

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	INDICTMENT NOS.:
	)	

STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	DEFENDANT’S MOTION TO
-versus-	)	EXCLUDE PREJUDICIAL TERMS
	)	
JOHN DOE,	)	
	)	
Defendant.	)	
_____	)	

The Defendant, John Doe, by and through his undersigned counsel, Andrew J. Savage, III, respectfully submits the following memorandum in support of his Motion for an Order prohibiting the use of prejudicial terms in the course of jury selection and trial of the above-captioned indictments. Such prejudicial terms include the use of the word “victim” to describe the accusing parties. Specifically, Doe requests the following relief:

- That between now and the end of trial, when the Court is not referring to the accusing parties in this case by their proper names, that the Court refer to them as the “complaining witnesses.”
- That at trial, the Court order that all prosecuting attorneys and witnesses be precluded from referring to the accusers as “victims.”
- That at trial, the Court, the parties, and all witnesses refer to all persons, including both Doe and his accusers by their individual names.
- That no jury charges issued in this case refer to the accusers as “victims.”

MATERIAL FACTS

Doe is charged with one count of Assault with Intent to Commit Criminal Sexual Conduct with a Minor, Second Degree, and two counts of Lewd Act Upon a Child, specifically

performing sexual acts. Doe is accused of performing these acts sometime in 1979 or 1980 while serving as a Roman Catholic priest in the Charleston area. The accusers waited until 2004 and 2005 before contacting local law enforcement authorities, and only after frenzied media coverage regarding abuse within the Roman Catholic Church and accompanying civil lawsuits. Doe denies the accusers' allegations.

LEGAL ARGUMENT

References to the Accusers as the "Victim" Violate the Presumption that Doe is Innocent

Doe is presumed innocent. This is an undisputed truth under South Carolina law and the the state and federal constitutions. See U.S. Const. Amend. XIV; S.C. Const. art. I § 3. The presumption of innocence has deep historical roots and is a core tenet of criminal law. *Coffin v. United States*, 156 U.S. 432, 453 (1895). Moreover, the U.S. Supreme Court has stated "Due process commands that no man shall lose his liberty unless the Government has borne the burden of ...convincing the fact finder of his guilt." *In re Winship*, 397 U.S. 358, 364 (1970). South Carolina has long recognized the weight and extent of the State's burden: "[T]he guilt of the accused...must be proven beyond a reasonable doubt. All presumptions of law...are in favor of innocence and every person is presumed to be innocent until he is proved to be guilty." *State v. Hyder*, 242 S.C. 372, 379, 131 S.E.2d 96, 100 (1963).

In sexual assault cases, the core dispute is usually whether the crime occurred at all or whether there was consent, and therefore there is a question whether the complaining witness is a victim or not. Thus, as in this case, where the defendant denies the allegations, references to the

accusers as “victims” necessarily conveys the speaker’s opinion that a crime in fact occurred, evincing a bias against the defendant which patently violates the presumption of innocence. *Jackson v. State*, 600 A.2d 21, 24 (Del. 1991) (“...the word ‘victim’ should not be used in a case where the commission of a crime is in dispute.”); *State v. Wright*, 2003 WL 21509033, at *2 (Ohio App. July 2, 2003) (unpublished opinion in Northeastern Reporter) (“[T]he trial court should refrain from using the term ‘victim,’ as it suggests a bias against the defendant before the State has proven a ‘victim’ truly exists.”).

In South Carolina the term victim refers to someone who has suffered a wrong which ***is a crime***.

“‘Victim’ means a person who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a crime against him. The term ‘victim’ also includes the person's spouse, parent, child, or lawful representative of a crime victim who is deceased, who is a minor or who is incompetent or who was a homicide victim or who is physically or psychologically incapacitated.”

