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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Kristi F. Curtis, Circuit Court Judge

LARRY DURANT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001799

APPENDIX

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**[THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
FROM THE NOVEMBER 22, 2024 PCR HEARING –
APPLICANT’S EXHIBITS 1-8 (PHOTOGRAPHS)]**

1 issue is we had a conversation as we were leaving and she
2 said she thought she might still have this dress. She did
3 not contact me for several days. She had to see if she
4 could find it. It was amongst stuff she had boxed up.
5 She did not ever wear it again after that. It was washed
6 and she found it and she gave it to me. And she said it
7 had -- I know it's been washed. I said, that's okay, you
8 know, we'll see if there's anything there.

9 Q This pertinent that you don't believe is pertinent --

10 A We created paperwork, sir, a chain of custody, a
11 receipt and her name is on it to explain very clearly who
12 and where it came from, the dates and everything that you
13 are asking about.

14 Q Of course. Now, if you'll allow me to ask my
15 question. This dress that you did not find pertinent at
16 the time, that you did not put in any reports at the time
17 was then sent off to SLED. The results came back as
18 negative and then a memo was created that just happens to
19 say hey, by the way, this might have been washed?

20 A Because you asked for one, sir.

21 Q And if I didn't ask for it, we would have never know
22 about it, correct, because you didn't put it in a report?

23 A There is a --

24 Q Show me in a report before I requested where you
25 mentioned that the dress was washed or anything before

1 SLED tested the dress. Anytime that that was mentioned at
2 all?

3 A Here's the receipt with Ms. MINOR and Mr. Durant's
4 name.

5 Q Yes, ma'am.

6 A And the dress and the date and the subsequent report
7 from SLED. That is usually what we do with evidence.
8 It's very typical with evidence, sir.

9 Q So after SLED had tested the dress, after SLED had
10 said there was no semen or anything on the dress, then you
11 created a report in December that said oh, by the way, she
12 told me that the dress was washed?

13 A Because you asked for one.

14 Q I agree with that. But you agree with me, this was
15 all after the dress was already tested?

16 A Yes. It is not normally what I would do. Had you
17 not asked, I would have simply allowed the report to speak
18 for itself, that the dress was tested and it showed no
19 biological fluorescence.

20 Q Well, let's take the next part. Another e-mail came
21 up afterwards?

22 A This is the same e-mail, sir.

23 Q Well, isn't that the e-mail where they said, My
24 apologies, attached is a copy of the second memorandum?

25 A No. It says, My apologies, attached is a memorandum

1 for Valerie explaining the dress because that is what you
2 asked for.

3 Q And then you gave the memorandum that you wrote that
4 is dated July 10th, 2015?

5 A The date that I submitted it to SLED, yes, sir. That
6 is the action I took, therefore, that is the date on the
7 top of the memorandum.

8 Q Nowhere on this memorandum does it indicate, by the
9 way, I wrote this in December?

10 A No, you asked for it in December. I would not have
11 written it at all, had you not asked.

12 Q We've already discussed that memories are fallible?

13 A Yes.

14 Q And we can't memorize everything?

15 A I don't need to memorize anything, sir. It's here in
16 the SLED report with the receipt that I have shown you.

17 Q In the SLED report, does it indicate that you told
18 them that the dress was washed?

19 A I indicated that to the analyst, so the analyst could
20 have testified that.

21 Q Okay. Where is that in the writing? Is that in a
22 writing anywhere?

23 A Not in mine. I indicated that to the analyst when I
24 told them I was bringing evidence in. This is very
25 typical for the way evidence is handled. We are more than

1 happy to create anything that you asked us for if you
2 think it will be beneficial to you. We have absolutely
3 nothing to hide.

4 Q Is that written down anywhere in this conversation
5 with the analyst?

6 A It's written down in the memorandum that you asked
7 for. The analyst has it, and she could have easily come
8 here and discussed it. I don't know if she did. I wasn't
9 in here.

10 Q How did you tell the analyst that the dress had been
11 washed?

12 A Verbally.

13 Q Again, verbally over the telephone?

14 A Yes.

15 Q Again, this would be something that we're relying on
16 your memory for?

17 A You don't have to rely on my memory, it's in the
18 memorandum, sir, that you asked for.

19 Q And the only reason we have the memorandum is because
20 I asked?

21 A You asked. It is outside the scope of what we
22 normally do, yes.

23 Q Now, discussing the next thing she asked you was
24 about D.B. . And you're familiar with your
25 interviews in discussing with Ms. D.B. ?

1 A Yes, she normally goes by D.B. rather than D.B. .

2 Q Again, you provided -- you wrote up two synopses, two
3 memorandums dealing with Ms. D.B. , correct?

4 A I have the one from our initial meeting and, let's
5 see -- I'm sorry, I don't have a second. Although, I may
6 have because I did meet with her on more than one
7 occasion, but I don't see it here.

8 Q Okay. Well, we'll trust your memory. Going from
9 your meetings with D.B. , you wrote a memorandum
10 again about your meeting with D.B. , agreed?

11 A Yes, I would presume that I would have, yes.

12 Q And in your meetings with D.B. , you
13 mentioned the fact that -- you actually talked about the
14 abortion inside of the memorandums, both of them, from
15 D.B. ? That's what the Attorney General's Office
16 --

17 A Obviously, sir, you have the other memorandum. If
18 you'll let me see it, I can tell you --

19 Q Well, I'm asking you questions based upon what you
20 testify in front of the Attorney General's Office. Am I
21 mistaken?

22 A Again, we talked about the first interview that I did
23 with her. If you have another one, I would appreciate
24 seeing it so I can tell you accurately what it says.

25 Q Do you remember even doing the second interview?

1 A I do remember speaking with her.

2 Q Do you remember what --

3 A But I don't see this memorandum in front of me with
4 the memorandums that I have here. Because I give all of
5 my originals to my file. If I approve them, I send them
6 to the attorney. Sometimes I'll give you copy of my own
7 and, apparently, that's what I've done.

8 Q And maybe I'm mistaken, were you present with
9 Detective Kelly when she did a second interview with
10 [REDACTED] D.B. [REDACTED] ?

11 A I was, actually, at that house first. And yes, we
12 then waited for Detective Kelly, yes.

13 Q And maybe I have misspoken. There was a second
14 interview that maybe you did not fill out with the
15 memorandum of the interview, maybe that was Detective
16 Kelly?

17 A Maybe that would be why I don't have it, Detective
18 Kelly created it.

19 Q So there are two memorandums. Let's talk
20 specifically about yours, the first one.

21 A Uh-huh.

22 Q Inside of this memorandum, we talk about [REDACTED] D.B. [REDACTED]
23 [REDACTED] doing an interview with you, agreed?

24 A I can't disagree. [REDACTED] D.B. [REDACTED] did do an interview with
25 me, yes.

1 Q And during that interview, she discussed with you the
2 fact that she was pregnant?

3 A Yes.

4 Q And like I said, I don't want to get into much of the
5 hearsay, but she discussed with you that she was pregnant.
6 And in that interview, you indicated and wrote down that
7 she was pregnant, that the pastor gave her \$500 for an
8 abortion?

9 A I don't see a dollar amount, sir.

10 Q That he gave her money for an abortion. Do you agree
11 with there?

12 A Yes.

13 Q And so you discussed the fact -- and you are a
14 forensic interviewer, this is your job -- I mean, you have
15 been a forensic interviewer and you have been --

16 A I am trained to do forensic interviews, yes.

17 Q And you're a trained investigator?

18 A I am.

19 Q And you investigate crimes?

20 A I do.

21 Q So Ms. **D.B.** told you that she had gotten an
22 abortion?

23 A Yes.

24 Q At the time, she would have been under the age of 13?

25 A Correct.

1 Q Because that's one of things she told you, she
2 couldn't do it in Columbia. She had to go to another
3 state because they wouldn't do those because of her age?

4 A She did not tell me that.

5 Q Did you learn that information also after you had a
6 second interview with Detective Kelly?

7 A I would again need to see that interview.

8 MR. KENT: May I approach the witness, Your Honor?

9 THE COURT: Yes.

10 BY MR. KENT:

11 Q I'm showing you a memorandum of an interview done by
12 Detective Kelly, which indicates you were present at the
13 time y'all interviewed Ms. D.B. approximately a week
14 and a half, two weeks ago?

15 A No, this was not two weeks ago, sir.

16 Q Okay.

17 A This was in February.

18 Q February of this year?

19 A Yes. And there is a dollar amount in this one, yes.

20 Q Do you now remember Ms. D.B. indicating a dollar
21 amount while you and Detective Kelly were present in the
22 interview with her?

23 A Actually, you're talking about D.B. .

24 Q Yes.

25 A D.B. did not say that.

1 Q D.B. never told you a dollar amount?

2 A D.B. did not say a dollar amount, no, sir.

3 Q Okay.

4 A This is her mother that it references.

5 Q So it's your testimony that D.B. never told
6 you or Detective Kelly a dollar amount?

7 A I don't recall any dollar amount. Again, when you
8 said \$500, it's certainly not in my report and --

9 Q Well, let's get to the important part of the matter.
10 There was no doubt there was a discussion of an abortion?

11 A Yes.

12 Q There was no doubt there was a discussion that Pastor
13 Durant paid for the abortion?

14 A That's my understanding, yes.

15 Q There is no doubt that Ms. D.B. told you that she
16 was pregnant?

17 A She had said that.

18 Q There is no doubt that she would have been a minor at
19 the time that she was pregnant?

20 A Yes.

21 Q There is no doubt -- there is almost hardly anyone in
22 the United States of America who she could have had sex
23 with that wouldn't be a crime, getting a 13-year-old
24 pregnant, would you agree with me there?

25 A Unless it was another 13-year-old, sir.

1 Q Did we investigate any of that at all?

2 A We did not. I asked her if it was another adult --
3 she said it was not Mr. Durant. I said, Was it another
4 adult? That was for her safety that we asked that
5 question. She said it was not. She started to shut down
6 and not look at me anymore and not talk, so I just left
7 that situation alone.

8 Q So just ignored it, just left it alone? That would
9 be some of the stuff you said is just not pertinent, it's
10 not important?

11 A It was not important to this investigation.

12 Q Based upon what you think?

13 A No, sir, it's not important to this investigation
14 when she indicates that it is a same-age individual that
15 she has been involved with. They do -- everybody has --
16 even a 13-year-old has some right to privacy.

17 Q Would you also believe that it's not important that
18 Pastor Durant wasn't the father of the baby and didn't get
19 her pregnant? Is that not important?

20 A I think that is. If she had said yes, I certainly
21 would have written that down.

22 Q But she said no, so you didn't put that in the report
23 because it's only important if she says yes. It's not
24 important that she said no?

25 A Well, I can certainly understand, sir, why you would

1 want to have that written down. But I think it's safe to
2 say that as you pointed out, you know me very well, I have
3 worked these things for a very long time. If I had
4 evidence of this particular Defendant doing something, it
5 would have been offered up. She said it was not him. I
6 left that alone.

7 Q So your testimony is it's only important if she would
8 have said yes. And if she would have said yes, it would
9 have been included in the report?

10 A It would have been included --

11 Q So if it would have shown guilt on his part, you put
12 it in. But if it shows any innocence, that ain't
13 important stuff?

14 A No. I think it is -- you can safely presume that he
15 is not the responsible party for that pregnancy if it is
16 not there. You do not have to prove a negative. He is
17 not the father of that child. She made that clear.

18 Q And you're a smart woman, so it's very interesting
19 that you write a report. You indicate that she was
20 pregnant. You indicate that he paid for the abortion, but
21 you never put in the record that she says he's not the
22 father. You never put in the report that she says it was
23 another teenager. None of that is put in the report. But
24 you do put in the fact that you say that she said that he
25 paid for the abortion. What is the implication there?

1 A Actually, I indicated that he did a number of things
2 in this report.

3 Q And I'm asking you --

4 A And would have certainly indicated if he had done
5 that.

6 Q What is the implication by not putting in the fact
7 that he's not the father?

8 A That he is not the father.

9 Q But you didn't put it in. You don't even put in that
10 you asked who the father was. You don't put any of that
11 in the report at all. You just gloss that over?

12 A I understand what you're saying, sir, but it is not
13 necessary to invade her privacy further when she has
14 answered my questions. It is not necessary to put that he
15 is not -- if he's not in there as the father, then he is
16 clearly not responsible.

17 Q It's not necessary to invade -- you already asked the
18 question. You already knew answer. And upon knowing the
19 answer, you simply chose not to put in the report. Can we
20 just agree with that. It's not in the report. You didn't
21 put it in there. And you've testified that if she would
22 have said yes, it would have been in there?

23 MS. ABEE: Objection, Your Honor, this has been asked
24 and answered already.

25 THE COURT: Well, it was multi-faceted question, so

1 if you want to ask it again, break it down a little bit.

2 MR. KENT: I think we have our answer.

3 BY MR. KENT:

4 Q Do you remember how we found out that that
5 information was not inside the report? Do you remember
6 another e-mail train which we asked about the information
7 in the report?

8 A Off top of my head, no, sir.

9 Q Do you remember getting e-mails back and forth from
10 me about the importance and asking about the exculpatory
11 nature and who was the father of the child, that I had to
12 specifically ask this information?

13 A I think you sent your e-mails pretty much of the time
14 to Ms. Abee. I don't have too many directly from you.

15 Q Did Ms. Abee ever forward you information and make a
16 request of you of Mr. Kent is asking for more information?

17 A Yes, she would do that.

18 Q You actually sent a kind of mean-spirited, joking
19 response to me, didn't you?

20 A Well, we've bantered on some other cases in a
21 mean-spirited, joking way, calling people stinky, et
22 cetera, so it wouldn't be surprising.

23 Q Have I joked or bantered at all about this case at
24 all with you?

25 A I don't think you have.

1 Q What did you send in that?

2 A I said, You apparently -- where is the message that
3 you sent, so I could address that?

4 Q These were an e-mail train and you would agree with
5 me that I was asking a bevy of questions to the Attorney
6 General's Office, basically, begging for evidence. Would
7 you agree with me there?

8 A No, sir, you were not begging for evidence. This
9 case has gone on since 2013. You've been involved in it
10 most of the time. Any time you've asked for anything,
11 you've gotten it.

12 Q Let me know after you've had a chance -- let me know
13 if you're ready?

14 A I am. Actually, most of these came to Ms. Abee and I
15 am CC'd.

16 Q Yes, ma'am.

17 A But one you did send directly to me.

18 Q So you are familiar with these?

19 A Yes.

20 Q And a lot of the requests that I asked was the same
21 thing I've asked in front of the jury, why is none of this
22 information memorialized. Would you agree with me there?

23 A I think that is what you asked, yes.

24 Q And you sent a response. What in the world is he
25 talking about now, question mark, question mark. Her

1 interviews were memorialized in quotation marks. In
2 parentheses, I guess he means documented in the memorandum
3 or statement. And then you actually gave a definition of
4 memorialized?

5 A Yes.

6 Q In a joking, kind of mean-spirited way?

7 A No, that was not joking or mean-spirited. Actually,
8 that was not meant to go to you. I had received all of my
9 e-mails from Ms. Abee that you had sent her. And I
10 thought I was replying to her, as you can tell, since I'm
11 actually asking her about you mean.

12 Q What in the world is he talking about now, question
13 mark, question mark?

14 A Correct.

15 Q And then I responded, You find this funny, I don't.
16 Correct?

17 A Exactly. And I do not find this funny. There is
18 absolutely nothing funny about what is going on in this
19 situation, not remotely. I never find this type of thing
20 humerus at all.

21 Q Now, I want to talk about T.H. . Do you
22 remember doing interviews with Ms. T.H.?

23 A I do. It was the same day. It was Ms. T.H. that
24 led me to interview D.B. because she had said she
25 thought D.B. had been offended against, as well.

1 Q And you took -- an arrest warrant was taken out for
2 Mr. Durant based upon what you said that Ms. T.H. had
3 told you, correct?

4 A I did not take out an arrest warrant, sir.

5 Q Well, an arrest warrant was taken out based upon
6 information that Ms. T.H. had given you, Ms. T.H. had
7 indicated according to the arrest warrant and according to
8 statements.

9 A I believe Detective Kelly would have done that, yes.

10 Q Well, let's go this way. Do you remember taking a
11 second interview with Ms. T.H.? And that would have been
12 about a week and a half, two weeks ago.

13 A That -- yes, we met with them prior to trial, yes.

14 Q Okay. And you would agree, the memorandums that
15 usually that you do in dealing with these individuals are
16 lengthy because you try to get as much detailed
17 information in them as possible, agreed?

18 A I'm sorry, ask that again.

19 Q Memorandums can be lengthy because we try to get as
20 much detailed information in the memorandum as possible?

21 A Well, it depends on what they say how long it is, of
22 course.

23 Q T.H., are you familiar with her case?

24 A I am.

25 Q You're an investigator in that case?

1 A I am.

2 Q The warrant and the charging against Ms. T.H.
3 alleges that Mr. Durant stuck his fingers inside of her.
4 Would you agree with me there?

5 A I don't have the warrant, sir. I did not write the
6 warrant. I did not issue the warrant. I did not serve
7 the warrant.

8 Q I'm with you. What I was asking you, are you
9 familiar with that case and is that what the charge was?
10 You said you were familiar with the case of T.H.?

11 A I'm familiar with the general overall of what this
12 case involves, yes, sir. Specifically, on any one
13 warrant, I could not tell you what it says.

14 Q In the memorandum that you gave dealing with T.H.
15 , you just gave a little two-sentence blurb at the
16 end dealing with T.H.?

17 A Yes.

18 Q T.H. provided the following new information?

19 A Yes.

20 Q She said that Durant would put his hands inside of
21 her panties, but did not put his fingers inside her body
22 or try to have sex with her?

23 A Yes.

24 Q That's new information?

25 A That is, yes.

1 Q Now, if you're not familiar with the warrant or
2 familiar with what she's charged with, how would you know
3 that's new information?

4 A Because I looked. I went to see what had been said
5 previously and in a memo by Detective Kelly, that's what
6 it indicated.

7 Q And so this would be in opposite of the memo from
8 Detective Kelly that originally she said that he had stuck
9 his fingers inside of her? That's completely different?

10 A No, I think -- actually, no, it's not the opposite.
11 She said Durant would put his hand inside her panties, but
12 did not put her fingers inside her body or try to have sex
13 with her. He seemed to focus more on her breasts. That
14 is not the opposite. I think that Detective Kelly
15 probably thought that when she said that or the manner in
16 which she said that that's what she meant. But that is
17 not what she said to me, so I put down what she said to
18 me.

19 Q Because that's a different charge, sticking your
20 fingers inside somebody is different than not sticking
21 your fingers inside somebody?

22 A That's correct, it is a different charge, yes.

23 Q Have we gone through the avenues and responsibilities
24 of dismissing that charge since it's a completely
25 different charge?

1 A You would have to address the attorneys on that, sir.
2 I don't know that.

3 Q Have you gone to the attorneys and said hey, we have
4 the wrong charge here. She said something different than
5 what's in Detective Kelly's statement?

6 A Again, sir, you would have to take that up with the
7 attorneys. They get a copy of every single thing that I
8 generate. It always goes to them.

9 Q Yes, ma'am. They get a copy of everything that you
10 believe is pertinent?

11 A They get a copy of every single thing that I
12 generate, sir.

13 Q And you have had an opportunity to review -- let me
14 ask you again. You know this case in detail, correct?

15 A I know this case, yes, sir.

16 Q And some of the allegations in the case that we
17 haven't heard is allegations that Pastor Durant would have
18 sex with these girls and would not use condoms. That's
19 one of the allegations. Would you agree with me there?

20 A I would have to see which statement you're referring
21 to, sir. This is -- there are a lot of statements and a
22 lot of paperwork in this case. And I do work numerous
23 sexual assault cases. So I don't want to confuse them.
24 Sometimes when I'm talking about one case, if there's
25 similarities to another case, I will confuse them. So I

1 don't quote anything unless I can actually look at and
2 make sure that I'm saying it correctly.

3 Q So you would agree with me, even on this case, you
4 can't remember everything that's inside all of the files?

5 A Sir, I can't remember everything from anything. I
6 think that's pretty normal for people. I think people
7 forget names, dates, et cetera, et cetera. It helps to
8 have some sort of documentation. There are certain
9 things, though, that you experience in life in general
10 that stand out to you, that make an indentation on your
11 memory, so some things are more memorable than others.

12 Q And you understand and you've done this long enough
13 in testifying and dealing with cases, we shouldn't trust
14 people's memory. We should trust what's in writing. Do
15 you agree me?

16 A I think that, yes, but you also have to apply common
17 sense. I realize it's possibly the least common thing in
18 the world, but you have to apply common sense, Mr. Kent,
19 when you have, as you pointed out, an experienced
20 investigator providing you with information. I understand
21 that you might want more specific information and I am
22 always happy to provide it if I possibly can.

23 Q You wouldn't send a smart aleck e-mail if I asked for
24 more specific information?

25 A I actually have e-mails from you and I -- previously,

1 sir, in that regard. I understand that you seem to be
2 upset that I corrected your use of a word, and I apologize
3 if that upset you --

4 Q And I just apologize that you're hiding evidence on
5 Mr. Durant. Thank you so much for your time.

6 MS. ABEE: Your Honor, very brief redirect.

7 THE COURT: Go ahead.

8 REDIRECT EXAMINATION

9 BY MS. ABEE:

10 Q Investigator Williams, were you acting as a forensic
11 interviewer in this case?

12 A I was not. I did not conduct a forensic interview
13 with any of these young ladies.

14 Q All right. What was your role in this case?

15 A My role in this case was to assist Detective Kelly.

16 Q And we talked a little bit about the dress and the
17 DNA on the dress. And I believe you stated it came back
18 that there was no sort of fluids on the dress, right?

19 A No, there was none according to the report, yes.

20 Q And when that information came back, did you hide it
21 from the Defense?

22 A Of course, not. We do not hide things from anybody.

23 Q Did you turn those SLED results over?

24 A Of course.

25 Q What about when you spoke with T.H. recently

1 and she stated that his fingers actually did not go inside
2 of her, did you hide that information from the Defense?

3 A Absolutely not. If I find any evidence that a person
4 who is accused of something is not the responsible party,
5 that will immediately be brought forth.

6 Q Thank you.

7 A This is a serious, serious situation. You don't put
8 somebody in this situation unless you're 100 percent that
9 you're going in the right direction.

10 MS. ABEE: Thank you, Your Honor. I have no further
11 questions.

12 THE COURT: Recross?

13 MR. KENT: Nothing further.

14 THE COURT: You may step down.

15 THE WITNESS: Thank you, Your Honor.

16 I believe this is Mr. Kent's.

17 THE COURT: We have been at it for a little while
18 this morning. Why don't we take a 10-minute break so
19 everything can use the restroom. Don't begin
20 deliberations or discussions about the case. We'll have
21 you back in just a few minutes. All right.

22 (WHEREUPON, the jury left the courtroom at 11:19
23 a.m.)

24 THE COURT: Okay. Let's take 10 minutes and we'll
25 come back.

1 (WHEREUPON, a short break was taken.)

2 THE COURT: All right. The Defendant is in the
3 courtroom. Do you have your next witness ready?

4 MS. ABEE: Yes, sir, Your Honor. He is right
5 outside.

6 THE COURT: Bring the jury in.

7 (WHEREUPON, the jury entered the courtroom at
8 11:43 a.m.)

9 THE BAILIFF: All the jurors are back in the
10 courtroom.

11 THE COURT: Thank you. We're going to resume now
12 with the State calling its next witness.

13 MS. ABEE: Thank you, Your Honor. The State calls
14 David Kellin.

15 THE BAILIFF: Place your left hand on the Bible,
16 raise your right hand. State your name, please.

17 THE WITNESS: Maylen David Kellin.

18 DAVID KELLIN, after being duly
19 sworn, testified as follows:

20 THE BAILIFF: Come around, sir. State your name and
21 spell your last for the record.

22 THE WITNESS: Maylen David Kellin.

23 DIRECT EXAMINATION

24 BY MS. ABEE:

25 Q Good afternoon, Mr. Kellin.

1 A Good afternoon.

2 Q Are you currently employed?

3 A I am.

4 Q Where at?

5 A I have two different positions. I have a private
6 practice in Kershaw, South Carolina, and I'm also a
7 counselor at Palmetto Citizens Against Sexual Assault.

8 Q What type of services do you provide?

9 A I provide trauma focus, cognitive behavior therapy
10 for traumatized patients.

11 Q And explain that to us a little bit. What does that
12 mean?

13 A When a child or adult is traumatized either by abuse,
14 physical or sexual abuse, they have reactions related to
15 that abuse. My job as a counselor is to come in and
16 provide counseling that relates to that abuse to help them
17 get back to a normal level of functioning.

18 Q So to tell us all a little about your educational
19 background.

20 A Okay. I have a Bachelor's in Science Degree from
21 Lander University. I have a Master's in social work from
22 the University of South Carolina. I've also trained as a
23 forensic interviewer through Finding Words here in South
24 Carolina. Extended forensic interviewer training at the
25 National Child Advocacy Center in Alabama.

1 Q Do you have any training specifically in counseling
2 sexually abused individuals?

3 A I do. I'm rostered in the State of South Carolina as
4 a trauma focus cognitive behavioral therapist.

5 Q What professional licenses do you hold, if any?

6 A I have a license in social work through the State of
7 South Carolina.

8 Q How many years have you been involved in counseling
9 abused children and adults?

10 A Eight years directly with abused children. I started
11 counseling children and adolescents 24 years ago.

12 Q What types of people do you counsel?

13 A Right now, it, typically, is a child or adolescent
14 that's referred to the Child Advocacy Center who's been
15 identified or has disclosed abuse, physical or sexual
16 abuse.

17 Q Have you ever testified in court before?

18 A I have.

19 Q Have you ever been qualified as an expert in court
20 before?

21 A I have.

22 Q Approximately, how many times?

23 A In general sessions court, approximately four times.
24 Family Court, numerous times.

25 MS. ABEE: Your Honor, at this time, the State seeks

1 to tender David Kellin as an expert in the areas of child
2 maltreatment and child abuse dynamics.

3 MR. KENT: No objection.

4 THE COURT: All right. Well, he has now been
5 qualified as an expert in those fields. You, again,
6 should take the same instructions that I gave you
7 regarding earlier expert witnesses and allow you -- and
8 decide how much weigh, if any, this witness's testimony is
9 indicted -- is worth depending on all of the testimony
10 that you hear.

11 MR. KENT: May we approach, Your Honor?

12 THE COURT: Uh-huh.

13 (WHEREUPON, a bench conference was held.)

14 THE COURT: All right. Again, you will decide how
15 much weight to give his testimony based on all the
16 evidence that you hear throughout the trial.

17 All right. Go ahead.

18 MS. ABEE: Thank you, Your Honor.

19 BY MS. ABEE:

20 Q Now, Mr. Kellin, have you spoken with any victim in
21 this case?

22 A No, ma'am.

23 Q Have you read any statement in this case?

24 A No, ma'am.

25 Q Have you reviewed any investigative reports in this

1 case?

2 A No, ma'am.

3 Q Do you know anything about this particular case at
4 all?

5 A Nothing, ma'am.

6 Q I want to talk to you now and ask you a few questions
7 about some characteristics. Explain to us what grooming
8 is?

9 A Okay. Grooming is when a person who is intent on
10 harming a person slowly makes actions to gain the trust or
11 access to a child or a person. So in a case of a child
12 abuse situation, the person who is doing the harming -- or
13 intent on doing the harming would gain the trust of the
14 parent or gain the trust of the family and, ultimately,
15 gain the trust of the child to get closer and closer to
16 the child, and then doing small actions that would,
17 ultimately, lead into an abuse situation.

18 Q And can grooming affect the process of disclosure or
19 somebody saying that they had been sexually abused?

20 A Yes, it can.

21 Q Explain to us how.

22 A As the process of grooming goes on, it is a
23 trust-building process. So when it gets to the point
24 where an abuse happens, the child may feel conflicted
25 about sharing anything because they have trust with this

1 person and feel like that person may be a good person in
2 their life. And then something bad happens, they feel
3 like I can't share that because this person would get in
4 trouble or this person said not to say anything. I trust
5 them, so I'm not going to say anything.

6 Q And just generally, tell what we -- what you mean
7 when you say the word disclosure. What is that?

8 A Okay. Disclosure is when somebody says something bad
9 has happened to them. So with child abuse, it's when
10 there's -- the child makes a statement that something
11 happened to them. Somebody touched them, somebody hurt
12 them, somebody was mean to them.

13 Q Are there different types of disclosure?

14 A There are, at least, two different types of
15 disclosure we look at. One is an accidental disclosure.
16 That's when somebody is talking in the room and, all of a
17 sudden, somebody blurts out that happens to me, too, or,
18 at school, they're going an educational program and the
19 child suddenly blurts out oh, that's me. That's
20 accidental.

21 Then there's a purposeful disclosure. And that's
22 where a child goes to a parent, goes to a caregiver or
23 teacher and says so and so is hurting me or so and so has
24 done something to me.

25 Q What about the term delayed disclosure, what does

1 that mean?

2 A Delayed disclosure means that there's a period of
3 time between the time something has happened and the time
4 in which either an accidental disclosure or a purposeful
5 disclosure happens. According to what we know within the
6 field, it's more likely that with sexual abuse, the
7 disclosure is delayed for a significant amount of time.

8 The national kind of look at numbers, about one in
9 four children will disclose abuse when it's happened to
10 them. The 75 percent of them don't. They just carry it
11 over the course of their lifetime with no disclosure. So
12 the disclosure rates are typically very small.

13 Q What kind of factors can lead to somebody delaying in
14 their disclosure?

15 A What we know is that fear is the most likely and most
16 common response when we ask children -- when we know that
17 there's been abuse and we ask what about that disclosure.
18 Fear of punishment or fear of making somebody angry. Some
19 sort of fear reaction tends to be the most likely cause
20 for that. But there's also threat by the perpetrator or
21 the person who is hurting, feeling like that person is a
22 trusted part of their life. It may be a relative that
23 they're very close to, and they don't want to share and
24 make that disclosure because that would end up causing
25 trouble within that relationship for them.

1 Q What about guilt or shame? Can that play a role in
2 disclosure?

3 A Yes.

4 Q What about the abuse being somebody in a positio of
5 authority, can that affect the timeliness of a disclosure?

6 A Very much so. That power that children give to
7 adults make it very easy for an adult to say don't say
8 anything or this is our secret. This is something we
9 don't want anybody to know or I'm going to get fired if
10 you say something. And that child in respect or care or
11 whatever to that adult doesn't say anything.

12 Q Now, can disclosure sometimes be a process?

13 A Yes. What we know is it is a process of -- usually,
14 the accidental disclosure is a very small part of what
15 happens. And over time, the amount of information that's
16 disclosed tends to increase. It's rare that we get a
17 full, all details, every bit of information in an initial
18 disclosure. Initial disclosures tend to be very small.

19 Q So explain to us how that relates to what partial
20 disclosure is?

21 A Partial disclosure is similar to accidental. When a
22 child maybe makes a purposeful disclosure, maybe they go
23 in and tell just enough so they can get some help, but not
24 say everything about what happened. Or they may be
25 confused and as they get older, they may come to more of

1 an understanding and share more of what happened.

2 Q So is it common that more details come out over time?

3 A Yes.

4 Q And what about the concept or the idea of minimizing
5 or recantation, what's that?

6 A Okay. Minimizing and recantation, that's when a
7 child or the person who has been hurt reverses what
8 they've said. So somewhere along the line, they come and
9 say no, it didn't happen. This is not true. I lied about
10 this. And it happens in some cases. It doesn't happen in
11 every case, but it does happen in some cases.

12 Q What are some factors that could lead to somebody
13 recanting their disclosure?

14 A It's a very broad set of factors, almost individual
15 to the person. Lack of support from the family can lead
16 to recantation. Depending on how much frustration or
17 trouble or upheaval there is in life for that child, that
18 can cause a child to throw up their hands and say no, I'm
19 just going to end this and say I didn't do this.

20 Sometimes, and within my practice, I've noticed that
21 as we get into extended times for things to get done,
22 sometimes children will just want to end the process and
23 go forward with their life and say it didn't happen so
24 that they can eliminate any prosecution or any further
25 process and just continue on with life.

1 Q So you just told us about recantation, which is just
2 taking it back, right?

3 A Right.

4 Q What's minimizing?

5 A Minimizing is when you give less information or if
6 you start to reduce its severity. So I have some children
7 that I've counseled or worked with where we know there is
8 a penetration of the child, but when a child talks to me,
9 they say it's just a touch. That's minimizing.

10 Q And do children often maintain a relationship with
11 their perpetrator?

12 A Here again, it's more likely than not that they'll
13 maintain a relationship. What we know statistically is
14 that about 85 percent of people who hurt kids are known
15 and trusted to that child. So that trust relationship, if
16 it had been groomed or if it was a family member or a
17 coach, that relationship pre-exists the abuse. So
18 maintain -- a lot of the kids tell me they'd rather just
19 not have had the abuse happen so they can have that person
20 back.

21 One of the most heartbreaking times I have is when
22 there is a parent or grandparent that has done something
23 and then the child says well, if we just get this away,
24 don't worry about this, I want my grandpa back or my dad
25 back. And that's heartbreaking because we can't encourage

1 that. But they still would like that relationship they
2 had prior.

3 Q Now, can religion play a role in whether or not
4 someone discloses sexual assault?

5 A I guess it can. You know, I could foresee situations
6 where one's faith might cause you to not disclose or to
7 disclose, or depending on the authority rested within a
8 faith as to whether or not you would have permission to
9 disclose or have the ability to confront those things.

10 Q And you told us when you were telling us about your
11 profession that you counsel sexually abused children; is
12 that right?

13 A Yes.

14 Q Now, does every child feel comfortable talking about
15 their sexual abuse with just anyone?

16 A Not typically, no.

17 Q Now, what about counseling, is every child always
18 ready and prepared to go through counseling?

19 A No.

20 Q Is counseling somewhat a process?

21 A Counseling is a process. When we look at somebody
22 who's been identified with PTSD, we're looking at about 16
23 sessions to 24 sessions to help them with that process.
24 They still have to be willing at the beginning to engage.
25 And part of the counselor's job is to help to engage that

1 person in the discussion. But not every child who goes
2 through the CAC process and has a forensic interview and
3 has an investigation going on is necessary for counseling
4 or is willing to start counseling.

5 MS. ABEE: Your Honor, may I beg a second of the
6 Court's indulgence?

7 (Pause.)

8 MS. ABEE: Your Honor, I have no further questions
9 for Mr. Kellin at this time.

10 THE COURT: Mr. Kent.

11 CROSS-EXAMINATION

12 BY MR. KENT:

13 Q Mr. Kellin, how are you doing?

14 A All right.

15 Q My name is Shaun Kent. We've spoken on the phone a
16 couple of weeks ago?

17 A Yes.

18 Q I'm going to ask you and talk to you about some of
19 the same questions when I talked to you on the phone.

20 A Yes.

21 Q The first thing, I think the little expression they
22 give is you are a blind expert?

23 A Yes.

24 Q By blind expert, the phrase, basically, means you
25 don't know anything at all about this case?

1 A I know nothing.

2 Q Nothing. And one of the things we talked about on
3 the phone was every single child is different?

4 A Yes.

5 Q And we can be a blind expert and give generalities
6 and our impressions, but every kid can be different?

7 A Every child is different, yes.

8 Q And that's why sometimes it's important to interview
9 these kids to see if they fit into any of these statistics
10 that we talk about?

11 A Yes.

12 Q So we understand that your entire testimony is
13 tempered by the fact that you've never met with anybody,
14 you've reviewed anybody. Your testimony is just
15 generalities?

16 A Yes.

17 Q We would agree with that?

18 A Yes.

19 Q And I'm going to ask you about some of those
20 generalities that we talked about on the telephone?

21 A Yes.

22 Q Understanding these are just very generalities?

23 A Right.

24 Q We talked about the fact -- when we were on the
25 phone, we talked about forensic interviews, do you

1 remember that?

2 A Yes.

3 Q And I was asking you about forensics interviews and
4 how they're done in South Carolina?

5 A Right.

6 Q And do you remember what -- first, tell the jury what
7 a forensic interview is and how they should be done and
8 your understanding, as the Attorney General's expert, how
9 they should be done?

10 A Okay. A forensic interview is a specialized
11 interview that's conducted. In South Carolina, a child
12 advocacy center or a center that is designated in a county
13 as a location for that interview. It is a nondirective
14 interview that's in a child-friendly environment that asks
15 the child, basically, to recount what happened. And it's
16 recorded, typically, by video camera. My expertise in
17 terms of what happens in a forensic room is based on what
18 I've done --

19 Q Yes, sir.

20 A -- in Kershaw County and what I've done in Lancaster
21 County. I can't speak to other counties. I know that our
22 general hope and expectation is that all counties follow a
23 similar pattern.

24 The interview process developed in the child advocacy
25 center out of Alabama when a young lady came in and had --

1 after being identified as having been abused, had about 14
2 different full interviews done by each agency involved.

3 So there was a process started called the
4 multi-disciplinary team approach where one interview was
5 done at the child advocacy center that would then be used
6 with all the other agencies involved.

7 Q And that's one of the suggestions. We talked about
8 that. You don't want to do a lot of interviews with
9 children?

10 A No.

11 Q You want to do one?

12 A Typically, we like to do one. There are times where
13 we have to do more than one, but, typically, we do one
14 interview.

15 Q And why is that again -- I understand what you said,
16 but we talked about that on the phone. Why do you only
17 want to do one interview?

18 A For me, I only want to do one forensic interview
19 because I don't want to contaminate. I don't want to have
20 other people come in the process afterwards and add
21 information or try to change information. I like for my
22 interviews to be just that one time where I can gather as
23 much as I can, understanding that that is not an interview
24 for counseling, that's not an interview for treatment. It
25 is really the initial contact disclosure interview that is

1 then shared with the investigation process for them to
2 continue.

3 Q Okay. And I think we talked about that, that usually
4 law enforcement will call you in to do the forensic
5 interview?

6 A Right. In the two centers that I worked, we did --
7 we only did forensic interviews when we were asked by the
8 police department, sheriff's department or DSS.

9 Q And it's usually preferable to do a forensic
10 interview because y'all are trained in how to interview,
11 talk to children and make sure there's no suggestibility
12 or anything of that nature? Y'all have a specific amount
13 of training?

14 A Right. We do have a 40-hour training in South
15 Carolina at Finding Words, which is conducted out of
16 Columbia. And I took that training, as well as advanced
17 training, both in extended forensic interviewing and
18 forensic interviewing.

19 Q And when you do these forensic interviews, you're
20 just trying to -- you are garnering information, but you
21 are look for suggestibility, believability, you're looking
22 for everything?

23 A The forensic interview looks at being able to allow
24 that child to make whatever statements they need to make.
25 Forensic interviewers, typically, are not qualifiable as

1 an expert to talk about the suggestibility of --

2 Q Right.

3 A -- a child. They're there kind of as the trained
4 recorder, reporter of the information the child would
5 produce for the investigation. So instead of going into
6 an interview room at the sheriff's department, we use a
7 trained person in a child-friendly environment.

8 Q We can see that would be difficult taking a child to
9 an interview at the investigator's officer or at the
10 police department because that could affect the child's
11 disclosure?

12 A Yes.

13 Q And affect how the child discloses?

14 A Yes.

15 Q And that's why you talked about we do a
16 child-friendly environment so they feel like, okay, I have
17 to help the police out because I'm here. They want me to
18 tell them what they want to know.

19 A Right.

20 Q During that child-friendly interview, we record it
21 and look at it so we can figure out everything?

22 A That's correct.

23 Q We talked about -- on the phone, I was talking to you
24 about how children disclose information?

25 A Uh-huh.

1 Q Do you remember that? I was asking you about dates?

2 A Right.

3 Q Could you explain -- do you remember the questions I
4 was asking you about?

5 A I do. You asked if they could recall a specific date
6 or time --

7 Q Scientific dates and times, February 3rd at 9:15 p.m.
8 that this happened?

9 A And I think I asked you when was the last time you
10 can recall a specific date when you had an Egg McMuffin.

11 Q Right.

12 A Because for most of us, we don't recall specific
13 dates of things. We can recall events usually in relation
14 to other things. For younger children, it's more likely
15 in relation to something else.

16 I had one young victim come talk to me in a forensic
17 interview, and I asked her about when did it happen. She
18 said it was the weekend race of NASCAR in Houston, this
19 year. She could recall that event. I asked her what day
20 of the month. She didn't know what day and time of the
21 month and that, but she knew it was that Houston race for
22 NASCAR is when that happened.

23 And that's how kids tend to remember, by events that
24 are bigger and then within a timeframe of those. So it
25 might be within a week or two of those events.

1 Q That's based upon your expertise in dealing with this
2 for --

3 A It's based on my experience in working with the kids
4 I've worked with.

5 Q And you are the Attorneys General's expert in this
6 area. They talk about recantation. That sometimes
7 recantation -- what are the rationales of recantation.
8 Would you agree with me a rationale for recantation is it
9 didn't happen, also?

10 A It could be, yes.

11 Q That is a possibility?

12 A It is a possibility, yes.

13 Q It depends on the child. We went through all these
14 examples, but recantation also happens because it didn't
15 happen?

16 A It can be, yes.

17 Q And you've seen that in your experience that
18 sometimes people come and recant their testimony because
19 it didn't happen?

20 A Yes.

21 Q And that happens often?

22 A It happens. I don't want to say it happens in my
23 practice often, but I know that there are some statistics
24 that look at recantation rates. I don't have those in
25 front of me, but I know that there are some, but it's not

1 -- I would not classify it or clarify it as high.

2 Q I understand.

3 A A lot.

4 Q And then, finally, just to make sure I have
5 everything clear, the grooming, the disclosure, the
6 recantation, the religion, all of these things all depends
7 on who we're talking to individually?

8 A Yes.

9 Q And that is nothing that you can testify to today
10 because you haven't met or talked to anybody in this case?

11 A That's correct.

12 MR. KENT: Thank you so much, Mr. Williams.

13 THE COURT: Redirect?

14 MS. ABEE: Yes, sir, Your Honor.

15 REDIRECT EXAMINATION

16 BY MS. ABEE:

17 Q Mr. Kellin, does the levels of suggestibility in a
18 child change with age?

19 A Yes, it does.

20 Q So is a six-year-old child more likely to be
21 suggestible than, say, a 16-year-old?

22 A Yes.

23 Q And what about an eight-year-old versus an
24 18-year-old?

25 A Yes, I would agree, yes.

1 Q Let's talk a little bit about -- Mr. Kent was talking
2 about recalling dates and times, right?

3 A Right.

4 Q I think you said you asked him when is the last time
5 he ate an Egg McMuffin, right?

6 A Right.

7 Q You would agree with me that sexual assault is a
8 little bit more memorable than eating an Egg McMuffin,
9 right?

10 A It can be, yes.

11 Q And you also stated that children are more likely to
12 remember specific dates on sexual assaults based around
13 events, right?

14 A Yes.

15 Q Would you consider a holiday one of those events?

16 A Yes.

17 Q So if a sexual assault started and happened for the
18 very first time around, say, Christmas, would that be more
19 memorable?

20 A That probably would be, yes.

21 Q And, finally, Mr. Kent was talking about recantation
22 and talking about how sometimes it's recanted because it
23 just didn't happen, right?

24 A Right.

25 Q What do we call that when somebody says it happened,

1 but it didn't?

2 A That's lying I would say.

3 Q Can it also be called a false positive or a false
4 report?

5 A Yes.

6 Q What's a false denial?

7 A A false denial is when a child says something didn't
8 happen when it actually did.

9 Q And in your experience is a false report or a false
10 denial more likely in a case?

11 A More likely, a false denial where a child says
12 something didn't happen when it did.

13 MS. ABEE: Thank you, Your Honor. I have no further
14 questions?

15 THE COURT: Recross.

16 MR. KENT: Just one.

17 RECROSS-EXAMINATION

18 BY MR. KENT:

19 Q And we had that conversation about the holidays. And
20 we did discuss children do mention this happened on this
21 specific holiday. But in your experience, they've
22 mentioned the holiday, correct, this happened on
23 Christmas, this happened on Easter, this happened on
24 Halloween?

25 A It can be. It depends on the child when they say

1 that. A lot of times in the forensic interview when we
2 ask about timeframe, we can will ask if there's a holiday
3 involved or around what time of year did that happen. So
4 if we don't go naming holidays --

5 Q Right.

6 A -- or saying did it happen here, did it happen there.
7 But we would look at, you know, was this fall or was this
8 summer? You know, what was it like outside? Was it light
9 or dark? Our questions are purposely generic in a sense
10 --

11 Q Generic --

12 A -- to give the child the opportunity to say what they
13 need to say.

14 Q And you forensic interviewers, you guys don't go in
15 there dressed as law enforcement, do you? You don't dress
16 as cops?

17 A No --

18 Q You would never --

19 A -- we go like every day people.

20 Q You don't suggest dressing as a police officer as
21 you're talking to a child?

22 A No.

23 Q Why is that?

24 A Because a law enforcement officer uniform tends to
25 represent authority to a child. To me, I would not dress

1 as a law enforcement, one, I'm not a law enforcement
2 officer, but two, it would suggest something different to
3 the child. We would lose some of that child-friendly
4 nature area for an interview.

5 Q And you mentioned the thing about power. Can that
6 also happen with a child --

7 MS. ABEE: Objection, Your Honor. We're outside the
8 scope of redirect.

9 MR. KENT: I'll put my hands down.

10 THE COURT: Sustained.

11 MR. KENT: So I can keep going, right? I get
12 confused.

13 THE COURT: Yes.

14 BY MR. KENT:

15 Q So when we're talking about children, you just don't
16 want you guys dressed as law enforcement officers is the
17 easiest way to say that?

18 A I was not trained to dress as a law enforcement
19 officer during a forensic interview.

20 MR. KENT: Thank you so much.

21 THE COURT: You may step down. Thank you.

22 MS. ABEE: And, Your Honor, may Mr. Kellin be excused
23 from the subpoena?

24 MR. KENT: No objection.

25 THE COURT: You're free to do.

1 Next witness.

2 MS. ABEE: Your Honor, the State calls Samara Samuels
3 to the stand.

4 THE BAILIFF: Place your left hand on the Bible,
5 raise your right hand. State your name, please.

6 THE WITNESS: Samara Samuels.

7 SAMARA SAMUELS, after being duly
8 sworn, testified as follows:

9 THE BAILIFF: Thank you very much. Come around,
10 please. State your name, spell your last for the record.

11 THE WITNESS: My name -- my governmental name is
12 Samara Scott Samuels. My last name is spelled,
13 S-A-M-U-E-L-S.

14 DIRECT EXAMINATION

15 BY MS. ABEE:

16 Q Thank you, Ms. Samuels. I'm going to kind of jump
17 straight to the point. Are you a notary?

18 A Yes, I am.

19 Q At any point in time, did you notarize a deed deeding
20 a house from Larry Durant to Ms. Lizzie Johnson?

21 A Yes, I did.

22 MS. ABEE: Your Honor, may I approach?

23 (There was no response.)

24 MS. ABEE: May I approach?

25 THE COURT: Yes, go ahead.

1 BY MS. ABEE:

2 Q Ms. Samuels, I'm handing you what's been marked as
3 State's Exhibit 10. Do you recognize this?

4 A Yes, I recognize it.

5 Q And what is this generally?

6 A This is a quit claim deed given from Apostle Durant
7 to Elder Johnson.

8 Q Now, who is the notary on this?

9 A I am the notary.

10 Q Is that your signature on this deed?

11 A Yes, it is.

12 Q Okay. And were you there when this quit claim deed
13 was deeded from the Defendant to Ms. Johnson?

14 A Yes, I'm a notary. I have to be there.

15 Q Did you see Larry Durant sign that deed?

16 A Yes, he was there. I even had to hold the paper down
17 for him to sign it.

18 Q And you saw him sign that paper?

19 A Yes, ma'am.

20 Q Now, Ms. Samuels, I'm going to hand you what's been
21 entered into evidence as State's Exhibit 11. Is this also
22 a quit claim deed?

23 A Yes, it is.

24 Q And down here at the bottom, does this report to be
25 your signature?

1 A No. It is not.

2 Q So down here where it says S. S. Samuels, that's not
3 your signature?

4 A No, it is not.

5 Q Did you sign this deed?

6 A I'm not familiar with that deed. I'm familiar with
7 the first deed. Now, what is on this deed? Are you
8 saying that this deed went back from Elder Johnson back to
9 Larry Durant?

10 Q Yes, ma'am, I am. Did you notarize that deed,
11 deeding the house at THE RESIDENCE from Ms. Johnson back to
12 Larry Durant?

13 A No, I deeded it from Larry Durant to Lizzie Ann
14 Johnson.

15 Q Is there a specific way that you sign your name,
16 Ms. Samuels?

17 A Yes.

18 Q And tell us about that.

19 A The way that I sign my name on my last S pertaining
20 to Samuels, I also put a C with a cursive inside of that
21 last S, which is clearly indicated on the first deed from
22 Larry Durant to Lizzie Johnson. On the second deed, it is
23 not stipulated as such.

24 Q Okay. So you're telling us that special C in your S
25 doesn't exist on State's Exhibit No. 10?

1 A Correct.

2 Q Are there multiple pages to these documents,
3 Ms. Samuels?

4 A Yes, it is.

5 Q Okay. I'm going to first look at State's Exhibit No.
6 10. I'm going to specifically turn to the last page.
7 There seems to be another notary signature on this?

8 A On the first deed, correct.

9 Q Is that your signature on this first deed?

10 A Yes, ma'am.

11 Q Now, I'm going to look again at State's Exhibit No.
12 10 and flip to the notary signature on the next to last
13 page. Who notarized the next to the last page?

14 A Apostle Larry Durant's wife, which is a notary signed
15 the second deed. Now, that's a conflict there as far as a
16 notary. Because when you are a notary, you cannot
17 notarize nothing that benefits you to the said document.
18 And because she signed this as a notary on this said
19 document that she is getting a benefit from, this is
20 really null and void.

21 Q And so you didn't sign -- you didn't notarize the
22 rest of this document? Your signature isn't throughout
23 the rest of it?

24 A No, I have no recognition of the second deed. I'm
25 looking at it, but I'm looking at things that don't make

1 sense to me. Even as a notary on this fifth to the last
2 page, there is a white out on the Larry Durant's name. As
3 a notary, you cannot white out anything.

4 MS. ABEE: Thank you, Ms. Samuels. I have no further
5 questions.

6 THE WITNESS: You're welcome.

7 CROSS-EXAMINATION

8 BY MR. KENT:

9 Q Hi, how are you?

10 A Hey, Shaun.

11 Q How are you doing?

12 A I'm fine.

13 Q Didn't recognize me, did you?

14 A I didn't recognize you either.

15 Q Ms. Samuels, I don't have many questions. We've
16 known each other for quite some time?

17 A Yes, we have.

18 Q I do not have any questions from you. I agree with
19 pretty much most of your testimony. The only thing I have
20 a question about is I'm showing you No. 10 and No. 11,
21 these two exhibits?

22 A Okay. 10 is which one now.

23 Q I'm just showing you the two deeds that you just
24 looked at?

25 A Yes, sir. Yes, sir.

1 Q I only have one question for you.

2 A Okay.

3 Q In the notary body -- and I agree with you, you did
4 not sign No. 11. I'm going to agree with you.

5 A You agree with that.

6 Q Me and you agree on that. But on 10 and 11, just in
7 that body, did you write the notary body? You see where
8 I'm saying where it says State of South Carolina,
9 Richland? Do you understand where it says State of South
10 Carolina, where South Carolina is written --

11 A Correct.

12 Q -- Richland is written, Larry Durant is written,
13 Lizzie Johnson's name is written and the date is written?

14 A Correct.

15 Q Did you write that in that body?

16 A Yes, I did, on 10.

17 Q On 10. So that is not your handwriting on 11?

18 A Eleven, I did not even know existed, so I can't write
19 something I didn't know existed.

20 MR. KENT: Thank you. That's all I have.

21 THE WITNESS: You're welcome.

22 MR. KENT: Good to see you.

23 THE WITNESS: Same here.

24 THE COURT: Redirect?

25 MS. ABEE: No, Your Honor.

1 THE COURT: You're free to go.

2 THE WITNESS: I can go now?

3 THE COURT: Yes, ma'am.

4 THE WITNESS: Thank you.

5 THE COURT: Next witness.

6 MR. FERNANDEZ: Yes, Your Honor. The State calls
7 Jacob Mitchell.

8 THE BAILIFF: Place your left hand on the Bible,
9 raise your right. State your name, please.

10 THE WITNESS: Jacob Mitchell.

11 JACOB MITCHELL, after being duly
12 sworn, testified as follows:

13 THE BAILIFF: Thank you. Come around, sir. State
14 your name, spell your last for the record.

15 THE WITNESS: Jacob Mitchell, M-I-T-C-H-E-L-L.

16 DIRECT EXAMINATION

17 BY MR. FERNANDEZ:

18 Q Mr. Mitchell, good afternoon now. With whom are you
19 currently employed?

20 A I'm employed with the State Federal Credit Union.

21 Q Okay. And what is the nature of your employment
22 there?

23 A ID, network administration.

24 Q Were you formerly in law enforcement?

25 A Yes, sir.

1 Q Okay. Tell us about your law enforcement career.

2 A Certainly. I worked with the Sumter Police
3 Department from about 2008 to 2016.

4 Q Okay.

5 A Doing crime scene investigation, computer forensics.

6 Q Okay. What's your typical job responsibilities in
7 the crime scene investigation unit?

8 A Responding to any type of crime scene of a serious
9 nature involving, usually death, homicide or any crime
10 scene that I'm told to go to. Documenting crime scene,
11 like, in evidence and preparing the evidence for court
12 testimony, things like that.

