testified, the jury was properly instructed by the trial court prior to deliberations. The jury was clearly not so

[8] This case was tried in October of 2013, which is well before the South Carolina Supreme Court's decision in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), which instructed trial judges to omit language like "just verdict" and "search for the truth" from their comments to the jury.

swayed by Barr's allegedly inappropriate comments as they found Applicant not guilty on one of his charges.

This Court finds Applicant's allegation that Counsel failed to object to statements during the State's closing that were designed to inflame the passions and prejudice of the jury meritless. This Court finds Barr and Counsel's testimony as to this allegation very credible. This Court finds Counsel was not deficient for failing to object to the State's closing argument as the comments highlighted by Applicant were not objectionable. Applicant has also failed to establish any resulting prejudice from this alleged deficiency. Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the State's argument that anal or vaginal sex was sufficient to result in a finding of guilty for Count I of the indictment.

Applicant alleges Counsel was ineffective for failing to object when the State informed the jury that Applicant could be convicted of Count 1 if there was vaginal or anal intercourse.

Both Counsel and Barr testified that the jury was properly instructed regarding Applicant's charges and what was required in order to find Applicant guilty of each charge.

During Barr's closing argument she states,

> Now Count 1 of the indictment, relates to the testimony regarding oral sex. Count 2, is . . . assault with intent to commit criminal sexual conduct in the first degree. You all also may also recall on yesterday, I told the law actually defines what sexual battery is. Sexual battery can mean oral sex. It can mean anal sex or anal intercourse. I shouldn't use the word sex, because it implies that it was consensual. But anal intercourse, vaginal intercourse. Count 2, specifically relates to testimony by Victim that the defendant attempted to put his penis in her behind. So if you find [Applicant] committed both of these acts, then your verdict should be that of guilty on both counts.

(Trial Tr. 320-321.)

This Court finds Barr's comments during closing clearly state Count 1 of the indictment relates to oral sex and Count 2 of the indictment relates to the allegation that Applicant attempted "put his penis in her behind." Additionally, the jury was properly instructed by the trial court on both counts, and the verdict form also states Count 1 relates to oral sex and Count 2 relates to "anal intercourse" with Victim.

This Court finds Barr and Counsel's testimony as to this allegation very credible. This Court finds Applicant has failed to show how Counsel was deficient for failing to object to the State's closing argument regarding Count 1 of Applicant's charges as the comments highlighted by Applicant were not objectionable. Applicant has also failed to show any resulting prejudice from the alleged deficiency. Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Samantha Cooper's testimony pursuant to Rule 5 and Brady.

Applicant testified had he known about Cooper's testimony prior to trial he most likely would have taken the plea offer.

Counsel testified he was not aware of any statement Applicant made to Samantha Cooper (Cooper) prior to trial. Counsel testified he is not sure the statement was a confession. Counsel testified the gist of Cooper's testimony was, "[Applicant] said I did not mean to do it. We need to talk." (Trial Tr. 282.) Counsel testified Cooper's testimony never defined what Applicant meant by "it." Although Counsel did object to Cooper's statement at trial, Counsel testified it was a statement against interest and he was not able to keep it out. (Trial Tr. 280.) Counsel testified Cooper's testimony was that she came over to confront Applicant after she talked to Victim and was in possession of a gun at the time. Counsel testified it would have been better to know about the statement prior to trial rather than being caught flatfooted. Counsel testified Applicant never

told him he had a conversation with Cooper prior to his arrest. Counsel testified if he had been aware of the statement it would not have changed his trial strategy. Counsel testified he cross-examined Cooper and did not believe Cooper came off credible in her testimony. Counsel testified a deputy told him after court that Cooper did not do very well. Counsel testified Cooper's testimony was not material to Victim's testimony. Counsel testified the Victim's mother's testimony was very convincing because she corroborated part of the Victim's story.

Barr testified Cooper is the sister of Victim's mother. Barr testified she did not disclose the statement to Counsel prior to trial. Barr testified Cooper's statement was separate from what Counsel reviewed in her file because it was work product. Barr testified her file contained everything she received from law enforcement. Barr testified Cooper's statement was oral and not written and was not given to law enforcement officers or to an agent of the solicitor's office. Barr testified Cooper was on her witness list she provided for trial. Barr testified she was not required to provide the statement to Counsel.

