

No. 17-

IN THE
Supreme Court of the United States

MICHAEL VECHERY,

Petitioner,

v.

FLORENCE COTTET-MOINE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE VIRGINIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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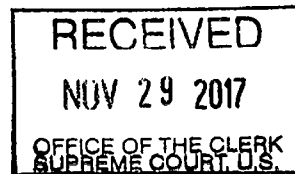
Petitioner Pro se

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QUESTION PRESENTED

Whether the Circuit Court violated Petitioner's constitutional right to fully present his case and his constitutional right to raise his daughter in a manner free of arbitrary judicial intervention by:

- (1) Refusing to re-open the evidence to allow Petitioner to submit evidence that directly pertained to his competency as a parent;
- (2) Refusing to conduct an *in camera* interview with the minor-daughter to determine whether she was competent to testify, despite the fact that she was the sole witness of an assault Respondent committed against Petitioner;
- (3) Arbitrarily barring the daughter from playing competitive golf for a year despite the absence of any evidence suggesting that the golfing was having any adverse consequences on the child.

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Petitioner, Michael Vechery, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the Virginia Court of Appeal.

OPINIONS BELOW

The opinion of the Virginia Court of Appeals, which was unpublished was issued on April 4, 2017, and is attached as Appendix A. The opinion of the Circuit Court of Virginia, which was unpublished, was issued on June 9, 2016 and is attached as Appendix B. The Virginia Supreme Court's one-page order denying review for lack of jurisdiction is attached as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the Virginia Court of Appeal for which petitioner seeks review was issued on April 4, 2017. The Virginia Supreme Court order dismissing petitioner's timely petition for discretionary review was filed on August 28, 2017. This petition is filed within 90 days of the Virginia Supreme Court's dismissal of discretionary review, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 14 provides, in relevant part:

No state . . . shall deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction
the equal protection of the laws.

STATEMENT OF CASE

This case arises out of a multi-year custody dispute. On January 22, 2014, the Montgomery County, Maryland Circuit Court entered a consent order confirming Petitioner and Respondent's joint legal custody. However, in February 2014, Petitioner sought an order pursuant to Va. Code Ann. § 20-108 to modify the custody order to give him full custody. The Juvenile and Domestic Relations Court in Loudoun County denied that request and gave full custody to Respondent due to the parties' inability to co-parent.

Petitioner filed a timely appeal in the Circuit Court (Judge Irby) and a trial was held on April 20, 2016. Prior to trial, Petitioner had requested that the judge conduct an *in camera* interview with the daughter to determine her competency to testify. However, the parties agreed to defer the motion until after the presentation of evidence. Despite repeated subsequent requests, the court categorically refused to conduct an *in camera* interview, thereby depriving the court and parties of critical evidence in making the custody determination.

During testimony, Respondent's strategy was to paint Petitioner as violent and hot-tempered. She called witnesses who testified about altercations that he had allegedly started with Respondent, and presented evidence about a DUI to which he had pled guilty the year prior. Petitioner vigorously disputed the characterizations of Respondent's witnesses and argued that Respondent was

the provocateur. Petitioner had given testimony of being roofied, filing a police report, and being a non drinker for fifteen months related to the DUI. Petitioner provided evidence that Respondent had filed three protective orders against him in the past five years, as well as a claim of physical abuse with HHS. All four of those claims were dismissed. A few days after the April 20 testimony, Respondent attacked and bit Petitioner after their daughter's soccer match resulting in Respondent being charged with assault and battery. Petitioner immediately filed a motion to re-open testimony to introduce evidence of the assault and the resulting charges, which would have directly rebutted Respondent's portrayal of Petitioner as an aggressor. Judge Irby, denied the motion without explanation.

Petitioner also called four witnesses who testified to Petitioner's excellent character and fathering abilities. Two of the witnesses were golf professionals who testified that the daughter was a golf "prodigy" who, with proper training, had the potential to get a golf scholarship at an institution of higher learning, and become the "next Tiger Woods." They also testified that Petitioner was an excellent coach who had a stellar relationship with his daughter, and that the daughter loved playing and training golf with him. Petitioner presented uncontroverted evidence that the daughter only practiced golf a few hours per week and that Petitioner never forced his daughter to play golf. Nonetheless, Judge Irby's May 2, 2016 order barred the daughter from playing competitive golf and taking golf lessons from outside golf pros for a year – this despite there being no evidence suggesting that such a ban would be in the "best interests" of the daughter, and despite that neither party requested any such ban be imposed.

Petitioner filed a timely appeal before the Virginia Court of Appeals arguing that the circuit court had erred, *inter alia*, by (1) refusing to conduct an *in camera* interview with the daughter; (2) refusing to re-open the evidence; and (3) imposing a year-long ban on the daughter playing competitive golf. The Court of Appeals affirmed the circuit court order in full. App A.