13 Q Are you familiar with the case that you're here for
14 today?

15 A Yes, sir.

16 Q Okay. I'm going to direct your attention back to
17 June of 2014, specifically June 6th, 2014. Were you with
18 the Sumter Police Department at that time?

19 A I was.

20 Q And do you recall responding to effect and execute a
21 search warrant of Mr. Larry Durant?

22 A Yes, sir.

23 Q Okay. And the gentleman that you executed the search
24 warrant for, is he present here in the courtroom today?

25 A Yes, sir, he is.

1 Q Could you please identify him for us?

2 A Gentleman sitting in the middle over there at the
3 Defendant table.

4 Q Okay. What article of clothing is he wearing?

5 A He's wearing a gray suit and sunglasses.

6 Q Tell us about what you -- what your responsibility
7 was that day and where you met Mr. Durant?

8 A We received a search warrant to take a photograph of
9 Mr. Larry Durant. And so we were to meet him at the
10 hospital, Tuomey. Being that it was local, we met him at
11 the hospital and served the search warrant, took a
12 photograph.

13 Q And the photographs that you were specifically
14 authorized to take, what body part were you specifically
15 authorized to take a photograph of?

16 A Yes, sir, it was of his penis.

17 Q And did you, in fact, take those photographs?

18 A Yes, sir, I did.

19 Q Approximately, how long did the process last?

20 A Couple of minutes.

21 Q Okay.

22 A It didn't take very long.

23 (WHEREUPON, State's Exhibit No. 12 was marked
24 for identification.)

25 MR. FERNANDEZ: Permission to approach the witness?

1 THE COURT: Sure.

2 BY MR. FERNANDEZ:

3 Q I'm going to show you what's been marked as State's
4 Exhibit No. 12. Are you familiar with that photograph?

5 A Yes, sir.

6 Q Did you take this photograph?

7 A I did.

8 Q All right. And what does the photograph show?

9 A It's a picture of Mr. Durant's penis.

10 MR. FERNANDEZ: I move to place State's Exhibit No.
11 12 into evidence.

12 THE COURT: Over objection, it's admitted.

13 (WHEREUPON, State's Exhibit No. 12 was admitted
14 into evidence.)

15 MR. FERNANDEZ: Beg the Court's indulgence.

16 (Pause.)

17 MR. FERNANDEZ: No further questions.

18 THE COURT: Are you going to publish it to the jury?

19 CROSS-EXAMINATION

20 BY MR. KENT:

21 Q How are you doing, sir?

22 A Good. How are you?

23 THE COURT: Hold on. You admitted it into evidence.
24 Are you going to --

25 MR. FERNANDEZ: Not at this time, sorry.

1 THE COURT: Okay.

2 BY MR. KENT:

3 Q And I don't have very many questions for you. Are
4 you doing okay?

5 A Yes, sir.

6 Q The only thing I have, a couple of things. And you
7 may or may not be familiar with it. But you had mentioned
8 that Mr. Durant met y'all at the hospital. He didn't meet
9 you on his own. He was taken there by law enforcement.
10 He didn't want to voluntarily come, correct?

11 A I believe so, yes, sir.

12 Q Yeah, he didn't voluntarily show up and say hey, take
13 a picture of my penis. He was taken there by law
14 enforcement and his pants were forced down and y'all took
15 a picture of him; is that correct?

16 A No, sir.

17 Q Did he voluntarily come and just say I want to be
18 here?

19 A We met at the -- we met at Tuomey. I believe that
20 was in the -- stipulation in the search warrant that we
21 would meet at Tuomey. We asked him if he would remove his
22 pants and he did so.

23 Q And he was represented by an attorney and there was
24 no attorney there with him at all, correct?

25 A I don't believe so.

1 Q You didn't see me there, did you?

2 A No, sir.

3 Q Okay. So there was no lawyer. He was there, had a
4 search warrant, pants pulled down and you took a picture
5 of his penis?

6 A Correct.

7 MR. KENT: Thank you. No further questions.

8 THE COURT: Redirect?

9 MR. FERNANDEZ: Nothing, Your Honor.

10 THE COURT: You may step down.

11 MR. FERNANDEZ: Permission to excuse this witness
12 from his subpoena?

13 THE COURT: You're free to go.

14 Any other witnesses?

15 MS. ABEE: Your Honor, the State has no further
16 witnesses at this time.

17 THE COURT: All right.

18 Well, folks, you have now heard all the State's
19 evidence. At this point in the trial, the State rests and
20 so we will move to the next phase of the trial. But we'll
21 do it after lunch since it's 12:30 right now. Let's have
22 you back in the jury room at 2:00 o'clock.

23 Again, while you've heard the State's case, that
24 doesn't necessarily mean the trial is over with, so let us
25 again remember the instructions I've been giving you not

1 to discuss the case with each other or anyone else. Don't
2 try to find out anything about the case on social media or
3 any of the internet. Don't publish anything on social
4 media. And if anybody does approach you to talk to you
5 about the case while you're at lunch, please report that
6 as soon as you get back.

7 Go ahead and enjoy your lunch. If you would, be back
8 in the jury room by 2:00 o'clock. Thank you.

9 (WHEREUPON, the jury left the courtroom at 12:25
10 p.m.)

11 THE COURT: All right. Before we break, I know you
12 asked if you could have time to make a decision. I did
13 just want to tell Mr. Durant, what we talked about, I
14 guess, on Monday or maybe it was the start of trial
15 yesterday.

16 Mr. Durant, do you recall that I told you that do you
17 have the right to testify, which would include calling
18 other witnesses -- or put up a defense, which would
19 include calling other witnesses and testifying yourself,
20 but you are not required to. You don't have to testify,
21 and if you don't, I will tell the jury not to hold that
22 against you while they're deliberating. You also do not
23 have to call any witnesses if you don't want to or offer
24 any other kind of evidence.

25 Over the lunch hour, you will need to make that

1 decision, that final decision. I'm going to give you and
2 your lawyers the opportunity to discuss that and make that
3 final decision after lunch. But it is that time of the
4 trial where you have to decide. Again, it is your right
5 and your right alone, but you will certainly want to
6 discuss that with your lawyers and seek their counsel on
7 that. So you'll need to make a decision when we come back
8 at 2:00 o'clock.

9 Now, I know you'll have -- do you have any motions
10 you want to make right now?

11 MR. KENT: I do and I can make them very quickly.

12 THE COURT: Go ahead.

13 MR. KENT: The first, before I even get into my DV
14 motions, I would -- at the point in which the State's
15 expert testified, just so the record is clear, I know the
16 record indicates that I have no objection. I think that's
17 all that would have been said on the record, that I have
18 no objection to this witness testifying as a blind expert.
19 At that point in time, we had a side bar. I told the
20 Court before he had testified that I would be objecting to
21 his testimony, just for the record.

22 THE COURT: Just for the record, you did say that on
23 side bar that you did object to Mr. --

24 MR. KENT: Kellin.

25 THE COURT: -- Kellin's testimony.

1 MR. KENT: Just so the record is clear, just if you
2 want to -- anything Ms. Abee might just want to put on the
3 record, just objecting to his testimony before he
4 testified.

5 MS. ABEE: Yes, Your Honor. We would contend that
6 his testimony was admissible under the Court's most recent
7 holdings in State v. Anderson and State v. Brown, which
8 allows for the use of a blind expert to testify in the
9 areas of the child maltreatment and child abuse dynamics,
10 replacing the former forensic interviewer testimony that
11 would testify regarding those as to not unduly bolster any
12 of credibility of the witnesses. That's why we used a
13 blind expert, who has no knowledge of the witnesses in the
14 case or the case itself testifies as to those dynamics as
15 to not unduly bolster any of the credibility of any of the
16 victims.

17 THE COURT: All right. Anything else? Do you have
18 any other motions?

19 MR. KENT: Your Honor, at this point in time, one, we
20 would renew all motions made during the course of trial.
21 Again, for the record, the Court has been very generous in
22 allowing us to simply make our pretrial motions and those
23 pretrial motions were protected as every individual
24 testified throughout the course of trial. That would
25 be -- Ms. Blazer will have to correct me if I'm wrong,

1 that would be the initial motion we made in which the
2 Court referenced the CSC charges, that would be our Lyle
3 motion. That would be our motion as to the seclusion of
4 the picture of Mr. Durant's penis.

5 I think that would be all of the motions that were
6 made during the course of the trial. Your Honor, I'd ask
7 those be subsumed in our directed verdict motion, taking
8 the evidence in the light most favorable to the nonmoving
9 party, who, of course, in this situation is the State of
10 South Carolina. We would at this point in time, on behalf
11 of Mr. Durant, move for a directed verdict based summarily
12 on the motions made pretrial.

13 THE COURT: Well, as further pretrial motions and
14 all, those are again denied. Directed verdict motions are
15 also denied. There is direct evidence and substantial
16 circumstantial evidence sufficient to get the case to the
17 jury at this point. So those are denied.

18 Now, while you're at lunch, Dan is going to run off
19 the proposed jury charges, which at this point say the
20 Defendant testified, and we'll make amendments. But if we
21 come back and you're not going to put up a case, then
22 we're going to go into closing arguments, so we'll give
23 you those so you can take a look at that.

24 I'd also -- before you break, if you would, let's
25 make sure what is and is not into evidence before you do

1 that.

2 MR. FERNANDEZ: Yes, Your Honor. As we talked
3 before, there are two pieces of evidence we still need --
4 this would be obviously a good time to do it, during the
5 lunch break, but two pieces of evidence that need to be
6 substituted. And whether Your Honor prefers that we mark
7 the former exhibits as Court's Exhibits to keep it a part
8 of the record or just to swap them out completely, I'll
9 leave to it Your Honor.

10 THE COURT: I can't imagine that it would make any
11 difference if you just swapped out and put in the redacted
12 ones.

13 MR. FERNANDEZ: That's correct, Your Honor. We'll do
14 that.

15 THE COURT: We'll just go with common sense.

16 MR. FERNANDEZ: Just so the record is clear, Your
17 Honor, we are substituting the same documents. There
18 would simply be one name redacted out of those documents,
19 Lavana Mills, I believe. Lavana Mills will be redacted
20 because she did not testify at this trial.

21 THE COURT: Okay. Anything else?

22 MS. ABEE: No.

23 THE COURT: All right. Well, we'll see you folks
24 back at 2:00 o'clock.

25 (WHEREUPON, a lunch break was taken.)

1 (WHEREUPON, State's Exhibit Nos. 8 and 9 were
2 changed after being redacted.)

3 THE COURT: All right. We've got everybody back in.
4 It looks like the Defendant is in the courtroom.

5 Did you get the document substituted in that you
6 wanted?

7 MR. FERNANDEZ: Yes, Your Honor. We just handled
8 that. There is still is, actually, one document that
9 needs to be swapped. We'll simply have to figure that out
10 when there's another break.

11 MR. KENT: We'll get it done, Your Honor.

12 THE COURT: All right. What have you decided about a
13 defense?

14 MR. KENT: Your Honor, we will be putting on a
15 defense.

16 THE COURT: You will?

17 MR. KENT: Yes, sir.

18 THE COURT: Okay.

19 MS. ABEE: And, Your Honor, I do believe there is
20 something we need to take up prior to the jury coming back
21 in regarding a potential defense witness that they have.

22 THE COURT: What is that?

23 MS. ABEE: About 17 minutes ago, I was handed a
24 report by a handwriting expert, who conducted an analysis
25 on March 23rd of 2016, regarding the handwriting to the

1 deeds that we talked about that have been forged.

2 Your Honor, I know Mr. Kent, and he told me that he
3 had just received the report himself, however, I do find
4 it a little suspicious that this examination was conducted
5 on March 23rd, 2016. We've had a reciprocal Rule 5 filed
6 since the beginning of this case. However, we are just
7 now getting this handwriting analysis today, two months
8 and two days after the examination was actually conducted,
9 Your Honor. I also take some serious questions with the
10 report itself.

11 I would move that this report be excluded. We just
12 got it, have not had time to vet it out. In fact, one of
13 the reasons why I stated why we didn't call the forgery
14 case is because we hadn't had time to have a handwriting
15 analysis review this or hadn't had one done and the
16 Defense or Mr. Kent didn't say anything that they had done
17 it, Your Honor.

18 Further, I moved to enter the forgery under the res
19 gestae theory. You held it was inadmissible. We followed
20 that. It was the Defense themselves that put up that
21 testimony, Your Honor, opened the door for these charges
22 to come in. Your Honor, we would contend that it's
23 because they, in fact, knew the results of this
24 examination. In fact, when Mr. Kent was cross-examining
25 Ms. Samuels today about her signatures on the report, he

1 specifically I'm not going to disagree with you, Ms.
2 Samuels. I know that's not your signature on the second
3 deed. Your Honor, we were sandbagged with this at the
4 very last second, right before they decided to put up a
5 defense. And we would move that it be excluded from being
6 entered into evidence on their behalf.

7 THE COURT: Mr. Kent.

8 MS. BLAZER: Actually, I'll respond, Your Honor.
9 First of all, our witness list Mickey Dawson, who is a
10 widely-known expert in handwriting analysis in South
11 Carolina. And they've been in possession of that witness
12 list since well before the trial.

13 Moreover, as the Court will recall, yesterday
14 afternoon, Ms. Johnson testified and on cross-examination
15 of her, the issue of the forgery did arise. And I don't
16 -- I do not think the Court's ruling with regard to the
17 fact that the forgery is not the res gestae of this
18 present case prevented us from asking for questions about
19 that.

20 Indeed, she opened the door to this defense. As you
21 are aware, there is an existing forgery count out there
22 that's been out there for quite some time. And Mr. Dawson
23 was retained for the purposes of assisting in that defense
24 should that case ever be called in the future. After the
25 testimony yesterday afternoon, I picked up the phone and

1 called Mr. Dawson and I spoke to him out in the hallway at
2 about 5:00 o'clock. I said, I think we need to know what
3 your report is going to say. And based on the answers he
4 gave me on the telephone, I said, Yes, I'd like you to
5 please draft a report and please come tomorrow. And he
6 will tell the Court today that he actually drafted and
7 printed the report this morning before he drove here.

8 THE COURT: He drafted it? Why is it dated
9 March 23rd?

10 MS. BLAZER: I think his inspection probably was done
11 in March. I don't have any information about that. I
12 think that's probably the answer, that he began looking at
13 the documents as early as March, but I don't think he
14 would perjure himself and say he drafted it today if he
15 had drafted it in March. The first time I saw it was
16 about five minutes before Ms. Abee saw it.

17 And, you know, in reviewing Rule 5, we do have a
18 reciprocal obligation with regard to disclosure and we
19 have a continuing duty to disclose. When a report doesn't
20 exist, there's nothing to disclose. When a report does
21 exist, we do have a duty to disclose it. And when it came
22 into our possession, it was immediately turned over to
23 Ms. Abee.

24 MS. ABEE: Just a couple of things briefly, Your
25 Honor. One, the purpose for which they're stating that

1 they're using it is because Lizzie Johnson said that was
2 not her signature. Lizzie Johnson was a witness in this
3 case. They brought it up. So in order to, I'm assuming,
4 impeach the credibility of Lizzie Johnson, they want to
5 put in this handwriting expert to say that this is now her
6 handwriting.

7 However, to analyze handwriting under 901(b)(2), Your
8 Honor, under the South Carolina Rules of Evidence, you
9 don't have to have an handwriting expert. Nonexperts can
10 look at that, including the jury, and determine the
11 similarities or the differences between the handwriting.
12 So we are not in any way taking away the argument from
13 them that this signature was, in fact, Lizzie Johnson's
14 and that she was lying.

15 Your Honor, further, I still take question with the
16 fact that they just received the report five minutes
17 before I received it, yet again, Ms. Samuels was
18 questioned on the stand today and Mr. Kent said to her, I
19 don't disagree that this is your signature. And she even
20 made some comment to the effect of oh, you agree with me.
21 He said, I agree with you. So I don't quite understand
22 how he knows that that is not Ms. Samuel's signature, yet
23 didn't know what the results of this report that we were
24 handed 20 minutes ago were going to be, Your Honor.

25 MR. KENT: Your Honor, if I may, I don't want to

1 double team. I know Ms. Blazer had been arguing, if it
2 would be okay to explain our position?

3 THE COURT: Go ahead.

4 MR. KENT: Your Honor, candidly, had I been speaking
5 to Mr. Dawson? Yes, our office had been speaking to Mr.
6 Dawson. As you're aware, there is a separate forgery
7 count that's three years old. Based upon the separate
8 forgery count that's three years old, I have had phone
9 conversations with Mr. Dawson. I explained to him what I
10 was looking for and told him what I wanted on the separate
11 forgery account.

12 We have talked on the telephone. No report had been
13 prepared. I received, literally, I guess would be last
14 week from your law clerk requesting a pretrial brief.
15 After looking at the pretrial brief, looking at the fact
16 that they wanted to talk about the forgery, I contacted
17 Mr. Dawson. I actually had my secretary contact his
18 office and talk to him, asked him about the details. I
19 said prepare us a report if he can, but I never talked to
20 him again. I never got a report. As an officer of the
21 court, I'll tell you candidly. Mr. Dawson will come in
22 here and tell you he has never prepared a report.

23 Ms. Blazer talked to him yesterday evening. She
24 talked to him again outside of the courtroom. She talked
25 to him on my cell phone, told him that he would be

1 necessary, told him to -- asked him to prepare a report.
2 He came this morning. I called him to make sure he was
3 here. He came into the room that we were sitting in right
4 about at 1:30. He came in, he gave a report.

5 I immediately contacted Ms. Blazer downstairs. I
6 said Mickey Dawson is up here. Can you come up here? She
7 walked up, looked at it. I said, Can you do me a favor?
8 Go to the prosecutor's room, let them know that Mr. Dawson
9 is here. He has prepared a report. They're welcome to
10 review the report and welcome to talk to Mr. Dawson, which
11 they did. They talked to Mr. Dawson and look at the
12 report.

13 As an officer of the court, to suggest that I had a
14 report earlier than I did, it's simply not true. I'll put
15 Mr. Dawson on the stand and invite any Court inquiry as to
16 anything that has happened. As you're aware, there's a
17 separate forgery charge. And to say that I'm not allowed
18 to prepare for that charge is not proper. There was no
19 report made whatsoever.

20 Additionally, to say that I'm not following 901 --
21 it's not saying I'm not following 901. What the rule says
22 is I can put on a defense that I feel is viable in this
23 case and that's what I'm doing. That would be our
24 position.

25 MS. ABEE: And --

1 THE COURT: You want him to testify to whose
2 signature's a forgery?

3 MR. KENT: He's going to testify as to the deeds that
4 are already placed into evidence. He has been requested
5 to examine three things on the document. Number one, he
6 has been requested to examine Larry Durant's signature.
7 Number two, he's been requested to examine -- I'm sorry,
8 four things on the document. Larry Durant's signature,
9 he's been requested to examine Lizzie Johnson's signature.
10 He has been requested to examine Samara Samuels's
11 signature, who was recalled by the State to say that that
12 is a forgery and that's not her name on the document. And
13 he has been requested specifically to look at the notary
14 body and to go through the documents. I would also
15 note -- well, I'm not going to say that, Your Honor.

16 MS. ABEE: And, Your Honor, I'm not saying that he
17 had a report in his hand, this report previously. I agree
18 with Mr. Kent that -- I mean, I believe him when he tells
19 me he just got this report in his hand. However, he knew
20 that this existed and these handwriting samples were sent
21 over on -- let's see, they were received in the laboratory
22 for examination on March 23rd, 2016. I have no doubt that
23 the report wasn't prepared until recently as last night or
24 this morning. However, I just can't help but feel that
25 that was a purposeful way of circumventing the reciprocal

1 Rule 5 that had been filed, which would have asked them to
2 hand over this report to us, obviously, a lot more than 20
3 minutes ahead of time, Your Honor. Not to mention -- and
4 I know this would go to the weight of the report and not
5 whether or not it's admissible, but there were no
6 handwriting exemplars taken in this case. You have a
7 handwriting expert that is looking at one document and
8 then another document to determine which one is real and
9 which one is fake. There's no handwriting exemplars.

10 Lizzie Johnson has not gone to SLED or gone to
11 Mr. Dawson's office in order to write out everything so
12 that he can accurately prepare it. Mr. Dawson himself
13 told us back in the room when I got this report that he
14 was preparing it off a copy. Your Honor, we haven't had
15 adequate time to prepare for any sort of rebuttal to this
16 and it should be inadmissible at this point in time.

17 THE COURT: Let's call him in. I want to find out
18 when this report came into existence.

19 MR. KENT: Mr. Dawson is in the courtroom, Your
20 Honor.

21 (Out of the presence of jury.)

22 THE BAILIFF: Place your left hand on the Bible,
23 raise your right hand. State your name, please.

24 THE WITNESS: Marvin Dawson, Jr., also known as
25 Mickey Dawson.

1 MARVIN DAWSON, JR., after being
2 duly sworn, testified as follows:

3 THE BAILIFF: Come around, sir. State your name,
4 spell your last for the record.

5 THE WITNESS: Marvin H. Dawson, Jr., D-A-W-S-O-N,
6 known also as Mickey Dawson.

7 MR. KENT: Your Honor, did you want to question the
8 witness?

9 THE COURT: You go ahead.

10 MR. KENT: You just want me to question him.

11 DIRECT EXAMINATION

12 BY MR. KENT:

13 Q Mr. Dawson, how are you doing, sir?

14 A Fine.

15 Q I'm just going to get into the gravamen of what we're
16 dealing with. You were asked by my office to look at a
17 bunch of documents, isn't that true?

18 A Correct.

19 Q And you've been asked -- quite some time ago, we sent
20 documents to your office involving signatures and things
21 of that nature, correct?

22 A Several months back, yes, sir.

23 Q At any point in time since I sent those documents to
24 you -- well, actually, let me ask you this. Did I ask you
25 for a report on those cases?

1 A No, sir.

2 Q When did you actually prepare a report on those
3 cases?

4 A This morning.

5 Q This morning. When would be the first time you gave
6 me a report on those cases?

7 A Approximately an hour and 10 minutes ago.

8 Q Okay. About an hour and 10 minutes ago?

9 A Yes, sir.

10 Q Immediately after getting the report, did I have the
11 prosecution come in and look at the same report and give
12 them an opportunity to speak to you?

13 A Would you repeat that again, please?

14 Q I'm sorry. Immediately after getting the report,
15 within a substantial period of time, did I call the
16 prosecution and have them come in and look at your report
17 and give them an opportunity to speak to you?

18 A That's my impression, yes.

19 Q But I would not have had a report before the two of
20 us talked on this last break before 2:00 o'clock?

21 A That's correct.

22 Q And you have not prepared any other report for me on
23 anything whatsoever?

24 A No, sir.

25 Q And none was requested of you until --

1 A None was requested until early evening, last evening.

2 Q Last evening, you received a phone call from Cameron
3 Blazer?

4 A From the staff. I don't recall, it could have been.

5 Q From the staff or who told you late last evening that
6 we needed a copy of your report and we needed you to come
7 testify today?

8 A That is correct.

9 MR. KENT: Thank you so much.

10 MS. ABEE: If I may, Your Honor?

11 THE COURT: Go ahead.

12 CROSS-EXAMINATION

13 BY MS. ABEE:

14 Q Mr. Dawson, you stated that you received these
15 documents several months ago, is that fair?

16 A Correct.

17 Q Did you look at them?

18 A Yes, I did.

19 Q Did you do any analysis on them back then?

20 A Yes, I did.

21 Q Did you communicate at all with Mr. Kent, Ms. Blazer
22 about those results?

23 A Yes, I did.

24 Q So they were aware of the results that you then put
25 in this report this morning?

1 A Perhaps, not necessarily this exact verbiage, no.

2 Q But they were aware that you had looked at the
3 documents, right?

4 A Yes, I believe that's correct.

5 Q And you stated that you had already performed your
6 examination, right?

7 A Yes, for the most part.

8 Q Is it typical for you to not create a report when
9 you're doing the examination?

10 A It's a client's requested report. I may not. It's
11 up to them.

12 Q So do you keep notes when you're doing the
13 examination?

14 A I do, yes.

15 Q And is that what your report is based off of?

16 A Pretty much so, yes.

17 Q And you wait until you're asked by the attorney to
18 create the report, right?

19 A That's correct.

20 Q You don't create it before then?

21 A No, ma'am.

22 Q Do they specifically ask you not to create it before
23 then?

24 A No.

25 Q Why don't you create when you're doing the

1 examinations?

2 A That's a separate act, if you would, in the protocol
3 and I wait until my client asks me for a report.

4 Q Okay. So let me get this straight. You do the
5 examination. You take the results. You communicate some
6 of that with the defense attorney, but then you don't put
7 it into a report until they ask you to do so; is that
8 right?

9 A That's correct.

10 MS. ABEE: Your Honor, may I have one second?

11 (Pause.)

12 MS. ABEE: I have no further questions for

13 Mr. Dawson, Your Honor.

14 THE COURT: Anything else?

15 MR. KENT: Nothing further, Your Honor.

16 THE COURT: Okay. All right. You can step down.
17 You can go back out.

18 THE WITNESS: Thank you, Your Honor.

19 THE COURT: All right. Well, he didn't create a
20 report until last night. They didn't have to give it to
21 you ahead of time.

22 MS. ABEE: Your Honor, we would still contend this is
23 a blatant attempt to circumvent Rule 5. He stated that he
24 performed the analysis, that he knew the results. He
25 communicated those results to Mr. Kent, and then he sits

1 there and he waits until the Defense asks him to create a
2 report. Therefore, not having to turn it over in advance
3 to the State, Your Honor. I mean, it's a blatant attempt
4 to circumvent what the purpose of Rule 5 is. Just say go
5 ahead and do your analysis, go ahead and let me know what
6 all the answers are, but don't put it in a report because
7 then I don't have to turn it over. I mean, we don't have
8 any time to sit here and vet out whether or not this is
9 accurate or not accurate, nor do we even have the
10 foundation to do so because there's no handwriting
11 exemplars for any of the three people whose signatures and
12 handwriting are being examined, Your Honor.

13 THE COURT: Well, if I told you it wouldn't be the
14 first time I've ever seen a defense lawyer do that, would
15 it surprise you?

16 MS. ABEE: I can't say it would, Your Honor.

17 THE COURT: Well, I don't believe that they violated
18 Rule 5, but I can give you some time to study it if you
19 want. I'll give you the rest of the day and we'll resume
20 tomorrow morning if you would like to have some time to
21 study it and prepare for it.

22 MS. ABEE: Your Honor, in order to do that, we'd have
23 to have a handwriting analyst from SLED and I would have
24 to get handwriting exemplars, so we would ask that
25 handwriting exemplars be ordered from the Defendant as

1 well as Ms. Samuels and Ms. Lizzie Johnson at this time.

2 THE COURT: Well, you had the opportunity to do all
3 of that if you wanted to. If you want time to study his
4 report, that's a different thing. But you've had two
5 years to do any kind of expert handwriting analysis for
6 the State you wanted to, so that's not what I'm offering
7 to let do you. I'm offering to give you some time. You
8 said you had roughly 20, 30 minutes to study this report.
9 I'll give you half an hour, hour. I'll give you, you
10 know, the rest of the day until 9:30 tomorrow morning if
11 you want since you just, you know, got surprised with it.

12 MS. ABEE: Can I have one second --

13 THE COURT: Sure.

14 MS. ABEE: -- to talk with my co-counsel?

15 (Pause.)

16 MS. ABEE: Your Honor, I really hate to do this, but
17 I think it is our burden or, at least, our ethical
18 position to, at least, get someone to look at this and for
19 us to have the rest of the day to explain what's going on
20 and adequately prepare for the testimony of Mr. Dawson.
21 If there's other witnesses they want to call and we want
22 to put them on, I'm happy to do that while everyone else
23 goes and tries to figure out this so we don't slow the
24 court process or waste the jury's time. I am happy to do
25 that. I don't know if they're anticipating calling any

1 other witnesses. But as far as Mr. Dawson is concerned, I
2 would like some time with this report.

3 THE COURT: I understand.

4 Do you have any other witnesses that you want to call
5 this afternoon?

6 MR. KENT: I do, Your Honor. Respectfully, though, I
7 would like to call Mr. Dawson first if we're going to give
8 them the afternoon to review.

9 THE COURT: Okay. How many witnesses do you
10 anticipate that you will have and will you finish
11 tomorrow?

12 MR. KENT: I will 100 percent finish tomorrow, yes,
13 sir.

14 THE COURT: Okay.

15 MR. KENT: I would anticipate that I would call five
16 to six witnesses.

17 THE COURT: And getting to the jury would be about
18 what time of day, do you think?

19 MR. KENT: Two o'clock, I think the jury would have
20 the case. That will give us time to put on our case,
21 break for lunch and then give the jury the case by
22 2:00 o'clock.

23 THE COURT: All right. Well, we will then recess
24 until 9:30 tomorrow morning.

25 Bring the jury --

1 Do you want to say something?

2 MS. ABEE: No, I just didn't know if we were
3 dismissed or you were going to bring the jury in.

4 THE COURT: Oh, I'm going to bring the jury in and
5 tell them --

6 MS. ABEE: Yes, sir. I just wanted to make sure
7 before we left.

8 MR. KENT: Your Honor, may we approach?

9 (WHEREUPON, a bench conference was held.)

10 (WHEREUPON, the jury entered the courtroom at 2:23
11 p.m.)

12 THE BAILIFF: All the jurors are back in the
13 courtroom, Your Honor.

14 THE COURT: All right. Bear with us just one second.
15 Something came up just as you guys were coming in.

16 (Pause.)

17 (WHEREUPON, the bench conference was continued in the
18 presence of the jury, but outside the hearing of the
19 jury.)

20 THE COURT: All right. Folks, we ran into just a
21 little of a snag with scheduling and so I'm going to give
22 you the afternoon off, and we will resume tomorrow morning
23 at 9:30. Again, don't begin deliberations or discussions
24 about the case. We will finish it up tomorrow. No doubt,
25 this will put us back a few hours, but everyone

1 anticipates that you should get the case tomorrow to begin
2 your deliberations in the afternoon at the latest.

3 So go home tonight. Again, same thing, don't discuss
4 the case. Don't talk about it with anybody, including
5 other jury members. Don't try to find out anything about
6 the case, post on social media. And if anyone does talk
7 to you about the case, please report that back.

8 I noticed this morning's paper, I didn't see anything
9 about the case, but doesn't mean there won't be anything
10 in there tomorrow. So please refrain from looking at the
11 newspaper tomorrow if you would. And if anybody, again,
12 does approach you about the case, please report that
13 tomorrow when you get back.

14 Okay. Thank you for your patience. We'll see you at
15 9:30 tomorrow.

16 (WHEREUPON, the jury left the courtroom at 2:26
17 p.m.)

18 THE COURT: All right. Do you need me to call a
19 judge in Union tomorrow?

20 MS. BLAZER: I did tell Mr. Dawson that you might
21 give the judge in Union a call, just so they'd know.

22 THE COURT: Who is it?

23 MS. BLAZER: He's not sure. I'll find out.

24 THE COURT: If you'll find out, I'll be glad to call
25 them and explain what's going on. We'll take care of

1 that. Otherwise, we'll see everyone tomorrow morning at
2 9:30.

3 MS. BLAZER: Thank you, Your Honor.

4 MS. ABEE: Thank you, Your Honor.

5 (WHEREUPON, Court was adjourned for the day to
6 be reconvened on Thursday, May 26, 2016.)

7 THURSDAY, MAY 26, 2016

8 THE COURT: Anything we need to talk about with
9 the handwriting expert?

10 MS. ABEE: No, sir. We're ready for
11 cross-examination now. Thank you.

12 THE COURT: Everybody ready?

13 MR. KENT: Your Honor --

14 MS. ABEE: Sorry. I was going to say yes, Your
15 Honor.

16 MR. KENT: All I have, just by way of housekeeping,
17 Your Honor, we had mentioned earlier that you would give
18 me an opportunity -- we had e-mailed your law clerk a copy
19 of our pretrial brief and you said if I wanted, I could
20 make that a Court's Exhibit.

21 THE COURT: It doesn't do back to the jury room.

22 MR. KENT: No, sir.

23 THE COURT: For appellate purposes if you want it.

24 MR. KENT: Just to make sure it's part of the record.
25 It's a pretrial brief we've already served much earlier on

1 the Court as well as to prosecution. This will be a
2 Court's Exhibit, Your Honor.

3 THE COURT: Okay.

4 (WHEREUPON, Court's Exhibit No. 1 was marked for
5 identification only.)

6 THE COURT: All right. Well, if everybody is ready,
7 let's bring the jury in.

8 (WHEREUPON, the jury entered the courtroom at
9 9:33 a.m.)

10 THE BAILIFF: All the jurors are back in the
11 courtroom, Your Honor.

12 THE COURT: All right. Folks, we will resume now
13 with the Defense calling their first witness.

14 MR. KENT: Your Honor, at this time, we would call
15 Mickey Dawson to the stand, Marvin H. Dawson.

16 THE BAILIFF: State your name, please.

17 THE WITNESS: Mickey Dawson, Marvin Dawson.

18 MARVIN DAWSON, JR., after being
19 duly sworn, testified as follows:

20 THE BAILIFF: Have a seat up here, sir. State your
21 name, spell your last for the record.

22 THE WITNESS: Marvin Dawson, Jr., D-A-W-S-O-N, known
23 also as Mickey Dawson.

24 DIRECT EXAMINATION

25 BY MR. KENT:

1 Q Mr. Dawson, how are you doing, sir?

2 A Fine. Thank you.

3 Q I'm going to give you the same admonitions that I've
4 given everybody else. Madam court reporter is taking down
5 every word that you are saying. She can't take down head
6 nods and shakes and things of that nature, so make sure
7 any question that I ask that you answer affirmatively
8 without a head nod or a shake or anything of that nature,
9 okay?

10 A Yes, sir.

11 Q Additionally, make sure we speak loud and clear
12 enough so everybody in the jury can hear everything you're
13 testifying to?

14 A Certainly.

15 Q First, I want to get into a little background. And
16 state your name one more time so the jury knows who you
17 are.

18 A Marvin Dawson, Jr.

19 Q You also go by the name of Mickey; is that correct?

20 A That's correct, sir.

21 Q Mickey, where do you live?

22 A Spartanburg, South Carolina.

23 Q We're going to do a little background. How long have
24 you lived in Spartanburg, South Carolina?

25 A Approximately 16 years.

1 Q What do you do for a living?

2 A I'm known as forensic document examiner, sometimes
3 called a handwriting expert.

4 Q Could you explain to the jury what that is?

5 A A document examiner examines handwriting,
6 typewriting, machine copies, mechanical impressions,
7 anything normally where a pen or instrument mechanically
8 would make a mark, impression on some kind of paper,
9 walls, whatever. We examine for authenticity or no
10 authenticity, is it genuine or nongenuine. And the other
11 examinations we may do, ink, paper, et cetera. It's a
12 rather far reaching definition of our job description.

13 Q How long have you been doing that for?

14 A Approximately 40 years, yes.

15 Q Would you tell the jury what type of training and
16 background and experience led to your profession?

17 A I have an undergraduate degree from the University of
18 South Carolina. I'm a graduate of the FBI National
19 Academy. I am Board certified by the American Board of
20 Forensic Document Examiners. I interned, two-year
21 internship with the Georgia Bureau of Investigation. Came
22 back to the South Carolina Law Enforcement Division, known
23 as SLED, and started SLED's document laboratory back in
24 the early 70's and staffed the laboratory and worked 1988,
25 '89. And then went to DSS to do their document work and

1 do the same work with the State. I retired from the State
2 of South Carolina after 27 years as a State Law
3 Enforcement officer. Twenty of those was in lab work as a
4 document examiner.

5 Q This is going to sound like a dumb question. I know
6 you went through some of it. You've had extensive
7 training in this area, forensic?

8 A Yes. I'm a member of the appropriate organizations
9 and Board certified as a Board examiner, member of the --
10 charter member of the Southeastern Association of Forensic
11 Document Examiners, a member of the American Academy of
12 Forensic Science Document Section, and a member of the
13 Question Document Society. I've been across -- numerous
14 work shops, seminars over the years. I've presented
15 papers before, each of those bodies on a national level.
16 I've taught the discipline to others, as well.

17 Q You said you've also taught forensic document review?

18 A I have, yes.

19 Q And then, finally, have you ever testified in any
20 court as an expert in forensic document review and
21 handwriting?

22 A Yes, I have.

23 Q How many times would you say that you have testified
24 in any court as to forensic --

25 A Approximately, a little over 350 times in federal,

1 state, municipal court, court marshals, regulatory boards,
2 et cetera over the years.

3 Q Have you ever been qualified as an expert in forensic
4 document review and even handwriting?

5 A In each of those times, yes.

6 Q So you have been qualified as an expert over 350
7 times in forensic document review and handwriting
8 analysis?

9 A I have, yes, that is correct.

10 MR. KENT: Your Honor, at this point in time, we
11 would offer Marvin H. Dawson as an expert in forensic
12 document review as well as handwriting analysis?

13 MS. ABEE: No objection, Your Honor.

14 THE COURT: All right. Folks, this witness has now
15 been qualified as an expert in the field of forensic
16 document review and handwriting analysis. The same
17 instructions I gave you earlier in the week on experts
18 applies to this witness, as well. You decide how much
19 weight to give his testimony based on all the evidence
20 that you'll hear throughout the trial.

21 You may resume.

22 BY MR. KENT:

23 Q Now, Mickey, at the beginning, I asked you. Now,
24 that we have more of an idea, I'll ask you a little bit
25 more, what goes into handwriting analysis, forensic

1 review, document review, what goes into that?

2 A Let me summarize it in this manner if I can. When we
3 learn to write, first grade, second grade, we have a copy
4 book that the county board gives us. It gives the school
5 board to teach from. We learn block letters. The next
6 couple of years, we start connecting those into cursive
7 writing. We continue this through our educational system,
8 if you would.

9 A document examiner says a person's handwriting
10 matures in the late teens or early 20's. That is, we kind
11 of get set in our ways. A person's handwriting is
12 identified or eliminated by individual characteristics or
13 habits. What happens is we get sloppy. Instead of making
14 the lower part of a G a certain way, we slash it down. An
15 A, instead of a nice round A, we make it oblong. Letter
16 forms we're taught to write, we deviate from and put our
17 little individual habits in there. Instead of an I dot,
18 maybe a slash. Instead of putting upper case and lower
19 case letters as we're taught, we may start deviating. Or
20 an A may be large than the following letter. Maybe
21 disconnecting letters. It's habits we have. And it's
22 individual habits we associate with the writing that we
23 can associate with the writer.

24 So we have a questioned, in this case, signature, and
25 then we have specimen signatures or known signatures. We

1 have signatures submitted that are known signatures of an
2 individual, the way the individual writes, the habits of
3 the individual. Then we compare the habits of the known
4 writer to the characteristics of the questioned writing
5 and try to determine its authenticity or nonauthenticity,
6 whether it's genuine or nongenuine.

7 Q And, Mickey, is this actually -- this is a science?

8 A It's a science, yes.

9 Q Is this like when I was a kid trying to forge my
10 mom's name on report cards and the teacher is like that
11 ain't your mom's signature? Is this the same or is it
12 much more intense than that?

13 A Well, that's a pictorial reference. We all get a --
14 we get a letter in the mailbox, can look at it and tell
15 whether's it from mom, dad, cousin, grandmother, whomever.
16 We recognize the pictorial similarity. A document
17 examiner looks at the internal writing of it, as the
18 characteristics I described a while ago. What's unique
19 about that writing?. What's unique about the way the
20 letters are formed, the individual parts? Pictorially, we
21 can associate with that.

22 Q Yes, sir.

23 A But to try to identify for these purposes, we need to
24 be a little bit more precise and that's where my
25 discipline comes in.

1 Q Now, there's two types of ways -- and please correct
2 me if I'm wrong, I'm not an expert. I understand there's
3 two types of ways that you guys can analyze things.
4 There's something called signatures exemplars. You can
5 get a bunch of signatures from somebody. And you can also
6 look at documents; is that correct?

7 A There are two types of known writing. Collected
8 writing, where you go into a person's social and work
9 environment, and requested writing, where you ask somebody
10 to sit down and write for you. So yes, you can have
11 exemplars, known writing, specimen writings, numbers.
12 There's several different names, but it's all the same
13 thing. Undisputed writings of the individual to use as
14 specimens to use as a benchmark to compare against the
15 questioned.

16 Q Now, you were contacted and hired by the Defense,
17 there's no doubt about that, correct?

18 A I was contacted by your office. I didn't know it was
19 the defense.

20 Q Okay. But you were contacted by my office and you
21 were asked to do some stuff?

22 A That's correct.

23 Q Could you explain to the jury just generically -- and
24 I'll give you a copy of your report. Just generically,
25 what you were asked to do and what you did?

1 A Thank you. This three-ring binder is my work binder.
2 In here contains my report and contains the evidence I had
3 to work with. And I was asked to examine two quit claim
4 deeds. One quit claim deed was identified to me as a
5 questioned document, that was the quit claim deed dated
6 November 1st, 2009. A second quit claim deed is dated
7 November 16th, 2009. And this was represented as a known
8 document.

9 Q Let me stop you real quick before we go any further.
10 I'm going to show you what's been premarked and placed
11 into evidence as State's Exhibit No. 10 and State's
12 Exhibit No. 11.

13 A Yes, sir.

14 Q I'm just going to ask you to review both of those
15 documents. Let the jury know if those are substantially
16 similar, if not the same as the documents you were asked
17 to review to make your analysis?

18 A Yes. State's Exhibit 10 appears to be the original
19 of my document that I reference as Q-1 or question one.
20 State's Exhibit 11 appears to be the original dated
21 November 1st, 2009, of what I refers as Q-2 or the second
22 questioned document. I have machine copies to work from.

23 Q Keep going. I interrupted you when you were telling
24 the jury what you used and what you did. Keep going.

25 A I had specimens of three writers submitted to me.

1 The first writer was a Larry Durant. A second writer was
2 a Lizzie Johnson. A third writer was a Samara S. Samuels.
3 I had those three writers submitted and said are
4 signatures genuine or nongenuine.

5 Q So, basically, you were asked to compare signatures?

6 A Yes, sir.

7 Q Now, you weren't asked to say did this person sign
8 this document? You were asked to say are these signatures
9 the same in the documents? Does that make sense?

10 A I was asked if the names on the documents were
11 executed by the individuals who wrote the same signature
12 on the known specimens.

13 Q And let me make that much more simple.

14 A Yeah, please do.

15 Q Yeah, because I get confused and I'm confusing.
16 Showing you State's Exhibit No. 10 and State's Exhibit
17 No. 11.

18 A Yes.

19 Q Is it safe to say you were asked to compare State's
20 Exhibit No. 10 to State's Exhibit No. 11?

21 A Yes, I was.

22 Q And you weren't asked who signed it, if anyone signed
23 it. You were just asked to compare State's Exhibit No. 10
24 to State's Exhibit No. 11; is that correct?

25 A That's correct.

1 (WHEREUPON, Defendant's Exhibit No. 1 was marked
2 for identification only.)

3 BY MR. KENT:

4 Q Okay. And you prepared a report in response to this?

5 A I did, yes.

6 Q And that is a report that you're talking about right
7 now?

8 A Yes.

9 Q All right. And inside your report -- and I think you
10 went through it, you included some other information other
11 than State's Exhibit No. 10 or 11. What else did you
12 utilize to have your findings?

13 A In my report, I stated it was most probable that
14 Larry Durant's signatures appearing on State's Exhibit 10
15 and 11 were not authored or written by the known writings
16 of Larry Durant. In other words, these signatures were
17 not genuine.

18 Q They were not genuine signatures?

19 A That is correct, sir.

20 Q And that's what you indicated in your report?

21 MR. KENT: Your Honor, at this point in time, I'd
22 like to enter Mr. Dawson's full report and finding into
23 evidence.

24 MS. ABEE: No objection, Your Honor.

25 THE COURT: It's admitted.

1 (WHEREUPON, Defendant's Exhibit No. 1 was
2 admitted into evidence.)

3 MR. KENT: Permission to publish, Your Honor?

4 THE COURT: Go ahead.

5 BY MR. KENT:

6 Q Mr. Dawson, do you see your report right in front of
7 you on the computer screen?

8 A Oh, I do not.

9 Q We'll let you talk from your report and the rest of
10 us will be able to see. All right. Right now, we are
11 currently looking at the first page of your report of
12 examination?

13 A Yes, sir.

14 Q Can you explain to the jury as they're reading the
15 report of the examination, looking at Page 1, what it says
16 and what was done?

17 A Your office submitted a case to me, this case, on
18 March 21st, 2016, identified the documents. Q-1 was the
19 quit claim deed book -- was from a quit claim deed book
20 1131 page, et cetera, dated 9/16/09. It was a machine
21 copy. It's noted that Q-2 is from the quit claim book,
22 identified the pages, dated 1/11/09, is a machine copy.
23 The Q -1 was submitted as bearing the questioned signature
24 of Larry Durant. Q-2 was submitted as bearing the
25 questioned signature of Larry Durant, Lizzie Johnson and

1 Samara Samuels.

2 Q Under there, it says something about known of Larry
3 Durant. What does that mean when you ask for known
4 signatures?

5 A Known signatures, I'm referencing these specimens,
6 the documents that were submitted to me, saying these are
7 undisputed signatures of a writer. In this case K-1,
8 which is known one, was submitted to me as the known
9 writing of Larry Durant. A signature of page from a book
10 dated 5/31/13, a machine copy, has a signature, and there
11 was a collected signature. The second, K-2 is a one-page
12 white unlined paper bearing three requested signatures of
13 Larry Durant. It was undated and it was also a machine
14 copy. These were submitted as -- submitted to me as
15 signatures as a writer identified to me as Larry Durant.

16 Q I'm going to Page 2 of your report?

17 A Page 2, I've identified a writer as K-2. And that is
18 the known of a Lizzie A. Johnson. An affidavit of
19 forgery, dated 6/13/13, a machine copy. A witnessed
20 victim's statement dated 6/13/13, a machine copy, and her
21 signature which appeared on the Q-1 document, which was
22 submitted to me as a known signature of Ms. Johnson.

23 Q Okay. Then it also says known of Samara Samuels?

24 A Yes.

25 Q What is that?

1 A Samara Samuels is identified in this report as K-3 or
2 the third section of known writing. Have a witnessed
3 victim's statement dated 8/30/13, it's a machine copy.
4 Witnessed victim statement, Page 2, dated 8/30/13, a
5 machine copy. Affidavit of forgery dated 6/13/13, a
6 machine copy. And a witnessed victim's statement dated
7 6/13/13, a machine copy. Also, a signature of hers
8 appearing from Q-1. These were known signatures of
9 Ms. Samuels submitted to me -- submitted to me as known
10 signatures of Ms. Samuels.

11 Q Okay. Then you have down the purpose of the
12 examination. What was the purpose of the examination?

13 A The previously described documents were submitted for
14 the purpose of determining, if possible, the authorship or
15 authenticity of the questioned Larry Durant's signature
16 appearing on documents Q-1 and Q-2. And the authorship or
17 authenticity of the Lizzie A. Johnson signature appearing
18 on Q-2 and the authorship or authenticity of the Samara
19 Samuels signature appearing on Q-2.

20 Q And then you talk about the examinations and the
21 findings. Explain that.

22 A It listed the documents were examined in the
23 laboratory on April 14, April 15, May 19 and May 24 and a
24 detailed examination was undertaken, including microscopic
25 examination of the signatures appearing on the questioned

1 documents.

2 Q Now, I'm looking at Page 3 of your document?

3 A Yes, sir.

4 Q What are the results of the examination?

5 A The examination and comparison questioned documents,
6 number one, based on documents submitted, is determined it
7 is most probable that Larry Durant's signatures appearing
8 on documents Q-1 and Q-2 are not genuine. Based on the
9 limited standards, it's most probable that Lizzie A.
10 Johnson's signature appearing on document Q-2 is a genuine
11 signature. Based on limited standards, it is most
12 probable the Samara Samuels on document Q-2 is not a
13 genuine signature.

14 Q All right. Keep going with your results?

15 A Under remarks, the above is qualified upon
16 examination of original eight questioned signatures. I
17 was working from machine copies. It's requested that
18 additional specimen signatures be submitted for
19 examination. All documents are returned with this report
20 and a copy of this report will be in DDL file 166398
21 placed in storage for six years, after which it may be
22 destroyed.

23 Q So let's make this a little more simple. Starting
24 with document, which is also State's Exhibit No. 10, which
25 is directly in front of you, which you used to review, you

1 compared the person who signed Lizzie Johnson's signature
2 on document No. 10. Was that the same person in your
3 expert opinion who signed Lizzie Johnson on document No.
4 11?

5 A Based on the documents I had to work with, it's most
6 probable, yes.

7 Q Now, explain to the jury why you're saying most
8 probable. You don't have the originals?

9 A I did not have the original. I did not have the
10 original to work from and had limited standards, yes.

11 Q Now, had you had the originals, how would that have
12 changed your impression?

13 A At this point, I do not know. I didn't examine it.
14 But the original is void of characteristics we look for in
15 simulations or forgeries that would impact it. If the
16 original had those characteristics, it would impact it.
17 If the original does not, it would probably raise the
18 examination.

19 Q It would make it rather more probable? It would be
20 definitive?

21 A It would, yes.

22 Q And you have in front of you the originals right
23 there. Are there any differences you see between the
24 originals and the copies that you received?

25 A With all respect to the Court, I do examine on the

1 witness stand. I'll be glad to take any documents
2 submitted by the Court back to my laboratory, use the
3 appropriate instruments, time and examine them and bring
4 that back.

5 Q We're fine, Mr. Dawson. I don't think the jury wants
6 to sit here for another week, so we're going to go with
7 what we have right now, okay.

8 Now, looking at -- is there something you can tell
9 about the intelligence of a signature? I think you had
10 talked some signatures are intelligent signatures.

11 A I don't believe I said that.

12 Q Or the sophistication --

13 A Maybe you're talking about skill level.

14 Q Skill level of a signature. What does that mean?

15 A Well, Einstein had a very low skill writing. Some of
16 us just don't have the motor mechanisms as others would
17 have. Some of our writing is nice and very colorful and
18 pictorially pleasing. Others just scribble. We've all
19 seen doctor's signatures. So we refer to that in our
20 language as skilled versus unskilled signatures. And it's
21 one thing we use to evaluate -- it's part of the formula
22 we use, so to speak, to evaluate a signature.

23 Q And now going back with the next part of our
24 examination, we looked at the Samara Samuels signature.
25 And in comparing the signature of Samara Samuels from

1 document No. 10 to document No. 11, did you find that the
2 same person who signed Samara Samuels's signature in
3 document No. 10 was or was not the same person who signed
4 the signature on No. 11?

5 A I found it most probably that that writer of Samuel's
6 signature did not sign the notary block on State's
7 Exhibit 11.

8 Q So whoever signed Samara's signature on No. 10 did
9 not also sign -- most probably did sign No. 11?

10 A That was my opinion, yes.

11 Q And the Larry Durant's signatures, is there anything
12 you noted and realized about those signatures based upon
13 the known and samples that you were given?

14 A The Larry Durant had two signatures. Under
15 examination, it's most probable, based on what I had to
16 work with, that writer of the known Larry Durant's
17 signatures did not write either one of Larry Durant's
18 signatures on either State's Exhibit 10 or State's
19 Exhibit 11.

20 Q Did you also have an opportunity to look at the
21 notary block. And by notary block, I'm talking about the
22 thing that says the State of South Carolina, Richland,
23 South Carolina, basically, what the notary would write
24 before they sign. Did you have an opportunity to look at
25 that?

1 A Yes, I did.

2 Q And State's Exhibit No. 10, there's a notary block.
3 Then State's Exhibit No. 11, there's a notary block. Did
4 you make a determination based upon that?

5 A It appears there is common authorship of the same
6 person filled out the administrative part for the block,
7 even though the Samuels's signatures were different.

8 Q Finally, you prepared some charts. When you did your
9 investigation, there's certain things we look for that aid
10 in your investigation. Like, you have to put little red
11 dots and things of that nature where you can show the jury
12 how you look and see things; is that correct?

13 A That's correct.

14 Q And you prepared some charts that would aid you in
15 showing the jury how you actually deal with these things?

16 A We marked several of the indicators on there, whether
17 it's genuine or nongenuine, just for purposes of this
18 demonstrations. We don't mark all of them. If we did,
19 you'd have a whole red chart.

20 MR. KENT: I'd ask permission to have the witness
21 step down from the stand, Your Honor?

22 THE COURT: Sure.

23 MS. ABEE: Your Honor, I would just ask for
24 permission to reposition so I can see.

25 THE COURT: That's fine.

1 BY MR. KENT:

2 Q I'd like you to come down. And grab your charts.
3 First, we're going to look at the Lizzie Johnson
4 signature. And I want you to explain to the jury -- they
5 have it in front of them, also, but you can explain to
6 them what you did and what you showed?

