

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

The Honorable John C Hayes, III, Circuit Court Judge

Case No
04-GS-46-2614-2618
02-GS-46-3232-3234
04-GS-46-200

State of South Carolina,

Respondent,

v

Billy Wayne Cope,

Appellant

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1

Whether Cope was denied a fair trial for the rape and murder of his daughter by the exclusion of evidence that his alleged co-conspirator, James Sanders, whose saliva and semen were found on the victim, had also committed numerous other nighttime residential burglaries and assaults in the same time frame and geographic area, and that in each of these other cases Sanders acted alone and left no evidence of breaking into the homes

2

Whether Cope was denied a fair trial by the exclusion of evidence tending to show that Sanders had bragged about the murder in such a way as to indicate he had acted alone

3

Whether, assuming, arguendo, that Sanders' confession and his spree of other similar crimes were all inadmissible against him at a joint trial, due process required that the trial judge grant Cope's motions to sever his trial from Sanders'

Whether the trial judge unfairly impaired Cope's defense by preventing his expert witness from describing similar cases in which suspects made demonstrably false confessions to having murdered close family members

Whether Cope's confessions should have been suppressed because (a) they were the product of an unlawful arrest without probable cause, and (b) the police interrogated him without counsel after initiation of formal adversarial proceedings, in violation of the Sixth Amendment

Whether the complete failure of proof on the essential element of an unlawful agreement required the trial judge to grant Cope's motion for a directed verdict of acquittal on the conspiracy count

STATEMENT OF THE CASE

Appellant Billy Wayne Cope was charged in arrest warrants on November 30, 2001 with the murder of his daughter Amanda, criminal sexual conduct against Amanda and unlawful neglect of all three of his minor children (R p 430, lines 21-24) A York County grand jury indicted him for murder, criminal sexual conduct (three counts) and unlawful neglect of minor children (three counts)(R p 81, lines 11-25, R p 82, lines 1-6), Indictment Numbers GS-46-2614 to 2618, GS-46-3232 to 3234, GS-46-1843 to 1844, 46-3233 to 34 Subsequent indictments were returned charging Cope and one James Sanders with conspiracy to commit criminal sexual conduct, Sanders was also indicted for the murder of Amanda Cope and two counts of criminal sexual conduct against her Indictment Numbers GS-46-199 to 200, GS-46-196, GS-46-197-198 A superseding murder indictment was returned against Cope on July 22, 2004 Indictment number GS-46-3232 The trial judge, the Honorable John C Hayes, III, severed the criminal sexual conduct and unlawful conduct charges involving both of Cope's surviving children by order dated August 26, 2004 The state called the remaining charges against Cope and Sanders for trial in the York County Court of General Sessions on September 8th, 2004 (R p 894, lines 9-20) The jury convicted both men as charged on September 22, 2004, (R p 3675, lines 23-24, R p 3676, lines 1-18),

and Judge Hayes sentenced Cope to life imprisonment for murder, 30 years consecutive for one count of criminal sexual conduct, and concurrent terms of 30, 10, and 5 years for the second count of criminal sexual conduct, criminal neglect of a child and conspiracy, respectively (R p 3686, lines 18-25, R p 3687, lines 1-6) Following denial of Cope's motion for a new trial, Cope timely served and filed a notice of appeal on September 30, 2004, and this appeal followed

FACTS

Billy Wayne Cope awoke in his Rock Hill, S C home on the morning of November 29, 2001, to find his 12-year-old daughter Amanda dead in her bedroom (R p 2939, lines 1-25) She had been raped, beaten and strangled Her mother's purse lay open on the bed (R p 3520, lines 16-17, State's Exhibit 16)

Examination of the body would later reveal dried saliva around a bite mark on the child's breast and semen on her sweat pants (R p 1057, lines 20-25, R p 1058, lines 1-24, R p 1177, lines 8-23) SLED DNA analysis would eventually establish that both the saliva and the semen belonged to a serial burglar and rapist named James Sanders, (R p 2240, lines 15-21), who was living just around the corner from the Cope house at the time of Amanda's murder (R p 875, lines 24-25, R p 876, lines 1-2) line 1 Authorities would also later discover that Sanders

was linked (by DNA, fingerprints and eyewitness identification) to five other residential assaults between December, 2001 and January, 2002, four of which occurred within less than a mile of the Cope home (Defense Exhibit 6, R p 831, lines 7-25, R p 832, line 1)

No evidence of any kind indicated that Cope and Sanders knew one another or that their lives had intersected in any way On the contrary, the record discloses that at the time of Amanda's murder, Cope was an obese white man who rarely left the house except to go to church or to his part-time job, while Sanders was a muscular African-American man who prowled the nighttime streets of Rock Hill looking for homes to break into and women to assault Moreover, all of Sanders' other crimes were described by their victims as having been committed by a solitary intruder

While these facts seemingly represent a straightforward example of the power of DNA technology to solve a crime, the course of the investigation of Amanda Cope's murder proved to be anything but straightforward as the semen and saliva found on Amanda's body and clothing would not be identified as Sanders' until August of 2002, some nine months after her murder By that time, the state's case against the only suspect the police had previously been able to produce – Amanda's own father – had hardened like concrete

From virtually the moment of Amanda's death, police had focused their investigation on Cope, primarily because Cope appeared to have been the only adult in the Cope home on the night of Amanda's death and because police were unable to detect any signs of forced entry to the residence (R p 89, lines 8-17) Although investigation would later reveal that Sanders had accomplished each of his other Rock Hill residential assaults without leaving any physical trace of forced entry, this fact – like the fact that the DNA recovered from Amanda Cope belonged to James Sanders – would not become known to authorities for some time

Cope accordingly emerged very early on as law enforcement's only suspect and was therefore the sole subject of the Rock Hill police department's intense and ceaseless scrutiny in the hours and days after the murder Interrogated repeatedly by a revolving team of officers at the Rock Hill Law Enforcement Center beginning on the very afternoon of his child's death, Cope was accused of murdering and raping Amanda for hours and hours on end Indeed, Cope vociferously denied any involvement in Amanda's death some six hundred times during that period (R p 1774, lines 20-25, R p 1781, lines 13-19) The following day, however, after protracted overnight interrogation, (R p 2954, lines 3-15, R p 2961, lines 3-6, R p 2987, lines 11-22), little sleep, (R p 2968, lines 6-20, R p 2973, lines 24-25), and confrontation with polygraph results purporting to

demonstrate his guilt, (R p 2975, lines 4 –25, R p 29761, lines 1-8),¹ Cope became temporarily convinced that he “must have” raped and murdered his own daughter, (R p 2981, line 4), and gave authorities a statement to that effect (R p 2981, lines 9-21) Additional confessions followed as Cope endeavored first to disavow his initial statement, (R p 2990, lines 2-23), and then to distance himself from it by characterizing his supposed actions as having taken place in a dream state (R p 2993, line 21-25, R p 2994, lines 1- 24) Ultimately, Cope gave authorities a series of bizarre statements, (R p 1774, line 22, R p 1781, line, 13-15), including a videotaped “re-enactment” of the crime on the child’s own bed (R p 1827, lines 13-15) Cope subsequently recanted each one of these statements Notably, not one had made any reference to Sanders or any other co-conspirator

In the meantime – while the fact that it was James Sanders, not Billy Wayne Cope, who had left his semen and saliva on Amanda remained undiscovered – law enforcement accumulated a great deal of additional information about Cope that tended to cement their mistaken belief that Cope had committed a horrendous crime against his own child This information included

¹ Cope’s actual performance on this polygraph test was a hotly contested issue at trial, a defense expert trained by the U S Department of Defense Polygraph Institute testified unequivocally that Cope had “passed” this exam, (R p 2376, lines 3-7), and that his answers indicated “a strong truthful outcome ” (R p 2376, line 11) There is no question, however, that on November 30, 2001, the police told Cope that his test results indicated he had been lying when he denied any involvement in the attack on Amanda (R p 2975, lines 4-25, R p 2976, lines 1-8)

- police observations of what they later described as Cope's odd, seemingly emotionless behavior after discovery of the child's body, (R p 184, lines 15-19),
- Cope's improbable suggestion to the police that Amanda might have accidentally strangled herself on a torn blanket lining,(R p 970, lines 5-13),
- the filthy and chaotic environment in the Cope home, which was swarming with cockroaches and strewn with trash, piles of clothing, and unwashed dishes, (R p 1001, lines 2-4, R p 1300, lines 9-14, State's Exhibit 69 A-G),
- prior criminal convictions of both Cope and his wife for child neglect stemming from their failure to correct grossly unsanitary living conditions in their home two years previously,(Court's Exhibit 3, Joe Hosey, *Deputies Take Neglected Girls*, The Herald, June 18, 1999 at 4A),
- ambiguous autopsy findings regarding chronic inflammation of Amanda's vaginal tract, indicating either natural bacterial infection or, possibly, prior introduction of an irritating object, R p 1082, lines 2-25, R p 1083, lines 1-25, R p 1084, line 1),
- discovery of a towel containing Cope's semen hidden in a hallway near Amanda's door, and his admission that he had masturbated into a towel at

some time prior to the murder, (R p 1776, lines 4-23, R p 2933, lines 18-21, State's Exhibit 9)

Combined with his confessions and the apparent lack of a forcible breaking at the Cope residence, this very distasteful mass of evidence relating to Cope's character, habits and behavior seemed to amount to an airtight case, the prosecution's confidence is plainly apparent in statements to the news media during the weeks following Cope's arrest (Court's Exhibit 3, Jennifer Stanley and Wendy Bigham, *Father Charged With Girl's Death*, The Herald, December 1, 2001 at 1A) Thus, even when DNA analysis eventually provided incontrovertible proof that the saliva and semen found on Amanda actually belonged not to her father but to a neighborhood serial burglar and rapist for whom Amanda's murder was but one of several similar "no forced entry" crimes, the prosecution declined to drop the charges against Cope

Instead, the solicitor simply folded Sanders into the pre-existing case against Cope, and proposed a new theory that both Sanders and Cope had somehow conspired to rape and murder Amanda in tandem He put this theory into operation by obtaining a new indictment alleging a criminal conspiracy between Cope and Sanders, (R p 82, lines 2-3), and then prosecuted both men together in a single trial featuring both Sanders' DNA and Cope's various confessions

As a means of dealing with the unexpected results of the DNA analysis, this strategy had one marked advantage it avoided the need to acknowledge any mistakes by the police or the prosecution in their pursuit of Billy Wayne Cope. In particular, it deflected the very uncomfortable question of whether the Rock Hill Police Department had extracted a false confession from the innocent father of a murdered child. But the prosecution's decision to launch a new prosecution of Sanders without abandoning its original prosecution of Cope and to do so at a single joint trial created a series of thorny legal issues. As will be seen, the trial judge resolved almost all of these issues against Cope rather than against Sanders or the state, and in so doing deprived Cope of a fair trial.

In addition, much of the very unpleasant information concerning the Cope family's home life was known before trial not only to the police and the prosecution but also to the general public, thanks to a torrent of news coverage that had inundated the Rock Hill area for several years (Court's Exhibit 3). This coverage extended far beyond the evidence that would later be adduced at trial, and included detailed recitations of the sordid and unsavory facts behind the Copes' 1999 prosecution for child neglect (Court's Exhibit 3, Joe Hosey, *Complaint Preceded Children's Removal*, The Herald, June 9, 1999 at 4A). Perhaps most prejudicially of all, news reports published just before the trial alluded to a belated

accusation of sexual abuse by the two younger Cope children, made some three-and-a-half years after his arrest (and disclosed to the news media by means of an unsealed prosecution court filing) (Andrew Dys, *Cope Case Takes A Turn Solicitor May Seek Death Penalty After Hearing From Two Daughters*, The Herald, August 24, 2004, at 1A) ²

The jury venire summoned for Cope's trial was not merely exposed to these facts, but also apparently recalled at least some of them, since roughly 90 percent of the jury panel stood when asked whether they had heard about the case (R p 580, line 25, R p 581, lines 1-9, R p 640, lines 19-21) (defense counsel's uncontradicted estimate of percentage of jury panel responding to court's question) The extent to which the jurors' prior knowledge included inflammatory and inadmissible details about Cope's background or unproven allegations concerning his surviving children cannot be known, since the trial judge permitted no voir dire inquiry into the content of the publicity to which jurors had been exposed (R p 583, lines 15-25, R p 584, lines 1-11, R p 591, lines 13-25, R p 592, lines 1-13), see Mu'min v Virginia, 500 U S 415 (1991), State v Lucas, 285 S C 37, 39-40, 328 S E 2d 63, 64-65, cert denied, 472 U S 1012 (1985) (upholding refusal to allow voir dire examination regarding content of pretrial

² Cope was never in fact prosecuted for any of these supposed assaults on his other two daughters

publicity) However, it is fair to say that Billy Wayne Cope went on trial in a community, and before a jury, that had been saturated by years of exceptionally prejudicial information

Cope's efforts to right the balance by presenting evidence of his innocence quickly ran into a series of unfair obstacles First, when Cope sought to introduce evidence placing Sanders' attack on Amanda in the context of the latter's pattern of similar, solitary burglaries and assaults, the trial judge sustained the state's and Sanders' objections The stated basis of this refusal to allow Cope to present any evidence about the behavior and modus operandi of the man who the state had thrust upon him as a co-defendant was that Sanders' other crimes were insufficiently similar to warrant their admission at a joint trial with Sanders (R p 889, lines 12-25, R p 890, lines 1-6) The judge also denied each of Cope's repeated motions to sever his trial from Sanders' so as to obviate any risk that Sanders would be unfairly prejudiced by Cope's introduction of evidence of Sanders' pattern of similar criminal activity (R p 2313, lines, 18-25, R p 2314, lines 1-9)

In addition to excluding all of the other crimes evidence that would have revealed Sanders to have been a lone, predatory burglar and rapist operating in the Copes' neighborhood around the time of Amanda's murder, the trial judge also

sustained Sanders' objection to Cope's proffered testimony from a prison inmate, James Hill, who had overheard Sanders bragging to another inmate about the burglary, rape and strangulation of a "little girl in Rock Hill " (R p 3429, lines 8-17) Although the surrounding circumstances left little doubt that Sanders was bragging about the murder of Amanda Cope, and neither Sanders' counsel nor the state suggested the existence of any other unsolved burglary-rape-murder of a little girl in Rock Hill for which Sanders might have been claiming credit, the judge sustained Sanders' objection on the ground that the statements overheard by Hill had not been adequately tied to the Cope murder

Thus deprived of virtually all of the evidence that would have allowed the jury to place Sanders in his actual context, and thereby make a reliable assessment of the likelihood that he would have teamed up with a socially isolated and grossly obese white stranger to assault and murder the latter's 12-year-old daughter, Cope's defense centered on the theoretical implausibility of the state's theory that Sanders and Cope had somehow collaborated in Amanda's rape and murder, and on the counter-intuitive but increasingly well-established science surrounding false confessions To this end, Cope called a nationally-known expert on false confessions, the social psychologist Saul Kassin, to explain what social science has learned from careful analysis of the increasing number of documented instances of

such confessions in recent years (R p 2446, lines 1-22) However, the trial judge also sustained the prosecution's objection to any discussion by Dr Kassin of specific cases in which suspects had made confessions to killing family members that were later demonstrated to be false, (R p 2439, lines 5-21), in the absence of such real-life examples, Cope was left powerless to respond to the prosecution's seemingly commonsensical argument that no father would ever have confessed to his daughter's murder if he had not actually committed it (R p 3588, line 10-25, R p 3589, lines 1-11)

The state's case, for its part, also focused almost exclusively on Cope's confession and on the state's intuitive – though inaccurate – argument that no one would falsely confess to such a serious crime against one's own child (R p 3588, lines 10-25, R p 3589, lines 1-11)³ With respect to its central conspiracy charge, the state relied entirely on the fact that Cope had confessed to a crime that DNA showed Sanders had committed The state insisted, and jury ultimately agreed, that this troubling admixture of inconsistent evidence actually proved yet another crime – a conspiracy between two men who, for all the evidence showed, had never met

³ The only significant additional evidence presented against Cope consisted of (1) two vaguely incriminating letters purportedly written from jail by Cope, the authenticity of which was vigorously challenged at trial, (R p 1955, lines 23-25, R p 1956, lines 1-5, R p 1958, lines 20-25, R p 1959, lines 1-21), and (2) autopsy evidence, directly challenged by a defense forensic pathologist, that Amanda's internal injuries were consistent with Cope's confession that he sodomized her with a broom handle, (R p 2831, lines 1-14)

before the night of Amanda's death Cope timely moved for a directed verdict of acquittal on this count, and the correctness of the trial judge's denial of that motion is now another issue presented for decision in this very unusual appeal

The remaining facts necessary for an appreciation of this and the other legal issues raised by this appeal are summarized at the beginning of each argument section

ARGUMENTS

I The Trial Court Erred In Denying Cope's Repeated Efforts To Introduce Modus Operandi And Confession Evidence Regarding His Co-Defendant, James Sanders

Amanda Cope was raped and murdered in her Rock Hill home on November 29, 2001 As discussed above, she had been beaten, strangled, and evidently robbed, there were no apparent signs of forced entry Just thirteen days later, and less than one mile away,(R p 767, lines 6 -15, R p 876, lines 1-3), Katherine Davis would also be attacked in her home by an intruder who robbed and raped her, (R p 770, lines 2-6, R p 767, line 24), and who also left no signs of forced entry (R p 767, lines 24-25, R p 768, lines 14-16) Four days after that attack, (R p 775, lines 15-17), and just under five miles from the Cope home, Sarah Phillips would be assaulted, (R p 776, lines 7-9, R p 876, line 1-3), when an intruder entered her house, attempted to rape and perhaps rob her, (R p 834, lines

10-25, R p 835, lines 1-7), and, again left no signs of a forced break-in (R p 778, lines 6-7, R p 780, lines 10-11) Three days after the attack on Ms Phillips, (R p 739, lines 18-22), and just four-tenths of a mile from the Cope residence, (R p 738, line 25, R p 876, line 1-3), Alicia Lowery would be assaulted in a virtually identical manner (R p 740A, lines 14-20, R p 749, line 7) And three weeks after the attack on Ms Lowery, and a few blocks from the Cope residence, Sara Hagman would be robbed and assaulted in her own home by an intruder who left no signs of forced entry (R p 740, lines 13-19, R p 753, lines 4- 5, R p 738, line 25, R p 876, lines 1-3) ⁴

Evidence would eventually establish conclusively that James Sanders committed every single one of these crimes ⁵ Evidence would also establish that when Sanders attacked these people – in their homes, often without waking other family members, leaving no signs of forced entry – he acted alone (R p 738-751, all lines, R p 752-756, all lines, R p 767-774, all lines, R p 774-786 all lines)

⁴ Cope also proffered evidence regarding a fifth residential break-in committed by Sanders during this same time period and in this same area In that incident – which occurred on the very same night as the attack on Sara Hagman – an intruder, who left no signs of forced entry, entered the home of the White family but fled upon being detected Sanders was identified as this intruder based on fingerprints lifted from the scene (R p 109, lines 14-18, Defense Exhibit 5)

⁵ DNA would link Sanders to the Hagman and Davis attacks, positive identification would identify him as the attacker on Lowery and Phillips Sanders' fingerprints were discovered at the White home (R p 879, lines 11-14, Defense Exhibit 5) Sanders was also indicted by the State with respect to each crime (R p 80, lines 9-13, R p 879, lines 18-21)

At trial, Cope sought repeatedly to introduce evidence of these other crimes in support of his defense that Sanders, and Sanders alone, had raped and murdered his child. Just as Sanders had attacked these other women – by attempting to sexually assault and rob them, by employing strangulation to subdue them, by entering their homes without leaving any signs of forced entry – so, too, Cope sought to tell the jury, had Sanders attacked Amanda, in the same manner, in the same neighborhood, and during the very same time period. Just as Sanders had attacked these other women – acting alone and as a complete stranger to his victims – so, too, Cope sought to tell the jury, had Sanders attacked Amanda just blocks and days away. Just as Sanders had attacked at least two of his other victims without waking anyone in the house, so, too, Cope sought to tell the jury, had Sanders attacked and killed Amanda as Cope lay sleeping in his bedroom, with a loud mechanical device – a “CPAP” machine required to treat his sleep apnea⁶ – strapped across Cope’s face. Cope also sought to present testimony from a disinterested inmate who had been incarcerated with Sanders and heard Sanders confess, quite graphically, to raping and murdering a “little girl in Rock Hill.”

(R p 225, lines 8-17)

⁶ Cope’s CPAP machine, which continuously generated and blew oxygen into his nose and mouth, consisted of an external oxygen generator that made a “loud” whirring sound, (R p 2930, line 13), and a mask carrying oxygen from the generator and blowing it across his face (R p 2926, lines 15-19). Cope wore his CPAP mask strapped to his face all night long (R p 2926, line 16).

Despite Cope's repeated efforts to bring forward this critical information, the jury heard none of it. The court first rebuffed Cope's efforts to introduce Sanders' other crimes pursuant to State v. Lyle, 125 S. C. 406, 118 S. E. 803 (1923) and Rule 404(b), SCRE. The court then denied Cope's motion for a severance in order to introduce the Sanders information as third party guilt evidence. Additionally, the court excluded Sanders' confession on relevancy grounds. In the end, the jury was told nothing of Sanders' pattern of criminal activity, nothing of Amanda's place in that pattern, and nothing of the serial and solitary crime spree in which Sanders had been engaged at the time the brutal attack in this case occurred. The jury also never heard that Sanders had bragged about attacking Amanda in a detailed statement that made no mention whatsoever of any co-conspirator.

Cope was thus prevented from offering any evidence corroborating his claim that Sanders had come into his home, unbeknownst to Cope, and had attacked Amanda without leaving any trace of forced entry. This claim, which was the heart of Cope's defense, appeared dubious, to say the least, absent evidence that Sanders had in fact repeatedly committed exactly such acts in the Copes' Rock Hill neighborhood around the same time and had in fact confessed to the Cope crime. The exclusion of this evidence accordingly undermined Cope's entire defense,

amounted to reversible error under South Carolina law, and a violation of Cope's federal due process rights

A The Trial Court Erred In Denying Cope's Motion To Admit Evidence Of Sanders' Other Crimes Pursuant To Rule 404(b), SCRE, And State v. Lyle

The trial court abused its discretion by excluding Cope's proffered evidence of Sanders' other crimes pursuant to Rule 404(b), SCRE, and State v. Lyle, *supra*. This evidence was Cope's only means by which to prove his vital – but seemingly impossible – contention that Sanders, acting alone, had broken into Cope's home and attacked Amanda without leaving signs of forced entry and without waking her father.

Sanders' prior crimes were admissible under not one but two of the enumerated Lyle/ 404(b) exceptions: they tended to establish the existence of a common scheme or plan and they were probative of the identity of the perpetrator. See State v. Fletcher, 363 S C 221, 609 S E 2d 572, 582 (2005). The crimes were also proved by clear and convincing evidence and their probative value far outweighed any potential prejudicial effect on Sanders' trial. See Fletcher, 363 S C at 244-46, 609 S E 2d at 584. The evidence of Sanders' other crimes thus satisfied every criterion for admission under Lyle and Rule 404(b). Indeed, the exclusion of evidence of Sanders' other crimes directly contravened the purpose of

both Rule 404(b), SCRE, and of Lyle, applying a rule intended to protect a defendant's right to a fair trial, see, e.g., Fletcher, 363 S C at 241, 609 S E 2d at 582, to shore up what would otherwise have been exposed as a weak and misconceived prosecution theory and to entirely frustrate Cope's effort to present a full defense ⁷

1 Evidence Of Sanders' Other Crimes Qualified For Admission Under Two Separate Lyle/ 404(b) Exceptions - To Establish The Existence Of A Common Scheme Or Plan And To Establish The Identity Of The Perpetrator

South Carolina law excludes evidence of a defendant's other crimes when offered to show criminal propensity or bad character of a defendant State v Beck, 342 S C 149, 536 S E 2d 679 (2000) Such evidence is admissible, however, when it is necessary to prove a material fact or element of the crime charged Fletcher, 363 S C at 241, 609 S E 2d at 582 Other crimes may accordingly be introduced when they are offered to prove motive, intent, the absence of mistake, a common scheme or plan, or the identity of the perpetrator Rule 404(b), SCRE, Lyle, 118

⁷ As a threshold matter, it is clear that other crimes evidence may be offered by one defendant against another In State v Good, 315 S C 135, 432 S E 2d 463 (1993), the South Carolina Supreme Court affirmed introduction of evidence by one defendant that his co-defendant had previously robbed the murder victim Rejecting all objections to the admissibility of this evidence, the court noted that "[t]here would be little question about admissibility [of the other crime] if the State had attempted to introduce this evidence," and, as such, "the trial judge did not err in allowing the [co-defendant] to introduce it," Good, 315 S C at 140, 432 S E 2d at 466 Furthermore, all three parties in this case agreed at trial that a defendant may properly offer other crimes evidence against a co-defendant (R p 79, lines 9-25)

S E at 807 In this case, Cope produced testimony – from both of the victims of Sanders’ other attacks as well an expert – which was probative of both a common scheme and the identity of the perpetrator

To begin, the level of similarity between Sanders’ other crimes and the attack on Amanda Cope exceeds the degree of similarity found in numerous cases wherein these Lyle /404(b) exceptions have been applied In State v Hallman, 298 S C 172, 379 S E 2d 115 (1989), for example, a case involving sexual abuse perpetrated while the victim was a foster child in the defendant’s home, the Supreme Court upheld admission of evidence that the defendant had sexually abused three other women who had been fostered by the defendant Even though the other crimes in that case occurred seven years prior to the charged offense, the complainants ranged in age from four to thirteen, the abuse occurred in a variety of locations, and the manner and severity of alleged abuse varied amongst the incidents, the court nonetheless found that the charged offense and the prior crimes were committed in “the same manner under similar circumstances,” Hallman, 298 S C at 173-175, 379 S E 2d at 116-117, and thus admissible under Lyle as evidence of a common scheme or plan Similarly, in State v Blanton, 316 S C 31, 446 S E 2d 43 (1994), the court rejected a claim by a man convicted of sexually molesting his eight year old granddaughter that the trial judge should have

excluded, as too dissimilar and remote in time, evidence that he had sexually molested two other unrelated females seven and eight years prior to the molestation of his granddaughter, Blanton, 316 S C at 32-33, 446 S E 2d at 439. The Blanton court held that the seven to eight year time difference between the other crimes and the charged offense was not too great for the prior acts to be considered part of a common scheme or plan. Id., 316 S C at 32, 446 S E 2d at 440.

The similarity between Sanders' other crimes and the attack on Amanda Cope far exceeds the similarities found in Blanton and Hallman. Indeed, numerous similarities exist between Sanders' other crimes and the charged offense, as established by Cope's detailed in camera proffer. First, Sanders' other crimes all involved breaking into a stranger's home without leaving signs of forced entry, (R p 831, lines 11-22, R p 1642, lines 8-25, R p 1643, lines 1-9, R p 3562, lines 12-15), a similarity that ought to bear particularly great weight given that the state suggested throughout the trial that residential break-ins without evidence of forced entry were extremely rare. In addition, all of the proffered crimes occurred between November 29, 2001 and January 12, 2002 – a six-week period, (R p 831, lines 12-13), and all but one occurred less than a mile away from the Cope home, (R p 831, line 25). Moreover, all the other crimes were committed in private residences, (R p 832, lines 8-9, R p 852, lines 12-16), all were committed against

complete strangers,(R p 833, lines 3-15), and in three of the four other crimes, as in the attack on Amanda, Sanders' utilized choking/asphyxiation, (R p 838, lines 5-6), and evidenced a dual motive of theft and sexual assault, (R p 834, lines 8-17) Finally, in two of the other crimes, as in the attack on Amanda, Sanders committed or attempted to commit his assaults despite the presence of others in the residence (R p 884, lines 1-7) ⁸

South Carolina courts have repeatedly relied on just one or two such similarities when applying Lyle exceptions See, e.g., Lyle, 118 S E at 808 (close geographical concentration of offenses), Beck, 342 S C at 136-137, 536 S E 2d at 683 (concentrated timeline of offenses), Hallman, 298 S C at 175, 379 S E at 117 (similarity of method of commencing crimes), Blanton, 316 S C at 33, 446 S E 2d at 439 (similarity in type of abuse perpetrated) The striking commonalities between the attack on Amanda and Sanders' other crimes are accordingly more than sufficient to satisfy the identity and common and scheme exceptions of Lyle and Rule 404(b)

⁸ That Sanders actually raped only the two most vulnerable victims – Amanda Cope, a 12 year old girl, and Catherine Davis, a 60 year old, disabled woman – does not detract from the similarities between his other crimes and the charged offense It does not matter for the purpose of a Lyle analysis that the ultimate extent of each crime may have differed, as long as the crimes “commenced in the same manner under similar circumstances” Hallman, 298 S C at 175, 379 S E 2d at 117

2 Sanders' Other Crimes Were Established Through Clear And Convincing Evidence

If not the subject of a conviction, other crimes or acts must be established by clear and convincing evidence in order to be admissible State v Gillian, 360 S C 433, 602 S E 2d 62 (Ct App 04) The other crimes evidence at issue in this case easily meet that standard Alicia Lowery identified Sanders as her assailant in a line-up (R p 744, lines 22-25, R p 745, lines 1-9) Sanders was linked to the attack on Sara Hagman by an identification and by DNA (R p 879, lines 11-12) DNA evidence also linked Sanders to the rape and robbery of Catherine Davis (R p 879, lines 11-12) That Sanders broke into Sarah Phillips' home was established by both in-court and photographic line-up identifications (R p 776, lines 23-25) Indeed, Sanders had been indicted by the state in each of these cases (R p 80, lines 9-13, R p 879, lines 18-21) For these reasons, the trial court found that there was clear and convincing evidence that Sanders perpetrated the crimes against Ms Lowery, Ms Hagman, Ms Phillips, and Ms Davis (R p 889, lines 12-17, R p 891, lines 6-7) This finding is well supported by the evidence and must be affirmed See State v Wallace, 364 S C 130, 136, 611 S E 2d 332, 335 (Ct App 2005) (trial court's determination of clear and convincing evidence in context of other crimes must not be disturbed on appeal if ruling is supported by any evidence)

3 The Probative Value Of Sanders' Other Crimes Substantially Outweighed Any Prejudicial Effect

Even where evidence satisfies one or more Lyle/ 404(b) exception and is supported by clear and convincing evidence, the evidence is nonetheless inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to a defendant Rule 403, SCRE, State v Braxton, 343 S C 629, 634, 541 S E 2d 833, 836 (2001) The evidentiary value to Cope's defense of evidence of Sanders' other crimes, however, substantially outweighed any prejudice to Sanders, such prejudice being marginal at best in light of the DNA evidence that already linked Sanders indisputably to the attack on Amanda

Evidence of Sanders' other crimes in the two month period following Amanda Cope's murder would have powerfully undermined the state's entire theory of the case against Cope as the prosecution was only able to reconcile the fact that Cope had confessed to a crime that, according to DNA, Sanders had in fact committed, by alleging that Cope and Sanders somehow attacked Amanda together Due to the total lack of evidence linking Cope and Sanders, the state argued that Cope "had to" have conspired with Sanders given the apparent lack of forced entry into the Cope home (R p 3562, line 15) Evidence that Sanders, acting alone, had, on a number of occasions, broken into Rock Hill homes without leaving any signs of forced entry would therefore have virtually demolished the

state's case. With respect to prejudice, in contrast, Sanders was already undeniably tied to Amanda's attack by the DNA evidence he left behind on her body and her clothing. Sanders' other crimes were thus merely cumulative evidence of his guilt, evidence that paled in comparison to the power of DNA. Any prejudice to Sanders resulting from admission of evidence of his other crimes would accordingly have been, at the very most, incidental. Moreover, as discussed below, any prejudice to Sanders could have been eliminated entirely by granting Cope's request for severance so that Sanders' other crimes could have been admitted as evidence of third party guilt.