"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 asses his credibility." State v. Dinkins, 339 S.C. 597, 529 S.E.2d 557 (2000) (citation omitted). "The Brady disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments. It requires the prosecution to disclose evidence that is: 1) in its possession; 2) favorable to the accused; **and** 3) material to guilt or punishment." State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 219-220 (1998) (emphasis added) (citing United States v. Bagley, 473 U.S. 667 (1985), United States v. Agurs, 427 U.S. 97 (1976), Brady v. Maryland, 373 U.S. 83 (1963)). "Rule 5(a)(1)(A), S.C.R. Crim.P., provides . . . upon the request of the defendant, the State must disclose the substance of any oral statement made by the defendant

in response to interrogation. However, where a defendant does not make an oral statement in response to interrogation, the State is not required to disclose the statement, and no error is committed by allowing testimony regarding it." Clark v. State, 311 S.C. 314, 428 S.E.2d 870 (1993) (citing State v. Hoffman, 285 S.C. 130, 328 S.E.2d 631 (1985)).

Here, the statement Applicant made to Cooper prior to his arrest is not favorable to Applicant and was not made to law enforcement or an agent acting on behalf of law enforcement. Barr did not violate Brady or Rule 5, S.C. R. Crim.P. by not disclosing this statement to Counsel. Further, Counsel testified he was able to cross-examine Cooper and did not believe she came off credible to the jury. Counsel testified he felt he was effective in his cross-examination of Cooper. Counsel also addressed Cooper's testimony during his closing argument. Counsel argued, ". . . they wanted to end with a boom with [Cooper]. She served no purpose. She didn't see anything." (Trial Tr. 354.)

Applicant testified he most likely would have accepted the plea offer had he known about Cooper's statement prior to trial. Counsel testified he advised Applicant numerous times that it was in his best interest to accept the plea offer. Counsel testified if Applicant pled guilty he felt confident he could provide mitigation on Applicant's behalf and would request probation. Barr testified she told Applicant she could not recommend probation, but would not oppose it. Applicant, even after observing Victim's forensic interview and meeting with the Counsel, Barr and his mother, decided to reject the offer. Barr and Counsel both testified Applicant did not want an offer that would require him to register as a sex offender or serve jail time. Both Counsel and Barr testified Applicant was aware of the mandatory minimum sentence of twenty-five years prior to rejecting the plea offer. It is unreasonable to believe Applicant would have changed his mind about the plea offer had he been aware of Cooper's testimony, which Counsel and Barr testified

was not the most persuasive evidence against Applicant. It is evident from the testimony at the post-conviction relief hearing that Applicant was thoroughly warned about proceeding to trial, was informed of the risks and potential sentence he faced if convicted and yet chose to proceed to trial despite those warnings. It is unreasonable to think he would have changed his mind had he been aware of Cooper's statement.

This Court finds the testimony of Counsel and Barr to be very credible whereas Applicant's testimony is not credible. This Court finds Applicant has failed to show how Counsel was deficient regarding this allegation as Applicant was thoroughly warned about the risk of proceeding to trial, was told by Counsel multiple times he believed it was in his best interest to take the plea offer, and Applicant still chose to proceed to trial. As such, Applicant has failed to meet his burden as set forth in Strickland and this allegation denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately investigate and call witnesses to contradict Samantha Cooper.

Applicant alleges Counsel was deficient for failing to call Gladys Evans (Evans) to rebut Cooper's testimony at trial.

Evans testified on behalf of Applicant at the post-conviction relief hearing. Evans testified she has known Applicant for thirteen years. Evans testified she lived next door to Applicant. Evans testified her door is about ten feet from Applicant's door. Evans testified she did not watch Victim or her siblings. Evans testified she was never asked by Victim's mother to watch Victim on the date of the incident. Evans testified she has arthritis and on the date of the incident decided to walk to her door to get some sunshine. Evans testified she saw Victim sitting on Applicant's porch and invited her in, but Victim refused. Evans testified she told Victim to knock on Applicant's door and she did. Evans testified Applicant opened the door and asked Victim why she was beating on the door. Evans testified Victim went into Applicant's house and she went

back inside her house, shut the door, and watched television. Evans testified she did not see Applicant anymore until two hours later when she saw all of the people in the neighborhood outside. Evans testified she did not see Applicant again until law enforcement brought him out. Evans testified she would have heard someone screaming and she did not hear anything that day. Evans testified she made a statement to police officers who came to her residence that day. Evans testified she told the officers she did not have company that day. Evans testified she never spoke to anyone else regarding the incident. Evans testified she did not hear Applicant's "confession" to Cooper and if it had happened she would have heard it. Evans testified she has known Applicant for a long time, but would not lie for him. On cross-examination, Evans testified she does not know Cooper, but knows she is Victim's aunt. Evans testified she does not know what Cooper looks like.