7 A The first signature is from the -- the first
8 signature is from State's Exhibit 11, the November
9 document, quit claim document. And this signature is the
10 questioned signatures from November 11th right here. The
11 signatures down here are the specimen signatures, the
12 known writings of Ms. Johnson.

13 She has some very individual characteristics. The I
14 dot, for example, is right here, slash I dot here. You'll
15 find she slashes I dots down. Sort of an awkward rounded
16 A. You'll pick this up in the lower signature here.
17 Several types of Js. We all have alternate letter
18 designs. We may make a different letter once in a while
19 or periodically. This alternate design is very well
20 illustrated here in the J form the writer uses. You'll
21 see the O is compressed in here. You pick up the O
22 compressed in here. The H, very purported bow, and it
23 rides -- the bow of the H rides up into the form of the H.
24 You'll find that the N at the top left side is pointed,
25 rounds off. You'll pick this up coming through here. The

1 S has a loop in the lower part. You have the same loop
2 coming in here, all way down. The N is open. You'll find
3 the middle part of the N coming down and squiggly end
4 flares out. This is picked in all of these. The
5 signature appears to be fairly naturally written. The J
6 appears awkward. You'll pick up your awkward J in the
7 lower part down here. The stroke of the A comes down and
8 rides up the right-hand staff. You'll find it comes off
9 of it here, but you still have the A off-footed, as well.
10 So you have individual characteristics in this signature
11 that also appear in the three known signatures. That was
12 the basis of my most probable authenticity.

13 Q Okay. Now, let's grab the Samara Samuels. If you'll
14 give me one moment so I can switch this. Okay.

15 A The Samuels signature is from the November Q-2
16 document, as well. If you'll notice, it's very nicely
17 done. It's broader where the specimen signatures are more
18 compact. It has a different skill level, if you would.
19 This is more compressed or rapidly written. It's all
20 crunched up, different letter forms. And the N, once
21 again, is made with the open midpoint coming down, the U
22 point. The D is an open D, a loop to the front part.
23 You'll notice that you do not have this same D formation
24 down here. It's open. It's rounded with a single staff.
25 The S, horizontal, return loop back around the corner.

1 You have an entirely different S form coming off the base
2 down here. There are a number of differences between the
3 questioned and known. This is what separates it from a
4 known signature to a questioned signature or
5 nonauthenticated signature.

6 Q Okay. If you'll grab your next one. Just give me
7 one moment so I can catch up. Yes, sir.

8 A This is the notary block we were talking about. This
9 is the November Q-2 block. This is the September Q-1
10 block. The Samuels signature, which was just discussed
11 that is not a genuine signature, not authored by the same
12 writer of the specimen is here. You'll notice the
13 writings of the -- the administrative writings, I call it,
14 of the questioned and the known all fall in line. You
15 have a difference of an upper case B formation from
16 November below, but everything else is right on the money.
17 So it's common authorship of the block here and the block
18 here.

19 Q Thank you. If you'll go to your last one, sir.

20 A Larry Durant, this is your September, the good
21 document. This is the November, the Q-2 document. As you
22 see, the signatures are rapidly written. They vary in
23 style, they vary in substance from time to time. These
24 are the specimen signatures of Mr. Durant.

25 This is where we speak of skill level. Basically,

1 what I had to work with is the difference of skill,
2 difference of letter form. You can look at the D form.
3 The D structure is entirely different. If you notice the
4 D structure, staff comes up, above and around. This is to
5 the right of the staff, under the staff. It's made
6 entirely different. Not only is pictorially different,
7 but it's also structurally different.

8 Q Thank you, sir. Now, Mr. Dawson, when we talked, I
9 don't give you background of these individuals, their
10 vision or anything of that nature. We just submit the
11 documents to you; is that correct?

12 A I have no idea what this case is about except
13 signatures. I know nothing else about it.

14 Q And as a matter of, yesterday when we were talking,
15 your eyes perked up and got big when I mentioned to you
16 the individual who was alleged to have signed both of
17 those deeds was blind?

18 A That is correct.

19 Q Why was that?

20 A You would not expect a blind person to write a
21 signature on a baseline level. You would not expect a
22 blind person to -- or someone who has limited vision to
23 have the letter formations, the consistency of letter
24 formations across the top two signatures. Normally, a
25 person who has difficulty writing has various aids they

1 can use, but you can see normally the function of the
2 aids. They use a certain type of ruler or some type of
3 guide. Those guides are normally very visible. And in my
4 opinion, guides were not used on those. That's just
5 naturally executed by a writer.

6 Q Naturally executed by a writer?

7 A It appears so, based on machine copies, yes.

8 Q And you notice on the known samples, some of those
9 signatures go up and some of those signatures go down. Is
10 that what you were talking about that you would expect
11 with somebody with limited vision?

12 A Yes, even on unlined paper, you have sort of an
13 imaginary a baseline. Apparently, the writer of the
14 specimen signatures had difficulty developing the
15 baseline.

16 BY MR. KENT:

17 Q And again, one of the first things I talked to you
18 about is you did not get a bunch of signatures from
19 somebody named Lizzie Johnson, correct?

20 A They were not available, that's correct, my
21 understanding.

22 Q If you were told that in State's Exhibit No. 10 that
23 the individual admitted to signing that one, but said they
24 did not sign State's Exhibit No. 11, what would be your
25 expertise opinion? Would that be true or false?

1 A That does not even affect my opinion. I go by the
2 facts, I see them there. Many times, we have someone who
3 says something, whatever. That doesn't have any value, in
4 my opinion.

5 Q Okay. So your expertise opinion is the same person,
6 whoever it is, who signed Lizzie Johnson on State's
7 Exhibit No. 10 is the same person who signed Lizzie
8 Johnson on State's Exhibit No. 11?

9 A Based on what we had to work with, yes, sir.

10 Q Is it your opinion that the same person who signed
11 Samara Samuels on State's Exhibit No. 10 is not the same
12 person who signed Samara Samuels on State's Exhibit
13 No. 11?

14 A That's correct.

15 Q It's your opinion that the same person, whomever it
16 may be, who signed the body portion of the notary sample,
17 which says South Carolina, Richland, Larry Durant, Lizzie
18 A. Johnson, first November, 2009, as well as the
19 commission is the same person who did the same thing in
20 State's Exhibit No. 11?

21 A It would appear so, yes.

22 Q And then finally, it is your opinion that based upon
23 the known samples you were given, knowledge of
24 individual's eyesight now, that neither of the signatures
25 involved in State's Exhibit No. 10 nor State's Exhibit

1 No. 11 were Larry Durant's signatures?

2 A No, you have different letter forms in there.

3 MR. KENT: Thank you so much. That would be the
4 extent of my questions. Please answer any questions from
5 the State of South Carolina?

6 THE COURT: Cross?

7 MS. ABEE: Thank you, Your Honor. May it please the
8 Court, Your Honor?

9 THE COURT: Yes.

10 CROSS-EXAMINATION

11 BY MS. ABEE:

12 Q Mr. Dawson, when did you become a certified document
13 examiner?

14 A Nineteen -- certified -- Board certified?

15 Q Yes, sir.

16 A 1988, I believe.

17 Q And when did you start performing forensic document
18 examinations?

19 A Around 1972, '73.

20 Q And I think you said you worked from -- worked at
21 SLED, South Carolina Law Enforcement Division, from 1972
22 to 1988; is that right?

23 A That's correct.

24 Q I think you told us that you actually started the
25 document review lab then, right?

1 A I started the document laboratory at that time. I
2 had already started the forensic photography laboratory.
3 This is the second one I started, yes.

4 Q And then I think you said you went to DSS?

5 A That's correct.

6 Q And why did you leave SLED?

7 A I went to DSS. I do private practice, and I also did
8 work for the State. It's the best thing for me.

9 Q So you went from working for the state to working for
10 the state and doing private practice; is that right?

11 A That's correct.

12 Q Then after, I believe you said, 27 and a half years
13 in law enforcement, you became solely into private
14 practice, right?

15 A That is correct, yes.

16 Q And you've been doing private practice for how many
17 years now?

18 A Actually, I was -- that's a good question. I'm not
19 sure. I would have to say from about 1993, '92, '93.

20 Q So more than 20 years?

21 A Yes, ma'am.

22 Q Okay.

23 A That's correct.

24 Q And you talked a little bit about what it is that you
25 examine when you're looking at the signatures. And you

1 mentioned that you didn't have exemplars in this case,
2 right?

3 A I'm sorry?

4 Q You didn't have handwriting exemplars in this case,
5 right?

6 A I did have handwriting exemplars, yes, ma'am. I had
7 specimen writings.

8 Q You didn't have somebody sit there and write out full
9 pages in their own handwriting, right?

10 A Requested writing, no, I did not. I had only one set
11 of requested writing, and that was Mr. Durant.

12 Q Okay. So you had known handwriting samples requested
13 from Larry Durant, right?

14 A I had requested Mr. Durant, that's correct.

15 Q Yes, sir. You did not have them from Ms. Lizzie
16 Johnson?

17 A Actually, the answer to your question is no, but
18 probably 98 percent of the time, we don't have it.

19 Q Okay. So that's a no, you didn't have any
20 handwriting exemplars from Ms. Lizzie Johnson, right?

21 A No, I did not.

22 Q You also didn't have them from Ms. Samara Samuels,
23 rights?

24 A No. We prefer collective writing from the field over
25 someone sit down and write. Many times, there are some

1 writers who have a tendency to change their writing a
2 little bit and we don't have good samples.

3 Q And usually when you request these samples, they
4 don't just sign their name. They write out a bunch of
5 different things, right?

6 A You may in law enforcement, but a lot of times, we
7 like to have apples to apples and oranges to oranges. So
8 we ask them to write the exact verbiage of what we're
9 trying to examine. Otherwise, you have a questioned
10 document with an A, B, C here and they write D, E, F over
11 here and you can't compare the two. So we try to match up
12 the verbiage or statements or sentences, depends on what
13 the case is.

14 Q Well, with the handwriting exemplars that Mr. Durant
15 gave you, you had him sign his name three different times,
16 right?

17 A I didn't have him sign his name. Ma'am, I have on
18 idea who had him sign his name.

19 Q But you would agree with me, his name was signed
20 three different times for you to be able to compare?

21 A His name is signed three times, that is correct.

22 Q And that's not something you have of Ms. Lizzie
23 Johnson, correct?

24 A That is correct.

25 Q And that is something you did not have of Ms. Samara

1 Samuels, correct?

2 A That's correct.

3 Q And each person individually has a range of deviation
4 in their handwriting, right?

5 A Some have more than others. Some people write
6 absolutely by the textbook, write the same way all the
7 time, others bounce around. It all depends. So not
8 everyone has the same amount of deviation.

9 Q And if you have more samples of somebody's
10 handwriting, you're able to tell if they have this degree
11 of variation and deviance in their handwriting, correct?

12 A If you're looking for deviation, yes, but when you're
13 comparing I dot slashes continuously, you're comparing
14 disconnects continuously, comparing habits and they pop up
15 in three, four, or five, then you have a reasonable
16 expectation that it will pop up in others. But that is
17 correct, the more you have, the more deviation you can
18 show.

19 Q Did you request the handwriting exemplars from Larry
20 Durant?

21 A I probably did. I don't recall quite frankly. I
22 work cases all the time. Since I have those requested, I
23 probably did. I cannot say absolutely.

24 Q So if you would have requested them, someone would
25 have signed their name knowing that those were going to

1 you, correct?

2 A You'll have to talk to the counsel who took those. I
3 assume the attorney took them. I don't know.

4 Q But you would request them from, say, the attorney,
5 is that your normal practice?

6 A They were provided to me by my client, who was an
7 attorney in this case.

8 Q And I want to talk about something else with the
9 documents that you reviewed. You didn't review originals,
10 correct?

11 A I did not, no.

12 Q You reviewed machine copies, right?

13 A That is correct.

14 Q And machine copies do add some limitations as to what
15 you can and cannot tell about the handwriting, correct?

16 A As to characteristics, yes, but machine copies, also,
17 give you forms of the letters and how the letters connect.
18 So machine copies are pretty good. The originals, of
19 course, are the best evidence.

20 Q And, for example, machine copies can't tell you where
21 the pressure is when somebody's writing, correct?

22 A Depends on how good the copy is. Sometimes, machine
23 copies can show you the line variations, can show you the
24 variations and pen pressures. Other times, it does not.

25 Q And so you would prefer originals when trying to

1 determine whether or not someone is tracing, for example?

2 A Yes, I would.

3 Q Because that pen pressure marks can show you whether
4 somebody is actually tracing a signature, can it not?

5 A Not necessarily, some people write heavy anyway.
6 Some people just absolutely bear down, leave a track in
7 the paper. Other times, you will have the original and
8 you will find little track marks in there. When you have
9 a document or a signature, even a machine copy that shows
10 variation and line pressure even to a machine copy,
11 chances are you do not have a tracing or simulation or
12 forgery.

13 Q Your results in this case, you said it was most
14 probably, correct?

15 A That's correct, yes, ma'am.

16 Q And even you just stated on direct that your opinion
17 could change based on having the originals and having
18 handwriting exemplars, correct?

19 A That's a possibility. Remote as it may be, that's a
20 possibility, yes.

21 Q And Mr. Dawson, are you being paid for your time in
22 this case?

23 A I am being paid for my time, that's correct.

24 Q And you're being paid by the Defense for your time
25 here testifying?

1 A I'm being paid by someone, yes, ma'am.

2 Q The State didn't subpoena you or call you to the
3 stand, correct?

4 A That's correct.

5 Q And the State didn't ask you to prepare this report,
6 correct?

7 A The Defense is paying me. I don't know who through
8 the Defense is paying me.

9 Q So you were called here by the Defense, right?

10 A That's correct.

11 Q Mr. Dawson, you said you have no idea what this trial
12 is about, right?

13 A I do not, no.

14 Q So you have no idea that this is a criminal sexual
15 conduct case?

16 A No, I do not.

17 MS. ABEE: Thank you, Your Honor. I have no further
18 questions.

19 THE WITNESS: And that really wouldn't make any
20 difference. I was addressing the signatures.

21 THE COURT: Redirect?

22 REDIRECT EXAMINATION

23 BY MR. KENT:

24 Q You don't work for free, do you?

25 A I get paid for my time, sir.

1 Q So you didn't drive here from Spartanburg just
2 because I'm so charming, I'm assuming?

3 A I was asked to come and testify and paid for my time,
4 sir.

5 Q Looking at Defense Exhibit No. 1 -- and the jury will
6 have Defense Exhibit No. 1. And I know we went over it a
7 little bit, but you were given a lot more signatures than
8 just were in those deeds; is that correct?

9 A I had additional signatures, that is correct, several
10 additional signatures. I didn't load the charts up with
11 them, no.

12 Q So we gave you different signatures from things that
13 we knew were signed by a particular person?

14 A That's correct.

15 Q So we gave you different dates or different times of
16 signatures?

17 A What's listed in the report is what we received, sir.

18 Q So we just give you as much, you do your report based
19 upon your bevy of experience as long as you've been doing
20 this, testifying in over 355 -- 350 general sessions
21 trials qualified as an expert. Do you stand by the
22 opinion that you've given to the jury today?

23 A I'll stand on my report, yes, sir.

24 Q You stand by your report?

25 A Yeah.

1 MR. KENT: Thank you so much.

2 THE COURT: Recross?

3 MS. ABEE: No, Your Honor.

4 THE COURT: You may step down. Thank you.

5 MR. Kent: Thank you.

6 I ask this witness be excused, Your Honor.

7 THE COURT: You are free go.

8 Next witness? Take a break?

9 MR. KENT: Yes, sir.

10 THE COURT: Okay. Let's take a 10-minute break. I
11 will again instruct you not to begin your deliberations or
12 discussions about the case or discuss this in any manner.
13 We'll have you back in 10 minutes. All right.

14 (WHEREUPON, the jury left the courtroom at 10:20
15 a.m.)

16 THE COURT: All right. Back in 10 minutes.

17 (WHEREUPON, a short break was taken.)

18 THE COURT: All right. Ready?

19 MR. KENT: Yes, sir.

20 THE COURT: All right. Let the record reflect the
21 Defendant is in the courtroom.

22 Bring the jury in.

23 (WHEREUPON, the jury entered the courtroom at
24 10:32 a.m.)

25 THE BAILIFF: All the jurors are back in the

1 courtroom, Your Honor.

2 THE COURT: All right. Defense, call your next
3 witness.

4 MR. KENT: Thank you, Your Honor. At this point, the
5 Defense would recall to the stand A.R. .

6 THE BAILIFF: Place your left hand on the Bible,
7 raise your right. State your name, please.

8 THE WITNESS: A.R. .

9 A.R. , after being duly
10 sworn, testified as follows:

11 THE BAILIFF: Thank you. Come up here, please.
12 State your name and spell your last for the record.

13 THE WITNESS: A.R. .

14 DIRECT EXAMINATION

15 BY MR. KENT:

16 Q Ms. A.R. how are you doing?

17 A I'm doing good. How are you?

18 Q I know you've already testified in the trial. I
19 don't have very many questions to ask you, okay?

20 A (Witness nods.)

21 Q You remember those things about the head shakes. She
22 can't take head shakes. Make sure everything you say is
23 affirmative, yes or no, okay?

24 A Yes.

25 Q I've got some just generic questions. You're

1 familiar with social media, correct?

2 A Yes.

3 Q You understand what social media is?

4 A Yes.

5 Q I'm not smart when it come to social media. You
6 understand what Facebook is?

7 A Yes.

8 Q You understand what Instagram is?

9 A Yes.

10 Q And understand what Twitter is?

11 A Yes.

12 Q And you formerly had a Facebook account?

13 A Yes.

14 Q And an Instagram account?

15 A Yes.

16 Q And a Twitter account?

17 A Yes.

18 Q You no longer have the Twitter account?

19 A No, I don't.

20 Q Do you still have the Instagram account?

21 A Yes.

22 Q Do you still have the Facebook account?

23 A No.

24 Q The Facebook account, that was just an account just
25 under your name, correct?

1 A Yes.

2 Q The Instagram account, what is your hand -- you can
3 put different names on your Instagram accounts and Twitter
4 accounts, correct?

5 A Yes.

6 Q What was the name of under your Instagram account?

7 A Bad kid, underscore, A.R. .

8 Q Back up, please. We're getting a little
9 reverberation just a little bit when you talk. But still
10 loud and clear enough so everybody can hear?

11 A Okay.

12 Q And your Twitter account was at I'm just A.R. or
13 something like that, correct?

14 A I'm not sure.

15 Q Okay. Do you remember having a Twitter account?

16 A Yes, I do.

17 Q You don't remember what your Twitter account was?

18 A No, I don't.

19 Q And you would agree with me you had a Twitter account
20 and it had a little picture of you right next to the
21 Twitter account, correct?

22 A That's correct.

23 Q If I told you that your Twitter account name was at
24 I'm just underscore capital A.R. that was your
25 Twitter account?

1 A No, that was not.

2 Q Okay.

3 A I don't have no recognition of that.

4 Q I want to show you, just approach you and show you
5 the Twitter account with your picture and your name. Do
6 you remember that Twitter account?

7 A No. I'm not aware of this.

8 Q You don't remember that Twitter account with your
9 picture or your name next to it?

10 A That is my picture, but I didn't create this.

11 Q So that is a picture -- that is your picture?

12 A From what I can see, it looks like me, but I'm not
13 100 percent sure it is me.

14 Q And it was a picture associated with a Twitter
15 account. You're saying you did not create the Twitter
16 account?

17 A No, I didn't because I would never capitalize my last
18 name in any of my social media, so this is not mine.

19 MR. KENT: Thank you so much. That's all the
20 questions I have.

21 THE COURT: Okay.

22 MS. ABEE: Your Honor, I have no cross-examination.

23 THE COURT: All right. You can step down.

24 MR. KENT: Your Honor, at this time we will recall
25 Detective Kelly to the stand.

1 THE COURT: All right.

2 THE BAILIFF: State your name, please.

3 THE WITNESS: Detective Natalie Kelly.

4 NATALIE KELLY, after being duly
5 sworn, testified as follows:

6 THE BAILIFF: Thank you. Come around, please. State
7 your name and spell your last for the record.

8 THE WITNESS: Detective Natalie Kelly, K-E-L-L-Y.

9 DIRECT EXAMINATION

10 BY MR. KENT:

11 Q Detective Kelly, you've already been on the stand. I
12 don't have very many questions for you. You've been in
13 here throughout the course of the trial, correct?

14 A I have.

15 Q We've already discussed the fact of what you know
16 inside of the file and what you don't know inside of the
17 file?

18 A That's correct.

19 Q I'm going to ask you some questions. If you need
20 your full case file to review it, just let me know and
21 we'll bring it to you so you can look at it.

22 A Okay.

23 Q Detective Kelly, there's been some question, you have
24 interviewed or discussed and talked to all of the females
25 who are making allegations in this case; is that correct?

1 A That's correct.

2 Q One of the questions that was asked was did any of
3 these girls go through any therapy at all?

4 A Not that I'm aware of.

5 Q No therapy for any of them?

6 A No.

7 Q There were also further allegations inside of the
8 file that most of the girls made the allegations that
9 during the sexual experience or whatever happened that
10 Larry Durant did not use a condom?

11 A That's correct.

12 THE WITNESS: Okay. That's all questions I have.
13 Thank you so much.

14 MR. FERNANDEZ: Nothing from the State, Your Honor.

15 THE COURT: You may step down.

16 Next witness?

17 MR. KENT: The Defense would call Myer Whack to the
18 stand.

19 THE BAILIFF: Place your left hand on the Bible,
20 raise your right hand. State your name, please.

21 THE WITNESS: Myer Donnell Whack.

22 MYER DONNELL WHACK, after being
23 duly sworn, testified as follows:

24 THE BAILIFF: Thank you. Come around, sir. State
25 your name, spell your last name for the record.

1 THE WITNESS: Myer Donnell W-H-A-C-K.

2 DIRECT EXAMINATION

3 BY MR. KENT:

4 Q All right. Mr. Whack, how are you doing, sir?

5 A Doing fine.

6 Q Just state your name to the jury one more time, if
7 you will.

8 A Myer Donnell Whack.

9 Q Mr. Whack, where are you from?

10 A I'm from Manning.

11 Q How long have you lived in Manning?

12 A Probably all my life, until I graduated from high
13 school.

14 Q Where did you go to high school?

15 A Manning High.

16 Q When did you graduate?

17 A In 1994.

18 Q Okay. What do you do currently?

19 A I'm a CNC technician at Blythewood in Columbia, South
20 Carolina.

21 MR. KENT: Are y'all having trouble hearing? It's
22 reverberating badly. It's not just me. Let's see if we
23 can turn this microphone.

24 BY MR. KENT:

25 Q Let's try that again, Mike. Tell me what you do.

1 A I'm a CNC technician in Blythewood.

2 Q I'm going to need you to lean forward a little bit
3 more because now I can't hear you.

4 A I'm a CNC technician inside Blythewood, south
5 Carolina.

6 MR. KENT: I'm still hearing the reverberation. Can
7 we take a little break?

8 THE COURT: Let's see what we can do.

9 MR. KENT: Technology, sometimes it's great and
10 sometimes it's not.

11 BY MR. KENT:

12 Q We're going to try one more time. Tell me again for
13 the third time where do you work or what do you do?

14 A I work inside Blythewood, South Carolina. I'm a CNC
15 technician.

16 Q We're good to go. We're going to keep going on that
17 note. How long have you been doing that?

18 A For like 10 years now.

19 Q CNC technician. I don't understand what that is.

20 A I program machines.

21 Q Okay. Are you married?

22 A Yes, I am.

23 Q How long have you been married?

24 A Right now, it will be seven years in this month right
25 here.

1 Q Do you have any children?

2 A Yes, I do.

3 Q Tell me about your children.

4 A I have four kids. I have a son that is 21. I have a
5 daughter that's 16, another daughter that is 10 and
6 another daughter that is five.

7 Q And the two of us, we've known each other for quite
8 some time?

9 A Right, correct.

10 Q I've known you for almost a decade, if not longer?

11 A Right.

12 Q I'm going to ask you some personal questions as you
13 understand.

14 A Right.

15 Q I'm not trying to embarrass you, but if you're on the
16 stand, there's some things that we have to ask you.

17 A That's fine.

18 Q I understand that at some point in time, you've had
19 some fraudulent checks charges in your life?

20 A That's right.

21 Q You've had several fraudulent check charges?

22 A That's correct.

23 Q And you've also had a charge for failure to stop for
24 a blue light?

25 A Correct.

1 Q Those are all charges that you've had in your life in
2 your past?

3 A Right.

4 Q Some as recently as last year?

5 A Correct.

6 Q Sorry to get that out, but sometimes we have to talk
7 about things when you take the stand. I want to talk to
8 you about where do you go to church?

9 A Word International Ministries.

10 Q How long have you been at that church?

11 A For like 20 years.

12 Q Tell me about the church.

13 A Oh, it's a wonderful church. I've been there since I
14 was 19 years. I grew up in the church.

15 Q Where is the church located?

16 A At 1010 North Guinyard.

17 Q Do you have position at the church? Is there
18 something you do?

19 A Yes, I do.

20 Q What do you do at the church?

21 A I'm an elder, also, I'm an armor bearer. I'm a sound
22 technician, video. I wear a lot of hats.

23 Q We're going to talk about those hats and make sure
24 everybody understands.

25 A Uh-huh.

1 Q Even though you have a 21-year-old daughter -- or
2 son, you don't look old enough to be call an elder.
3 Explain to the jury why you're called an elder.

4 A I'm an elder because, you know, pretty much I seek
5 God, you know. I went through the channels of doing the
6 things I needed to do to serve God. You know, I live
7 before God every day. I study my Word and, you know,
8 pretty much, you know, it's just a call God has placed on
9 my life.

10 Q You're also an armor bearer?

11 A Of course.

12 Q We've heard that phrase a lot in this courtroom.
13 Could you explain to the jury what an armor bearer is?

14 A An armor bearer is someone that serves and protects
15 the leaders. I'm pretty much -- you know, I serve my
16 leader because, you know, at the point, you know, like I
17 said, he could not see. Also he's -- like, you know,
18 almost like he's guide. Make sure, you know, all his
19 personal stuff is together, make sure all his stuff is,
20 you know, ready for Sunday. You know, also, do things
21 outside his house, make sure his grass is cut, car is
22 clean, make sure his clothes is right. As an armor
23 bearer, we do a lot.

24 Q Do you lie for him?

25 A No, oh, no.

1 Q Would you do anything for him? It sounds like you
2 just work for this guy?

3 A No, I don't. I would not lie.

4 Q Do you work for him or do you get paid by him?

5 A No, I not.

6 Q So why do you do all this stuff?

7 A Because I believe the man of God that he is. I
8 believe who he is.

9 Q So you do stuff for him?

10 A Right.

11 Q Tell me again about the arm -- so you've known -- how
12 long have you known Larry Durant?

13 A Approximately, like, 20 years.

14 Q And as your role as an armor bearer, tell us a normal
15 thing that happens after service, what happens?

16 A After service, we do to the back. We make sure we
17 wipe him down. Make sure he's fine. He don need
18 anything. The majority of the service sometimes he don't
19 want to see somebody. And if he does want to see
20 somebody, you know, he probably just say hey, I want to
21 see someone. But the majority of time, people come to the
22 door and say I want to see him. And if he really want to
23 see that person, he will say yeah or nay. A lot of times
24 he will be tired and worn out.

25 Q So when he goes to see somebody, what do y'all do?

1 You just leave them there and leave for hours?

2 A No, we're right at the door.

3 Q What do you mean by right at the door?

4 A Right at the door. It's like the door is right
5 there. It's like you can't go no farther right there.
6 It's like a brick building. You can hear everything
7 that's inside of the building. It's not like sound proof.

8 Q So you would stand right outside the door when
9 anybody would go into the room to meet with Pastor Durant?

10 A Correct.

11 Q Is that the role of the armor bearer?

12 A Right.

13 Q Is it a block -- we haven't heard this door
14 described. Is it a block door? Is there a window on the
15 door? Can you see through the door? What type of door?

16 A It's a door. It has a window on the door. It's a
17 wood door. I mean, it's not sound proof.

18 Q So you can hear things that go on on the other side
19 of the door?

20 A Correct.

21 Q Have you ever heard anything inappropriate that you
22 thought something was going on in there?

23 A No.

24 Q What's longest that you've ever had anybody sit
25 inside of the room with Pastor Durant?

1 A Maybe about five or 10 minutes, no longer than that.

2 Q So no one is ever there for a long period of time?

3 A No, no.

4 Q What would happen if somebody was in there for a long
5 period of time?

6 A I would find out what's going on because, you know,
7 we have other people waiting, other people want to see
8 him. You know, what's going on.

9 Q And we've heard stuff about these doors locking. You
10 would be right there behind the door. Have you heard the
11 door locked?

12 A No, no, no.

13 Q Would you be suspicious if you heard the door lock?

14 A Yes, yes.

15 Q In your mind, have you heard the door lock?

16 A Never did.

17 Q Has there ever been a time where you've walked inside
18 of the room or knocked on the door and gone to talk to
19 Pastor Durant while he's in there meeting with somebody?

20 A Yes, many times.

21 Q So there's nothing to stop you from walking in and
22 out?

23 A Nothing to stop me, no.

24 Q In the 20 years you've known him, has he ever stopped
25 you and said don't come in here, I'm in the middle of

1 something or anything like that?

2 A No.

3 Q I'm going to talk to you specifically about some
4 folks?

5 A Okay.

6 Q Do you know the name Lizzie Johnson?

7 A Yes, I do.

8 Q Do you know the name MINOR ?

9 A Yes, I do.

10 Q Do you know the name A.R. ?

11 A Yes, I do.

12 Q Do you know the name T.H. ?

13 A Yes, I do.

14 Q Do you know the name D.B. ?

15 A Yes, I do.

16 Q Now, starting with the last four I mentioned, were
17 those members of the church?

18 A Yes.

19 Q Would you see all of them hanging around together?

20 A Yes.

21 Q Were they always often together?

22 A Yes.

23 Q Did you ever see them go inside of the room and talk
24 to the pastor?

25 A Yes.

1 Q So that's nothing -- they would go in there and talk
2 to the pastor?

3 A Yes.

4 Q At any point in time, did you hear anything while
5 they were inside of the room that you thought was
6 inappropriate?

7 A Never did.

8 Q Did you ever see MINOR and A.R. at
9 church at the same time?

10 A Yes.

11 Q Anything raise your suspicions while they were at
12 church or anything of that nature?

13 A No.

14 Q So your testimony as his armor bearer, you're with
15 him pretty much all the time?

16 A Pretty much.

17 Q You or somebody else. Who are some of the other
18 armor bearers at that church?

19 A We got Elder Vaughn, Missionary Hodge, sometimes it
20 would be Regina Maynard. You know, that's pretty much it.

21 Q So for a large portion of the time, you're with the
22 pastor?

23 A Right.

24 Q And you're with him -- when he's at the church, are
25 you with him pretty much all of the time?

1 A Yeah.

2 Q How does he get home?

3 A Pastor.

4 Q And you say pastor, his wife?

5 A His wife.

6 Q That lovely lady who has been sitting behind him the
7 whole time?

8 A Yes.

9 Q So she's usually the one who will take him?

10 A Yeah.

11 Q So he doesn't get done with church and just drive
12 himself home?

13 A No.

14 Q So somebody is waiting around for him after church?

15 A Right.

16 Q And it's generally his wife?

17 A His wife.

18 Q I have noticed when we're going in and out of the
19 courtroom, he puts his hand on your shoulder and you guide
20 him and walk him places?

21 A Right.

22 Q Why do you do that?

23 A So I can let him know what's coming up, what's close
24 by so he won't go up and fall and hurt himself.

25 Q Why would he bump and fall?

1 A He has two prostheses and he can't see.

2 Q So this is something you've been doing for a long
3 time?

4 A For a long time.

5 Q Or somebody does it?

6 A Right.

7 Q Do you ever see him walking and going by himself
8 anywhere?

9 A No.

10 Q He always has somebody guiding or leading or taking
11 him somewhere?

12 A Right.

13 MR. KENT: Thank you so much, Mr. Whack. Answer
14 anything from the State.

15 THE COURT: Cross?

16 CROSS-EXAMINATION

17 BY MR. FERNANDEZ:

18 Q Mr. Whack, good morning.

19 A Good morning.

20 Q I want to explore a little bit what about it means to
21 be an armor bearer.

22 A Okay.

23 Q Just for my own personal edification. I know you
24 talked a little bit about it. I'm going to expand on what
25 you just said if that's okay.

1 A Uh-huh.

2 Q I think you did comment that you do -- in addition to
3 your official functions as being an armor bearer, I guess,
4 that's church; is that correct?

5 A Uh-huh.

6 Q Would be official -- your official responsibilities
7 would include things that you do at church?

8 A Right.

9 Q In addition to those responsibilities, you actually
10 do other things that people would probably consider
11 private duties, personal assistant type jobs. Would that
12 be correct?

13 A I wouldn't call it private. It's just part of the
14 job because I know his abilities. I know what he can and
15 cannot do by being physically blind and not having legs.

16 Q Okay. So you consider doing his laundry and all the
17 -- mowing his lawn, those are all things that are part of
18 the church?

19 A No, I don't laundry.

20 Q Oh, sorry. I thought you said laundry. I apologize.
21 I thought you said wash clothes, you didn't say that?

22 A No.

23 Q So you never do laundry?

24 A No.

25 Q Okay.

1 A Why should I? He has a wife.

2 Q Okay. So you mow the lawn?

3 A I mow the lawn, I wash the cars. I get his clothes
4 out.

5 Q So you said things like washing laundry, that should
6 be what his wife does?

7 A His wife does.

8 Q And what other things should his wife should do that
9 you don't do?

10 MR. KENT: Objection, calls for speculation.

11 THE COURT: Sustained.

12 BY MR. FERNANDEZ:

13 Q You've known the Defendant, Mr. Durant, for how long,
14 20 years?

15 A About 20 years.

16 Q And how old were you when you would have met him?

17 A I was 19.

18 Q And did you meet him in school, the same
19 neighborhood, like where would you guys --

20 A No, I met him by Lizzie Johnson.

21 Q Okay.

22 A I met him by Lizzie Johnson because Lizzie Johnson
23 was married into my family by my uncle. I've known her
24 for a while since I was young.

25 Q Ms. Johnson?

1 A Ms. Johnson.

2 Q Okay.

3 A I've known her since I was young. I met him by him
4 coming to my house. And he said something that startled
5 me. And when it startled me, it came to pass. And from
6 that point on, I was following him since then because I
7 believed who he was by being the man of God he was.

8 Q Now, would you consider yourself a fairly religious
9 person?

10 A Very.

11 Q And I think you said it before, you just kind of
12 touched on it before when you were talking to me, you
13 believe that Pastor Durant is inspired by God; is that
14 correct?

15 A Yes, he is.

16 Q So when Pastor Durant says something, you believe it
17 as true?

18 A Amen, uh-huh.

19 Q And we agree that God, perhaps, works in mysterious
20 ways?

21 A Yeah.

22 Q Okay. And so if Pastor Durant asked you to do
23 something that, perhaps, you find odd or, perhaps, out of
24 order, would you follow it?

25 A No, I would not.

1 Q Okay. So you do have a limit as to what you would
2 do?

3 A Right. If it's not in the will of God, if it's not
4 right I'm not going to do it. Because I'm not going to
5 hinder myself nor my kids.

6 Q So you believe that Pastor Durant can be wrong
7 sometimes, is that what you're saying?

8 A We all human.

9 Q Okay. I'm going to go over a little bit of your
10 record because I know counsel did touch on it. Just
11 correct me if I'm wrong, I just want to talk to you a
12 little bit about it. 2006, you have six counts of
13 fraudulent check; is that right?

14 A Correct.

15 Q So you forged checks and submitted them as true?

16 A Yeah.

17 Q In 2008, you have another fraudulent check charge?

18 A Uh-huh.

19 Q In 2011, you have a failure to stop for blue lights
20 charge?

21 A Uh-huh.

22 Q And that means that you actually went -- when police
23 tried to pull you over --

24 MR. KENT: Objection, Your Honor, you can't get into
25 the details. I think he's answered the question.

1 MR. FERNANDEZ: Okay. I'll move on.

2 THE COURT: Go ahead, go ahead.

3 BY MR. FERNANDEZ:

4 Q In 2012, you have another fraudulent check charge,
5 that's 2012?

6 A Yes.

7 Q And these are convictions, so you've been convicted
8 in court?

9 A Uh-huh.

10 Q And 2015, you have another fraudulent check charge,
11 two counts?

12 A Yeah, I guess so. I don't remember that. If you say
13 so.

14 Q You don't have any reason to dispute that?

15 A No.

16 Q So you do?

17 A Uh-huh.

18 Q Now, let me talk a little about the services. And I
19 think --

20 MR. FERNANDEZ: Permission to approach the witness,
21 Your Honor, to show him a piece of evidence?

22 THE COURT: Go ahead.

23 BY MR. FERNANDEZ:

24 Q I'm going to ask you to identify a few things for me.
25 These are pictures that have already been entered into

1 evidence. I just want you to take a look at these. The
2 first is marked State's Exhibit No. 1, the second is
3 marked State's Exhibit No. 2 and the third one is marked
4 State's Exhibit No. 3. Would you please tell me if you
5 recognize what these pictures show?

6 A That's his office.

7 Q Okay. And when you say his office, whose office is
8 it?

9 A It was the Apostle's office.

10 Q And what location -- what church location would this
11 office be?

12 A 1010 North Guinyard.

13 Q Okay. Is that his desk, Pastor Durant's desk?

14 A Yes.

15 Q Is that another picture of his desk?

16 A Yes.

17 Q Tell me what this is a picture of?

18 A His door.

19 Q And what material are the walls made of in this
20 church office?

21 A Brick.

22 Q Would it be cinder block?

23 A Yeah.

24 Q And what material is the door made of?

25 A Wood.

1 Q That's wood?

2 A Uh-huh.

3 Q And is there a window in the door?

4 A Uh-huh.

5 Q Is the window covered up?

6 A Yes.

7 Q And is there two signs on the front of the door?

8 A Yes.

9 Q And what do the signs say?

10 A Not not enter.

11 Q Okay. And the other sign on the doorknob?

12 A Please knock.

13 Q Is that true and accurate about how the office
14 generally looks?

15 A Yeah.

16 Q And I think you just testified earlier people did
17 frequently obtain private prayer sessions with Mr. Durant
18 after a prayer service?

19 A I don't call -- we don't call it prayer session.

20 Q What would you call it?

21 A It's a meeting.

22 Q The during these meetings -- and any number of people
23 would go to these meetings, is that what you said before?

24 A Yeah, I mean, you have people who want to see him
25 after service. Some services, he did not want to be

1 bothered and some services he's like okay. He wants to
2 see them if people really want to talk to him. Not every
3 service.

4 Q And you said approximately five to ten minutes these
5 meetings would last?

6 A Correct.

7 Q During these meetings, was the door closed?

8 A Yes.

9 Q And I think you already testified, but [REDACTED] MINOR
10 [REDACTED] A.R. [REDACTED] T.H. [REDACTED] and [REDACTED] D.B. [REDACTED],
11 they all attended private meetings when you were standing
12 outside?

13 A I mean, they came there, but normally five to ten
14 minutes.

15 Q But they were in closed-door meetings?

16 A Right.

17 Q And I think you said that you would have heard
18 everything that was going on outside?

19 A Correct.

20 Q And I guess it stands to reason if there were no
21 words being spoken, you would have heard nothing, correct?

22 A Right.

23 Q Let me ask you a little about the Defendant, Mr.
24 Durant, himself. Has he -- you said -- do you drive him
25 around?

1 A Yes.

2 Q Okay. Has he ever driven a car?

3 A No.

4 Q He's never driven?

5 A Never driver.

6 Q Do you know if he's ever obtained a driver's license?

7 A Yes, he has one.

8 Q He has a driver's license?

9 A Uh-huh.

10 Q Okay. Thank you. How does -- you said he reads the
11 word of the Bible. How does he read?

12 A He doesn't read.

13 Q Does he use braille or is there a special --

14 A No, he has phones and iPad. He has people like his
15 wife and myself or other members that reads to him. A lot
16 of things on his iPad has stuff to read to him.

17 Q So you've never seen him read anything?

18 A No.

19 Q Has he ever used a cell phone before?

20 A No. He know how to talk. He knows how to answer a
21 cell phone, like blue tooth.

22 Q Does he ever use his fingers --

23 A No.

24 Q -- to do things on a cell phone?

25 A No.

1 Q You say you've been around him all the time?

2 A Correct.

3 Q I mean, you eat lunch him?

4 A Yes, I have.

5 Q You wake up -- in fact, during court, you actually
6 usually will lead him around, correct?

7 A Correct.

8 Q And estimate how many hours a day you spend with
9 Mr. Durant?

10 A Well, I mean, I work, too. I have a job.

11 Q You work normal hours at a job?

12 A Yeah, I have a job and a family, too, as well.

13 Q Okay. So not including your hours at work, at least,
14 so is's a nine-to-five-type job?

15 A Yeah, I work 12 hours a day.

16 Q You work 12 hours?

17 A I work 12 hours a day.

18 Q Not including those times, how often do you spend
19 with Mr. Durant?

20 A If called during the course of the day -- if I'm at
21 work and I call him and I said, Apostle or Pastor, do you
22 need anything, if needed, I'll go and help out whatever
23 needed, but if he don't need anything, I usually stay
24 home. But if he needed to go anywhere that places of
25 prayer, church, or anything, I'm there.

1 Q Okay. And he has asked you to go retrieve people for
2 private meetings before? He has asked you to go say hey,
3 this person needs to come --

4 A They usually come to the door.

5 Q Have you ever retrieved someone for him?

6 A No.

7 Q Never?

8 A No.

9 Q And you said before that your role as armor bearer is
10 to serve and protect Mr. Durant?

11 A Correct.

12 Q And it's -- is that an important role that you take
13 very seriously?

14 A Yeah, because that's my leader. That's the one who's
15 hearing from God for me. Of course, I'm going to make
16 sure he's in a safe environment that -- you know, that
17 he's safe and that the pastor is safe, his wife is safe.
18 You know, he can hear from God, of course.

19 Q So it's your job to keep him safe and protect him?

20 A Not my job, whoever is the armor bearer.

21 Q In your role as an armor bearer --

22 A Right.

23 Q -- it's your job?

24 A And every member.

25 Q I'm sorry, I didn't hear you?

1 A And every member.

2 Q Okay.

3 A Uh-huh.

4 MR. FERNANDEZ: Beg the Court's indulgence one
5 moment.

6 (Pause.)

7 MR. FERNANDEZ: No further questions, Your Honor.

8 Thank you, Mr. Whack.

9 THE WITNESS: You're welcome.

10 THE COURT: Redirect?

11 MR. KENT: Nothing further, Your Honor.

12 THE COURT: All right. You can step down.

13 Next witness.

14 MR. KENT: Your Honor, we would call Elvin Vaughn to
15 the stand.

16 THE BAILIFF: Place your left hand on the Bible,
17 raise your right hand, please.

18 THE WITNESS: Elvin Vaughn.

19 ELVIN VAUGHN, after being duly
20 sworn, testified as follows:

21 THE BAILIFF: State your name and spell your last for
22 the record.

23 THE WITNESS: Elvin Vaughn, V-A-U-G-H-N.

24 DIRECT EXAMINATION

25 BY MR. KENT:

1 Q Mr. Vaughn, how are you doing, sir?

2 A Pretty good, sir.

3 Q I'm going to need you to speak loudly and clearly
4 enough so the person on the back end of the jury can hear
5 every word you're saying, okay?

6 A Absolutely.

7 Q And Madam Court Reporter is taking down every word
8 that you're saying, so she can't take your head shakes or
9 nods or anything of that nature, so make sure we speak in
10 words, yes and no in answering the questions. Okay?

11 A Yes.

12 Q At any point in time, you do not understand the
13 question that I ask or if I speak entirely too fast,
14 simply tell me to stop, slow down, okay?

15 A Yes.

16 Q Let's tell the jury a little about yourself. Tell
17 them who you are, where you're from. Just tell them who
18 you are.

19 A Again, my name is Elvin Vaughn. I'm a minister at
20 Word International Ministries. I'm a truck driver by
21 trade. I'm an armor bearer for Apostle Durant.

22 Q Let's talk about your background. Are you married?

23 A Yes, sir, I am.

24 Q Who are you married to?

25 A Arlisa Vaughn.

1 Q How long have you been married?

2 A Eight years.

3 Q Do you have any children?

4 A Absolutely.

5 Q How many children you have?

6 A I have five total.

7 Q Tell us the names and ages of your children.

8 A Elvin, Jr., Genesis, Nathan, Allen and Aisha.

9 Q I was about to say don't forget one of your kid's
10 names.

11 A Yeah.

12 Q Your wife's not in the courtroom, we'll be okay. How
13 long have you been driving trucks?

14 A Eighteen years.

15 Q And you still do that, correct?

16 A Absolutely.

17 Q I'm going to get right into it and talk to you a
18 little bit about why you're here today. You mentioned
19 that you're an armor bearer?

20 A Yes, sir.

21 Q Explain to the jury what an armor bearer is?

22 A Basically, armor bearer serves the purpose as prayer
23 to the pastor, whatever needs he or she may need. You
24 kind of serve as -- you serve. You're a server to
25 whatever they need. And what I mean server, I mean to the

1 degree of, especially in this case, where the Apostle have
2 on legs, he has to be led to different places. He cannot
3 go on his own. He cannot see on his own. He can see to a
4 certain degree, but he cannot see like you and I can see.
5 And I have help with wearing glasses, but he -- it's to
6 the extreme.

7 Q Are you -- you say you serve at the Pastor's request
8 and you do things for him. Do you cheat, lie and steal
9 for him?

10 A Absolutely not.

11 Q Would you cheat, lie or steal for him?

12 A Absolutely not.

13 Q Would you do anything that would affect your
14 religion?

15 A Absolutely not.

16 Q That's not something that's in your candor. That's
17 not something you would do. Why wouldn't you?

18 A Well, because, first of all, I fear God and what God
19 would do. And I can't do that. That's just not in my
20 character.

21 Q Now, in your role as an armor bearer, have you
22 ever -- well, tell me what happens after church sessions.

23 A Well, what happens normally if we have visitors,
24 visitors, they would be -- they would come and they would
25 greet the pastor, the apostle. For the first time

1 visitors, that's the normal thing. And when they come
2 back there, an armor bearer is back there at all times.
3 And with that being said, whether it be first time -- like
4 I said, first time visitors, you know, they come.

5 Q And when you say always back there at all times, is
6 somebody generally with the pastor at all times?

7 A Absolutely.

8 Q Why is that? He can't have a moment by himself?

9 A Well, no, that's not the case. Like I say, for the
10 most part, he can't see.

11 Q And what about his legs?

12 A He has none.

13 Q So that makes it even more difficult?

14 A Absolutely.

15 Q And you said he can see some?

16 A Right.

17 Q And he can see directly in front of him?

18 A Right.

19 Q He has difficulty seeing?

20 A Absolutely.

21 Q And he's legally blind?

22 A Absolutely.

23 Q And he has no legs from the knees down?

24 A Absolutely.

25 Q I'm going to ask you some names. Do you know an

1 individual by name of MINOR ?

2 A Yes, sir.

3 Q Do you know an individual by the name of A.R.

4 ?

5 A Yes, sir.

6 Q Do you know an individual by the name of T.H.

7 ?

8 A Yes, sir.

9 Q Do you know a woman by the name of D.B. ?

10 A Yes, sir.

11 Q Were they all members of your church?

12 A Yes, sir.

13 Q Was this a group that would always hang around
14 together?

15 A Yes, sir.

16 Q So this is something that was known that they would
17 hang around together?

18 A Absolutely.

19 Q At any point in time, did you ever see them have
20 meetings or talks with Pastor Durant?

21 A By themselves, no.

22 Q Explain to the jury what you mean by that.

23 A Well, when it comes to meetings, like I said, as you
24 said meetings, they -- everyone would want to see the
25 pastor from time to time concerning whatever they're got

1 going on. And a lot of times, they would last about two,
2 five minutes tops.

3 Q So they weren't long meetings?

4 A No.

5 Q Why weren't they long meetings? Would you feel
6 awkward if there was a long meeting happening?

7 A Absolutely.

8 Q Where would you be when these meetings or talks or
9 anybody would meet with the pastor?

10 A Right by the door.

11 Q And we've heard testimony, was this the type of
12 church where you couldn't hear anything?

13 A It's paper thin. The walls are paper thin. You
14 could hear anything going on, you know, conversation-wise.
15 You could hear it. It's just not that silent.

16 Q If you were sitting outside the room and you heard
17 something or heard something going on, would you have
18 walked in?

19 A Absolutely.

20 Q Did you have permission to walk in? Did anyone ever
21 tell you, don't you dare walk into these rooms?

22 A Yes, sir.

23 Q You could have always walked in at any point in time?

24 A Yes, sir.

25 Q Sometimes, did you just walk in?

1 A Yes, sir.

2 Q So there weren't -- did you walk in because there was
3 trouble or just sometimes just walked in?

4 A Just walked in.

5 Q And that's something all armor bearers were allowed
6 to do?

7 A Absolutely.

8 Q Anybody could walk into the room or walk out whenever
9 they wanted at any point?

10 A Right.

11 Q Is it your testimony with these paper thin walls at
12 the church you never heard anything at the church?

13 A Absolutely not.

14 Q How would Pastor Durant get home?

15 A His wife would bring him or -- bring and take him.

16 Q So she was always at church with him?

17 A Absolutely.

18 Q This wasn't a fellow who was just hanging out at
19 church by himself with nobody there just hanging out?

20 A Not at all.

21 Q So he was there, he was either with one of you armor
22 bearers. And then when it was time to go home, whenever
23 it was, his wife would take him home?

24 A Absolutely.

25 MR. KENT: Thank you so much. Answer any questions

1 from the State.

2 THE COURT: Cross?

3 MS. ABEE: Yes, sir, Your Honor.

4 CROSS-EXAMINATION

5 BY MS. ABEE:

6 Q Mr. Vaughn, you stated that the Defendant can see to
7 a certain degree, right?

8 A Yes.

9 Q Have you ever seen him drive?

10 A No.

11 Q Do you know whether or not he has a driver's license?

12 A Yes.

13 Q So he does have a driver's license?

14 A Yes.

15 Q Now, let's talk about, you said that you,
16 essentially, have to help lead him around because he
17 doesn't have legs, right?

18 A That's correct.

19 Q But he has prosthetics, doesn't he?

20 A That's right.

21 Q And he can talk on his prosthetics, can't he?

22 A Yes, that's right.

23 Q In fact, when people have meetings with him, you're
24 not in that room with him then, right?

25 A Sometimes I am.

1 Q But sometimes you're not, is that fair?

2 A That could be fair.

3 Q So he could move around his office, right?

4 A To a certain degree.

5 Q And do you know whether or not the Defendant has any
6 kids?

7 A Yes.

8 Q Okay. So he has children?

9 A Absolutely.

10 Q Now, you stated that you never saw D.B. or T.H.
11 or MINOR or A.R. have meetings by themselves with the
12 Pastor, right?

13 A Right.

14 Q But there are other armor bearers, aren't there?

15 A Absolutely.

16 Q It's not just you?

17 A Absolutely.

18 Q And you stated that his wife was also at church,
19 right?

20 A Absolutely.

21 Q And the Defendant's wife was pretty involved in the
22 church, wasn't she?

23 A She's the pastor.

24 Q So there are things that she had to do at the church,
25 as well, right?

1 A Absolutely.

2 Q She wasn't back in the meetings with the Defendant,
3 right?

4 A At times, she would have been.

5 Q And at times, she's not there, is that fair to say?

6 A That's fair to say.

7 MS. ABEE: Your Honor, may I approach?

8 THE COURT: You may.

9 BY MS. ABEE:

10 Q Mr. Vaughn, I'm showing you what's been entered into
11 evidence as State's Exhibit 1, State's Exhibit 2 and
12 State's Exhibit 3. Do you recognize these?

13 A Yes, I do.

14 Q Okay. And State's 1 and 2, what are these pictures
15 of?

16 A The office.

17 Q Okay. And this is the office at 1010 Guinyard,
18 right?

19 A Absolutely.

20 Q Okay. And this is the door of that office?

21 A I'm not sure about that.

22 Q Okay. Well, then we won't talk about State's
23 Exhibit 3, but let's talk about 1 or 2. This is the
24 office that you would be standing outside of during those
25 meetings, right?

1 A Right.

2 Q And you said that you could hear anything, right?

3 A Right.

4 Q Because those walls are paper thin, aren't they?

5 A Absolutely.

6 Q Mr. Vaughn, these walls are cinder block, aren't
7 they?

8 A They are.

9 Q Okay. And when you were describing to us earlier
10 what an armor bearer was, you said that whatever he needs,
11 you serve him; is that right?