B The Trial Court Erred In Denying Cope's Motion To Sever His Trial From Sanders' So That Information Regarding Sanders' Other Crimes Could Be Admitted As Evidence Of Third Party Guilt

1 Information Regarding Sanders' Other Crimes Would Have Been Admitted As Evidence Of Third Party Guilt In A Severed Trial

“[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” Crane v. Kentucky, 476 U.S. 683, 690 (1986), California v. Trombetta, 467 U.S. 479, 485 (1984). “Few rights,” of course, “are more fundamental than that of an accused to present witnesses” on his behalf. Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (citing Webb v. Texas, 409

U S 95 (1972) Indeed, “where constitutional rights directly affecting the ascertainment of guilt are implicated,” the “ends of justice” must override “mechanistic” application of evidentiary rules Chambers, 410 U S at 302, see also United States v Scheffer, 523 U S 303, 316 n 12 (1998)

For this reason, South Carolina law provides that defendants be permitted to introduce evidence of a third party’s guilt whenever such evidence shows facts that are “inconsistent with [the defendant’s] own guilt [and] rais[e] a reasonable inference or presumption as to [a defendant’s] own innocence ”⁹ State v Gregory, 198 S C 98, 104-05, 16 S E 2d 532, 534 (1941), accord State v Gay, 343 S C 543, 541 S E 2d 541 (2001), State v Cooper, 334 S C 540, 514 S E 2d 584 (1999), State v Parker, 294 S C 465, 366 S E 2d 10 (1988) To be sure, “evidence which can have (no) [sic] other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible,” Gregory, 198 S C 98, 104-05, 16 S E 2d, 532, 534 (internal citation omitted), nor is evidence lacking “a train of facts or circumstances, as tends clearly to point out such other person as the guilty party ” Id Evidence, however, that does support a claim of innocence, does clearly indicate the guilt of another and is itself supported by credible foundational facts, is admissible by a defendant

⁹ The constitutionality of the South Carolina standard for admission of third party evidence is currently under review by the United States Supreme Court State v Holmes, 361 S C 333, 605 S E 2d 19 (04), cert granted, ___ U S ___, 126 S Ct 34 (2005) (argued February 22, 2006)

Indeed, such evidence becomes essential where, as here, other affirmative evidence of innocence – such as alibi testimony or exonerative forensics – is not available or applicable

The information that Cope sought to introduce in this case regarding Sanders was precisely such essential evidence. Not just a critical component of his defense, the truth about Sanders was Cope's defense, as it provided the only evidence to be had in support of his claim that someone had broken into his home and attacked his daughter without leaving signs of forced entry and without waking other family members

Although the admissibility of "other crimes" as third party guilt evidence has not yet been expressly addressed by the South Carolina courts, nothing in South Carolina law indicates that the standard for admitting third party guilt evidence is altered in any way when the proffered evidence relates to a third party's other crime or crimes. In addition, many other courts have addressed this precise question and have reversed convictions in cases very similar to Cope's. In State v. Cotton, 351 S E 2d 277 (N C 1987), for example, the defendant, who was charged with rape and burglary, sought to introduce evidence of two similar attacks committed by an unidentified individual on the same evening and in the same neighborhood as the assault in question. The North Carolina Supreme Court

reversed the trial court's exclusion of this evidence, relying on a standard nearly identical to South Carolina's third party guilt rule. Specifically, the Cotton court ruled that where a series of similar assaults appears to have been committed by a lone third party in a manner and location that suggest that the third party, and not the defendant, could have committed the offense at issue, it is an abuse of discretion to prevent the defendant from presenting those other crimes to the jury. Id. at 280 ¹⁰

Similarly, in State v. Williams, 518 A 2d 234 (N.J. Super. 1986), a New Jersey appellate court reversed the attempted murder conviction of a defendant who had sought to introduce evidence of two other assaults committed nearby both before and after the offense at issue. Although these other assaults were far from identical to the crime with which the defendant was charged, the appellate court ruled that their exclusion nonetheless "eviscerated the defense entirely and denied [the] defendant a fair trial," Id. at 235. Noting that "a lower standard of similarity of offenses is required to justify the use of such evidence by a defendant than is required when the state offers [other crimes] evidence," the Williams court found sufficient correspondence between the charged offense – an outdoor stabbing wherein no sexual assault occurred – and the other crimes – rape

¹⁰ After eleven years in prison, Cotton was eventually exonerated by DNA. See President's DNA Initiative website, located http://www.dna.gov/case_studies/convicted_exonerated/cotton

abductions wherein only one victim was stabbed and wherein both victims were transported to off-street locations – to rule exclusion of the other offenses reversible error ¹¹ Id at 238

In so doing, the Williams court relied on a case that even more closely resembles this one – State v Garfole, 388 A 2d 587, 591 (N J 1978) In Garfole, a defendant accused of molesting a teenager sought to introduce evidence regarding four other similar assaults The defendant had an alibi for two of those four other offenses and wanted to argue that, to the extent the similarity of the crimes indicated that one person had committed them all, that person could not have been the defendant Citing both Wigmore and McCormick and noting that third party other crimes evidence is particularly significant where each of the crimes in question occurs within a “close time sequence” and geographical vicinity, the

¹¹ Notably, the level of similarity required in these cases is generally deemed considerably lower than the standard applied to other crimes evidence offered against the accused While the prosecution must establish a virtually unique modus operandi to introduce such evidence against a defendant, “a lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State” United States v Stevens, 935 F 2d 1380, 1403 (3rd Cir 1991) (quoting State v Garfole, 388 A 2d 587, 591 (N J 1978)), accord Perry v Watts, 520 F Supp 550, 560 (N D Cal 1981), State v Williams, 518 A 2d 234, 238 (N J 1986), Commonwealth v Jewett, 467 N E 2d 155, 158 (Mass 1984), People v Bueno, 626 P 2d 1167, 1169 (Colo Ct App 1981), see also Joan L Larsen, Of Propensity, Prejudice, and Plain Meaning The Accused’s Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b), 87 NW U L Rev 651, 660-62 (1993)

Thus, the trial court erred in presuming that its determination that Sanders’ other crimes were not sufficiently identical to satisfy the modus operandi Lyle exception foreclosed any analysis of Sander’s other crimes under a third party rubric (R p 893, lines 1-6)

Garfole court determined that it had been reversible error to exclude the other crimes information Id at 449-453

Numerous other appellate courts have also found reversible error where material and substantiated evidence of similar third party crimes has been excluded ¹² Significantly, in each of these cases, neither the evidence linking the third party to the proffered other crimes nor the evidence linking the third party to the crime with which the defendant was charged was nearly as strong as the DNA evidence that has linked James Sanders to both the other crimes at issue here and to the brutal attack and murder of Amanda Cope If, then, as these cases show, it is

¹² See, e.g., United States v Stevens, 935 F 2d 1380, 1401-06 (3rd Cir 1991) (reversible error to exclude evidence that victim of similar crime did not identify defendant as assailant), Kucki v State, 483 N E 2d 788 (Ind Ct App 1985) (reversible error to exclude fact that third party was suspected of committing similar crimes in the area, even though evidence suggested third party was out of state at time of offense at issue), State v Burge, 487 A 2d 532, 545 (Conn 1985) (reversible error to exclude evidence regarding third party who “lived in the vicinity of the scene of the crime [and who] had confessed to the recent commission of a similar assault under similar circumstances at a location near to the place where the victim in this case had been assaulted and killed”), Commonwealth v Jewett, 458 N E 2d 769, 771 (Mass Ct App 1984) aff’d 467 N E 2d 155, 158 (Mass 1984) (reversible error to exclude evidence that man who resembled defendant had recently committed similar sexual assault under similar circumstances), People v Bueno, 626 P 2d 1167 (Colo Ct App 1981) (reversible error to exclude information regarding similar crimes from which the defendant had been excluded as a suspect), Commonwealth v Rini, 427 A 2d 1385, 1388 (Pa Super 1981) (reversible error to exclude “evidence that someone else committed a crime which bears a highly detailed similarity to the crime with which the defendant is charged”), State v LeClair, 425 A 2d 182, 187 (Me 1981) (reversible error to exclude evidence about similar crime occurring at home of third party on the day following crime at issue), Commonwealth v Keizer, 385 N E 2d 1001, 1003 (Mass 1979) (reversible error to exclude evidence of a crime committed by similar method while defendant was in custody), State v Bock, 39 N W 2d 887, 458 (Minn 1949) (reversible error to exclude “crimes of a similar nature [that] have been committed by some other person when the acts of such other person are so closely connected in point and time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime charged against him”)

reversible error to exclude defense evidence regarding a third party merely suspected of similar crimes, surely it must be reversible error to exclude Cope's evidence, which proved by DNA that a particular third party, James Sanders (1) was serially and solitarily committing similar crimes at the time of offense at issue, and, (2) participated in the offense at issue. This remains the case – given the extraordinary evidentiary strength of these two connections – even in a jurisdiction such as South Carolina where the nexus between the third party and the crimes at issue must be relatively robust.

Moreover, courts have found that a defendant's right to present third party other crimes evidence is particularly strong when offered to rebut a conspiracy theory by demonstrating the third party's pattern of acting alone. In People v Cruz, 643 N E 2d 636, 655 (Ill 1994), for example, the Illinois Supreme Court reversed a capital rape-murder conviction where, inter alia, the trial court excluded evidence that a third party had committed crimes similar to those with which the defendant had been charged, and that the third party had previously acted alone. Recognizing the heightened need for such evidence when the prosecution argues that the defendant and the third party acted together, the court held that the

exclusion of third party other crimes evidence warranted overturning the defendant's conviction ¹³ Id., at 655-656

Thus, while it may be permissible to exclude third party other crimes evidence where witnesses or other evidence tend to exclude the third party from the crime at issue, see, e.g., Daniel v State, 395 S E 2d 638 (Ga 1990), or where the evidence of third party crimes is inadmissible hearsay, see, e.g., Gates v United States, 481 A 2d 120 (D C 1984), where, as here, the predicate evidence is uncontradicted, entirely competent,¹⁴ highly probative, and essential to the defense, it must be admitted in order to accord the defendant a fair trial

Finally, even assuming, arguendo, that the trial court properly denied Cope's request to inform the jury of Sanders' other crimes, Cope ought to have been allowed to enter evidence of those crimes without reference to Sanders, as he sought to do in the wake of trial court's expression of concern regarding impact of such evidence on Sanders' fair trial rights. The trial court, however, denied both Cope's efforts to resolve this conflict via severance, (R p 891, lines 18-19, R p 892, lines 13-25), see Sec I B , infra, as well as his proposal to avoid the conflict

¹³ After spending almost eleven years on death row, Cruz, like Cotton, was ultimately exonerated by DNA. See President's DNA Initiative website, located at http://www.dna.gov/case_studies/convicted_exonerated/cruz_hernandez

¹⁴ Cope sought to introduce information regarding Sanders' other crimes via testimony directly from the victims of those crimes and via DNA and fingerprint evidence

entirely by referring to Sanders' other crimes without mentioning Sanders – i.e. by offering evidence that some unnamed third party was committing a string of assaults and robberies in Rock Hill in which the perpetrator would enter homes without leaving signs of a forced break-in and often without waking other occupants (R p 2308, lines 22-25, R p 2309, lines 1-21) This evidence, offered not only as evidence of third party guilt but also to counter the state's arguments that it would have been virtually possible for anyone to enter the Cope home without leaving signs of forced breaking unless Cope had invited them in, was also erroneously excluded by the court

2 Severance Should Have Been Granted So That Information Regarding Sanders' Other Crimes Could Have Been Admitted As Evidence Of Third Party Guilt

The admissibility of Sanders' other crimes as third party guilt evidence required the trial court to grant Cope's motion for severance. Although criminal defendants who are jointly charged are not entitled to separate trials as a matter of right, State v Walker, 366 S C 643, 656, 623 S E 2d 122, 128 (2005) (internal citations omitted), severance is required where "there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." Id. at 129, see also State v Harris, 351 S C 643, 572 S E 2d 267 (2002), State v Dennis, 337 S C

275, 523 S E 2d 173 (1999) Thus, a trial court must “act cautiously in allowing a joint trial[,] consider problems that may arise from a joint trial and assure protection of each defendant’s constitutional right[s],” Walker, 366 S C at 657 (citing State v Singleton, 303 S C 313, 400 S E 2d 487 (1991)), and is subject to “a continuing duty at all stages of the trial to grant a severance if prejudice” to a particular defendant will be caused by a joint trial Schaffer v United States, 362 U S 511, 516 (1960) This duty mandated that the trial court in this case sever the trials of Cope and Sanders, its refusal to do so was reversible error

a Severance Must Be Granted Where One Defendant’s Constitutional Right To Defend Himself Via The Presentation Of Certain Evidence Or Argument Is In Direct Conflict With A Co-Defendant’s Constitutional Right To Defend Himself Via Exclusion Of That Same Evidence Or Argument

The narrow severance issue in this case – granting severance to allow admission of information regarding a co-defendant’s other crimes as third party guilt evidence – is a matter of first impression in South Carolina However, the larger question of how to resolve situations where co-defendants’ constitutional rights are at direct odds with one another is a matter that has been addressed by the South Carolina Supreme Court, as well as by courts in other jurisdictions with virtually identical severance standards

In State v Green, 269 S C 623, 239 S E 2d 646 (1977), a defendant wanted to comment on his co-defendant's exercise of his right to remain silent. Although the Green court ultimately held that, due to the lack of mutually antagonistic defenses, the trial court did not abuse its discretion by denying severance in that case, the court also recognized that severance is required whenever one co-defendant's right to present certain evidence or argument conflicts with another co-defendant's right to have that evidence or argument excluded. Id. at 625, 646-47.

Federal courts¹⁵ have similarly held that where a conflict exists between co-defendants' respective trial rights, "for each of the defendants to see the face of Justice[,] they must be tried separately." De Luna v United States, 308 F 2d 140, 141 (5th Cir 1962), reh'g denied, 324 F 2d 375 (5th Cir 1963) (severance required where one co-defendant's right to a fair trial required court to allow him to comment on co-defendant's silence)¹⁶. Largely in the context of cases where a defendant seeks severance in order to call his co-defendant as a witness, these courts have addressed precisely the conflict at issue here: the dilemma that arises

¹⁵ In federal courts, as in South Carolina, the question of severance is left almost entirely to the discretion of the trial judge. See, e.g. Zafiro v United States, 506 U S 534, 541 (1993).

¹⁶ See also United States v Mardian, 546 F 2d 973, 980 (D C Cir 1976) (severance required where one co-defendant's need for a continuance based on incapacitating illness of his attorney conflicted with co-defendants' right to speedy trial), Bruton v United States, 391 U S 123, 136-137 (1968) (either severance or exclusion of offending statement is required when government seeks to introduce the statement of non-testifying co-defendant in joint trial), United States v Truslow, 530 F 2d 257, 261 (4th Cir 1975) (reversible error to deny severance upon introduction of Bruton statement), United States v Harris, 409 F 2d 77, 81 (4th Cir 1969) (same).

when one defendant cannot present essential and otherwise admissible evidence solely because he is being jointly tried. Applying the principle that “a single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant’s right to a fundamentally fair trial,” United States v Echeles, 352 F 2d 892, 896-97 (7th Cir 1965) (internal citation omitted), these courts have held that severance must be granted when “a fair trial for [one co-defendant] necessitate[s] providing him the opportunity of getting evidence before the jury” that would be inadmissible in a joint proceeding. Echeles, 352 F 2d at 898. See also Tifford v Wainwright, 588 F 2d 954, 956 (5th Cir 1979), reh’g denied 592 F 2d 233 (severance required where one co-defendant’s right to a fair trial required court to allow him to call other co-defendant as a witness). These courts have also noted that conspiracy charges quite often create such conflicts amongst the rights of the co-defendants. See, e.g., Mardian, 546 F 2d at 977, Echeles, 352 F 2d at 898 (citation omitted), Glasser v United States, 315 U S 60, 76 (1942).

In sum, both South Carolina and federal courts have acknowledged that severance must be granted when a joint trial creates a conflict amongst the constitutional rights of the defendants. In this case, Cope was denied a fair trial by the trial court’s exclusion of evidence of Sanders’ other crimes, a decision which

was based on Sanders' right to a fair trial. The failure to grant severance in this situation was therefore a violation of well-established law.

**b Cope Was Prejudiced By Exclusion Of Evidence Of
Sanders' Other Crimes**

Cope was greatly prejudiced by exclusion of evidence of Sanders' other crimes. In fact, exclusion of Sanders' true background distorted the factual landscape so severely that it appeared to the jury that no evidence whatsoever supported Cope's claim that Sanders entered his home and brutally assaulted and murdered his daughter without leaving any apparent signs of forced entry and without waking Cope.

Just as the authorities found that proposition preposterous enough, before they knew about Sanders' activities, to arrest Cope for Amanda's murder, so, too, must the jury have rejected this seemingly baseless defense from the outset based on the sheer improbability of such a scenario. Indeed, stripped of its factual foundation, Cope's entirely accurate contention that James Sanders was capable of – not to mention, serially committing – precisely the acts his defense alleged, not only failed to support Cope's defense but affirmatively damaged it, causing him and his counsel to lose credibility with the jury from the very first moment of the trial. Compounding this perverse turn of events was the prosecution's exploitation

of the jury's misimpression. Despite what the state's own investigation of Sanders had revealed, state witnesses testified, (R p 1642, lines 1-8 R p 1643, lines 1-9), and the solicitor argued, (R p 3562, line 15), as though the notion of James Sanders breaking into a Rock Hill home without leaving signs of forced entry was patently ridiculous.

Corroboration is vital in any legal proceeding. It is all the more essential in a case where the theory of the defense appears implausible at first blush, and where the prosecution relies upon and exacerbates this false impression. As the South Carolina Supreme Court has recognized, any evidence that buttresses a defendant's otherwise uncorroborated version of events is highly material and can mean the very difference between a guilty verdict and an acquittal. State v Wiley, 106 S C 437, 437, 91 S E 382, 382 (1917) (ordering new trial upon discovery of new evidence corroborating manslaughter defendant's previously uncorroborated self-defense claim), see also Roviaro v United States, 353 U S 53, 63-64 (1957) (defendant "faced with the burden of explaining or justifying" his conduct has a "vital need for access to any material witness" that will corroborate his otherwise uncorroborated claims). Failure to sever in this case thus did more than merely "compromise a specific trial right," Walker, 623 S E 2d at 129, it entirely prevented Cope from exercising his most fundamental of rights – the right to

present a defense Chambers, 410 U S at 302, State v Johnson, 293 S C 321, 323, 360 S E 2d 317, 319 (1987) State v Schmidt, 288 S C 301, 302, 342 S E 2d 401 (1986)

C The Trial Court Erred In Excluding Testimony From James Hill Concerning Sanders' Admission To Assaulting A "Little Girl In Rock Hill"

The trial court's exclusion of evidence of numerous other substantially similar (and solitary) crimes by Sanders, and its failure to grant severance were not the only rulings that deprived Cope of the ability to rebut the state's theory that he and Sanders raped and murdered Amanda in tandem. In addition, the court excluded evidence that Sanders had bragged to fellow prison inmates about "getting away" with an apparently solo act of rape-murder that was almost certainly that of Amanda Cope.

James Hill, a convicted burglar who in late 2002 was confined with James Sanders in the segregation unit of Perry Correctional facility in Pelzer, South Carolina, (R p 3426, lines 13-20), testified at a hearing outside the presence of the jury that he overheard Sanders talking to another inmate. According to Hill's sworn testimony, Sanders and the other inmate

got to the subject of crimes and criminal history and they got to joking about how the police force weren't doing their jobs, that it was easy to get away from them, to delude them [sic], and he made the comment that he was going to get away with what he did to that little girl in Rock Hill, and he went on

to describe explicitly what he had done and then in getting away

(R p 3429, lines 8-17) Hill also overheard Sanders “remark about oral and anal sodomy” and “smothering the child,” specifically quoting Sanders as stating that he (Sanders) “f____d her F____d her good ” Hill further testified that Sanders “alluded to the fact that he had got in through a window in the house and that he had left through the same window and proceeded to go to another individual’s house ” Id., (R p 3429, lines 19-25, R p 3430, lines 1-4, R p 3431, lines 13-16) Hill prefaced this proffered testimony by describing himself as a reluctant witness who had received no inducement to testify, was then recovering from an unrelated prison stabbing, and could expect only increased threats to his personal safety for incriminating Sanders as he was doing (R p 3427, lines 1-25, R p 3428, line 1)

After this proffer, Sanders’ counsel objected to Hill’s testimony concerning Sanders’ admissions as irrelevant “because there has been no identifying characteristics ” (R p 3432, lines 21-25, R p 3433, lines 1-10) The trial judge sustained Sanders’ objection, noting that Hill’s proffered testimony did not include any specification by Sanders as to “the time, place, or other circumstances” of the crime (R p 3433, lines 5-7)

1 Hill's Testimony Concerning Sanders' Confession Was Relevant And Admissible Under The South Carolina Rules Of Evidence

Evidence is relevant if it has "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, Fed R Evid 401 At issue in the trial of Sanders and Cope was the question of who sexually assaulted and killed 12-year-old Amanda Cope, a victim who certainly could be fairly described as a little girl from Rock Hill The state's theory was that Cope allowed Sanders – by all evidence a complete stranger – to participate in the sexual abuse and murder of Cope's own daughter Cope's defense was that Sanders committed the crime by himself

This defense was strongly supported by Sanders' admission, which was notable for its lack of any reference to an accomplice or co-perpetrator James Hill's testimony – that Sanders told another inmate that he got away with the sexual assault and killing of a little girl from Rock Hill – clearly tended to increase the probability that Sanders assaulted and killed Amanda, and that he did it the same way he committed all his other crimes by a stealthy entering without breaking, and alone The connection to the Amanda Cope murder is especially strong given the total absence of any evidence of any other unsolved rape and

murder of a “little girl from Rock Hill ” Sanders’ ugly boast was not merely “of consequence” to the case, but, rather, went to its very heart, and Hill’s testimony was therefore relevant under Rule 401

Moreover, no rule of law limits admission of defendants’ incriminating statements to highly detailed narratives of the offense charged. Confessions, like any other evidence, are relevant and admissible if there is a logical or rational connection between the confession sought to be presented and the matter of fact in issue at trial. State v Tufts, 355 S C 493, 585 S E 2d 523 (Ct App 2003). Thus, the fact that the statement Hill overheard did not contain still more details regarding the time, place, and circumstances of the attack Sanders was discussing did not render the statement inadmissible. Indeed, incriminating statements lacking specificity are commonly used by the state to link defendants to crimes. See, e.g., State v Cason, 317 S C 430, 431, 454 S E 2d 888, 889 (Ct App 1995) (prosecution witnesses testified the defendant said he “killed a f____g n____r b____h” in murder trial involving black female victim), State v Caulder, 287 S C 507, 510, 339 S E 2d 876, 878 (Ct App 1986) (witness who had been incarcerated with the defendant testified at trial that defendant stated he thought he “got away with killing this woman”), see also State v Cheeseboro, 346 S C 526, 548, 552 S E 2d 300, 312 (2001) (defendant’s statement regarding robbery of an

establishment with a safe admissible in trial regarding murder that occurred at barbershop with a safe on the premises, despite absence of any other connection between the statement and the crime)

Absent any evidence that Sanders was actually bragging about having gotten away with some unrelated rape and asphyxiation-murder of a different “little girl in Rock Hill,” and given the DNA evidence that provided an indisputable link between Sanders and the Amanda Cope murder, his admission was more than sufficiently tied to the Cope case to be considered legally relevant. Indeed, the fact that Sanders’ admission provided many, but not all, of the details of this crime went only to the weight the jury should have accorded to the admission, and not to its admissibility. By deeming Hill’s testimony irrelevant for lack of specificity, however, and not otherwise analyzing its relevancy, the trial judge improperly constricted the broad standard of relevancy and erroneously excluded admissible and highly probative testimony.

2 Hill’s Testimony Concerning Sanders’ Confession Satisfied The Hearsay Exception Regarding Statements Against Penal Interest

Although neither the state nor Sanders made any hearsay objection to Hill’s testimony at trial, it should be noted that Sanders’ admissions as related by Hill’s would have been admissible under the hearsay exception of Rule 804(b)(3), SCRE

Testimony falls within the exception of 804(b)(3) if the moving party can show that (1) the proffered statements were made by an unavailable declarant, (2) the statement exposed the declarant to criminal liability, and (3) corroborating circumstances clearly indicate the trustworthiness of the statement. Hill's testimony regarding Sanders' statement meets these criteria. First, a witness who invokes his Fifth Amendment right to silence is unavailable for hearsay purposes. Rule 804(a)(1), SCRE, State v. Doctor, 306 S. C. 527, 529, 413 S. E. 2d 36, 38 (1992). Sanders asserted his privilege when he declined to testify in his own defense at the joint trial. Second, Sanders' admission that he had raped and murdered a child obviously exposed him to the gravest possible criminal liability.

As for the final provision of the Rule, the question of whether corroborating circumstances indicate that the statement is trustworthy must be determined "after considering the totality of the circumstances under which a declaration against penal interest was made." State v. Kinloch, 338 S. C. 385, 391, 526 S. E. 2d 705, 708 (2000). In this case, a totality-of-the-circumstances analysis leads to the conclusion that Sanders' statement is sufficiently corroborated for purposes of 804(b)(3). Hill did not receive any reward for his testimony, and had no motive to testify against Sanders. To the contrary, he had a compelling motive not to testify against Sanders – an apparently well-justified fear of retaliation on the part of a

witness who was still recovering from a prison stabbing at the time of his testimony See United States v Lowe, 65 F 3d 1137, 1146 (4th Cir 1995) (“declarant’s motive in making the statement and whether there was a reason for the declarant to lie” is a factor to be considered in 804(b)(3) analysis), cf State v Wannamaker, 346 S C 495, 552 S E 2d 284 (2001) (affirming exclusion of 804(b)(3) statement because, inter alia, potential witness was friend and roommate of defendant), State v McKnight, 321 S C 230, 235, 467 S E 2d 919, 922 (1996) (affirming exclusion of 804(b)(3) statement because witness with a motive to testify against the alleged declarant), State v Staten, 364 S C 7, 610 S E 2d 823 (Ct App 2005)(noting that potential witness was girlfriend of person accused of crime and thus had motive to fabricate exculpatory testimony)

In addition, the truthfulness of the statement’s contents is powerfully corroborated by the biological evidence inculpatory Sanders, namely the presence of Sanders’ semen and saliva on Amanda’s clothing and body See Lowe, 65 F 3d at 1146 (“nature and strength of independent evidence relevant to the conduct in question” is a factor to be considered in 804(b)(3) analysis), cf State v Forney, 321 S C 353, 359, 468 S E 2d 641, 645 (1996) (upholding exclusion because “there is no independent evidence corroborating statements that [the

declarant] killed [the victim]”) Thus the requirements of 804(b)(3) are met, and Hill’s testimony would have survived any hearsay objection, had one been made ¹⁷

3 The Exclusion Of Hill’s Testimony Violated Cope’s Federal Due Process Right To Present A Full Defense And Sixth Amendment Right To Trial By Jury

In addition to violating well-settled principles of South Carolina evidence law, the exclusion of James Hill’s testimony also violated Cope’s federal due process right to “a meaningful opportunity to present a complete defense ” Crane v Kentucky, 476 U S at 690 (internal quotations omitted) This right includes the right to compel the attendance of witnesses at trial and to present those witnesses in defense of the charges brought Rock v Arkansas, 483 U S 44, 61-62 (1987) It also includes the right to have an impartial jury serve as the trier of all facts necessary for conviction, with the prosecution bearing the burden of proving to the jury guilt beyond a reasonable doubt Apprendi v New Jersey, 530 U S 466, 477-78 (2000) Both of these due process entitlements were transgressed by the exclusion of James Hill’s testimony

¹⁷ In addition, even assuming, arguendo, that the Hill statement did not satisfy a well-established exception to the hearsay rule under South Carolina law, an exculpatory confession of a third party offered through hearsay, even if state evidentiary rules prohibit its admission, is admissible on due process grounds when the evidence at issue is reliable and highly relevant to a critical issue in the case State v Ard, 332 S C 370, 382, 505 S E 2d 328, 333 (1998) (overruled on other grounds[0]) (citing Green v Georgia, 442 U S 95 (1979)) Where, as here, “constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice ” Chambers, 410 U S at 302

As discussed above “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense ” Chambers, 410 U S at 302 (internal citations omitted) Mr Cope’s defense at trial was that Sanders killed Amanda, and that he acted alone, rather than in some kind of conspiracy with Cope James Hill would have testified that he heard Sanders bragging about his participation in a murder under circumstances that were materially identical to those surrounding Amanda Cope’s death The similarity between Sanders’ statement and Amanda’s murder lends credence to Cope’s defense theory that Sanders did indeed assault and kill Amanda, and that he did so alone Amanda Cope was sodomized and raped, Sanders bragged that he sodomized and raped his victim (R p 3429, line 19 to 25, R p 3430, line 1-4) Sanders bragged that he smothered his victim, Amanda had injuries consistent with strangulation (R p 1045, lines 14-18) Sanders claimed that his victim was a little girl from Rock Hill, Amanda was a little girl from Rock Hill Sanders also said that he entered through a window, which is consistent with the theory that Sanders entered and exited the Cope residence without leaving apparent signs of forced entry Most importantly, Sanders’ statement did not contain any reference whatsoever to another person – much less the victim’s father – observing or participating in the attack and killing Hill was accordingly a witness whose testimony would have

powerfully substantiated Cope's entire theory of defense. Thus, the unwarranted exclusion of Hill's testimony was not only erroneous under South Carolina evidence law, but also violated Cope's fundamental federal due process right to present witnesses in his defense.

The exclusion of the Hill testimony also transgressed Cope's Sixth Amendment right to trial by jury. This right "is fundamental to the American scheme of justice," Duncan v. Louisiana, 391 U.S. 145, 149 (1968), and an essential element of the jury's responsibility for assessing the truth of every accusation is "determining the weight and credibility of witness testimony," United States v. Scheffer, 523 U.S. 303, 313 (1998) (citations omitted), Washington v. Texas, 388 U.S. 14, 22 (1967). Given that Hill's testimony was relevant and admissible, the jury should have heard his testimony, evaluated his credibility, and determined the appropriate weight to be accorded his testimony. By preventing the jury from performing this vital function, the trial judge usurped the fact-finding role of the jury and, consequently, violated Cope's right to a jury trial.

II The Trial Court Erred In Excluding Testimony By The Defense False Confession Expert About Two Other Cases Of "Coerced Internalized" False Confessions That Were Substantially Similar To The Cope Case

The trial court made yet another critical error that deprived Cope of evidence essential for a complete defense when it precluded Dr. Saul Kassin, the defense

expert on false confessions, from testifying about two particular false confession cases – those of Gary Gauger and Peter Reilly. In barring this testimony, the court failed to follow its own articulated rule that testimony about other false confession cases would be admissible if these cases were “on all fours” with the Cope case. By failing to even analyze the similarities among the three cases, the court abused its discretion. This abuse of discretion prejudiced Cope because it prevented him from offering a plausible explanation to the jury not only for why he was influenced to confess to a murder he did not commit, but also for why he confessed to perhaps the most heinous crime imaginable – the rape and murder of his own child.