The Court of Appeals found that the circuit court did not abuse its discretion in failing to conduct an *in camera* interview because Petitioner only requested such an interview after the parties presented the evidence. App. 8a. The Court of Appeals also upheld the circuit court's refusal to re-open the record to hear evidence of Respondent's assault based on a technicality: specifically, it held that Petitioner could not appeal the decision not to hear the new evidence because the circuit court failed to issue a formal ruling denying Petitioner's request. App. 6a. Finally, the Court of Appeals upheld the one-year ban on the daughter's competitive golfing based on the circuit court's surmise that the golfing was a source of stress in the family dynamic. App. 8a-10a.

Petitioner file a timely petition to the Virginia Supreme Court which was summarily denied. App. 11a.

REASONS FOR GRANTING THE PETITION

This case involves matters of profound constitutional and precedential significance. The Supreme Court of the United State "has long recognized that freedom of personal choice in matters of . . . family life," including how one chooses to raise his or her child, "is one of the liberties protected by the Due Process Clause of the

Fourteenth Amendment.” *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). It has also recognized that custody over one’s biological child implicates fundamental constitutional rights. *Santosky v. Kramer*, 455 U.S. 745 (1982). *See also Washington v. Glucksburg*, 521 U.S. 702 (1997) (“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one’s children.”).

This case raises important questions about the procedures that a court must adhere to before it interferes with this fundamental interest. Specifically, it raises novel issues about whether a court may flat out refuse, without reason, to consider evidence that directly bears on a parent’s custody rights in the window of time between the close of evidence and the court’s issuance of a custody order. This case also provides an important opportunity to plug a procedural hole concerning a court’s obligation to interview a minor child to determine her competency to appear as a witness: namely, it would provide this Court with an occasion to confirm that this obligation does not evaporate simply because a party temporarily and conditionally withdraws it. Finally, this case presents an important opportunity to clarify that a trial court may not unilaterally dictate what sort of activities a minor child may or may not engage in, without regard for the wishes of the child or the parents.

I. This Court Should Grant the Petition to Clarify The Procedures for Admitting Material Evidence in a Custody Dispute After Discovery Has Closed.

This case provides the Court an opportunity to clarify which of two clashing values must prevail in a custody hearing: a party's right to have his or her case "fully and fairly argued." *Brown v. Peters*, 202 Va. 382, 391 (1961); *Morgan v. United States*, 304 U.S. 1 (1938), and the inherent discretion a court has to manage its docket by setting discovery deadlines, see *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 35 (2012).

As this Court has recognized, encompassed within the right to have one's case fully and fairly argued is the right to present pertinent evidence. See, e.g., *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) ("The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause."). At the same time, efficiency and fairness require that limitations be imposed on how and when a party may submit evidence to a tribunal for review. Although the Virginia Court of Appeals has recognized that trial court commits an abuse of discretion by failing to re-open proceedings to "permit additional evidence that is relevant to the best interests of the child, especially where the order has not been finalized," *Accomack Cty. Dep't of Soc. Servs. v. Muslimani*, 12 Va. App. 220, 226 (1991), this case demonstrates that Virginia's courts have improperly prioritized a trial court's discretion over the Due Process right to fully present one's case.

Thus, on April 28, 2016, a mere eight days after the trial and prior to the circuit court issuing its final ruling, Petitioner filed a motion to reopen the testimony. That

motion was prompted by an incident days earlier in which Respondent attacked Petitioner after a soccer game. Yet, the Court denied Petitioner's motion and admonished him to stop "bullying" the Respondent. That decision both violated Petitioner's Due Process rights and was highly prejudicial. In the aftermath of the incident in question, Petitioner was taken to the hospital and treated for bites. Shortly thereafter, on April 24, 2016, Respondent was charged in Fairfax County with Assault and Battery the same day as the attack. That evidence spoke directly to Respondent's fitness as a parent and the credibility of her assertions that Petitioner was the aggressor in their prior altercations.

The Virginia Court of Appeals upheld the circuit court's decision on a technicality: specifically, it held that the circuit court had not formally issued a ruling on Petitioner's request and that, consequently, "there is no ruling for [this Court] to review." Opinion at 6 (quoting *Fisher v. Commonwealth*, 16 Va. App. 447, 454, 431 S.E.2d 886, 890 (1993)). That holding is both wrong as a matter of law and fact (indeed, even Respondent did not argue that the circuit court had failed to rule on the request) and sets a dangerous precedent. If allowed to stand, this holding would allow trial courts to insulate their failure to receive relevant, admissible evidence from review by simply failing to issue a formal order denying a party's request. This Court should intervene to ensure that the constitutional right to have one's case heard does not fall victim to such indefensibly rigid procedural technicalities.