12 A That's right.

13 MS. ABEE: Your Honor, I have no further questions.

14 THE COURT: Redirect?

15 MR. KENT: Nothing further from this witness.

16 THE COURT: You may step down.

17 MS. BLAZER: Your Honor, the Defense calls Keshona
18 Edwards.

19 THE BAILIFF: Place your left hand on the Bible,
20 raise your right. State your name, please.

21 THE WITNESS: Keshona Edwards.

22 KESHONA EDWARDS, after being duly
23 sworn, testified as follows:

24 THE BAILIFF: Come around up here, please. State
25 your name, spelling your last for the record.

1 THE WITNESS: My name is Keshona Edwards. My last
2 name is spelled E-D-W-A-R-D-S.

3 DIRECT EXAMINATION

4 BY MS. BLAZER:

5 Q Good morning, Keshona. How are you?

6 A I'm good.

7 Q You need to sit forward so they can hear you. Go on
8 and introduce yourself to the jury.

9 A Hi. My name is Keshona Edwards.

10 Q Keshona, where do you live?

11 A In Sumter, South Carolina.

12 Q Again, you're going to speak up so that they can hear
13 you, I can hear you and the court reporter can hear you,
14 okay?

15 A In Sumter, South Carolina.

16 Q How old are you?

17 A Nineteen.

18 Q How long have you lived in Sumter?

19 A All my life.

20 Q Do you have a lot of family in the area?

21 A Yes.

22 Q Mom, dad?

23 A Yes. My mother's name is Simona Major. My
24 grandfather's name is Simon Major. He's the director at
25 the jail.

- 1 Q The jail?
- 2 A Yes.
- 3 Q Do you have a job?
- 4 A Yes.
- 5 Q Where do you work?
- 6 A Apple's Eye.
- 7 Q All right. How long you been working there?
- 8 A Three weeks.
- 9 Q Did you go to school in Sumter?
- 10 A Yes, Sumter High.
- 11 Q Did you graduate?
- 12 A Yes.
- 13 Q When was that?
- 14 A Last year.
- 15 Q Do you go to church?
- 16 A Yes, I do.
- 17 Q Where do you go to church?
- 18 A Word International Ministries.
- 19 Q Who's your pastor?
- 20 A Larry Durant.
- 21 Q Do you know T.H. [REDACTED] ?
- 22 A Yes.
- 23 Q How do you know D.B. [REDACTED] ?
- 24 A That's my cousin.
- 25 Q Do you know A.R. [REDACTED] ?

1 A Yes.

2 Q How do you know A.R. ?

3 A We went to church together.

4 Q Do you know MINOR ?

5 A Yes.

6 Q How do you know MINOR ?

7 A We went to church together.

8 Q Do you know D.B. ?

9 A Yes.

10 Q How do you D.B. ?

11 A That's my cousin.

12 Q So T.H. 's your cousin, D.B. 's your cousin and
13 A.R. and MINOR were parishioners with you?

14 A Yes.

15 Q How long have you known them?

16 A Forever.

17 Q Say that again.

18 A For a long time.

19 Q For a long time. Keshona, are you familiar with the
20 allegations in this case?

21 A Yes.

22 Q And did you learn about these allegations before or
23 after Pastor Durant was charged?

24 A Right before.

25 Q How did you learn about them right before?

1 A Well, me and T.H. was in the car on the way
2 back from color guard practice and A.R. called
3 her.

4 Q And A.R. called T.H. ?

5 A Yes.

6 Q Without telling me what they say, how did you become
7 aware that there were allegations against Pastor Durant?

8 A Well, I heard the Bishop's name.

9 MS. ABEE: Objection, Your Honor, hearsay.

10 BY MS. BLAZER:

11 Q When you heard a conversation between A.R.
12 and T.H., was that conversation -- did it seem
13 serious or did it seem jovial, playful?

14 A Playful.

15 Q Okay. But as a result of that conversation, you
16 believed that there were allegations being made against
17 Pastor Durant?

18 A Yes.

19 Q Did you come to learn about the allegations against
20 Pastor Durant from any other person? Did any other person
21 make you aware of them before he was charged?

22 A Yes.

23 Q Who was that?

24 A Alfon Cummings.

25 Q Who is Mr. Cummings?

1 A [REDACTED] A.R. 's brother.

2 Q [REDACTED] A.R. 's brother. Did he call you? Did he
3 come see you? How did he make you aware of these
4 allegations?

5 A He called me.

6 Q Okay. Did anyone at any time, at that time or since
7 that time, ask you to make allegations against the pastor?

8 A No.

9 Q Did you make any allegations against the pastor?

10 A No.

11 Q Why?

12 A Because he didn't touch me.

13 MS. ABEE: Objection, Your Honor, inadmissible
14 propensity evidence.

15 MS. BLAZER: I don't know that it's propensity.

16 MS. ABEE: Can we approach, Your Honor?

17 (WHEREUPON, a bench conference was held in the
18 presence of the jury, but outside the hearing of the
19 jury.)

20 BY MS. BLAZER:

21 Q So Keshona, have you ever made any allegations
22 against Pastor Durant?

23 A No.

24 Q Has Pastor Durant ever touched you inappropriately?

25 A No.

1 Q Has he ever spoken to you inappropriately?

2 A No.

3 Q You mentioned that T.H. and D.B. are your
4 cousins?

5 A Yes.

6 Q After these allegations surfaced, did it affect your
7 family in any way?

8 A Yes.

9 Q How so? Tell me.

10 A A lot of them wasn't talking to me.

11 Q They won't talk to you?

12 A No.

13 Q Why is that?

14 A Because they feel like -- I think they say I'm taking
15 sides, but I'm not.

16 Q They -- you think that they think that you're taking
17 sides?

18 A Yes.

19 Q But you're not taking sides?

20 A No.

21 Q Keshona, do you know what Twitter is?

22 A Yes.

23 Q Can you explain it for the jury? Maybe some of them
24 have Twitter, maybe some of them don't. What's Twitter?

25 A It's a social network. You just post statuses back

1 to back.

2 Q Post statuses?

3 A Yes.

4 Q Is that something -- is it pictures, is it words,
5 what is it?

6 A Words. It can be pictures, too.

7 Q So if you wanted to share your thoughts to Twitter,
8 what would you do?

9 A Post a status.

10 Q Okay. So you type it on a computer, on your phone?

11 A Yes.

12 Q And how would somebody else see that status?

13 A If they were following me or they can go on it.

14 Q Do you have a Twitter account?

15 A Yes, I do.

16 Q Did you have a Twitter account in 2013?

17 A Yes, I do -- yes, I did, I'm sorry.

18 Q At that time, were you following people on Twitter?

19 A Yes.

20 Q Who might you follow on Twitter? Do you follow
21 famous people or friends?

22 A Both.

23 Q Both, okay. So who is somebody famous you would have
24 followed?

25 A (There was no response.)

1 Q Musicians, movie stars, that kind of thing?

2 A Yes.

3 Q So you can see what they say?

4 A Yes.

5 Q But you can also see what your nonfamous friends say?

6 A Yes.

7 Q Were you following anybody in 2013 who is involved in
8 this case?

9 A Yes.

10 Q Who?

11 A A.R. , T.H. D.B.

12 Q Do you recall A.R. having a Twitter account
13 in 2013?

14 A Yes.

15 Q Do you remember what her Twitter account name was?

16 A I'm just underscore A.R. .

17 THE COURT: Say it again.

18 THE WITNESS: I'm just underscore A.R. .

19 BY MS. BLAZER:

20 Q I'm just underscore A.R. . So that's the name of her
21 account. How do you know that was the name of her
22 account?

23 A It was her at name.

24 Q So were you following that at name?

25 A Yes.

1 Q And was she following you?

2 A Yes.

3 Q As far as you know?

4 A Yes.

5 Q So can you have conversations on Twitter or is it
6 just one sided, I'm saying something, she's saying
7 something? How does that work?

8 A You can have conversations.

9 Q Did you ever have a conversation with A.R.
10 on Twitter?

11 A Yes.

12 Q In the summer of 2013, do you recall A.R.
13 making -- posting tweets that had anything to do with this
14 case?

15 A Yes.

16 Q Was she tweeting in a serious manner or a joking
17 manner?

18 A Joking.

19 Q Did you do anything when you saw these tweets?

20 A Yes, my mother told me to screen shot it.

21 Q Say that again?

22 A My mother told me to screen shot it.

23 Q She told you to screen shot it. And did you?

24 A Yes.

25 Q So you -- how do you screen shot tweets, what do you

1 do?

2 A It was on my phone, Iphone, so I just hold the top
3 button and middle button and took a picture.

4 Q You took a picture of the screen of A.R. 's
5 tweets?

6 A Yes.

7 Q What did you do with that picture?

8 A I sent it to my mother and my mother sent it to my
9 pastor.

10 (WHEREUPON, Defendant's Exhibit No. 2 was marked
11 for identification only.)

12 BY MS. BLAZER:

13 Q Keshona, I'm going to show you what I'm going to call
14 Defendant's Exhibit 2 for identification purposes only.
15 Take a look at that. Do you recognize that?

16 A Yes.

17 Q Could you describe for me what that is?

18 A It's the Twitter account with A.R. 's Twitter.

19 Q Is it her account? Is is a picture of her account?
20 How do you know that's her account?

21 A It's her account. I screen shotted it.

22 Q That is the screen shot that you took?

23 A Yes.

24 Q Is that the original or is that a copy?

25 A That's a copy of it.

1 Q But you feel certain that that is the screen shot
2 that you took?

3 A Yes.

4 MS. BLAZER: Your Honor, at this time, I'd move
5 Defense Exhibit 2 into evidence.

6 MS. ABEE: There is an objection from the State, Your
7 Honor, two-fold. One would be a lack of foundation. This
8 is the same exhibit that was shown to A.R. [REDACTED] who
9 stated that she could not authenticate these pictures.
10 And secondly, Your Honor, even if this is A.R. [REDACTED]'s
11 statement, it's still hearsay coming in through this
12 witness.

13 MS. BLAZER: Your Honor, it's --

14 THE COURT: Hold on, let me send the jury out while
15 we discuss this.

16 I told you sometimes we may need to take up a matter
17 of law. I need you to step out while I hear what the
18 lawyers are going to argue outside of your presence.
19 Again, don't begin deliberations or discussions about the
20 case.

21 (WHEREUPON, the jury left the courtroom at 11:22
22 a.m.)

23 THE COURT: Let me see this.

24 MS. BLAZER: Sure.

25 (Pause.)

1 THE COURT: All right. So do you want to address her
2 objections?

3 MS. BLAZER: So her objection is that first -- I
4 believe I have them in order -- there's no foundation and
5 the second is that it's hearsay. So as to the first
6 the -- this witness can testify that this is a copy of a
7 photograph that she took. And she's already laid the
8 foundation for why she took the photograph and she has
9 told the jury this is a replication of the photograph she
10 took. I think that's the foundation for the photograph.

11 With regard to the hearsay contained therein, we're
12 not offering it for the truth of the matter asserted.
13 This young woman took a picture of this. She was prompted
14 to do it because of what was contained therein. Ms. A.R.
15 has already testified that that's not her Twitter handle
16 and she can stand by that. But this young woman has
17 testified to the jury that he believed it was her. She
18 had a relationship with her and she thought this was she.
19 To the extent that this was Ms. A.R.'s, this is an
20 inconsistent statement with the way that she's testified
21 and I think that overcomes the hearsay objection.

22 MS. ABEE: Your Honor, Ms. Blazer addressed the
23 authentication of the photo, the screen shot itself.
24 However, she did not address the authentication of the
25 content inside of the photo. That was attempted to be

1 addressed through A.R. [REDACTED], who stated would seem to
2 be a picture of her, but was not her Twitter handle.
3 Anyone with an e-mail address can create a Twitter handle
4 to be anyone. I could be David Fernandez. I could be
5 anyone. So it isn't authenticated as being A.R. [REDACTED]
6 [REDACTED]'s statements.

7 If they are A.R. [REDACTED]'s statement, Your Honor,
8 then they are inadmissible. The fact that this witness
9 thought that they were A.R. [REDACTED]'s statements or her
10 belief that they were A.R. [REDACTED]'s statements are not
11 relevant to this case if they cannot authenticate and lay
12 the foundation that they are, in fact, A.R. [REDACTED]'s
13 statements, Your Honor. And if they're not being entered
14 for the truth of the matter asserted, but rather to show
15 whether or not this witness took a picture of them, Your
16 Honor, then that's irrelevant, as well. We would contend
17 that they are being entered for the truth of the matter
18 asserted. And if we cannot authenticate who the declarant
19 is of those statements, Your Honor, then the statements
20 themselves should be redacted and the picture --

21 THE COURT: Well, I read it. I can't quite figure
22 out what it is that's being said in there. So you'll have
23 to -- I guess, you know, they use those little acronyms.
24 I don't understand why it's being offered. I know you
25 want to say it's for impeachment purposes.

1 MS. BLAZER: Yes, sir.

2 THE COURT: But you've still got to -- I'm not sure
3 that impeachment necessarily overcomes hearsay. Tell me
4 what it is that is purportedly being said.

5 MS. BLAZER: May I approach?

6 THE COURT: I don't understand the acronyms.

7 MS. BLAZER: Well, if I may --

8 THE COURT: And why would you offering it if it's not
9 for the truth of the matter asserted?

10 MS. BLAZER: Your Honor, it -- whether Ms. A.R. --
11 it appears to be saying in these tweets, I know why he was
12 cheating. Then it says SMH, which is I think shaking my
13 head.

14 THE COURT: I have no idea. You have to have
15 somebody tell me.

16 MS. BLAZER: Let me leave that alone. I swear my mom
17 is so crazy. He wanted all the blank, LMAO, laugh my
18 blank off, laugh my blank off. My mom is stupid, yo,
19 talking about pastor had all the blank. I think whether
20 the pastor was cheating and the pastor had all the blank
21 is not the truth of the matter asserted. It is the sense
22 of seriousness with which Ms. A.R. was addressing what
23 she's purporting to be a sexual assault via a public means
24 where this young lady was interacting with her regularly
25 on Twitter.

1 And so the jury -- we're not asking the jury to
2 believe or disbelieve the truth of what Ms. A.R. has
3 asserted, but the fact that she was tweeting and this -- I
4 believe that this witness can testify that she had a
5 relationship with Ms. A.R. that was personal that led her
6 to believe that this was Ms. A.R.'s account. And when
7 she read this on Ms. A.R.'s account, it was vulgar and
8 offensive to her, so she took a picture of it.

9 THE COURT: All right.

10 MS. ABEE: Your Honor, whether or not Ms. Edwards
11 believed it was Ms. A.R.'s account, A.R. got up
12 on the stand and under oath said it's not her account.

13 THE COURT: Well, then it's up to the jury to believe
14 whether or not it is.

15 MS. ABEE: Yes, Your Honor, but these --

16 THE COURT: Authentication is what she purports it to
17 be, and that is a snapshot of a Twitter account, which she
18 says was of A.R. A.R. has denied it's hers. I
19 mean, there's more than one way to authenticate something.

20 MS. ABEE: Yes, sir, we would still contend the
21 statements themselves aren't relevant and still hearsay.
22 They're hearsay of A.R. and they're irrelevant.
23 They aren't even, according to Ms. Blazer, purporting to
24 be talking about her sexual assault, but something else,
25 Your Honor. The only date stamp on that says seven hours

1 ago. It doesn't even have a year. So there isn't even a
2 context and a date frame for the screen shot either, Your
3 Honor.

4 MS. BLAZER: Your Honor, I believe she gave the
5 timeframe when she testified. She said that this was in
6 the summer of 2013. And I'm sorry, I lost track of the
7 other points being made by Ms. Abee, but I don't -- she
8 can certainly lay the foundation of when she took this
9 picture. Because she was already asked about it, she's
10 knowledgeable about it.

11 THE COURT: Well, it seems to me that she is able to
12 authenticate what she is --

13 MS. BLAZER: Uh-huh.

14 THE COURT: -- taking a snapshot of, which is what
15 she says is Ms. -- that is a representation of a snapshot
16 of a Twitter account, which she says is [REDACTED] 's. The
17 jury can believe whether or not it is.

18 As for the hearsay, it's not -- it doesn't sound to
19 me like you're offering to prove whether or not the
20 minister was, in fact, having sex with anybody, but you're
21 offering to it prove the state of mind of [REDACTED].

22 MS. BLAZER: Yes, sir.

23 THE COURT: In which case, it's not by definition
24 hearsay. It's not being used to prove -- it's not being
25 offered to prove the truth of the matter asserted therein

1 by A.R. , but to show the state of mind of A.R. in
2 writing it, so I will let it in.

3 I would -- well, you're going to have to ask her what
4 those acronyms.

5 MS. BLAZER: Yes, sir.

6 THE COURT: Why don't we go ahead and -- do you have
7 piece of paper?

8 MS. BLAZER: Why don't I let the court reporter mark
9 it so she doesn't have a stroke.

10 THE COURT REPORTER: So this one is in?

11 MS. BLAZER: As far as I know.

12 THE COURT: All right. All right. Read me out what
13 that says.

14 THE WITNESS: It says my mom is crazy, but I know why
15 he is cheating. Shake my head. Didn't leave that alone.
16 I have swear my mom is crazy, haha. He wanted all the
17 blank.

18 THE COURT: You're going to have to say it even if
19 you don't want to.

20 THE WITNESS: He wanted all the pussy, laughing my
21 ass off, laughing my ass off. My mom is stupid. They all
22 talking about the pastor had all the pussy.

23 THE COURT: Hold on a second. Let me see it.

24 All right. When you say laughing my ass off, you
25 mean LMAO, right?

1 THE WITNESS: Yes.

2 THE COURT: What does LMAOO? Is that different?

3 THE WITNESS: It's the same.

4 THE COURT: And there was a SMHH?

5 THE WITNESS: Shaking my head.

6 THE COURT: So the two H's is just the extra H?

7 THE WITNESS: Yes, sir.

8 THE COURT: All right.

9 Okay. Bring the jury back in.

10 (WHEREUPON, the jury entered the courtroom at
11 11:33 a.m.)

12 THE BAILIFF: All the jurors are back in the
13 courtroom, Your Honor.

14 THE COURT: All right. You may resume.

15 CONTINUED DIRECT EXAMINATION

16 BY MS. BLAZER:

17 Q So, Keshona, right before the break, we were talking
18 about a picture you had taken of some tweets that you
19 thought were from A.R. ; is that right?

20 A Yes.

21 MS. BLAZER: At that time, Your Honor, I moved to
22 admit Defense two into evidence.

23 THE COURT: Admitted over State's objection.

24 MS. BLAZER: Thank you, Your Honor.

25 (WHEREUPON, Defendant's Exhibit No. 2 was

1 admitted into evidence.)

2 MS. BLAZER: At this time, I would like to publish to
3 the jury Defense Exhibit 2 and ask Ms. Edwards to go
4 through it with us because there are some acronyms and
5 such in it.

6 THE COURT: All right.

7 By publishing, she means read, so you can read it
8 out. And I know there are words in there you don't want
9 to say out loud, but you need to.

10 THE WITNESS: Okay. My mom is crazy, but I know why
11 he's cheating, shake my head. Let me leave that alone,
12 though. I swear my mom is so crazy. Hahaha. He wanted
13 all the pussy. Laugh my ass off. Laugh my ass off. My
14 mom is stupid, yo, talking about the pastor had all the
15 pussy.

16 BY MS. BLAZER:

17 Q Can you read that last one for me one more time just
18 a little bit slower?

19 A Laugh my ass off. My mom is stupid, yo, talking
20 about the pastor had all the pussy.

21 MS. BLAZER: Thank you, Keshona. I have no further
22 questions. You have to answer any questions that the
23 State may have of you.

24 THE COURT: Cross-examination.

25 MS. ABEE: Thank you.

CROSS-EXAMINATION

BY MS. ABEE:

Q Ms. Edwards, you said that you had Twitter, right?

A Yes.

Q So you know how a Twitter account is made, don't you?

A Yes.

Q You put in an e-mail address, right?

A Yes.

Q You create a password, right?

A Yes.

Q And then you create a Twitter handle, don't you?

A Yes.

Q Now, you can create any Twitter handle that you want as long as it hasn't already been taken by someone else, right?

A Yes.

Q And you can say that that Twitter handle belongs to anybody else, right?

A Yes.

Q And you can put a picture up of anybody else?

A Yes.

Q So, for instance, I could say that I was you and create a Twitter account with your name, right?

A Yes.

Q Now, that Twitter handle, do you have it in front of

1 you, that piece of paper?

2 A Yes.

3 Q The Twitter handle is I'm just underscore A.R.,
4 right?

5 A Yes.

6 Q It doesn't say A.R. on it, does it?

7 A No.

8 Q And in all of those tweets, nowhere does it say
9 A.R., right?

10 A Yes.

11 Q So her name is nowhere in that Twitter?

12 A No.

13 Q Okay. And then you said that you saw this, right?

14 A Yes.

15 Q And that you thought it was A.R.'s, right?

16 A Yes.

17 Q And you thought that she was talking about Pastor
18 Durant, right?

19 A Yes.

20 Q It doesn't say Pastor Durant's name anywhere there,
21 does it?

22 A No.

23 Q However, your mom told you to screen shot it, didn't
24 she?

25 A Yes.

1 Q And your mom is who?

2 A Simona Major.

3 Q And your mom, Simona Major, she's involved in the
4 church, isn't she?

5 A What do you mean?

6 Q She attended Pastor Durant's church?

7 A Yes.

8 Q And you've been attending Pastor Durant's church
9 since you were how old?

10 A Five.

11 Q So you were attending since you were about five and
12 I'm assuming your mom was attending with you?

13 A Yes.

14 Q For just that long, right?

15 A Yes.

16 Q Did she attend longer?

17 A Yes.

18 Q So your mom saw this and she told you to screen shot
19 it, didn't she?

20 A Yes.

21 Q And then you said she turned it over to Pastor
22 Durant?

23 A Yes.

24 MS. ABEE: Your Honor, may I have one second?

25 THE COURT: Uh-huh.

1 (Pause.)

2 MS. ABEE: No further questions, Your Honor.

3 THE COURT: Redirect?

4 MS. BLAZER: No, sir, Your Honor. May this witness
5 be excused?

6 THE COURT: You may step down.

7 THE COURT REPORTER: We need the exhibit, please.

8 THE BAILIFF: Leave it right there.

9 MR. KENT: Your Honor, I would call Arlisa Vaughn to
10 the stand.

11 THE BAILIFF: Place your left hand on the Bible,
12 raise your right hand. State your name, please.

13 THE WITNESS: Arlisa Vaughn.

14 ARLISA VAUGHN, after being duly
15 sworn, testified as follows:

16 THE BAILIFF: State your name, spelling your last for
17 the record.

18 THE WITNESS: Arlisa Vaughn.

19 DIRECT EXAMINATION

20 BY MR. KENT:

21 Q Ms. Vaughn, I know you haven't been in the courtroom,
22 but I'm going to need you to speak loud and clear so
23 everybody in the jury can hear every word that you're
24 saying.

25 A Okay.

1 Q And Madam Court Reporter in front of you -- I know
2 people get tired of hearing me saying this, but Madam
3 Court Reporter in front of you is taking down every word
4 you're saying.

5 A Okay.

6 Q She can't take down head shakes and nods and things
7 of that nature.

8 A Okay.

9 Q And you won't be on the stand very long, I promise.
10 I just have a few questions for you.

11 A Sure.

12 Q Tell the jury about yourself. Who are you?

13 A I'm Arlisa Vaughn, of course, member of Word
14 International Ministries. I've been there for over 10
15 years.

16 Q Okay. What do you do there?

17 A Trustee.

18 Q Tell me what a trustee does.

19 A Trustee is responsible for maintaining bank accounts
20 or help -- you know, helping in the finance office and
21 dealing with, you know, different bills and writing checks
22 and things like that.

23 Q So you're responsible for -- you're, basically, the
24 church's accountant is the easiest way to describe it?

25 A Yes.

1 Q Tell me how the church accounts for what happens, how
2 are checks written, who writes checks.

3 A I pretty much write checks. Whatever they need to be
4 done, bills to be paid, it goes through me. And anything
5 that the pastor needs to be done, I pretty much sign the
6 check.

7 Q And we keep saying the pastor. There's two pastors
8 in this church?

9 A Well, Apostle or Pastor Durant.

10 Q And Pastor Durant, Apostle Durant is sitting there in
11 the black suit?

12 A Yes, that's correct.

13 Q And behind him, who's been here the entire time,
14 that's his wife?

15 A That's correct.

16 Q That's the pastor you're also talking about?

17 A Yes.

18 Q So when you said anything the pastor wants, I want
19 you to say their names. I want you to say Melody or
20 Larry. I want to know who you're talking about.

21 A Okay.

22 Q When you talk about who needs you to write checks or
23 anything of that nature, who are you talking about?

24 A Melody.

25 Q Have you written checks for Melody before?

1 A Yes.

2 Q At some point in time, I asked you to look into the
3 church's accounts recently to find some checks; is that
4 correct?

5 A Correct.

6 Q Do you remember what I asked you and could you tell
7 the jury what you did?

8 A Yes. I went to search for a check that was written
9 out to Johnnie Mae Brayboy, a check for \$500, which was a
10 loan to her.

11 Q Which was a loan?

12 A Correct.

13 Q Who is Johnnie Mae Brayboy?

14 A She is the mother of D.B. .

15 Q And there's been some allegations about the pastor
16 giving her \$500?

17 A Correct.

18 Q Someone did give Johnnie Mae Brayboy \$500, correct?

19 A That's correct.

20 (WHEREUPON, Defendant's Exhibit No. 3 was marked
21 for identification only.)

22 BY MR. KENT:

23 Q I'm showing you what's been marked as State's [sic]
24 Exhibit 3. Can you tell me what that is?

25 A This is the check that was written out to Johnnie Mae

1 Brayboy, a loan for Mae in the memo.

2 Q How are you familiar with what that is?

3 A I wrote it.

4 Q You wrote it?

5 A Yes.

6 Q And you went and got a copy of it?

7 A That's correct.

8 Q Upon my request?

9 A Yes.

10 Q Here very recently?

11 A Yes.

12 Q Tell me what you did, how you got a copy, what did
13 you do?

14 A I went to the bank and requested a copy of the check.

15 MR. KENT: Your Honor, at this point in time, I'd
16 move Defense Exhibit No. 3 into evidence.

17 MS. ABEE: Without objection, Your Honor.

18 THE COURT: Admitted.

19 (WHEREUPON, Defendant's Exhibit No. 3 was
20 admitted into evidence.)

21 BY MR. KENT:

22 Q So when you go to the bank and get a check, is there
23 a reason you are allowed to get a check and nobody else?
24 How come you're allowed to get the check?

25 A Because my name is on the account as the trustee.

1 Q And tell me what would happen usually with these
2 checks. I mean, did you just write out checks however you
3 wanted to? How were you told to write out checks?

4 A No, I didn't write them out as I wanted to. If there
5 was something that needed to be paid, such as a bill or
6 anything like that, it was requested that it was written.

7 Q Would somebody else write the body sometimes and you
8 would simply sign the check?

9 A No.

10 Q You would always write the checks out?

11 A Yes.

12 Q Now, this check we're talking about particular, tell
13 me how that happened if you remember?

14 A Pastor just came to me and told me what she needed to
15 be written out and I just pretty much did that.

16 Q Okay. Did they tell you what the check was for?

17 A As they say in the memo, it was a loan for Johnnie
18 Mae Brayboy.

19 Q And as we're looking at this, it has your signature
20 on the bottom?

21 A Correct.

22 Q And on the signature line, it was just loan for Mae?

23 A Yes.

24 Q Is that what y'all call Ms. Brayboy?

25 A Nickname, yes.

1 Q It's from January 25th, 2013?

2 A That's correct.

3 Q And this is written on the church's account?

4 A That's correct.

5 Q Signed by yourself?

6 A That's correct.

7 Q And the person who requested this check would have
8 been who?

9 A As far as?

10 Q Like who told you to write the check?

11 A Pastor would have requested I write it.

12 Q Remember what I told you about --

13 A Melody, I'm sorry.

14 Q So Melody had you write a check for Johnnie Brayboy?

15 A Correct.

16 Q It wasn't Pastor Durant?

17 A Correct.

18 Q And this was a loan?

19 A Correct.

20 Q For \$500?

21 A That's correct.

22 Q Now, I go to churches pretty often. Y'all can get
23 cash, right?

24 A Yes.

25 Q If Pastor Durant wanted cash to do something with --

1 A Right.

2 Q -- he could have gotten cash from you?

3 A That's correct.

4 Q He could have said give me \$500, I need to give to it
5 somebody?

6 A Right.

7 Q And if he would have done that, no problem?

8 A Right.

9 Q But this was specific, orderly, somebody has to
10 borrow \$500?

11 A That's correct.

12 Q And it was written in a loan?

13 A Correct.

14 Q Nobody was trying to hide it or anything of that
15 nature?

16 A Right.

17 MR. KENT: Thank you so much for your time.

18 THE COURT: Cross?

19 CROSS-EXAMINATION

20 BY MR. FERNANDEZ:

21 Q Very briefly, ma'am. Thank you. I'll have you on
22 your way.

23 So to be clear, Ms. Vaughn, when you refer to the
24 pastor in this case, you meant Melody Durant; is that
25 correct?

1 A Yes.

2 Q And Melody Durant is who for my education?

3 A She is pastor of our ministry, Word International
4 Ministries.

5 Q Is she related to Larry Durant?

6 A Yes.

7 Q In what form?

8 A That's his wife.

9 Q Now, as trustee, I know you said that's your title.
10 It's, essentially, an accountant of the church, correct?

11 A Yes.

12 Q And let me ask you this, in your experience, how long
13 have you been the accountant?

14 A Maybe within the last five years or so.

15 Q And would it be -- this is your experience with
16 handling official church matters. Would it be appropriate
17 or inappropriate if someone were to use church funds for
18 private use?

19 A Could you repeat that, please?

20 Q Would it be inappropriate if someone used church
21 funds for private use, like personal use?

22 A I still don't --

23 Q Okay. You said you paid bills, correct?

24 A Yes.

25 Q And that would be bills that the church as an entity

1 accrued?

2 A Right.

3 Q Has anyone ever asked you to write them a personal
4 check?

5 A No.

6 Q To themselves in the churches?

7 A No.

8 Q Okay. So when I say if anyone used the money from
9 the church for personal use, that would be inappropriate,
10 that would be wrong?

11 A That's if it was.

12 Q I'm just saying if it was done, it would be wrong,
13 correct?

14 A No. I couldn't say that.

15 Q That would not be wrong?

16 A No.

17 Q So who is allowed to use church funds for their own
18 personal use in your church?

19 A No one is using church funds for personal use. I'm
20 still trying to get what you're saying. Personal use as
21 far as if you're loaning someone some money or are you
22 talking about the Pastor Larry Durant or --

23 Q I'm just talking in general right now. I'm going to
24 get more specific a second. I'm just trying to establish
25 what the procedures are in the church and your role as the

1 accountant. Okay. So if someone were to ask you to write
2 a check -- I'm not naming names, no one, just anyone in
3 particular say hey, I'd like you to write me a check for X
4 amount of dollars and just give it to me. Would that be
5 okay or would that be not okay?

6 A No, because I don't know what it's for.

7 Q So has anyone ever come to you and said I'd like you
8 to write me a personal check?

9 A No.

10 Q Okay. And if someone came to you and asked you to
11 write them a personal check and wouldn't tell you what
12 it's for, would you write it?

13 A No. I'd ask a question before writing it, yes.

14 Q So you would always want to know what it's for?

15 A Correct.

16 MR. FERNANDEZ: Beg the Court's indulgence.

17 (Pause.)

18 BY MR. FERNANDEZ:

19 Q On the church -- I'm sorry. On the document there
20 that you just said -- you wrote that check, correct?

21 A Correct.

22 Q And in the line, it says loan; is that correct?

23 A That's correct.

24 Q Do you know what the loan was for?

25 A It was a loan for Mae.

1 Q But you don't know for what purpose, correct?

2 A I didn't ask if it was for business or personal.

3 Q Did you assume it was business or is that -- is that
4 something you would just assume if Melody Durant or Pastor
5 Larry Durant came to you and asked you for a generic loan
6 for somebody?

7 A It wasn't an assumption. What she said it was is
8 what it was.

9 Q So the only specificity you need then is it's a loan?
10 You don't need to know exactly why the money is being sent
11 out?

12 A Not necessarily. If she said it was for what it was,
13 it's for what it was.

14 Q When they ask you to do something, you do it?

15 A Not like you say, no.

16 Q Well, if they ask you to give a loan out, you would
17 do it, you wouldn't ask what the loan was for; is that
18 correct?

19 A Not like you're saying.

20 Q I'm asking you a question. Is it true --

21 A If she asked me to write a check for something for
22 her, yes, I would do it.

23 Q Okay.

24 A Because I trust her, yes.

25 MR. FERNANDEZ: Thank you.

1 MR. KENT: No further questions, Your Honor.

2 THE COURT: You step down.

3 MR. KENT: Your Honor, at this time, we would call
4 Dr. Jason Leonard.

5 THE BAILIFF: Place your left hand on the Bible,
6 raise your right hand. State your name, please.

7 THE WITNESS: My name is Jason Michael Leonard.

8 JASON LEONARD, M.D., after being
9 duly sworn, testified as follows:

10 THE BAILIFF: Come around, sir. State your name,
11 spell your last for the record.

12 THE WITNESS: It's Jason Michael Leonard,
13 L-E-O-N-A-R-D.

14 DIRECT EXAMINATION

15 BY MR. KENT:

16 Q Dr. Leonard, how are you doing, sir?

17 A Well, thank you. How are you?

18 Q I know you're soft-spoken. We'll get you in and out
19 of here as quickly as we can.

20 A Thank you.

21 Q Madam Court Reporter right there is taking down every
22 word that you're saying. She can't take down head nods,
23 shakes or things of that nature. So make sure when you
24 give your answers, they're affirmative yeses and nos.

25 A Okay.

1 Q We need to speak loudly enough so the last person on
2 the back of the jury can hear you.

3 A Can you hear me okay?

4 Q Yes, sir. Let's talk a little bit about your
5 background.

6 A Okay. My name Jason Leonard. I grew up in
7 Cincinnati, Ohio. I went to University of Willamette
8 Medical School where I graduated at the top of my medical
9 school class. I did residency in family medicine at
10 McLeod Family Medicine in Florence, South Carolina, where
11 I finished in 2007. Since 2007, I have been a physician
12 here at Colonial Family Practice in Sumter and I've worked
13 at the main office on Broad Street the entire time. My
14 background is family medicine. I am Board certified in
15 family medicine. I have served as the president of the
16 Sumter Clarendon Lee County Medical Society. Is that
17 sufficient.

18 Q I think I officially found the only person who speaks
19 faster than I do. I think Madam Court Reporter actually
20 agrees with me.

21 A I'll slow down.

22 Q Thank you so much. Dr. Leonard, again, I'm not --
23 you're here as a doctor. Do you treat Larry Durant?

24 A Yes.

25 Q How long have you treated Larry Durant?

1 A Since 2009.

2 Q I'm not here as an expert. I'm here, basically, to
3 talk about the fact that you have treated Larry Durant for
4 quite some time?

5 A That's correct.

6 Q How long have you treated him again?

7 A Since 2009.

8 Q I just want to go over briefly some of the things
9 that you have treated him for?

10 A Okay.

11 Q First of all, tell me about him as a patient.
12 There's been some suggestions about his eyes. Does he
13 have 20/20 vision?

14 A No.

15 Q As his doctor, what's his eyesight -- is he blind, is
16 he legally blind?

17 A Yes, he is legally blind. I don't know off the top
18 of my head his exact eyesight, but he is diagnosed with
19 legal blindness. That the diagnosis he had prior to me
20 seeing him.

21 Q Before he came to you, he had been diagnosed as
22 legally blind?

23 A Yes.

24 Q Number two, is he a double amputee?

25 A Yes.

1 Q Tell me about that. I know you don't treat him for
2 that, but he came to you also as a double amputee?

3 A That's correct. That's something that certainly well
4 predated my care for him, but that has been an issue.
5 That's one of the things I treated him for, any issues
6 related to his amputee status.

7 Q What do you mean the issues related to his amputee
8 status?

9 A He had chronic knee pain. He's had several times
10 where he's got knee effusions, which is inflammation in
11 the knee joint, and I've had to drain his knee several
12 times. He takes chronic medications for it.

13 Q And this is something he's talked to you about, his
14 chronic knee pain?

15 A Yes.

16 Q And he has met with you with his wife?

17 A Yes.

18 Q And they have talked to you about the knee pain and
19 the knee problems?

20 A That's correct.

21 Q Have they talked to you about problems with sexual
22 intercourse because of knee pains and knee problems?

23 A They have briefly, yes.

24 Q So that is something they have discussed with you?

25 A Yes.

1 Q And discussed with you problems with different
2 positions and the safest way of having intercourse because
3 of his knee problems?

4 A Yes.

5 Q Including standing up?

6 A Yes.

7 Q You have also treated him for erectile dysfunction?

8 A That's correct.

9 Q Could you -- I'm not going to get into it, but you
10 have treated him for erectile dysfunction for quite some
11 time?

12 A That's correct, pretty much the entire time I've been
13 taking care of him.

14 Q So since 2007, 2008, he's had erectile dysfunction?

15 A That's right.

16 Q In treatment for erectile dysfunction, one of the
17 things you do is give him prescriptions to help him
18 maintain or keep an erection?

19 A That's correct.

20 Q His wife has been in there when he's had these
21 problems?

22 A Yes.

23 Q And she knows about it?

24 A Right.

25 Q So this isn't something he's come to you, I need

1 these things. He's had erectile dysfunction?

2 A Yes.

3 Q That erectile dysfunction, could it be related to any
4 other disorders or anything he has? I just don't know.
5 Or is that anything you've looked at through your
6 treatment?

7 A Do you mean what is the cause of erectile
8 dysfunction? Is that what you're asking?

9 Q No, that's not what I'm asking. But he has been
10 treated for erectile dysfunction?

11 A That's correct.

12 Q This is something that's indicated in his charts?

13 A That's correct.

14 Q This is something you have treated him for for quite
15 some time?

16 A That's correct.

17 Q And then, finally, Doctor, have you ever treated
18 Mr. Durant for a chronic disease which is transmitted
19 sexually?

20 A Yes.

21 Q Is this a disease that is still active in his body?

22 A Yes.

23 Q Would this be a disease that was active in his body
24 from the entire time that you have known him and treated
25 him?

1 A Yes, I diagnosed him with it in 2009.

2 MR. KENT: Thank you so much. Thank you for your
3 time.

4 THE COURT: Cross?

5 MS. ABEE: Yes, Your Honor.

6 CROSS-EXAMINATION

7 BY MS. ABEE:

8 Q Dr. Leonard, do you have knowledge of sexually
9 transmitted diseases educationally?

10 A Yes, ma'am.

11 Q And are you aware of how they're transferred?

12 A Yes, ma'am.

13 Q And is this something you're very familiar with?

14 A Yes, ma'am.

15 Q I want to first talk a little bit about the erectile
16 dysfunction that Mr. Kent talked to you about. Now, you
17 said that you were treating Mr. Durant for erectile
18 dysfunction, right?

19 A Yes.

20 Q And treating means helping cure someone, right?

21 A Well, some diseases aren't curable. If you had
22 diabetes, I cannot cure of that unless you have dramatic
23 weight loss, so managing would be the more appropriate
24 medical term.

25 Q So managing his erectile dysfunction, right?

1 A Yes.

2 Q And I believe there was some mention of medicine that
3 would allow Mr. Durant to be able to maintain an erection,
4 correct?

5 A That's correct. That is kind of the standard.
6 There's medications to use. If there's causes such as low
7 testosterone or other conditions, we can work on treating
8 those with medications.

9 Q And you prescribe that type of medication to the
10 Defendant?

11 A Yes, ma'am.

12 Q And now I want to talk about the sexually transmitted
13 disease that you stated that Mr. Durant had. Sexually
14 transmitted diseases are usually transmitted through some
15 type of fluid, right?

16 A Correct.

17 Q So semen, right?

18 A Semen, blood, yes.

19 Q Saliva?

20 A Saliva.

21 Q And usually they're transmitted through some sort of
22 open wound in the body; is that right?

23 A Potentially, but not always.

24 Q But if there's some sort of cut, then that allows
25 that fluid to get into the body, right?

1 A Yes, but it gives you a higher instance of
2 transmission, but it's not mandatory for a transmission.
3 And again, we're speaking very broad terms here. I mean,
4 there's so many sexually transmitted diseases, each of
5 them have different modes of transmission.

6 Q I'm going to try to slow down so you slow down.
7 Sexually transmitted diseases aren't always transferred,
8 are they?

9 A No, ma'am.

10 Q Say, for instance, if someone didn't ejaculate, you
11 stated that sexually transmitted diseases transferred
12 through semen, if someone ejaculated in their hand, then
13 that wouldn't be inside the body, correct?

14 A Correct.

15 Q So that would be a low probability that a sexually
16 transmitted diseases would, in fact, transfer, wouldn't
17 it?

18 A That's correct.

19 MS. ABEE: Your Honor, I have no further questions.

20 THE COURT: Redirect?

21 MR. KENT: Nothing further. I'd ask that Dr. Leonard
22 be excused.

23 THE COURT: You may step down. You're free go.

24 THE WITNESS: Thank you.

25 THE COURT: Next witness.

1 MR. KENT: May I have five minutes, sir?

2 THE COURT: Yes.

3 Folks, let me send you out. We're going to take just
4 a few minutes break, check on lunch. I told them to order
5 you lunch. What we're going to do is have a short lunch
6 hour so you can eat your lunch here. And we can get on
7 track to get it to you shortly thereafter. So we'll check
8 on when it will be here and then we'll have you back in
9 just a few minutes for figuring out exactly what we're
10 going to be doing around this next hour or so.

11 Okay. So, again, don't begin deliberations or
12 discussions. We will have you back in just a few minutes.

13 (WHEREUPON, the jury left the courtroom at 11:58
14 a.m.)

15 THE COURT: Okay. You made the decision about him
16 testifying?

17 MR. KENT: That's why I was asking just five minutes.

18 THE COURT: Okay. We'll take five. Be right back.

19 MR. KENT: Thank you.

20 (WHEREUPON, a short break was taken.)

21 THE COURT: All right. Let the record reflect the
22 Defendant is in the courtroom.

23 Mr. Kent, what's the Defense's plan of course at this
24 time?

25 MR. KENT: Your Honor, the Defendant will not be

1 testifying. And that will be the extent of the Defense's
2 case.

3 THE COURT: Okay. Well, Mr. Durant, I want to talk
4 to you again one last time. Your lawyer has told me now
5 that you are not planning on testifying. I've told you
6 now throughout the trial that that is your decision and
7 your decision alone. If you want to testify, you
8 certainly can. And, again, you would be subject to not
9 only answering questions from your lawyers, but also from
10 the State, as well. But if you do not want to testify, I
11 will instruct the jury that that is your Constitutional
12 right and they are not to hold that against you at all
13 while they are deliberating. Do you understand that?

14 THE DEFENDANT: Yes, sir, I do.

15 THE COURT: Do you have any questions you want to ask
16 me about that or your lawyers?

17 THE DEFENDANT: No, sir, I don't.

18 THE COURT: All right. You made a decision you do
19 not want to testify?

20 THE DEFENDANT: That's correct, sir.

21 THE COURT: All right. Well, then you may be seated.
22 So now, the Defense will rest. Are you guys going to
23 have any rebuttal.

24 MS. ABEE: Your Honor, as to the last witness's
25 testimony, we were thinking about it but we don't have our

1 ducks in a row to call a rebuttal case based on that last
2 witness at this moment.

3 THE COURT: Well, I'm going to bring the jury in.

4 Do you want me to tell the jury that you're resting
5 or would you prefer to rest in front of the jury?

6 MR. KENT: I prefer to rest.

7 THE COURT: Okay.

8 MR. KENT: You know, I like to talk. I like to hear
9 my voice.

10 THE COURT: What's that?

11 MR. KENT: I like to hear my voice.

12 THE COURT: Well, you know, it has a certain melody
13 to it.

14 Well, I'm going to send them to lunch -- or they're
15 going to have lunch brought here. I'm going to tell them
16 1:00 o'clock, we'll be ready to go.

17 MS. ABEE: Yes, sir.

18 THE COURT: We'll do the jury charge real quick
19 before we let you guys go.

20 (WHEREUPON, the jury entered the courtroom at
21 12:08 p.m.)

22 THE BAILIFF: All the jurors are back in the
23 courtroom, Your Honor.

24 THE COURT: All right. Thank you.

25 Any further witnesses from the Defense?

1 MR. KENT: Your Honor, at this point in time, that
2 would be the case for Larry Durant. That would be the
3 extent of our case.

4 THE COURT: All right. The Defense has rested. Will
5 there be any rebuttal from the State?

6 MS. ABEE: No, Your Honor.

7 THE COURT: Okay. Well, folks, you have now heard
8 all of the evidence that you are going to hear in the
9 trial. I'm going to send you back to the jury room. I
10 had the clerk order you lunch. It should be here any
11 moment. I'm doing that now so that we can kind of move
12 things along a little bit quicker. So what I'll do is
13 when you go back there, as soon as lunch comes, go ahead
14 eat it. And then we're going to -- hopefully, it will get
15 here soon and then we'll start back up at 1:00 o'clock
16 with the closing arguments. And then I'll charge you on
17 the law, and then we'll get it to you for your
18 deliberations.

19 Now, you have heard all of the evidence that you're
20 going to hear in this trial, but it is still improper for
21 you to begin your deliberations because you haven't heard
22 closing arguments, nor have I told you what the law is in
23 this area. So you cannot begin your deliberations. But
24 while you're back there, please, do not jump the gun and
25 discuss witness demeanor, any of the evidence, anything at

1 all about the case. Talk about whatever you want to,
2 except this case. Okay.

3 Go ahead and go on back. If you -- if the meal comes
4 and you want to go stretch your legs or something, that's
5 fine, you can do that. Just try to be back in the jury
6 room by 1:00 o'clock. I'd like to get started back as
7 soon as we can, assuming that lunch isn't late. I'll give
8 you a little bit of time if it doesn't get here. They
9 said it's on its way and, hopefully, will be here in a
10 minute. Thank you so much. We'll see you back at
11 1:00 o'clock.

12 (WHEREUPON, the jury left the courtroom at 12:10
13 p.m.)

14 THE COURT: All right. Do you have any motions that
15 you want to make at this time?

16 MR. KENT: I'd renew all my motions made throughout
17 the course of the trial, Your Honor. I renew all our
18 pretrial motions. I renew our directed verdict motion and
19 ask for a subsequent directed verdict motion now that it's
20 made at the conclusion of the case.

21 THE COURT: All right. For the same reasons that I
22 denied them earlier, I'll deny them again.

23 MR. KENT: Yes, sir, Your Honor.

24 THE COURT: All right. Well, have y'all had a chance
25 to look at the jury charges? Is there anything from the

1 State on them?

2 MR. FERNANDEZ: I didn't notice anything that jumped
3 out at me, Your Honor, and I don't think we have any
4 additional requests.

5 THE COURT: How about the Defense?

6 MR. KENT: No.

7 THE COURT: Anything? She knows the law.

8 MS. BLAZER: I'm the law lady, I guess. No, Your
9 Honor, we're perfectly happy with the charge.

10 THE COURT: Well, there's a first time for
11 everything.

12 All right. Well, then, do y'all want to open and
13 close or just close?

14 MS. ABEE: I'd prefer to just close, Your Honor.
15 It's up to the Defense.

16 MR. KENT: (Indicating in the negative.)

17 THE COURT: How long do you think you'll need?

18 MR. KENT: Four hours.

19 THE COURT: That's why I asked, there will be a
20 limit.

21 MR. KENT: No, Your Honor, 20 minutes.

22 THE COURT: Okay.

23 MS. ABEE: I can be done in under 30.

24 THE COURT: I won't -- if you get to that point where
25 we're looking at 30 minutes and it doesn't look like

1 you're winding up, I'll start making noises that will
2 hopefully not disturb you. I've seen you before in
3 action, 20 minutes is awfully ambitious, but it doesn't
4 mean it won't happen.

5 MR. KENT: It will be an entertaining 20 minutes.

6 THE COURT: There you go. That's without commercial
7 breaks.

8 MR. KENT: Yes, sir.

9 THE COURT: All right. See you about 1:00 o'clock.

10 MS. ABEE: Thank you, Your Honor.

11 (WHEREUPON, a lunch break was taken.)

12 THE COURT: Do you have a problem with the copy of
13 the charges going back?

14 MR. KENT: No objection.

15 MS. ABEE: No.

16 THE COURT: All right. Ready?

17 MR. KENT: Yes, Your Honor. Thank you so much.

18 MS. ABEE: Yes, Your Honor.

19 THE BAILIFF: All jurors are back in the courtroom,
20 Your Honor.

21 (WHEREUPON, the jury entered the courtroom at
22 1:03 p.m.)

23 THE COURT: All right. Welcome back, folks. I hope
24 you enjoyed your lunch. I was a little bit disappointed
25 about not seeing any coleslaw in there. So you can go

1 back and tell your wife you had a salad. Oh, well.

2 We're now into the final phase of the trial before
3 you begin your deliberations, and that's the closing
4 argument by the lawyers. I'll remind you that what the
5 lawyers are now saying is not to be considered by you as
6 evidence. It's argument about the evidence. I will be
7 charging you on the law. And they know what I will be
8 charging you, so they will be giving you a preview of that
9 in their closing and discussing with you the facts in an
10 attempt to persuade you to render a verdict on their
11 client's behalf.

12 Our rules of procedure are that the State has the
13 right to close, and so you will hear from the Defense
14 first with their closing argument, and then you will hear
15 from the State.

16 After they are finished with the closing argument, I
17 will then go over the law or charge you on the law, and
18 you will then retire to consider your verdict.

19 So Mr. Kent, if you are ready, you may begin.

20 MR. KENT: Thank you, Your Honor. May it please the
21 Court.

22 CLOSING ARGUMENT BY MR. KENT

23 MR. KENT: One of my absolutely favorite movies is a
24 great southern movie called Cat on a Hot Tin Roof. Some
25 of you may have seen it, some of you haven't. It's black

1 and white. I watch it. People laugh at me, I like old
2 movies. There's a great Southern character in the movie
3 about a guy named Burl Ives. He since has passed, but he
4 was great. He had a great southern voice, something I
5 don't have. I have a high, pitchy, screechy voice, but he
6 had this great southern voice.

7 One of the things that is happening throughout the
8 course of the movie is Big Daddy is dying. And his whole
9 family knows that he's dying. They're sitting in a room,
10 like in a fancy parlor and talking about Big Daddy dying
11 and what they're going to do with Big Daddy's money when
12 he dies. When Big Daddy dies, this is what we're going to
13 do with his money. When Big Daddy dies, this is what I'm
14 going to do with his money. When Big Daddy dies, this is
15 what I'm going to do with his money. So they're all
16 talking about it.

17 And all of a sudden, Big Daddy walks in the room.
18 You know that feeling when you walk in a room and people
19 are talking about you? You know that real awkward feeling
20 and everybody gets real quiet and you know they're talking
21 about you? Well, that what happens. He walks in the room
22 and everybody is talking about him and they get quiet.
23 And he says this great line from television I have never
24 forgot. In his deep southern voice, he looks around and
25 he says, The air is filled with the stench of mendacity.

1 I said, man, that's some cool stuff. So I looked it up.

2 Ladies and gentlemen, mendacity is a lie. Mendacity
3 is untruth. Mendacity is a stench when you know that
4 there's just something wrong that just doesn't fit.

5 Ladies and gentlemen, that's what was is the stench that
6 has permeated this courtroom for the entire time that
7 we've been trying this case. We have sat here now for
8 four days. We have gone through evidence. We have gone
9 through witness after witness. And you have heard me talk
10 over and over again.

11 One of the things that has been very consistent as
12 you've walk in and out of the courtroom is you've probably
13 seen myself and Ms. Blazer stand up every time you walk in
14 the courtroom. Somebody's like, why do they always stand
15 up? I represent what y'all do so much that there's only
16 two people in this courtroom that I stand up when they
17 walk in, His Honor and y'all. I respect you because you
18 have taken your time, you have taken your energy and you
19 have taken your wisdom and you've sat there on a case that
20 is just difficult. So that's why we stand up as you come
21 in.

22 My job, as I told you in opening statements, is to
23 let you know what happened. That's it. We find our job
24 difficult because this is myself, it's Ms. Blazer,
25 Mr. Weeks and Larry Durant against the State of South

1 Carolina with all of their power, all of their money, all
2 of their resources. It's us.

3 I told you at the beginning of this case that it's
4 sort of like making a cake. And we better make sure at
5 the end of this trial once they make the cake that all of
6 the recipe, all of the ingredients are inside of this
7 cake. So as I said, as we listen to it, let's make sure
8 the State of South Carolina with all of their power, all
9 of their money, all of their resources has given us all
10 the ingredients that is necessary for them to prove their
11 case. I told you that. I'm telling you that. I
12 challenged you to listen for everything. What did they
13 offer you? Think about it.

14 The first thing, let's make this clear. This is one
15 case. This is case of the State of South Carolina versus
16 MINOR They have forgotten that. Because what
17 they have done, the first thing is they said, uh, we got
18 to make this cake. We've got to make this cake. We have
19 one recipe, but there's something wrong with that recipe.
20 Let's throw a bunch of other people in there. No charge.
21 But let's throw a bunch of people in there so they may not
22 realize the cake doesn't taste right. So what do they do,
23 they throw a bunch of other girls in. And I call them
24 girls, but they are adults. Let's be clear, these are
25 adult women that they've thrown in there. All of their

1 power, all of their money, all of their resources. And
2 they put them on the stand one by one to have them
3 testify. And they testified one by one and I listened to
4 them.