In order to educate the jury on the phenomena of false confessions, the various types of false confessions, and the factors that can lead people to confess to crimes they did not commit, Cope proffered Dr. Kassir, one of the leading experts in the subject, as an expert defense witness. After a lengthy voir dire, the trial court qualified Dr. Kassir as a false confession expert, and found that his testimony would assist the jury, that the underlying science was sufficiently reliable, and that the probative value of Dr. Kassir’s testimony was not outweighed by any prejudicial effect. (R p. 2437, lines 22 to 25, R p. 2438 lines 1-6). The court limited Dr. Kassir’s testimony in one critical respect, however, holding that

he could not testify about “particular cases” of false confessions unless they were “on all fours with this particular case ” (R p 2438, lines 4-6) This limitation grew out of the court’s concern that if Cope’s counsel elicited a “litany of horror cases” of wrongful convictions based on false confessions, the prejudicial value of such cases would outweigh the probative value of Dr Kassin’s testimony (R p 3638, lines 8-22)

In the course of Dr Kassin’s testimony before the jury, Dr Kassin made reference to the infamous Central Park Jogger case, a case in which five teenage defendants confessed to and were convicted of rape and attempted murder before being exonerated by DNA evidence¹⁸ This mention of the Central Park Jogger case drew an objection from the state and a sharp rebuke by the judge outside of the presence of the jury

I thought I made it clear that I did not want testimony that, I hate to use the word sensational, but borders on sensational I don’t want this jury put in fear that they are going to have to live the rest of their lives if they put an innocent man in jail because the joggers and all this other stuff happened I want them, if you want to help the jury, then I thought my ruling was given them the tools not the examples, I thought that’s what I ruled

(R p 2453, lines 17-23) Instead of conceding that Dr Kassin would not testify about other cases, defense counsel then asked the judge to delay his ruling until the

¹⁸ For an in depth description of the facts of the Central Park Jogger case, see Steven A Drizin & Richard A Leo, The Problem of False Confessions in the Post-DNA Age, 82 N C L Rev 891, 891- 901 (Mar 04)

court heard a full proffer of Dr Kassin's testimony The court granted this request (R p 2457, lines 1-15)

During this proffer, Dr Kassin described a particular type of false confession – the coerced internalized false confession As Dr Kassin explained, such confessions occur when “individuals would not only confess to a crime” under interrogation, but also “come to doubt their own innocence and then ultimately confess to something they didn't do and believe that confession ” (R p 2460, lines 4-7) Coerced internalized confessions, Dr Kassin further explained, follow a “predictable script ” (R p 2460, line 9) They involve individuals whose memories are vulnerable to manipulation – perhaps because they are sleep-deprived, or exhausted, or grieving – who are then presented with false evidence of their guilt (R p 2460, line 11-16) In trying to reconcile the fact that he has no memory of committing a crime with “apparently unimpeachable objective evidence of their guilt,” (R p 2460, line 24), the vulnerable suspect, according to Dr Kassin, then “entertains the idea that he committed this act” and somehow repressed his memory of it or blocked it out (R p 2461, lines 5 –12) The suspect accordingly begins to imagine how he would have committed this act, and ultimately confesses falsely to the crime in tentative language such as “I must have done this” or “I guess I did that ” (R p 2461, lines 14-17) In each case of coerced

internalized false confessions, Dr Kassin explained, the common ingredient is that the “presentation of false evidence puts them over the edge ” (R p 2461, lines 21-22)

During this proffer, Dr Kassin discussed two cases of coerced internalized false confessions that bore striking resemblances to Cope’s first inculpatory statement In the first case, one Peter Reilly confessed to murdering and sexually assaulting his mother

A man by the name of Peter Riley [sic] who came home and found his mother was dead and he called the police and they arrived and brought him in for questioning and after several hours of questioning they offered to administer a polygraph He said, fine, I’ll take the polygraph He failed the polygraph and began to doubt his own memory Asked the question is it possible somebody could commit an act like this and not be aware of it and the detective who is interviewing him said yes, that sort of thing can happen At which point he started to imagine what he must have done, talked about being angry at his mother for disciplining him and other details and ultimately gave a confession It turned out that there was exculpatory information and after two or three years in jail he was released and DA’s Office didn’t go back to retry the case

(R p 2464, lines 18-25, R p 2465, lines 1-9) The second case described by Dr Kassin was that of Gary Gauger, an Illinois man who was convicted of murdering both of his parents and sentenced to death

There was another and I’ll just give you one more case because it bears a very close resemblance to this one, of a 41 year old man by the name of Gary Geiger [sic] who comes home to find his parents slaughtered and he calls 911 He is then brought in

for interrogation. He is administered a polygraph. After extensive interrogation he is told that he failed the polygraph. At which point he starts to conclude that I must have done it and I blacked out. Ultimately, he confesses to bringing, to coming up behind his parents, yanking their heads back by the hair, and slitting their throat. It turns out that the surveillance tape later picked up a motorcycle gang in which one of the members was bragging about this particular murder in detail and knew all about it and so he was again exonerated.

(R p 2466, lines 10-25, R p 2467, line 1)

Dr. Kassir then testified that Cope's case, like those of Gauger and Reilly, contained many of the classic ingredients of a coerced internalized false confession: a vulnerable fatigued subject who is confronted with false evidence of his guilt that causes him to doubt his memory, to hypothesize about how he would have killed his family member, and ultimately to confess that he must have killed his family member. (R p 2487, lines 14 to 25, R p 2488, lines 1-24)

After this proffer, the state objected to Dr. Kassir making any mention of the Gauger and Reilly cases. (R p 2492, lines 1-6) The judge, without analyzing whether the particular cases were "on all fours" with the Cope case, sustained the objection. (R p 2492, lines 7-8)

**A The Trial Court Abused Its Discretion By Excluding Testimony
About Two Cases That Were Substantially Similar To The Cope
Case**

A trial court's ruling "to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion " Mizell v Glover, 351 S C 392, 570 S E 2d 952 (2002) An abuse of discretion occurs, however, when the ruling rests on an error of law or a factual conclusion that is without evidentiary support, Fontaine v Peitz, 291 S C 536, 354 S E 2d 565 (1987) Moreover, a court's ruling on the admissibility of expert testimony is an abuse of discretion where the exclusion of such evidence is "manifestly arbitrary, unreasonable, or unfair " Ellis v Davidson, 358 S C 509, 524 595 S E 2d 817, 825 (S C App 04) Here, the trial court abused its discretion because it failed to follow its own rule, and arbitrarily excluded any testimony about two cases which were "on all fours" with the case before it

The cases of Gary Gauger and Peter Reilly are identical in many respects with the Cope case These similarities include (1) that all represent "coerced internalized" false confessions, a relatively rare type of false confession during which an innocent and vulnerable defendant, when confronted with seemingly unassailable evidence of his guilt, begins to doubt his own memory and actually comes to believe that he might have committed the crime, (2) that Gauger, Reilly

and Cope were all vulnerable, sleep-deprived, grief-stricken relatives of the victims, (3) that all three men were presented with what was purported to be powerful evidence of their guilt, (4) that the trigger for all three confessions was the same – all three men were told they had failed a polygraph test, (5) that all three, when they began to confess, used tentative language like “I might have” or asked interrogators if they could have killed the victims but not remembered doing so, (6) that all three eventually confessed to murdering loved ones – Gauger to killing both his parents, Reilly to killing and sexually assaulting his mother, and Cope to killing and sexually assaulting his daughter, and, (7) that all three men recanted their confessions. In preventing Dr. Kassir from mentioning the Gauger and Reilly cases, the trial court not only failed to compare the facts of the Cope case to those cases, it gave no legally sufficient reason for its decision. Such a baseless decision is the essence of arbitrariness.

State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004), does not require a different result, notwithstanding the fact that Myers was another case in which Dr. Kassir was called to testify about false confessions. As in this case, the trial court in Myers qualified Dr. Kassir and permitted him to testify, but precluded him from testifying about particular cases unless those cases were identical to the Myers case. When Dr. Kassir sought to discuss two cases – a false confession case from

Indiana and the very same Peter Reilly case at issue here, the trial court precluded him from doing so Id., at 50-51, 596 S E 2d at 493-4 The South Carolina Supreme Court affirmed the trial court's decision, holding that the exclusion of the Indiana case was not an abuse of discretion because the case was so dissimilar. The court also held that the exclusion of the Reilly case was not error because, although the case was similar, Dr Kassin was permitted to briefly talk about the case, and in light of his other testimony, Myers was not prejudiced by the exclusion Id.

Myers can thus be distinguished because the Gauger and Reilly cases were not merely "similar" to the Cope case but were, in fact, nearly identical in many respects. All three interrogations followed the same script, and used the identical ploy of a "failed" polygraph test, to convince a defendant who claimed he had no memory of murdering a loved one that he might have done so by blocking out any memory of the crime. Moreover, unlike in Myers, Dr Kassin was not permitted to testify at all about these cases at trial. As a result, the jury in this case was deprived of the essential information it needed to understand the circumstances that give rise to a coerced internalized false confession, and that innocent defendants can be – and have been – persuaded to confess not only to murder, but to raping and killing their own family members.

B The Exclusion of Testimony Regarding The Gauger And Reilly Cases Prejudiced Cope

The prejudice suffered by Cope as a result of the trial court's exclusion of Dr Kassir's testimony is easily appreciated when one considers the special power of confession evidence and the difficulty that defendants who falsely confess have in winning exoneration at trial. Confessions are perhaps the most powerful type of evidence in a court of law. Arizona v. Fulminante, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct") (citing Bruton, 391 U.S. at 139-40). As one commentator has put it, "the introduction of a confession makes the other aspects of a trial in court superfluous," C.T. McCormick, Handbook of the Law of Evidence at 316 (2d ed. 1972).

Experimental research across a range of settings has demonstrated that juries tend implicitly to believe confessions and to view them as dispositive evidence of guilt. This is so even if the confessions are completely uncorroborated by other evidence, contain significant errors, and fail to lead police officers to any evidence that they did not already know. See Saul M. Kassir & Gisli Gudjonsson, The

Psychology of Confessions: A Review of the Literature and Issues, 5 Psychol Sci in the Public Interest at 56 (04) (discussing studies) Studies of actual cases also support the proposition that juries often accept confessions uncritically In the two largest studies of proven false confessions, false confessors who pled not guilty and took their cases to trial were convicted by juries between 73% and 81% of the time Richard A Leo and Richard S Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J Crim L & Crimin 429, 491-496 (1988), Drizin & Leo, 82 N C L Rev at 996

Juries so readily convict innocent defendants in false confession cases because false confessions are counterintuitive – jurors simply cannot imagine that they would ever confess to a crime they did not commit For this reason, jurors give little credence to a defendant's naked claim that his confession is false But it is becoming increasingly clear that people do, indeed, falsely confess in such situations and with alarming frequency In fact, false confessions are emerging as one of the leading causes of wrongful convictions, of the first 130 known post-conviction DNA exonerations in the past 15 years, 35 (or nearly 27%) have involved false confessions Benjamin N Cardozo School of Law, The Innocence

Project, at [http //www innocenceproject org/causes](http://www.innocenceproject.org/causes), see also Drizin & Leo, 82 N C L Rev 891 (documenting 125 proven false confessions)

Moreover, jurors in the Cope case needed not only to learn that false confessions occur as a general matter, they also had a second misimpression to overcome before being in a position to fairly and reliably evaluate Cope's defense. This was the natural misimpression that people cannot be influenced to confess to crimes as grievous as murder or rape, and especially not where the victims are members of the defendants' own families.

Again, only studies of documented false confessions, highlighted through expert testimony, can assist juries in this regard. In fact, studies of proven false confessions show that the overwhelming majority of documented false confession cases occur in murder cases. Drizin & Leo, 82 N C L Rev at 947 (101 of 125 (81%) proven false confessions are to murder). As only an expert can explain, this is because it is in the most serious cases that police officers are most likely to push the envelope with their interrogation tactics. As far as the belief that no innocent person could be influenced to confess to killing or raping a loved one, this is where Dr. Kassir's testimony would have been most critical. Like Cope's case, both the Gauger and the Reilly confession cases were "coerced internalized false confessions" in which defendants were presented with false evidence of their guilt.

in the form of polygraph results. Such evidence, Dr. Kassir would have explained, is a proven trigger for false confessions – it has been known to cause defendants to doubt their own memory of the events and, through a police-encouraged process of trying to visualize how the crimes were committed, lead them to believe that they might have killed their loved ones. Without these case studies, jurors had no frame of reference to enable them to accept that Cope, or for that matter anyone, could be influenced to confess to killing a loved one.

Juries expect defendants to tell a story about what happened that makes sense, a story that possesses “narrative integrity.” See, e.g., Old Chief, 519 U.S. at 183. Defendants who tell the jury a story with missing pieces inevitably are convicted. The trial court’s decision to preclude Dr. Kassir from testifying about two similar cases in which defendants falsely confessed to killing loved ones under nearly identical circumstances thus prevented the defense from filling a critical piece of its defense theory. This decision was an abuse of discretion which should result in a reversal of Cope’s conviction.

III The Trial Court Erred In Denying Cope's Motion To Suppress His Statements Because Those Statements Were Obtained In Violation of Cope's Fourth and Sixth Amendment Rights

A The Trial Court Erred In Denying Cope's Motion To Suppress His Statements Under The Fourth Amendment

At approximately 10 15 p m on November 29, 2001, Lts Herring and Waldrop picked up Cope at his mother's home to question him about Amanda's death (R p 271 , line 15-16) For the next three and one-half hours, the officers pressured Cope to confess to Amanda's murder (R p 273, line 21-23) Cope adamantly asserted his innocence some 600 times, (R p 1781, lines 13-19), repeatedly telling the police that he had no knowledge of the circumstances of his daughter's death, and imploring them to give him a polygraph test (R p 2965, line 13 to 25, R p 2966, line 2)

Nonetheless, at approximately 3 00 a m on November 30, 2001, the Rock Hill authorities decided to place Cope under arrest for the murder of his daughter (R p 91, line 3 -25, R p 92, line 25) Lt Blackwelder then typed up a warrant for Cope's arrest and went to the home of Magistrate Margy McNeely to present the warrant Although not a single fact in support of probable cause appear on the face of the warrant, Lt Blackwelder testified that she verbally communicated to Magistrate McNeely the basis for her belief that Cope killed Amanda, specifically telling the magistrate (1) that Cope appeared to be the only adult in the home at

the time of girl's death, (2) that there were no signs of forced entry inside or outside the residence, and (3) that Cope had made some inconsistent statements as to what time his children went to bed on the night of the murder (R p 89, lines 6-21, R p 95, lines 3-25) Lt Blackwelder did not tell Magistrate McNeeley that Cope had persistently and vehemently denied any knowledge of the circumstances of his daughter's death (R p 133, lines 9-12) Magistrate McNeeley authorized the warrant and Cope was served at 4 21 a m (R p 93, lines 22-25)

The next morning, Cope was transported by Lt Herring to the York County Sheriff's Office for a polygraph test to be administered by Det Baker (R p 2968, lines 7 to 20) When this test was over, Det Baker informed Cope that he had failed the test, and proceeded to interrogate him for some two and a half hours (R p 2975, line 6 to 25, R p 2976, line 10) During this interrogation, Cope made his first confession to killing Amanda (R p 477, lines 2-16)

Over the next several days, Cope continually revised or attempted to revise this initial incriminating statement On December 3, 2001, he told Capt Cabaniss and Lt Blackwelder that he "didn't do it" (R p 2998, lines 9-16) When Cope realized the police would not accept his recantation, however, he changed his statement, and claimed to have unintentionally harmed Amanda while in a dream state (R p 3322, lines 1-17) Immediately after Cope gave this second "dream"

statement, Rock Hill officers transported Cope to his home and had him “re-enact” Amanda’s murder, on videotape, creating a third statement (R p 1800, lines 12-17) Unsatisfied, Capt Cabaniss pressed Cope to make yet another statement wherein Cope would confess to killing Amanda intentionally This Cope eventually did, at 4 55 p m on December 3, 2001, creating a fourth and final incriminating statement

All of these statements were a direct result of Cope’s illegal arrest and accordingly ought to have been suppressed

1 Cope Was Arrested Without Probable Cause

Probable cause to support an arrest exists when “the facts and circumstances within the arresting officer’s knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested ” State v George, 323 S C 496, 509, 476 S E 2d 903, 911 (1996) In assessing the totality of the circumstances, a reviewing court “must examine the facts individually in their context to determine whether rational inferences can be drawn from them” that support a finding of probable cause United States v Martinez-Cigarroa, 44 F 3d 908, 911 (10th Cir 1995) Reviewing courts must consider not only the facts supporting the finding of probable cause, but also those that militate

against that finding United States v. Valenzuela, 365 F.3d 892, 897 (10th Cir. 2004)

A police officer's mere intuition, or even strong or reasonable suspicion, does not amount to probable cause. Henry v. United States, 361 U.S. 98, (1959), United States v. Gray, 137 F.3d 765, 769 (4th Cir.) (en banc), cert. denied, 525 U.S. 866. See also, State v. Dupree, 319 S.Ct. 454, 458-459, 462 S.E.2d 279, 282 (1995) (defining probable cause in context of warrantless search). Such "hunches," no matter how important a role they may play in police work, cannot be used to justify investigative detentions that go beyond the limits of a Terry stop. See Terry v. Ohio, 392 U.S. 1, 27, (1968). Nor can a court find probable cause by piling "hunch upon hunch." Valenzuela, 365 F.3d 892 at 897.

In this case, the Rock Hill police based their contention that there was probable cause to arrest Cope upon "facts and circumstances" that amounted to nothing more than mere suspicion. No reasonable officer, without rushing to judgment, could have concluded that Cope probably murdered his daughter. Instead, the officers investigating the murder determined that Cope "must have" murdered Amanda based on inferences they made from the lack of forced entry, coupled with the fact that Amanda's injuries had to have been inflicted by an adult. However, the police failed to consider two other reasonable explanations for the

apparent lack of forced entry (1) that an adult intruder entered the house without leaving such signs, or (2) that a person within the house let an adult intruder in

Indeed, arrests based solely on no signs of forced entry are rarely, if ever, supported by probable cause See, e.g. People v Ellis, 476 N E 2d 22 (Ill Ct App 1985) (lack of signs of forced entry fails to establish anything beyond a mere hunch or suspicion that defendant committed the arson of his home, this hunch “overlooked the possibility that the house could have been entered through a door or window which negligently had been left open”) It is for this reason that courts have generally insisted that there be some additional evidence, usually in the form of physical or forensic evidence, to support a finding of probable cause in cases involving lack of forced entry See, e.g., Johnson v State, 722 S W 2d 417, 419-420 (Tx Ct Crim App 1986) (en banc) (probable cause found for murder arrest where there were no signs of forced entry, plus “reliable information from a credible source” that the attacker was a black male who would be blood spattered, and appellant appeared to have blood on his white pants), Winston v State, 131 S W 3d 333 (Ark 2003) (probable cause found where there was no forced entry plus the defendant was the last person seen at the scene on the night of the murders, defendant’s girlfriend gave a gun she owned to police officers, and told

them that “she and Winston were the only people who knew where the gun was kept and that Winston had told her to hide the gun after the murders occurred”)

At the time they sought the arrest warrant in this case, the Rock Hill police had no actual evidence linking Cope to the murder. Cope had denied committing the murder hundreds of times during the interrogation prior to his arrest, there was no physical or forensic evidence or eyewitness testimony linking Cope to any crime and Cope’s two other daughters, whose room was directly adjacent to Amanda’s, said they had not heard or seen anything unusual. Although Cope gave a few arguably inconsistent statements to the police regarding the children’s bedtimes, these statements were unrelated to the crime and did not support the conclusion that Cope raped and murdered his own child.

2 All Of Cope’s Statements Were Fruits Of His Illegal Arrest

“[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed,” United States v. Bayer, 331 U.S. 532, 540 (1947). For this reason “a later confession always may be looked upon as fruit of the first,” id., and all of Cope’s statements must be deemed products of his illegal arrest, Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979).

In this case, “the cat was out of the bag” as soon as Cope made his first statement. Indeed, it was uncontroverted at trial that each of Cope’s statements lead inexorably to the next – his second (“dream”) statement was given in an effort to mitigate the incriminating aspects of the first, his third (videotaped) statement was given in response to a demand that Cope re-enact the second statement, his fourth statement was given in response to law enforcement’s insistence that he modify his second and third statements to eliminate any “dream” scenario. Thus, all of Cope’s confessions – arguably one single protracted and continually revised statement – should have been suppressed.

B The Trial Court Erred In Denying Cope’s Motion To Suppress All Statements Made After December 1st Under The Sixth Amendment

On December 1, 2001, Cope was presented at a hearing presided over by Summary Court Judge Ray Long (R p 426, 427, 428, 429, 430, 431). During this hearing, the judge set Cope’s bond and informed him of his rights to an attorney, a jury trial, and a preliminary hearing (R p 427, lines 2-5). The judge filled out Cope’s application to determine whether he qualified for a public defender, and asked Cope to sign the form (R p 427, lines 3-24). At the end of the hearing, Judge Long deemed Cope eligible for a public defender, (R p 429, lines 8-10),

gave him information regarding his next court date, and informed him that a public defender would represent him thereafter (R p 429, lines 12-20)

While Cope's first incriminating statement pre-dated this hearing, each of the subsequent statements was obtained after and without the presence – or the legitimate waiver of – Cope's counsel. Those statements must accordingly be suppressed.

Indeed, Cope's right to counsel with respect to at least some of those statements was not merely ignored – it was intentionally undermined by law enforcement. During the interrogation session that produced Cope's final statement, Cope's attorney, Assistant Public Defender B J Barrowclough, arrived at the police station and asked to speak with Cope (R p 2559, lines 23-25).

Although Capt Cabaniss, the leader of the Cope investigation and one of his key interrogators, was immediately informed that Cope's attorney had arrived, Cope was not allowed to meet with Barrowclough for almost three hours, (R p 2564, lines 17-18). By the time Cope was allowed to meet his attorney, Cabaniss had succeeded in getting Cope to sign a statement waiving his right to an attorney, which Cabaniss himself had written out.

**1 Mr Cope's December 3rd Statements Were Obtained In
Violation Of Cope's Sixth Amendment Right To Counsel**

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense ” U S Const Amend VI Embodying a “recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself,” Moulton v Maine, 474 U S 159, 169 (1985) (quoting Johnson v Zerbst, 304 U S 458, 462-463(1938)), the right to counsel is considered “indispensable to the fair administration of our adversarial system of criminal justice,” Moulton 474 U S at 168, and accordingly applies “at every stage of a criminal proceeding where substantial rights may be affected ” Mempa v Rhay, 389 U S 128, 134 (1967)

The Sixth Amendment right to counsel is thus triggered “at or after the time that judicial proceedings have been initiated ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,’” Fellers v United States, 540 U S 519, 523 (04) (quoting Brewer v Williams, 430 U S 387, 398 (1977), Kirby v Illinois, 406 U S 682, 689 (1972)) Because Cope's December 1st initial appearance represented the commencement of “adversary proceedings,” and because the December 3rd interrogation of Cope represented a “critical stage”

of the prosecution, Cope's December 3rd statements were obtained in violation of his Sixth Amendment rights and ought to have been suppressed

**a The December 3rd Interrogation Represented A
Critical Stage In the State's Prosecution of Cope**

The Sixth Amendment right to counsel encompasses events prior to trial such as the interrogations at issue in this case. Indeed, the Supreme Court has recognized that a defendant has an especially great need of the assistance of his counsel when he is confronted, pre-trial, "by his expert adversary," United States v. Ash, 413 U.S. 300, 310 (1973), see also Wade, 388 U.S. at 224 (noting that the Sixth Amendment right to counsel extends to pre-trial events because "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pre-trial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality"). The "Sixth Amendment [therefore] guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State," Michigan v. Jackson, 475 U.S. 625, 632 (1986) (quoting Moulton, 474 U.S. at 176).

**b The December 1st Initial Hearing Constituted The
Beginning Of "Adversary Proceedings" Against Cope**

Even though South Carolina has not yet considered this precise question, other states – and many federal courts – have been uniform and unambiguous in holding that the Sixth Amendment right to counsel attaches at an initial hearing. See, e.g., O’Kelley v State, 604 S E 2d 509, 512 (Ga 04) (“[W]e hold that an initial appearance hearing is a formal legal proceeding wherein the Sixth Amendment right to counsel attaches”), State v Lagarde, 917 So 2d 623 (La Ct App 2005) (“Under Louisiana law, a defendant's right to counsel guaranteed by the State Constitution attaches no later than the defendant's initial appearance or first judicial hearing”), State v Tucker, 626 A 2d 1105, 1119 (N J 1993), United States ex rel Dove v Thieret, 693 F Supp 716, 723 (C D Ill 1988) (“Normally, unless the prosecution is involved prior to the initial hearing, that is the point when the state begins to prosecute and the defendant gains the right to the presence of counsel”), State v Barrow, 359 S E 2d 844, 847 (W Va 1987) (“An adversary judicial criminal proceeding is instituted against a defendant where the defendant after his arrest is taken before a magistrate and is, inter alia, informed of the complaint against him and of his right to counsel ”), cf United States v Moreno, 122 F Supp 679, 681 (E D Va 2000) (“Because defendant had not been arrested, indicted, arraigned, or made an initial appearance at the time of the interview, no Sixth Amendment right to counsel existed ”) (emphasis supplied), United

States v Walker, 148 F 3d 518, 529 (5th Cir 1998) (rejecting a defendant's argument that his right to counsel attached in November of 1995 when his initial hearing did not occur until August 5, 1996)

The fact that Cope's initial appearance was largely administrative and did not itself require the presence of counsel is irrelevant with respect to this analysis "The question whether [a proceeding] signals the initiation of adversary judicial proceedings is distinct from the question [of] whether the [proceeding] itself is a critical stage requiring the presence of counsel " Jackson, 475 U S at 629-30 n 3 Nor does it matter that Cope failed to ask for his lawyer on December 3rd and in fact ultimately acceded to the state's strong invitation to decline counsel's assistance Jackson, 475 U S at 633 n 6 (1986) ("We presume that the defendant requests the lawyer's services at every critical stage of the prosecution"), Brewer, 430 U S at 404 ("the right to counsel does not depend upon a request by the defendant"), Carnley v Cochran, 369 U S 506, 513 (1962) ("it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request")

2 Cope Was Prejudiced By The Violation Of His Sixth Amendment Rights

True enough, in order to establish a Sixth Amendment violation, courts generally require that a defendant show not only that his right to counsel had

attached and that the time period during which he was deprived of counsel was a “critical stage” in the prosecution, but also that he was, in some way, adversely affected or prejudiced by this deprivation. See Alston v. Garrison, 720 F.2d 812, 817 (4th Cir. 1983). That is, “a judgment may stand only when there is no reasonable possibility that the [practice] complained of might have contributed to the conviction,” Garrison, 720 F.2d at 81 (quoting United States v. Hasting, 461 U.S. 499, 506 (1983)). However, it is not necessary that the demonstrated prejudice be outcome-determinative – the defendant need only show that the government’s disregard for his right to counsel “imposed [an] additional effort or burden on the defense.” Briggs v. Goodwin, 698 F.2d 486, 494 (D.C. Cir. 1983). Indeed, “[m]ere possession by the prosecution of otherwise confidential knowledge about the defendant’s strategy or position is sufficient in itself to establish detriment to the criminal defendant.” Id. In this case – where the prosecution’s entire case rested largely on Cope’s incriminating statements – in particular the videotaped “re-enactment” of the crime – the absence of counsel on December 3rd resulted in substantial prejudice to Cope.

3 Suppression Is The Only Appropriate Remedy For The Sixth Amendment Violation In This Case

Sixth Amendment relief must be “tailored to the injury suffered” and designed to “neutralize the taint” of that injury. Morrison, 449 U.S. at 668. Under

the circumstances presented here – where authorities intentionally kept a represented person from consulting with counsel and where the statements obtained in the absence of counsel were highly damaging, the only appropriate remedy ought to have been to deprive the government of the “fruits of its transgression[s] ” Id at 669, cf Morrison, 449 U S at 669 n 2 (rejecting dismissal as Sixth Amendment remedy where there was “no claim of continuing prejudice which could not be remedied by a new trial or suppression of evidence) This is not simply a case where the “constable blundered” by failing to appreciate that Cope had a right to counsel, this is a case “where the constable planned an impermissible interference with the right to the assistance of counsel ” United States v Henry, 447 U S 264, 270, 275 (1980), see also Brewer, 430 U S at 399 (Sixth Amendment violated where police “deliberately and designedly” set out to interview defendant in the absence of counsel)

IV The Trial Court Erred In Denying Cope’s Motion For A Directed Verdict On The Conspiracy Charge

This state’s decision to charge Cope with conspiracy was one of expediency – there was simply no other way, short of admitting a grievous error, for authorities to reconcile the fact that Cope had confessed to a crime that Sanders had clearly committed Thus the conspiracy charge went forward despite the fact that not a shred of evidence existed to connect Cope, an obese, reclusive white man, with

Sanders, an African American sexual predator. Rather, the conspiracy charge was based solely upon the inference that there “had to be” a conspiracy between Cope and Sanders in order for the state’s case to make any sense. (R p 916, lines 20-22). Thus the state ultimately prosecuted Cope for conspiracy merely by “piling inference upon inference,” contrary to South Carolina law. State v Barroso, 320 S C 1, 9, 462 S E 2d 862, 868 (S C App 1995), rev’d on other grounds, 328 S C 268, 493 S E 2d 854 (1997). The court should therefore have granted Cope’s motion for a directed verdict on the conspiracy count.

Criminal conspiracy is defined by statute as a “combination between two or more persons for the purpose of accomplishing and unlawful object” S C Code Ann §16-1-7-410 (2003). The essence of a conspiracy charge is the agreement or combination. State v Crawford, 362 S C 627, 608 S E 2d 886, 891 (S C 2005). A formal or express agreement is not necessary to prove a conspiracy, a tacit or mutual understanding which results in the willful, intentional adoption of a common design is sufficient. Id. Although an agreement can accordingly be proven by circumstantial evidence, see State v Buckmon, 347 S C 316, 323, 555 S E 2d 402 (2001), courts must nonetheless ensure that the existence of an agreement is not proven merely by “piling inference upon inference,” Barroso, 320 S C at 9.