Counsel testified he was not aware prior to trial what Cooper would be stating in her testimony. Counsel testified he met with Applicant and his family prior to trial and they did not provide him any leads or witnesses to investigate. Counsel testified the only mention of Evans in the police report was one sentence where Victim states she went to Evans' residence prior to going to Applicant's residence. Counsel was recalled to the witness stand during the post-conviction relief hearing after hearing Evans' testimony and Counsel testified Evans' testimony would not have changed his trial strategy. Counsel testified he would have consulted with Applicant and his family about whether to call Evans had they known about Cooper's testimony. Counsel testified he did not feel a rebuttal witness was necessary after Cooper's testimony because he felt his cross-examination was effective. Counsel testified his trial strategy was to show the jury the terrible job Kingstree Police Department did handling this case.

"The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements." Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). In Thornes, the petitioner alleged his counsel was ineffective for failing to interview the victim. Id. at 308, 426S.C.2d at 765. At the post-conviction relief hearing, Thornes and the victim testified to demonstrate that the victim's testimony would have been sufficient to sway the outcome of the trial or Thornes' decision to pled *nolo contendere*. Id. at 309, 426 S.C.2d at 765. Thornes argued his counsel did not interview victim prior to his plea, and as a result, failed to have a realistic appraisal of Thornes' chances at trial. Id. The Court held, "This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Id. at 309-310, 426 S.C.2d at 765. "The attorney, in the case at bar, unless clairvoyant, could not have reasonably known that any benefit would accrue to his client." Id. at 310, 426 S.E.2d at 766.

Here, Counsel could not have known to call Evans as a rebuttal witness because he did not know about Cooper's testimony prior to trial. Counsel testified Applicant did not give him any witnesses or leads to investigate in this case. Counsel testified the law enforcement report had one sentence about Evans and it only pertained to the Victim contacting her prior to Victim going to Applicant's residence. As in Thornes, Counsel here cannot be found deficient as he could not have reasonably known Evans' testimony would be necessary to rebut Cooper's testimony as he did not know what Cooper was going to say at trial. Applicant and his family did not provide any witnesses or leads for Counsel to pursue prior to trial. Applicant's own statement to law enforcement puts him in the house with Victim at the time of the incident. Counsel was not investigating an alibi defense and did not have an affirmative defense in this case. As the parties stated numerous times on the record, this case came down to the credibility of Victim. Counsel

had no reason to believe Evans would have provided any assistance to the defense since, even by Applicant's own statement, only Applicant and Victim were in the residence at the time of the incident.

Applicant has also failed to show how he was prejudiced by Counsel's alleged deficiency. Evans' testimony at the post-conviction relief hearing was not persuasive on the issue of whether Applicant was confronted by Cooper. First, Evans testified she did not know Cooper and did not know what she looked like. Second, Evans testified after Victim went into Applicant's residence, she went back inside, shut the door, and watched television. Evans testified she did not come back to the door until two hours later when she observed all of the people in the neighborhood outside. Based on Cooper's testimony, her confrontation occurred after she talked to Victim shortly after the incident took place and prior to her calling the police. (Trial Tr. 278-284.) At that time, according to Evans' testimony, she would not have seen Applicant or Cooper as she was back inside of her residence watching television. Cooper's testimony also indicated the confrontation did not take place inside Applicant's residence or on his porch. Cooper testified Applicant was standing on the grass when she confronted him. (Trial Tr. 281) Cooper also testified Applicant ran to his door and locked it and she did not pursue him because he was a minor. (Trial Tr. 283.) Based on Evans' testimony at the post-conviction relief hearing, it is entirely possible for the confrontation to have occurred outside of her presence, thus making Evans' testimony inconsequential to Applicant's case.

Lastly, Counsel testified he was effective in his cross-examination of Cooper and testified she did not come off credible at trial. Counsel testified he did not believe a rebuttal witness would have been necessary at trial. As the trial judge stated when he denied Counsel's motion for a new trial, "[I]t's a credibility question whether they believed particularly the young victim or not. And

they obviously believed her." (Trial Tr. 381.) This case did not hinge on Cooper's testimony or a color photograph, it came down to the credibility of Victim and her mother. As both Counsel and Barr testified, Victim's mother was the most compelling witness at trial.

This Court finds the testimony of Counsel and Barr to be very credible as to this allegation. This Court finds Applicant has failed to show how Counsel was deficient as Applicant did not provide Counsel any leads or witnesses to investigate, and Counsel credibly testified he successfully cross-examined Evans and did not feel Cooper's testimony would have made a difference in Applicant's trial. This Court also finds Applicant has failed to show any resulting prejudice as to this allegation as he failed to establish how calling Cooper to testify would have changed the outcome of his trial. The testimony Cooper provided during the evidentiary hearing would not have impeached or negatively impacted the Victim's mother's testimony, who both Barr and Counsel credibly testified was the most compelling witness at trial. As such, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 22nd day of November, 2019.

Kristi F. Curtis

KRISTI F. CURTIS
Presiding Judge
Third Judicial Circuit

Sumter, South Carolina