5 And let's start first with MINOR's testimony.
6 She testified. She testified to what happened and we
7 listened. The most important thing that MINOR
8 testified to, think back with your mind, think back with
9 your notes, is I asked her, I said, Tell me about his
10 prosthetics. You remember that? I said tell me about his
11 legs. Do you remember what I did? They go up to about
12 right here, right? And everybody remembers when I looked
13 at her and I said, They go up to about right here, right?
14 And what was her response? Yeah. They go up to right
15 there. And that's where they stop? Yeah. And I stopped.
16 We're going to get back to that in a minutes because
17 that's something that I want you to remember more
18 important than anything else that has been said throughout
19 the course of the trial.

20 We talked to MINOR about the dates. Do you
21 remember how specific she was on her dates? This happened
22 on this date at this time. This happened on this date at
23 this time. This happened on this date at this time.
24 Very, very specific. I thought it was a little strange,
25 but I didn't say anything.

1 And we offer all of these other women up, whose
2 stories, I will be honest with you, are remarkably
3 similar. Remarkably similar. I also found it very
4 peculiar that the only women who came forward, who have
5 made these allegations all just happen to be friends, just
6 happen to live together and just happen to have one common
7 person. Do you remember who the common person was?
8 Lizzie Johnson. I found that a little bit peculiar. But
9 I kept listening because I wanted to see the State of
10 South Carolina with all of their power, all of their
11 money, all of their resources give me something that I
12 could believe in because this is the State of South
13 Carolina. This is the charging arm. These are people who
14 make the decisions over people's lives. And what have
15 they offered you?

16 Let's do back to MINOR What did I tell you
17 in opening statements? God, I'd love to see some DNA
18 office. Because according to her and what did she say,
19 this happened in this office. This is where it happened.
20 This is where the ejaculate happened and that's where you
21 should find it.

22 One of the funnier things that happened is when the
23 State of South Carolina actually asked a DNA expert, DNA
24 degrades over time, doesn't it? It disappears? I think
25 we've all heard about cold cases and people getting

1 convicted hundreds of years later. But the State of South
2 Carolina wants you to believe that DNA can just disappear,
3 but they need it to disappear. Because if you believe in
4 DNA, oh, my gosh, we have a problem with our case, don't
5 we?

6 Then we did a forensic medical interview. What did
7 they tell you in the forensic medical interview? They
8 have the doctor on the stand, specifically, and they asked
9 the doctor. What did she say? There's no sign of sex.
10 Oh, God, we got to get past that. That doesn't fit our
11 cake theory. Well, Doctor, just because there's no sign
12 of sex doesn't mean that somebody had sex, does it? Just
13 because she still has a hymen doesn't mean she had sex,
14 does it? How much do we have to tolerate? No DNA
15 evidence. No sign of sexual trauma.

16 I asked one of the witnesses today. Do you remember?
17 Did any of them go to therapy at all? Not one person went
18 to any therapy. There's a reason why people don't go to
19 therapy? Because they don't need it or it didn't happen.
20 All the power, all the money, all the resources in the
21 State of South Carolina. What evidence have they offered
22 you? They put their own expert on the stand, David
23 Kellin, who testified -- and you remember, I asked him the
24 questions about the statement. I asked him about the
25 dates. And he says no, do you remember the last time you

1 had an Egg McMuffin? Kids don't talk like that. Children
2 don't talk like that. I asked him that, their witness,
3 their expert. So then they tried to fix that a little
4 bit. Oh, that's not really accurate. You know, Egg
5 McMuffins aren't as serious. People remember these
6 things. But he never budged, their expert. People don't
7 remember specific dates. People don't talk in specific
8 dates. No one said this happened six times and I can tell
9 you the exact date and the exact time. It's unrealistic.
10 Their witness, not mine. And this is what they offer us,
11 the great State of South Carolina.

12 So then, we put the officers on the stand. And you
13 remember the testimony of these officers. I'm going to
14 tell you candidly, Natalie Kelly, I've known her for a
15 long time. I respect everything she says. She's an
16 amazing officer I don't think she would lie or anything,
17 but there's problems when your investigators do this type
18 of investigation for a case that serious. But let's back
19 up. Did they really do an investigation or did they make
20 an assumption? The great State of South Carolina has been
21 what I told you, my ex-girlfriend or my fiancée. That's
22 what they've done. They decided somebody told them
23 something, we've got to believe it. So what do we do? If
24 somebody gives us evidence that's important. If somebody
25 tell us something we need to know. What are we going to

1 do? We ignore it. That's what they said on the stand.
2 We will ignore important information. We will ignore
3 important evidence. Why are we going to ignore it? Oh, I
4 just didn't think it was pertinent, Mr. Kent.

5 Somebody else looked you in the face and told you
6 that he wasn't the father of the child. This woman was 13
7 years old when she talked to them, which basically means
8 there is just about nobody in the United States could have
9 sex with her and not be a crime. So they said they
10 ignored that crime, didn't even look into that crime.
11 They don't put in a report vital information because they
12 don't want to turn it over. The reason they don't want to
13 turn over this vital information is because it will help
14 you make a decision. It might be a decision that they
15 want. And that's when things begin to get serious.

16 The last witness that I offered you in this trial,
17 myself -- well, let's go through two witnesses. Someone
18 in the back of the room, and I know the State of South
19 Carolina is going to come up here and they're going to
20 talk about Larry Durant's penis. Someone in the jury room
21 is going to ask the question, oh, my God, everything he
22 said is correct, but how in the world would those girls
23 know about his penis? Why would they know about that?
24 They must be telling the truth because they all know about
25 the penis. Because that's their case. Let's make that

1 perfectly clear, that's their case, the penis. Where they
2 took this poor man, they took his pants down and forced a
3 picture of him.

4 Let's remember the case earlier. You remember Lizzie
5 Johnson? You all remember Lizzie? Remember Lizzie
6 testified? Remember what Lizzie told you about the house,
7 the deed, the things she has stolen? Remember all the
8 stuff that she told you? Remember, she's still fighting
9 over this house right now? She looked you in your faces
10 and what did she tell you? I didn't sign that second
11 deed. Remember, all the girls giggled. I think we all
12 heard them, they were laughing back there. I found that a
13 little peculiar, but they all started giggling at that
14 point in time. And that's we called an expert to come in,
15 an expert to say look, I don't care what anybody says,
16 whoever signed this one definitely signed this one.

17 You remember, I asked Lizzie on the stand, look, if
18 you were to have signed both of these deeds, you'd agree
19 that's a big issue, isn't it? Oh, yeah. That would mean
20 that you, basically, stole \$20,000 from the City of
21 Sumter. Oh, yeah, I would agree with that. And you have
22 a stolen a \$112,000 home? Oh, I would agree with that.
23 And you have taken a charge out on a man who didn't do
24 anything wrong if both of those are your signatures. You
25 don't think that's motive. All the power, all the money,

1 all the resources of the State of South Carolina. And I
2 asked Lizzie at the beginning, was it difficult, was it
3 deceitful? Lizzie, did you used to date Mr. Durant?

4 Yes.

5 Were you sexually involved with Mr. Durant?

6 Yes. Use your own common sense at this point in
7 time.

8 The State may get up here and say oh, that's just not
9 believable. That's just not rational. If somebody is
10 going to steal a \$112,000 home, defraud the government of
11 \$20,000, has already been accused of stealing money from
12 Manning South Carolina, actually, been looked at by the
13 FBI for stealing money from a building that the church
14 owns, gone to law enforcement and lied about forgery,
15 which we now know, you don't think they could take it a
16 little step further?

17 You heard the testimony of Keshona Edwards to bolster
18 it. Remember what Keshona talked about in that car?
19 Look, I was in the car. They were giggling and talking
20 about Pastor Durant. That's why we put her on the stand.
21 I found that really peculiar. We asked her about the
22 tweets. She talked about the tweets, which I thought was
23 real interesting, A.R. talking about the tweets.
24 LMAOO, my mom's stupid, yo. Talking about the pastor had
25 all the pussy. He wanted all the pussy. Laughing my ass

1 off. A person who is alleging that she had been molested,
2 that she had raped, that she didn't want to do this is
3 tweeting and joking about all of this. She's talking to
4 her friend, T.H. [REDACTED], in the car joking about all of
5 this. Why are they laughing and joking about this?
6 Common sense, all the power, all the money, all of the
7 resources of the State of South Carolina.

8 Now, let's go finally, you've heard the armor
9 bearers. You've heard them get on the stand. You heard
10 them say, look, this happened in the church. We are
11 there. We're always outside the door. This couldn't have
12 happened. So now we have witnesses for us who said we
13 were sitting there. We didn't hear anything. We have
14 witnesses for the State of South Carolina who said we
15 didn't find anything. And we have experts who says we
16 definitely didn't find anything. We've got no DNA. We've
17 got a fully intact hymen. We've got a normal sexual exam.
18 All of this stuff shows normal. All of this shows is no
19 evidence. So the question we ask the great State of South
20 Carolina is when does no evidence actually become
21 evidence, because that's when they want you to believe.
22 When does no evidence become evidence?

23 Then, finally, the last witness I called. I
24 embarrassed my friend. I embarrassed a man of God in this
25 room, somebody I care about, who has been a good friend of

1 mine for three years, and I embarrassed him. I did it. I
2 put his doctor on the stand to talk about his ailments.
3 Why? Because I thought it was necessary to prove his
4 case. He does have erectile dysfunction. That, in and of
5 itself, shouldn't convince anything, but he has trouble
6 making love to his wife. He talked to his doctor with his
7 wife present about not being able to make love to his
8 wife, not being able to have sex standing up as these
9 girls have alleged that he did, that he goes in there and
10 he has sex standing up.

11 Then I asked the doctor about his sexually
12 transmitted disease. It gives me no pride in bringing
13 that up about this man in open court, but I needed you to
14 hear the whole story. And I know Ms. Abee asked all those
15 creative questions about well, there's a chance this
16 couldn't be transferred. There's a chance this couldn't
17 be transferred. Four women got on the stand and all
18 testified that none of them had a sexually transmitted
19 disease. I asked each and every one of them. I, myself,
20 had to call the investigator and ask about the condoms.
21 They all said no, he never wore condoms.

22 Then the State of South Carolina with all of the
23 power, all of their money, all of their resources clearly
24 did not go to high school biology. Because the comment
25 was you can have unprotected sex with a woman and

1 ejaculate in your hand and you're not going to spread any
2 STDs. The reason there was no spread of STDs, the reason
3 there was absolutely no DNA, the reason this child still
4 has a fully intact hymen, the reason nobody heard a single
5 thing, the reason they were in the car joking about all of
6 these matters, the reason they all happened to live in the
7 same home, the reason nobody else came forward other than
8 friends is very clear. It didn't happen. When is no
9 evidence? You must keep asking yourself that question.

10 And then, finally, my blind, no-legged friend, ask
11 yourself a question, is it possible? He's there. Look at
12 him. Ask yourself, this blind man with no legs, the great
13 mastermind, the amazing Larry Durant, who is able to
14 convince all of these people to lie for him or he's a man
15 whose faith is truly being challenged at this point in
16 time. All the money, all the power, all of the influence
17 of the State of South Carolina has come against
18 Mr. Durant. We've had officers hiding evidence. We've
19 had young ladies creating stories that are just not
20 realistic. And the one thing we have not had presented to
21 us is evidence.

22 The last thing I was going to tell you was the
23 picture of the penis. I'm going to embarrass my friend
24 one more time. This is the picture. We stripped a man
25 down and took a picture of his penis. And yes, I want you

1 to go back and look at it. And the one thing I want you
2 to notice about the picture of this penis, where do those
3 prosthetics go to? If someone actually saw this penis, do
4 you really think they're going to say the prosthetics
5 stopped at the knees or are they all the way up to his
6 thigh and his penis? She never saw it.

7 The Judge is finally going to instruct you at the
8 conclusion of this trial on reasonable doubt. He's going
9 to tell you that reasonable doubt is the type of doubt
10 that would cause a reasonable person to hesitate to act.
11 I've been practicing law now for almost 16 years. I went
12 to law school up in Michigan. I'm Carolina, I'm a
13 Gamecock. Don't like Clemson fans. Sorry if you are. I
14 came down from law school from Michigan and I will be
15 candid, I had been practicing law and I did not understand
16 reasonable doubt. I'll be the first one to admit it. You
17 see me in court, I barely understand what the Judge says.
18 Overruled or sustained, I had to stare at him a little bit
19 to make sure I understood. But I didn't understand the
20 theory of reasonable doubt until one day I was sitting in
21 my parent's house. And I've told this story many times.
22 I was sitting in my mom and dad's house. As I was sitting
23 at my mom and dad's house, it was one of those typical
24 spring days down in Charleston, South Carolina. My mom
25 was in the kitchen cooking collard greens, fried chicken,

1 anything you could thing about that's southern. Music was
2 playing, Percy Sledge was playing on the radio, I'll never
3 forget it, when a man loves a woman. The window were all
4 open because pollen was just going throughout the air.
5 You know the days I'm talking about. The cars are covered
6 in complete yellow. So we're sitting there and my little
7 brother is in the room. Mom's cooking, dad's listening to
8 music and I'm just sitting there with him. My brother --
9 and I can't to this day remember what happened, but he
10 ended up mouthing off to my mom, like he always did. So
11 my dad just lost it. He looks at me. He's like, you take
12 your butt upstairs to the room and don't you dare whatever
13 you do slam the door, show any attitude whatsoever. My
14 brother had an awful habit of slamming doors showing
15 everybody who was the boss when he went places. So my
16 little brother storms upstairs. Collard greens are
17 cooking, fried chicken, Percy Sledge, pollen coming
18 throughout the place. So my brother storms upstairs and
19 like clockwork, you can imagine it, you heard it, the door
20 slams. My dad got this rage on his face, just this anger
21 like nothing I've ever seen in my life. So he goes
22 storming up the stairs. All of a sudden, he goes storming
23 up the stairs, my mom comes storming up the stairs right
24 behind him. My mom is yelling, Herman, Herman, don't kill
25 him. I'm like, Herman, Herman, kill him because I want to

1 see my brother get his butt kicked. So we're all running
2 up the stairs at the same time together. Herman is just
3 furious. He's just angry. Percy Sledge playing, pollen
4 in the air, fried chicken, collards greens. You can see.

5 So we go into the room that we have over the garage.
6 And as we go into the room that we have over the garage,
7 my dad slams the door open. He throws it open. He's
8 angry. I know he's about to kill this kid and I'm just so
9 excited because I want to see him die. So we go in there.
10 As we go in there, there's my little brother just sitting
11 there in the middle of the floor just looking. Window is
12 open, breeze is coming in, pollen is everywhere. And he's
13 just looking. He's just looking at my dad. My dad goes
14 right up to him because he's about to smack the tar out of
15 him. He raises his hand and he gets ready to hit him.
16 And my brother says, Dad, I didn't do it. I'm mad. Bull,
17 just get him. So he's got his hands and he's about to do
18 something. He said, Dad, I didn't do it. It was the
19 wind. Ain't nobody believed it was the wind. But his
20 hands up, Percy Sledge is playing, fried chicken, collard
21 greens, you can taste, everything's yellow. And as my dad
22 gets ready to take that one move, all of a sudden, a gust
23 of wind comes, I promise you, and the breeze just comes
24 through the window, my dad just pauses. He hesitates. In
25 the back of his mind, he's like I'm not sure. And that

1 hesitation is a point that I actually understood what
2 reasonable doubt meant. That's the point when I realized
3 that hesitation is what it is.

4 At some point, you're going to be back in that jury
5 room and you're going to start talking about the case and
6 you're going to deliberate and you're going to finish.
7 You're going to go home and your family is going to ask
8 you a question, what happened with that trial. You're
9 going to tell a story about that crazy fellow who sat in
10 front of you on his knees and his hands looking like
11 Dewayne Wayne from those 80's television shows. And
12 they're going to talk to you about this. And they're
13 going to tell you what happened. And they're going to say
14 what did you do. At that point, if you have doubts, it's
15 too late. If you have doubts at all about this case,
16 today is the day that we have doubts. When you're talking
17 to your family, it's too late for Mr. Durant. Twenty
18 years from now is way too late for Mr. Durant. Today is
19 the day if we're going to have doubts.

20 I'll leave you with one last story. I've lived with
21 this case now for three years. It is story of a little
22 old man and a wise young boy. The little old man is just
23 very wise and the young boy has decided, you know what,
24 I'm going to fool this old man. This is how I'm going to
25 fool this old man. I'm going to go up to the old man.

1 I'm going to get a bird and I'm going to put it in my
2 hand. I'm going to have the bird in my hand and I'm going
3 go to the old man, Old man, is this bird alive or is this
4 bird dead? The old man is going to say, according to the
5 little boy, if he says the bird is alive, the boy is going
6 to crush the bird and show him and laugh. And say haha,
7 the bird's dead. Now, if the old man looks at it and says
8 it's dead, the boy said my plan is just to open my hand
9 and let the bird fly. So he's excited. He's got this
10 master plan.

11 So he goes up to the old man and he says, Old man,
12 what do you think I have in my hands? The wise old man
13 looks at the boy and he says you have a bird in your hand.
14 The boy gets a grin on his face and he says, Old man, is
15 that bird alive or is that bird dead? The man stops and
16 he pauses, he says it's your hands. It's your hands now.

17 THE COURT: All right. State ready?

18 MS. ABEE: Thank you, Your Honor. May it please the
19 Court.

20 CLOSING ARGUMENT BY MS. ABEE

21 MS. ABEE: For years of her life, MINOR spent
22 her Sundays in the Defendant's church. But not just her
23 Sundays, her Tuesdays, her Wednesdays, her Fridays, like
24 clock work. She grew up in the Defendant's church. And
25 it was at church that she listened to him read the word of

1 the Bible and pray for the congregation. But instead of
2 being her shepherd, he was nothing but a wolf in sheep's
3 clothing. Because back in his office he waited. He
4 waited as four young girls were brought in and he sexually
5 assaulted not one, not two, not three, but four young
6 girls in his office under the pretense of prayer. And
7 because he did that, you have to find him guilty.

8 Now, Judge Young is about to instruct you on the law
9 and ask you to return a verdict of guilty or not guilty.
10 We're asking that you find the Defendant guilty for the
11 crime of criminal sexual conduct with a minor in the
12 second degree. And in order to do that, we had to prove
13 two main things to you throughout this trial. One, that
14 there was a sexual battery. And a sexual battery is any
15 sort of penetration no matter how slight or how little or
16 how long it lasted, any penetration. Secondly, we had to
17 prove to you that that penetration happened between the
18 Defendant and MINOR when she was somewhere around
19 the ages of 11 and 14. That was our burden of proof to
20 you throughout the course of this trial.

21 Now, you and I and a lot of people sitting here in
22 this courtroom, we heard all the testimony that came from
23 the stand this week. And yes, a lot of this case rest on
24 the testimony of MINOR and A.R. and T.H. and
25 D.B. . There are no eyewitnesses. But we don't get to

1 pick who the victims are, and we don't get to pick the
2 location, and we don't get to pick the eyewitnesses.
3 Larry Durant picked that for us when he sexually abused
4 these girls. But even so, their testimony doesn't stand
5 alone. So let's take a look at what we heard throughout
6 this week.

7 You heard that these four girls, they grew up in this
8 church. These weren't just holiday church goers that went
9 a couple times a year, just on the holidays. They spent
10 their Sundays there and their Tuesdays and their Fridays.
11 They grew up in that church, so did their family members.
12 Their family members were daycare workers, ministers,
13 armor bearers, bookkeepers. Their family was deep in that
14 church, deep in the words of Larry Durant.

15 But then some things started to change. **MINOR** told
16 you that instead of just leaving after church, she started
17 to get called back to Pastor Durant's office. Not just
18 called back, brought back. His armor bearers would go to
19 wherever she was, in the parking lot, out in the church
20 and they would get her and ask her to come back because
21 the Defendant wanted to talk to her. And it was back in
22 this office where she got some special attention.

23 You see, the girls told you about altar calls. Altar
24 calls is when Pastor Durant would open up to the entire
25 church and ask who needed prayer. And people who needed

1 prayer would come up to the front and he would lay hands
2 on them. He would pray for them right there in front of
3 everybody. But not MINOR, MINOR got special private
4 prayer time because the Defendant needed to pray for
5 diseases. He needed to pray that she wouldn't like girls
6 anymore. And so she was brought back into his office
7 behind this door. This door where it says do not enter.
8 This door with the placard that says meeting in session,
9 please do not disturb or knock. This door where the
10 window is covered in paper. No one can see in. No one
11 can see out. This door would be shut, and it would be
12 locked because the Defendant would tell MINOR to lock it.
13 When she was in there -- and what the Defense wants you to
14 believe are these paper thin walls, but you can see with
15 your own two eyes these are cinder block walls. They're
16 not paper thin.

17 In this room with the cinder block walls, the praying
18 was a little different, too. Because this praying didn't
19 have words. So as the Defendant put his fingers inside of
20 MINOR's 13-year-old body, he didn't say anything. He
21 didn't pray anything. As he bent her over his desk, he
22 didn't say anything. He didn't pray anything. He was
23 supposed to be praying for her, but instead, he was
24 preying on her, preying on her innocence. Then when he
25 was confronted with this, he cried. He denied, but then

1 he apologized. Think about that.

2 But it wasn't just MINOR It was D.B. It was
3 T.H. It was A.R. All of these girls, he went
4 from praying for them to preying on them. Preying on
5 their belief in him, preying on their belief in his words
6 because these girls grew up in this church. And yes,
7 perhaps, it was naive. Perhaps, they should have known
8 better, but they were deep in the Word and deep in their
9 belief in Larry Durant.

10 Now, I know that it might be hard to sit here and
11 think about how a pastor could do that to lifelong members
12 of his congregation. It might be easier to just want to
13 sit here and think that these girls are lying, but in this
14 place, in this courtroom, we are not concerned with what
15 is easy. We are concerned with the facts. We are
16 concerned with the truth, no matter how hard a pill that
17 is to swallow. And the truth in this case points to the
18 guilt of Larry Durant.

19 Now, you heard from David Kellin this week. David
20 Kellin was qualified as an expert in the area of child
21 abuse dynamics and child maltreatment. Now, he has never
22 met these girls, never met A.R. , T.H. , MINOR ,
23 D.B. , has never met any of them, couldn't pick them out
24 of a lineup. He hasn't read a police report in this case,
25 hasn't read a written statement. But what he told us is

1 that the characteristics of this case are so similar to
2 the characteristics of sexual abuse cases. He knows
3 nothing about the case. He told us about delayed
4 disclosure and how delayed disclosure is extremely common
5 in sexual assault cases. And that's when somebody doesn't
6 tell that they were sexually assaulted right when they
7 were sexually assaulted. Some time passes, just like in
8 this case.

9 MINOR told you that it started in December of 2012
10 and she didn't report it until the end of May of 2013,
11 delayed disclosure. David Kellin told you that delayed
12 disclosure even increases when somebody is in a position
13 of authority. Someone is in a trustworthy position. This
14 causes the victims of sexual assault to delay in their
15 disclosure or not disclose at all.

16 And he also told us about the difference between
17 accidental disclosure and purposeful disclosure.
18 Purposeful disclosure is when someone comes out and says I
19 was sexually assaulted. They report it to the police.
20 They come out and say it. But accidental disclosure is
21 disclosure that comes out as part of a conversation. It
22 didn't intend to come out, but it comes out because what
23 people are talking about. And that's what we're talking
24 about here.

25 MINOR and A.R. didn't just go up the their aunt

1 and their mom and say hey, mom, this happened to me. They
2 were talking about it in a bathroom behind a closed door.
3 And they were overheard talking about it. That's how this
4 disclosure came out. They didn't seek out an adult. They
5 didn't seek out the police to try to tell them this
6 happened. They were overheard talking about it. That's
7 because this was an accidental disclosure. They didn't
8 want people to know that this happened to them.

9 And grooming. We heard about grooming, how grooming
10 is when somebody takes in their victim's family members,
11 tries to become friends with them. Tries to gain their
12 trust, gain their honesty. They want the family members
13 of their victims to trust them in everything they're doing
14 because then, they wouldn't believe that they were
15 perpetrators. And then they test the waters. Once
16 they're in there and they have developed a relationship
17 with the family, they start little by little. First, it
18 starts the touching, no one tells. No one reports to the
19 police. Then it escalates. Fondling of the breasts,
20 digital penetration, full on intercourse. After each one,
21 after each level is tested and no one reports and no one
22 tells, they move on to the next level.

23 And that is exactly what happened here. These girls
24 told you that it started with prayer. Prayer for the
25 breasts, then moved to the vagina, and then moved to full

1 on intercourse. Because Larry Durant groomed his victims.
2 He groomed that family to trust him, to trust their kids
3 with him. And they groomed those victims to not tell
4 anyone when they were sexually assault.

5 And yeah, David Kellin told you, each child is
6 different. Each case of sexual assault is different. He
7 told you that not everyone is ready for therapy and ready
8 for counseling. That in order for counseling and therapy
9 to be productive, you have to be ready to go through it.
10 So yeah, these girls didn't have counseling and didn't
11 have therapy, but that does not mean that this didn't
12 happen to them.

13 And each girl is different. You heard from these
14 four girls that told you that it happened and you hear
15 from Keshona Edwards who said it didn't happen to her.
16 What's the last thing David Kellin said to us when I was
17 questioning him? That false denials, which is when you
18 say it didn't happen when it did are more common than
19 false reporting. That's what the expert told you.

20 Now, Mr. Kent just got up here and presented to you
21 their closing argument. He said a whole lot of things and
22 he tried to poke a whole lot of holes in this case, so I
23 want to address them. But it's important to understand
24 they have no burden of proof in this case. They don't
25 have to prove a single thing to you. That burden rests

1 here with us. Mr. Kent could have sat here at this table,
2 kick up his heels and not said single word throughout the
3 course of this trial. Because that's our burden. But
4 when they do, whey they do decide to say things. When
5 they do decide to put on a case, you get to ask yourself
6 if it makes any sense.

7 So does it make common sense that Lizzie Johnson is
8 the mastermind of this great lie in order to have a house
9 and she put her daughter and her granddaughter and two
10 other girls she cares about through this? Through days of
11 sitting up here and listening to testimony of embarrassing
12 things. Does it make sense that she put them up to this,
13 for what, a house? It makes no sense. Why would these
14 girls be lying? They get nothing out of this. They have
15 absolutely no motivation to lie.

16 Does it make sense that this is the type of attention
17 that these girls want? Does it make sense that **MINOR**
18 **██████** wants to be known as the girl who was sexually
19 assaulted by her pastor? No 14-year-old, 17-year-old,
20 21-year-old, 40, 50, 60, 70, no one wants to be known as
21 the girl that was sexually assaulted by her pastor. So is
22 that the type of attention she wants? Is that what she's
23 getting out of this lie is attention?

24 Well, then, maybe she's lying, I don't know, to get
25 out of trouble. Maybe she's in trouble. She says she was

1 lying about it back then. She said she was lying about
2 good things, right? She was lying about her grades so she
3 could play basketball. She said she was lying about
4 having a cell phone so she could continue to talk on it
5 without it getting taken away. But what does she get out
6 of this lie? She gets nothing but the embarrassment of
7 telling what happened to her in a room full of strangers.
8 If this was a lie, why wouldn't she be telling everybody,
9 screaming it from the roof tops? Why wouldn't she tell
10 every single person in that congregation? Why wouldn't
11 she tell every single police officer? Why would she have
12 waited to tell? She didn't tell because she was
13 embarrassed. She didn't tell because she was scared. She
14 didn't tell because she wanted the Defendant to be right.
15 She wanted him to be right when he told that he could stop
16 her from liking girls because she knew it upset her
17 grandmother. She believed in him and wanted him to be
18 right. He took advantage of all of that.

19 And we saw her grandmother, Ms. Lizzie. Ms. Lizzie
20 took the stand. And she said some things. She added a
21 little bit of lightness and some stuff really heavy. She
22 said some things that made some people out here laugh, a
23 couple of you laughed and chuckled a little bit at it.
24 But the Defense wants you to think that these girls were
25 laughing because they think this is funny. It didn't look

1 fun to me when MINOR sat up on that stand and had
2 to describe how Defendant bent her over a desk. It didn't
3 look fun to me when A.R. got up here and had to
4 explain how the Defendant put his fingers in her vagina to
5 cure her from any diseases. It didn't look fun for me
6 when T.H. got up here and talked about how the
7 Defendant would rub her breasts to cure her from any sort
8 of diseases. And it did not look fun to me when D.B.
9 had to sit up here and tell you, a bunch of
10 strangers, that at the age of 14, she got pregnant and
11 that her Defendant told her that he could bump the seed
12 out of her so she wouldn't be pregnant anymore. And when,
13 surprise, that didn't work paid for her abortion. You saw
14 the \$500 check yourself to Johnnie Mae Brayboy, her
15 mother. That didn't look fun me.

16 They want you to believe that Lizzie Johnson is what,
17 angry at the Defendant for the house. That MINOR is just
18 confused and will do anything that Lizzie Johnson said.
19 You bet they are. Lizze Johnson is angry. She is angry
20 that she took her daughter and granddaughters to that
21 church religiously and that he abused not only her trust,
22 but their trust and faith and belief in this church. So
23 yeah, she is angry. And MINOR, she knows what happened
24 to her, but she is confused. She's confused as to why
25 someone that was supposed to protect her and pray for her

1 preyed on her. So yeah, the Defense is right, Ms. Lizzie
2 is angry and MINOR is confused, but not for the reasons
3 they want you to believe.

4 They want you to believe this is some sort of botched
5 investigation. That these are a bunch of crooked police
6 officers that had nothing but tunnel vision, that they
7 focused on one idea to the exclusion of all others and
8 paid no attention to anything else. That is not this
9 case. They talked to everyone. They collected everything
10 they could, even if it wasn't going to help their case,
11 and they turned it all over to the Defense. That
12 polka-dotted dress. You heard that polka-dotted dress was
13 collected years after MINOR had worn it. And she thought
14 she had even washed it between that time, she didn't know.
15 Everyone knowing that it could potentially turn up no
16 evidence, the State still collected it and turned it over.

17 But instead of focusing on what the State did do, the
18 Defense wants to draw your attention to these little red
19 herrings and these rabbit holes that don't matter. The
20 date on the memorandum. The date on the memorandum
21 doesn't matter. It doesn't matter at all. They want to
22 draw your attention to the fact that a forensic interview
23 wasn't done in this case. But your investigators weren't
24 serving and acting as forensic interviewers. They were
25 acting as investigators. Forensic interviews are done,

1 you heard, when a child is not clear in their disclosure,
2 that's it's hard to figure out what happened. It's clear
3 to figure out what happened in this the entire time.
4 Forensic interviews are done when children are
5 suggestible. And David Kellin told you himself that the
6 level of suggestibility changes over age. A four-year-old
7 is lot more suggestible than a 14-year-old. An
8 eight-year-old is more suggestible than an 18-year-old.
9 So these girls didn't needed forensic interviews. But
10 this is the type of stuff that the Defense wants you to
11 think about.

12 They want you to think they had tunnel vision, but
13 when all the signs point in one direction to the
14 Defendant, you have to follow those signs. And they
15 talked about how there is no physical evidence in this
16 case. There is no corroboration. First, it's important
17 to remember that testimony is evidence. That is evidence.
18 Just because you can't hold it in your hand doesn't mean
19 that it is not evidence. So there is plenty of evidence
20 that there is sexual assault in this case.

21 You heard Dr. Saunders that it's normal to be normal.
22 This isn't just us tweaking some theory for it to fit our
23 case. You heard that in 90 to 93 percent of sexual
24 assault examinations and sexual assault cases, there are
25 no signs of physical evidence or sexual trauma. Because

1 Dr. Saunders explained to you that it starts to heal, that
2 area of the body starts to heal fast, especially when once
3 you've puberty. She said within hours, within hours any
4 signs of trauma will start to heal.

5 MINOR had her physical exam 10 days after this
6 was even reported. A.R. was five days after that.

7 T.H. wasn't until the next year, the next calendar
8 year. So yeah, there was no physical signs of this
9 assault, but it's because the science supports that it
10 wouldn't exist.

11 Then they talked about the chair with no DNA on it.
12 The chair that the girls didn't even tell you that they
13 had sex on, but the cops collected it anyway. There was
14 never an allegation that they had sex on the chair. But
15 what there was an allegation of was how Pastor Durant
16 would clean up afterwards. A.R. told you that
17 he used hand sanitizer to clean up. So they collected
18 that hand sanitizer bottle. They waved a light on it and
19 they did a test. And it tested positive for acid
20 phosphatase, which is found in high concentrations in
21 semen. Exactly just like A.R. told you. She
22 said that he would pull out, ejaculate in his hand and
23 then she'd have to clean him up. And he's clean up with
24 that hand sanitizer. And high levels of acid phosphatase
25 were found on that bottle.

1 And, yeah, a DNA profile couldn't be developed off
2 of. There wasn't enough to develop a DNA profile. And
3 SLED only tested for female DNA. But once we're done and
4 Judge Young is done instructing you on the law, what you
5 will not hear him say is that there has to be DNA. What
6 you will not hear him say is there has to be physical
7 evidence. And what you will not hear him say is there has
8 to be eyewitnesses. What you will hear him say is that
9 you are the sole determiners of the credibility of what
10 comes out of that stand. What each of these witnesses
11 said. You decide what to believe or whether or not to
12 believe based on what you heard and what you saw here in
13 this courtroom.

14 Now, I want to talk a little about D.B. .
15 D.B. took the stand and she told you what happened to
16 her. And then the Defense, Ms. Blazer, got up here and
17 she read off the handwritten statement of D.B. . She
18 read where D.B. handwrote that none of this happened to
19 her. That she was strong armed by Valerie Williams, the
20 investigator. The Defense didn't bring this up in their
21 closing. Because even though they read the letter and
22 they introduced it, what did D.B. tell you? She said
23 that her mother got a phone call and said that if D.B.
24 copied down this statement in her handwriting that she
25 wouldn't have to testify. And she told you she didn't

1 want to testify. So she copied it down. And she doesn't
2 know who it was, but she knew it wasn't Investigator
3 Kelly. She knew it wasn't Investigator Valerie Williams.

4 But who benefited from that letter? Who, at least,
5 tried to benefit from that letter, that letter trying to
6 make D.B. recant what happened to her was the
7 Defendant. She wrote it so she wouldn't have to testify,
8 but somebody somewhere had her copy it so they could try
9 to ensure that she wouldn't testify. And why, because
10 everything she says is so compelling. And it is so on
11 line to what happened to MINOR and the rest of those
12 girls.

13 The the great mastermind behind all of this, this
14 deed. The deeds that were forged or not forged. Let's
15 talk about these deeds just a little bit. I didn't want
16 to because I honestly don't think they have anything to do
17 with this case. This isn't a case on forgery, this is a
18 case on sexual assault. But the Defense brought in an
19 expert who looked at copies of these, not with handwriting
20 exemplars, not the originals, but machine photocopies of
21 these. And he said that he could tell that it was the
22 same signature of Ms. Lizzie on both of them. But even on
23 his own report that you'll get to see, at the very end, it
24 says that he wants handwriting exemplars and that he could
25 only say it was most probable because he was looking at

1 machine copies. Even the Defense's paid expert said that
2 his opinion could change if he looked at the originals.
3 And they want to submit this to you as being 100 percent
4 the truth that Lizzie Johnson signed both of these.

5 But without looking at the loops in the handwriting
6 and the dots of the I's, you only got to look at basic
7 things and ask yourself common sense. Larry Durant deeded
8 or didn't deed the house to Lizzie Johnson on September
9 the 16th of 2009, and then she allegedly deeded it back to
10 him on the November 1st of 2009.

11 Why would she do that if she was forging both of
12 them? She would forge the deed to herself and then what,
13 forge his name again and forge the deed back to him? What
14 does she get out of that? She doesn't get anything out of
15 that. Why would she not just forge the deed to herself
16 and let it go? Why would she forge this one? Why would
17 she sign Larry Durant's name on this one? The person who
18 benefits from this one is Larry Durant. And on the back
19 page of this, the person who notarized it is Melody
20 Durant, his wife that's been sitting behind him this
21 entire time.

22 And even if this is forged, September 16th of 2009,
23 it was filed November the 4th of 2009, and this one was
24 signed November 1st, 2009. So let's say even if
25 Ms. Lizzie forged this deed to herself and then had some

1 sort of, I don't know, buyer's remorse and wanted to fix
2 it, this deed wasn't even clocked yet at the time that
3 this one was forged. So the house at the time that this
4 one was dated still belonged to Larry Durant. So why
5 would you forge both? The only important date on this is
6 May 31st of 2013. That's when this was filed. That's
7 when this was clocked. That's when Larry Durant had the
8 house in his name with the register of deeds. That's when
9 he could file notice of eviction on Ms. Lizzie. And this
10 is six days, six days after she chose her granddaughters
11 over Larry Durant. That's when this was filed.

12 Now, let's talk a little bit about the Defense's
13 witnesses. You saw their armor bearers, people in the
14 church. The armor bearers told you that it is their job
15 to protect Larry Durant. It is their job to serve him and
16 that is exactly what they did up on that stand. They
17 tried to protect him. They tried to serve him in every
18 way that they thought they knew that they could. What did
19 they actually give us? We know that they gave us some
20 lies, right? We know that these paper thin walls are
21 actually made out of cinder block. We know that that's
22 the truth. We know that Larry Durant, even though he's
23 legally blind, they told us that he has a driver's
24 license. And one of the first things you do when you get
25 a driver's license is what, an eye test. Check your

1 vision. They told us Larry Durant had a driver's license.

2 The Defense talked about this Twitter and these
3 tweets. These tweets, if you remember, Mr. Kent showed
4 [REDACTED] A.R. and she said this isn't me. She said this
5 isn't my Twitter. She goes it kind of looks like a
6 picture of me. And you'll be able to see it. It's a
7 black face with a white shirt. She said, I guess that
8 kind of looks like me, but that's not my Twitter handle.
9 I can't remember what it is, but would never capitalize my
10 name like that. They put up Keshona Edwards who said,
11 yeah, this is [REDACTED] A.R. 's account. It doesn't say
12 the name [REDACTED] A.R. anywhere, but I thought it was [REDACTED] A.R.
13 [REDACTED]. Because she's joking about this. But do you
14 remember her testimony? She said that she saw it. And
15 who made her take a screen shot out of it? Her mama. She
16 said her mama made her take a screen shot and then gave it
17 to Pastor Durant. Her mom that was deep in that church,
18 who worked at that church, worked with Larry Durant,
19 attended that church for longer than Keshona even did and
20 Keshona grew up there. That's how that existed. That's
21 how that got into evidence. And [REDACTED] A.R. told you
22 herself this is not her. This is not her words.

23 And then we have the fact that Mr. Durant has an STD
24 and that he has erectile dysfunction, that he can't have
25 sex. We know he has kids, so we know at one point in time

1 he could have sex, right? Then you heard the doctor say
2 that STDs aren't always transmitted. They're transmitted
3 through some sort of fluid, blood, saliva, semen. And I
4 asked him, the doctor who I'm sure has taken biology
5 classes, I asked him, so if somebody pulled out and
6 ejaculated in their hand, is it likely that an STD would
7 be transferred. He said you can't be positive, but no, it
8 would be a lot less likely than an STD would be
9 transferred. It has to be transferred through the fluid.
10 And thank God, it's not always transferred. Because these
11 girls don't have STDs. But it's because the Defendant --
12 the only testimony that we've heard of where he ejaculated
13 was in his hand, not inside of those girls.

14 If this was some big plot and ploy by Lizzie Johnson
15 to get this house back, then there's an issue with that.
16 Because T.H. told her mom in February. This came
17 out in May. So T.H. just must some sort of
18 crystal ball to know that Ms. Lizzie in May was going to
19 want to make these allegations against Mr. Durant, so she
20 said, you know what, I'm going to go ahead and disclose to
21 someone. Y'all, it makes no sense. If she's disclosing
22 in May to her mom and her mom's making a phone call saying
23 that this isn't going to happen anymore and it doesn't
24 happen anymore and then the other allegations come out in
25 May, it just doesn't support that theory. It doesn't

1 support the theory that all these girls got together, put
2 themselves through this, for what, a house, a house that
3 Ms. Lizzie's telling you she's still living in. She
4 hasn't been ejected from. It is still her house.

5 You know, the Defense has talked about cooking,
6 cooking dishes. I think they said Ms. Blazer was a
7 fantastic cook, which I believe. But they said when you
8 make a recipe and you leave out some ingredients, it
9 doesn't necessarily taste the same. So when you leave out
10 the salt and the pepper, the chicken isn't as flavorful,
11 but y'all, it's still chicken. It made not be as pretty
12 or it may not taste as good or look as good, but it still
13 is what it is. This case is still a case of sexual
14 assault no matter how pretty it is or how flavorful it is.
15 Just because that chicken doesn't have salt and pepper
16 doesn't mean it's not still chicken. And there just
17 because there wasn't DNA all over the room or semen all
18 over the carpet doesn't mean that this isn't a case of
19 sexual assault. That is a case of sexual assault because
20 MINOR says so and because she gains nothing out of
21 this. This isn't just a he said, she said. It's a he
22 said, she said, she said, she said and she said. All
23 these girls said it because it happened to every single
24 one of them.

25 But there are two pieces that can't be explained.

1 You have the underwear. The girls who said that he wears
2 white Fruit of Loom underwear, white little boy's type
3 underwear. You're going to get to look back at these
4 pictures when you're deliberating. The hamper at his
5 house and his dryer. White underwear. Girls got that one
6 right. And then his penis, which Mr. Kent already showed
7 you. They described it as flesh colored and pink.
8 There's a skin pigmentation on it. The girls got that one
9 right, too. It's not because Ms. Lizzie told them, it's
10 because they cause it with their own eyes. The only
11 testimony you heard was that they never said they'd seen a
12 picture of it. They had never seen -- or never heard
13 anyone talk about it. What Mr. Kent says isn't evidence.
14 So he can float as many theories as he wants out there,
15 but that's not evidence. The evidence that you heard is
16 that they had never seen a photo of it. That no one had
17 ever described it or told them about it. Yet, they can
18 describe it perfectly. And they can describe it perfectly
19 because they saw it with their own two eyes when they're
20 having sex with him. They saw it with their own two eyes
21 and their description is spot on.

22 We had to prove our case to you beyond a reasonable
23 doubt. And a reasonable doubt is not some imaginary doubt
24 or some fanciful doubt. It's not a doubt that just allows
25 Larry Durant to escape penalty of law. It is based on

1 reason. It is based on common sense. If you can stand
2 here with your feet firmly planted on the ground and say
3 yeah, that guy sexually assaulted MINOR then you can
4 find him guilty.

5 Mr. Kent told you a story about when causing a
6 hesitation to act. And that's what a reasonable doubt is,
7 something that causes you to hesitate to act. But nothing
8 caused Larry Durant to hesitate to act when he sexually
9 assaulted those girls. And nothing should cause you to
10 hesitate to act when you go to find him guilty. He was
11 supposed to be there shepherd, but he was nothing but a
12 wolf in sheep's clothing. These girls gained nothing out
13 of making any of this up. Find Larry Durant guilty.

14 CHARGE OF THE COURT

15 THE COURT: All right, folks, we are now at the point
16 where we are going to have me explain to you or charge you
17 on what the law is that applies to this kind of case. Do
18 you remember at the beginning of the trial, I told you,
19 you have a job in this trial. And one of my jobs was to
20 preside over the trial and to make sure that each side got
21 a fair trial for our rules of procedure and admissibility,
22 rule on admissibility, things like that. Your job is to
23 consider only the evidence that was before you and
24 presented in this courtroom. You can only consider
25 witnesses or evidence that was presented from the witness

1 stand or exhibits, such as photographs or documents, that
2 were admitted as part of the trial.

3 I also now have the additional duty of charging you
4 on the law that is applicable to this case. And it is
5 your duty under the oath that you took at the beginning of
6 the trial to accept the law and apply only the law as I
7 charge -- now, charge it to you. So if you have some idea
8 of what you think the law is or what it ought to be and it
9 does not agree with what I now charge you on what the law
10 is, you must forgot those ideas that you have because you
11 are sworn to accept the law and apply the law exactly as I
12 state to it you.

13 As jurors, you are the sole judges of the facts. As
14 I told you, I cannot comment on the facts or make any
15 statement about my feelings about the facts in this case.
16 You, the jury, are the sole judges of the facts. And you
17 are not to infer from anything that I said during the
18 progress of the trial in ruling on admissibility or
19 evidence or anything that I may say now or that I did
20 throughout the trial or during the course of this
21 instruction that I have an opinion about this case. The
22 law does not allow me to have an opinion about the case.
23 This is solely a matter for you to determine. And as
24 jurors, it is your duty to determine the effect, the
25 value, the weight and the truth of the evidence that was

1 presented throughout the trial.

2 I will remind you, the fact that the Defendant was
3 arrested, charged and indicted in this case is not
4 evidence in this case, and it cannot be considered by you
5 as evidence of guilt in this case, nor does it create any
6 presumption or inference of guilt. The document which is
7 known as the indictment that I told you about at the
8 beginning of the trial is simply the formal written notice
9 which contains the charge that was made against the
10 Defendant, and it is the formal document by which this
11 case is brought into this court. The indictment in this
12 case, which was indictment 2014-GS-43-947, which is right
13 here in my hand, alleges that the Defendant committed the
14 act of criminal sexual conduct with a minor in the second
15 degree. I will go over the elements of that in a few
16 moments. Right now, I just want to remind you, he was
17 indicted, but that is only the charging instrument, and he
18 pled not guilty to that indictment. And that plea puts
19 the burden on the State of proving the guilt of the
20 Defendant beyond a reasonable doubt.

21 A person who is charged with a criminal offense in
22 South Carolina is never required to prove himself
23 innocent. This is an important rule of law in this
24 country, that a defendant who is in a criminal trial will
25 always be presumed to be innocent of the crime for which

1 he is indicted unless and until his guilt has been proven
2 by evidence satisfying you of that guilt beyond a
3 reasonable doubt.

4 This presumption is just not some legal theory. This
5 isn't just a legal phrase that you hear about in law
6 school. This is a substantial Constitutional right to
7 which every defendant is entitled. And this presumption
8 of innocence accompanies the Defendant from the time he is
9 charged throughout the trial and unless and until you
10 reach a verdict of guilt beyond -- based on evidence
11 satisfying you of that guilt beyond a reasonable doubt.

12 I've told you the burden of proof is beyond a
13 reasonable doubt. Some of you may have served as a juror
14 in a civil case. And I explained to you at the beginning
15 of the trial, the burden of proof in a civil case is less
16 than it is in a criminal case. In a civil case, the
17 burden of proof is a preponderance of the evidence or is
18 whatever the party is trying to prove more likely true
19 than not true.

20 In a criminal case, the State's evidence must be more
21 powerful than that. It must be beyond a reasonable doubt.
22 Proof beyond a reasonable doubt is proof that leaves you
23 firmly convinced of the Defendant's guilt. Reasonable
24 doubt has also been define as the kind of doubt that would
25 cause a reasonable person to hesitate to act.

1 There are very few things in this world that we know
2 with absolute certainty. And in criminal cases, the law
3 does not require proof that overcomes every possible
4 doubt. If based on your consideration of the evidence,
5 you are firmly convinced that the Defendant is guilty of
6 the crime charged, then you must find the Defendant
7 guilty. If on the other hand, you think there is a real
8 possibility that the Defendant is not guilty, then you
9 must give the Defendant the benefit of the doubt and find
10 him not guilty.

11 I also want to instruct you again and emphasize, the
12 fact that the Defendant did not testify is not a factor to
13 be considered by you in any way in your deliberations and
14 in your consideration on the question of guilt or
15 innocence of the Defendant. It must not be considered by
16 you in any manner whatsoever. A defendant has a
17 Constitutional right to remain silent. And the assertion
18 of this right must not be considered by you in your
19 deliberations. I repeat that under your oath that you
20 took at the beginning of the trial, you are to draw no
21 conclusion whatsoever from the fact that the Defendant in
22 this case did not testify. The fact that the Defendant
23 did not testify should not even be discussed in the jury
24 room. The burden of proof, as I have stated to you, is on
25 the State. The Defendant is not required to prove his

1 innocence. The burden of proof remains on the State to
2 prove guilt beyond a reasonable doubt.

3 Now, during a trial, we, generally speaking, have two
4 types of evidence, direct evidence and circumstantial
5 evidence. Direct evidence directly proves the existence
6 of a fact and does not require deduction. Circumstantial
7 evidence is proof of a chain of facts and circumstances
8 which indicate the existence of a fact. Crimes may proven
9 by circumstantial evidence. And the law makes no
10 distinction between the weight or value to be given to
11 either direct or circumstantial evidence.

12 However, to the extent that the State relies on
13 circumstantial evidence, all of the circumstances must be
14 consistent with each other and when taken together point
15 conclusively to the guilt of the accused beyond a
16 reasonable doubt. If the circumstances merely portray the
17 Defendant's behavior as suspicion, this the proof has
18 failed. The State has the burden of proving the Defendant
19 guilty beyond a reasonable doubt. This burden rests with
20 the State regardless of whether the State relies on direct
21 evidence, circumstantial evidence or some combination of
22 the two.

23 Also, as jurors, you must determine the credibility
24 of witnesses who testified in this case. Credibility
25 simply means believability. It's your duty as jurors to

1 analyze and evaluate the evidence and determine which
2 evidence convinces you of its truth.

3 In determining the believability of witnesses who
4 testified in this case, you can believe one witness over
5 several witnesses or several witnesses over one witness.
6 You can believe the testimony of a witness in its entirety
7 or you can reject the testimony of witness in its
8 entirety. You can believe a part of the testimony of a
9 witness and reject the remaining part of the testimony of
10 that same witness. If you reject part, you can still
11 accept the remainder of a witness's testimony.

12 You may consider whether any witness has exhibited to
13 you any interest, bias, prejudice or other motive in a
14 case. You can consider the appearance and demeanor of the
15 witness while the witness is on the witness stand. You
16 are not bound to decide the case based on the number of
17 witnesses that a side produces.

18 Now, as to the indictment for the charge of criminal
19 sexual conduct with a minor second degree, the State must
20 prove beyond a reasonable doubt that the Defendant engaged
21 in a sexual battery with the victim. Now, victim is
22 defined as the person alleging to have been subjected to
23 criminal sexual conduct. Actor means a person accused of
24 criminal sexual conduct. And sexual battery is sexual
25 intercourse, cunnilingus, fellatio, anal intercourse or

1 any intrusion however slight of any part of a person's
2 body or any object into the genital or anal openings of
3 another person's body except when the intrusion is
4 accomplished for medically-recognized treatment or
5 diagnostic purposes.

6 The State must then prove beyond a reasonable doubt
7 that the victim was, at least, 11 years old, but not more
8 than 14 years old at the time of the sexual battery.

9 Consent, willingness, indifference or ignorance on the
10 part of the minor, if any, as to what was taking place
11 does not in any way affect the charge of criminal sexual
12 conduct with a minor because an unmarried woman under the
13 age of 14 cannot legally consent to sexual intercourse.

14 Now, in determining your verdict of guilty or not
15 guilty, you cannot consider any possible penalty for a
16 particular crime. The punishment for the crime is a
17 matter for me to determine. It should never be considered
18 by you in any way whatsoever in arriving at a verdict of
19 guilty or not guilty. Your verdict must be unanimous. In
20 other words, all 12 of you must agree.

21 There are two possible verdicts in this case. It's
22 guilty or not guilty. There is no significance whatsoever
23 in the order in which I stated these possible verdicts. I
24 just simply have to state one of them first.

25 Now, Mr. Foreman, when the jury agrees on a verdict,

1 you take and write on the back under here where it says
2 verdict what the verdict is. You will write either guilty
3 or not guilty, and then you'll sign it and date it and let
4 the bailiff know that you have reached verdict.

5 I'm going to send you back now into the jury room.
6 However, don't begin your deliberations just yet. I have
7 to give the lawyers the opportunity to say if I misspoke
8 in some way. Then we'll have the evidence brought back to
9 you by bailiff, along with a copy of the jury charges and
10 the indictment. Once that bailiff comes back with that,
11 he will tell you the judge says it's okay for you to begin
12 your deliberations. But just let us go through this
13 formality. It doesn't take five minutes. Go back. Don't
14 begin deliberations until I send this back and the bailiff
15 tells you that you can begin your deliberations.

16 (WHEREUPON, the jury left the courtroom at 2:14
17 p.m.)

18 THE COURT: Anything from the State?

19 MS. ABEE: No, Your Honor.

20 THE COURT: From the Defense?

21 MR. KENT: Nothing, Your Honor.

22 THE COURT: Okay. Let's just double check and make
23 sure we've got everything.

24 And if you would, let me have the two alternates so I
25 can discharge them.

1 (WHEREUPON, State's Exhibit No. 7 has been redacted.)

2 (WHEREUPON, the alternates came into the courtroom at
3 2:15 p.m.)

4 THE COURT: Okay. Now, ladies, once the case is
5 submitted to the jury, you are done. You don't have to
6 come back, call or anything like that. You're free to go
7 for the week. They'll send you a check, I guess, in the
8 mail. Thank you for your service. If anybody calls you
9 about the case or contacts you to talk to you about it,
10 you're free do that. Sometimes the lawyers will call
11 afterwards. They're not doing anything wrong. If you
12 want to talk to them, you can. If you don't want to, you
13 don't have to. Thank you for your jury service this week.
14 Hope you enjoyed it.