Similarly, once the existence of a conspiracy is established, the state must prove beyond a reasonable doubt at least a slight connection between the defendant and the conspiracy in order to convict the defendant of knowingly participating in the conspiracy Id. This connection is required to prevent the jury from concluding that a conspiracy exists and that the defendant was a part of it by “bridging an evidentiary gap with rank speculation” Goldsmith v Witkowski, 981 F 2d 697, 703 (4th Cir 1993), cert denied, 509 U S 913 (1993)

South Carolina precedent therefore holds that conspiracy convictions must rest upon something beyond the fact that each defendant is individually implicated of the substantive offense underlying the conspiracy charge. For example, in State v Mouzon, 326 S C 199, 485 S E 2d 918 (1997), the South Carolina Supreme Court affirmed the reversal of a defendant’s conviction for conspiring to distribute crack cocaine, even though the state presented evidence that Mouzon was present on the street with drug dealers at a location where drug transactions were taking place. When the drug transaction soured and the purchaser tried to flee the scene in his car, several men scattered and grabbed bottles to throw at the car to stop it from leaving. Mouzon went behind his house and was seen by one of the bottle-throwers with a gun in his hand shortly after the fatal shots were fired. Id at 202, 920. The Court found that, at the most, the state showed the existence of “similar

or parallel objectives between similarly situated people,” when what is needed is “proof they intended to act together for their shared mutual benefit within the scope of the conspiracy charged ” Id., at 206, 922 (quoting United States v Evans, 970 F 2d 663 (10th Cir 1992), cert denied, 507 U S 922 (1993)), see also State v Gunn, 313 S C 124, 437 S E 2d 75 (1993) Accordingly, “[t]he mere fact that two persons happened to be doing the same thing at the same time does not compel the conclusion that there was a conspiracy,” William Shepard McAninch & W Gaston Faurey, The Criminal Law of South Carolina, 476 (4th ed 2002) ¹⁹

That actual proof of both an agreement and some connection between the co-conspirators is necessary to secure a conspiracy conviction is illustrated by cases in which South Carolina courts found sufficient evidence to affirm conspiracy convictions See, e.g., Crawford, supra, (conspiracy conviction affirmed where defendant, the father of one co-conspirator and uncle to another, was in vehicle immediately after burglary and fled scene after car was stopped, police found flashlights, bolt cutters, and gloves in car), State v Childs, 299 S C 471, 385 S E 2d 839 (1989) (conspiracy conviction affirmed where defendant knew co-

¹⁹ McAninch s viewpoint has deep roots in South Carolina law, as shown by State v Ameker, 73 S C 330, 339, 53 S E 484, 487 (1906), wherein the South Carolina Supreme Court affirmed the following conspiracy jury instruction given by a trial court judge

“[S]uppose, Mr Foreman, that you and the gentleman on your left would go out in the streets of Orangeburg and commit an assault and battery on some other person, that would be an unlawful act, but it would not be a conspiracy, unless there was an agreement between you to do the act before doing it It is an agreement to do an unlawful act that is the gist of the whole matter ”

conspirator, was seen running from area where victim's body was found, bloodhounds tracked victim's scent to co-defendant's house, and defendant admitted that he had agreed to be lookout for co-conspirator), State v Clark, 286 S C 432, 334 S E 2d 121 (1985) (conspiracy conviction affirmed where defendant found near scene of housebreaking, lied about knowing co-conspirator who was actually his cousin, and admitted co-defendant told him about larceny plans but denied participation) No such evidence existed in this case

The trial court did not fulfill its legal obligation to ensure that an agreement between Cope and Sanders was not proven merely by "piling inference upon inference" in this case On the contrary, it allowed the state to tell the jury in closing argument, that a conviction could rest upon inference alone

If I convince you that Mr Cope is guilty beyond a reasonable doubt and I convince you that Mr Sanders is guilty then they had to do it together They can't both be guilty of these crimes and not have done it together I don't know what kind of relationship these men had I don't know the extent of it I don't know I don't have to know All I have to do is satisfy each of you that each one of them is guilty and if they were both guilty, then they had to do it together

(R p 3560, lines 8 to 15)

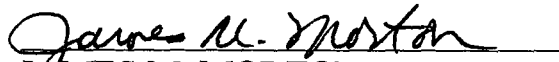
This argument erroneously invited the jury to find Cope guilty of conspiracy despite the absence of any evidence showing the essential element of a conspiracy charge – an agreement – and despite the lack of any evidence connecting Cope and

Sanders In the absence of such evidence, the trial court should have directed a verdict in Cope's favor

CONCLUSION

The Court should reverse the conviction and remand to the York
County Court of General Sessions for a new trial

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable John C Hayes, III, Circuit Court Judge

Case No 2004-GS-46-2614
2004-GS-46-3232, 2004-GS-46-200, 2004-GS-46-3233
2004-GS-46-3234

The State of South Carolina

versus

Respondent,

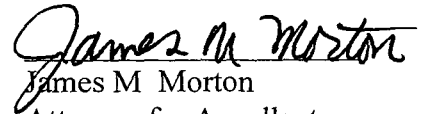
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Appellant complies with SCACR 211(b)

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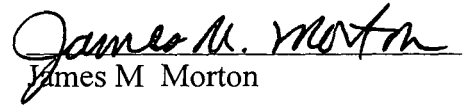
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IN THE COURT OF APPEALS**

**APPEAL FROM YORK COUNTY
Court of General Sessions
The Honorable John C Hayes, III, Circuit Court Judge**

**04-GS-46-2614-~~2618~~
02-GS-46-3232-3234
04-GS-46-200**

STATE OF SOUTH CAROLINA,

Respondent,

v

BILLY WAYNE COPE,

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- 1 Whether Cope was denied a fair trial for the rape and murder of his daughter by the exclusion of evidence that his alleged co-conspirator, James Sanders, whose saliva and semen were found on the victim, had also committed numerous other nighttime residential burglaries and assaults in the same time frame and geographic area, and that in each of these other cases Sanders acted alone and left no evidence of breaking into the homes?
- 2 Whether Cope was denied a fair trial by the exclusion of evidence tending to show that Sanders had bragged about the murder in such a way as to indicate he had acted alone?
- 3 Whether, assuming, arguendo, that Sanders' confession and his spree of other similar crimes were all inadmissible against him at a joint trial, due process required that the trial judge grant Cope's motions to sever his trial from Sanders'?
- 4 Whether the trial judge unfairly impaired Cope's defense by preventing his expert witness from describing similar cases in which suspects made demonstrably false confessions to having murdered close family members?
- 5 Whether Cope's confessions should have been suppressed because (a) they were the product of an unlawful arrest without probable cause, and (b) the police interrogated him without counsel after initiation of formal adversarial proceedings, in violation of the Sixth Amendment?
- 6 Whether the complete failure of proof on the essential element of an unlawful agreement required the trial judge to grant Cope's motion for a directed verdict of acquittal on the conspiracy count ?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Billy Wayne Cope, was charged in arrest warrants on November 30, 2001 with the November 29, 2001 murder of his twelve (12) year old daughter, Amanda Cope, criminal sexual conduct against Amanda and unlawful child neglect of all three of his minor children, Amanda, Kyla, and Jessica R 430, 8/25/04 Tr 73, lines 21-24 The Court of General Sessions for York County indicted Cope for murder, criminal sexual conduct (three counts) and unlawful neglect of minor children (three counts) R 81-82, 8/23/04 Tr 30, lines 11-25, Tr 31, lines 1-6, Indictment Numbers 04-GS-46-2614 to 2618, 02-GS-46-3232 to 3234, 03- GS-46-1843 to 1844, 46-3233 to 34 **Amended Supplemental ROA, p 30-47**

Subsequent indictments were returned charging Cope and James Sanders with conspiracy to commit criminal sexual conduct Sanders was also indicted for the murder of Amanda Cope and two counts of criminal sexual conduct against her Indictment Numbers 2004-GS-46-199 to 200, GS-46-196, GS-46-197-198 A superseding murder indictment was returned against Cope on July 22, 2004 Indictment number 2004-GS-46-3232 The Honorable John C Hayes, III, severed the criminal sexual conduct and unlawful conduct charges involving both of Cope's surviving children by order dated August 26, 2004 R 3699-3700

The state called the remaining charges against Cope and Sanders for trial in the York County Court of General Sessions on September 8th, 2004 R 894, 9/8/04 Tr 173, lines 9-20 Cope was represented at trial by A Philip Baity, James Morton, David Wood and Michael Smith of the York County Bar Sanders was represented by Leland Greeley of the York County Bar The prosecution was represented by Solicitor Thomas Pope, Deputy Solicitor Kevin Brackett and Assistant Solicitor Willy Thompson of the Sixteenth Judicial Circuit Solicitor's Office The trial

was held from September 8 through September 22, 2004 before the Honorable Judge John Hayes

The jury convicted Cope and Sanders as charged on September 22, 2004 R 3675-3677, 9/22/04 Tr 194, line 23, to 196, line 1 Judge Hayes sentenced Cope to life imprisonment for murder, 30 years consecutive for one count of criminal sexual conduct, and concurrent terms of 30, 10, and 5 years for the second count of criminal sexual conduct, criminal neglect of a child and conspiracy, respectively R 3686-3687, 9/22/04 Tr 205, line 18, to 206, line 1 Judge Hayes sentenced Sanders to life for murder, five years for conspiracy, and thirty years for each count of criminal sexual conduct, consecutive

Cope made a motion for a new trial R 3695-3698 Following denial of Cope's motion for a new trial, Cope timely served and filed a notice of appeal on September 30, 2004 Sanders filed a notice of appeal on September 30, 2004 This appeal follows

The relevant facts will be set out within the argument Particularly , Respondents do not endorse the Appellant's version of the "facts" set out in their brief inasmuch as they have been disputed by evidence or expressly rejected by the jury At most it is a version of their theory

The state's version of the facts are much simpler Between 2 and 4 a m on November 29, 2001, Amanda Cope, a 160 pound 12 year old girl, was brutally assaulted in her vaginal and rectal area, suffered severe beating to body from her head to her abdomen, and strangled to death in her bedroom This act was accomplished by the combined effort of her father, Billy W Cope and James Sanders Evidence supporting this version, as found to be factually true by the jury's verdict, is found throughout this Brief, but particularly in Argument IV, which will not be re-stated herein, but is incorporated by reference

ARGUMENT

I The trial court properly used its discretion concerning the admission of evidence concerning prior bad acts and statements of his co-defendant, James Sanders

In his first argument, Cope contends that he should have been allowed to present evidence concerning other crimes allegedly committed by James Sanders, and an alleged statement made by Sanders after incarceration. In addition, he raises the issue of whether his trial should have been severed from Sanders. He argues that the failure to do each of these deprived him of an opportunity to present to the jury his theory that Sanders acted alone in the crime. The trial court properly denied these efforts concluding the “other bad act” evidence failed to satisfy the requirement of Rule 404(b) to be admissible, that the alleged statement in jail was not relevant or admissible, and that the refusal to sever was appropriate.

A The Trial Court Properly Excluded Cope’s Proffer of Evidence of Other Crimes James Sanders Committed Under Rule 404(b) and State v. Lyle

In his brief before this Court, Cope claims that the trial court erred in excluding evidence that co-defendant Sanders committed other crimes subsequent to the November 29, 2001 murder. Cope asserts that this evidence was admissible under SCRE 404(b) to show the existence of a “common scheme or plan” and “identity.” The trial judge rejected the showing after a pre-trial hearing on September 8, 2004 based upon the dissimilarity of the crimes. R. 887-890, 9/8/04 Tr. 166-69.

The Proffered Evidence

A Alicia Lowery - 20 year old Black Female - December 12, 2001 Incident

This occurred in the victim’s residence at 224 Whitgreen Street in Rock Hill. Alicia

Lowery returned home at 7 00 PM and entered her residence through her back door. Although she lived there with her female cousin, no one else was home at the time. She went straight to the bathroom. When she came out, she noticed the front door was open. As she went to close the door, Sanders, who she did not know and did not have a weapon, forced his way in through the open door. Sanders tackled her. At some point he demanded money. R 751, 9/8/04 Tr p 29 Sanders grabbed a black plastic bag and initially put it over her head but she clawed it off. He then wrapped a throw rug around her head. He attempted to undress her by trying to pull up her shirt and tried to unbuckle her belt. She took a pen out of her back pocket and stabbed him a couple of times. Sanders pushed her back into one of the bedrooms or bathroom and closed the door and he held it shut from the outside. While she was in that room, she heard her screen door slam and Sanders ran away. R 739-751, 9/8/04 Tr 16-29. She later identified Sanders in a line-up and at the hearing. R 741, 745, 9/8/04 Tr 19, 23.

B Sarah Hagman Lee - 20 year old White Female - January 12 2002 Incident

Around midnight, Sarah Hagman Lee was attacked in her residence at 131 Reid Street (which is within the same block as George White's residence where a burglary had occurred at 10 30 that same night)¹. Lee answered a knock at her bathroom door while she was in her room watching T V, thinking it was a roommate. There were a series of knocks without an answer before she went to the door. Sanders pushed his way into her bedroom pushing her back and hitting her head. (This residence is a boarding house that she had recently moved into.) They

¹ Cope proffered evidence regarding the George White residential break-in committed by Sanders around 10 30 that night and within the block as Lee. In that incident, White walked into his living room and saw Sanders. He yelled at him and Sanders fled upon being detected, apparently seeking sanctuary and escape at Lee's. Sanders was identified as this intruder based on fingerprints lifted from the scene. R 830, 9/8/04 Tr 109, lines 14-18, Defense Exhibit 5.

wrestled their way back through the bathroom and into the kitchen. Once he had he

her on the ground he kicked her and pushed her, Sanders then got up and went into her bedroom and grabbed her purse which was on her sofa. When he came back into the communal kitchen, which was the only way out of the house, Lee had gotten up and grabbed a baking pan. She then hit Sanders in the head with a pan three times. He dropped her purse and some mace fell out of it. Sanders then got on top of her, but she sprayed Sanders with the mace and he got off of her. As Sanders ran for the door, Lee picked up a screwdriver (which was not hers and she assumed that Sanders brought with him) and tried to stab him as she grabbed Sanders' left foot. Lee stabbed at Sanders at three times and noticed blood running down his neck behind his left ear. Sanders then ran out the door with Lee's purse. Although she did not know him previously, she identified him. She stated he had a toboggan on his head than night that she pulled off during the assault and he was not wearing gloves. She did not know how he entered the house and was not aware of any signs of forced entry. Another female resident was across the hallway during the attack, but would not have been able to see the attack. (The record does not indicate whether she heard the commotion or not or whether she called the police). R 753-766, 9/8/04 Tr 31-

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C Kathy Davis - Elderly White Female - December 12, 2001 Incident

At 11:30 PM, Davis, alone, answered a knock at the door. Sanders, who she was unable to identify, said he had car trouble and asked to use the phone. He then pushed the door open and knocked her down. Sanders asked where she had money and looked everywhere for it, including under the bed and in the mattress. Sanders picked her up and carried her into the bedroom and on to her bed. He kissed on her lips and breast and had vaginal intercourse with

her He finally got \$20 from her purse He then left after getting the money and pulled out the phone from the wall to get a head start Subsequently, Sanders was connected to this case by DNA R 766-774, 9/8/04 Tr 44-52

D Sarah Phillips - Adult White Female - December 16 2001 Incident

This occurred in the victim's second floor apartment located at Deerfield Run Apartments on McGee Road in Rock Hill Sarah Phillips was home with her three daughters that night She had fallen asleep on her sofa The TV was on along with the lights and the Christmas tree She woke up around 1 00 AM with Sanders standing over her He said nothing and was not out of breath He had come in through the possibly unlocked patio door and must have climbed up the lattice She stated that she immediately screamed and he put his hand over her mouth She wiggled and kicked causing Sanders to put a rocking chair on her attempting to trap her One of her daughter started coming down the hall yelling She continued to scream and he let go and ran out the patio sliding glass door The defendant did not say anything She stated that the entire event lasted two minutes or a short period of time He had on a grey sweat shirt and a grey toboggan She identified Sanders as the culprit R 774-786, 9/8/04 Tr 52-64

E Gregg McCrary - Crime Analysis Expert

McCrary testified he had reviewed information about the incidents involving Davis, Phillips Lowery and Hagman R 828, 9/8/04 Tr 107 He also reviewed information about the murder of Amanda Cope

He contended that there were factors to consider about these incidents including date, location, in-door crime, out-door crime, suspect (known or stranger), forced entry, dual motives, sex, robbery, choking or asphyxia, element, and evidence R 831, Id 110 He considered these

crimes to have a tight temporal pattern from December 12 to January 12. He contended the location revealed that they were all in Rock Hill within miles of each other, which he contended was a family close geographic pattern. He contended that there was significance in committing crimes in door as opposed to out in the public because a private residence would allow the culprit more control of the premises. He considered a stranger factor to be significant and asserted that stranger based rapes were uncommon as opposed to "known relationship." He contended that in the particular cases there was no sign of what he defined as "forced entry." Concerning dual motives based upon his review of the police reports, there appeared to be a consistent pattern of dual motives of sex and forced sex, sexual assault, robbery and money. He noted that in the Phillips incident she had not reported an interest in robbery or money, but he included it as robbery due to the police report. R 829-836, 9/8/04 Tr 108-115

As to this classification, Judge Hayes questioned how McCrary could include robbery as a factor when the victim did not include it in her testimony. R 836, 9/8/04 Tr 115. The witness noted that she had not reported it as such. R 836-37, Id p 115-16

Concerning choking or asphyxial elements, he suggested that some had not reported this, like Davis who he opined was overcome easily due to being disabled, but that Phillips, Lowery, and Hagman (Lee) all had reported this behavior.² He also asserts that the offender did not take precautions in avoiding identification because of the presence of DNA or fingerprint at the

² It is evident that he also equates this factor with merely putting a hand over a victim's mouth who is screaming. See Phillips. As to Lee, he equates a choke hold for control with choking or asphyxia.

scene³

McCrary felt the Cope murder possessed similar characteristics because it was 17 days before the Davis assault, was an in-door crime, had no forced entry and contended sex and robbery existed because of her pocketbook being on the bed. In addition, he found the presence of asphyxia or choking present. He opined a statistical base about the relationship rapes and that stranger rapes are rare.

McCrary discounted the fact that Cope was charged with raping his daughter because the DNA match was to Sanders, "so the actual sexual assault was not done by Cope." R. 840, 9/8/04 Tr. p. 119, ll. 23-25. He opined that "there is sort of a common scheme and pattern that exists in these cases." R. 845, 9/8/04 Tr. p. 124, ll. 17-21.

On cross-examination, he admitted he had not spoken with the victims nor visited the crime scenes. R. 849-50, 9/8/04 T. 128-29. Importantly, he admitted that he failed to look at other crimes of burglary that occurred in the Rock Hill area during the same time period. R. 851, Id. at p. 130, ll. 9-22. He also admitted that he did not report on Cope whether it was "known or stranger" and had not reviewed the videotape. He admitted that if the father was the "suspect" it would be different from the others.

As to forced entry, he considered it to be physically defeating a lock or door jamb. McCrary admitted that in Davis, Lowery, and Hagman (Lee), the perpetrator pushed the door open, forcing it and then entering.

Concerning Davis, it was pointed out "he kept looking for money", but in Phillips there

³ Again, this classification ignores that on one occasion, the DNA match was the result of Sanders being stabbed (Lee).

was no evidence of robbery. Additionally, the hand was put over Phillips' mouth because she was screaming. As to Hagman (Lee), he was unable to state that there was evidence of a sexual assault on her or that it was other than a fight and robbery. R 858, 9/8/04 Tr 137

As to Cope, he felt the mere fact the victim's pocketbook was out of place was evidence of "robbery." R 858, 9/8/04 Tr 137

As to age of victim, although Amanda was 12 years old, the others were all grown women. R 858-59, 9/8/04 Tr 137-38

As to date patterns, he felt that the fact Cope was the earliest, and rejected that if Cope fell within the time frame it would be more substantiated. R 859, 9/8/04 Tr 138

His analysis of choking and asphyxiation next came under assault by Sanders' counsel. Particularly, Davis never indicated any and Phillips only stated the hand was over the mouth to stop screaming (twice), that Lowery described the bag, but not that there was any attempt to strangle, and in White there was nothing except flight. Although Hagman (Lee) spoke about a "choke hold" she never described someone on top of her trying to choke her (as in Cope). Id. at 140

Concerning Cope, it was pointed out that there was evidence of sexual mutilation in vaginal and rectal trauma, and evidence about a broom stick being used. However, there was no evidence of sexual mutilation (by object) in any of the other cases, although there was some vagina trauma on Davis. He admitted that there was no actual sexual assault on Hagman and others, but they had fiercely resisted. McCrary felt that the two sexually assaulted victims, the 60 year old disabled Davis and 12 year old girl were vulnerable. R 862-63, 9/8/04 Tr 141-42

However, he then admitted as to Phillips, Lowery, Hagman, there was no commonality of

vulnerability by age

Most importantly, he admitted that one “glaring difference” in the crimes is that Amanda Cope was dead and the others were not R 863-64, 9/8/04 Tr 142-43

F The Court's Order

In denying the admission of the evidence concerning the other bad acts of Sanders, the court determined that the various crimes were too dissimilar to be admitted At the outset , he rejected the testimony of expert crime analyst Gregg McCrary who attempted to equate the various crimes, concluding that his testimony was flawed Particularly, Judge Hayes noted that McCrary did not address whether there were other similar crimes in the Rock Hill area He stated that the asserted similarities were not significant He stated that the crimes happening “in doors”, to strangers, that no forced entry was arguable but not significant where stealth was used, climbing a lattice or waiting outside in a car for a door to open R 887-88, 9/8/04 Tr p 166-167 He questioned the concept of dual motives

The Court did conclude that Cope had proved by clear and convincing evidence that Sanders was involved in the four incidents R 889, 9/8/04 Tr p 168 However, it felt it failed to rise to the level necessary for admission under Rule 404 to show motive, common scheme or plan He noted that there were a variety of dissimilarities and when attempted to match up, they cannot be done, even though there are some similarities He noted that using identity to prove a connection to the crime did not count since there was DNA so identity is not necessary to prove Sanders was at this place He found that the ages of the victims are dissimilar , but the locales are somewhat similar He stated that he was not going to catalog them, “but I find that they are dissimilar to the extent that he will not let them in under Rule 404 R 889-90, 9/8/04 Tr p 168-

169 The Court further stated that the evidence did not need to be addressed under the balancing test of Rule 403 because he found that the evidence did not meet the level of a common scheme R 893, 9/8/04 Tr p 172, l 1-6 See also, R 2308-2313, 9/16/04 Tr p 25-30 - renewed motion to admit and denial at beginning of defense case

Standard of Review

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice State v Gaster, 349 S C 545, 557, 564 S E 2d 87, 93 (2002), State v Frank, 262 S C 526, 533, 205 S E 2d 827, 830 (1974) An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law State v McDonald, 343 S C 319, 325, 540 S E 2d 464, 467 (2000), State v Manning, 329 S C 1, 7, 495 S E 2d 191, 194 (1997)

Evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent Rule 404(b), SCRE, State v Lyle, 125 S C 406, 118 S E 803 (1923) To be admissible, the bad act must logically relate to the crime with which the defendant has been charged If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing State v Beck, 342 S C 129, 135-36, 536 S E 2d 679, 682-83 (2000) Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant State v Braxton, 343 S C 629, 541 S E 2d 833 (2001)

In the context of evidentiary law, Lyle and its progeny protect a defendant from the unrestricted admission of bad act evidence. This preliminary fact-finding by the judge ensures the evidence is subjected to some procedural safeguard before the jury hears it. There are exceptions to the general rule of inadmissibility.

In the present case, Cope is primarily arguing the common scheme or plan exception. When this exception is invoked, it is important to recognize that a close degree of similarity between the prior bad acts and the crime charged, by itself, does not satisfy Lyle. Indeed, the mere presence of similarity only serves to enhance the potential for prejudice. State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). The foundation for admissibility transcends mere similarity, for the admission of such evidence under the common scheme or plan exception requires a connection between the extraneous crimes and the crime charged so that proof of the former tends to prove the latter. Succinctly stated, prior bad act evidence must be relevant to prove the alleged crime. See State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997) ("A common scheme or plan concerns more than the commission of two similar crimes, some connection between the crimes is necessary"), State v. Hough, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997) ("The common scheme or plan [exception] concerns more than the commission of two similar crimes, some connection between the crimes is necessary"), State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) (noting that "a general similarity [is] insufficient to support the common scheme or plan exception"), State v. Bell, 302 S.C. 18, 27-28, 393 S.E.2d 364, 369 (1990), cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990) (noting that "evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged"), State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987).

("Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged "), State v Stokes, 279 S C 191, 193, 304 S E 2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person There must be some connection between the crimes

If there is any doubt as to the connection between the acts, the evidence should not be admitted "), State v Wallace, 364 S C 130, 611 S E 2d 332 (Ct App 2005) (finding the trial court erred in admitting evidence of alleged prior bad acts merely because the prior acts were similar to the crime charged, holding instead that the trial court should look beyond mere close similarity to consider the connection between extraneous bad act and the crime charged), State v Carter, 323 S C 465, 467, 476 S E 2d 916, 917-18 (Ct App 1996) (noting that "[i]n the prosecution of one crime, proof of another direct substantive crime is never admissible unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue", and further noting that "evidence of prior bad acts must be relevant to prove the alleged crime"), State v Campbell, 317 S C 449, 451, 454 S E 2d 899, 901 (Ct App 1994) (holding that "the evidence of prior bad acts must be relevant to prove the alleged crime")

Lyle and 404 (b) have set forth a rule of exclusion not inclusion As the Supreme Court stated

Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime But the dangerous tendency and misleading probative force of this class of evidence require that its admission

should be subjected by the Courts to rigid scrutiny Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors Hence, if the Court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected

Lyle, 125 S C at 416-17, 118 S E at 807 (emphasis added)

ANALYSIS

Cope relies on opinions from both the Court of Appeals and the South Carolina Supreme Court have focused exclusively on the close degree of similarity between the crime charged and the evidence of the other crime, without mentioning the "system" or relation between the two, which is the crux of the original exception See, e g , State v Hallman, 298 S C 172, 175, 379 S E 2d 115, 117 (1989) , State v Blanton, 316 S C 31, 32, 446 S E 2d 438, 439 (Ct App 1994) ("The prior acts were sufficiently similar to the charged offense to be admissible ") See State v Wingo, 304 S C 173, 176, 403 S E 2d 322, 324 (Ct App 1991) (finding the evidence of prior bad acts tended to show common plan or scheme when the experiences of each victim paralleled that of the other victims) ⁴

⁴ Other decisions correctly reflect a more narrow interpretation of the common scheme or plan exception See, e g , State v Brooks, 341 S C 57, 62, 533 S E 2d 325, 328 (2000) ("When the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced "), State v Parker, 315 S C 230, 233, 433 S E 2d 831, 832 (1993) ("[T]he connection between the prior bad act and the crime must be more than just a general similarity "), State v Rogers, 293 S C 505, 507, 362 S E 2d 7, 8 (1987) (stating that where the acts are ten years apart and the only connection between the testimony of the two daughters was that the defendant touched them both, the prior bad act evidence should have been excluded), overruled on other grounds by State v Schumpert, 312 S C 502, 506 n 1, 435 S E 2d 859, 862 n 1 (1993), State v Nix, 288 S C 492, 496, 343 S E 2d 627, 629 (1986) (finding where the robbery could not have been committed without the get-away-car, the relevance of the car theft to

His reliance on Hallman and Blanton are grossly misplaced. In Hallman, a sexual conduct case, the court found the evidence of prior acts against the defendant's foster children admissible relying on the similarity of the acts. Particularly, "the prior bad acts here occurred while each of the young women was a foster child to appellant and of similar age to the victim. In each instance, appellant took advantage of this relationship for his sexual gratification." In Blanton, the court found admissible prior acts where all three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All of the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification.

Here, as correctly determined by the trial judge there was no Lyle similarity between the other acts and Cope.⁵ The instant case concerned the middle of the night (between 2 and 4 AM

the crimes charged was easily perceived), State v. Stokes, 279 S C 191, 192-93, 304 S E 2d 814, 814-15 (1983) (concluding the trial judge erred in admitting testimony from a witness who speculated that the defendant intended to rape her because there was no connection made between that prior bad act and the act for which the defendant was charged), State v. Whitener, 228 S C 244, 265, 89 S E 2d 701, 711 (1955) (allowing testimony of another sexual act perpetrated against the same victim some hours after the original offense because the crimes were so related to each other that proof of one tended to establish the other), State v. Hubner, 362 S C 572, 608 S E 2d 463 (Ct App 2005) (stating that the similarity between separate acts must not merely be a similarity in the results, "[r]ather, there must be such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are the individual manifestations"), State v. Carter, 323 S C 465, 468, 476 S E 2d 916, 918 (Ct App 1996) (reversing defendant's conviction where there was no legal connection between the prior bad act and the crime charged), State v. Campbell, 317 S C 449, 451, 454 S E 2d 899, 901 (Ct App 1994) (finding absent a connection between the two acts, the testimony of prior drug sales utilizing a similar sales technique precisely the type of evidence Lyle prohibits).

⁵During the pretrial hearing on August 25, 2001, in response to a motion to sever Cope's other charges, Deputy Solicitor Thompson made a statement why then state was not proceeding on Sanders' other charges at the same time because the crimes were too dissimilar to be tried together. R 884-86, 8/25/04 Tr p 163, l 14 - p 165, l 5. In that proceeding, he described traits

R 1115, 9/9/04 Tr p 103) nighttime sexual mutilation and murder of the twelve year old female victim through abhorrent injuries to both her vaginal and rectal areas by an object. None of these preliminary factors existed in any of the proffered cases against Sanders. There was saliva, identified to Sanders DNA present around her breast. No sperm was found in the vaginal area. R 1078, 9/9/04 Tr p 66. There was evidence of a struggle in the bed with significant force consistent with holding her down while she was alive. R 1034-35, 9/9/04 Tr p 22-23. There were obvious signs of assault on Amanda including bruising about the head and abrasions on the back. It appeared that she had been struck from side to side on her head repeatedly. R 1048-49, 9/9/04 Tr p 36-37. There was evidence of strangulation on her neck area. R 1054-57, 9/9/04 Tr p 42-45. The pathologist rejected the claim that a blanket could have accidentally strangle her based upon the autopsy. R 1056, 9/9/04 Tr p 44. As to the rectal injuries, they were consistent with a blunt object being inserted up to 8 inches into the rectum. R 1089, 1104-05, 9/9/04 Tr p 77, 92-93. Dr. Maynard stated that this object would have been consistent with a broom handle or a dildo. R 1106-07, 9/9/04 Tr p 94-95. He stated the injury could not have been caused by a penis. R 110, 9/9/04 Tr p 106. He also found blows to the abdomen. He opined that Amanda was assaulted vaginally, anally and over her entire body with numerous bruises, injuries, and hemorrhages that occurred. The assaults were of an extreme vicious nature to cause the amount of rectal bleeding and were caused by a foreign object with sufficient force to cause deep internal hemorrhages that occurred. R 1120, 9/9/04 Tr p 108. Her death was the result of strangulation. R 1120, 9/9/04 Tr p 108.

There is no similarity or pattern evident in Cope assaults that existed in the proffered

of dissimilarity in the different crimes

crimes No crime resulted in death No crime involved a child No crime involved rectal penetration No crime involved strangulation by hand on the neck No crime involved similar vaginal penetration and bruising by an object No crime involved an sexual assault from 2 to 4 am

The Appellant seeks to equate “no forced entry” as a theme to his showing of similarity to suggest a common scheme but even in his proffers revealed dissimilarity in the entry in the other Sanders crimes from just appearing through an open patio door, to knocking on a door and gaining entry through an assertion of car trouble Where there was no evidence that theft occurred in the Cope murder, it appeared that seeking money was a theme in Davis and Lee, While a sexual assault occurred in Davis, it did not possess the mutilation of the vaginal and rectal areas that occurred to Cope

Although the crimes occurred in the Rock Hill area, the victims covered the entire range from 12 to 60 years old Simply put, unlike Hallman and Blanton, there was no signature style in the burglaries Each possessed different traits on how Sanders gained entry and the manner that he exited the scene The other crimes also revealed differences on how Sanders would react when confronted from immediate flight to fight

Since the crimes failed to show any “common scheme or plan” the Court did not abuse his discretion in disallowing the introduction by Cope His assertions that this deprived him of his right to show that Sanders, by habit, acted alone in committing crime does not entitle him to enter evidence that simply does not satisfy the evidentiary standards of Lyle and Rule 404(b)

Absent a sufficient showing, the Court properly denied admissibility.⁶ This issue must be denied

⁶ As determined by the judge, Sander's identity at the Cope scene was not necessary to be proved by the assistance of other act evidence due to the DNA findings. At issue was the common scheme concept and essentially whether Sanders, in fact, had a "common scheme." The Appellant, as noted, failed to prove that a "common scheme or plan" but only show that he had committed other crimes by clear and convincing evidence.

B The trial court properly denied the motion to sever his case from Sanders after denying the admission of the evidence of Sanders other crimes

The record reveals that after the trial court denied the admission of the evidence of Sanders other alleged crimes that his counsel moved to sever his case R 891-92, 9/8/04 Tr p 170-171 Although denied by the Court, counsel Morton asserted that if the court was concerned about the prejudice of the evidence against Sanders that it could be cured by the severance and then the evidence could be admitted as third party guilt Judge Hayes then declared that he had not considered the prejudice portion of the evidentiary test because he found that it failed to meet the common scheme test R 893-94, 9/8/04, Tr p 172-173 Respondents submit this denial was not an abuse of discretion

Motions for severance are addressed to the discretion of the trial court State v Nichols, 325 S C 111, 122, 481 S E 2d 118, 124 (1997) "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt " Hughes v State, 346 S C 554, 559, 552 S E 2d 315, 317 (2001) (emphasis removed) "A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial " Id "An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial " Id (citing People v Greenberger, 58 Cal App 4th 298, 68 Cal Rptr 2d 61, 86 (1997)), see also State v Dennis, 337 S C 275, 281-82, 523 S E 2d 173, 176 (1999) (the denial of a severance motion will not be reversed absent an abuse of discretion and a showing of resulting prejudice) Furthermore, as murder co-defendants, appellants were not

entitled to separate trials by right State v Kelsey, 331 S C 50, 73, 502 S E 2d 63, 75 (1998)

First, we reject the argument asserted the joint trial resulted in a "spill-over effect" from evidence admitted against other co-defendant. Because the State alleged the men conspired and acted in concert to commit the substantive crime charged, all of the State's evidence admitted in the joint trial would have been admissible against Cope if he had been granted separate trials. See State v Wilson, 315 S C 289, 294, 433 S E 2d 864, 868 (1993) (noting the State is granted great latitude in introducing circumstantial evidence of a conspiracy from its commencement to its conclusion and that substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the conspiracy's existence, object, and scope), State v Mikell, 257 S C 315, 324, 185 S E 2d 814, 817-18 (1971) (acts and statements of a co-conspirator made in furtherance and during a conspiracy are admissible to prove the existence of a conspiracy)

Second, the trial court did not deny the admission of the other act evidence based upon the "prejudice" to the co-defendant, but because it was inadmissible because he failed to show the existence of any common scheme or plan, either among the proffered crimes or Cope's death. He attempts to bootstrap that these matters may otherwise be admissible as evidence of third party guilt under state law. This argument, though at first blush compelling still does not override the evidentiary inadequacy it suggests.

Although the Appellant's brief was written prior to the decision of the United States Supreme Court in Holmes v South Carolina, ____ U S ____, 126 S Ct 1727 (2006), concerning an intervening standard of third party guilt, the impact of the decision does not require a different result in this case because an erroneous standard was not applied in this case by the trial court in reaching its decision. In Holmes, the Court ruled that the trial court erred in excluding third-party

guilt evidence Holmes was convicted of murder, first-degree criminal sexual conduct, first-degree burglary, and robbery after 86-year-old Mary Stewart died from complications resulting from a brutal attack in her home Holmes was convicted and sentenced to death, but a new trial was granted on state post-conviction review At the second trial, the prosecution relied heavily upon forensic evidence including a palm print, clothing fibers, and DNA Insisting that the evidence was contaminated and that he was being framed, Holmes sought to introduce evidence that another man committed the crime The trial court found the evidence inadmissible due to its speculative nature The South Carolina Supreme Court affirmed, taking a different position than the trial judge, holding that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence " State v Holmes, 361 S C 333, 342-343, 605 S E 2d 19, 24 (2004) The United States Supreme Court reversed

The Court determined that the exclusion of the third-party perpetrator evidence violated Holmes' federal constitutional rights by the appellate court decision where such evidence was excluded *due to the existence of strong forensic evidence in favor of the Holmes' guilt* Holmes, 126 S Ct at 1735 The Court reasoned that such an approach inappropriately focused on the prosecution's case "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt " Id the Court concluded that this Court reliance upon the standard of State v Gay, 343 S C 543, 541 S E 2d 541 (2001), was inappropriate and remanded the matter

The Court's judgement required that third party guilt issues be evaluated consistent with

the Court's earlier analysis set out in State v. Gregory, 198 S C 98, 104, 16 S E 2d 532, 534 (1941) as limited by the constitutional analysis set out by the United States Supreme Court in the Holmes opinion ("Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the Gregory rule and other similar third-party guilt rules were designed to further") Under the Gregory test (affirmed as appropriate by the U S Supreme Court and not challenged therein), the *evidence* offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence, evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible " State v. Gregory, 198 S C 98, 104, 16 S E 2d 532, 534 (1941) (citing 16 C J 560) The Gregory court went on to cite from 20 Am Jur 254

But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty

Id , 198 S C at 104-105, 16 S E 2d at 535

The problem with the Appellant's argument is that he was not being denied the opportunity to present this particular evidence because of a lack of severance Even if severed,

this particular evidence would be inadmissible because it still does not satisfy the Rule 404(b) common scheme threshold. Plainly evidence of Sanders' guilt was and would be forthcoming by the admission of his DNA evidence. It was the evidentiary insufficiency that precluded the particular other act evidence from coming in. The Court did not err in denying the severance. The same decision on severance would have resulted had Holmes already been decided. Contrary to the assertions of the Appellant, there is no constitutional mandate that in a separate trial a lower standard of similarity of offenses would be required under Rule 404(b) when evidence is sought to be used by a defendant rather than the state. Rule 404(b), a rule of exclusion in South Carolina, does not express that it is a rule for either the state or defense, or only for the state. However, it is only one addressing that evidence of other crimes are not admissible to prove the character of a person in order to show action in conformity therewith. To the extent his attempt is only to show that he acts alone in his crime, i.e. "in conformity therewith" he can gain no benefit from a separate trial or otherwise.