S.C. Const. art. I §24 (C)(2)

It would be erroneous to refer to an accuser as a “victim” when the existence of a crime is in dispute. See *Jackson, supra*. The term “victim” creates a bias in that it assumes the commission of a crime prior to any such determination by a jury and is accordingly inconsistent with the presumption of innocence. Under the South Carolina Victim’s Bill of Rights found in the South Carolina Constitution, no right is established to be referred to as a “victim” during trial, nor is there any such understanding in the statutory definitions of victims under South Carolina’s statutory scheme. See S.C. Code §16-3-1110 (8) (Supp. 1998) (“‘Victim’ means a person who suffers direct or threatened physical, emotional or financial harm as the result of an

act by someone else, which is a crime.”). Therefore, the accusers in this case have no right to be referred to as “victims.”

**At Trial, References to the Accusers As “Victims” by the Court
or Prosecutors Would Improperly Express a Personal Belief that the
Accusers are Telling the Truth and/or Doe is Guilty**

The implicit notion attached to the term “victim” suggests an inference of guilt on a defendant: particularly in a case where the jury is asked to determine whether the crime took place. When a judge or prosecutor refer to an accuser as “victim” this instantly legitimizes the accuser’s claim and places a defendant in a position where he must rebut the term itself in order to maintain his cloak of innocence.

South Carolina law recognizes that it is improper for the prosecutor or the court to express a personal belief in the credibility of a prosecution witnesses. *Vaughn v. State*, 362 S.C. 163, 169 607 S.E.2d, 75, 72 (2004) (“A prosecutor cannot vouch for a witness’s credibility.”); *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (“Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony.”); *State v. Brisbon*, 323 S.C. 324, 331 474 S.E.2d 433, 437 (1996) (“It is well established that a trial judge must refrain from any comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of an accused, or any fact in controversy.”).

The sensitive nature of this case requires that all parties use content-neutral terms in

order to ensure civility and reduce the any commentary which would “infect[] the trail with unfairness” and make the trial a denial of due process. *State v. Day*, 341 S.C. 410, 423, 535 S.E.2d 431, 438 (2000). It would also avoid confusion not only by the Court and counsel, but also by the many witnesses in this case, and ensure an accurate record.

**By Using the Term “Victim” in Jury Charges, the Court Makes
Conclusions of Fact and Thereby Invades the Province of the Jury**

The term “victim” should not be included in the charges to the jury. Jurors are the exclusive judges of all questions of fact and the credibility of witnesses. *State v. Nomura*, 79 Hawai’i 413, 903 P.2d 718, 721 (Haw. Ct. App. 1995) The “term ‘victim’ is conclusive in nature and connotes a predetermination that the person referred to had in fact been wronged.” *Nomura*, at 417, 721. In *Nomura*, the court held that the use of the term “victim in a jury instruction violated a state evidentiary rule precluding the court from commenting on the evidence.” *Id.* The court reasoned that the witness’s status as a victim was the precise issue to be determined by the jury:

[W]e hold that the reference to a complaining witness as “the victim” in criminal jury instructions is inaccurate and misleading where the jury must yet determine from the evidence whether the complaining witness was the object of the offense and whether the complaining witness was acted upon in the manner required under the statute to prove the offense charged.

Nomura, at 722.

In the context of this case, a jury instruction cannot refer to the accuser as a victim without necessarily and wrongly implying that Doe is a criminal. Any reference to the term “victim” in the jury instructions for this case would be highly improper because this term is the functional equivalent of instructing the jury that Doe is guilty. It should go without saying that

the State's instructions should be "drawn in such a manner as to eliminate the possibility that it may be construed as assuming that the evidence shows the guilt of the defendant." *State v. Kinard*, 245 S.W.2d 890, 895 (Mo. 1952)

CONCLUSION

Therefore, and in accordance with all constitutional rights to Due Process, Doe respectfully requests that between now and the end of trial, this Court require all parties to refer to the accusers as "complaining witnesses" not "victims" Further, Doe requests the Court order all prosecuting attorneys, defense attorneys, and witnesses to refer to Doe and his accusers by their individual names; and that no jury charges issued in this case refer to the accusers as "victims."

Respectfully submitted,

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