15 (WHEREUPON, the alternates left the courtroom.)

16 THE COURT: All right. Alternates are discharged.
17 Got all the evidence.

18 MS. ABEE: Yes, Your Honor.

19 MR. KENT: Yes, Your Honor. We reviewed that.

20 THE COURT: Go ahead and tell them they can begin
21 deliberations.

22 Y'all can be at ease. Don't wander off too far.

23 (WHEREUPON, the jury began deliberations at 2:16
24 p.m.)

25 (WHEREUPON, jury sent out note at 5:11 p.m.)

1 THE COURT: Well, something different comes up just
2 about every trial, it seems like. Got a note from the
3 jury. The bottom line is they are split, locked up. They
4 told me what their split is, but I'm not going to tell you
5 what it is, but for one thing.

6 It says, Your Honor, after two hours and 45 minutes,
7 presumably, and it says the vote is after four attempts,
8 and it tells me what the break is between guilty and not
9 guilty, but the usual thing is they have one juror who
10 will not vote.

11 MS. ABEE: What?

12 THE COURT: I've never had that. And I don't know
13 how to deal with that other than bring them in, give them
14 an Allen charge, ask them to try and tell them that not
15 voting is just not an option. They need to vote guilty or
16 vote not guilty, but not voting doesn't do anything. I'm
17 completely open for suggestions on it. It's such a
18 baffling thing, I'm almost certain that it would be
19 unique.

20 MR. KENT: It would be one of my typical trials then.
21 I'm not asking the break down, but would it still be a
22 hung jury without the one person who wouldn't vote?

23 THE COURT: Correct.

24 MR. KENT: You understand why I asked that question?

25 THE COURT: Uh-huh.

1 I'm just going to give them a version of an Allen
2 charge and try to explain to them that we need them to
3 continue to work at it and reconsider and consider. And,
4 you know, the standard language about no juror is going to
5 hear anything different and they're as good of a jury as
6 the next one, and please continue to try.

7 MR. FERNANDEZ: Your Honor, I don't know if this is
8 crazy, but there were two alternates. I know we spoke to
9 one of them, but there might be --

10 THE COURT: Well, I've discharged them. The law says
11 you're supposed to discharge them.

12 MR. KENT: Since they're discharged --

13 THE COURT: If they're gone, that's not an option.

14 MR. KENT: Your Honor, just for the record, I
15 understand the Court at this point in time, I understand
16 the case law would be interested in giving an Allen
17 charge. On behalf of Mr. Durant, we would object to the
18 Allen charge. We think there's case law that suggest that
19 it may unfairly target the minority jury. I don't know
20 the break down, but just for the record, we object to the
21 Allen charge.

22 THE COURT: Okay.

23 MR. KENT: I just wanted to place that on the record.

24 THE COURT: Anything you want to add by way of
25 suggestions?

1 MS. ABEE: No, Your Honor.

2 THE COURT: All right. Bring jury in.

3 (WHEREUPON, there was an off-the-record
4 discussion.)

5 (WHEREUPON, the jury entered the courtroom at
6 5:15 p.m.)

7 THE BAILIFF: All the jurors are back, sir.

8 THE COURT: All right. Folks, I got the note that
9 you sent back through the Foreman. It's a little unusual
10 in having -- it's not unusual to have a jury that has
11 difficulty coming to a verdict. I've yet to have one that
12 says somebody won't vote. But let me just give you some
13 words of guidance before I send you back.

14 Jury duty is a difficult thing. It really is. What
15 we ask people to do is not easy. Some cases are easier
16 than others, but all of them are really hard, if you ask
17 me. First of all, to get two people to agree that the sun
18 rises in the east in the morning is kind of difficult. To
19 get 12 people to come in and listen to a week's worth of
20 testimony and reach a unanimous agreement, well, it's
21 hard. And people see things different ways and, you know,
22 have different interpretations of what it is they believe
23 is the right verdict. I completely understand that.

24 When we have a situation like this, I like to ask the
25 jury to do two things. First is keep -- I guess the way I

1 would like to phrase this is consider your position and
2 consider the other side's position. Whether you're in the
3 majority or in the minority at this particular time, I
4 don't want to know. In fact, I would ask that you not
5 tell me what the vote break down is.

6 But those of you that are in the majority of the vote
7 for one way, consider whether or not the minority's
8 position has merit to it. Just think about it as well, if
9 I were in their shoes, would I see it that way? Those of
10 you that are in the minority position, then I would ask
11 that you do the same thing. Put yourself in the other
12 person's shoes. And sometimes that helps people to see
13 that the other side has merit to it. And again, I'm not
14 trying to say change your mind. You may go into and come
15 out of that little mental exercise with the exact same
16 position. But it's often helpful when you have a
17 difficult decision to make to see if you can see it from
18 the other guy's viewpoint. Maybe that will help you out.
19 That's really about the best guidance that I can give you.

20 Because if you folks can't make a unanimous decision,
21 then what we'll have to do is come back, get another jury,
22 and we'll have to present, essentially, the same evidence
23 that you heard this week and another 12 people will have
24 to make a decision. I don't have any reason to suspect
25 that there's any 12 better people in Sumter County than

1 you 12 folks. You guys see how the process went. It was
2 completely a sort of random process which you got picked
3 for jury duty. You know, it was a process we went through
4 to eliminate that nobody knew anybody or knew anything
5 about the case, had any preconceived outcome or had any
6 prejudices. Everybody that's on this jury right now,
7 essentially, said I can be a fair and impartial juror in
8 this case and that I will make a decision based on what I
9 hear in this courtroom and what you, the judge, tell me
10 the law is. That's all what we can ask any 12 jurors to
11 do. That's how you got on this jury. If we have to retry
12 it before another jury, I don't have any reason at all to
13 believe that there are any 12 better folks than you 12
14 folks to make this same decision. But that's what we'll
15 do if you folks can't come up with a decision. So what I
16 would ask is that you go back and see if you can work on
17 it some more.

18 If you tell us you can't make a decision, then we'll
19 respect that, but give it another shot in light of what
20 I've told you and see if there's some way that you can
21 come up with a unanimous verdict.

22 Now, I don't know who the one person is, and I'm not
23 asking who the one person is that won't vote, but that's
24 really not helpful to the situation at all. All that will
25 do is ensure that we have a mistrial if you continue to

1 refuse to even vote even if the 11 other folks do reach
2 unanimous decision. So that's not a helpful process and
3 really under the process we have, we need all 12 people to
4 vote. I don't care how you vote, but it really does -- it
5 really is necessary for you to vote in order for us to
6 have a verdict. Whether it's guilty or not guilty, it's
7 got to be unanimous one way or the other. So we do need
8 you to participate whoever this person is at this point is
9 saying I'm not voting.

10 So in light of that, let me send you back. However
11 long it is you want to take this evening, we'll be here as
12 long as you want to be here. You know, I'll leave it at
13 that.

14 And Mr. Foreman, go ahead and send your jury back and
15 see what you can come up with.

16 (WHEREUPON, the jury left the courtroom at 5:21
17 p.m.)

18 (WHEREUPON, Court's Exhibit No. 2 was marked for
19 identification only.)

20 THE COURT: Okay. Well, carry on.

21 (WHEREUPON, Court was in recess awaiting a
22 verdict.)

23 THE COURT: All right. We have everybody now. Let
24 the record reflect the Defendant is in the courtroom.

25 I understand we have a verdict?

1 THE BAILIFF: Yes, sir.

2 THE COURT: Bring the jury in.

3 (WHEREUPON, the jury entered the courtroom at
4 5:55 p.m.)

5 THE BAILIFF: All the jurors are back in the
6 courtroom, Your Honor.

7 THE COURT: All right. Mr. Foreman, I understand the
8 jury has reached a verdict; is that correct?

9 THE FOREMAN: Yes, sir, Your Honor.

10 THE COURT: Is it unanimous?

11 THE FOREMAN: Yes, sir, Your Honor.

12 THE COURT: All right. Would you hand it to the
13 bailiff, please.

14 All right. Publish the verdict.

15 If the Defendant will arise.

16 (The Defendant rose.)

17 VERDICT

18 THE BAILIFF: The State of South Carolina, County of
19 Sumter in the Court of General Sessions, docket number
20 2014-GS-43-947. As to the indictment of criminal sexual
21 conduct with a minor in the second degree, we, the jury,
22 find defendant guilty. Signed by Roy --

23 (Defendant's wife fainted.)

24 THE BAILIFF: -- Graham, 5/26/16.

25 Ladies and gentlemen of the jury -- may I have your

1 attention, please. Ladies and gentlemen of the jury, is
2 this your verdict, so say you all by raising your right
3 hand.

4 UNIDENTIFIED WOMAN: Oh, my God.

5 THE BAILIFF: All right. Thank you.

6 THE COURT: Do you wish to have the jury polled?

7 MR. KENT: Yes, Your Honor.

8 THE COURT: All right. Poll the jury, please.

9 THE BAILIFF: Ladies and gentlemen, when I call your
10 name and number, please stand and raise your right hand.

11 THE BAILIFF: No. 181, Robert Wingard, was this your
12 verdict?

13 JUROR: Yes.

14 THE BAILIFF: Is it still your verdict?

15 JUROR: Yes.

16 THE BAILIFF: No. 18, George Britton, was this your
17 verdict?

18 JUROR: Yes.

19 THE BAILIFF: Is it still your verdict?

20 JUROR: Yes.

21 THE BAILIFF: No. 54, John Gibson, was this your
22 verdict?

23 JUROR: Yes.

24 THE BAILIFF: Is it still your verdict?

25 JUROR: Yes.

1 THE BAILIFF: No. 143, Deshawn Simmons, was this your
2 verdict?

3 JUROR: Yes.

4 THE BAILIFF: Is it still your verdict?

5 JUROR: Yes.

6 THE BAILIFF: No. 46, Lennalee Elie, was this your
7 verdict?

8 JUROR: Yes.

9 THE BAILIFF: Is it still your verdict?

10 JUROR: Yes.

11 THE BAILIFF: No. 116, Rebecca Myers, was this your
12 verdict?

13 JUROR: Yes.

14 THE BAILIFF: Is it still your verdict?

15 JUROR: Yes.

16 THE BAILIFF: No. 62, Maria Haughton, was this your
17 verdict?

18 JUROR: Yes.

19 THE BAILIFF: Is it still your verdict?

20 JUROR: Yes.

21 THE BAILIFF: No. 23, Stephanie Cason, was this your
22 verdict?

23 JUROR: Yes.

24 THE BAILIFF: Is it still your verdict?

25 JUROR: Yes.

1 THE BAILIFF: No. 69, Antonio Hodges, was this your
2 verdict?

3 JUROR: Yes.

4 THE BAILIFF: Is it still your verdict?

5 JUROR: Yes.

6 THE BAILIFF: No. 71, Rashawna Howard, was this your
7 verdict?

8 JUROR: Yes.

9 THE BAILIFF: Is it still your verdict?

10 JUROR: Yes.

11 THE BAILIFF: No. 55, Roy Graham, was this your
12 verdict?

13 JUROR: Yes.

14 THE BAILIFF: Is it still your verdict?

15 JUROR: Yes.

16 THE BAILIFF: No. 91, Malik Livingston, was this your
17 verdict?

18 JUROR: Yes.

19 THE BAILIFF: Is it still your verdict?

20 JUROR: Yes.

21 THE BAILIFF: The jury has been polled, Your Honor,
22 and the guilty plea stands.

23 THE COURT: All right. Folks, let me thank you for
24 your jury service this week. This is -- jury service is
25 one of the most important things that we can do in our

1 form of government. It is a very difficult thing to do at
2 times, and this was a difficult trial. Y'all heard some
3 difficult testimony. And, you know, none of them are
4 easy, some are harder than others. This was a hard one.
5 I can tell by the amount of time that you folks spent
6 deliberating that you struggled with it, but all 12 of you
7 heard the evidence, and all 12 of you agreed on the
8 verdict. That's really all that we can ask you to do as
9 citizens. We thank you for your service.

10 I like to tell people that, you know, when you get
11 that jury notes, a lot of times people go oh, you know, I
12 really don't want to serve on a jury. I'd like to do it,
13 but I can't do it this week. A number of things go
14 through your mind. But once people get here and they get
15 a chance to serve on a jury, it's been my impression that
16 most people really do enjoy serving on a jury. They do
17 understand better how our system works after they've had
18 an opportunity to do it. I hope that you'll feel that
19 way.

20 You know, people view jury service as a duty, as a
21 responsibility of citizenship, but, you know, this is
22 something that -- what you have done this week as jurors
23 is very rare and difficult to get as a right around this
24 world. There's only about a dozen countries in the entire
25 world that allow a right to a trial by a jury of fellow

1 citizens when the government charges somebody with a
2 crime. In most places, where they have anything like a
3 trial, it's a judge or a panel of judges that make the
4 decision. But our Founding Fathers thought it was so
5 important that they memorialized the right to have a jury
6 trial in a case like this three times in the United States
7 Constitution. So it's an important thing that you did
8 this week. It's also, I believe, a privilege to serve on
9 a jury. And I hope that's what you'll walk away with.
10 It's not that it was a burden, but that it was a privilege
11 to serve on jury because you participated in your
12 government.

13 You know, we have those three branches of government,
14 legislative, executive and judicial. This is the judicial
15 branch. And I told you, you were judges just like I'm a
16 judge. We just have different roles. So what you folks
17 did this week is agreed to come in here and listen to this
18 evidence and make it based on what you heard in this
19 courtroom is special, and I thank you for your service.

20 You are free to go now. You don't have to serve any
21 more this week. You don't have to call a telephone number
22 or anything like this. But you are now free to go and we
23 thank you for your service.

24 I have been telling you all week long don't talk to
25 anybody about the case. You're free now to talk to

1 anybody you want to about the case, including if the
2 lawyers call you up. Sometimes they like to call and ask,
3 you know, about the process. It helps them prepare better
4 for their next case. You're welcome to do that. You
5 don't have to. And if somebody calls you up and says I
6 want to talk to you about it, just tell them. If they
7 insist, then you just call the Court and we'll make sure
8 that's taken care of. But you're not doing anything wrong
9 by talking to anybody now. If you want to read the
10 newspaper, post things on the internet, whatever you want
11 to do, you're free to do it and you're not in any trouble.
12 I've been given you those warnings all week long, but
13 you're finished with jury service, so you're free to
14 resume your normal life. Thank you for your service. You
15 are free go.

16 (WHEREUPON, the jury left the courtroom at 6:04
17 p.m.)

18 THE COURT: All right. We will move --

19 Well, do you have any post-trial motions that you
20 want to make at this time or do you want 10 days to make
21 them?

22 MS. BLAZER: I think we'd like to have the 10 days,
23 Your Honor.

24 THE COURT: All right. Well, we're going to move to
25 sentencing. Is there anything the State wants to tell me

1 before we hear from the Defense?

2 MS. ABEE: Your Honor, we do have a sentencing sheet
3 if you want us to get that filled out and send to the
4 Defense, as well.

5 THE COURT: Okay.

6 MS. ABEE: Your Honor, I do believe some of the
7 victims would like to address you if that would be
8 appropriate and at the appropriate time.

9 THE COURT: All right. That would be now.

10 Yes, ma'am, just for the record so she'll know who is
11 talking, just state your name.

12 MS. A.R. : A.R. .

13 THE COURT: Okay. What would you like to tell me?

14 MS. A.R. : I just want to tell you that,
15 first, thank you for being here this week and, you know,
16 just seeing just a part of our troubled life that we had
17 to go through this week revisiting this situation. And I
18 just want the people behind me to know that me and Durant
19 did not share the same love for each other. Never in a
20 million years have I would have thought this would
21 happened. If you would have asked me three years ago this
22 would have happened, I never would have told you it would
23 have.

24 I truly trusted him. I loved him. I never -- still
25 don't even have nothing fully against him. And he -- but

1 he destroyed my family. He didn't care about me. He told
2 them I was lying. I got family that I grew up with that I
3 love that just turned their backs on me, told me I was
4 lying. And it's all because of him. He told them I was
5 lying, told them I'm the one -- my grandma is the one
6 that's making this all up. So I just want my family to
7 know that I would like to have them back, and I was never
8 lying, and I still love them. I'll willing to forgive
9 them even though they didn't believe me.

10 THE COURT: Thank you.

11 Yes, please just state your name.

12 MS. MINOR MINOR

13 THE COURT: All right. What would you like to tell
14 me?

15 MS. MINOR Well, hello, Your Honor. Like my
16 cousin said, thank you for taking your time out to hear
17 what we had to go through, sadly. And to let Larry know,
18 who's behind me, that I never had any vendetta against
19 you. I've loved you all my life. I mean, you were like a
20 father figure to me. I grew up in your church. You never
21 did anything wrong to me until three years ago. Just
22 thinking about it, it's crazy how it affected me in so
23 many different ways. I'm just so glad that it's all over
24 now and justice has been served.

25 THE COURT: Thank you. Anything else from the State?

1 MS. ABEE: No, Your Honor. Just may I approach with
2 the sentencing sheet?

3 THE COURT: Yes. Did he have any prior record?

4 MS. ABEE: Your Honor, he has a grand larceny, I
5 believe, from 1978, something way in the past.

6 THE COURT: All right. What's the State's position
7 on sentencing?

8 MS. ABEE: Your Honor, we would, of course, ask for
9 the maximum in this case. You've heard throughout this
10 week and this trial week all the various different plots
11 and ploys that the Defendant used in order to coerce
12 multiple young girls, but specifically in this case,

13 MINOR She was only 13 when this started, Your
14 Honor. And Your Honor heard factually how egregious these
15 allegations were. For someone to build up the trust that
16 she had in him and then take advantage of that, Your
17 Honor, under this disguise of being some sort of prayer.
18 And this did happen multiple times, Your Honor. It
19 started in December of 2012 and ended in May of 2013. So
20 for the prolonged abuse that the victim endured in this
21 case, we would ask for the maximum sentence.

22 THE COURT: All right. Mr. Kent.

23 MR. KENT: Thank you, Your Honor. May it please the
24 Court. First, I would request -- and I understand the
25 Court's position of going directly into sentencing. Just

1 by way of request and for the record, I would request a
2 presentence report to have the opportunity for the Court
3 to get more information on Pastor Durant before you lay
4 down your sentence.

5 THE COURT: No, I'm ready to go into sentencing now.

6 MR. KENT: I understand.

7 THE COURT: Just tell me what you want me to know.

8 MR. KENT: Yes, sir, Your Honor. You have heard the
9 bevy of the charges. You have the information. Your
10 Honor, you know me quite well. I'm not an individual who
11 beguiles or does not agree with the jury system. I
12 understand the jury has made their decision and I respect
13 their decision.

14 Your Honor, I've known Pastor Durant now for in
15 excess of three years. He has steadfastly maintained his
16 innocence. Even as the verdict has come by, he has
17 maintained his innocence.

18 Respectfully to the Court, normally, if there is a
19 conviction, I generally do not allow my clients to say
20 anything based upon the fact of their appellate rights.
21 And please don't take any disrespect in that whatsoever.
22 He has some family who would like to address you. His
23 wife would like to address you, tell you a little bit
24 about his character. You have not heard from her during
25 the course of the trial. And then I have a few more

1 things to say and I'd be ready for sentencing, if that
2 would be okay, Your Honor.

3 THE COURT: Who would like to say something?

4 MR. KENT: I think his wife would.

5 THE COURT: Yes, ma'am, your name?

6 THE WIFE: My name is Melody Durant.

7 THE COURT: Okay. What would you like to tell me?

8 THE WIFE: I've been married to this man for 17
9 years. I know my husband, and I know without a shadow of
10 a doubt that he did not do this. He is innocent. And if
11 anyone knows me, I am not going to lie for anybody, not
12 even my husband. I know him. I also know the -- I know
13 my husband, and I know he didn't do this. He is not able.
14 I appreciate you for listening. Thank you.

15 MR. KENT: Your Honor, I understand completely
16 sentencing becomes the most difficult thing that a judge
17 can do. I understand your position on these cases and I
18 understand what a judge has to do after there has been a
19 conviction in the case.

20 This isn't the type of case where I can sit here with
21 a straight face and tell you there was not a lion's share
22 of evidence -- and I told the pastor this, that there was
23 a lion's share of evidence in which the jury could have
24 considered his guilt. But there was also a lion's share
25 of evidence that the jury could have considered his

1 innocence. They made the decision based upon the evidence
2 they heard and based upon the young lady's testimony that
3 he was guilty of the charges.

4 Your Honor, you, yourself, have heard the evidence
5 and heard there is some strong evidence which could show
6 the innocence of this man. Your Honor, I was not
7 exaggerating when I told the jury that in the three years
8 that I became to represent him, he has become my friend.
9 He has always been respectful. He has always been
10 spiritual to me. He has always been as good of a man as
11 he could possibly be.

12 His family beyond a shadow of a doubt has done
13 nothing but show respect. They have helped me on this
14 case more than you can possibly imagine. They have very
15 candidly looked. They haven't hidden anything. They
16 haven't tried to disguise anything. If I've asked for
17 anything, they would give it to me.

18 I've represented a lot of people, Your Honor, as you
19 know, over the last 16 years. I have yet to represent
20 anybody who has maintained their innocence so steadfastly
21 and anybody who has gone out of the way to try to help to
22 try to prove their innocence. And not by trying to
23 intimidate or try to harass people, but just give me names
24 and simply say, please, talk to them.

25 So for the last three years, what I have done is

1 actually developed a side of the process of meeting and
2 talking to people who like Larry Durant. The level of
3 positively, the people's lives he has touched, the
4 charities that he has given to, the things that the church
5 has done has been amazing.

6 Your Honor, you would expect when you represent
7 somebody who is faced with such charges, the first thing
8 they would do is say something completely negative about
9 the victims, completely negative about the people,
10 something completely nasty about them. There was nothing
11 he would ever say to me. He took some umbrage, shall we
12 say, with our legal defense because he wanted nothing
13 negative to say about any of the girls who made these
14 allegations. When I asked him very candidly why did the
15 girls make these allegations against him, his defense is
16 very simple, I just don't know. I would ask him anything
17 that he could give me that would help me on
18 cross-examination of the young ladies. There was nothing
19 he would offer, which is why the cross-examination of the
20 young ladies was so tepid as it was.

21 We discussed everything that you should know about
22 Mr. Durant when it was time to make a decision on whether
23 or not he should testify. As I mentioned, Your Honor,
24 I've been doing this for 16 years. I've had countless
25 amount of trials. And I have a very steadfast rule, if I

1 put on a case, generally, I put my client on. Myself and
2 Mr. Durant worked tirelessly on his testimony. He was
3 ready to testify. There was no usable record that would
4 have come in against him. When, finally, it came to the
5 point it was time to testify, he realized that his parents
6 or his stepparents were inside of the courtroom, Melody's
7 parents, and he did not want to subject them to anything
8 that would be embarrassing or anything that would hurt
9 them or anything that would disrespect the church, which
10 is the only reason why he chose not to testify. And I can
11 tell you as an officer of the court, we were prepared, we
12 were ready and we were willing to put him on the stand to
13 testify.

14 I cannot sit here with a straight face and tell you I
15 know what happened to these young ladies. And I cannot
16 tell you with a straight face I know it. And I still
17 cannot tell you with a straight face that I know what
18 happened. I know what the evidence showed. I know what
19 the lack of DNA showed, and I know all of these things.
20 The one thing that I can tell you as somebody who has
21 known you for quite some time is that's a good fellow
22 behind me. I 100 percent respect the jury's verdict. I
23 100 percent respect the work that law enforcement did to
24 put this case together because I know it was very
25 difficult. I have candidly told the Attorney General's

1 Office that I respect the amount of hard word that they
2 did to put this case together because I know it was a very
3 difficult case. And I told them that not just now.

4 All I would ask, Your Honor, is in your wisdom, as
5 you sentence Mr. Durant, which I know you will do, to
6 realize, understanding the nature of the charges and
7 understanding what you have to do, that somebody who has
8 known you, who is a good person that I respect
9 wholeheartedly. I understand the maximum sentence in this
10 charge carries up to 20 years, which realistically would
11 be a life sentence for this individual in the Department
12 of Corrections. Candidly, at his age, with his physical
13 conditions, with his health conditions, pretty much any
14 sentence will be a life sentence for him in the Department
15 of Corrections.

16 A lifetime of doing good deeds. A lifetime of
17 looking out for people. A lifetime of prayer. You've
18 seen to the left side of the courtroom.

19 If everybody who is here to show support for Pastor
20 Durant will stand up, please (indicating).

21 Your Honor, these were individuals who he has
22 supported, who I have talked to, who has said nothing but
23 positive things about him. These are children, these are
24 mothers, these are wives, these are husbands who have sat
25 here everyday throughout the course of the trial and

1 prayed. All that I would request is that in your mercy,
2 you sentence him accordingly, understanding what you have
3 to do under the charge, but also based upon the lifetime
4 of hard work.

5 Again, I ask that you not take any personal feelings
6 to the fact that I have asked Pastor Durant not to address
7 the Court. That was my personal decision, not his. It's
8 just based on the fact he will be sentenced and he has
9 appellate rights.

10 THE COURT: He does not want to speak?

11 MR. KENT: He would like to speak, but I have
12 requested that he does not because of his appellate
13 rights.

14 THE COURT: Okay. Anything else?

15 MR. KENT: No, sir, that would be it.

16 THE COURT: All right. Well, Mr. Durant, the jury
17 has spoken. This was a very difficult case. The charges
18 that were made against you were very difficult charges to
19 hear. This was --

20 MR. KENT: Your Honor, I do not mean to interrupt
21 you. He made it very clear that he would like to address
22 the Court.

23 THE COURT: What?

24 MR. KENT: He would like to address the Court.
25 Against my advice, he would like to address the Court.

1 THE COURT: Okay. Go ahead, Mr. Durant.

2 MR. KENT: Can he address from here, Your Honor?

3 THE COURT: Whichever he prefers.

4 You can stand. I can hear you from there. What
5 would you like to say?

6 THE DEFENDANT: Your Honor, I appreciate your
7 fairness in handling this case. And I'm just sitting here
8 in utter shock of what took place. And I feel that I'm in
9 a dream, a nightmare that is happening. Sir, I worked all
10 my life to try to build this community and try to build
11 people. And I gave for my family, and they suffered.
12 They didn't like it because I gave to other people. And
13 the way they said I groomed these children up to molest
14 them, it's just not true. I raised children up in my
15 home. I have daughters myself. I've been around kids all
16 my life. And this is the first time these allegations has
17 ever been made against me.

18 Your Honor, I am almost lost, lost for words because
19 I know the sentence -- my wife is -- I'm concerned about
20 my wife and my children. I know it's devastating to them,
21 even the people on the other side. I just don't know why
22 But, Your Honor, I plead mercy on this -- for the Court,
23 and I have breathing machines and pressures and all kind
24 of conditions.

25 There is no physical way I could have done this to

1 these girls multiple times in this place. And rarely, me
2 and my wife had sex, rarely, unless it was planned out.
3 And I didn't get a chance for some other people to come
4 and let them know that the thing concerning my penis was
5 widely known, widely known. It's not just something that
6 just popped up at the last moment. It was widely known in
7 the church, sir. And I'm just sorry that we didn't get an
8 opportunity -- or didn't take the opportunity to let the
9 people talk because I didn't want to embarrass them to let
10 them say these kind of things.

11 Your Honor, I am -- like I said, I feel like I'm on a
12 desert island for doing -- for something that I did not
13 do. And I know if I get a long time, I'm going to die in
14 prison. I'm going to die behind bars. And for all the
15 time I spent trying to build a family and the community,
16 it's going down the drain by one decision of a group of
17 people that don't even know me. I respect what they said,
18 but a group of people that don't even know me made a
19 decision that will determine not only my life, but my
20 entire family and my congregation's life.

21 I ask you, Judge, if there's any way you could have
22 mercy upon me, mercy on this situation that I would not --
23 would not have to die in prison because I need medical
24 attention, I certainly will appreciate it.

25 I thank you so much for taking the time for hearing

1 me. Thank you, sir.

2 THE COURT: You're welcome.

3 MR. KENT: Your Honor, would you mind if he sat back
4 down?

5 THE COURT: That's fine.

6 MR. KENT: Thank you, Your Honor. That will end my
7 presentation. I apologize.

8 SENTENCE OF THE COURT

9 THE COURT: Okay. Well, the charges in this case
10 were really unlike any I have heard before. The evidence
11 that the State presented was compelling. The Defense made
12 a strong case. And the jury chose to believe the young
13 ladies. I can't disagree with the verdict at all based on
14 what I heard. These charges were monstrous in nature.

15 The problem that I have with the particular facts in
16 a case like this is you have somebody who was put a
17 position of trust. All ministers are put on a pedestal to
18 some degree or another, and, you know, I've -- I grew up
19 the son of a minister. I've seen all sides of that that
20 can happen both for good and bad. You know, you see how
21 people treat ministers with putting them on a pedestal,
22 believing that ministers are incapable of doing bad. But
23 as you grow up in a family with a minister and hear a lot
24 of things that go on and see a lot of things, you know,
25 you realize that ministers are people. They're humans.

1 And as such, they fall.

2 I don't fault anybody for falling from grace, but
3 when you take the position that you have been given by
4 your community and people that believe in you and abuse it
5 to the extent that these young ladies have alleged and
6 that the jury believed, well, then you deserve the maximum
7 in my opinion. The sentence of the Court is 20 years in
8 the Department of Corrections. You'll get credit for any
9 time that you served pretrial. Good luck to you.

10 MR. KENT: Thank you, Your Honor. You said we would
11 have our 10 days to file post-trial motions?

12 THE COURT: Correct.

13 MS. ABEE: Thank you, Your Honor.

14 THE COURT: If you file something, send it to me in
15 Charleston.

16 MR. KENT: I'm sorry? I didn't hear you.

17 THE COURT: I said whatever you file, send a copy to
18 me in Charleston. It doesn't always get forwarded has
19 been my experience.

20 MR. KENT: Thank you, Your Honor.

21 MS. ABEE: Thank you, Your Honor.

22 THE COURT: Okay. Good luck to you.

23 *****END OF PROCEEDINGS*****
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

I, PENNY M. JOHNSON, Official Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in General Sessions Court for Sumter County, South Carolina, on the 23-26 days of May, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 8, 2016

Penny M. Johnson

Penny M. Johnson Court Reporter

My Commission Expires: 06/16/2018

STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS
COUNTY OF SUMTER 2014-GS-43-00947

STATE OF SOUTH CAROLINA)
)
-vs-) TRANSCRIPT OF RECORD
)
) June 8, 2016
LARRY DuRANT,)
)
) Sumter, South Carolina
Defendant.)

B E F O R E:

The Honorable Roger M. Young, Judge.

APPEARANCES:

Kinli Abee, Assistant Attorney General
Attorney for the State

Shaun Kent, Esquire
Attorney for the Defendant

Reported By:

Amanda Kelly Haffenden, RPR, CRR
Circuit Court Reporter for the
Ninth Judicial Circuit

1 (June 8, 2016.)

2 MR. KENT: As you're aware, we've given a
3 copy to your law clerk, we filed a defense Rule 59 and a
4 request for emergency hearing.

5 On May 26, 2016, we concluded the trial of
6 the State of South Carolina versus Larry DuRant. He was
7 found guilty and convicted. He was given 20 years by
8 Your Honor. At the conclusion, you allowed us to have
9 ten days for any necessary post-trial motions.

10 Your Honor, at the conclusion, literally as I
11 was driving home that evening, I received a phone call
12 from Ronnie McCray. Mr. McCray asked me pretty pointedly
13 why I did not utilize him as a witness. He had been
14 interviewed by us. He asked very pointedly why he was
15 not utilized as a witness. We had a conversation about
16 that.

17 Thereafter, he made a subsequent conversation
18 about the fact that his ex-wife, Yolanda McCray, who was
19 the outcry witness utilized by the State of South
20 Carolina, was also related to Keyona Riley as well as
21 A.R. [REDACTED], two of the victims who testified in the
22 trial. He informed that he was shocked that Ms. McCray
23 was allowed to testify without mentioning of her prior
24 criminal record.

25 My exact response was I didn't think Ms.

1 McCray had a prior criminal record, and he said, Well,
2 I'm her ex. I know for a fact she has a criminal record.

3 I went back to the office. I contacted
4 Ms. Blazer. I told her -- and I actually put Mr. McCray
5 on the telephone with Ms. Blazer so he could hear that
6 part, so she could get that part of the conversation. At
7 that point in time, I wasn't back to my office yet I do
8 not believe. I think the very next morning I ran a
9 public SLED catch. Based upon the name and the
10 information that was given to me by Mr. Riley, I ran a
11 SLED catch, which I've included in a copy of my memo.

12 The SLED cache indicated -- we ran a SLED
13 cache under the name Yolanda McCray, as well as the date
14 of birth, 1972 [REDACTED]. We put in the social security
15 number that was included inside of her witness statement.
16 When we did that, there were several aliases that came
17 up: Wanda Shoantela Riley; Yolanda Shoantela Riley;
18 Volanda S. Riley; Volanda Riley; Yolanda Shoantela Riley;
19 Yolanda S. Riley; Yolanda Riley, and Wanda Riley and
20 Vlonta, V-l-o-n-t-a, Riley.

21 When we ran the SLED catch again, the public
22 records check, several criminal charges came up
23 immediately, including things --

24 THE COURT: What were they?

25 MR. KENT: And I'm going to go through

1 everything that was included inside the record. In 1991,
2 she had a simple assault charge under the Vlonta Riley.
3 In 1993, she had a shoplifting conviction under the name
4 Yolanda Riley out of Myrtle Beach. In 1995, she had a
5 fraudulent check charge under the name Yolanda S. Riley
6 out of Clarendon County. 1995, there was a forgery
7 arrest under the name Yolanda Riley out of the Manning
8 police department.

9 In 1997, she has a conviction for driving
10 under suspension under the name Vlanda, V-l-a-n-d-a, S.
11 Riley. That was a conviction, yes, sir. In 1999, under
12 the name, Ulanda, U-l-a-n-d-a, Shoantela,
13 S-h-o-a-n-t-e-l-a, Riley, there was another fraudulent
14 check charge conviction out of Sumter, South Carolina.
15 In 2001, under the same name that I just mentioned,
16 Ulanda Shoantela Riley, the highway department, she had a
17 speeding as well as a driving under suspension
18 conviction. In 2004, under the name Ulanda, U-l-a-n-d-a,
19 Riley, she has a conviction for obtaining signature under
20 false pretenses which she was convicted. In 2004, under
21 Wanda Riley, from Manning, South Carolina, there was a
22 forgery arrest.

23 THE COURT: What year was that?

24 MR. KENT: That was in 2004, Your Honor.

25 THE COURT: What was the conviction again?

1 MR KENT: It doesn't show the conviction. It
2 just shows there was an arrest. It doesn't show a
3 disposition as of this point.

4 Yes, sir. The obtaining goods under false
5 pretenses was a separate conviction, a six-year
6 conviction, and then there was -- in 2005, out of Marion,
7 South Carolina, under Wanda Riley, there was a financial
8 transaction card fraud that was dismissed and nolle
9 prossed, and that would be the extent of the record.

10 THE COURT: Nothing since 2005?

11 MR. KENT: No, sir, Your Honor.

12 THE COURT: All right.

13 MR. KENT: So then we immediately pulled
14 that.

15 As the Court is aware, one of the central
16 cruxes of the defense offered on behalf of Mr. DuRant was
17 obtaining signature under false pretenses. One of our
18 central defenses was a forgery allegation against Lizzy
19 Johnson, that there was a forgery allegation being
20 utilized, that there was a false signature that was
21 utilized, and these false signatures, what was happening
22 was our theory --

23 THE COURT: Yolanda McCray, was she the
24 grandmother?

25 MR. KENT: No, Your Honor. Lizzy Johnson was

1 the grandmother. Yolanda McCray is the actual mother.

2 THE COURT: Of the victim?

3 MR. KENT: Of the victim's sister -- victim's
4 cousin.

5 THE COURT: Okay.

6 MR. KENT: The central important issue is
7 also the outcry witness. As you're aware, during the
8 State's closing argument, the Attorney General's closing
9 argument, which was, candidly, a very effective closing
10 argument, during their closing argument, one of the
11 things that they argued very effectively was the fact
12 that one of the reasons you should not believe the theory
13 offered by the defense and should believe the theory --
14 or even if you don't believe a lot of the things that
15 were said, one of the things you can believe is the
16 outcry witness just happened to overhear this
17 conversation, so you must believe what the outcry witness
18 stated because she happened to overhear it which gives
19 their theory credibility, that no one could have made up
20 this entire theory.

21 The problem with that, of course, as Your
22 Honor yourself mentioned during sentencing, this was a
23 credibility case, and in light of the credibility case,
24 the jury could make a decision of either listening to the
25 defense witnesses or listening to State witnesses. With

1 Yolanda McCray as the outcry witness, being able to
2 testify un-cross-examined about her criminal record,
3 including our central theory of defense, obtaining
4 signature under false pretenses, and the fact that they
5 are related to Lizzy Johnson, who we're saying
6 specifically was embroiled in this forgery, that is our
7 theory, that this is the type of information that we
8 should have been allowed to cross-examine on.

9 Your Honor, I am not sitting up here
10 specifically saying that I believe the Attorney General's
11 office hid anything from us whatsoever. I'm not saying
12 that. I'm not saying that on the record that I believe
13 they hid anything whatsoever from us. What I am saying
14 is this is information that we were entitled to in
15 proffer, entitled to. As you're aware, Your Honor, I
16 have included inside of my packet my Rule 5, which was
17 sent not to Ms. Abee, but was sent to the attorney who
18 had the case before her, Kelly Hall, Assistant Attorney
19 General, and that was sent on January 14, 2014.

20 Included inside of that packet was a specific
21 request, on line 13, which I specifically request the
22 criminal records of the juvenile and adult of such
23 witnesses. Your Honor, this, of course, is bolstered by
24 the fact -- and this is one of the reasons we do not
25 believe the Attorney General's office hid anything from

1 us. As you're aware, during the course of the trial,
2 what would happen is the Attorney General's office handed
3 us criminal rap sheets and records as individuals were
4 getting ready to testify.

5 At one of the points what they did is when
6 Ms. Johnson got ready to testify, Lizzy Johnson, as you
7 remember, the grandmother in this situation, before she
8 testified, they properly handed us a rap sheet, and they
9 said, This is something on her rap sheet. We're not sure
10 if we're going to be able to get into it, and we had a
11 hearing in front of Your Honor about her prior criminal
12 record, and we did that on several other witnesses.

13 I do not believe that this is a situation
14 where they were trying to hide things; and, number two, I
15 don't think they knew what our legal defense was so they
16 wouldn't understand how important the obtaining signature
17 under false pretenses was until I would make the theory,
18 and I didn't make the theory unless after this woman had
19 already testified.

20 But the point is, they were giving us
21 criminal records as these individuals were testifying.
22 None were given on behalf of Yolanda McCray, and I
23 believe they'll tell you honestly they didn't know she
24 had a criminal record either. I don't think that makes
25 it excusable. This woman was allowed to testify in front

1 of a jury without mention of her criminal record in a
2 case which is all about credibility.

3 That would be the basis of my motion. I made
4 a 59 motion. Your Honor, on top of that, looking at the
5 course of the trial, there were a lot of issues, shall we
6 say, with some of the things, some of the pretrial
7 motions that I made that you've already heard and
8 utilized. There was a lot of pretrial motions made about
9 certain evidence that was not given in a timely manner,
10 the taking a picture of Mr. DuRant's penis, the problems
11 that we had with the testimony of Allie Williams, which
12 went to the credibility also; the issues about the
13 abortion issue.

14 All of these things go with credibility, and
15 so it is our belief, Your Honor, that it is proper at
16 this point in time to grant our 59 motion for a new trial
17 on behalf of Mr. DuRant because this is a credibility
18 case. This isn't one of those typical cases where -- I
19 know at some point the Court of Appeals made the comment
20 that it's harmless error, that the other evidence against
21 would be overwhelming.

22 As you're also aware, Your Honor, this wasn't
23 a situation where the jurors stayed out for about five or
24 ten minutes. The jurors stayed out a length of time in
25 excess of four hours. They actually came back initially

1 with a hung jury. At that point in time, we gave an Alan
2 charge, which we objected to, objected to the Alan
3 charge, and after the Allen charge, they came back with a
4 verdict.

5 Your Honor, to say this is not paramount or
6 not an issue in the case I think would just be incorrect,
7 and that would be our position on the motion, Your Honor.

8 THE COURT: Okay.

9 MR. KENT: Thank you, sir.

10 THE COURT: Who's arguing for the State?

11 MS. ABEE: I am, Your Honor.

12 May it please the Court: Your Honor, first
13 off, as an officer of the Court, I do have to correct
14 something that I have incorrectly stated in my motion
15 that I've literally discovered sitting here, flipping
16 through it for the 50th or 60th time.

17 I state that factually as requested that the
18 rap sheet be run under Yolanda McCray via the e-mail,
19 which I attached as attachment A, that's M-c-r-a-e. In
20 reviewing the e-mail again, I requested it under Yolanda
21 McCray, same last name, but M-c-C-r-a-e, Your Honor.
22 There was typo in my request. Same date of birth. That
23 was an error on my part, Your Honor; however, the
24 analysis is still the same.

25 In order to state we violated Brady, Your

1 Honor, under Gibson v. State, there were several things
2 that have to be shown: First, that the evidence was
3 favorable to the accused; two, that it was in the
4 possession of or known to the prosecution; three, it was
5 suppressed by the prosecution; and, four, it was material
6 to guilt or punishment, Your Honor.

7 Mr. Kent was correct in stating that we had
8 no idea that Yolanda McCray had a prior criminal history
9 or a prior record in this case. We turned over other
10 witnesses, similar convictions, Your Honor. We certainly
11 would have done so with Ms. McCray had we known that she
12 did, in fact, have a record.

13 Secondly, Your Honor, we would contend that
14 it wasn't suppressed by the prosecution, also that it
15 wasn't material to the guilt or to the punishment, Your
16 Honor. Regardless of what Ms. McCray testified to, being
17 the outcry witnesses, there were several other witnesses
18 throughout the trial that did testify to the exact same
19 thing, so it wasn't just Ms. McCray.

20 She testified mainly in three different parts
21 throughout the trial. First she testified to the church
22 and its runnings and what armor bears were and typical
23 Sunday behaviors that were testified to by several
24 different people throughout the trial, so that alone --
25 that testimony wasn't material to the guilt or the

1 punishment, Your Honor.

2 Secondly, the disclosure itself, Mr. Kent
3 raises that. During closing arguments, we did state that
4 this was an accidental disclosure, that the children
5 didn't go to a parent or go to law enforcement to
6 purposefully disclose. They were overheard, and take out
7 Ms. McCray's testimony, and the children, victims, would
8 still have testified to that, Your Honor.

9 So there still would have been the testimony
10 that they were talking in a bathroom, someone overheard
11 them, questioned them, and that is what led to their
12 disclosure, Your Honor, so that point was still made
13 throughout the trial. And, finally, Ms. McCray testified
14 to the fact that the defendant was called on the phone
15 after the disclosure was made, which two of the victims
16 as well as the grandmother also testified to, Your Honor.

17 So we contend there isn't a Brady violation,
18 Your Honor; however, if the Court does determine that
19 there was a Brady violation and that we somehow withheld
20 information that we had, we then turn to State v. Taylor,
21 Your Honor, which then goes into the different criteria
22 that has to be met in order to grant a new trial based on
23 newly discovered evidence, which the rap sheet and prior
24 record of Yolanda McCray would, in fact, be newly
25 discovered evidence at this point in time.

1 There are five different things that have to
2 be proven: One, that the evidence would probably change
3 the result if a new trial is had, that -- two, it has
4 been discovered since trial; three, cannot have been
5 discovered before trial; four, is material to the issue
6 of guilt or innocence; and, five, is not merely
7 cumulative or impeaching.

8 Your Honor, that is exactly what this is on
9 that prong number five. It is merely impeaching of
10 Yolanda McCray, who, as Your Honor might remember, was
11 one of the quicker witnesses that testified. In fact,
12 the defense counsel and I had a conversation prior to her
13 testifying, where he said, Is she going to be long? Are
14 you keeping her short? And he said, Yeah, she'll be
15 short, Your Honor.

16 So there's a failure to meet the five prongs
17 of State v. Taylor to obtain a new trial based on after
18 discovered evidence, Your Honor. It is merely impeaching
19 of that witness, and, again, it's unlikely to change the
20 result if a new trial is had; therefore, we ask that you
21 deny the defense attorney's motion at this time.

22 THE COURT: Reply?

23 MR. KENT: If I may, Your Honor, and I was
24 just seeing if they were saying Mr. DuRant was in the
25 courtroom. I apologize.

1 Your Honor, what becomes interesting -- and I
2 was going to make a point, so I'm now even a little bit
3 more confused, and I appreciate the candor to the Court,
4 but in relying on the legal analysis put forth inside of
5 the Attorney General's motion, the Attorney General in
6 their motion states that, Despite a good effort to
7 ascertain witness record, the prosecution was not in
8 possession of Yolanda McCray's criminal record due to her
9 use of a fake name.

10 I guess I need, for clarification purposes,
11 are they saying that the brief is incorrect, that she
12 didn't provide a fake name or did provide a fake name?
13 Why that becomes interesting is it's going to change my
14 argument I make to the Court right now. If they're
15 saying that she provided a fake name, of course, that's a
16 different analysis, that this individual provided fake
17 information to the Attorney General's office.

18 THE COURT: I wasn't clear on that. Are you
19 saying the name is incorrect in the brief or the name was
20 incorrect in what you asked it to be requested?

21 MS. ABEE: I'll be happy to clarify, Your
22 Honor. Her name is Yolanda McCrae, M-c-r-a-e. I
23 requested M-c-C-r-a-e. So the record, the rap sheet that
24 Mr. Kent talks about, specifically the 2004 conviction, I
25 believe, is under Yolanda Riley, R-i-l-e-y, which is not

1 the name that we would have requested. Even had it been
2 spelled properly, it still would have been a separate
3 name.

4 THE COURT: Doesn't it show up on her social
5 security number too?

6 MS. ABEE: We weren't in possession of her
7 social security number, Your Honor. We ran her name, the
8 fact she's a black female, and her date of birth is what
9 we ran the rap sheet under.

10 THE COURT: So did you not run it under the
11 social security number, or you ran it and nothing showed
12 up?

13 MS. ABEE: I did not run it under the social
14 security number, Your Honor.

15 THE COURT: Just under the incorrect name?

16 MS. ABEE: The name, the date of birth, and
17 black female, yes, sir.

18 MR. KENT: Thank you, Your Honor, for the
19 clarification, and, again, I just want to make sure we're
20 clear for the record. So we're not saying Yolanda McCray
21 gave a fake name to the Attorney General's office. I
22 just want to be --

23 MS. ABEE: That is correct. She gave the
24 name Yolanda McCray. We did not have Yolanda Riley run
25 as a rap sheet, so I guess the better phrase would be

1 under a different name.

2 THE COURT: Do we know that the person that
3 had these prior convictions is, in fact, Yolanda Riley?

4 MR. KENT: Yes, we do, Your Honor. And now,
5 just to change course a little bit, to go with the
6 analysis that the Attorney General's office just gave,
7 that almost becomes a little bit bigger of a problem. It
8 kind of spits into the face of the brief that they just
9 put forth to say that we wouldn't have had this and it's
10 a good faith error.

11 I was a solicitor for quite some time. As a
12 prosecutor for quite some time, one of the things we do
13 is, when a defense attorney puts on their own
14 witnesses -- one of the things we do is, Well, I need
15 your person's name, birth date, and social security
16 number so I can run the proper background check or proper
17 rap sheet.

18 Number two: When you meet with individuals,
19 one of the things that you often ask them is do you have
20 a criminal record that we need to worry about that you
21 could be impeached upon? I find it a little bit strange.
22 I'm not sure what their policy is, but I find it a little
23 bit strange that we don't run a social security number
24 with an individual because of the problems that they just
25 said. You can misspell a name.

1 Looking at what they've said, you can't say
2 it wasn't in our possession because you did it
3 incorrectly. It should have been in your possession, as
4 you see from ours. When we ran the name that was on the
5 State's witness list is where we ran the name from. We
6 ran the name and spelling from the State's witness list,
7 and the social security number was garnered from the
8 witness statement, so these are things they had in their
9 possession.

10 So they were able to run a proper rap sheet,
11 they just did it incorrectly, so they can't say this
12 wasn't information that wasn't in our possession we
13 shouldn't have turned over. This was clearly information
14 that wasn't in our possession.

15 Your Honor, the fear of allowing a good
16 faith -- and I said very clearly, as to this issue and I
17 think I put it in writing, I trust Ms. Abee knows that
18 this was a good faith mistake, but the fear in allowing
19 good faith mistakes still hamper people's rights, because
20 if we were to simply allow it and say, Well, we just
21 spelled the person's name wrong. We didn't run a social
22 security number. We didn't do any better checks and
23 balance to make sure we had the right information, that's
24 a problem.

25 When a person gets on the stand, as the Court

1 rules very clearly, their credibility comes on the stand
2 with them. If we are allowing the State of South
3 Carolina to say, Oops. Sorry. We didn't run a proper
4 rap sheet. We don't have one. Let's just assume they
5 don't have a record, you can see the danger that could
6 happen.

7 They spelled the name wrong, so you can't sit
8 here -- and I'm arguing against their brief because one
9 of the things they argued in their brief is this is
10 information that just wasn't in their possession.

11 Additionally, Your Honor, taking what they
12 have stated as far as Brady violations, number one: The
13 evidence was favorable to the accused. Well, clearly, it
14 is favorable to the accused because it goes 100 percent
15 to our legal defense. This isn't something where we're
16 saying, Well, we should have been able to get into an
17 assault and battery or a shoplifting. This is obtaining
18 signatures under false pretenses, what exactly our legal
19 defense is.

20 Number two: It was in the possession or
21 known to the prosecution. It's our position, based upon
22 what they just said, it would have been in their
23 possession and known to the prosecution because they have
24 the right to run an NCIC search, which I don't have, and
25 they have the actual individual who had a criminal record

1 and she was in a position that they could have talked to
2 her.

3 Number three: It was suppressed by the
4 prosecution, and I want to be careful how I say this. I
5 am not saying that they intentionally hid something from
6 us, but the word suppressed has multiple meanings. By
7 suppressed, it means it wasn't given to us so that we
8 could properly cross-examine them on it. I don't think
9 they tried to hide it, but it was suppressed because of
10 their mistake.

11 Number four: It was material to guilt or
12 punishment. This is a credibility case, Your Honor. If
13 there was any other scintilla of evidence whatsoever
14 other than people's word -- and this was a word case.
15 This was our word versus this other individual's word,
16 which is why I had such a problem and I made all the
17 pretrial motions. This is 100 percent material.

18 The outcry witness was able to get on the
19 stand unfettered, without any cross-examination, without
20 any knowing of her very lengthy criminal record. To say
21 that I -- Your Honor, you sat in here for four days in
22 the trial when people had criminal records, both of us,
23 not only myself, but Mr. Fernandez did a very good job of
24 when witnesses testified and going very effectively
25 through their criminal record, and I did the same when we

1 had Lizzy Johnson on the stand.

2 We were going into the criminal records of
3 individuals who testified. To simply allow someone to
4 get on the stand without mention of their criminal record
5 in a credibility case and then effectively argue in a
6 closing argument that you must believe this information.
7 Why must you believe this information? And they didn't
8 say this, but you can see the argument: Some people have
9 criminal records, but you got to believe this lady. She
10 just overheard the information.

11 And I'm going to pause while my client comes
12 into the courtroom.

13 Just so the record is clear, at this point in
14 time, Larry DuRant has been escorted into the courtroom.
15 On behalf of my client, I had no problem, and I said on
16 the record that I had no problem with us beginning the
17 hearing without him present. If you'll give me about 30
18 seconds, I'll explain what's happened up to this point in
19 time.

20 THE COURT: Sure.

21 (Brief pause.)

22 MR. KENT: And, Your Honor, that would be our
23 reply as to that issue. I do believe that this is
24 material. To say in a credibility case that that's
25 information that's not important is preposterous. It

1 would be -- again, as I said earlier, it would be one
2 thing if we were to sit here and say the jury came back
3 in ten minutes. The evidence was overwhelming. There
4 was DNA evidence. There was eyewitnesses. There was a
5 lot of other information that the jury could have relied
6 on.

7 In this situation, all the jurors had to rely
8 on at all was the testimony of witnesses; hence,
9 credibility becomes a central issue, and you, Your Honor,
10 yourself even mentioned during sentencing this was a
11 credibility case. You could have seen it going either
12 way. They chose to utilize the testimony of the
13 individuals for the State and relied upon that
14 credibility.

15 Thank you so much, Your Honor.

16 THE COURT: Anything else from the State?

17 MS. ABEE: Very briefly, Your Honor. Even
18 assuming, as Mr. Kent says, that this is merely the word
19 and credibility case, we're talking about the credibility
20 and the word of the victims who testified as to their
21 sexual assaults, Your Honor.