He also makes an unpreserved suggestion that even if properly excluded, that Cope should have been allowed a severance solely to allow the entry of the bad act evidence of the crimes without reference to Sanders. Since it was not asked for below as a basis for the timely severance motion, it cannot be considered in the appeal as a matter of state procedure.⁷ This issue

⁷This concern was raised for the first time before the beginning of the defense case when he renewed his bad act evidence admission request which was denied. At that time he also suggested that even without saying Sanders that he wanted to introduce evidence that there were such identified crimes as the four previously presented in the area and time period and that a lack of forced entry "to reflect on the credibility of the police." R. 2308-2310, 9/16/04 Tr. p. 25-27. The court again re-iterated that these were not similar crimes. After the denial, he again moved for a severance and renewed the motion asserting that he was severely prejudiced by the inability to prove "motive" by the lack of the other crime evidence. R. 2312-13, id. at 29-30 [The Appellant failed to state how this suggests a "motive"]. The court continued to deny the motions.

is not preserved for appellate review See State v Dunbar, 356 S C 138, 142, 587 S E 2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal ")

Assuming it was preserved as a basis for a severance request, it simply does not meet the limited purpose that he seeks to admit - to show that the concept of a lack of forced entry is much more common than the police admitted. Again, the circumstances of these cases merely reveal the facts of those four isolated cases, including ones where the culprit was actually let in through the open door. His interpretation that their wholesale admission now springs as an attempt to impeach a general comment by the police is unfounded. The Appellant has referred to R 1642-43, 9/13/04 Tr p 261-262 to suggest the admission was required. There, in cross-examination, Todd Gardner testified that he had found the Cope residence to be secure when he checked the area around the house with doors locked and windows sealed. Contrary to the assertion in the brief, Gardner stated that he had never processed a residential burglary scene where there were no signs of a forced entry, but declared that "I'm not saying it don't happen, but I'm saying I can't recall working one of them [and] I guess its possible " R 1643. See also, R 3566, 9/22/04 Tr p 84, l 15 (prosecution closing argument). It is difficult to see how this evidence of isolated cases would impeach Gardner's testimony, suggesting that it had deprived him a right to present a defense. However, any error in failing to admit those matters at trial (an issue not raised in this appeal), would have certainly been harmless error. Similarly, these comment did not warrant a severance to be granted.

The trial judge did not abuse his discretion in denying the severance motions. His argument must be denied.

C The Trial Court Did Not Abuse its Discretion In Excluding Upon defendant James Sanders Objection Testimony From James Hill Concerning Sanders' Admission To Assaulting A "Little Girl In Rock Hill" Where There Was No Testimony As To Time, Place or Other Circumstances To Connect The Case To The Cope Murder

James Hill, a convicted burglar serving an 18 year sentence from 2003, was confined with James Sanders in the segregation unit of Perry Correctional facility in Pelzer, South Carolina in 2002 9/21/04 Tr 222, ll 13-20 In camera, he testified at a hearing that he overheard Sanders talking to another inmate According to Hill's testimony, Sanders and the other inmate

got to the subject of crimes and criminal history and they got to joking about how the police force weren't doing their jobs, that it was easy to get away from them, to delude them [sic], and he made the comment that he was going to get away with what he did to that little girl in Rock Hill, and he went on to describe explicitly what he had done and then in getting away

R 3429, 9/21/04 Tr 225, ll 8-17 Hill stated that Sanders made "remarks about oral and anal sodomy" and "smothering the child," specifically quoting Sanders as stating that he (Sanders) "f____d her F____d her good " Hill further testified that Sanders "alluded to the fact that he had got in through a window in the house and that he had left through the same window and proceeded to go to another individual's house " R 3429, Id., Tr 225, l 19 - p 226, l 4, R 3431, Tr 227, ll 13-16 Hill also stated that he met Cope four or five months after that when they were housed together in the Life Skills Christian Block and overheard a discussion about his case and proceeded to tell him what he had just testified about R 3430-31, 9/21/06 Tr p 226-227

After this proffer, Sanders' counsel objected to Hill's testimony concerning Sanders' admissions as irrelevant "because there has been no identifying characteristics " He noted that his client had been charged with many allegations and that there was nothing that made it relevant to

this case R 3432-33, 9/21/04 Tr 228, l 21- p 229, l 10

The trial judge sustained Sanders' objection, noting that Hill's proffered testimony did not include any specification by Sanders as to "the time, place, or other circumstances" of the crime R 3433, 9/21/04 Tr 229, ll 5-7⁸

As stated earlier the standard of review is abuse of discretion. The trial judge did not abuse his discretion in this matter. His basis for sustaining defense counsel Greeley's motion for exclusion was that the evidence was deficient because there was no testimony as to time, place or other circumstances. It is evident that the alleged comments in 2002 do not necessarily relate to the Cope case because it neglects to identify the "little girl" only that he had raped a little girl in Rock Hill. He does not state when the rape occurred or that he was even charged with the crime at the time. Simply put, the evidence that he raped a little girl in Rock Hill and left through a window that he entered is insufficient.

Concerning third party evidence, after Holmes, requires under the Gregory test, the *evidence* offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence, evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." State v. Gregory, 198 S C 98, 104, 16 S E 2d 532, 534 (1941). The trial court, in its discretion concluded that this comment related by

⁸ In his brief, he asserts that the statement by Sanders should have been admitted under SCRE Rule 804(b)(3) as a "statement against penal interest." Initial Brief of Appellant, p 53-54. However, he never asserted at trial this basis for admission and it is not preserved for appeal. See State v. Dunbar, 356 S C 138, 142, 587 S E 2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.")

Hill merely casts a conjectural inference upon Sanders because of its lack of a connection to this incident, particularly where Sanders was the subject of other criminal allegations⁹

Alternately, assuming the evidence was admissible under Holmes and Gregory, the exclusion of the evidence was harmless error. It cannot be ignored that Sanders was convicted by this jury of both murder and criminal sexual conduct, as well as the conspiracy. An examination of the record in this case reveals that any error in excluding Petitioner's third-party-guilt evidence, if it was error at all, was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). As the Court stated in Rose v. Clark, 478 U.S. 570, 579 (1986), a judgment of conviction should be affirmed "[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt." Even if this Court should find that there was error in the exclusion of the evidence, any error in the exclusion is harmless beyond a reasonable doubt.

In Chapman, the Supreme Court rejected the notion that all constitutional errors at trial necessitated automatic reversal. The Court also held that constitutional errors should be measured against a higher level of scrutiny than non-constitutional errors. Chapman, 386 U.S. at 23, 87 S.Ct. 824. Recognizing that non-constitutional errors can be treated as harmless if there is no "reasonable possibility that the evidence complained of might have contributed to the conviction," the Court in Chapman announced that constitutional errors are harmless only if the

⁹ It must be clear that we are not stating that the exclusion of the evidence was proper because of the strong evidence of Cope's guilt or forensic evidence inconsistent with the proffer. Under Holmes, that threshold analysis on admissibility would be error. Instead we are asserting that the evidence itself failed to satisfy the relevance requirement based upon the defects noted by the judge on whether the comment even applied to this case where Sanders, as alleged by Cope, was a serial criminal.

reviewing court is "able to declare a belief that [the error] was harmless beyond a reasonable doubt " Id (quoting Fahy v Connecticut, 375 U S 85, 86-87 (1963)) Beginning with Chapman and continuing in a line of decisions thereafter, the Supreme Court has formulated a two-part analysis for assessing the import of constitutional errors committed by trial courts Under the first facet of the Chapman test, the reviewing court determines whether the error is in a class of violations subject to the harmless error rule ("trial errors") or, instead, is within a rather narrow category of errors that require automatic reversal ("structural errors") Arizona v Fulminante, 499 U S 279 (1991) Structural errors "affect 'the entire conduct of the trial from beginning to end, such that any attempt by a reviewing court to isolate the impact of the error would be fruitless ' Because a "trial error" occurs during the presentation of the case to the jury, the error "may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission (or exclusion) was harmless beyond a reasonable doubt "

Here there was a plethora of evidence that Cope was involved in the death of his daughter As noted - though challenged - his statements of guilt and re-enactment of the murder and assault with an object support the harmless error assessment Although not a predicate to the admissibility of the Hill statement under Holmes, on a harmless error analysis, the proffer conflicts and is contradicted by the evidence at trial where the information that he "f--- her" was inconsistent with the lack of semen *in her body* and the alleged entry and exit from the Cope home suggested by the comment as being through the window was inconsistent with the physical makeup of the Cope home where the windows were secured in some fashion by either screens, plastic or being nailed down and where the windows were dirty, sooty and with spider webs that would have been obvious if anyone had climbed in or out In fact, the evidence revealed that

there was no sign of wiping smudging or anything to suggest that anything had entered through any window See, R 988-89, 1236-38, 9/8/04 Tr p 267-268 9/9/04 Tr p 224-226

Although the statement did not indicate any involvement by another person in Sanders acts, that fact alone does not undermine the powerful evidence which suggests the lack of harmful error by its exclusion, if believed Further, the fact that Hill admitted that when Sanders told him, "I didn't think nothing of it" and later befriended Cope at prison and revealed it to him, makes his credibility in serious question further limits the probative impact by the lack of presentation of this evidence in a harmless error test

For all these reasons, the assertion must be denied

II The trial judge did not abuse his discretion in limiting the expert testimony of social psychologist, Dr Saul Kassin, concerning false confessions by disallowing two anecdotal examples, where the expert was able to describe to the jury the concept of “coerced internalized false confessions ” The excluded evidence was inadmissible hearsay concerning the Peter Reilly and Gary Gauger cases and any probative value was substantially outweighed by its prejudicial effect

The Appellant complains that the trial judge abused his discretion by prohibiting Dr Saul Kassin, a social psychologist, to include in his opinion testimony concerning the factors involved in the phenomena “false confessions” to include two (2) anecdotal cases involving the confessions of Peter Reilly and Gary Gauger as specific examples of “coerced internalized false confessions ” He contends that the failure to admit these examples, which were “similar,” was an abuse of discretion because “it **prevented** him from offering a plausible explanation to the jury not only why he was influenced to confess to a murder he did not commit but why he confessed to perhaps the most heinous crime imaginable ” *Initial Brief of Appellant*, p 59

Contrary to the assertion within the brief, although expressly precluded from presenting his interpretation of the anecdotal examples of Gauger and Reilly, the defense was not “prevented” from offering a plausible explanation as to why he was influenced to confess to the murder by the expert witness Contrary to the assertions in the brief, the exclusion of these two anecdotal “real life” examples, did not leave Cope “powerless” to respond to the State’s claim concerning the confession *Initial Brief of Appellant*, p 23

Assuming arguendo that the trial judge, over the State’s objection, properly admitted the expert testimony on false confessions, the excluded anecdotal examples were inadmissible First, even if relevant, any probative value of the hearsay examples may have been greatly outweighed

by its prejudicial impact because (1) the excluded testimony about Reilly and Gauger would have averted the jury's attention from its focus on both the voluntariness and credibility of Cope's confessions, (2) the introduction of Gauger and Reilly's confessions would have opened the door to collateral evidence for the jury to determine whether either the Gauger or Reilly confessions were actually "false", and, most importantly (3) Dr Kassin was able to testify about the factors concerning "false confessions", including general examples of "coerced internalized false confessions" without the specific examples. The trial court properly used its discretion in excluding these anecdotal interpretations of the confessions in the Gauger and Reilly cases.

STANDARD OF REVIEW

Rule 702, SCRE, allows the testimony of an expert witness qualified by knowledge, experience, skill, training, or education to assist the jury to understand the evidence or determine an issue. Even if evidence is admissible under Rule 702, however, it may be excluded under Rule 403, SCRE, if its probative value is outweighed by its prejudicial effect. State v. McHoney, 344 S C 85, 96, 544 S E 2d 30, 35 (2001).

The trial court's decision to exclude expert testimony will not be reversed on appeal absent an abuse of discretion. State v. Price, 368 S C 494, 629 S E 2d 363 (2006), State v. Myers, 359 S C 40, 596 S E 2d 488 (2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law or on a factual conclusion that is without evidentiary support. State v. Price, *supra*.

To warrant reversal based upon the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice. State v. Douglas, 367 S C 498, 507, 626 S E 2d 59 (S C App 2006). To show prejudice, there must be a reasonable

probability that the jury's verdict was influenced by the challenged evidence or lack thereof

Douglas, supra

In light of the adoption of the SCRE, the Supreme Court has held that the admission of expert testimony should be analyzed pursuant to Rules 702 and 402, SCRE and the factors outlined in State v Jones, 273 S C 723, 259 S E 2d 120 (1979) Under Rule 702, SCRE, the trial court must find

(1) the scientific evidence will assist the trier of fact, (2) the expert witness is qualified, and (3) the underlying science is reliable¹⁰ The trial judge should determine the reliability of the underlying science by using the *Jones* factors the publication of peer review of the technique, prior application of the method to the type of evidence involved in the case, the quality control procedures used to ensure reliability, and the consistency of the method with recognized scientific laws and procedures Council, supra Further, if the evidence is admissible under Rule 702, SCRE, the trial judge must determine if its probative value is outweighed by its prejudicial effect under Rule 403, SCRE

How the Issue was Raised Below

Prior to the trial, the prosecution became aware that the defense intended to utilize a psychological expert on false confessions On August 13, 2004, a motion was filed to exclude or limit the testimony **Amended Supplemental ROA p 10** Motion, August 13, 2004 In that preliminary motion, the State asserted that it had learned that the defense intended to call a

¹⁰ Rule 702, SCRE, states

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise

psychologist to testify concerning the prevalence of false confessions and factors that make a climate conducive to rendering a false confession. Id. In addition, the State believed that “the witness may be called to describe other cases where false confessions have been made and might be asked his opinion on the voluntariness and/or reliability of the confessions given in the case.” Id. The State initially asserted that the “area of expertise does not meet the requirements concerning admissibility of expert evidence under Rule 702 SCRE and State v. Jones, 259 S.E.2d 120 (1979).” Assuming arguendo admissibility, the State alternatively moved to limit the testimony by the exclusion “of facts from other specific cases or any opinions that such expert may attempt to render that go beyond either the scope of their expertise or the recognized boundaries of that area of expertise.” Further, if such testimony was admissible, the State noticed its intent to introduce in cross-examination or reply testimony all the circumstances of this defendant’s confessions. Id.

During the defense case, Dr. Saul Kassin, a social psychologist, was offered as an “expert in the area of social psychology of police interrogation.” R. 2406-07, 9/16/04 Tr. 124-25.¹¹ He declared on voir dire that his purpose was not to state that a particular confession is true or false, but “merely to talk about the general principles that lead people to confess to crimes that they did or did not commit.” R. 2409, 9/16/04 Tr. p. 127, ll. 16-25.¹²

The State initially objected to the qualification of Dr. Kassin on two (2) grounds. R. 2414-16, 9/16/04 Tr. p. 132, ll. 1-15. First, the State contended that this area qualifies

¹¹ Dr. Kassin stated he had an article coming out that people cannot distinguish between true or false confessions, including social scientists. R. 2409, 9/16/04 Tr. 121.

¹² In his voir dire, Dr. Kassin admitted that “nobody knows the frequency of false confessions.” R. 2411, 9/16/04 Tr. p. 129, ll. 8-9.

as a scientific area that is capable of being ascertained with enough certainty that a jury should rely upon it under the Jones standard R 2414-15, 9/16/04 Tr 132-33 Second, the State contended the evidence was not admissible because Cope had not stated the confessions were false R 2415, 9/16/04 Tr p 133, ll 1-15 Finally, the prior witness had opined that polygraphs were more reliable than psychological testimony, yet polygraphs are not admissible R 2415, 9/16/04 Tr p 133, ll 10-15

The defense argued that the testimony would qualify under Rule 702 The trial court then required the defense to make a proffer under the requirements of Jones, supra R 2418-2431, 9/16/04 Tr 133-149 Dr Kassin declared that he could not state “to a reasonable degree of scientific knowledge that the confession is false ” R 2426, 9/16/04 Tr p 144, ll 5-10 He stated that his testimony would be that false confessions occur and that there are three (3) types of false confessions that bring different psychological dynamics into play R 2427, 2429-30, 9/16/04 Tr 144, 146 The types are voluntary false confessions, coerced compliant confessions, and coerced internalized confessions Id He stated that it was his opinion that under certain circumstances a suspect vulnerable to manipulation as a function of stress, fatigue, or drug use is presented with apparently objective unimpeachable false evidence, which the vast majority of false confession evidence cases contain, it can lead people to confess to things they didn’t do and to have memories of events that they never experienced R 2430-31, 9/16/04 Tr p 148, l 16 - p 149, l 8 He stated that he had case studies and examples of that in certain documented cases of false confessions R 2431, 9/16/04 Tr 149, ll 9-12

Solicitor Brackett then re-asserted that he felt the testimony would not be useful to the jury because it is “commonsense” and that the facts of the case allow the argument, but asserted a

lack of scientific basis to establish some objective scientific method by which they can analyze the confession any better than they could with their own common sense R 2431, 9/16/04 Tr 149

The State then re-asserted its motion in limine regarding the mentioning of other particular cases He asserted that there are numerous confessions given and that if he went into a particular factual scenario, it may require him to contact the other jurisdiction on whether the facts were correct and whether people may still believe these people were guilty¹³ He asserted that injecting these other cases would be “confusing, misleading, and prejudicial” under Rule 403 R 2433, 9/16/04 Tr p 151, ll 1-3

Counsel Barty then cited to State v Myers, 359 S C 40, 596 S E 2d 488 (2004) which involved Dr Kassir’s testimony and whether he was not allowed to go into specific cases and asserted the Court had sanctioned the idea of the use of examples as appropriate if they had a factual connection with the instant case The defense asserted it was implicit acceptance of science as assisting the trier of fact because the Court did not reject his opinion outright R 2437, 9/16/04 Tr 155

Judge Hayes then asked the defense whether the expert was going to testify about any particular cases R 2437, 9/16/04 Tr p 155, ll 6-7 Counsel Barty declared that it was not his intent “to call any reference to any specific other case” and that he planned to discuss generally the science that is recognized and certain hallmarks and factors that are common to know cases of false confession R 2437, 9/16/04 Tr p 155, ll 10-13

¹³ See, Kansas v Marsh, ___ U S ___, 126 S Ct 2516 (2006)(Scalia, J concurring) at 2531-2538 on mischaracterizations of “exonerations” in various studies

The court then concluded that the evidence would assist the jury and that Dr Kassir was qualified. The court then stated

Court I find that the probative value is not outweighed by the prejudicial value but the witness cannot testify about particular cases unless they are all focus with this particular case, and you've told me that, you don't know of any

Baity I have not, I am not going to ask him about those

R 2438-39, 9/16/04 Tr p 156, ll 1-8 The court then reiterated his concern that if he starts justifying from other cases "I'm going to stop him." Counsel Baity stated that there may be a case with similar factors, but not the same as a case with two defendants and DNA on one and a confession on the other. The court reiterated a concern that if counsel presents a horrible string of injustice of individuals in spite of overwhelming DNA evidence and being in jail confessed, then prejudicial value will outweigh prejudicial effect. R 2428-2430, 9/16/04 Tr 156-58

Dr Kassir then began his testimony before the jury. R 2441, 9/16/04 Tr p 159, l 1. He testified that the study of confessions draws on different areas of psychology, including social and cognitive psychology. R 2442, 9/16/04 Tr 160-61. He stated counsel had provided him with the statements, audio tape and video tape re-enactment, police reports, prior testimony, polygraph examination and protocol to determine if a relevant science could be applied to help understand the materials. R 2443-44, 9/16/04 Tr 161-62. He also stated that he would have like to have had a videotape of the entire interrogation, but it was not done. R 2444, 9/16/04 Tr 162

Dr Kassir stated that people sometimes falsely confess to crimes they did not commit, but conceded that he could not estimate the numbers, but they knew about post-conviction DNA

exonerations where people had confessed, but don't know about the "invisible number of cases" that led some researchers who reviewed 125 recent false confession cases to suggest they were looking at the "tip of the iceberg" R 2446, 9/16/04 Tr p 164, ll 14-22

Dr Kassin stated that there were several ways to determine that a confession is false, but it is based upon the outcome. In some instances, a person gives a detailed confession and at some point it is discovered the crime never occurred and the person released or not tried. A person may confess in a detailed manner and statements about why they did it, only to later have a culprit come forward and confess or evidence not otherwise available showing his innocence. "There are a whole number of those cases" R 2447-48, 9/16/04 Tr p 165, l 2-22. Further, "there are a number of cases where scientific evidence, like DNA, shows in fact that the person who gave the confession often a very detailed statement, was not the culprit" R 2447-48, 9/16/04 Tr p 165, l 18 - p 166, l 4.

Dr Kassin stated that he had studied false confessions for 20 years and concluded he could not estimate how often it happens, although he opined it was with "regular frequency". He said he studied "known case studies" of people found innocent subsequent to confessing and developed three separate groups of false confessions. The first group, "voluntary false confessions" included a sizable number of people who confessed to crimes they did not commit without pressure, which he contended was similar to the *Lindberg* case when 200 confessions were called in. He contended that the reasons varied such as protecting someone else, feeling guilty about not being there for the victim, or wanting attention, such as a high profile case. R 2448-2451, 9/16/04 Tr 166-69. Dr Kassin noted these situations demand corroboration and proof that the confessor knew someone that others did not about the crime.

Dr Kassin stated that there were two types of police induced confessions. He stated that the easiest to understand was called "coerced compliant false confessions." These are confessions where someone might confess to a crime completely knowing he's innocent but he's in a situation that because of stress and interrogation tactics his situation has gotten so unpleasant that he wants a way out to terminate the bad situation or avoid threatened or implied harm or to gain a reward. Once out of the pressure, according to Kassin, he turns to the lawyer and states that I confessed, but I did not do it. These are the "most common" false confessions. He stated that they were exhibit in the recent Central Park jogger case in 1989. R. 2452-53, 9/16/04 Tr p. 170, l. 19 - p. 171, l. 1.

At point, the state objected and it was sustained. R. 2453, 9/16/04 Tr p. 171, ll. 2-3.

a In Camera and Proffer

In camera, the Court declared that he thought he had made it clear that he did not want to hear about sensational cases, but that his ruling was "to give them the tools, not the examples." R. 2453, 9/16/04 Tr p. 171, ll. 13-23.

Counsel Baity stated that he was attempting to show the jury that this is a recent science heavily dependent on case study. R. 2453-54.

The Court feared he was crossing the line by discussing sensational cases and the probative value has to outweigh the prejudicial. The court stated he should be able to testify what factors he looks at. The defense asserted that a large portion of his science was case specific on other cases he's dealt with. R. 2455, 9/16/04 Tr p. 173, ll. 5-6.

The court then stated if he can't testify without the examples then he can't testify because of prejudicial value outweighing probative. R. 2455-56, 9/16/04 Tr p. 173, l. 24 - p. 174, l. 2.

Counsel Baity then suggested a proffer of Dr Kassin's testimony to allow for a determination of prejudicial value R 2457, 9/16/04 Tr 175

In the proffer, Dr Kassin testified about the fact that there were cases where confessions were made by the defendants, contested as soon as they were done because they believed they were going to get a chance to go home afterward, publicly going along and privately maintaining their innocence He said this was all he wanted to say about the Central Park case He opined there were experiments that people prefer short-term benefits over long-term benefits which is consistent with the act of confessing to something they did not do as an act of expediency to terminate a short-run bad situation Dr Kassin noted the coercion could be subtle and induced under pressure R 2458-2460, 9/16/04 Tr 176-78

Dr Kassin testified about "coerced internalized confessions" which in 1985 were difficult to understand because the psychology of memory had not caught up with what the confessions illustrated In this type, the person who confess to a crime under these interrogation circumstances, but then doubt their own innocence and believe their confession R 2459-60, 9/16/04 Tr 177-78 Dr Kassin stated they followed a predictable script and with an individual whose memory is vulnerable to manipulation, due to drugs, sleep deprivation, great stress, or fatigue, they are vulnerable to manipulation, and presented with false evidence, has to reconcile his lack of memory of the event with the objective evidence and entertain that they did the act and go through the process of imagining how they did it and ultimately results in the false confession Dr Kassin stated the confessions "always sound exactly the same - I guess I did, I must have done it and blocked it out " When exonerated in these cases, "they always follow that pattern" and the common ingredient of the presentation of false evidence puts them over the edge

and disorients them R 2461-62, 9/16/04 Tr 179-80

Dr Kassin stated that there were documented cases of this phenomena which he used in creating the classification scheme R 2462-63, 9/16/04 Tr p 179, l 25 - p 180, l 21 Dr Kassin discussed a memory study which he opined showed it was possible to make a person think that he was involved in something that he actually was not involved in R 2464-65, 9/16/04 Tr 182-83 Dr Kassin stated that when he developed the classification scheme in 1985 that they were looking at a whole bunch of cases R 2464-65, 9/16/04 Tr 182-83

Critical to this appeal, at that point, Dr Kassin stated in support of his proposition about psychological research on making a person think he was involved in something that he was not involved in

A case by the name of, a man by the name of Peter Riley who came home one day and his mother was dead and he called the police and they arrived and brought him in for questioning and after several hours of questioning they offered to administer a polygraph He said, fine, I'll take the polygraph He failed the polygraph and began to doubt his own memory Asked the question is it possible somebody could commit an act like this and not be aware of it and the detective who is interviewing him said, yes, that sort of thing can happen At which point he started to imagine what he must have done, talked about being angry at this mother for disciplining him and other details, and ultimately gave a confession It turned out that there was exculpatory information and after two or three years in jail he was released and DA's office didn't go back to retry case

There was another and I'll just give one more case because it was a very close resemblance to this one, of a 41-year-old man by the name of Gary Geiger of Illinois who comes home to find his parents had been slaughtered and he calls 911 He is then brought in for interrogation He is administered a polygraph After extensive

interrogation he's told that he failed the polygraph. At which point he starts to conclude that I must have done it and I blacked out. Ultimately he confesses to bringing, to coming up from behind his parents, yanking their heads back by the hair, and slitting their throat. It turns out that the surveillance tape later picked up a motorcycle gang in which one of the members was bragging about this particular murder in detail and knew all about it and so he was again exonerated but there was a case where he questioned his own memory. And when, what's puzzling about these cases is when he even leaving the situation of the interrogation room and speaks for example to a lawyer, the lawyer says, what happened. He says, well, I don't know. I think I may have done this. They are just not sure. Their memory has been impaired in this way. Yes.

R 2464-66, 9/16/04 Tr p 182, l 18 - p 184, l 7

Dr. Kassir stated that vulnerability to this memory alteration is based upon something about the person, mentally retarded, highly suggestible, young, naive, stressed, grieve-stricken, fatigued, sleep-deprived, and drugs. R 2466-68, 9/16/04 Tr 184-86. He further stated that there are prescribed techniques used to obtain confessions, particularly the Reid Inbau techniques of isolation in the police station (not home or on the street) after the interview has led to a belief of guilt by the police, a positive confrontation (you are guilty, we know you did it), restricting denials, to implying there may be evidence and bluffing or even lying about the existence of evidence designed to break the subject down. R 2466-67, 9/16/04 Tr 184-87. The third process is to provide an escape hatch. In the Reid technique, a form of minimization is used by providing an alternative scenario, as being a good person, but it was provoked or an accident to make a confession seem less bad. R 2469, 9/16/04 Tr 187. Dr. Kassir stated these techniques were commonly used based upon his case studies. R 2469-70, 9/16/04 Tr 187-88.

Dr Kassin stated social psychologists had studied people's ability to know when someone is truthful or lying and concluded that experts are not much better than the average person R 2470-71, 9/16/04 Tr 188-89 He opined that people cannot be trained to be better judges of the truth based upon research Id He noted that law enforcement technique manuals suggest that if someone is reticent about taking a polygraph that it suggests something to hide and if willing to take it suggests innocence, but is not a guarantee R 2471-72, 9/16/04 Tr 189-90

Dr Kassin further described interview techniques taught and used by police based upon psychology to make the confession appear to be a more desirable outcome He stated if these techniques are taken to an extreme "not only are guilty people confessing" who normally confess within the first two hours, but in the vast majority of the 125 cases of false confessions studied, the interrogations were for more than six hours R 2474-75, 9/16/04 Tr 192-93

In almost every false confession case there is excessive time in interrogation and the presentation of false evidence R 2475, 9/16/04 Tr p 193, ll 2-21 Dr Kassin described how he knew from case studies the interrogation techniques used While the ideal situation is a video-tape of all sessions which is done in many jurisdictions, police reports may provide accurate information on time or techniques used Dr Kassin stated that there is no reason an interrogation should not be taped Further, he opined that it had been found to be beneficial to the prosecution to counter frivolous claims of coercion R 2476, 9/16/04 Tr 194

Dr Kassin stated that he evaluated a particular confession by using all available information R 2477-79, 9/16/04 Tr 195-97

Dr Kassin stated a confession filled with detail is very persuasive However, he stated that his opinion was that it cannot be determined if a confession is true or false by just looking at

the confession. Instead, the statement needs to be compared to the facts of the case. R 2479-80, 9/16/04 Tr 197-98

Dr. Kassin noted comparing details in the statement needs to be compared with whether the details came from a second-hand source, such as viewing a photograph or overheard police conversations or the news. R 2481-82, 9/16/04 Tr 199-200

Concerning the Cope case, Dr. Kassin stated he learned what went on from the two November 29 police reports, the 3½ hour tape from November 29-20, wherein he asks for a polygraph, the report from Detective Baker who did the polygraph, the statement of Cope, the fact Cope was held over the weekend, then gave a written statement, the video re-enactment, and the statement to Det. Blackwelder. He stated the described techniques were used in the interrogation because he heard them on the tape, including confrontation about guilt, denials not believed, insinuation about other evidence, bluffing and gating questions, and minimization with a suggestion of an accident or black out. R 2483-84, 9/16/04 Tr 201-02

Dr. Kassin stated he was concerned about the "excessive length" of the interrogation as a marker of a false confession. Further, the re-enactment occurred after he had been confined for three and ½ days. He felt the videotape statement internally contradicts itself "to a point of absolutely implausible." R 2484-85, 9/16/04 Tr p 202, l 25 - p 203, l 17

As to the presentation of false evidence, Dr. Kassin stated this came with the polygraph. He had repeatedly adamantly requested a polygraph four or five times. After he agreed he had faith in the polygraph, but after he took it the next day and learned he failed, he had to reconcile his belief in his innocence with the unimpeachable evidence of the polygraph. He then asked about "blacking out." R 2486, 9/16/04 Tr 204

Dr Kassin opined that the re-enactment did not fit the known facts of the crime and described transitions in his mental state that were not possible R 2486-879/16/04 Tr 204-05

Dr Kassin stated that there are common characteristics of the category of coerced internalized false confession with Cope's statements which he described R 2487-88, 9/16/04 Tr 205-06 Dr Kassin also opined that the later initiated contact after arrest suggested he felt trapped and was looking for a change in his situation R 2488-89, 9/16/04 Tr 206-07

At the conclusion of this proffer, Judge Hayes stated that he would allow the testimony up to his causes for concern The court found it was a veiled way of saying it was a false confession, but he said he could not do that and it was not necessary for the jury to hear his concerns because they can analyze it using the technique, bluffing, baiting, minimizing, and black out However, the court confirmed that he could ask Dr Kassin what he found - bluffing, etc , but that he could not state his "cause for concern " R 2490-91

Solicitor Brackett stated that in the proffer that Dr Kassin mentioned two cases Gary Geiger and the Riley case and stated he could make the point he made without referencing the facts and circumstances R 2491-92, 9/16/04 Tr p 209, l 25 - p 210, l 10 The trial court agreed and stated "I'll have him leave those cases out too " R 2492, 9/16/04 Tr p 210, ll 7-8

b Jury Testimony After Proffer

Back in front of the jury, Dr Kassin similarly testified to the proffer about voluntary false confessions and coerced compliant confessions R 2492-96, 9/16/04 Tr 210-14

Dr Kassin then referred to "coerced internalized false confessions" as existing in a number of cases in 1985 where innocent people confessed believed they had actually committed the crime He stated that the people were convicted and persuaded almost as brain washing He

stated this happens to people vulnerable to manipulation and “there are a lot of cases just like this ” As before, he described those subject to vulnerability as coming from mental retardation, children or those highly suggestible Also, he said it might be from a bad situation, sleep deprived, or isolation from family, particularly stressed He said that there is a “predicable sequence” and at some point a vulnerable person is presented with false evidence and told there is objective evidence of their guilt Since the person does not remember doing it, he has to reconcile the evidence with the lack of memory “Almost like a script”, because there are “lots of cases that follow exactly the same pattern”, when confronted with the devastating evidence, the person entertains the idea that “I did this and didn’t realize it, could I do it and not know it, could I have blacked out” leading to the idea that they must have done it R 2496-98

At this point, Dr Kassir stated the person predictably say things like “I must have done it, I guess I did it”, because they are not reporting from memory The person then proceed to an imagination like exercise as to “how would you have done it” which lead to the “coerced internalized false confession” when they say they committed the crime and believe it and give a very detailed confession R 2498-99, 9/16/04 Tr 210

Dr Kassir stated the person will then state what, how, who they were with, when and frequently why they did it R 2499, 9/16/04 Tr p 217, ll 5-12 All this turns out false “Again in a number of cases just like this”, we later know it is false because of independent evidence shows it was impossible that they did it He noted many studies show false memories are implanted through various types of strategies having to do with the presentation of false evidence R 2499-2500, 9/16/04 Tr 217-18

Some of these types of false confessions included statements of being in a “dream state”

and lacking a direct memory or trying to sort it. However, Dr. Kassir stated when a lawyer enters the picture they say they confessed, but weren't sure they did it because they trusted the information given as reliable when it was not. R. 2500-01, Id. p. 218-19

When he was asked if it had occurred in the past, he declared "there are actual cases, innumerable actual cases where this has happened where we have very textured, detailed confessions including a suspect who said I think I may have done it, I'm not sure, but it looks like I did it, who turns out to be innocent." R. 2500, 9/16/04 Tr. p. 218, ll. 20-25. Dr. Kassir described lab experiments where they can get people to believe something happened and then memory is constructed around the belief. R. 2501-02, 9/16/04 Tr. 219-220

He again described the types of people who would be vulnerable to manipulation as suffering from great trauma, stress, fatigue or drugs and admit that he may not have a full memory. R. 2502, 9/16/04 Tr. 220

Dr. Kassir then expounded on interrogation interview techniques commonly used to obtain confessions. He asserted that "we know" what interrogation looks like because of their knowledge of the training manuals, particularly Inbau and Reid.¹⁴ He described the various steps of the Reid technique. The initial interview is non-confrontational and non-accusatory and merely ask questions to observe behavior and see what the suspect knows and how they say it. This is done to determine whether he is telling the truth or lying. R. 2503-04, 9/16/04 Tr. 221-22. The questioning would include provocative baiting questions and the interrogator should look for clues such as fidgeting or eye contact.