II. This Court Should Grant the Petition to Clarify When a Child's Testimony Must Be Received in a Custody Hearing.

To the best of Petitioner's knowledge, there is a consensus across courts that a trial court must consider the testimony of a competent child. To that end, the Virginia Supreme Court has held that "[i]t is the duty of the trial judge to determine such competency after a careful examination of the child," and the failure to do so will constitute an abuse of discretion. *Hepler v. Hepler*, 195 Va. 611, 619-20 (1954).

Here, the trial court did not conduct the necessary *in camera* interview with Petitioner's daughter to determine whether she was competent to testify – despite Petitioner's repeated requests to do so prior to trial. Instead, on April 20, 2016 – the same day of the trial – the trial court signed an order, over Petitioner's objections, deferring the matter until the Court heard additional evidence in the case. After the hearing, Petitioner renewed his request to have the court conduct the interview. The trial court refused without explanation. The Court of Appeals upheld that decision because, "[a]t the time the evidence was presented in this case, [Petitioner] did not call the child as a witness." Opinion 8 (citing *M.E.D. v. J.P.M.*, 3 Va. App. 391, 404, 350 S.E.2d 215, 224 (1986) ("In the absence of any action to call the child as a witness, we believe the court did not err in declining to 'meet with' her in chambers."))).

The Court of Appeals decision was, in essence, a ratification of procedural trickery. If allowed to stand, trial courts could nullify the right to present what is arguably the single most important piece of evidence in a custody hearing by deferring a motion to conduct an *in camera*

interview until after the presentation of the evidence, and then refuse to conduct the interview because the request was not renewed until after the evidence was presented.

This Court should intervene to clarify that a court may not defer consideration of whether to admit such crucial evidence in a custody hearing until after evidence is presented, and then use the fact that evidence has been closed as a basis for refusing a parent's renewed request for an *in camera* interview.

III. This Court Should Grant the Petition to Limit Family Courts From Arbitrarily Prohibiting Children From Engaging in Harmless Activities.

In Virginia, it is well-established that "the trial court has broad discretion in determining what promotes the children's best interests." *Brown v. Brown*, 30 Va. App. 532, 538 (1999). However, as this case illustrates, that "broad" discretion has *de facto* become boundless and unreviewable.

Here, the circuit court barred the daughter from playing competitive golf for a year – despite being a prodigy and despite the absence of any evidence showing that her golfing habits were in any way detrimental.

Indeed, uncontroverted testimony in the proceedings below established that the daughter is a golf prodigy who, with proper training, could become the next Tiger Woods; that Petitioner was an excellent golf coach; and that the daughter enjoyed training her golfing skills with her father. The record also showed that Petitioner is deeply invested in cultivating the daughter's golf skills, both as a means of teaching her all the values associated

with competitive sports (*e.g.*, discipline and practice), but also as a vehicle to get a scholarship in the future. To be sure, the circuit court received testimony that the parents had squabbled over scheduling golf outings – but no more so than any other activity. Unfortunately, discord permeates all of the parties’ interactions, whether that be in planning weekend exchanges, religious decisions, choices of parental coordinator, or travel. For the court to single out golf – the one activity that the daughter is a bona fide prodigy – constitutes an arbitrary and unlawful interference in Petitioner’s ability to raise his child.

The circuit court’s order barring the daughter from playing competitive golf for a year strikes at the core of the constitutionally protected right of a parent to raise one’s child without arbitrary interference by the state. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *see also Troxel v. Granville*, 530 U.S. 57, 60 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court of the United States].”). “In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Id.* Because the right “to direct the education and upbringing of one’s children” is a “fundamental liberty interest,” neither the state legislature nor the state courts may not infringe it absent a showing that the infringement is “narrowly tailored to serve a compelling . . . interest.” *Washington v. Glucksburg*, 521 U.S. 702 (1997). Moreover, when making a decision that will affect that the parents’ upbringing of their child, “special weight [must be given] to the parent’s

own determination" of what is in the child's best interest.
Troxel, 530 U.S. at 61.

The circuit court failed to hew to these dictates and the Court of Appeals ratified that failure. This blind acquiescence to the circuit court decisions in custody proceedings is, unfortunately, part of a broader trend. Indeed, Petitioner has been unable to locate a *single* case where the Court of Appeals reversed a restriction that was placed on the child or parent in a custody proceeding.

This Court should review and reverse the decision below to make clear that a court may not restrict a child from engaging in activities with a parent unless there is a showing that the restriction is narrowly tailored to limiting activities that are particularly harmful and contrary to the child's best interest.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: November 27, 2017

Respectfully submitted,

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