22 This is an outcry witness. What she
23 testified to was that she overheard them disclosing or
24 talking about their sexual assaults, so this impeachment
25 material has no material effect on the case itself, Your

1 Honor, because if this was one of the victims and she had
2 a record that wasn't disclosed, I could certainly see how
3 that would change -- or at least could potentially have a
4 change in the outcome of the case as far as being
5 impeachment material, Your Honor, but this was an outcry
6 witness.

7 This was one of several witnesses that the
8 State called, Your Honor, and any of her convictions that
9 were not in the State's possession are just merely
10 impeachment material, and they are not material to the
11 case, Your Honor, nor do we contend that they would
12 change the outcome of the case because of her limited
13 scope in testimony and what she testified to, so we would
14 still stick by our argument that a new trial should be
15 denied on that basis.

16 THE COURT: All right. Well, I don't think
17 it sounds like there's any evidence, or even suggestion,
18 that the State's conduct was intentional in this case, so
19 the only real question is was it an inadvertent
20 oversight, and, if so, did it rise to the level of being
21 material, such to the point that it would affect a real
22 question of guilt or punishment?

23 You know, nobody is going to get a perfect
24 trial. It's nice to think we do them, but you do the
25 best you can, and mistakes get made. It does look like

1 in this case the State sent a name with a typographical
2 error in it. It came back as showing there were no
3 priors when, in fact, the witness had priors.

4 Now, all of the priors that got listed were
5 over ten years, and while they are of a witness and not a
6 party, there is a real question as to whether or not they
7 would have been admissible at trial. I can't say that
8 they would or they wouldn't at this point, but they were
9 all over ten years of age.

10 The Court has more discretion on a
11 non-defendant witness to allow older ones in, and I think
12 I may have even allowed one in on an older conviction of
13 another witness. Nevertheless, the real question is, you
14 know, was there a lot of other evidence of guilt and
15 would the impeachment value of this have made a
16 difference on a close-call sort of case?

17 The State did not have this in their
18 possession. It wasn't known to them. They didn't
19 suppress it. The evidence clearly would have been
20 favorable to the accused, to have that sort of
21 impeachment available for a witness, but, really, it
22 boils down to would this have affected the outcome of the
23 trial? And it's very difficult to look at that sort of
24 thing and figure out what's in the jury's mind, but you
25 did have, you know, one young lady who made the

1 accusation; three other young ladies, who, you know,
2 supported what she said by way of 404(b) evidence.

3 It was really a question of whether or not
4 you believed them as opposed to whether or not you
5 believed the mother who said she overheard two of the
6 girls talking about it, because that just set in the
7 chain of events that led to his ultimate arrest.

8 But the real question is, you know, these
9 girls made that accusation, and you either believe them
10 or you didn't believe them. Same thing, you either
11 believed the defendant or you didn't believe the
12 defendant. The issue of Yolanda McCray's testimony
13 was -- you know, I guess the correct legal phrase in this
14 is sort of immaterial, but it certainly didn't rise to
15 the level of, I think, putting at issue a serious
16 question of impeachment as to the young ladies, the four
17 girls, especially the victim in this case. It would have
18 been an impeachment issue about whether or not this lady
19 actually overheard them, and so I find that there was not
20 a violation of Brady requirements to disclose this
21 record, and so the motion for a new trial is denied.

22 MR. KENT: Thank you so much, Your Honor.
23 Could I put one more thing on the record as to that
24 issue?

25 THE COURT: Sure.

1 MR. KENT: And I understand the Court has
2 consistently used the phrase that was impeachment, and I
3 understand the Court's ruling on that argument, just to
4 make sure I'm covered for the record.

5 The Court has consistently, as well as the
6 Attorney General's office, said that we wanted to use
7 this as impeachment material. It's not only impeachment
8 material, this is actually our legal defense, is what I
9 want to make sure I'm clear about. This was our legal
10 defense as to the obtaining signature under false
11 pretenses, so I want to make sure that specific part of
12 her record, which was a 2004 conviction in which she was
13 given five years probation, and understanding it wouldn't
14 have been outside of the ten-year window, it would have
15 been within the ten-year window and would have been
16 admissible --

17 THE COURT: And I'm saying even if it had
18 been admissible -- and I may very well have let it in
19 because I think I let in another witness who had an older
20 than ten-year conviction.

21 MR. KENT: Yes, sir.

22 THE COURT: I'm just saying this was
23 apparently inadvertent, and I don't think that this was
24 something that the case would have turned on. I
25 understand your theory that it would have and the jury

1 should have known it. I get that.

2 MR. KENT: And I just want to make sure --
3 not to argue with Court at all, but just to make sure
4 that if another Court is reading this down the road that
5 they understand our position. It's not impeachment
6 material. It's necessary for us to flesh out our legal
7 defense and make sure it's clear that there were two
8 witnesses who were central in this case: Lizzy Johnson
9 and Yolanda McCray, who happen to both be related and
10 both have problems with obtaining signatures, which
11 specifically went to our theory of the forgery, to point
12 to the theory of stealing the residence, and stealing the
13 residence would have created this cavalcade of necessity
14 for these charges to come out.

15 That's what we want to make sure -- we're not
16 saying that it's just impeachment material, that it's
17 necessary for Mr. DuRant to have the right present his
18 full legal defense, and he wasn't allowed to present his
19 full legal defense. At this point, I understand the
20 Court's position about the Attorney General's office
21 didn't have them in their possession, I believe they did,
22 because just to say that, Oh, we didn't run the rap sheet
23 correctly, I think the standard is did or could have,
24 reasonably, and they reasonably could have.

25 I mean, if we are allowed to have prosecutors

1 just misspell things, say, Oops, I misspelled that. I
2 didn't have it, and the Courts have looked at that over
3 and over when they say, Well, I didn't go to the officer
4 and get this properly, or, I didn't get this information
5 properly from the officer the way that I should.

6 That would be my position. I don't want to
7 argue with the Court. I just want to make sure I'm clear
8 on the record.

9 THE COURT: All right. Anything else while
10 we're here?

11 MR. KENT: While we're here, Your Honor, you
12 had given me, graciously, an amount of time to renew all
13 my post-trial motions, and I just want to say very
14 clearly I just renew any motions made during the course
15 of trial, all the motions during that were made during
16 pretrial. You've heard our motion for a new trial, and I
17 just --

18 THE COURT: I think you've made them
19 abundantly correctly at the right time, but I understand
20 the need -- sometimes, you know, you get these things and
21 you go, How many times do you have to make the same
22 motion throughout a trial?

23 And, you know, you go, well, the rules say
24 this, and then there is case law that says this and then
25 sometimes it sounds like you get a panel that says, well,

1 we're just going to hear it because we want it.

2 MR. KENT: And I know for a fact I did not
3 renew any post-trial motions, my directed verdict motion
4 or any of the motions I made, so at this point in time,
5 in light of the fact that the Court is giving me ample
6 time, I've renewed all motions made during the course of
7 trial as well as my directed verdict motion as well as my
8 pretrial motions and so forth.

9 THE COURT: And they're all, again, denied
10 for the reasons stated previously.

11 MR. KENT: And I would, at this point in
12 time -- and I understand Court gave their sentence, and I
13 understand the rationale for the Court's sentence. At
14 this point in time, since I'm allowed to, I'd make a
15 motion for the Court to reconsider the sentence that they
16 gave for 20 years.

17 That popped in my head rationally as
18 Mr. DuRant was walked into the courtroom, rolled into the
19 courtroom, in a wheelchair. His prosthetic legs were
20 taken away from him. As you know, the actuary tables,
21 the amount of time that he's going to live in prison -- I
22 had thought about requesting an appellate bond. It's my
23 understanding from Ms. Blazer that an appellate bond
24 would not be appropriate in this situation in light of
25 the time he was given.

1 I would ask the Court to reconsider the
2 sentence of 20 years. In light of this case, again, I
3 can't hold more than what -- it was a credibility case,
4 and I understand the Court said that also.

5 I'd ask you to reconsider the 20-year
6 sentence based upon his age, based upon his health. A
7 20-year sentence in this situation is a life sentence, so
8 I would just ask the Court to reconsider the sentence
9 they set at 20 years.

10 THE COURT: Well, as I said, if you believed
11 what the girls had to say, then his acts were
12 reprehensible, those of a predator, and society needs
13 protection from people that did what he was convicted of
14 doing, and, in my opinion, the maximum sentence was
15 entirely justified based on the evidence that came out at
16 trial, so the motion is denied.

17 MR. KENT: Thank you, Your Honor.

18 THE COURT: Anything else?

19 MS. ABEE: Nothing from the State, Your
20 Honor.

21 MR. KENT: That covered everything on behalf
22 of Mr. DuRant, Your Honor.

23 THE COURT: All right. Thank you.

24 - - -

25 (Whereupon, the proceedings were concluded.)

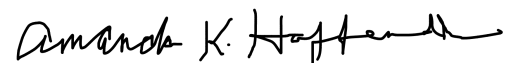
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I, the undersigned, Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Sumter County, South Carolina, on the 8th of June 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 15, 2017



Circuit Court Reporter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-001264

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SC Court of Appeals

The State,..... Respondent

v.

Larry Durant,..... Appellant.

Final Brief of Appellant

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QUESTION'S PRESENTED

Question I

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After the jurors announced a deadlock, did the trial judge err by giving an *Allen* charge that singled out the sole non-voting juror, directing that juror not to prevent a unanimous verdict, after which the jurors returned a unanimous verdict in less than thirty-four minutes?

Question V

Did the trial judge err by denying Pastor Larry Durant's new trial motion based on a *Brady* violation resulting from the prosecutor not disclosing the prior criminal history of Ulanda McRae when her prior criminal history for dishonesty impeached her credibility?

Question VI

Should this Court order a new trial for Pastor Larry Durant based on the Cumulative Error Doctrine?

STATEMENT OF THE CASE

On June 22, 2013, the Sumter Police Department charged Pastor Larry Durant with second-degree criminal sexual conduct with a minor based on allegations made by K.R. On October 23, 2014, the Sumter County Grand Jury returned a true bill indictment. R. 789.

From May 23 to 26, 2016, the State tried Pastor Durant before the Honorable Roger M. Young, Sr. and a jury. Kinli Bare Abee and David Fernandez of the South Carolina Attorney General's Office represented the State. Shaun Kent, Cameron Blazer, and David Weeks represented Pastor Durant. The jurors convicted Pastor Durant, and Judge Young sentenced him to imprisonment for twenty years. R. 712-32; R. 796.

On May 27, 2016, Pastor Durant moved for a new trial based on a *Brady*¹ violation. R. 786088. On June 8, 2016, Judge Young convened a hearing on the motion. After hearing arguments from counsel, Judge Young denied the motion. R. 734-70.

On June 8, 2017, Pastor Durant filed a notice of appeal. This brief follows.

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

STATEMENT OF FACTS

A. Introduction.

Four teenage women, K.R., A.R., T.H., and D.B., alleged sexual assaults by Pastor Larry Durant. All four women were connected to Lizzy Johnson, a former romantic partner of Pastor Durant, who was in an on-going property dispute with Pastor Durant involving cross-allegations of forged property deeds. All four were also connected to Ulanda McRae,² Lizzy Johnson's daughter. K.R. and A.R. are both granddaughters of Lizzie Johnson. Ulanda McRae is A.R.'s mother and K.R.'s aunt. T.H. is A.R.'s God Sister. K.R. lived with Ms. Johnson and Ms. McRae and A.R. beginning in July 2012, and K.R. has lived with D.B., as well. T.H. was a frequent visitor of K.R.'s, and all four—K.R., A.R., D.B., and T.H.—are close friends. While K.R., A.R., D.B., and T.H. all made allegations against Pastor Durant, the State only proceeded to trial on the allegations involving K.R.

B. Pastor Durant and Lizzy Johnson.

Pastor Larry Durant is the minister of World International Ministries and presides over services at two locations, a smaller church on Manning Avenue and a larger church on North Guinyard Drive. Because Pastor Durant is legally blind and has had both legs amputated below the knee, he has assistants known as “armor bearers,”³ who help him before, during, and after services, after which he is often quite tired. The church also has

² Ulanda McRae's name sometimes appears in the trial transcript as Ulanda Riley. In the post-post trial motion hearing, her name appears and Yolanda McRae or Yolanda McCray. As seen in Question V, *infra*, the correct spelling of her name is significant.

³ “An armor bearer is someone that serves and protects the leaders” of the church. R. 575-76.

many additional employees, including accountant, treasurer, secretary, and superintendent.

Lizzy Johnson met Pastor Durant in 1995 and began attending his church in 1998. She served in various positions in the church including treasurer, secretary, and superintendent. (Ulanda McRae began attending his church in 1999 and also held many positions within the church, including armor bearer. R. 249, 251.) Ms. Johnson admitted that in 1989 she “loaned” her cousin money out of a safe box, resulting in a charge for breach of trust. She was also investigated by federal authorities for stealing money from an apartment complex owned by the church. R. 356-59; 379.

Ms. Johnson once lived at Pastor Durant’s house. They dated and had a sexual relationship for six months to a year. She later moved into another house owned by Pastor Durant. The legal ownership of this property—whether it was Ms. Johnson or Pastor Durant—remained an issue through the trial.⁴ Ms. Johnson’s daughter, Ulanda McRae, and her daughter K.R. also lived at this address. Ms. McRae’s niece, A.R. moved in with them in July 2012. Both K.R. and A.R. are Ms. Johnson’s granddaughters. T.H. and D.B. visited Ms. Johnson, Ms. McRae, K.R., and A.R. at this address. K.R., A.R., T.H., and D.B. are all close friends.

C. Property Dispute.

Lizzy Johnson lived with Pastor Durant for a while and then moved into another house he owned. Lizzy Johnson claimed Pastor Durant gave her this property. Pastor Durant had purchased the property for \$23,000.00, but it reached a value of \$112,000.00. Lizzy Johnson alleged that Pastor Durant deeded the property to her and forged her

⁴ This will be discussed in more detail, *infra*.

signature on a deed returning it to him. She made these allegations to law enforcement, which resulted in Pastor Durant being charged with forgery. Lizzy Johnson applied for and obtained a \$20,000.00 government grant for making improvements to the property she claims Pastor Durant gave to her. Lizzy Johnson also acknowledged Pastor Durant had evicted her from the residence at one point because she was not paying rent. R. 364-91.

D. Sexual Assault Allegations.

On May 19, 2013, Lizzie Johnson and Ulanda McRae claim to have overheard a conversation between A.R. and K.R. detailing sexual abuse by Pastor Durant. Ms. Johnson first confronted Pastor Durant about the abuse allegations over the phone, while Ms. McRae and A.R. listened in. Pastor Durant denied any abuse had occurred. Ms. Johnson later confronted Pastor Durant in person. R. 252-57; 359-63.

K.R. attended Pastor Durant's churches since she was five years old. She attended with her family, including her aunt Ulanda McRae and grandmother Lizzie Johnson, on Tuesdays, Wednesdays, Fridays, and Sundays of each week. A typical Sunday included an 8:00 a.m. worship service at the smaller church on Manning Avenue. After that service concluded at 9:00 a.m., members moved to the bigger church on North Guinyard Drive for Sunday School and the 11:00 a.m. worship service. K.R. claims that in 2012, when she was thirteen years old, Pastor Durant began sexually abusing her in the church offices of both churches. According to K.R., an armor bearer would summon her to the office for prayer to help her "not like girls and not catch[] any diseases." A.R. claimed Pastor Durant inserted his fingers into her vagina in the office of the smaller church. K.R. claimed Pastor Durant inserted his penis into her vagina and had sexual intercourse in the office of the larger church. K.R. claimed the sexual abuse happened

several times a week. R. 21-29. K.R. claimed she did not tell an adult about the alleged abuse because she “was afraid no one would believe.” She acknowledged, “at the time [she] was lying real [sic] bad about having a cell phone and a lot about [her] grades.” R. 227-44. Ms. McRae confirmed that, at the time K.R. frequently lied to get her way. R. 258-59. K.R. acknowledged that she has lived with both A.R. and D.B., that T.H. visited her house, and that the four complaining witnesses are “pretty close.” R. 247 l. 13—248 l. 3.

A.R. began attending both of Pastor Durant’s churches when she was four years old. Her mother is Ulanda McRae, and her grandmother is Lizzy Johnson. She attended church three to five times a week for Bible study, choir rehearsal, praise dancing, and worship services. When she was eighteen years old, A.R. claimed Pastor Durant called her to his office at the larger church “to pray for me to make sure I wouldn’t get any diseases or no kind of harm would come to my body,” including “unmarital pregnancies.” Once inside the office, A.R. claimed Pastor Durant told her to pull down her pants and put his fingers in her vagina. A.R. claimed the sexual activity continued at both churches. A.R. claimed Pastor Durant told her “God was taking him to a new level and we’re going to have to go further in this process.” A.R. claimed Pastor Durant began having sexual intercourse with her when she was eighteen years old. R. 38-56. A.R. said that she “could not tell anyone because they wouldn’t understand” and claimed to be afraid to tell, though she never explained of whom or what she was afraid. She claimed her mother overheard her and K.R. talking about the assaults. She listened when Ms. Johnson called Pastor Durant to confront him and heard Pastor Durant deny the allegations. R. 259-72. A.R. acknowledged that she and K.R. (her cousin) are “close”

(like sisters) and that the two lived together at the time of the allegations. R. 275, ll. 3-16.)

T.H. attended Pastor Durant's churches with her family on Sundays from age four to sixteen. Her mother sang in the choir and taught Sunday School. A.R. is her God Sister. T.H. claimed Pastor Durant would pray to prevent "[s]exual diseases, breast cancer," and anything that could cause harm. T.H. claimed Pastor Durant would "touch my breasts or fondle in my vagina." According to T.H., Pastor Durant never actually inserted his fingers inside her vagina or had sexual intercourse with her. She claimed the abuse began in 2012 when she was fourteen or fifteen years old, occurred six or seven times, and happened in Pastor Durant's offices at both churches. R. 57-69. T.H. said that she had revealed the abuse to her mother in February 2013. She claimed the abuse stopped when she told A.R. and her mother. On cross-examination, T.H. acknowledged she told law enforcement that the alleged abuse started when she was sixteen, and her courtroom testimony was the first time she claimed it happened when she was younger than sixteen. R. 57-69. T.H. further acknowledged that she is close with K.R., A.R., and D.B. R. 313-16.

D.B. began attending Pastor Durant's churches at a young age with her family. Her mother was an usher, her nephew was an armor bearer, and sister oversaw the daycare. In 2012 or 2013, when she was fourteen or fifteen years old, Pastor Durant began sexually abusing her. She claimed Pastor Durant "prayed and put his fingers inside my vagina when I had bladder issues." She claimed Pastor Durant had sex with her "in his office and at his home." She claimed Pastor Durant said he would "bump the

seed out” after she got pregnant by another man.⁵ Pastor Durant arranged for D.B.’s mother to receive \$500.00 to pay for an abortion. D.B. testified Pastor Durant’s penis had a pink discoloration. R. 69-78. D.B. testified that she spoke with Investigator Valerie Williams of the Sumter Police Department in February 2014 and “copied” a statement. D.B. claimed Investigator Williams “put words in [her] mouth.” R. 340-55.

E. The Trial.

1. Preliminary Instructions to the Jury.

Pastor Durant’s case was called to trial on May 23, 2016, before the Honorable Roger M. Young, Sr. and a jury. During his initial comments to the panel of prospective jurors, Judge Young said:

I should let you know. I don’t have the indictments in front of me to read them to you, but Mr. Durant is charged with criminal sexual conduct with a minor between the ages of 11 and 14. And, also, with three counts of criminal sexual conduct third degree and a charge of forgery.

R. 2, ll. 17-22. The trial judge correctly stated Pastor Durant’s pending charges, R. 789-95, but the prosecution was proceeding only on the second-degree criminal sexual conduct charge involving K.R.

Defense counsel interjected, “Your Honor, I have something to bring up at another point in time.” The trial judge responded, “Pardon?” Defense counsel informed the trial judge, “I’ll bring it up later.” The trial judge continued:

Again, I bring that up just for the purpose of letting y’all [know] this case involves allegations of sexual abuse. So,

⁵ Detective Natalie Kelly of the Sumter Police Department and Investigator Valerie Williams of the Attorney General’s Office interviewed D.B. After confirming that Pastor Durant was not the father of D.B.’s underage pregnancy, they did not conduct an investigation to determine the identity of the father, even though the pregnancy probably resulted from criminal sexual conduct with a minor. R. 454-56.

again, he pled not guilty to those charges. The State has the burden of proving them.

R. 2, l. 23 – 3, l. 5.

The trial judge convened a sidebar. After the sidebar, the trial judge informed the potential jurors:

I have to apologize to y'all and to Mr. Durant. I made a mistake. My law clerk is not with me today. He is getting sworn in. He just passed the bar exam. And he sent me an e-mail with the – what he thought were the charges. He was incorrect. There's only one charge that Mr. Durant is facing, and that is criminal sexual conduct with a minor in the second degree. So I was incorrect in stating those other charges before. So please do not consider that in any way or hold that against Mr. Durant.

R. 3, ll. 6-19. Although a good faith effort to correct an honest mistake, the trial judge's explanation to the jurors was not true.

The trial judge went on to explain the significance of a grand jury indictment. He explained grand jurors "determine if there was probable cause to charge someone with a crime." And, grand jurors are "sort of a buffer between the State and the person so they can be put on notice of what they are charged with." The trial judge then read the indictment containing the allegations involving K.R. R. 3, l. 20 – 5, l. 7.

Defense counsel placed the sidebar on the record, moved for a mistrial, and asked "for a continuance or a new jury panel." Counsel pointed out that the trial judge informed the potential jurors about the other criminal sexual conduct charges in a "situation where the State is actively trying to get these other charges" into evidence. R. 11, l. 5 – 13, l. 5. The trial judge denied the motions for a mistrial or a continuance. R. 14, ll. 5-25. Pastor Durant renewed all motions prior to the jurors being sworn. R. 162-63.

2. Pretrial *Lyle* Hearing.

The prosecution moved to introduce evidence of the other crimes pursuant to Rule 404(b), SCRE and *State v. Lyle*.⁶ The trial judge convened a pretrial hearing and heard testimony. Specifically, despite choosing to proceed only on the charges involving K.R., the State wanted to introduce evidence of the allegations made by A.R., T.H., and D.B., including their testimony. The State argued the *Lyle* evidence was admissible under our Supreme Court's decision in *State v. Wallace*.⁷ The State first argued, "These witnesses talked clearly about similar occurrences of sexual acts with [Pastor Durant], which would be relevant to the criminal sexual conduct with a minor charge." Second, the State argued the "common scheme or plan" exception of Rule 404(b) applied because, under *Wallace*, the State satisfied its burden "to show that the similarities outweigh the dissimilarities in the case." Finally, the State argued Rule 403, SCRE did not exclude the evidence because:

Allowing this testimony in would not suggest that the jury come to a conclusion based on an improper basis, but would rather establish that a common scheme or plan existed by Pastor Durant to lure these younger girls back into his office, to pray for them, Your Honor, and to disguise this sexual assault as prayer for them, for girls that grew up in his church from the time that they were younger.

R. 78-83.

Counsel for Mr. Durant argued in response that the South Carolina rule regarding "common scheme or plan" is the same for charges of criminal sexual conduct with a minor as for other charges. Counsel then provided a classic example of a "common

⁶ *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

⁷ *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

scheme or plan” where someone steals a car to facilitate committing other crimes.⁸ Counsel discussed the facts and holdings in *Lyle* and the case it relied on, *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901). Counsel argued that the analysis by the Court of Appeals in its earlier decision in *State v. Wallace*⁹ “got it right.” He argued admitting the challenged evidence would “allow[] the State of South Carolina to introduce propensity evidence,” which our state’s longstanding “jurisprudence has said that we don’t want to do.” He pointed out that the changing composition of our Supreme Court is likely “to change our analysis of how we look at *Lyle*.” R. 83-95.

Trial counsel additionally argued, even under our Supreme Court’s opinion in *Wallace*, the evidence was not admissible because the dissimilarities outweigh the similarities. He provided the trial judge with five charts illustrating how the dissimilarities outweighed the similarities.¹⁰ The State dismissed the defense charts out of hand and argued simply that our Supreme Court’s opinion in “*Wallace* is still good law” and should control. R. 87-95.

The trial judge believed he was bound by our Supreme Court’s opinion in *Wallace* and concluded, “The similarities, in my analysis, far outweigh any of the dissimilarities.” R. 95-97. The trial judge declared the defense motion a “continuing objection” that protected Pastor Durant for appellate review. R. 279, ll. 6-21.

⁸ See, e.g., *State v. Nix*, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986) (evidence of car theft was admissible as part of a common scheme or plan to accomplish a planned robbery, abduction, and rape).

⁹ *State v. Wallace*, 364 S.C. 130, 611 S.E.2d 332 (Ct. App. 2005), reversed by *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

¹⁰ These charts will be discussed in more detail, *infra*.

3. Trial Proceedings.

From the very beginning of the trial, the State made it clear that they planned to prove the allegations involving K.R. largely with evidence of the allegations by A.R., T.H., and D.B. During opening statements, the prosecutor told the jurors:

This case, ladies and gentleman, is about power. It's about church abuse. It is about a man who is a pastor in two churches. And it is about a number of female victims, teenagers, who were taken advantage of.

The jurors would “hear from victims,” not just K.R., but also A.R., T.H., and D.B. R. 179, ll. 1-4; 180, l. 12 – 181, l. 8.

The State called Detective Natalie Kelly of the Sumter City Police Department. Detective Kelly interviewed K.R. on May 22, 2013, the day after K.R. first reported the allegations to law enforcement. K.R. reported sexual abuse occurred in 2012 and 2013 inside the pastor's office at each of the two locations of World International Ministries. Detective Kelly next interviewed A.R., who reported sexual assaults in 2011 and 2012 in the pastor's office of each of the two churches and at the pastor's home when she was eighteen years old. Detective Kelly interviewed T.H., who reported sexual assaults occurring in the pastor's office at her church when she was sixteen years old. Detective Kelley interviewed D.B., who reported sexual assaults at her pastor's home when she was thirteen years old. After these interviews, Detective Kelly referred the four complaining witnesses for forensic medical exams. R. 187-193. Detective Kelly testified that none of the complaining witnesses alleged that Pastor Durant used a condom. Further, none of the complaining witnesses sought counseling for the alleged sexual abuse. R. 569-70.

Detective Kelly obtained a search warrant for cell phone records for cell phones belonging to Pastor Durant and some of the state's witnesses. The records did not

produce any evidence that corroborated the statements of any of the complaining witnesses. R. 212-13.

Detective Kelly also sought and obtained search warrants for the two church locations and Pastor Durant's home. Based on statements from K.R., she collected

two cans of Febreze Gain scent, one can of Lysol disinfectant spray, vanilla and blossom scent, two bottles of instant hand sanitizer, one suspected hair fiber from the carpet, two DNA swabs from the black leather chair, two DNA swabs from the right side of the desk, two test swabs from the front of the desk, two DNA swabs from the right – the left side of the black couch cushion, two DNA swabs from the right side of the black cushion.

This evidence was packaged by the Sumter Police Department Forensic Unit and sent to the South Carolina Law Enforcement Division ("SLED") for DNA analysis.¹¹ R. 193-94; 206-11; 224-25.

Jessica Stowe, a forensic serologist at SLED, found acid phosphatase—which is found in semen, vaginal fluid, fecal matter, plant matter, some feminine hygiene products, spermicide, and herbicides—on a hand sanitizer bottle, and forwarded it for DNA testing. Ms. Stowe also examined a dress belonging to K.R. but did not find anything of evidentiary value.¹² R. 290-304.

Jennifer Bartman, a DNA analyst at SLED, testified no STR/DNA identification evidence was found on the hand sanitizer bottle. Ms. Bartman also examined swabs from the leather chair, which contained a mixture of two DNA samples. Although Pastor

¹¹ James Tallon, a crime scene technician at the Sumter Police Department assisted in serving the search warrant, collecting evidence based on witness statements, and transferring the evidence to SLED for analysis. R. 281-89.

¹² Valerie Williams, an investigator for the Attorney General's Office, assisted Detective Kelly during this investigation and collected the dress from K.R. for examination. R. 422-26.

Durant could not be excluded as contributing to the DNA mixture, K.R., A.R., and T.H. were excluded. R. 318-30.

The State called K.R., A.R., T.H., Ulanda McRae, and Lizzy Johnson, who testified as described, *supra*.

The State called Investigator Jacob Mitchell of the Sumter Police Department. He photographed Pastor Durant's penis. Pastor Durant cooperated with this process. R. 499-504. The four complaining witnesses gave similar descriptions of discoloration of Pastor Durant's penis, but, as the defense pointed out, these witnesses could have gotten that information from Lizzy Johnson who had been intimate with Pastor Durant. R. 664-66.

Kathy Saunders, a family nurse practitioner at the Sumter County Health Center, performed medical exams on K.R., A.R., and T.H. The examinations of K.R. and A.R. were normal with no indications of sexual trauma. The examination of T.H. was consistent with past penetration. T.H., however, disclosed to Dr. Saunders that she had been sexually active. R. 389-721. None of the complaining witnesses had a sexually transmitted disease.

David Kellin was qualified as an expert in child maltreatment and child abuse dynamics. He had never interviewed any of the complaining witnesses or reviewed any of the investigative materials. He testified about the process of grooming. He distinguished accidental and purposeful disclosure of child sexual abuse. He also testified about the reasons why a child might delay disclosing sexual abuse. The prosecutor wanted Mr. Kellin to connect religion with delayed reporting of sexual abuse,

so he “guess[ed]” religion could “play a role in whether or not someone discloses sexual abuse.” R. 469-81.

The State called Samara Samuels, a notary. Through her, the State introduced evidence of two quit claim deeds—one purporting to deed a property from Pastor Durant to Lizzy Johnson and one purporting to deed the property back from Lizzy Johnson to Pastor Durant. Ms. Samuels testified she notarized the quit claim deed purporting to transfer the property from Pastor Durant to Lizzy Johnson. She claimed her signature was forged on the deed purporting to transfer the property from Lizzy Johnson back to Pastor Durant. R. 493-98.

Pastor Durant called Melvin “Mickey” Dawson, Jr., a forensic document and handwriting examiner to demonstrate that Pastor Durant never transferred the disputed property to Lizzy Johnson. Mr. Dawson examined the two quit claim deeds. He compared the signatures on the quit claim deeds to known handwriting samples of Pastor Durant, Lizzy Johnson, and Samara Samuels. He concluded that Pastor Durant was not the person that signed his name to the two deeds. He concluded that Lizzy Johnson signed both documents. Samara Samuel’s signature on the first and second deeds was not signed by the same person. R. 530-55 Defendant’s Ex. 1, R. 771-73.

Pastor Durant called Myer Mack, who has been a member of Pastor Durant’s churches for twenty years. He is an elder and armor bearer. After a worship service, Mr. Mack would wait outside Pastor Durant’s office door. Often, church members wanted to see Pastor Durant. Sometimes Pastor Durant would accept the visitors, but “a lot of times he [would] be tired and worn out.” When Pastor Durant would receive a visitor, Mr. Mack would wait outside the door, which was never locked, has a window, and is not

sound proof. Most visitors stayed for a short period of time, less than five to ten minutes. If a visitor stayed for a long period of time, he would “find out what was going on because . . . we have other people waiting.” R. 570-79.

Mr. Mack knows Lizzy Johnson, K.R., A.R., T.H., and D.B. All were members of Pastor Durant’s church. They were always together. There were times they would go into Pastor Durant’s office, but Mr. Mack never observed or heard anything inappropriate when they—or anyone else—went into Pastor Durant’s office. R. 579-80.

Elvin Vaughn was also an armor bearer for Pastor Durant. Pastor Durant is legally blind and does not have legs from the knees down. He also knows K.R., A.R., T.H. and D.B., who were always together. He never saw any of the four complaining witnesses meet alone with Pastor Durant. R. 594-602

Arlisa Vaughn, a trustee and the accountant for Pastor Durant’s churches, wrote a check in the amount of \$500.00 payable to D.B.’s mother. Melody Durant, Pastor Durant’s wife who is also a minister at the churches, asked Ms. Vaughn to write the check as a loan. R. 628-35.

Dr. Jason Leonard, M.D. testified that he had been Pastor Durant’s doctor since 2009. Dr. Leonard confirmed that Pastor Durant is legally blind and a double amputee. Pastor Durant has chronic pain in his knees that requires medication and other treatment. Dr. Leonard knew Pastor Durant was diagnosed with erectile dysfunction in 2007 or 2008, which he continued to treat. Finally, Dr. Leonard diagnosed Pastor Durant with a chronic sexually transmitted disease. This sexually transmitted disease remained active the entire time Dr. Leonard treated Pastor Durant. R. 640-46.

During closing arguments, defense counsel reminded the jurors that the trial is about the allegations made by K.R., but the State threw in a “bunch of other people,” even though there were no other charges. Counsel emphasized the lack of physical evidence and pointed out that the first two complaining witnesses, K.R. and A.R., lived together and with Lizzy Johnson. All four complaining witnesses had Lizzy Johnson in common. Lizzy Johnson knew about the discoloration of Pastor Durant’s penis because of her prior intimate relationship. Trial counsel argued that the property dispute with Pastor Durant was Lizzy Johnson’s motive. Trial counsel pointed out that two armor bearers contradicted the allegations. Pastor Durant has a sexually transmitted disease that the complaining witnesses do not have. R. 659-70.

The Solicitor argued, “[Y]es, a lot of this case rest[s] on the testimony of K.R., A.R., T.H., and D.B.” Pastor Durant “was supposed to be their shepherd, but he was nothing but a wolf in sheep’s clothing.” He “went from praying for them to preying on them.” R. 674-75.

4. Jury Deliberations – The *Allen* Charge.

The jurors began deliberating at 2:16 p.m. At 5:11 p.m., the trial judge announced “something different” had occurred and summarized a note from the jurors:

Your Honor, after two hours and 45 minutes, presumably, and it says the vote is after four attempts, and it tells me what the break is between guilty and not guilty, but the unusual thing is they have one juror who will not vote....

I’ve never had that. And I don’t know how to deal with that other than bring them in, give them an Allen charge, ask them to try and tell them not voting is just not an option. They need to vote guilty or not guilty, but not voting doesn’t do anything. I’m completely open to suggestions on it. It’s such a baffling thing, I’m almost certain that it would be unique.

R. 705, l. 23 – 706, l. 19; Court's Ex. 2, R. 776.

The State suggested substituting one of the alternate jurors for the juror refusing to vote, but the trial judge already had discharged the alternates. Defense counsel objected to the trial judge giving an *Allen*¹³ charge because “there’s case law that suggest[s] that it may unfairly target the minority juror.” R. 707, ll. 7-21. The jurors returned to the courtroom at 5:15 p.m., and the trial judge gave an *Allen* charge which concluded with the following admonition:

Now, I don’t know who the person is, and I’m not asking who the person is that won’t vote, but that’s really not helpful to the situation at all. All that will do is ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision. So that’s not a helpful process and really under the process we have, we need all 12 people to vote. I don’t care how you vote, but it really does – it really is necessary for you to vote in order for us to have a verdict. Whether it’s guilty or not guilty, it’s got to be unanimous one way or the other. So we do need you to participate whoever this person is at this point is saying I’m not voting.

So in light of that, let me send you back. However long it is you want to take this evening, we’ll be here as long as you want to be here. You know, I’ll leave it at that.

And Mr. Foreman, go ahead and send your jury back and see what you can come up with.

¹³*Allen v. United States*, 164 U.S. 492 (1896). S.C. Code Ann. § 14-7-1330 provides:

When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.

R. 708, l. 5 – 711, l. 15.

The jury resumed deliberations at 5:21 p.m. At 5:55 p.m., the jurors returned to the courtroom—only thirty-four minutes after they were previously sent out to resume deliberation—with a verdict finding Pastor Durant guilty of second-degree criminal sexual conduct with a minor. R. 711, l. 16 – 712, l. 24.

5. Sentencing

By sentencing, it was clear that even the trial court had come to believe that the trial was about the allegations involving all four women. During sentencing, the trial judge stated:

Well, the *charges* in this case were really unlike any I've heard before. The evidence that the State presented was compelling. The defense made a strong case. And the jury chose to believe the young *ladies*.

R. 731, ll. 9-13 (emphasis added).

The trial judge sentenced Pastor Durant to the maximum sentence of imprisonment for twenty years. R. 732; 796.

F. *Discovery of Brady Violation and Motion for New Trial.*

Immediately following the verdict, Ronnie McCray called defense counsel and asked why his ex-wife, Yolanda McCray, “was allowed to testify without mentioning of her prior record.” Defense counsel was not aware of any prior record. Based upon the name and the information provided by Mr. McCray, defense counsel ran a SLED catch, which was attached as an exhibit to the motion. Under the name “Yolanda McCray,” the SLED catch revealed numerous aliases and an extensive criminal record. Defense counsel summarized:

In 1991, she had a simple assault charge under the [name] Vlonta Riley. In 1993, she had a shoplifting conviction under the name Yolanda Riley out of Myrtle Beach. In 1995, she had a fraudulent check charge under the name Yolanda S. Riley out of Clarendon County. In 1995, there was a forgery arrest under the name Yolanda Riley out of the Manning police department.

In 1997, she has a conviction for driving under suspension under the name Vlanda, V-l-a-n-d-a, S. Riley. That was a conviction, res, sir. In 1999 under the name Ulanda, U-l-a-n-a Shoantela, S-h-o-a-n-t-e-l-a, Riley, there was another fraudulent check charge conviction out of Sumter, South Carolina. In 2001, under the name that I just mentioned, Ulanda Shoantela Riley, the highway department, she had a speeding as well as driving under suspension conviction. In 2004, under the name Ulanda, U-l-a-n-d-a, Riley, she has a conviction for obtaining signature under false pretenses which she was convicted. In 2004, under Wanda Riley, for Manning, South Carolina, there was a forgery arrest.

R. 735-38.

Counsel reminded the trial judge, because of the complete lack of physical evidence in the case, the trial turned entirely on the credibility of the witnesses. As trial counsel pointed out at the hearing, the trial court even mentioned witness believability during sentencing. Attacking the credibility of Lizzie Johnson—including the evidence of forged property deeds—was central to Pastor Durant’s defense at trial. The State in turn relied heavily on the credibility of the Ms. McRae, including in its “very effective” closing argument. Counsel argued “that we should have been allowed to cross-examine on” this criminal history. Under the defense theory, Ms. McRae’s criminal history, including the conviction for obtaining signature under false pretenses, was very relevant. Counsel noted that Pastor Durant’s original Rule 5, SCRCrimP and *Brady* motions “specifically request[ed] records of” each witness. Counsel argued that the failure to

disclose this information was not “harmless error” because “this is a credibility case.” The jurors deliberated for over four hours and “came back initially with a hung jury.” R. 738-43.

The State acknowledged Ulanda McRae’s criminal history. The prosecutor stated the witness’s name “is Yolanda McCrae [sic], M-c-r-a-e,” but the State requested her criminal history under the spelling “M-c-C-r-a-e.” The State did not use the witness’s social security number to request her criminal history. The State contended it “had no idea Yolanda McCray had had a prior criminal history.” The State argued there was not a *Brady* violation. R. 734-49.

Defense counsel pointed out “allowing good faith mistakes still hamper[s] people’s rights.” Counsel reviewed the elements of a *Brady* violation. He first argued, “The evidence was favorable to [Pastor Durant] because it goes 100 percent to our legal defense.” Second, it was in the possession of the prosecution because “they have the right to run an NCIC search” and had the ability to talk to their key witness. Also, the witness’s social security number was on her witness statement. Third, although a good faith mistake, the prosecution suppressed the evidence. It “wasn’t given to us so that we could properly cross-examine” Ulanda McRae “because of their mistake.” Fourth, “It was material to guilt” because “[t]his is a credibility case.” R. 749-54.

The trial judge reasoned, “[T]he only real question is was it an inadvertent oversight, and, if so, did it rise to the level of being material, such to the point that it would affect a real question of guilt or punishment.” The trial judge acknowledged he probably would have allowed the evidence, which “clearly would have been favorable to” Pastor Durant. He found, “The State did not have this in their possession. It wasn’t

known to them. They didn't suppress it." The trial judge then ruled, "It would have been an impeachment issue about whether or not this lady actually overheard them, and so I find it was not a violation of *Brady* requirements to disclose this record, and so the motion for a new trial is denied." 24. R. 755-57.

ARGUMENTS

Question I

Did the trial judge err when he did not declare a mistrial after telling the jurors that the State charged Pastor Larry Durant with second-degree criminal sexual conduct with a minor, three counts of third-degree criminal sexual conduct, and forgery, when the only the second-degree criminal sexual conduct with a minor was being called to trial?

In his initial remarks to the jurors, the trial judge incorrectly stated the charges that were to ultimately be before the jury. Specifically, he stated that Pastor Durant was charged with “criminal sexual conduct with a minor between the ages of 11 and 14. And, also, with three counts of criminal sexual conduct third degree and a charge of forgery.” While all these charges were pending against Pastor Durant, the State had chosen to pursue only the charge of criminal sexual conduct with a minor. Trial counsel objected. The judge then attempted to cure this misstatement by explaining he was mistaken, that Pastor Durant was facing only the one count. The trial judge then gave more credence than due to an indictment when he described the function of the grand jury as to “determine if there was probable cause to charge someone with a crime” and a “sort of a buffer between the State and the person so they can be put on notice of what they are charged with.” R. 3, l. 20 – 5, l. 7.

Pastor Durant moved for a mistrial. “The decision to grant or deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law.” *State v. Council*, 335 S.C. 1, 12–13, 515 S.E.2d 508, 514 (1999). “In order to receive a mistrial, the defendant must show error and resulting prejudice.” *Id.* Pastor Durant established “error and resulting prejudice,” and the trial judge’s denial of the of the mistral motion

and request to continue was “an abuse of discretion amounting to an error of law.” The trial judge, prosecutor, and defense counsel agreed it was error to tell the jurors about the other pending charges. The trial judge’s announcement of the other charges is more prejudicial than the “single reference to warrants that existed against” the accused in *State v. Thompson*, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003). The trial judge, instead of the prosecutor, introduced the jurors to other bad acts not admissible under Rule 403, SCRE and *Lyle* for the reasons discussed in Questions II and III, *infra*.

While it is true that “the trial judge should exhaust other methods to cure possible prejudice before aborting a trial,” *Council*, 335 S.C. at 13, 515 S.E.2d at 514, sometimes a “curative instruction [] only make[s] the situation worse.” *Id.* 335 S.C. at 12, 515 S.E.2d at 513. In the case at hand, the trial judge telling the jurors, “I made a mistake,” did not cure the prejudice because the judge, in fact, stated the charges correctly, and the testimony of A.R., T.H., and D.B. exposed the curative instruction as a sham. The trial judge telling the trial jurors that the grand jury is a “buffer between the State and the person” accused of a crime compounded the prejudice by bolstering the testimony of A.R., T.H., and D.B. by implying their allegations had been somehow vetted by the grand jury. Announcing the forgery charge implied the State had resolved the cross-allegations of forged property deeds in favor of Lizzy Johnson, even though the prosecution had never even conducted its own handwriting analysis. R. 524-25. The trial judge’s effort to explain the mistake failed “to safeguard the rights of” Pastor Durant. *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

The trial judge erred by announcing the other charges. The curative instruction—an obvious sham—made matters worse when the judge discussed the significance of a grand jury indictment. This Court should order a new trial.

Question II

When admitting the testimony of A.R., T.H., and D.B, did the trial judge err when relying on *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), because our Supreme Court’s holding in *State v. Wallace* is contrary to Rule 404(b) and *State v. Lyle* and should be overruled?

The State alleged Pastor Durant sexually assaulted A.R., T.H., and D.B in a manner similar to the allegations made by K.R. The South Carolina Supreme Court’s decision in *State v. Wallace* was the trial judge’s sole basis for admitting the testimony of A.R., T.H., and D.B. That decision, of course, *overruled* the earlier Court of Appeals decision. Defense counsel correctly pointed out the retirements of Chief Justice Jean Toal, Justice E.C. Burnett, and Justice John H. Waller, creates questions about the continued validity of *Wallace*. In *State v. Venancio Diaz Perez*, Appellate Case Number 2015-001576, our Supreme Court granted Mr. Perez’s motion to argue against precedent and convened oral arguments on November 30, 2016, during which Mr. Perez asked the Court to overrule *Wallace*. The decision in *Perez* is still pending.

Chief Justice Costa Pleicones dissented from the Supreme Court’s decision in *Wallace*, saying he would have affirmed the Court of Appeals’ opinion, which was written by now Justice Kaye Hearn. In his dissent in *Wallace*, then Justice Pleicones noted our Supreme Court’s “cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a ‘common scheme or plan’ under Rule 404(b), SCRE, have, in effect, created an exception to the rule’s exclusion of propensity evidence.” *Wallace*, 384 S.C. at 435-36, 683 S.E.2d

at 279. *See also State v. Hubner*, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009) (Pleicones J. dissenting) (“For the reasons given in my dissent in *State v. Wallace* . . . I respectfully dissent.”).

During the *Perez* oral argument, both Chief Justice Pleicones and Justice Hearn indicated they might adhere to their prior opinions in *Wallace*. Based on his detailed prior opinion rejecting propensity evidence, Justice John Kittredge likely will vote to overrule *Wallace*. *See State v. Tuffour*, 364 S.C. 497, 504, 613 S.E.2d 814, 818 (Ct. App. 2005) (“The appellate courts of this state have unwaveringly adhered to the rule of exclusion of prior bad act evidence to show criminal propensity or that the defendant is a bad person unworthy of the presumption of innocence.”) *vacated by State v. Tuffour*, 371 S.C. 511, 641 S.E.2d 24 (2007) (“Tuffour pled guilty to a lesser-included offense and was sentenced to time served under the same indictment which was the subject of Tuffour’s 2002 conviction and this appeal.”).

The Supreme Court’s holding in *Wallace*, accordingly, is inconsistent with the traditional Rule 404(b), SCRE analysis.¹⁴ Under the traditional Rule 404(b) analysis for a common scheme or plan, the testimony of A.R., T.H., and D.B. would not be admissible. Our Supreme Court observed in *State v. Nelson*:

In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. *Both rules are grounded on the policy that character evidence is not admissible for purposes of proving that the accused possesses a criminal*

¹⁴ The Court of Appeals’ opinion in *Wallace*, identified inconsistent approaches to our state’s Rule 404(b) analysis. 364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2.

character or has a propensity to commit the crime with which he is charged.

31 S.C. 1, 6, 501 S.E.2d 716, 718-19 (1998) (internal quotations and citations omitted) (emphasis added). Traditionally, admissibility under *Lyle*, *supra*, and Rule 404(b) is *not* determined by similarity. Regarding the admissibility of prior crimes, our Supreme Court warned in *Lyle*:

True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter; but that is the precise inference the general rule was wisely designed to exclude.

Lyle, 125 S.C. at 420, 118 S.E. at 808. “The substance of these common law rules has now been codified in” Rule 404, SCRE. *Nelson*, 331 S.C. at 6, fn. 7, 501 S.E.2d at 718-19, fn. 7.

Under the traditional interpretation of the rule, “[i]f the court does not clearly perceive the connection between the extraneous transactions and the crime charged, that is, its logical relevance, the accused should be given the benefit of the doubt, and the evidence rejected.” *State v. Brooks*, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000). See also *State v. Fletcher*, 379 S.C. 17, 25, fn. 3, 664 S.E.2d 480, 484, fn. 3 (2008) (“Prior acts must be so intimately connected to the crimes charged that their introduction is appropriate to complete the story of the crime charged.”); *State v. Pagan*, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006) (“To be admissible, the bad act must logically relate to the crime with which the defendant has been charged.”); *State v. Timmions*, 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. 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. Johnson*, 293 S.C. 321, 234, 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 a 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.”).

The South Carolina Supreme Court’s holding in *Wallace*, and similar appellate court decisions of this state,¹⁵ effectively created a rule *allowing* admission of prior bad acts against individuals other than the alleged victim in the case to demonstrate general propensity in direct contravention of Rule 404(b), SCRE. *See Wallace, supra*, (Pleicones J. dissenting); *State v. Fonseca*, 383 S.C. 640, 647, 681 S.E.2d 1, 4 (Ct. App. 2009) (“Although *Lyle* does not distinguish between sexual offenses and non-sexual offenses, the common trend in South Carolina is to apply the *Lyle* exceptions differently to sexual offenses.”) *affirmed by State v. Fonseca*, 393 S.C. 229, 711 S.E.2d 906 (2011).

South Carolina’s rule allowing admission of propensity evidence in child sexual abuse cases violates due process under the United States and South Carolina Constitutions. Although the Supreme Court of the United States has not addressed “whether a state law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime,” *Estelle v. McGuire*,

¹⁵ *E.g. State v. Hubner*, 384 S.C. 436, 683 S.E.2d 279 (2009); *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989); *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984); and *State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979).

502 U.S. 62, 75, fn. 5 (1991), the High Court has recognized the unfair danger of admitting such evidence by explaining:

Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. *The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.*

Michelson v. U.S., 335 U.S. 469, 475-76 (1948) (internal citations omitted) (emphasis added). *See also Old Chief v. U.S.*, 519 U.S. 172, 182 (1997) (holding the exact nature of a prior crime too prejudicial to be admissible even though it was an element of the current offense).

Further, it is well settled that a state can decide a constitutional issue on adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). South Carolina has a tradition of deciding constitutional issues based on adequate and independent state grounds. *See, e.g., State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985) (chemical castration is cruel and unusual punishment pursuant to S.C. Const Art I, §15); *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) (“The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.”). Article I, Section 3 of the South Carolina Constitution guarantees due process of law.

Other state courts that have addressed the admissibility of propensity evidence in child sexual abuse cases have held that introducing this type of propensity evidence violates the due process clauses of state constitutions. For example, “[b]ased on Iowa's history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental conceptions of fairness, . . . the Iowa Constitution prohibits admission of prior bad acts evidence based solely on general propensity.” *State v. Cox*, 781 N.W.2d 757, 768 (Iowa 2010). In reaching this conclusion, the Iowa Supreme Court reviewed its state’s “policy against admissibility of general propensity evidence stems from a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds.” *Id.* at 767 (internal quotations omitted). The Iowa Supreme Court further noted, “The general rule prohibiting propensity evidence was firmly established in Iowa courts at common law.” *Id.* at 764 (citing *State v. Vance*, 119 Iowa 685, 686, 94 N.W. 204, 204 (1903)). Likewise, the Missouri Supreme Court “act[ed] consistently with a long line of cases holding that the Missouri constitution prohibits the admission of previous criminal acts as evidence of a defendant's propensity” and invalidated a state statute admitting this type of evidence in child sexual abuse cases. *State v. Ellison*, 239 S.W.3d 603, 607-08 (Mo. 2007).

The same considerations are just as firmly rooted in South Carolina’s common law. Our Supreme Court decided *Lyle* in 1923 based on our state’s precedent. *See also State v. Kenny*, 57 S.E. 859, 861-62 (S.C. 1907) (“Logically, the commission of an independent offense is not proof, in itself, of the commission of another crime.... Without [an] obvious connection it is not only unjust to the prisoner to compel him to acquit

himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury.”).

The South Carolina Supreme Court’s decision in *Wallace*, allowing propensity evidence in child sexual abuse cases is in direct contravention of the common law approach to propensity evidence, as codified in Rule 404 (b), SCRE, and violates United States and State due process and accordingly should be overruled. This Court should order a new trial.

Question III

Did the trial judge err in admitting the testimony of A.R., T.H., and D.B. since that testimony was inadmissible under *State v. Wallace* and other valid precedent when the dissimilarities of the witnesses’ testimony outweighed the similarities and the danger of unfair prejudice from the testimony substantially outweighed the probative value?

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be 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. The State has the burden of establishing one of these exceptions. If the Court determines the evidence to be admissible as an exception to Rule 404(b), then “it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case.” *Brooks*, 341 S.C. at 62, 533 S.E.2d at 328. *See also* Rule 403, SCRE.

Under our Supreme Court’s opinion in *Wallace*:

When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the

similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).

384 S.C. at 433, 683 S.E.2d at 277-78 (internal citation omitted). The Court in *Wallace* identified five factors to be considered when determining admissibility of propensity evidence in child sexual abuse cases:

[T]he trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery.

384 S.C. at 433-34, 683 S.E.2d at 278. Our Supreme Court “emphasize[d] that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.” *Id.* The prosecutor correctly listed five factors set forth in *Wallace*. R. 80, ll. 3-10.

Defense counsel was also correct when he stated *Wallace* reduced the analysis to a “math equation.” Defense counsel provided the trial judge with five charts showing the “similarities verses the dissimilarities” in the allegations of the four complaining witnesses. Chart one pointed out that A.R. was eighteen and T.H. was sixteen when the assaults allegedly occurred, meaning the two witness had reached the age of consent. See S.C. Code Ann. § 16-3-655. Counsel reminded the trial judge that K.R. claimed Pastor Durant said the sexual activity would help her not to prefer women over men, but some of the complaining witnesses prefer men over women. Chart two compared the locations

of the alleged assaults, the clothing worn by Pastor Durant during the alleged assaults, and the type of sexual acts allegedly involved. Chart three compared whether Pastor Durant made any threats, whether the complaining witnesses were aware of Pastor Durant's prosthetic legs, and whether the door was locked during the alleged assaults. Chart four compared the location of the alleged assaults, duration of the alleged assaults, the presence or lack of conversation during the alleged assaults, and the different descriptions of how Pastor Durant purportedly cleaned up after the sexual activity. Chart five compared whether or not the complaining witnesses claimed Pastor Durant gave them money. R. 87-93.