¹⁴ Reid's textbook, *Criminal Interrogations and Confessions*, is now in its fourth edition. See, "Getting to the Truth: Analysis and Argument in Support of the Reid Technique of Interview and Interrogation", 21 Maine Bar Journal 20 (2006)

The Reid manual suggests that if a polygraph is suggested and the person is willing to take it, this suggests innocence whereas reluctance would be a sign of evasion and guilt, but it is not a guarantee. Similarly, behavior provoking questions, such as "we have DNA samples to send to lab for testing, what are they going to tell us" may reveal signs of innocence or guilt based upon "no problem" or questioning of the test. R 2506-07, 9/16/04 Tr 224-225

Dr. Kassiri stated that these reactions are not clear from research, but it is clear that investigators are trained to use these techniques as diagnostic tools. This is similar to a person's willingness to waive their rights and talk because they expressed "they had nothing to hide." R 2507-09, 9/16/04 Tr p 225, l 24 - p 227, l 1

Dr. Kassiri stated that research, however, indicates that police officers and trained interviewers are not better in determining "the truth" accurately any better than the average person where accuracy rates are in the mid-50's. Although the trained professional may be more confident in the judgment, Dr. Kassiri opined that studies indicate there is not a higher level of accuracy. R 2510-12, 9/16/04 Tr 228-30

According to Kassiri, after the interview process, a multi-step process, suggested by the Reid technique occurs which includes isolating the subject away from a comfortable place at home or with loved ones to an unfamiliar setting to create an unpleasant stressful environment. The goal is to create a setting that the subject would want to change. Then, there is "positive confrontation" by asserting "we know you are guilty" and prevent him from mounting a defense by interruption and persistent questioning. R 2513-14, 9/16/04 Tr 231-32. Designed to put the subject in a state of despair, it may include an insinuation of independent evidence.

The third step is minimization and create a situation where a confession may be viewed a

desirable or self-serving R 2514, 9/16/04 Tr 232 This may be done by suggesting accident, provocation or excuses to justify that it isn't a cold-blooded crime Id

While the goal of the Reid technique is to create enough pressure to have the guilty confess, problems can occur when the pressure filled techniques become extreme and "false confessions" happen under extreme circumstances

Dr Kassin then noted that research indicated people who confessed who actually did the crime happens within two hours, yet 80% of the false confessions occur after 6 hours of interrogation R 2516, 9/16/04 Tr p 234, ll 18-24 He noted that when fatigued, people are thinking in terms of short term He noted that lying to the subject, presenting false evidence produces not only false confessions, but false beliefs Importantly, he said "time is a factor", but there is not a magic line R 2516-17, 9/16/04 Tr p 234, l 24 - p 235, l 11

Dr Kassin stated when looking at a case to determine what techniques were used it varies with the situation His preference was for a full video from interview through confession, which occurs in some jurisdictions R 2517-18, 9/16/04 Tr p 235, ll 16-25 He looks at the material and while false confessions may look real and persuasive, but we now know it scripted and rehearsed after hours of interrogation Dr Kassin stated that unless the entire process is viewed, you don't know how it got there by what was said and done to move him from denial to confession In addition, it is important to know where the details came from because the accurate information that only a perpetrator should know R 2518, 9/16/04 Tr 236

Dr Kassin recounted the advantages to recording the entire process He noted, "in the wake of all the DNA exonerations" "containing false confessions which has astonished a number of researchers" due to the high number, a suggested reform was to video tape the whole process

He noted one study (Sullivan) had concluded that police found it to be beneficial to defeat frivolous claims that it was coerced when it was not R 2519-20, 9/16/04 Tr 237-38

Dr Kassin stated in evaluating a case for research purposes, he found false confessions looked real in detail, motives, but were shown to be false by either the crime never happened, which occurred in numbers of incidents, or a similar crime may lead to evidence they never had, like the murder weapon R 2521, 9/16/04 Tr p 239, ll 4-15 Dr Kassin reported DNA may be used to exonerate a person although the confession was filled with details “and there are a number of cases just like that”, which makes it worthy of case study R 2521-22, 9/16/04 Tr p 239, l 19- p 40, l 4¹⁵

Concerning the inclusion of vivid details as to determining the likelihood of a false confession, Dr Kassin stated the problem is where did the details come from The entirety of the confession must be viewed He pointed to “some cases” where very textured stories were given about the crime scene, but afterward learn that they were taken there or overheard conversations or read newspapers Similarly, the suspect may have learned of the injuries from viewing the photographs R 2522-23, 9/16/04 Tr 242-243¹⁶ He opined that it was difficult to ask a question without conveying information However, he noted that a factor in determining whether confession is good is to tell the police something they did not already know which is then corroborated But he cautioned the source must be known R 2524-25, 9/16/04 Tr 242-43

¹⁵ Dr Kassin was referred back to documented cases of false confession and asked if it was based upon his opinion or scientifically proven and he responded that these people were exonerated, prison doors released as set free ” An objection was sustained and the response ordered to be disregarded R 2522, 9/16/04 Tr p 249, ll 5-16

¹⁶ An objection concerning a specific case was overruled by the court R 2523, 9/16/04 Tr p 241, ll 17-23

Concerning the Cope case, Dr Kassin declared he had reviewed and read police reports The transcript of the November 29 audio tape and listened to it, reviewed the polygraph report, and the defendant's statement Aware that Cope was locked up the weekend, Kassin then stated he reviewed the December 3 statement, video re-enactment and final statement given to Det Blackwelder He stated he also read the prior testimony of Detectives Baker, Waldrop, Blackwelder and Captain Cabiness R 2525-26, 9/16/04 Tr 243-44

Dr Kassin stated he wished that there would have been a full recording of all that transpired instead of selected recordings However, he described the interrogation techniques he had described used in Cope's situation R 2527-28, 9/16/04 Tr p 245, ll 1-7

Q Please tell us what you've seen?

A Well, there is the one technique that creates the most problems that is implicated in the most false confessions and that is the presentation of false evidence This is that technique that after a period of time for some people it sometimes, it jolts their sense of reality so they become uncertain even about their own innocence In that case the presentation of false evidence, which is a way of mischaracterizing the evidence and particularly in this case there is a mischaracterization of an item of evidence that the defendant up front, they were asked, he was asked, so it looks like you have a lot of faith in this polygraph and he said yes He didn't hedge, he gave an answer that was plain and simple Yes, I believe in the polygraph He showed no fear of anything to hide at a polygraph That in some ways became his ultimate source of vulnerability At that point any polygraph evidence that came in that said to him you failed was going to shake his world It had to He believed in the polygraph and he'd been there for awhile He's been at this trying to deny his

involvement now for close to 24 hours

Q Were there any other techniques that you saw used in the interrogation in addition to this presentation of the results of the polygraph which may not have been correct?

A That's the big one. The other techniques that are clear from listening to, for example, the first interrogation audio tape, it's clear they used the positive confrontation. It is clear that he was accused of guilt, that in fact these were investigators who had already determined, without having to go through a full investigation, they made a judgment within 24 hours that he was guilty at which point they put blinders on, and at that point anything he said or did became simply support and confirmation for what they already believed. If he denied too adamantly, this was a sign of being evasive. If he, whereas the Inbau people would say you know he agrees to take a polygraph, that shows he has nothing to hide, maybe you should step back a bit. In this case it looks agreed to take a polygraph was not viewed in that light. He agreed to waive his rights to a lawyer, to silence, he agreed to physical examinations, he was fully cooperative, all the indicia that normally an investigator is trained to look for to suggest maybe I should back up, and yet despite his showing all of that, we began with a positive confrontation, there was persistence, no matter what he said or how he said it every denial was deemed a lie. So from his standpoint how does he extricate himself from this situation? What does he have to do to get out of the situation if every time he says something even as extreme as, I swear to God that did not do anything to my daughter, it's not believed. So the positive confrontation, the refusals to accept denials, the presentation of false evidence, there is a hint of minimization in that tape as well, there is a statement that suggests that maybe what you did was accidental,

and that maybe it just escalated, so you can see the seeds of all the interrogation techniques being planted right then and there And of course, this is taking place now shortly after he's been traumatized by what he has seen and at night between 10 45 and 2 30 AM the next morning So again when you take all of that into account this was an extreme interrogation

R 2527-30, 9/16/04 Tr p 245, l 9 - p 248, l 1

LAW ANALYSIS

1 The testimony concerning the Peter Reilly case and the Gary Gauger case were inadmissible hearsay evidence

At the outset, as evidenced by the entire argument in Appellant's brief, it cannot be disputed that the he contends the evidence set out in the proffer about the Peter Reilly case and Gary Gauger case are being sought to be admitted for "the truth of the matters asserted " Since Kassin asserts that those particular confessions were false, and seeks to testify about the particular circumstances surrounding the taking of those statements, and renders a conclusion of "innocence" suggested therein, his anecdotal testimony is plainly inadmissible as hearsay under SCRE, Rule 801 He has shown the existence of no exception to hearsay which would allow its admission Further, inherent in his testimony, is the fact that Dr Kassin was not the interrogator in either case Since he did not have "personal knowledge" of those matters, his testimony would be inadmissible under SCRE Rule 602

2 The Hearsay Anecdotal Evidence is not Admissible Under Rule 702

Respondents, assuming arguendo that false confession expert opinion evidence is admissible, assert that providing the specific examples of the Reilly and Gauger case presentation does not make the summaries admissible under the expert opinion rule merely because he has

relied upon them in giving his opinion. An expert witness may not be used as a conduit for the introduction of hearsay testimony for the truth of the matters asserted. See, Engbretsen v Fairchild Aircraft Corp., F 3d 721 (6th Cir 1994). See Peterson v National R R Passenger Corp., 365 S C 391, 618 S E 2d 903 (2005). Also, State v King, 904 A 2d 808 (N J 2006) (same). Respondents are not contending that Dr. Kassir could not use the information for his opinion, only that his use does not make the inadmissible then admissible. Compare, Hundley v Rite-Aid of S C., 339 S C 285, 529 S E 2d 45 (2000) (an expert may testify as to matters of hearsay for purpose of giving his opinion value, in the discretion of the court).

3 The Trial Judge Did Not Abuse His Discretion in Limiting the Testimony

The admission of the expert opinion is a matter within the discretion of the court. Here, he used SCRE Rule 403 to balance the admission of the hearsay summaries of the two (2) collateral cases to avoid the jury confusion and misdirection caused by this evidence.

First, as revealed by the laborious summary of Dr. Kassir's testimony the hallmark of false confessions and particularly "coerced internalized false confessions" were exhaustively revealed to the jury. Where Dr. Kassir was not limited in generally describing his case studies without reference to particular case names, the tools of his expert opinion were sufficiently presented to the jury. In fact, the record reveals that these tools were specifically applied to Cope's situation where the jury was left to resolve the situation.

Contrary to the claim of Appellant, the limitation did not "prevent him from a plausible explanation" for why he had confessed allegedly falsely. The factors in coerced internalized confessions about the utilization of the Reid technique and factors of vulnerability, length of

interrogation, fatigue, and the alleged presentation of the (disputed) false result of the polygraph were revealed within his opinion. Additionally, the mitigation of “vivid details” and inconsistent evidence was also revealed. It also cannot be argued the jury was unaware of the existence of DNA exonerations and similar non-specific anecdotal factors in rendering an assessment of this opinion.

The trial court did not abuse its discretion where the testimony about Reilly and Gauger were not relevant under Rule 401. In light of Kassir’s limitations by his own recognition of an inability to determine true or false confessions, a series of anecdotal cases involving different people and different sets of facts could not be relevant. Cf. State v. Green, 351 S. C. 184, 198, 569 S. E. 2d 318, 325 (2002).

Further, the Appellant misreads State v. Myers, 359 S. C. 40, 596 S. E. 2d 488 (2004) to suggest that “similar” anecdotal cases are admissible. To the contrary, Myers specifically stated “although the Connecticut case was similar, the trial court did not abuse its discretion in excluding the information.” Like the situation in Myers, Dr. Kassir did testify about specific cases, but did not use names or where the false confessions were given. It was an additional alternative holding in Myers by the brief description of the Connecticut case which led to the “cumulative” harmless error conclusion.

Further, under the Rule 403 analysis, it is clear the evidence was properly excluded because the probative value of the anecdotal references was substantially outweighed by the prejudicial effect. State v. Alexander, 303 S. C. 377, 401 S. E. 2d 146 (1991). As noted before Judge Hayes, this information would have diverted the jury’s attention away from determining the admissibility and reliability of Cope’s statements and focus on whether the statements by

Reilly and Gauger were false and whether Reilly and Gauger were actually innocent, in addition as to what techniques were used in those statements. It would have been incumbent upon the State to litigate those confessions and guilt and may have opened the door to the introduction of other similar crime confessions which were “true.” These factors would further divert the jury’s attention from its proper function. The judge did not abuse his discretion.

The Appellant further argued that the anecdotal evidence should have been admitted because they were “all focus” with the Cope situation. Although potentially similar under the Myers definition, they were not on all focus because of the unique circumstances of the crime where he killed his daughter and confessed and unknown corroborating evidence was developed through the interrogations, such as have slept five (5) hours prior to his “confession”, said he used broom to assault her, but was unaware about foreign object use, and was enraged. Nevertheless, similarity in the cases is not the touchstone of admissibility. Whereas the trial court, consistent with Myers reasonably limited the prejudicial effect of specific anecdotal testimony, the court did not abuse its discretion.

4 Alternately, False Confession Expert Testimony is Not Admissible Under Rule 702 and State v Jones

As an alternative ground, Respondents would submit the lower court erred in the admission of false confession expert testimony. Although this Court has held social science testimony is not required to fully meet the full rigors of expert scientific testimony of State v Jones, supra and Rule 702 in State v Douglas, supra, Respondents submit that such testimony fails to satisfy those requirements. See State v Free, 798 A 2d 83 (N J 2002)(Kassin testimony rejected under Frye standard), People v Kogut, 806 N Y S 2d 366 (S Ct Nass Co 2005)(similar

testimony limited where interrogation technique evidence excluded U S v Adams, 271 F 3d 1236 (10th Cir 2001)(not admissible), State v Tellier, 526 A 2d 941 (Me 1987) (same), State v Ritt, 599 N W 2d 802 (Minn 1999), State v Davis, 32 S W 3d 603, 608 (Mo Ct App 2000) Respondents note that similar testimony, though, has been deemed admissible in U S v Hall, 974 F Supp 1198 (C D Ill 1997), Miller v State, 770 N E 2d 763 (Ind 2002), Boyer v State, 825 So 2d 418 (Fla 1st DCA 2002)

Here, we would submit that the testimony essentially went to the credibility of a witness - the defendant, Billy Cope - and was not a proper subject for an expert witness because it should be left to the province of the jury See, Paul G Cassell, Balanced Approachs to the False Confession Problem A Brief Comment on Ofshe, Leo and Alschuler, 74 Denver U L Review 1123 (1997), Nadia Soree, When the Innocent Speak False Confessions, Constitutional Safeguards, and the Role of Expert Testimony, 32 Am J Crim L 191 (2005) (summary of jurisdictions positions on admission)

5 The Exclusion Did Not Prejudice Cope

Even if the anecdotal cases were admissible, the exclusion did not prejudice Cope Although there may be special power to confessions, the jury was made aware of the existence of the phenomena of false confessions and the traits common in the opinion of Dr Kassin of Cope's statement Contrary to the assertions, the jury did not need to know that others had falsely confessed to killing a mother or parent, to access how Cope could have confessed to killing his daughter if it was false The tools of similarity were presented The jurors were adequately given "case studies" to enable them to assess how a person could be influenced to confess falsely based upon his research Prejudice by excluding the examples has not been shown

6 Conclusion

For each of the reasons, there was no abuse of discretion in the reasonable limitation. A new trial is not required.

III The trial court properly denied the motion to suppress Cope's statements which were not obtained in violation of either the Fourth or Sixth Amendment

FOURTH AMENDMENT ISSUE

A The Trial Court Properly Denied the Motion to Suppress his Statements Under the Fourth Amendment Where They Were Taken After a Legal Arrest Supported by Probable Cause for the Murder Warrant and Unlawful Neglect Warrants

In the first portion of this argument, Cope contends that the statements in which he confessed were the product of an illegal arrest because it was not supported by probable cause. He contends that when he was arrested, the Rock Hill police based their contention only on mere suspicion that he killed his daughter and failed to consider other alternatives. Respondents submit that the trial court properly denied the motion to suppress.

1 How the Trial Court Ruled

A pre-trial suppression hearing was held from August 23-25, 2004. At the conclusion of the hearing, Judge Hayes determined that the warrants for murder and unlawful neglect were supported by probable cause. Particularly, Judge Hayes held

As to the particular warrant for murder I have to look at it in the totality of the circumstances in which it was issued which included sworn testimony by the affiant Mrs Blackwelder to Ms McNeely which included, at least from my notes, and I think that the murder occurred inside the residence, that the residence was secured, that there was no assertion of any other person had been in the residence other than two little girls, that there were severe injuries, and that had in fact been a sexual assault, that coupled with the language in the affidavit that Mr Billy Wayne Cope did violate South Carolina by murder, by assaulting Amanda Cope, and that she died as a result of the assault, I find are sufficient facts from which the Magistrate could and that in fact she did issue the murder

warrant so I find no lack of probable cause and do not, I guess the motion is to quash or set aside or invalidate the warrant, and I refuse to do that

As to the unlawful neglect, those three are much more specific quite frankly, they were issued by Judge Williams I believe and they follow under the perimeters, within and under the perimeters in which I just stated and also are based on probable cause sufficient that the court will not set those warrants aside either

R 492-93, 8/25/04 Tr 135-36

**2 The Unlawful Neglect Warrants Contain Sufficient Data
to Support Probable Cause and the Arrest Prior
to the November 30, 2001 Statements**

In his brief before this Court, Cope only challenges the sufficiency of the murder warrant. Yet, at the time of the November 30, 2001 statements, he had already been charged and arrested for unlawful neglect of a child. Detective Blackwelder testified that she initially had the murder warrant obtained and served upon Cope before 4:21 a.m. that morning. R 93-94, 8/23/04 Tr 42-43, 46. Importantly, after serving the murder warrant, she worked on the unlawful neglect or conduct charges. Det. Blackwelder testified these three warrants for unlawful neglect were signed by Judge Williams in the earlier morning hours around 8 a.m. and served by Vernon Harmon on Cope before he went to the Moss Justice Center to be interviewed by Detective Mike Baker for a polygraph examination. R 99, 109, 111-13, 2968, 8/23/04 Tr 48, 58, 60-62, 9/20/04 Tr p 90, ll 7-20. Harmon recalled having to wake Cope up that morning to serve him with warrants. R 221-22, 8/24/04 Tr p 62-63.

In the unlawful neglect arrest warrants, State Exhibit 2, 8/23/04 Tr 44 -46, ROA p 97-99, the following probable cause is set out:

DESCRIPTION OF OFFENSE

Unlawful Neglect Towards Minor Child 20-7-50

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts The defendant did violate the SC Code of Law by allowing his seven year old child to live in unsuitable and unsanitary living conditions while at 407 Rich St in the City of Rock Hill The residence was observed by affiant and numerous other officers of the Rock Hill Police Dept It was infested with bugs and lice and has unsuitable food for the minor The house also had inadequate bathing and toilet facilities

- * Police investigation
- * Recovery of evidence

State Exhibit 2 , Arrest Warrant H-023263 **Amended Supplemental ROA, p 26**

Judge Hayes opined that this warrant established sufficient probable cause to arrest Cope R 493, 8/25/04 Tr 136 Plainly, the affiant's own observation of the unsanitary conditions she personally observed supported the issuance of this warrant and arrest ¹⁷ A viewing of the subsequent video re-enactment statement implicitly supports the fact that this infestation and viewing of unsanitary conditions would have been obvious to any reasonable person See Video Re-enactment Tape of December 3, 2001

The trial judge reasonably applied constitutional law in determining the sufficient of the warrant and the existence of probable cause R 491-92, 8/25/04 Tr p 134-35 It exists when

¹⁷Blackwelder described the condition of the house at that time were clothes everywhere, bugs in every room, dried bugs in the refrigerator, and problems in plumbing and unclean house She stated that she described these facts to Judge Williams when she secured the warrants for unlawful neglect R 117, 8/23/04 Tr p 66 Blackwelder destroyed her clothes when she returned to her own home because of the lice infestation Id at 118

“the facts and circumstances within the arresting officers knowledge are sufficient for a reasonable person to believe that a crime has been” committed State v George, 323 S C 496, 509, 476 S E 2d 903, 911 (1996) The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion State v Wise, 359 S C 14, 21, 596 S E 2d 475, 478 (2004) The court's ruling will not be disturbed unless a manifest abuse of discretion and probable prejudice are evident Id An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law State v Wallace, 364 S C 130, 135, 611 S E 2d 332, 335 (Ct App 2005)

In State v Green, 341 S C 214, 532 S E 2d 896 (Ct App 2000), this Court declared the appellate standard of review in Fourth Amendment cases is limited to determining whether any evidence supports the trial court's finding and the appellate court may only reverse where there is clear error " Green, 341 S C at 219 n 3, 532 S E 2d at 898 n 3 Accordingly, this Court should apply an "any evidence" standard to the ruling below The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest

Probable cause for an arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested State v George, 323 S C 496, 509, 476 S E 2d 903, 911 (1996) (finding probable cause for warrantless arrest for murder) Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime State v George, Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal Id , see also Beck v Ohio, 379 U S 89, 91, 85 S Ct 223,

225, 13 L Ed 2d 142 (1964) (a court must consider "whether, at the moment the arrest was made, the officers had probable cause to make it--whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [Appellant] had committed an offense ")

In State v Freiburger, 366 S C 125, 620 S E 2d 737 (2005), the court held that "an officer's 'subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause ' " Id (quoting Devenpeck v Alford, 543 U S 146, 125 S Ct 588, 594, 160 L Ed 2d 537 (2004) (repeating the settled principle that " 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action' "), Whren v United States, 517 U S 806, 813, 116 S Ct 1769, 135 L Ed 2d 89 (1996) (quoted in Devenpeck))

The Appellant has not challenged the probable cause to arrest Cope on the neglect charges where probable cause existed at the time of the arrest and before the inculpatory statements were made on November 30 and December 3 Judge Hayes conclusion is supported by the "any evidence" standard in the warrant Since there was probable cause to arrest on these independent charges, whether there was adequate probable cause to arrest Cope for murder before the inculpatory statements, it does not undermine their constitutionality under the Fourth Amendment For this threshold reason, his argument must be denied

3 There is evidence in the record to support the trial court and conclusion that probable cause existed on the murder warrant

Assuming *arguendo* that this issue needs to be addressed for the Fourth Amendment

claim, Respondents submit that probable cause existed prior to the issuance of the murder warrant. The trial court found that

- 1 It was issued based upon sworn testimony by the affiant Blackwelder to Ms
 McNeely
- 2 The sworn testimony included that the murder occurred inside the residence,
- 3 That the residence was secured,
- 4 That there was no assertion of any other person had been in the residence other
 than two little girls,
- 5 That there were severe injuries,
- 6 That had in fact been a sexual assault, that coupled with the language in the
 affidavit that Mr. Billy Wayne Cope did violate South Carolina,
- 7 And that assaulting Amanda Cope, and that she died as a result of the assault

Detective Blackwelder testified that she affirmed to Judge McNeeley under oath that Amanda was dead, that the only people in the home were Cope and his three daughters, that there were no signs of forced entry inside or outside the residence and from the autopsy findings that Amanda Cope, that Billy Cope was the only adult male in the home at the time and that the two other daughters were not capable at that time of inflicting those type of bodily injuries. R. 401-02, 8/23/04 Tr. p. 44-45. Blackwelder stated that she also advised Judge McNeeley of the inconsistent statements that Cope had made concerning when the children went to bed. Id. She noted that Cope had told in the interviews with officers Herring and Waldrop inconsistent statements and that there was no forced entry. R. 408, Id. at 51.

Blackwelder stated that she was authorized to seek the murder warrant after a decision

was made by Lt Waldrop, Les Herring and Captain Charles Cabiness R 91, 8/23/04, p 40

She stated when she went to the scene that night it revealed to her the close proximity of his bedroom to her bed area of about 12 to 15 feet R 116, Id at 65

Lt Jerry Waldrop testified about going to the scene at 7 50 am while the body was still there He stated that they decided to charge Cope based upon the evidence at the scene, including no signs of forced entry, the severe beatings , the opinion of the pathologists that she had been sexually assaulted and sodomized, that there were no other individuals in the house, as well as Cope's statement that the house was secure and inconsistencies in his statements He described those as his inability to stick to any line of questioning R 192-93, 8/24/04 Tr p 33-34

Waldrop confirmed that he personally observed that the widows were secure and saw nothing to indicate that anyone could have crawled through He further learned that one of the girls had locked the door with a chain latch that night R 195, Id at 36 Like Blackwelder, he described the 10-12 foot distance between Cope's bed and Amanda's area He found the home in bad condition with clutter all around and that he was difficult to move around because of the disarray R 196, Id at 37 He found that the injuries to Amanda were brutal and would have required a tremendous amount of force and learned from the pathologist that the child had been repeatedly abused over a period of time Waldrop further found that Cope's initial story to the firefighters at the scene that Amanda was naked and he dressed her varied from a version he told them that she was dressed when he went into the room that morning R 197-98, Id at 38-39 At that time, Cope was asserting to them at the scene that the death was an accident based upon the blanket and that he had warned his 12 year old about it, but Waldrop opined that was very unlikely R 199-200, Id at 40-41 Further, he was aware that Cope had told a number of people that she had

“been dead four hours” which was consistent with Dr Maynard’s later assessment Id He stated that the decision to arrest was made by the group, but Captain Cabiness had the deciding vote R 209, Id at 50

Judge McNeeley of the Rock Hill Municipal Court confirmed that Blackwelder had come to her residence and that she described probable cause under oath She recalled being told that Cope was at the scene and that there were no other signs of anyone coming in and no other adults present at the house R 124, 8/23/04, Tr p 73 She recalled being told that there were no windows broken nor any signs of a break-in R 124-25, Id at 73-74 She recalled learning of severe head trauma injuries and that there was evidence of an assault Id

This issue must be dismissed on this ground because there is evidence support for the existence of probable cause This was more than a cause of mere suspicion on the part of the officer and ultimately the judge Contrary to the apparent assertions of Cope, probable cause need not rise to the level of “beyond a reasonable doubt” and require the exclusion of other hypotheses The Cope situation was more than merely no sign of forced entry The type of crime demanded force and Cope was capable, over others present, in supplying such force Indeed, Cope varied and inconsistent statements about the time he went to bed, his proximity to the violent event, including the admission that she had died four hours earlier when he claimed he found her that morning, albeit later consistent with the pathologist all pushed his involvement to the realm of probable cause The court below was correct to assess it as such and deny the requested motion to suppress that statements under the Fourth Amendment ¹⁸

¹⁸ As argued in the next section, his initiation of the contact with law enforcement should act as a waiver of his rights under the Fourth Amendment and allow the admission of the statements R 165-66, 169, 226-27, 287-89 See 8/24/04 Tr p 6-7, 10, 67-68, 128-130, State

4 Since there was probable cause to have Cope arrested under both murder and unlawful neglect warrants, the argument that the statements following the arrests were fruits of a poisonous tree are abrogated

Appellant argues the trial court erred by refusing to suppress his statements after his arrest because his arrest was illegal because officers arrested him without a valid murder warrant and without probable cause. Appellant argues his post November 30 statements, which were taken at the jail after his allegedly illegal arrest, should be suppressed as the fruit of the poisonous tree. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996) (finding probable cause for warrantless arrest for murder). Since it is not questioned that he could be arrested for unlawful neglect based upon the crime scene and valid warrant, his fruit of the poisonous tree argument must fail. See United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997) (if suspect's response to illegal stop is itself a new and distinct crime, then police constitutionally may arrest suspect for that crime). Accord United States v. Waupekenay, 973 F.2d 1533 (10th Cir. 1992) (although police entered suspect's home illegally, suspect commenced new illegal activity when he aimed semi-automatic rifle at police), State v. Windus, 207 Ariz. 328, 86 P.3d 384 (App. 2004) (although officers unlawfully entered defendant's yard, officers did not exploit their unlawful entry to provoke defendant's new, distinct

Exhibit 3 State v. Council, 335 S.C. 1, 16, 515 S.E.2d 508, 515 (1999) (defendant waives right to counsel where he initiates contact with the police)

criminal conduct consisting of an aggravated assault and resisting arrest), Clark v United States, 755 A 2d 1026 (D C 2000) (even if defendant was under unlawful arrest when he threatened police officer with bodily harm, evidence of that crime would not be suppressed as "fruit of the poisonous tree," as the commission of the threat was an intervening act that purged any taint associated with the unlawful arrest), State v Miskimins, 435 N W 2d 217 (S D 1989) (where defendant's response to unlawful action by police is itself a new, distinct criminal act, there are sound policy reasons for not suppressing this evidence) Alternately, probable cause existed for both His request was properly denied

SIXTH AMENDMENT ISSUE

B The Trial Court Properly Admitted Statements Made After December 1, 2001 Where Cope Initiated Contact With The Police After His "Bond Hearing " The trial court further properly held that Cope's Sixth Amendment rights had not attached at the bond hearing which is not an arraignment or indictment under state law Alternately, Cope expressly waived his right to counsel

The Appellant contends that as a result of his bond hearing before Judge Ray Long on December 1, 2001 at 7 30 a m , any subsequent interrogation demanded that Cope be provided with counsel prior to the custodial interrogation Because he was not provided with counsel prior to his December 3, 2001 interrogations¹⁹ he asserts that they must be suppressed under the Sixth Amendment violation The trial judge rejected the contention R 498-502, 8/25/04 Tr p 141-145

During the suppression hearing, the state asserted that under the Differentiated Case

¹⁹This argument does not impact upon any statement given prior to December 1, 2001, and does not effect the admissibility of the statements given prior to the polygraph or after the arrest, including the Friday, November 30, 2001 consent inculpatory statements given at the polygraph and after to detective Baker and Herring

Management System (8/25/04 - Exhibit 14) he was automatically screened for a public defender and never invoked his Sixth Amendment right to counsel. Further, he contended that Cope initiated contact with law enforcement on December 2, 2001.

Counsel Morton argued that the statements were coerced, but did not focus on either the 6th Amendment attaching or the same issues, presented by the evidence, but not pressed in argument. R 496-98, 8/25/06 Tr p 139-141.

Judge Hayes rejected the showing by Cope on the involuntariness of his statements. He held that the Circuit Administrative Order was an administrative function at a bond hearing to obtain information concerning the appointment of counsel. More particularly, Judge Hayes found "as an affirmative finding" that it was not an invocation of a desire for counsel. R 499, 8/25/04 Tr p 142, l 6-7. He further noted that Cope was read Miranda warnings in the neighborhood of a dozen times. Pertinent to this claim, Judge Hayes stated

as to the question of the right to counsel and how it ties into the statements and how it ties into getting in of the form before Judge Long. When an attorney did arrive and Mr. Cope was notified of the presence of the attorney and the attorney's availability, there was an affirmative action taken by Mr. Cope indicating that he did not wish to have counsel introduced into the process at that time and not have him present at that time. In fact, he signed such a statement at 3:10 P.M. on the third of December, and in fact there has been no testimony from Mr. Barrowclough but it was indicated in the testimony that it was confirmed by Mr. Barrowclough by presentation to him of the signed document, State Exhibit 8, and by oral confirmation by Mr. Cope when he was introduced to Mr. Barrowclough.

R 501-02, 8/25/04 Tr p 144-145.

The Sixth Amendment guarantees that in all criminal prosecutions "the accused shall enjoy the right to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "[O]nce a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent

waiver of that right--even if voluntary, knowing, and intelligent under traditional standards--is presumed invalid if secured pursuant to police-initiated conversation," and "statements obtained in violation of that rule may not be admitted as substantive evidence in the prosecution's case in chief " Michigan v Harvey, 494 U S 344, 345, 110 S Ct 1176, 108 L Ed 2d 293 (1990) (stating the holding of Michigan v Jackson, 475 U S 625, 106 S Ct 1404, 89 L Ed 2d 631 (1986))

Likewise, the South Carolina Supreme Court has held

When the Sixth Amendment right to counsel has attached, if police initiate interrogation after a defendant's assertion, at an arraignment or other similar proceedings, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid *unless the defendant initiates the contact himself*

State v Council, 335 S C 1, 15-16, 515 S E 2d 508, 515 (1999)(emphasis added) However, in Council, the Supreme Court also stated "[t]he Sixth Amendment right attaches only "post-indictment," at least in the questioning/statement setting, citing Michigan v Harvey, 494 U S 344, 110 S Ct 1176, 108 L Ed 2d 293

The testimony of Judge Ray Long indicated that he had a bond setting on Billy Cope on December 1, 2001 He described that his process is that he would inform the person of his right to an attorney, right to a jury trial, right to a preliminary probable cause hearing and then ask the defendant to sign a fee waiver so that a public defender application can be taken Judge Long stated that he automatically has the application filled out for all defendant, but I had him sign the waiver, which he does not have to do He stated that he filled out the form for Cope by asking the questions and I asked him to sign at the end "stating that he told me the truth "Specifically, he stated that Cope did not ask to have the form filled out "because it is something we do on everybody " Judge Long stated that he approved him for a public defender R 428-29, 8/25/04,

Tr p 71-72 Judge Long stated that at that time he gave Cope his court dates which included his "initial appearance" on December 31, 2001 ²⁰ He states that at the time he had the charges of murder, criminal sexual conduct first degree and three counts of unlawful neglect toward a minor child R 430, Id at 73 Judge Long stated the bond hearing was held around 8 a m that morning R 432, Id at 75

In a recent decision by the Court of Appeals, State v Anderson, the court concluded that there was a Sixth Amendment violation arising from the signing of paperwork requesting appointment of counsel Therein the Court stated

As additional support for admitting Appellant's statement into evidence, the trial court found that Appellant's signing of the paperwork for a public defender was not enough to invoke his right to counsel However, pursuant to State v Council, 335 S C 1, 15-16, 515 S E 2d 508, 515 (1999), we believe signing the paperwork requesting a public defender did invoke Appellant's Sixth Amendment right to counsel

In Council, the defendant was arraigned on October 14, 1992, and requested the court appoint an attorney to represent him Id at 14, 515 S E 2d at 514 An attorney was appointed to represent the defendant on October 16, 1992, and the defendant made inculpatory statements to the police on October 19, 1992 Id In discussing the defendant's claim that the October 19th statements were obtained in violation of his Sixth Amendment right to counsel, the court found as follows "Appellant's Sixth Amendment right to counsel attached on October 14, 1992, when he was arraigned Further, appellant asserted his right to counsel on October 14, 1992, when he requested appointment of counsel " Id As in Council, we find that Anderson's Sixth Amendment right to counsel attached at the time of his arraignment, and he invoked that right by requesting a public defender at 11 30 a m on June 16, 1998

Accordingly, we find that Officer Raczensky's contact with Appellant violated the protections afforded Appellant under the Sixth Amendment Even if

²⁰*State Exhibit 14* requires the screening of all defendants for public defenders at the bond hearing **Amended Supplemental ROA, p 54** The Initial Appearances are described in the Exhibit, p 2 as addressing the issue of legal representation and desire for a preliminary hearing and providing discovery However, it notes that murder cases do not fall in the time tracks

the police re-entered the room at the behest of Appellant's aunt, Officer Raczinsky admitted that he initiated the conversation with Appellant by asking him if "anything had changed" since the last time the two had spoken. Thus, the trial court erred in admitting Appellant's statement about the "drug deal" because it was made after Appellant had invoked his Sixth Amendment right to counsel and was pursuant to a conversation he did not initiate.

Anderson, supra

Unlike Anderson and Council, there are a number of distinguishing factors. First, both opinions suggest that the defendants therein were "arraigned." Here, the Appellant was at a bond hearing. In fact, he was not arraigned even before the August 23, 2004 hearing. At that time, counsel for Cope waived arraignment. R. 80-81, 8/23/04 Tr. p. 29-30. Second, contrary to the situation in Anderson, the actions by the magistrate were required under the Differentiated Case Management System and the signing of the forms was deemed a ministerial act by the Judge and did not indicate a desire for counsel. In fact, Judge Long declared that the signing of the form was merely to show he had told the truth in the process. Respondents acknowledge that a review of the form in State Exhibit 10 (8/25/06) is styled "affidavit of indigency and application for counsel," and read on the second page "and request that counsel be appointed to represent me."

Therefore, assuming the applicability of Council and Anderson, the Sixth Amendment right to counsel attached. However, Respondents would submit that absent an "indictment" and "arraignment," or even the "initial appearance" of the DCM System, those decisions may likely be in error because formal prosecution had not begun.

- 1 **Cope initiated contact with law enforcement subsequent to his bond hearing which acts as a waiver of his Sixth Amendment right to counsel**

Even if there was a Sixth Amendment right to counsel which attached on Saturday, December 1, 2001, it was waived by his initiated contact to law enforcement on Sunday, December 2, 2001 at 10 25 PM The record from the hearing revealed that Correction Officer Helen McGee was walking through the booking area and Cope was knocking on the door trying to get someone's attention When she asked what he wanted, Cope told her that he needed to speak to a Detective in Rock Hill about some things he had done to his children R 166, 8/24/04 Tr p 7 She stated that she did not initiate the contact with him and was coming through the restroom door when she heard the knocking At the time, he was in a booking cell She stated that she told him that she would let Lt Walden know and advised him She stated that she contemporaneously made a statement of that contact R 168-69, 8/24/04 Tr 9-10, State Exhibit 3²¹

Lt Herring stated that on Sunday night December 2, 2001, in the evening hours he received a call reflecting that Cope wanted to talk to him again R 286, 8/24/04 Tr p 127 He stated that he informed the dispatcher to tell the jailers at the Moss Judicial Center that we'd make arrangements the following Monday to come get Cope and talk to him He told him that it could wait R 287, 289, Id at 128, 130

Det Blackwelder testified that she went to speak with Cope on Monday, December 3, 2001 because of the page Lt Herring had received that Cope wanted to talk with them again She stated that she mirandized Cope again after Cabiness, Dugan and Hanoka had picked him up and

²¹ There was also testimony that on December 1 when being transported to the bond hearing, Cope made a similar request that " he felt he had done something wrong and wanted to talk to the Detective Division again, according to Vernon Harmon R 226, 8/24/04 Tr p 67 However, he never relayed that information and it pre-dated the bond hearing

brought him back. She stated that she asked him if he wanted to talk to them and he said yes and she mirandized him at that time. R 386-88, 8/25/04 Tr p 29-31. She stated that Cope said that he "did wish to speak with us and that he was the one who made contact asking to speak with us." R 388, Id. at 31, l 2-3. She stated that then when Cabiness came in Cope again represented to them that he was the one who that initiated contact and not us and asked him if he wanted to talk to us and he said yes. R 390, 8/25/04 Tr p 33.

During the interview of Cope on December 3, 2004, she became aware that an attorney, B J Barrowclough, was outside who was saying that he represented him. R 398, 8/25/04 Tr p 41. She stated that Cope indicated that he did not wish to see that lawyer. He made a note that stated "I Billy Cope do not wish to talk with my lawyer - B J Barrowclough at this time" and signed it at 3 10 PM. State Exhibit 8. R 314-15, 8/24/04 Tr p 155.

Capt Cabiness described the December 3, 2001 interview. He stated he had learned of the contact to Lt Herring the night before and getting him transported. He described their decision to have him come to Det Blackwelder's office. After confirming that she had given him his rights, Cabiness confirmed with Cope that he had sent word that he wanted and that he did want to talk with them. R 297, 8/24/04 Tr p 138. He told Cabiness after he again went over his rights with him that what he told the officers on Friday was not the truth. He testifies that after a new statement was completed, Cope agreed to go back to the crime scene to show what happened that night. R 303-04, 8/24/04 Tr p , 144-145. After the going to the crime scene, they returned around 1 30 PM. During this interview of Cope, he received a page that Barrowclough was in the lobby and indicated that he represented him and wanted to talk to him. Up to that point, Cope had not indicated a desire for a lawyer and had not (re)asserted his rights. After a discussion with the

Solicitor's Office, he asked Cope if he had an attorney and he said no he told him that Barrowclough was in the lobby and wanted to talk with him and Cope told Cabiness that he wanted to go ahead and finish this and talk to us before he talked with Barrowclough R 312, 8/24/04 Tr p 153 He stated that after a phone call, he confirmed in writing that he did not want to speak with the attorney R 313, 8/24/04 Tr p 154

Cabiness stated that at 5 P M he went out to the lobby and got Barrowclough and brought him back to the office where the interviews were conducted He introduced them and showed the document with the lawyer and confirmed to him that he had been aware that the lawyer was in the lobby and wished to talk with them R 314-15, 319, 8/24/04 Tr p 155-156, 160 Cabiness denied that any inducement were made to coerce Cope to not speak with Barrowclough R 315-16, 8/24/04 Tr p 156- 57 He stated that the statement was signed at 4 55 PM At that time Cope then met with his counsel Id See also, R 332-38, 8/24/04 Tr p 173-179

It cannot be disputed that Cope initiated the contact by making the request at the Detention Center for the police to contact him on Sunday, the day after his Sixth Amendment right had attached under Anderson Because of this initiated contact, he has waived his right to counsel during the further discussions and interrogation a criminal suspect's rights are not violated when the suspect, not the police, "initiates further communication, exchanges, or conversations with the police " State v Howard, 296 S C 481, 489, 374 S E 2d 284, 288 (1988) (citing Edwards, 451 U S at 485, 101 S Ct 1880) Finally, the Supreme Court has held that, after it has been determined that the waiver was valid, the analysis is over

[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a

conviction, the analysis is complete and the waiver is valid as a matter of law

State v Drayton, 293 S C 417, 426, 361 S E 2d 329, 334-335 (1987) (citing Moran v Burbine, 475 U S 412, 106 S Ct 1135, 89 L Ed 2d 410 (1986)) See State v Binney, 362 S C 353, 608 S E 2d 418 (2005) (waiver of right)

The waiver of his 6th Amendment right was valid He was aware of his right to have counsel assist him in the numerous earlier waivers before his bond hearing Assuming his request for appointed counsel at the bond hearing was real, he chose to forego counsel and initiate a request to have the police meet with him to follow up on the statements he had given that earlier This was not police initiated interrogation, but Cope initiate The analysis need go no further

The attempted intervention by B J Barrowclough during the last statement is a "red herring" since Cope had already initiated and waived his 6th Amendment right to counsel at the time of the interviews See Moran v Burbine, 475 U S 412, 422, 106 S Ct 1135, 89 L Ed 2d 410 (1986) ("Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right") In Moran, an attorney hired by the suspect's sister had been trying to contact the suspect and was told by the police, falsely, that they would not begin an interrogation that night Id , at 416-418, 106 S Ct 1135 The suspect was not aware that an attorney had been hired for him Id , at 417, 106 S Ct 1135 The Supreme Court rejected an analysis under which a different result would obtain for "the same defendant, armed with the same information and confronted with precisely the same police conduct" if something not known to the defendant--such as the fact that an attorney was attempting to contact him--had been different Id , at 422, 106 S Ct 1135 Here, Cope had already initiated contact and waived his right to a

counsel by that initiation. His waiver was valid as long as he chose not to re-assert it. His complaint otherwise lacks a viable constitutional foundation.

For all the foregoing reasons, the statements entered after Sunday December 2, 2001 are admissible under the Sixth Amendment. His complaint otherwise must be denied.

IV The trial court properly denied the motion for a directed verdict related to the criminal conspiracy between Cope and Sanders where circumstantial evidence existed that there was an agreement

In his brief and argument below, Cope contends that this charge lacked any proof. He contends that where there was no direct evidence of any connection between Sanders and Cope, the court erred by determining the basis for the charge was inference upon inference to develop the conspiracy. Contrary to the claims of Cope, there was sufficient evidence to connect Cope and Sanders to the sexual assault upon the body. The mere fact that Cope's series of confessions about the murder and assault by a broom like object upon Amanda and the existence of Sanders' DNA from his saliva upon her breast contemporaneous to the physical assaults and DNA on her pants conclusively eliminate the possibility of a conspiracy as Cope suggests. Although Amanda's body serves as the connection between the two, the door reveals agreement and conspiracy as supported by the circumstantial evidence. Simply put, the connection and overt act are revealed by allowing the entry by Cope of Sanders into the home where Sanders commits acts upon Amanda and Cope combines with him. The mere fact that Cope did not include Sanders in his statements is not dispositive of this issue. The trial court was correct in allowing the jury to consider the evidence and make the decision.

On November 29, 2001, between 2 and 4 am, twelve year Amanda Cope, a 160 pound girl, was forcefully sexually assaulted by an object in her vagina and her rectum, severely beaten

and strangled to death. Certain salient factors point to the existence of an agreement and conspiracy between her father and James Sanders to commit the sexual acts which ultimately lead to her death. There is substantial circumstantial evidence to support the existence of the conspiracy.

- 1 Cope tells Jessica that morning that her sister Amanda had been dead for four hours, revealing before any law enforcement involvement his knowledge of the time of death. This four hour time frame is later repeated to law enforcement. It was consistent with the pathologist findings. R 2083, 9/15/04 Tr p 48.
- 2 Amanda has a bite mark on her breast with saliva. The mark reveals an injury contemporaneous to other injuries near the time of death between 2 and 4.
- 3 Cope gives statement that he got up at 3 a.m. and checked on the girls, consistent with the range of the time of death. R 1448-49, 1472-73, 1771-72, 9/13/04 Tr p 67-68, 91-92. 9/14/04 Tr p 49-50, 76-77. Video, Exhibit 7 **(On file with Court)**.
- 4 Sanders DNA is consistent with the saliva located on the breast of Amanda at the time of the assault and death. R 2242, 9/15/04 Tr p 207.
- 5 The windows into Amanda's room were not disturbed. R 1566-69, 9/13/04 Tr p 187-188. The windows and doors around the house reveal no forced entry by the lack of signs of damage or tampering to doors or disturbance of dust, dirt spider webs to the sealed windows and screens. R 988-990, 1531, 1538-1580, 9/8/04 Tr p 267-269, R 1237, 9/13/04 Tr p 150, 157-99.
- 6 Jessica specifically recalls Amanda locking the front door by latching the chain on the front door the evening of the incident. Jessica locked the back door. R 2079,

9/15/04 Tr p 44 The door requires a chain to be unlatched from the inside for entry State Exhibit 41 E (photograph of door and chain) Jessica recalls that the door was already unlocked when the ambulance and police arrived shortly after they awoke that morning and learned her sister had died R 2084, 9/15/04 Tr p 49

- 7 Cope's statements reveal knowledge about factors of the assault and injuries to Amanda consistent with forensic evidence Further, Cope stated that they would not find semen at the crime scene and then later subsequently revealed the presence of a rag he used to masturbate R 1806, 1810, 9/14/04 Tr p 84, 88
- 8 Cope admitted staging the scene to make it appear to be an accident by placing the blanket around his daughter's neck, a historical factor in Cope relationship with his daughter that he had warned her about, something that Sanders would have been unaware of to suggest an accident R 1803, 9/14/04 Tr p 81 Video, State Exhibit 7 The scene was also staged by the cleanup of the area and body where she was clothed after the rectal assault and the area was cleaned of feces or traces of the assault, and the door were placed together to make it appear to be an accident, something that a sole intruder would have no reason to do, yet Cope would have reason to do should one of his daughters or another arrive at the scene before he wakes up to shed guilt away from himself R 1332, 1803-04, 9/10/04 Tr p 62, 9/14/04 Tr p 81-84
- 9 The house was full of clutter and debris to make passage difficult once inside and particularly if dark R 1582-94, 9/13/04 Tr p 201-213 (testimony describing

photographs of inside house), Video State Exhibit 7 Jessica testified that lights were shut off by her that night R 2079-80, 9/15/04 Tr p 44-45

9 The locked entry by the door was the only manner that Sanders could have entered the house Cope had to assist Sanders entry for the assault by opening the door and showing his way through the clutter to Amanda's room

10 The closet in Amanda's room was too small and cluttered for anyone to hide in R 2076, 9/15/04 Tr p 41 (Jessica testifies that Amanda's closet was messy and had bags of clothes and stuff in it and that she could not get into closet) She also stated that she was in the room with Amanda for 20 minutes after her father had gone to bed R 2078, 9/15/04 Tr p 43

Simply put, the evidence provided by the body of Amanda placed Cope and Sanders together at that time of the assault and death Since the scene was staged subsequently to the death, it is evident that a cover-up had begun before the police had arrived at the scene while Cope was claiming accident, even though Sanders was present and involved It is equally powerful circumstantial evidence that locking of the doors required it to be unlocked and opened for someone to be let in

At the outset of the case in the opening argument, the state laid the foundation for its case on conspiracy Amanda Cope was brutally penetrated in her vagina and rectum during the hours between 2 and 4 AM At 6 a m , law enforcement receives a 911 call where Cope, devoid of emotion states that his daughter is dead - "cold as a cucumber " R 948, 9/8/04 Tr p 227, State Exhibit 15 At that time Cope claims he last saw his daughter alive at two clock and then changes it to one o'clock R 949, 9/9/04 Tr p 228, l 7-8 He contended at that time she must

have strangled upon a piece of the blanket. He had even claimed he had previously warned her about this fact. *Id.* *A 12 year old female who weighs over 160 pounds was alleged to have wrapped herself in a blanket and choked resulting in her accidental death.* R 956, 970, 980, 998-99, 1161, 1201, 1284, 1292, 9/8/04 Tr p 235, 249, 259, 277-278, 9/9/04 Tr p 149, 189, 9/10/04 Tr p 13, 21. He initially declared that she had been dead for four hours, albeit claiming inconsistently to being asleep until before 6 a.m., which was consistent with the later determined actual time of death. R 956, 963, 1159, 9/8/04 Tr p 235, 242, 9/9/04 Tr p 147.

Once police and EMS arrive, Cope begins to make a series of inconsistent statements about her state of undress at the time he found her that morning, from being naked when he found her (R 959, 1159, 9/8/04 Tr p 238, l 1-17, 9/9/04 Tr p 147), to being clothed and straightening her clothes, where evidence revealed that her clothes had been put on her by someone else. The inconsistent statements and obvious staging of the crime scene became a theme to the trial. There was odd behavior when the police found her clothed with the blanket around her neck when they arrived on the scene. R 988, 9/9/04 Tr p 267. Further, while at the hospital during the collection process, Cope told Detective Burris that he knew there would be an autopsy and if his skin was found underneath his daughter's fingernails, it was because she had scratched his back that night. R 1205, 9/8/04 Tr p, 193.

Cope also initially told the police that the house was secure with the windows closed and there were no signs of any break-in. R 1285, 9/10/04 Tr p 14. [This was supported by law enforcement testimony. R 1237-38, 9/9/04 Tr p 225-226]

The variety of statements about the event and Cope's demeanor did not make sense that morning. Compare, State Exhibit 15 (911 Call) **(On file with Court)**, with R 963, 969-70, 971,

994-98, 9/8/01 Tr p 242, 248-249, 250, 274-275, 277 Cope even inquired whether he would be in trouble with the law because his daughter was found dead in the house R 981, 990, 9/8/04 Tr p 260, 269

The pathologist, Dr Maynard came to the scene and the possibility of a sexual assault was evident to him leading to a later autopsy R 1120, 9/9/04 Tr p 108 The autopsy reveals brutal rape and injury where her rectal cavity is bruised by an object like either a dildo or a broomstick being jammed in up to 8 inches R 1116-17, 9/9/04 Tr p 104-105 He opines that this could not be done with a penis [Oddly, Cope claims in the video re-enactment to have tossed out his dildo after the incident, but later a dildo is found in his room [R 1614, 9/13/04 Tr p 233] and Cope is also unable to identify or locate a broomstick that he says he used in the inculpatory confession] According to Dr Maynard, her vaginal area had significant injuries which were done by an object by more force than a normal sexual act R 1080, 9/9/68 No sperm was found in the vaginal area R 1090, 9/9/04 Tr p 69 Amanda also suffered from severe head injuries and brain swelling and there is a bite upon her breast R 1058, 9/9/04 Tr p 46 [The saliva around the bite mark is later determined to be consistent with Sanders] Dr Maynard also opined that her cause of death by strangulation could not have been caused by a blanket R 1057, 9/9/04 Tr p 45 Importantly to the staging concept, her body appeared to have been cleaned up after the assault R 1116-17, 9/9/04, Tr p 104, 105 He noted that it was uncommon that fecal material would not be in the soiled pants and that fecal material would usually be brought out and left around the anal opening in similar assaults R 1117, 9/9/04 Tr p 105 He further stated that when he was at scene he examined the bedding and did not see the presence of any fecal matter Id Importantly ne noted all the injuries to Amanda occurred within

a short time prior to her death. As to her abdominal injuries, he noted that they could have been caused by a 300 pound man kneeling on the abdomen or back with sufficient force even if the victim was lying in the bed. R 1119, 9/9/04 Tr p 107

In his series of early exculpatory statements, Cope continued his assertion of accident and that he had slept until 6 am. R 1208, 1221, 9/9/04 Tr p 196, 209. His room is within close proximity of the victim's room, yet he contended that he would not be able to hear matter based upon his sleep machine noise. R 1210-11, 1215, 9/9/04 Tr p 198-199, 203. Although initially stating he slept through the night, he later asserts at some time that he got up at sometime and went to the bathroom and checked on the girls. The pathologist ultimately determined that death occurred between 2 and 4 am.

Next day, he agrees to take a polygraph test. Before the test, he gives an exculpatory statement continuing to assert getting up at 3 a.m., but denied checking on Amanda. R 1448-49, 9/13/04 Tr p 67-68. After the test, he is advised of the result that he failed. R 1461, 9/13/04 Tr p 80. Cope then begins on an evolving series of inculpatory statements. R 1469, 1472-76, 9/13/04 Tr p 88, 91-95. At that point he admits killing Amanda and that he jammed a broom inside her rectum and vagina after he had gotten up in the middle of the night with an erection, went to her room, masturbated over her and got enraged after she woke up and saw him doing it and slammed her head into a video game as he straddled his 300 pound body over her, hit her with his fist and described using his hands to choke her. Id. He stated that she was already dead when he used the broom on her. Oddly, he volunteered that he deleted his internet files from his computer after the incident. R 1478, 9/13/04 Tr p 97. See also, R 1770-72, 9/14/04 Tr p 49-48-50 (Herring statement - 11/30/01 @ 2 P M.)

Days later, Cope changed his story to suggest that he woke up and acted act beating and smothering his daughter and ultimately penetrating her with a broom vaginally and rectally because he was upset with an old girlfriend who had aborted his child R 1798-99, 9/14/04 Tr p 76-77 (Cabiness statement - 12/3/01 @ 9 45 am) This leads to the crime scene video re-enactment where Cope acts out his recollection of the event with revealing force and corrections as he went through the scene and physically demonstrated his violence toward his daughter Video - State Exhibit 7 Subsequently, he gives another statement which provide new corroborative evidence including a towel rag that he masturbated into that was located at the scene R 1808-09, 9/14/04 Tr p 87-88

At 4 55 PM on December 3, 2001, Cope gives his final statement to Cabiness In that statement, he abandoned his “dream concept” and asserted that he woke up about 3 a m and went into Amanda’s room, used a dildo on her and masturbated, cleaned it off the floor with a towel While using the dildo while she was on her stomach, she woke up and he tried to keep her from seeing him and he jumped on top of her and started hit her in the head and strangled her until she went limp R 1816-1820, 9/14/04 Tr p 94-98 (Dec 3, 2001 Cabiness Statement @ 4 55) He described using the blanket to “make it look like she had strangled herself” After he jumped off the bed, he wiped off the dildo with the towel and put it between the mattress, arranged the doors to Amanda room so that they would lock together so his other daughters would not wake up in the morning and see her Id ²² **State Exhibit 9 (On file with Court)**

Subsequently, the DNA from the saliva upon Amanda’s breast and the semen on her

²²Evidence was also presented about disputed writings made by him to Amy Simmons where he stated that “I killed Amanda ” R 1956, 1958, 9/14/04 Tr p 233, 235

pants comes back connected to James Sanders R 2240-42, 9/15/04 Tr p 205 - 207 ²³ Cope had not mentioned another else being involved in either the assault or death of Amanda in any inculpatory statement

Sanders lived only about one block away from Cope, but the record contained no prior evidence of any existing relationship between them. However, the bruising and injuries on Amanda's breast where the saliva was found occurred around the time of her death so that there is now a temporal connection with Amanda and Sanders being inside the house together at the time she died. Now there is the combination of this evidence linking both Sanders and Cope to the crime that resulted in the criminal sexual conduct of Amanda and ultimately her death by place and time.

The state's theory then becomes that based upon the circumstantial evidence the only logical explanation is that Cope served up his daughter that fateful night for his and Sanders own perverse pleasures and did it together. This is more than inference upon inference, it is the only logical conclusion from the evidence.

Supportive of this concept was the fact that the house itself showed no signs any entry through windows and that the doors were locked before the children went to bed. Further as revealed in the video, the home was in complete chaotic clutter and that anyone entering, particularly in the night hours with lights on or off, would need a guide to get to any room through the clutter and junk on the floor.

Furthermore, the crime scene staged. Why would an unknown intruder wrap a particular

²³Cope's DNA was found on the towel he stated he used when he masturbated R 2241, 9/15/04 Tr p 206

item around the victim's neck to make it appear accidental for a 160 pound person, when that item was consistent with what Cope indicated that he had warned her about. How would Sanders know this and why would an unknown intruder even care to do this where the violence would be inevitably revealed? Why would Cope ever want to cover up how Sanders solitary involvement in the case and clean up the scene where there was no evidence of feces from the rectal penetration, remove the object used (broom or dildo)? The evidence leads to the logical conclusion that Sanders was let in from the previously locked door by Cope while his wife was working the night shift. This evidence leads to the logical conclusion that they were together in the event of sexual conduct. This circumstantial evidence leads to a showing of the existence of a conspiracy to commit sexual conduct on his daughter.

How This Issue Was Raised at Trial

At the conclusion of the State's case, defense counsel Morton, on behalf of Cope, made a motion for a directed verdict of acquittal on the conspiracy charge. R. 2295-97, 9/16/04 Tr. p. 12, l. 24 - p. 14, l. 16. He asserted that the State's case to link Cope and Sanders was that there was no forced entry and because Sanders' DNA was found on Amanda's leg. R. 2296, 9/16/04 Tr. p. 13, ll. 1-7. Counsel Morton contended that for a conspiracy there had to be an agreement which may be implied, but cannot be based upon speculation. He noted that there were various ways to enter the house, as shown by Sanders' other entries. He stated that the mere combination of the fact of no evidence of forced entry, of Sanders' DNA on the victim's leg, and of Cope being home is not evidence of an agreement. R. 2296, 9/16/04 Tr. p. 13, ll. 3-11. Counsel noted that he asked Cabiness about any evidence from family, friends, phone records, emails, or computers about any indication that Cope and Sanders knew each other. R. 2296, 9/16/04 Tr. p. 13, l. 20 - p. 14, l. 2.

He contended that this failure to show a meeting of the minds to commit criminal sexual conduct was shown by the failure to prove any connection between Cope and Sanders other than the fact that Cope was home and Sanders' DNA was found on his daughter's body R 2297, 9/16/04 Tr p 14, ll 8-16

Judge Hayes denied the motion without argument from the State R 2297, 9/16/04 Tr p 14, ll 17-20 Judge Hayes found "some direct evidence and substantial circumstantial evidence" R 2298, 9/16/04 Tr p 15, ll 2-4 In addition to the evidence cited by Morton, Judge Hayes emphasized the testimony of one young girl [Jessica Cope] that Amanda had chained the door and circumstantial evidence that someone took the chain from where Amanda had it and removed the chain over the night Further, Judge Hayes noted that Cope was home that night and Sanders was in the home that night He concluded there was direct and substantial circumstantial evidence R 2298, 9/16/04 Tr p 15, ll 11-23

On behalf of James Sanders, counsel Greeley made a similar direct verdict motion He stated that while the DNA evidence may be direct evidence that Sanders and the victim were in contact with each other However, he contended that the fact the alleged semen was found on her pants and saliva on her breast were locations of mobility He stated that there was no circumstantial evidence which placed Sanders inside the house unless the assumption is made that the contact occurred inside the house R 2299, 9/16/04 Tr 16

As to the conspiracy charge, counsel Greeley asserted there was no evidence of the two men having any contact, any association, or even knowing each other R 2300, 9/16/04 Tr 17 He contended that in the light most favorable to the State shows statements of what one defendant says he did and how he carried it out, but never mentioned Sanders in regard to the

crime He asserted that semen and saliva merely raises a suspicion of Sanders involvement R 2301, 9/16/04 Tr 18 Judge Hayes denied the motions as to Sanders R 2307-08, 9/16/04 Tr 24-25

The Indictment

The indictment for criminal conspiracy charged that Cope “ on or about November 29, 2001, willfully and unlawfully unite, combine, conspire, confederate, agree and/or have tacit understanding with James Edward Sanders for the purpose of committing the crime of criminal Sexual Conduct upon Amanda Cope, the victim being twelve years of age at the time in violation of 16-17-410 ” Indictment 2004-GS-46-0200 **Amended Supplemental ROA, p 43**

A STANDARD OF REVIEW FOR DIRECTED VERDICT

On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State State v Curtis, 356 S C 622, 591 S E 2d 600 (2004), State v Al-Amin, 353 S C 405, 578 S E 2d 32 (Ct App 2003), State v Morgan, 352 S C 359, 574 S E 2d 203 (Ct App 2002) 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 Cherry, 361 S C 588, 606 S E 2d 475 (2004) If there is any direct evidence or 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 Rosemond, 356 S C 426, 589 S E 2d 757 (2003), State v Lindsey, 355 S C 15, 583 S E 2d 740 (2003), see also State v Ballington, 346 S C 262, 551 S E 2d 280 (Ct App 2001) (stating judge should deny motion for directed verdict if there is any direct or substantial circumstantial evidence which reasonably tends to prove accused's guilt, or from which his guilt may be fairly and logically deduced) On

the other hand, a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged State v McKnight, 352 S C 635, 576 S E 2d 168 (2003), State v McCluney, 357 S C 560, 593 S E 2d 509 (Ct App 2004), State v Padgett, 354 S C 268, 580 S E 2d 159 (Ct App 2003) The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling State v Gaster, 349 S C 545, 555, 564 S E 2d 87, 92 (2002)

CONSPIRACY

Criminal conspiracy is statutorily defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means " S C Code Ann § 16-17-410 (2003), accord State v Gordon, 356 S C 143, 588 S E 2d 105 (2003), State v Follin, 352 S C 235, 573 S E 2d 812 (Ct App 2002) cert denied, State v Horne, 324 S C 372, 478 S E 2d 289 (Ct App 1996) The gravamen of the offense of conspiracy is the agreement, or combination State v Dasher, 278 S C 454, 298 S E 2d 215 (1982), see also State v Buckmon, 347 S C 316, 323, 555 S E 2d 402, 405 (2001) ("The essence of a conspiracy is the agreement ") "In criminal conspiracy it is not necessary to prove an overt act The gist of the crime is the unlawful combination The crime is then complete, even though nothing further is done " Ferguson at 303, 70 S E 2d at 356 (citing State v Ameker, 73 S C 330, 53 S E 484 (1906))

A formal or express agreement need not be established Horne at 381, 478 S E 2d at 293 "A tacit, mutual understanding, resulting in the willful and intentional adoption of a common design by two or more persons is sufficient, provided the common purpose is to do an unlawful act either as a means or an end " Id (citation omitted) Professor McAninch explains "The mere

fact that two persons happened to be doing the same thing at the same time does not compel the conclusion that there was a conspiracy " William Shepard McAninch & W Gaston Faurey, *The Criminal Law of South Carolina*, 476 (4th ed 2002) In State v Ameker, 73 S C 330, 53 S E 484 (1906), the Court stated the necessity of the agreement in approving the following instruction

"[S]uppose, Mr Foreman, that you and the gentleman on your left would go out in the streets of Orangeburg and commit an assault and battery on some other person, that would be an unlawful act, but it would not be a conspiracy, unless there was an agreement between you to do the act before doing it It is an agreement to do an unlawful act that is the gist of the whole matter "

Id at 339, 53 S E at 487

Similarly, in State v Mouzon, 321 S C 27, 467 S E 2d 122 (Ct App 1995), the defendant appealed his conviction for conspiracy to distribute crack cocaine One witness testified that on the night in question, several individuals, including the defendant, were present where drug transactions were taking place Id at 32, 467 S E 2d at 125 We reversed the conviction, holding

[T]o prove conspiracy, it is not enough that a group of people separately intend to distribute drugs in a single area, nor enough that their activities occasionally or sporadically place them in contact with each other What is needed is proof they intended to act together for their shared mutual benefit within the scope of the conspiracy charged

Id at 32-33, 467 S E 2d at 125 See State v Gunn, 313 S C 124, 437 S E 2d 75 (1993) (holding it is not enough for the offense of conspiracy that a group of people separately intend to distribute drugs in a single area, nor that their activities occasionally or sporadically place them in contact with each other)

Once a conspiracy has been established, evidence establishing beyond a reasonable doubt the connection of a defendant to the conspiracy, even though the connection is slight, is sufficient

to convict him with knowing participation in the conspiracy Horne, 324 S C at 382, 478 S E 2d at 294 The conspiracy is proven by overt acts committed in furtherance of the conspiracy Amerson, 311 S C at 319-20, 428 S E 2d at 873 However, overt acts are not necessary for a conspiracy conviction "It is axiomatic that a conspiracy may be proved by direct or circumstantial evidence or by circumstantial evidence alone " Horne, 324 S C at 381, 478 S E 2d at 294 In State v Miller, 223 S C 128, 74 S E 2d 582 (1953), the Court notes "Often proof of conspiracy is necessarily by circumstantial evidence alone " Id at 133, 74 S E 2d at 585 McAninch observes, "The agreement might be difficult to establish by direct evidence if none of the co-conspirators will talk Consequently, the cases in this jurisdiction, as well as others, which hold that the agreement can be established by circumstantial evidence are legion " McAninch & Faurey 476 See, State v Oliver, 275 S C 79, 267 S E 2d 529 (1980) (sufficiency of circumstantial evidence to convict on conspiracy), State v Kelsey, 331 S C 50, 502 S E 2d 63 (1998) (sufficiency of evidence for a criminal conspiracy), State v Childs, 299 S C 471, 385 S E 2d 839 (1989), State v Follin, 352 S C 235, 573 S E 2d 812 (Ct App 2002)

Conclusion

As stated above, there is substantial circumstantial evidence to support the existence of a conspiracy to commit criminal sexual conduct upon Amanda Cope on November 29, 2001 Contrary to the assertions of Cope, the connection was made in the evidence that Sanders and Cope were both involved in the sexual acts by the admissions (Cope) and the evidence (Sanders) The evidence also supports the fact that Cope admits getting up at 3 am, a time when the assaults and death are determined to have occurred The knowledge of particular injuries from the deadly assaults by Cope and the actual DNA connection with Sanders saliva put them together with

Amanda The non-forced entry, circumstantially proven by the earlier chain locked door being unlocked from the inside shows that Cope opened the door for Sanders and led him to his daughter Cope's admissions of having sexual conduct with Amanda previously while she was asleep since the beginning of October, is further evidence that Cope was not acting as a guardian for his daughter but rather saw her as a tool for his sexual gratification

This case is far different from the cases cited by Cope involving several individuals who happen to be involved in similar crimes at the same time like Mouzon and Amaker Here, the act of sexual conduct on Amanda, due to the unique timing of the bruise and saliva could not have occurred without the aid and acquiescence of Cope His complaint is without merit and must be dismissed The trial court was correct in allowing this jury to decide whether the state had proved beyond a reasonable doubt its existence

CONCLUSION

For all the foregoing reasons, the judgement of convictions for murder, criminal sexual conduct and conspiracy must be affirmed

Respectfully submitted,

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DONALD J ZELENKA

ATTORNEYS FOR RESPONDENT

August 17, 2007

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM YORK COUNTY
Court of General Sessions
Honorable John C Hayes, III, Circuit Court Judge**

**04-GS-46-2614-2618
02-GS-46-3232-3234
04-GS-46-200**

STATE OF SOUTH CAROLINA,

Respondent,

v

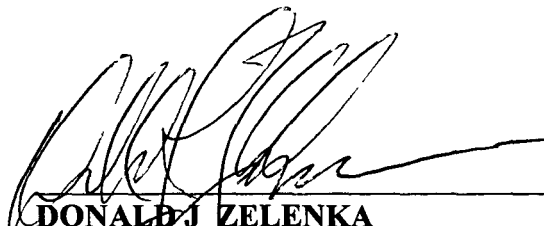
BILLY WAYNE COPE,

Appellant

AMENDED CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Amended Final Brief of Respondent complies
with SCACR 211(b)

This 17th day of August, 2007



DONALD J ZELENSKA
Assistant Deputy Attorney General
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CERTIFICATE OF SERVICE

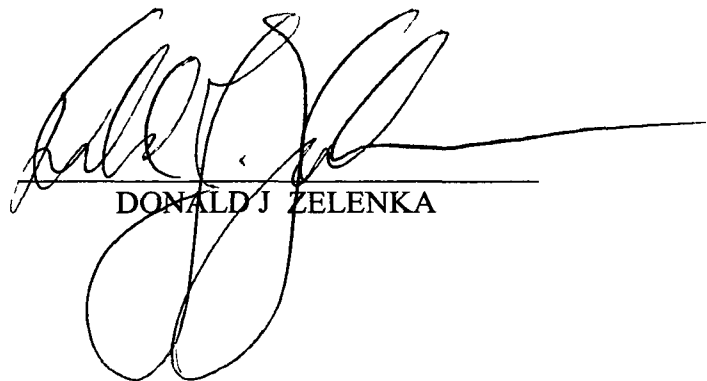
I, **Donald J Zelenka**, hereby certify that I have served the *Amended Final Brief of Respondent* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

The Honorable John C Hayes, III

04-GS-46-2614-~~2003~~

04-GS-46-3232-3234

~~04-GS-46-1843-1844~~

04-GS-46-200

State of South Carolina,

Respondent

v

Billy Wayne Cope,

Appellant

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C Cope's Alternative Request To Enter Evidence Of Sanders'
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RULES

Rule 404(b), SCRE	5, 7, 8, 9, 10, 13, 14, 17, 18, 19, 20
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Appellant Billy Wayne Cope was convicted of a crime that, according to incontrovertible DNA evidence, was committed by another person. Because Cope also “confessed” to this crime after ceaseless accusation and interrogation, the subsequent discovery of another man’s semen on the body of the victim meant one of two things – either that Cope and this other person conspired to commit the crime together, or that the other person committed the crime alone and Cope had somehow been pressured to “confess” to something he did not in fact do.

At first blush, the latter scenario seemed highly unlikely, especially given that Copes’ “confession,” obtained in the hours just after his daughter’s death and for many months the most significant piece of evidence in the case, had seemed to so conclusively close the matter. It is hard to know how Cope’s statements might have been received – or if they would have been extracted at all – had authorities begun their investigation with the knowledge that the DNA from the crime scene came not from Cope but from a serial rapist who lived and preyed upon his victims in the Copes’ very neighborhood. As it happened, however, this awkward discovery came some nine months after Cope’s “confession” had become the immovable bedrock of the prosecution’s case.

For this reason, the DNA evidence was received not as the answer, finally, to who had really killed Amanda but as a vexing source of a whole new set of questions. In fact, in an environment where all analysis and investigation began

with Cope's self-proclaimed involvement in the crime, it had become virtually impossible at that late date to contemplate a scenario wherein Cope in fact had no involvement in Amanda's death at all, no matter what the DNA had revealed. Given, too, that police found no evidence of a forced break-in at the Cope residence and that Cope was undoubtedly home at the time of the crime, the notion that the attack on Amanda could have occurred without Cope's participation was greeted with resounding incredulity. Could someone have entered the home without leaving any sign of forced entry? Could someone have committed such a violent attack without waking other family members? Could someone have accomplished this crime without an inside accomplice? The answer, to every question it seemed, was "no."

In truth, however, someone in the Cope's neighborhood was repeatedly attacking women in precisely this way – committing a series of no-forced-entry break-ins and attacking victims without an accomplice and without waking other members of their households. Moreover, these other attacks were occurring within blocks of the attack on Amanda and during the very same time period.¹

Evidence, including DNA, would eventually establish that a single serial rapist was committing these attacks and that the perpetrator in every case was none

¹ Three of these attacks occurred within a mile of the Cope residence, the fourth took place less than five miles away (R p 876, lines 1-7). All the attacks, including the attack on Amanda, took place between November 29, 2001 and January 12, 2002 (R p 831, line 20).

other than James Sanders, the very person who had who left his saliva and semen on Amanda's body and clothing. In fact, it was ultimately revealed that Sanders, who lived virtually around the corner from the Cope home, had gone on to assault four other women in the six weeks following his attack on Amanda. In each case, Sanders entered his victims' homes without leaving any signs of forced entry and without any sort of inside accomplice (R p 740, lines 9-19, R p 755, lines 9-19, R p 767, lines 24-25, R p 768, line 1, R p 778, lines 1-18, R p 780, lines 10-13). In two of these attacks, Sanders gained entry and assaulted his victims without waking other members of the victims' households (R p 754, lines 6-18, R p 779, lines 12-13).

In short, James Sanders' other crimes, by shedding light on his criminal predilections and abilities, provided clear responses to the exact objections raised to Cope's defense, especially in light of his alleged confession. Could someone really have entered the Cope home without leaving any signs of forced entry? Yes, James Sanders could have, because he was doing precisely that in Rock Hill at the time. Could someone really have committed the attack on Amanda without waking other family members? Yes, James Sanders could have, because he was able to do precisely that in several of his other crimes. Could someone really have committed the attack on Amanda without the assistance of an inside accomplice?

Yes, James Sanders could have, because in all of his break-ins and sexual assaults in the Rock Hill area, he always acted alone

In short, James Sanders' other crimes spelled the difference between a seemingly preposterous defense theory and one that fit like a puzzle piece into the larger and undisputed² picture of what was actually occurring in Rock Hill at the time of Amanda's death. Exclusion of these crimes therefore deprived Cope of evidence that was vital to his defense and, accordingly, deprived Cope of a fair trial

Thus, while Cope relies on his opening brief with respect to the majority of the arguments at issue in this case, he does respond here to the state's discussion of the trial court's exclusion of the Sanders evidence in order to note errors of both fact and law with respect to that decision as well as the constitutional magnitude of those errors

I The Evidence Presented By Cope Regarding Sanders' Other Crimes Satisfied The Admissibility Standards Of *Lyle* And 404(b), SCRE

As an initial matter, and as argued at length in his opening brief, *Initial Brief of Appellant* at 28-35, Cope submits that the Sanders other crimes evidence

² Sanders was positively identified by all four victims of his other crimes and further linked by DNA to two of the other attacks (R p 879, lines 5-14). Sanders was also indicted for each crime (R p 80, lines 19-24, R p 879, lines 18-21)

satisfied the traditional *Lyle*/404(b), SCRE, standards for admission. The state's attempt to obscure the similarities across Sanders' crime spree notwithstanding, these similarities in fact met or exceeded the standards applied by South Carolina courts for admission of other crimes.

The state attempts to distract the Court from these similarities by distorting Cope's arguments and by placing undue emphasis on differences between the various Sanders crimes that are entirely irrelevant given the specific commonalities alleged. The state argues, for example, that no particular pattern was shown with respect to Sanders' favored method of entry because in one of the other crimes Sanders entered through an open patio door and in another he used a ruse to get in through the front entrance of his victim's home, *Initial Brief of Respondent* at 17-18. But the common thread regarding means of entry that was identified by Cope was not predicated on patio doors, front doors or any other specific means or point of access. Rather, Cope asserted that Sanders made it his practice to enter homes without force and without leaving visible signs of a break-in. Similarly, the state makes much of the fact that the age of Sanders' victims varied. *Initial Brief of Respondent* at 18. However, Cope never alleged any age-of-victim pattern in this case.

In addition, the state's attempts to distinguish State v. Hallman, 298 S C 172, 379 S E 2d 115 (1989), and State v. Blanton, 316 S C 31, 446 S E 2d 438 (1994),

are conclusory and fail to identify the ways in which the similarities in those cases differ materially from the similarities demonstrated below. Indeed, the common schemes recognized by both the trial and appellate courts in Hallman and Blanton encompass precisely the kinds of inevitable and irrelevant variation that the state would have prove fatal to Cope. See Hallman, 298 S C at 173-175, 379 S E 2d at 116-117 (finding common scheme even though (1) the other crimes occurred seven years prior to the charged offense, (2) the complainants ranged in age from four to thirteen, (3) the crimes occurred in a variety of locations and (4) the manner and severity of the crimes varied amongst the incidents), Blanton, 316 S C at 32-33, 446 S E 2d at 439 (finding common scheme even though the other crimes preceded the charged offense by seven and eight years and even though the other crimes involved strangers while the complainant in the charged offense was the defendant's granddaughter)

Distractions aside, the fact remains that James Sanders assaulted four other women in Rock Hill during the weeks immediately following the attack on Amanda using techniques and displaying behavior that are clearly reflected in the crime he committed in the Cope home. Sanders entered these four women's homes just as he entered Amanda's – without leaving any signs of forced entry (R p 740, lines 9-19, R p 755, lines 9-19, R p 767, lines 24-24, R p 768, line 1, R p 778, lines 1-18, R p 780, lines 10-13). Sanders assaulted or attempted to

assault each of these women and, in at least three cases, subdued or attempted to subdue these women just as he had subdued Amanda – by choking or asphyxiating them (R p 740, line 25, R p 741, line 1, R p 756, lines 1-5, R p 779, lines 1-7) Sanders knew none of these women before hand, just as he did not know Amanda (R p 747, lines 8-9, R p 750, lines 22-24, R p 759, lines 16-20, R p 772, lines 2-6, R p 778, lines 18-19) Given all this, and the fact that Sanders acted alone in each of his other crimes, his other criminal acts established probative and non-prejudicial³ criminal practices on Sanders’ part that ought to have been admitted under Lyle and 404(b), SCRE

II The State, Like The Trial Court, Fails To Conduct Its Other Crimes Admissibility Analysis In A Manner That Takes Into Account The Unusual Way In Which Cope Sought To Use The Evidence Regarding Sanders’ Other Crimes And The Extent To Which This Evidence Was Essential To Cope’s Defense

The state, like the trial court, also misapprehends the reason why Cope sought to tell the jury the full truth about James Sanders, and accordingly evaluates Cope’s other crimes motion in a manner that is inappropriate given facts of this case Working from a “one size fits all” conception of other crimes admissibility, the state ignores the fact-sensitivity of both Lyle and 404(b), SCRE, and urges the

³ As discussed more fully in section II, *infra*, such evidence presented no prejudice to the defendant as the defendant himself sought its admission Moreover, as Cope argued in his opening brief and before the trial court, to the extent the trial court was concerned about the other crimes evidence prejudicing the jury against *Sanders*, severance of the Cope and Sanders cases would have solved this problem entirely See *Initial Brief of Appellant* at 43-47

8

Court to subject a defendant's effort to introduce favorable (indeed, crucial) evidence to restrictions that only properly apply when a party seeks to introduce such evidence *against* a defendant at trial. In so doing, the state errs with respect to both stages of the two-part Lyle/ 404(b), SCRE, analysis, ignores the constitutional magnitude of Cope's request and seeks to misapply a rule that, as the state itself acknowledges, is designed to "protect a defendant," *Initial Brief of Respondent* at 12.⁴

A Lyle Requires That An Other Crimes Admissibility Analysis Be Informed By The Purpose For Which The Evidence Is Offered

The proponent of other-crimes evidence must, without exception, demonstrate two things – that the probative value of such evidence will not be outweighed by its potential for prejudice and that the evidence in question is offered for a legitimate purpose (rather than merely to suggest a criminal propensity on the part of the individual who is alleged to have committed the

⁴ The state's admission in this regard is well founded in South Carolina law. See e.g., State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005) ("Lyle and its progeny *protect a defendant* from the unrestricted admission of bad act evidence") (emphasis added). Indeed, as this Court recently reiterated, the strictures of Lyle and 404(b), SCRE, are "grounded upon the familiar and salutary general rule, universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the state's theory of the defendant's guilt," State v. Tuffour, 364 S.C. 497, 502, 613 S.E.2d 814, 817 (Ct. App. 2005), *vacated on unrelated grounds* State v. Tuffour, 2006 WL 3742121 (S.C. Dec. 19, 2006) (quoting Lyle, 125 S.C. at 415-16). Accordingly, their function is to safeguard the rights of the defendant or, as this Court writes in Tuffour, "to ensure that the presumption of innocence is not relegated to an empty phrase," Tuffour, 364 S.C. 497 at 502, 613 S.E.2d at 817.

crimes) These standards, however, are necessarily fact-dependent and turn upon the specific rationale offered in support of admission of the evidence In other words, to determine whether a particular piece of other crimes evidence is more probative than prejudicial and whether it is being offered for a permissible purpose, one must first determine what the proponent claims the evidence is probative *of*, and what purpose it has been offered *for*

As a practical matter, because other crimes evidence is almost always offered by the prosecution in support of its efforts to secure a conviction, these constraints normally operate to require that the evidence at issue actually tend to connect the person who committed the other crime to the crime charged and necessitate rigorous scrutiny of any potential prejudice to the criminal defendant But in a case such as this one, where the other crimes were being offered not to implicate a defendant in the crime at issue (as the connection between Sanders and the attack on Amanda Cope was already well-established by Sanders' own DNA) but by a defendant himself in his own defense, the admissibility analysis is necessarily different

Lyle itself describes the other-crimes admissibility standard as a requirement that the proffered evidence be “logically relevan[t] *to the particular excepted purpose or purposes* for which it is sought to be introduced ” Lyle, 118 S E at 807 (emphasis added), see also State v Fletcher, 363 S C 221, 242, 609 S E 2d 572,

582 (Ct App 2005) (“[i]n making the determination of whether evidence of other bad acts is admissible, the trial court must gauge its logical relevancy *to the particular purpose* for which it is sought to be introduced”)(emphasis added), State v King, 349 S C 142, 153, 561 S E 2d 640, 645 (Ct App 2002) (“[t]o admit other bad acts under the Lyle exception, there must be a logical relevance between the acts in question and the *purpose for introduction*”) (emphasis added) Lyle accordingly sets forth a purpose-dependent test that asks whether, in view of the proponent’s intended use for the other crimes evidence, such evidence “reasonably tends to prove a material fact at issue,” Lyle, 118 S E at 807

Here, Cope offered Sanders’ other crimes pursuant to the “common scheme or plan” exception identified in Lyle and 404(b), SCRE He did not, however, as is usually the case with such evidence, offer the other crimes with the purpose of further implicating Sanders in the crime at issue, as Sanders’ own DNA had already clearly established that link Rather, Cope offered evidence of Sanders’ other criminal behavior in support of material facts essential to his own defense Specifically, Cope sought to introduce evidence regarding Sanders’ other crimes because (1) the fact that Sanders had committed other late-night residential break-ins and assaults – without leaving any signs of forced entry and without waking members of his other victims’ households – supported Cope’s argument that Sanders was capable of having gained access to the Cope home in the same way

and (2) the fact that Sanders had committed these other crimes by himself supported Cope's argument that Sanders was capable of perpetrating such break-ins and assaults without an inside accomplice. These points were no small matter, the state expressly argued to the jury that Cope "had to" have conspired with Sanders given the circumstances of the crime and the apparent lack of forced entry into the Cope home (R p 3562, lines 8-15, R p 3595, lines 3-25). Indeed, despite what the state's own investigation of Sanders had revealed, state witnesses testified, (R p 1642, lines 5-25), and the solicitor argued, (R p 3562, lines 17-25, R p 3595, lines 3-25), as if the notion of James Sanders gaining access to a Rock Hill home without leaving signs of forced entry was patently ridiculous.

Under normal "common scheme" circumstances, the state is seeking to establish a signature *modus operandi* on the part of the defendant and to argue that, by virtue of their similarity alone, the defendant's past crimes tend to prove that the defendant also committed the crime charged. In such cases, the extent and import of the alleged similarities is the very gravamen of admissibility as it is the similarities alone that make the other crimes relevant to the crime at issue. For this reason – and because in such situations there is great risk that a jury will be prejudiced against a defendant by exposure to other bad conduct on his part – a very high level of similarity is required before such evidence becomes legitimately

indicative of something other than criminal propensity, and thus more probative than prejudicial

In this case, by contrast, the similarities between Sanders' other crimes and the attack on Amanda were not being offered as proof that Sanders committed the latter assault. Rather, various specific facts of the other crimes were offered as support for various specific factual arguments essential to Cope's theory of defense – namely, that Sanders was capable of gaining access to a house without breaking locks or doors or windows, without waking members of his victims' households and without an inside accomplice. Moreover, in this case, there was no risk of prejudice to the defendant as the defendant himself sought admission of the other crimes evidence.

Because Cope's ultimate purpose in pursuing the Sanders evidence was different than the purpose to which such common scheme evidence is most often put, and because Lyle and its progeny require that Cope's specific purpose be kept in mind when evaluating the admissibility of his evidence, the court's admissibility analysis should have reflected the uniqueness of Cope's motion. That is, the court should have recognized that while Cope needed to demonstrate that Sanders' other crimes were similar enough to the charged offense to support the argument that Sanders had proven himself capable of committing the attack on Amanda in the manner advanced by Cope, it was not necessarily for Cope to establish the level of

near-identical similarity that is required when a proponent argues that the similarities alone support the conclusion that the same person must have committed each offense. In other words, while a high degree of similarity is properly required when the proponent claims that similarities, alone, prove what a particular person *always does* when committing a crime, less is required when the proponent relies on the other crimes merely to show what a particular person has proven himself *capable of doing* in certain circumstances.

The appropriate admissibility question, then, ought to have been not whether there existed such remarkable similarity between the other crimes and the attack on Amanda as to establish a unique *modus operandi* or an unmistakable criminal signature, but whether the features of the other crimes that Cope sought to highlight logically supported the specific factual arguments he wished to make. The record makes clear that such facts were indeed present in the other crimes proffered by Cope – every one of which Sanders committed alone and without leaving any physical signs of his illegal and uninvited entry, (R p 740, lines 9-19, R p 755, lines 9-19, R p 767, lines 24-25, R p 768, line 1, R p 778, lines 1-18, R p 780, lines 10-13), and two of which Sanders committed without waking other members of his victims' households, (R p 754, lines 6-20, R p 779, lines 12-13).

B When A Defendant Offers Other Crimes Evidence, His
Constitutional Right To Present A Defense Must Also Be
Part Of The Admissibility Analysis

Application of a cookie-cutter Lyle/404(b), SCRE, analysis to exclude Cope's other crimes evidence was also inappropriate in this case because a defendant's right to present essential defense evidence is one of federal constitutional dimension Chambers v Mississippi, 410 U S 284, 302 (1973)

As the Supreme Court recently reaffirmed in Holmes v South Carolina, 126 S Ct 1727, 1732 (2006), "the Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote " State evidentiary rulings may accordingly rise to the level of a due process or Sixth Amendment violation when they result in unjustified denial of a defendant's fundamental right to defend himself Montana v Egeloff, 518 U S 37, 43 (1996) Evidentiary rules that have the effect of excluding essential defense evidence must therefore be narrowly tailored to serve "valid" countervailing interests, Egeloff, 518 U S at 52, and state courts dually charged with applying these rules and safeguarding a defendant's constitutional rights may not impose these rules without first determining whether the interests served by the rules justify any resulting curtailment of a defendant's fundamental rights, Rock v Arkansas, 483 U S 44, 56 (1987) See also Crane v Kentucky, 476 U S 683, 690 (1986) (a defendant's due process and Sixth Amendment rights are violated when central defense evidence is excluded without valid state justification)

Thus, a very strict rule of exclusion regarding other crimes evidence may pass constitutional muster (and, indeed, may be constitutionally compelled) when introduction of such evidence would jeopardize a defendant's right to a fair trial. But mechanistic application of that very same rule is constitutionally prohibited in a case where no defendant would be prejudiced by admission of the evidence, and where, on the contrary, prejudice results from exclusion rather than admission.

Indeed, as Cope noted in his opening brief, *Initial Brief of Appellant* at 39 n 11, many jurisdictions have expressly held that a lower standard of admissibility applies to a defendant's proffer of other crimes evidence in light of the defendant's right to present a defense and given the absence, in such cases, of the very prejudice against which the standard is designed to guard. See, e.g., United States v Stamper, 766 F Supp 1396, 1406 (W D N C 1991) *aff'd sub nom In re One Female Juvenile Victim*, 959 F 2d 231 (4th Cir 1992), United States v Stevens, 935 F 2d 1380, 1403 (3rd Cir 1991), United States v Cohen, 888 F 2d 770, 777 (11th Cir 1989), United States v Aboumoussallem, 726 F 2d 906, 911 (2d Cir 1984), Perry v Watts, 520 F Supp 550, 560 (N D Cal 1981), United States v McClure, 546 F 2d 670, 673 (5th Cir 1970), State v Williams, 518 A 2d 234, 238 (N J 1986), Commonwealth v Jewett, 467 N E 2d 155, 158 (Mass 1984), People v Bueno, 626 P 2d 1167, 1169 (Colo Ct App 1981), State v Garfole, 388 A 2d 587, 591 (N J 1978).

Ultimately, as the Supreme Court recently reaffirmed in Holmes, *supra*, the Constitution requires that any evidentiary determination adversely affecting a defendant's right to present a complete defense be rationally related to the purpose of state evidentiary rules – “focusing the trial on the central issues by excluding evidence that has only a very weak logical connection to central issues” Holmes, 126 S Ct at 1734. No such rationale supports the trial court's exclusion of the Sanders evidence in this case, as the Sanders evidence was not merely connected to a central issue in the case but, indeed, essential to Cope's entire defense. Denied the full truth about Sanders, it appeared to the jury that no evidence whatsoever supported Cope's seemingly implausible theory that Sanders had entered his home and brutally assaulted and murdered his daughter without leaving any apparent signs of forced entry and without waking Cope. The excluded evidence, however, demonstrated that Sanders was indeed capable of – and repeatedly committing – precisely such acts, close in both time and location, to the attack on Amanda.

The protections of Lyle/ 404(b), SCRE, are designed as a shield for a defendant against the risk that his jury might be distracted and inflamed by evidence of his own other crimes, allowing the state to use these protections as a sword, and to thereby cut a defendant off from evidence essential to his own defense, perverts the rule entirely. Where, as here, this deprivation denies a defendant his constitutional right to present his defense, this Court can not

countenance such an arbitrary and unconstitutional misapplication of state evidentiary rules

II The State Misstates Or Misapprehends Cope's Severance Arguments

A Cope Did Not Seek Severance On The Basis Of A "Spill Over" Argument, Instead, Cope Sought Severance In Order To Present Sanders' Other Crimes As Evidence Of Third Party Guilt

Cope's motion for severance was not based on any alleged "spill over effect" *Initial Brief of Respondent* at 20. Rather, he argued that, given the trial court's ruling that evidence regarding Sanders' other crimes was not admissible under *Lyle*/404(b), SCRE, severance was required to allow him to be able to present Sanders' crimes as evidence of third party guilt *Initial Brief of Appellant* at 43-49. In addition, Cope argued that the interests and case law favoring a joint trial must give way when a joint trial would prevent a defendant from exercising his constitutional right to present evidence crucial to his defense *Initial Brief of Appellant* at 35-36.

B Cope Does Not Argue That, Had Severance Been Granted, Sanders' Other Crimes Would Have Been Admissible Under *Lyle*/404(b), SCRE, Instead, Cope Argues That, Had Severance Been Granted, Sanders' Other Crimes Would Have Been Admissible As Evidence Of Third Party Guilt And Would Not Have Been Subject To The Strictures Of *Lyle*/404(b), SCRE

The state also erroneously suggests that Cope's severance arguments fail because even if Cope's case had been severed from Sanders', evidence regarding Sanders' other crimes would still have been excluded under Lyle/404(b), SCRE *Initial Brief of Respondent* at 22-23. While the state is correct that Cope's severance motion was predicated on the admissibility of the Sanders' crimes at a separate, Cope-only trial, the state is not correct that the admissibility of such crimes would have been subject to Lyle/404(b), SCRE, in such a situation. As discussed above, *see* Sec II A, *infra*, the protections and strictures of Lyle and 404(b), SCRE, are designed for situations where a defendant's own other crimes are at issue. Thus, in a severed trial, Cope's desire to enter evidence of Sanders' other crimes would have been evaluated under a third party guilt standard.

C Cope's Alternative Request To Enter Evidence Of Sanders' Other Crimes Without Reference To Sanders Himself Was Not A Severance Request

Finally, Cope also wishes to make clear that his alternative request to present evidence of Sanders' other crimes without any reference Sanders himself – i.e. by offering evidence that some unnamed third party was committing a string of assaults and robberies in Rock Hill in which the perpetrator would enter homes without leaving signs of a forced break-in and without waking other occupants – was not a request for severance on those grounds, as the state has mistakenly

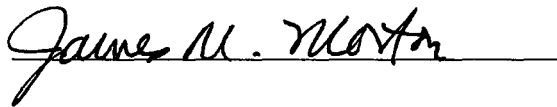
understood it *Initial Brief of Respondent* at 23 On the contrary, this alternative motion – made in the wake of the trial court’s denial of Cope’s Lyle/404(b), SCRE, request – was, like the Lyle/404(b), SCRE, motion, an effort to bring before the jury evidence to support Cope’s theory of defense and evidence to contradict state testimony and argument suggesting that such a “no forced entry” break in was not possible (R p 2308, lines 2-25) This request was unrelated to any severance motion ⁵

⁵ Cope acknowledges that the location of this argument in his opening brief – it is made at the end of a section that does indeed discuss severance – may have given rise to this confusion

CONCLUSION

For the foregoing reasons and for those set forth in the Appellant's opening brief, the Court should reverse the convictions and remand this case to the York County Court of General Sessions for a new trial

Respectfully submitted,



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April 19, 2007

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, III, Circuit Court Judge

Case No. 2004-GS-46-2614
2004-GS-46-3232, 2004-GS-46-200, 2004-GS-46-3233
2004-GS-46-3234

The State of South Carolina

versus

Respondent,

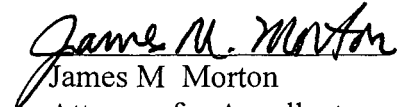
Billy Wayne Cope

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Reply Brief of Appellant complies with SCACR 211(b)

April 19, 2007


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