Counsel argued the *Lyle* witnesses should be excluded under *Wallace*, but the trial judge disagreed. As *Wallace* continued to recognize, "Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant." 384 S.C. at 435, 683 S.E.2d at 278-79 (2009). Regarding this analysis, the United States Supreme Court has specifically held that the relevant propensity evidence must be excluded when "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." *See Old Chief*, 519 U.S. at 181.

While the prosecutor in this case argued in the pretrial hearing that "[a]llowing this testimony in [the trial] would not suggest that the jury come to a conclusion of an improper basis," R. 83, ll. 6—8, the prosecutor's opening statement and closing

argument, instead, urged the jurors to convict Pastor Durant *because of* these other crimes. Admitting the testimony of A.R., T.H., and D.B. created a danger the jurors would convict Pastor Durant based on the other allegations rather than based on proof beyond a reasonable doubt of the elements of the crime charged in the indictment involving K.R.

Even if *Wallace* were to remain good law, the trial court misapplied it in this case and erred in admitting evidence. The trial court should have excluded the *Lyle* witnesses because of dissimilarities outweighed the similarities. Even if these witnesses were admissible under *Lyle*, the trial judge should have excluded the testimony because the prejudicial effect substantially outweighed the probative value and increased the danger of the jurors convicting Pastor Durant on an improper basis. This Court, therefore, should order a new trial.

Question IV

After the jurors announced a deadlock, did the trial judge err by giving an *Allen* charge that singled out the sole non-voting juror, directing that juror not to prevent a unanimous verdict, after which the jurors returned a unanimous verdict in less than thirty-four minutes?

After deliberating for three hours, the jury sent out a note, saying that they were deadlocked and that there was one juror who refused to vote. The trial judge commented that he had never encountered or even heard of such a situation. His proposed solution was to give an *Allen* charge and tell them that “not voting is just not an option. They need to vote guilty or not guilty, but not voting doesn’t do anything.” R. 705-06; Court’s Ex. 2, R. 776.

The State suggested substituting one of the alternate jurors for the juror refusing to vote, but the trial judge already had discharged the alternates. Defense counsel

objected to the trial judge giving an *Allen* charge, warning of case law suggesting it may “unfairly target the minority juror.” R. 707, ll. 7-21. The jurors returned to the courtroom at 5:15 p.m., and the trial judge gave an *Allen* charge which concluded with the following admonition:

Now, I don't know who the person is, and I'm not asking who the person is that won't vote, but that's really not helpful to the situation at all. All that will do is ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision. So that's not a helpful process and really under the process we have, we need all 12 people to vote. I don't care how you vote, but it really does – it really is necessary for you to vote in order for us to have a verdict. Whether it's guilty or not guilty, it's got to be unanimous one way or the other. So we do need you to participate whoever this person is at this point is saying I'm not voting.

So in light of that, let me send you back. However long it is you want to take this evening, we'll be here as long as you want to be here. You know, I'll leave it at that.

And Mr. Foreman, go ahead and send your jury back and see what you can come up with.

R. 708, l. 5 – 711, l. 15. The jury was then sent out to resume deliberations. Thirty-four minutes later, they returned to the courtroom with a verdict finding Pastor Durant guilty of second-degree criminal sexual conduct with a minor. R. 711, l. 16 – 712, l. 24.

“The trial judge has the duty to urge, but not coerce, a jury to reach a verdict. An *Allen* charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other's views.” *Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (internal citation omitted). “Whether an *Allen* charge is unconstitutionally coercive must be judged ‘in its context and under all the circumstances.’” *Id.* (citing *Tucker v. Catoe*, 346 S.C. 483, 491,

552 S.E.2d 712, 716 (2001) and *Lowenfield v. Phelps*, 484 U.S. 231, 237, 108 S.Ct. 546, 550, 98 L.Ed.2d 568, 577 (1988)). *Tucker* identified four “factors to determine whether the given *Allen* charge was unconstitutionally coercive.” In *Tucker*, the presence of two of the four factors warranted granting a new trial. *Id.* These factors are (1) whether the charge spoke “specifically to the minority juror(s),” (2) whether the judge included language requiring the jurors to reach a verdict, (3) whether the judge inquired into “the jury’s numerical division, which is generally coercive,” and (4) the length of time after the instruction until the jurors return a verdict. *Tucker* 346 S.C. at 492, 552 S.E.2d at 716. Applying the *Tucker* factors in this case militates in favor of ordering a new trial for Pastor Durant. The trial judge specifically addressed the non-voting juror, directed that juror not to prevent a unanimous verdict, and implied the trial judge would require the jury to deliberate—all night if necessary—until the jurors returned a unanimous verdict. The jurors then returned a unanimous verdict in less than thirty-four minutes.

Our Supreme Court considered a similar situation when it reversed a conviction in *Workman v. State* where the trial judge impermissibly directed an *Allen* charge to the minority jurors and said:

I cannot accept any report at this time that you cannot agree on a unanimous verdict in this case. I am of the opinion that you have not deliberated sufficiently long that I could in good conscience accept that report. And I tell you frankly it will take considerably more time before I am convinced that you cannot reach a verdict.

I therefore, humbly beseech you to return to your jury room, continue your deliberations with the hope that you can arrive at a unanimous verdict within a reasonable time.

412 S.C. 128, 132, 771 S.E.2d 636, 639 (2015) (emphasis supplied by the court). Here, the trial judge branded one juror “not helpful to the situation at all” because the juror

might “ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision.” And then the trial judge required, “However long it is you want to take this evening, we’ll be here as long as you want to be here.” The *Allen* charge, accordingly, was unconstitutionally coercive to a single juror.

The trial judge erred in giving an unconstitutionally coercive *Allen* charge that singled out the minority juror, included language requiring the jurors to reach a verdict (implying that they would only be released for the day once a verdict was reached), and which resulted in a guilty verdict less than thirty-four minutes later. Therefore, this Court should order a new trial.

Question V

Did the trial judge err by denying Pastor Larry Durant’s new trial motion based on a *Brady* violation resulting from the prosecutor not disclosing the prior criminal history of Ulanda McRae when her prior criminal history for dishonesty impeached her credibility?

Prior to trial, defense counsel filed Rule 5, SCRCrimP and *Brady* motions which “specifically request[ed] records of” each witness. The day after Pastor Durant’s trial concluded, trial counsel received a phone call alerting him that Ulanda McRae—a crucial State’s witness—had a criminal record which had not been disclosed to him by the State. Trial counsel then ran a SLED catch based upon the information provided—name “Yolanda McCray”—and learned that Ms. McRae had an extensive criminal history. Ms. McRae’s criminal record included charges and convictions under several aliases¹⁶ for simple assault, shoplifting, multiple fraudulent check charges, multiple forgery charges, multiple driving under suspension charges, and obtaining a signature under false

¹⁶ Vlonta Riley, Yolanda Riley, Yolanda S. Riley, Vlanda S. Riley, Ulanda Shoantela Riley, Ulanda Riley, and Wanda Riley.

pretenses. Based upon the results of the SLED catch, trial counsel filed a motion for new trial alleging a *Brady* violation by the State. The trial court heard and denied this motion. The trial court erred in denying this motion.

“*Brady* is based on a sense of fairness, and a belief that society gains when a defendant is accorded a fair trial. The focus is not on the misconduct of the Prosecutor, but on the fairness of the procedure.” *Gibson v. State*, 334 S.C. 515, 528, 514 S.E.2d 320, 326–27 (1999) (internal quotations omitted). *Gibson*, accordingly, held:

A *Brady* claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.

Id., 334 S.C. at 524, 514 S.E.2d at 324 (internal citations omitted). Further, “[t]his rule applies to impeachment evidence as well as exculpatory evidence.” *Id.* [C]onstitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* 334 S.C. at 525, 514 S.E.2d at 325.

While the trial court applied the correct test as set forth in *Gibson*, it erred in its application of the test. The trial judge correctly concluded the witness’s prior criminal history was favorable to Pastor Durant and material to the determination of guilt. The trial judge, however, erred in concluding the State was not in possession of the criminal history and, therefore, did not suppress it. The trial judge incorrectly focused on the “inadvertent oversight” of the prosecutor. Whether a prosecutor’s failure to reveal *Brady* evidence is “due to negligence or an intentional act” is irrelevant in determining whether a *Brady* violation occurred. *Gibson v. State*, 334 S.C. at 528, 514 S.E.2d at 326. As trial

counsel argued, the State has access to the NCIC database. The State requested criminal histories for other witnesses and, in fact, requested a criminal history for this witness under an incorrect name. The State was therefore in possession of Ms. McRae's criminal history. The trial judge also erred by suggesting a *Brady* violation does not apply to impeachment evidence—*Gibson* in fact clearly states that *Brady* does apply to impeachment evidence. *Gibson*, 334 S.C. at 524, 514 S.E.2d at 324.

Once it is determined, as in this case, that evidence favorable to the accused was in possession of and suppressed by the State, the question then becomes whether the suppressed evidence was material to the defense and whether its suppression resulted in a constitutional error. Trial counsel specifically requested criminal histories of all witnesses. Under *Gibson*,

favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonably probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

334 S.C. at 525, 514 S.E.2d at 325. Such a “reasonable probability” is demonstrated “when the Government's evidentiary suppression undermines confidence in the outcome of the trial.” *Id.*

Here, suppression of the evidence undermines the confidence in the outcome of the trial. The trial judge and defense counsel agreed that the case turned on the credibility of the witnesses. As trial counsel argued, “one of the central cruxes” of Pastor Durant's defense was Lizzy Johnson forging the two property deeds, which provided the motive for her, the four children, and Ulanda McRae to fabricate the allegations of sexual abuse. Because her criminal history was suppressed, the State allowed the jurors to believe Ulanda McRae was a model citizen and, therefore, a credible witness. The State

relied heavily on the testimony of Ulanda McRae in its closing, saying that “one of the reasons you should not believe the theory offered by the defense” was Ulanda McRae “just happened to overhear this conversation” between K.R. and A.R. Because of the State’s *Brady* violation, Pastor Durant was unable to present crucial impeachment evidence regarding Ulanda McRae.

The State failed to comply with its obligations pursuant to *Brady* when it suppressed material evidence in its possession that was favorable to Pastor Durant, thereby violating his due process rights. This Court should order a new trial.

Question VI

Should this Court order a new trial for Pastor Larry Durant based on the Cumulative Error Doctrine?

Each of the foregoing arguments independently entitles Pastor Durant to a new trial. This Court, however, should not overlook the cumulative error doctrine, which “provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial.” *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). *And see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002) (cumulative error of solicitor’s improper argument and improperly excluded evidence warranted reversal).

Pastor Durant’s questions on appeal are intertwined. The trial judge informed the jurors about the other charges pending against Pastor Durant, with which the State was not proceeding at that time. The trial judge’s attempt to correct the error failed when the prosecution called the other complaining witnesses. The prosecution’s theory of the case not only linked the credibility of the four complaining witnesses but also portrayed Pastor

Durant as a “wolf in sheep’s clothing” “preying” on his flock. The credibility of those witnesses was also intertwined with the credibility of Ulanda McRae. Telling the jurors about Ulanda McRae’s crimes of dishonesty likely would have unraveled the prosecution’s case. Even after the State asked the jurors to convict Pastor Durant because of the *Lyle* witnesses, the jurors deliberated for three hours and announced a deadlock. Without the *Lyle* witnesses and/or with the successful impeachment of Ulanda McRae, the jurors likely would have acquitted Pastor Durant. The trial judge’s singling out of a juror following the *Allen* charge and threat to hold the jurors through the night until they returned a unanimous verdict further undermines the confidence in the verdict.

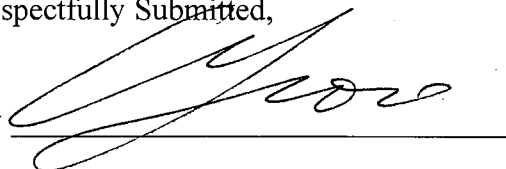
Because of the cumulative effect of these errors, this Court should order a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse Pastor Durant’s convictions and order a new trial.

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May 14, 2018
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-001264

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SC Court of Appeals

The State,..... Respondent

v.

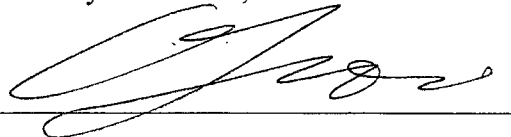
Larry Durant,..... Appellant.

Rule 211, SCACR Certification

This Final Brief of Appellant complies with Rule 211(b), SCACR.

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THE STATE, ...RESPONDENT,

v.

LARRY DURANT, ...APPELLANT.

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¹ 384 S.C. 428, 683 S.E.2d 275 (2009)

² 125 S.C. 406, 118 S.E. 803 (1923)

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³ Allen v. U.S., 164 U.S. 492 (1896).

⁴ Brady v. Maryland, 373 U.S. 83 (1963).

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STATEMENT OF ISSUES ON APPEAL

- I. The trial judge properly denied Appellant's motion for a mistrial after the judge revealed to jurors that Appellant was also indicted for three counts of third-degree criminal sexual conduct with a minor and forgery because the trial judge informed the jurors the State was proceeding on only the charge of second degree criminal sexual conduct with a minor and instructed them indictments are notice documents which are not evidence of the commission of a crime. Further, any alleged error in the admission of those charges was rendered harmless because the underlying behavior which merited those charges was introduced through the State's trial witnesses.
- II. The trial judge did not err in admitting the testimony of witnesses A.R., T.H., and D.B. because it was admissible evidence of a prior scheme or plan under South Carolina law, including Rule 404(b), SCRE, State v. Wallace, and State v. Lyle.
- III. The trial judge did not err in finding the testimony of witnesses A.R., T.H., and D.B. were admissible as evidence of Appellant's prior bad acts when the incidents against Victim and the witnesses were more similar than dissimilar. Due to the close degree of similarity among the bad acts, their probative value substantially outweighed the danger of unfair prejudice to Appellant.
- IV. The trial judge did not err in issuing an Allen charge because the charge was addressed to all three groups of jurors: those in favor of finding Appellant guilty, those opposed, and the individual who refused to vote. Moreover, the judge did not identify the juror who refused to vote, he instructed all jurors to keep an open mind and consider the positions of the other jurors, and he told jurors that if they failed to reach a unanimous decision a new jury would be selected and the State would retry the case.
- V. The trial judge properly denied Appellant's motion for a new trial based on an alleged Brady violation of failing to disclose witness Ulanda McRae's prior criminal history because the State was unaware of said history, did not suppress the information, and the evidence was immaterial to Appellant's guilt or punishment because McRae's testimony was cumulative to that of other trial witnesses.
- VI. This Court should deny Appellant's request for a new trial based on the Cumulative Error Doctrine because said theory is not recognized under South Carolina law. Further, the issue is not preserved for appellate review because Appellant failed to present this ground for relief to the trial judge.

STATEMENT OF THE CASE

On October 23, 2014, the Sumter County Grand Jury indicted Appellant for second-degree criminal sexual conduct (CSC) with a minor. On May 23, 2016, the State proceeded to a jury trial before the Honorable Roger M. Young, Sr. Shaun Kent, Cameron Blazer, and David Weeks represented Appellant; Assistant Attorneys General of South Carolina KinliAbee and David Ferndandez represented the State. The jury found Appellant guilty as charged and the trial judge sentenced him to twenty years' incarceration.

On May 27, 2016, Appellant moved for a new trial based on an alleged Brady violation. On June 8, 2016, the trial judge convened a hearing on the motion. After hearing the arguments from counsel, the trial judge denied the motion.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Pretrial Matters

Reference to Appellant's Indictments

While polling the prospective jurors, the trial judge stated:

I guess at this point, I should let you know. I didn't have the indictments in front of me to read them out to you, but Mr. Durant is charged with [CSC] with a minor between the ages of 11 and 14. And, also, three counts of criminal sexual conduct third degree and a charge of forgery.

Trial counsel immediately informed the trial judge he had "something to bring up at another point in time. The trial judge continued, stating the purpose of his comments was to inform the prospective jurors the case involved "allegations of sexual abuse." He noted Appellant had pled not guilty to the charges and the State had the burden of proving them. The State requested a brief sidebar, after which the trial judge informed the jurors he had made a mistake: he noted his law clerk, who was not present that day, had sent him a list of charges when Appellant faced only a single charge, second-degree CSC with a minor. He asked the jurors to "not consider . . . in any way or hold [those charges] against [Appellant]." (R.p.21, line 17-R.p.3, line 19).

The trial judge also explained an indictment is a charging instrument used to put a person on notice for the crime for which they are to appear at trial. Again, he told the prospective jurors he was incorrect in mentioning the additional charges, and followed my explaining an indictment does not create a presumption of guilt and is not evidence of a crime. (R.p.3, line 20-R.p.5, line 21).

The trial judge reiterated that the jurors must ultimately determine guilt based on the evidence presented at trial and that they were required to apply the law as instructed by the judge. (R.p.7, line 20–R.p.8, line 10).

Following the selection of the jury, both parties made several motions. Trial counsel thanked the trial judge for issuing a corrective instruction after referencing the forgery and third-degree CSC charges. However, he was concerned that reference to those charges tainted the jury pool, particularly if the evidence of Appellant’s other bad acts were not admitted at trial. Trial counsel believed that even if the other victims were allowed to testify, knowledge that Appellant was charged for his actions against those victims would corroborate their testimonies. Accordingly, trial counsel stated he was not requesting a mistrial but instead a continuance to obtain a new jury panel. (R.p.11, line 8–R.p.13, line 5).

In response, the State argued no further action was needed because the trial judge issued a clear, corrective instruction immediately after referencing the additional charges, particularly because the trial judge told the prospective jurors that the other charges did not exist. Further, any harm in his statements would depend on whether Appellant’s other victims ultimately testified at trial. Finally, the State noted jurors will not necessarily believe Appellant is facing criminal charges for his other bad acts simply because the State is presenting witnesses to testify about those actions. (R.p.13, line 7–R.p.14, line 4).

The trial judge apologized again, admitting he thought the State was going to trial on all charged crimes. However, he stated he believed the curative charge adequately remedied his mistake and “any motion for a mistrial or a continuance [was] denied.” (R.p.14, lines 17–25).

Lyle⁵ Hearing

⁵ State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)

Prior to trial, the State proffered the testimony of Appellant's victims beginning with K.R., the victim from whom Appellant's second-degree CSC with a minor charge originated. K.R. began attending Appellant's church when she was five years' old. Her aunt, Ulanda McRae, was one of Appellant's "armor bearers" (members of the church with additional responsibilities ranging from helping Appellant prepare for a service or standing guard outside the door to his office) and her grandmother, Lizzie Johnson, helped manage the churches' finances. K.R. testified her first sexual interaction with Appellant occurred in 2012, when she was thirteen and in the eighth grade. Appellant ordered one of his armor bearers retrieve her for a special "prayer session" during which he inserted his fingers into her vagina. Appellant claimed the prayer was to help her "not like girls" and avoid diseases. The assaults continued over time, usually Wednesdays, Fridays, and Sundays and occurred in his offices at both of his churches and progressing to sexual intercourse. The intercourse would occur with K.R. lying on Appellant's desk with him standing. During one such session of intercourse, K.R. noticed Appellant's penis had a pink pigmentation on parts, but flesh colored elsewhere. Appellant often remarked he wanted K.R. to "have his baby." (R.p.18, line 21–R.p.29, line 5).

A.R., K.R.'s cousin and McRae's daughter, recounted her abuse by Appellant. She began attending Appellant's religious services at age four, and would show up at the church Tuesdays or Wednesdays, Fridays, and Sundays for worship services, bible studies, and other groups. The first incident of abuse occurred in 2012 when she was eighteen. Appellant had summoned her to his office for a special prayer session to ensure she "wouldn't get any diseases and no harm would come to [her] body," including unplanned pregnancies. Instead, he inserted his fingers into her vagina. Eventually, Appellant began having sex with A.R., bending her over his desk while he stood. A.R. recalled Appellant's penis had "specks of pink" pigmentation all over his

penis, but that the remainder was normal. Their sexual relationship terminated on Mother's Day of 2013. When A.R. terminated the relationship, Appellant claimed she would no longer be blessed and things in her life, including her applications to colleges and general health would be negatively impacted. During cross examination, she recalled that on a few occasions Appellant gave her small amounts of money, no more than \$20. (R.p.38, line 9–R.p.52, line 17).

T.H., another victim testified regarding her experiences with Appellant. She began attending Appellant's church around the age of four. Her mother was a member of the church choir and a Sunday school teacher. T.H. went to the churches Wednesdays, Fridays, and Sundays for worship services and other activities. When she was approximately "fourteen or fifteen,"⁶ Appellant invited her into his office for a special prayer session to protect her from sexually transmitted diseases, breast cancer, and other things which could harm her. Instead, he fondled her breasts and vagina. This behavior occurred for a couple months, with Appellant summoning T.H. to his office through the use of his armor bearers. The abuse ended when she disclosed these incidents to her mother and her "God sister," A.R. (R.p.58, line 1–R.p.68, line 23).

D.B., the final victim who testified could not recall her exact age when she started attending Appellant's churches, but knew she was "really young." Her mother was an usher and her nephew was an armor bearer. Her first encounter with Appellant occurred when she was thirteen, around 2012 or 2013, after one of his armor bearers asked her to go back to his office. When she arrived, Appellant informed D.B. he wanted to pray for her, to protect her and that if she refused his request "something bad" would happen to her. Later, when Appellant discovered D.B. had a bladder infection, "prayers" to heal that ailment were included in their sessions. After

⁶ On cross-examination, Appellant admitted she may have actually been sixteen when the abuse occurred. (R.p.62, line 1–R.p.64, line 10).

Appellant discovered D.B. was pregnant with another man's child, he claimed he could "bump the seed" out of her. When D.B. tried to end the relationship, Appellant claimed the blessings promised to her and her family would not occur and that "something bad" would happen to them. The abuse occurred for approximately a year, during which Appellant would assault her in his offices and his home. During that period, he would penetrate D.B.'s vagina with either his fingers or his penis. When they had intercourse in his office, D.B. would lie on the desk while Appellant stood. She noticed Appellant had a pink discoloration over much of his penis. On cross-examination, D.B. recalled Appellant also gave D.B.'s mother \$500 for an abortion. (R.p.69, line 5–R.p.78, line 15).

At the conclusion of D.B.'s testimony, the State moved for the evidence to be admitted at trial as evidence of a common scheme or plan under Rule 404(b), SCRE. The State referenced the five factors cited in Wallace for evaluating common scheme or plan evidence: (1) the ages of the victims when the abuse occurred; (2) the relationships between the victims and perpetrators; (3) location(s) where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of occurrence/type(s) of sexual battery inflicted on the victims. Comparing the testimonies of K.R. and the other victims, the State noted the victims' testimonies portrayed very similar patterns of abuse: (1) the victims were all teenagers, ranging from thirteen to eighteen years old; (2) all of the victims were dedicated members of Appellant's churches whom started attending at a young age and spent multiple days a week attending services and other events; (3) all of the victims were abused in his church offices, and the victims who reported intercourse stated it occurred with them on Appellant's desk while he stood; (4) All the victims asserted they were lured back to Appellant's office with claims he needed to pray for their health and/or wellbeing; and (5)

K.R., A.R., and D.B. reported both digital penetration and vaginal sex while T.H. reported inappropriate touching of her vagina and breasts. (R.p.78, line 24–R.p.82, line 20).

Due to the overwhelming similarities among the victims’ testimonies, the State argued the probative value of admitting the testimonies of A.R., T.H., and D.B. substantially outweighed the danger of unfair prejudice to Appellant and demonstrated a common scheme or plan of Appellant to use his position, established relationships with the victims, and coercion to sexually assault all four witnesses. (R.p.82, line 21–R.p.83, line 17).

In response, trial counsel argued he disagreed with the Supreme Court of South Carolina’s prior case law regarding bad act evidence. He claimed Lyle “is still good law” but believed “there is no common scheme or plan exception or no rape exception or no sex trauma exception” for Lyle evidence. He conceded the case would be admissible pursuant to Wallace, but believed the Supreme Court’s decision was incorrect because other bad act evidence is, essentially, propensity evidence. He asseverated that Wallace made the common scheme or plan a “counting contest” between similarities and dissimilarities, with such evidence being introduced if there are simply more similarities than dissimilarities. (R.p.83, line 19–R.p.88, line 6)

Trial counsel also argued the facts alleged by the witnesses made the acts more dissimilar than similar, claiming: (1) A.R. and T.H. were really “adults” when their abuse occurred, as they were ages 18 and 16, respectively; (2) K.R. never testified Appellant threatened her; and (3) not all of the witnesses supplied certain details during their testimonies, such as whether Appellant locked the door⁷ before engaging in the sexual acts or specific references to Appellant’s

⁷ At the hearing, trial counsel concede “most” of the victims testified Appellant locked the doors to his offices when he engaged in the acts. (R.p.91, line 22–R.p.92, line 1).

prosthetic legs,⁸ differences in the timing of the abuse, and only two witnesses reported receiving money from Appellant. (R.p.88, line 7–R.p.93, line 6).

In reply, the State argued trial counsel was attempting to “split hairs” with his arguments, noting the “inconsistencies” counsel argued were irrelevant to establishing Appellant’s common scheme or plan because Appellant has control over his own actions, he could not control the victims’ actions, changes in behavior, or the things they experienced as a result of his actions. Looking at the important facts, such as three victims’ ability to identify Appellant’s penis, along with their consistent recitation of Appellant’s actions, showed the bad act evidence was admissible under Wallace and 404(b), SCRE. (R.p.93, line 7–R.p.95, line 6).

The trial judge, after noting he could not overrule Supreme Court precedent, noted the instant case was “one of the more compelling 404(b) cases [he’s] ever come across.” He found Appellant’s acted similarly with each victim. Appellant targeted impressionable teenage girls, using his connections with them and “the psychological ploy of prayer” and their inherent trust in his position of pastor to his advantage. Additionally, the abuse against each victim occurred during the same general timeframe and in the same locations, he found the State “far exceeded its burden” in demonstrating these testimonies were admissible evidence of a common scheme or plan. Accordingly, the trial judge allowed the evidence to be introduced at trial. (R.p.95, line 7–R.p.97, line 20).

After ruling on pretrial motions, the trial judge issued preliminary instructions to the jurors. He noted an indictment is a notice document and not evidence of Appellant’s guilt and that Appellant was presumed to be not guilty of his crime and that it was the State’s burden to prove otherwise. He informed the jury it’s duty was to evaluate the facts of the case, but that he

⁸ The record reflects Appellant is a double amputee. (R.p.19, line 19–R.p.20, line 10).

was the ultimate authority on the law applicable to the case and the jurors were required to apply the law as instructed. (R.p.164, line 9–R.p.172, line 4).

Trial

Evidence

K.R., A.R., T.H., and D.B. provided testimonies consistent with what they presented during the pretrial hearing. (R.p.227, line 7–R.p.248, line 3; R.p.260, line 1–R.p.277, line 5; R.p.305, line 21–R.p.317, line 12; R.p.340, line 24–R.p.355, line 3).

McCrae, A.R.'s mother and K.R.'s aunt, testified regarding her experiences with Appellant's churches. She would attend various functions at the church three to four days a week, where she served as a youth director, secretary, altar worker, Sunday school teacher, kitchen committee member, and armor bearer. She confirmed armor bearers assisted Appellant on a "personal level." She claimed she was unaware of Appellant's private prayer sessions with A.R. and K.R. until she overheard them in a bathroom in her home discussing a sexual assault. She confronted them over the conversation, at which time they disclosed they were sexually assaulted by Appellant. McCrae informed Johnson of the abuse and heard her confront Appellant via telephone. She recalled Appellant eventually broke down and cried, apologized, and requested to meet with her, Johnson, K.R., and A.R. (R.p.248, line 21–R.p.259, line 6).

Johnson met Appellant in 1995, and helped him establish his first church. Over the years, she served in various capacities within Appellant's churches, including treasurer, superintendent, and secretary. She remained active with Appellant's institutions until McCrae informed her of his abuse of K.R. and A.R. She confronted him over the phone and later at one of his churches, at which point a tearful Appellant asked her to help his wife run the church after he stepped down from his position. (R.p.356, line 20–R.p.364, line 7).

On cross-examination, Johnson testified she and Appellant briefly dated and lived together for a while when they first met. After their relationship ended, she moved into another home owned by Appellant located at 805 Murray Street. Appellant eventually deeded the property to her. Later, after Appellant was indicted for his crimes, a dispute arose over ownership of the property. The deed transferring the property to Johnson was dated September 16, 2009, and filed November 4, 2009. A second deed, dated November 1, 2009 and filed May 13, 2013, transferred the property back to Appellant. Notably, this deed was filed just a few weeks after McCrae and Johnson confronted Appellant over his abuse of K.R. and A.R. (R.p.364, line 16–R.p.391, line 13).

Samara Samuels, a notary, testified she notarized the deed transferring September 16, 2009 deed and saw the parties sign the document. However, her signature on the November 1, 2009 deed transferring the property back to Appellant was not signed by her. Further, she noted Appellant’s wife notarized part of that second deed, which she should not have done because Appellant’s wife personally benefitted from the receipt of the property. (R.p.493, line 16–R.p.498, line 20).

Marvin Dawson, a forensic document examiner and expert in handwriting analysis, was hired by Appellant to analyze the two deeds. Using writing samples provided to him by the defense along with machine copies of the deeds,⁹ he claimed: (1) Appellant’s signatures in both the deeds were not likely genuine; (2) the same person did not sign Samuels’s signature on the two deeds; (3) the same person signed Johnson’s name on both deeds. However, he cautioned his results were based on “limited standards” because copies of the documents may not

⁹ Dawson noted his analyses were impacted by the use of copies of the deeds because copies may not possess all of the characteristics of the original writings. He testified that he could compare the copies and originals in his home laboratory, but trial counsel insisted he give his opinion based on the copies he analyzed. (R.p.544, line 4–R.p.546, line 7).

accurately reflect all the characteristics of the original writings. He further noted he did not have writing samples from Samuels or Johnson to compare to the signatures.

(R.p.531, line 1–R.p.562, line 20).

Myer Whack, and armor bearer with Appellant’s churches, testified he did witness K.R., A.R., T.H., and D.B. go into Appellant’s offices for private meetings with him. Similarly, Elvin Vaughn, another armor bearer, admitted to seeing the four girls go into Appellant’s for short meetings after services.¹⁰ Both men admitted the walls to the office were made of cinder block and that they were not in Appellant’s offices during his private “prayer sessions.” Arlisa Vaughn, a trustee in charge of the churches’ finances, testified she gave D.B.’s mother five-hundred dollars on the direction of Appellant’s wife, and was only told the money was given to her as a loan. (R.p.571, line 4–R.p.600, line 12; R.p.628, line 21–R.p.635, line 16).

Jury Instructions and Allen Charge

At the conclusion of the parties’ closing arguments, the trial judge instructed the jury on the law applicable to the case. Again, he noted an indictment is not evidence of guilt but merely a notice document, and the State had the burden of proving Appellant’s guilt. He explained there were two possible verdicts in the case; guilty or not guilty, but that the verdict “must be unanimous.” (R.p.696, line 15–R.p.705, line 24).

Approximately three hours after they were discharged for deliberations, the jury sent the trial judge a note claiming they were split. Most of the jurors were split between finding Appellant guilty or not guilty of the charged offense. However, a single juror refused to vote in any capacity. To address the situation, the trial judge decided he would issue a modified Allen

¹⁰ On direct examination, Vaughn was asked whether he had seen the girls have “meetings or talks” with Appellant. Vaughn said he had not seen them have meetings with him “by themselves,” but when asked to explain his response he only claimed that meetings the girls had with Appellant were short, lasting “two, five minutes tops.” (R.p.599, line 19–R.p.600, line 4).

charge. Trial counsel objected to the charge, complaining such a charge could potentially target the members voting in the minority. (R.p.705, line 25–R.p.707, line 24).

The trial judge summoned the jury to the courtroom, and explained he understood different people “see things different ways” and thus have “different interpretations of what it is they believe is the right verdict. Not knowing the breakdown of the jurors’ votes, he asked both the majority and minority jurors to consider the positions and viewpoints of the other jurors. He emphasized: (1) he was not trying to change their minds; (2) it was entirely possible that after considering the “other side,” the jurors would not change their positions; (3) if the jurors were unable to reach a unanimous decision, the court would obtain a new jury and retry the case; (4) he would not force the jurors to reach a unanimous decision if they did not reach one after further deliberation. (R.p.708, line 2–R.p.710, line 21).

The trial judge also addressed the issue of the juror refusing to vote. Not knowing the identity of said juror and not attempting to identify him or her, he noted the juror’s failure to vote was not helpful to the situation and would only ensure a mistrial even if the other eleven jurors reached a unanimous decision. He added he did not care how that person voted, but voting either guilty or not guilty was necessary for a unanimous verdict. After telling the jury they could deliberate for however long they wanted to that evening, he sent them back to the jury room for additional deliberations. Thirty-four minutes later, the jury returned to the courtroom with a unanimous guilty verdict. (R.p.710, line 22–R.p.712, line 22).

Post-Trial Brady Hearing

Following the verdict, trial counsel was contacted by Ronnie McCrae (Ronnie), Ulanda McCrae’s ex-husband. Ronnie, who had been interviewed by trial counsel prior to trial, asked why he was not utilized at trial. He was shocked McCrae was permitted to testify without any

references to her prior criminal record. Trial counsel was unaware of the prior record and ran a public SLED catch to verify the information. Using McCrae's name, date of birth, and social security number, counsel ran a search that uncovered nine separate aliases/versions of her name. Trial counsel also discovered several criminal convictions associated with these names, including: (1) a charge for simple assault in 1991; (2) a shoplifting conviction in 1993; (3) a fraudulent check charge in 1995; (4) a forgery charge in 1995; (5) a conviction for driving under a suspended license in 1997; (6) a conviction for writing a fraudulent check in 1999; (7) a speeding charge and driving under suspension conviction in 2001; (8) a conviction for obtaining a signature under false pretenses in 2004; (9) a forgery charge in 2004; and (10) a nolle prossed charge for financial transaction card fraud in 2005. Notably, the 2004 conviction for obtaining a signature under false pretenses earned McCrae a sentence of six years' incarceration suspended upon the service of five years' probation and restitution. (R.p.735, line 5–R.p.738, line 14; R.pp.786–88).

Trial counsel moved for a new trial, arguing evidence of these prior convictions would have been critical evidence at trial because the case ultimately revolved around the credibility of the testifying witnesses, and the defense's strategy was to show the charges against Appellant were fabricated due to a property dispute between him and Johnson, McCrae's mother including allegations that Johnson forged Appellant's signature on a deed awarding her the real property upon which she lived. Trial counsel argued impeaching McCrae's credibility was also important because McCrae was the outcry witness who heard K.R. and A.R. discuss their assaults and the State used McCrae to add credibility to those victims' testimonies. (R.p.738, line 15–R.p.740, line 8; R.p.741, line 20–R.p.743, line 7).

However, trial counsel clarified he did not believe the State intentionally hid the evidence of McCrae's prior convictions, but that the State should have turned over the evidence pursuant to specific discovery requests made prior to trial, noting the State did provide him with Johnson's rap sheet prior to trial. Trial counsel further admitted he did not believe the State was aware of the importance of McCrae's criminal history prior to trial because he did not posit his theory that the allegations of sexual abuse were tied to a property dispute until after McCrae testified. (R.p.740, line 9–R.p.741, line 19).

The State explained it had been unaware of McCrae's criminal history due to a misspelling of her name (it used "Mcrae" instead of "McCrae" as the last name). It also noted McCrae's various charges and convictions were under multiple names. Notably, her 2004 conviction for obtaining property under false pretenses was listed under the name, "Wanda Shoantela Riley,"¹¹ a name which would not have been requested by the State. Finally, the State claimed it was not in possession of McCrae's social security number when it ran its search, and relied on her name, date of birth, and ethnicity in its search. The State argued its failure to disclose McCrae's criminal history could not be a Brady violation because: (1) the evidence was not in the possession of or known to the State; (2) was not suppressed by the prosecution; and (3) McCrae's testimony was ultimately immaterial to Appellant's conviction because she was testified to the general operations of the church, hearing K.R. and A.R. discuss the abuse, and to observing Johnson call Appellant on the phone, all items presented by other witnesses. However, even if a Brady violation occurred, such a violation would not merit a new trial because the evidence was "merely cumulative or impeaching" of McCrae. (R.p.743, line 12–R.p.746, line 21; R.p.754, line 16–R.p.755, line 15).

¹¹ The trial transcript listed this name as "Yolanda Riley," but the SLED catch showed the first name associated with this conviction was "Wanda." (R.p.747, line 21–R.p.748, line 3; R.pp.786–88).

In reply, trial counsel noted he, as a former solicitor, always used social security numbers when running background checks on witnesses given the mistakes that occur with name spellings. He also claimed it was odd, as a practical matter, the State failed to ask McCrae whether she had any prior convictions or other events in her past which could be used to impeach her at trial. Finally, trial counsel argued McCrae's social security number was in the State's possession at the time it ran its search because it was in her witness statement. Trial counsel also addressed the elements of Brady, claiming: (1) McCrae's criminal history was evidence "favorable to the accused" because her conviction for obtaining signatures under false pretenses supported the defense's theory of the case; (2) the information was in the State's possession because it had the right to run an NCIC search and McCrae was a witness for the State; (3) the information was unintentionally suppressed by the prosecution due to its own mistake; and (4) the evidence was material to Appellant's guilt because the entire case was based on the credibility of the witnesses. (R.p.749, line 4–R.p.754, line 15).

The trial judge denied the motion, finding: (1) the parties agreed the State's conduct was not intentional; (2) McCrae's prior charges/convictions were largely inadmissible due to their age; (3) the information was unknown to State and thus was not suppressed; and (4) McCrae's testimony was immaterial to guilt because it was the testimonies of the four victims which proved Appellant's guilt. (R.p.755, line 16–R.p.759, line 1).

ARGUMENT

I.

The trial judge properly denied Appellant's motion for a mistrial after the judge revealed to jurors that Appellant was also indicted for three counts of third-degree criminal sexual conduct with a minor and forgery because the trial judge informed the jurors the State was proceeding on only the charge of second degree criminal sexual conduct with a minor and instructed them indictments are notice documents which are not evidence of the commission of a crime. Further, any alleged error in the admission of those charges was rendered harmless because the underlying behavior which merited those charges was introduced through the State's trial witnesses.

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). “If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.” State v. Johnson, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005).

Regarding the requirement that a timely objection be raised, a defendant must make a contemporaneous objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (“A contemporaneous objection is required to properly preserve an error for appellate review.”). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (“A defendant must object at his first opportunity to preserve an

issue for appellate review.”); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) (“[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King’s belated objection to subsequent testimony came too late.”). A party may not argue one issue at trial and a different issue on appeal. State v. Dickman, 341 S.C. 293, 295 534 S.E.2d 268, 269 (2000). Additionally, an issue conceded at trial cannot be later argued on appeal. See State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (an issue conceded in the trial court cannot be argued on appeal); also State v. Bryant, 372 S.C. 305, 315–16, 642 S.E.2d 582, 588 (2007) (where defendant conceded below that the court’s ruling was not prejudicial, he may not later assert on appeal that the same ruling was prejudicial).

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320. Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant’s guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. “A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence. Heller at 171, 731 S.E.2d at 320.

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); State v. Meggett, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme

measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. Inman, 395 S.C. at 565, 720 S.E.2d at 45. “Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial.” State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. Meggett, 398 S.C. at 524, 728 S.E.2d at 496.

Initially, the State notes this issue is not preserved for appellate review. Trial counsel did not request a mistrial, specifically stating his motion was “definitely not for a mistrial.” Accordingly, the trial judge could not have erred for failing to grant a motion which was never before him. See Rogers, 361 S.C. at 183, 603 S.E.2d at 912–13.

On the merits, the trial judge’s decision to proceed with the trial was proper in the situation. Before a formal motion was made, the trial judge issued a curative instruction to the potential jurors informing them he was mistaken about the other indictments against Appellant, the jury should disregard his statements, and indictments are merely notice documents and not evidence of a defendant’s guilt. Accordingly, these corrective instructions cured any error. See State v. Weaver, 361 S.C. 73, 90, 602 S.E.2d 786, 794–95 (Ct. App. 2004) (“Generally, a trial judge’s curative instruction is deemed to cure any error.”); Council, 335 S.C. at 13, 515 S.E.2d at 514 (stating a trial judge should exhaust all other methods to cure prejudice before aborting an ongoing trial).

Finally, any alleged error in failing to order a mistrial is ultimately harmless in the case because a new set of jurors would still have been made aware that Appellant was behind other incidents of sexual assaults against minors and the alleged forgery of the deed. A.R., T.H., and D.B. all testified about their sexual assaults, the conduct underlying the other charges of CSC, at

trial and would have provided the same testimonies in any new legal proceeding. Moreover, the allegations of forgery would also have been presented in any new legal proceeding because discussion of the forged deeds was a central pillar of trial counsel's strategy. Accordingly, the trial judge's statements about Appellant's other indictments was merely cumulative to the evidence underlying those charges which would have been presented in any new proceeding.

See Heller at 171, 731 S.E.2d at 320.

II.

The trial judge did not err in admitting the testimony of witnesses A.R., T.H., and D.B. because it was admissible evidence of a prior scheme or plan under South Carolina law, including Rule 404(b), SCRE, State v. Wallace, and State v. Lyle.

Generally, evidence of prior bad acts is not admissible to prove the crime for which the defendant is charged. State v. Henry, 313 S.C. 106, 108, 432 S.E.2d 489, 490 (Ct. App. 1993). However, prior bad acts may be admissible when they establish: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the person charged. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Evidence of prior bad acts is admissible if it tends to show a common scheme or plan and is sufficiently similar to the charged offense and its probative value clearly outweighs its prejudicial effect. State v. Blanton, 316 S.C. 31, 32–33, 446 S.E.2d 438, 439 (Ct. App. 1994).

In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). “Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). “Further,

even though the evidence . . . falls within a Lyle 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, 634, 541 S.E.2d 833, 836 (2001) (citing Rule 403, SCRE).

“Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)); see also State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir. 1989) (“[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.”).

Appellant argues the Supreme Court of South Carolina’s ruling in Wallace is inconsistent with Rule 404(b), SCRE. He fails to recognize both Wallace and Rule 404(b), SCRE are statements of law consistent with Lyle, especially its explanation of common scheme or plan exception. In Lyle, the Supreme Court noted the same exceptions listed in Rule 404(b), SCRE were “well-established exceptions” to the common law rule that “evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution’s theory of the defendant’s guilt of the particular crime charged.” Lyle, 125 S.C. at 407, 118 S.E. at 806.

The State agrees with Appellant’s base assertion that the admission of evidence of a defendant’s prior or other bad acts merely to demonstrate his propensity for such a crime is unconstitutional. However, despite Appellant’s assertions to the contrary, both federal and state laws recognize the propriety of using such evidence in limited situations in which it holds evidentiary value for the crime for which a defendant is charged. See, e.g., Rule 404, FRE; Rule

404, SCRE. In Lyle, the court specifically recognized guilt of a particular offense may be inferred from its similarities to other offenses when such strong similarities establish such a connection between the crimes that proving the other offenses excludes or tends to exclude the possibility the charged crime was not committed by a defendant. In other words, the Lyle court found prior/other bad act evidence must be relevant to crime for which a defendant is charged. See Alexander, 303 S.C. at 380, 401 S.E.2d at 148 (“Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.”). This requirement of relevance has existed in all of Lyle’s progeny. See, e.g., Wallace, 384 S.C. at 432–34, 683 S.E.2d at 277–78.

Further, Appellant’s argument that the Supreme Court will, in the future, find evidence of other bad acts is inadmissible propensity evidence is highly unlikely. In State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (2011), a majority of the Supreme Court affirmed this Court’s earlier decision in which it found the trial court erred in allowing the State to introduce evidence of a defendant’s other bad act based on the decision in Wallace without overruling, abandoning, or modifying the analysis in Wallace in any way. See Fonseca, 393 S.C. at 229, 711 S.E.2d at 906 (“The Court [] properly held that the circuit court erred in permitting the State to introduce evidence of the 2001 incident, and properly summarily disposed of the State’s additional sustaining ground, and in so doing anticipated our decision in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009).” (footnote omitted)). Moreover, in Fonseca this Court did **not** find the prior bad act evidence to be inadmissible under the common scheme or plan exception due to the absence of logical relevancy to some matter at issue like intent or motive. State v. Fonseca, 383 S.C. 640, 649–50, 681 S.E.2d 1, 5–6 (Ct. App. 2009). Instead, the Court expressly determined the common scheme or plan evidence was not admissible in Fonseca’s case because “[t]he State

provide[d] no compelling argument **of any similarities** between the two occurrences, or any argument to overcome the fact that the incidents [were] remote in time.” Fonseca, 383 S.C. at 649, 681 S.E.2d at 5. Thus, as the Supreme Court directly recognized in its Fonseca opinion, this Court’s analysis in Fonseca was fully consistent with its subsequent analysis and decision in Wallace. Fonseca, 393 S.C. at 229, 711 S.E.2d at 906.

Because the proper use of evidence of other bad acts is recognized under both federal and state law, the trial judge did not err in admitting evidence of Appellant’s other bad acts pursuant to Rule 404(b), SCRE.

III.

The trial judge did not err in finding the testimony of witnesses A.R., T.H., and D.B. were admissible as evidence of Appellant's prior bad acts when the incidents against Victim and the witnesses were more similar than dissimilar. Due to the close degree of similarity among the bad acts, their probative value substantially outweighed the danger of unfair prejudice to Appellant.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (“A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.”). An abuse of discretion occurs when the trial judge’s conclusions 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).

In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). “If there is any evidence to support the admission of bad act evidence, the trial judge’s ruling cannot be disturbed on appeal.” State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008). Furthermore, in reviewing such a ruling, the trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339–40, 665 S.E.2d 201, 207 (Ct. App. 2008). “If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594

(Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

The similarity between prior bad acts and the crime charged is particularly important when determining whether the prior bad act is admissible as evidence of a common scheme or plan. Specifically, the Supreme Court of South Carolina has held that when determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine if there is a close degree of similarity. “Such evidence is relevant because proof of one is strong proof of the other.” Wallace, 384 S.C. at 433, 683 S.E.2d at 277–78. “When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).” Id., 384 S.C. at 433, 683 S.E.2d at 278.

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” Rule 403, SCRE. “Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)); see also State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir. 1989) (“[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.”). “A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” “We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment.” State v. Collins, 409 S.C. 524, 534, 763

S.E.2d 22, 28 (2014) (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

The trial judge did not abuse his discretion in admitting Appellant's prior convictions into evidence. The Supreme Court of South Carolina specifically requires a “close degree of similarity” between the prior bad acts and a defendant's charged crime before evidence of the former can be admissible at trial: to be admissible under Rule 404(b), SCRE, a defendant's prior bad acts must be similar to the crime with which he is charged, or else they would be irrelevant under Rule 401, SCRE. See, e.g., Wallace, supra; Cheeseboro, supra; Wilson, supra. The Court has often found that the probative value of evidence of similar prior bad acts outweighs the danger of unfair prejudice to a criminal defendant, even in situations in which the prior bad acts were convictions similar to one for which the defendant was on trial. See, e.g., Cheeseboro, supra; State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (finding the trial judge did not err in allowing evidence of defendant's two prior burglary convictions during his trial for first-degree burglary because they were offered to prove a statutory element of the charge).

In the case sub judice, Appellant's other alleged assaults shared striking similarities with his current charges, including: (1) the ages of the victims; (2) the locations of the assaults, with all victims experiencing assaults in both of Appellant's church offices; (3) the designation of the assaults as private “prayer sessions,” (4) Appellant's claims that the sessions would cure the victims of any “ailments” and protect them from harm; (5) all four victims were active participants of the churches and attended services and meeting at least three nights a week; (6) Appellant abused the victims on his desks; (7) Appellant began his patterns of assault with each girl with inappropriate touching of their vaginas, which escalated to sexual intercourse with

K.R., A.R., and D.B.; (8) the three victims who saw Appellant's penis reported the same unique pigmentation issue; (9) the victims were abused during the same general time period.

These similarities, and others, show Appellant engaged in common scheme with each of the victims in which he used religion, his position of trust, and the promise of divine favor to abuse each of the teenage victims. The probative value of the victims' testimonies describing a nearly identical common scheme of abuse far outweighed the danger of unfair prejudice to Appellant. See Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429 ("Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis."). Moreover, to the extent Appellant argues the prejudicial effect of admitting the other bad act evidence substantially outweighed its probative value, this argument was not made to the trial judge and is not preserved for appellate review. See Rogers, 361 S.C. at 183, 603 S.E.2d at 912–13.

Accordingly, the trial judge did not err in admitting the testimonies regarding Appellant's other bad acts as evidence of a common scheme or plan.

IV.

The trial judge did not err in issuing an Allen charge because the charge was addressed to all three groups of jurors: those in favor of finding Appellant guilty, those opposed, and the individual who refused to vote. Moreover, the judge did not identify the juror who refused to vote, he instructed all jurors to keep an open mind and consider the positions of the other jurors, and he told jurors that if they failed to reach a unanimous decision a new jury would be selected and the State would retry the case.

“Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence.” State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence only if that failure was prejudicial to the defendant. State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 422 (2011).

“An Allen charge is an instruction advising deadlocked jurors to have deference to each other’s views, that they should listen, with a disposition to be convinced, to each other’s arguments.” State v. Lee-Grigg, 374 S.C. 388, 418 n.1, 649 S.E.2d 41, 57 n.1 (Ct. App. 2007) (internal quotation marks omitted), aff’d 387 S.C. 310, 692 S.E.2d 895 (2010). “Whether an Allen charge is unconstitutionally coercive must be judged in its context and under all the circumstances.” Tucker v. Catoe, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (quoting Lowenfield v. Phelps, 484 U.S. 231 (1988)).

“In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel.” Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). “Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other’s views.” Id. “A trial judge has a duty to urge, but not coerce, a jury to reach a verdict.” Id. In Tucker, the Supreme Court of South Carolina adopted the standard established by the

United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. Those factors are:

- (1) Whether the charge spoke specifically to the minority juror(s);
- (2) The language of the charge, including statements such as “You have [] to reach a decision in this case”;
- (3) Whether the trial judge inquired into the jury’s numerical division, a question generally considered coercive; and
- (4) Weighing the length of time between the issuance of the Allen charge and the jury’s return of a verdict (with verdicts returned “shortly after” the supplemental charge suggesting a possibility of coercion) against trial counsel’s failures to object either to the charge itself or an inquiry whether the jurors believed further deliberation would result in a verdict.

Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237).

Viewed in conjunction with the Lowenfield factors, the trial judge’s Allen charge was not unconstitutionally coercive. The trial judge spoke to both the majority and minority jurors, without knowledge of which jurors supported either verdict, and asked them to consider the positions of the other side. The trial judge knew the numerical breakdown of the jury, but did not inquire into such in open court because the information was offered freely in the jury’s note. He informed the jurors: (1) he was not trying to change their minds; (2) it was entirely possible the jurors would not change their votes even after consider the other jurors’ opinions; (3) if the jurors were unable to reach a unanimous verdict, the court would obtain a new jury and retry the case; and (4) he would not force jurors to reach a unanimous decision if they did not reach one after further deliberation. When speaking to the unknown juror who refused to vote either way, he did say the verdict had to be “unanimous one way or the other,” but he also stated he did not care whether the juror voted for guilty or not guilty and that the act itself of voting was the only necessity for moving forward with the case. Viewed in conjunction with his statements to the entirety of the jurors, the trial judge clearly communicated he was not forcing any of the jurors, including the holdout, in any specific manner.

The final factor, the length of time between the Allen charge and the jury's verdict, also supports its constitutionality. While it is true the jury deliberated for only thirty-four minutes after receiving the charge, the pre-Allen deliberations lasted less than three hours and were impeded by a juror who refused to participate in the voting process. Given the post-Allen deliberations constituted nearly twenty percent of the jury's deliberation time and included all twelve jurors' participation, the thirty-four minute deliberation period was reasonable in the situation.

In Tucker, the Supreme Court of South Carolina stated the hour and a half post-Allen deliberation period was a "relatively short period of time" in that case because deliberations began at 1:33 p.m. on the first day, the jury became deadlocked around 5:00 p.m. that same day, and the jury received an Allen charge around 11:00 the following morning, returning with a verdict around 12:27 p.m. In total, the jury deliberated for approximately eight and a half hours, over half of that deadlocked before receiving the Allen charge. Id. at 485–88, 494, 552 S.E.2d at 713–14, 718. Here, unlike Tucker, the post-Allen discussions constituted a significant portion of the jury's deliberations and included a newly-participating juror. Also unlike Tucker, the jurors here spent a minority of the deliberations deadlocked.

Accordingly, the trial judge did not err in issuing his Allen charge.

V.

The trial judge properly denied Appellant's motion for a new trial based on an alleged Brady violation of failing to disclose witness Ulanda McRae's prior criminal history because the State was unaware of said history, did not suppress the information, and the evidence was immaterial to Appellant's guilt or punishment because McRae's testimony was cumulative to that of other trial witnesses.

Under Rule 5(a)(1)(C), SCRCrimP:

Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Under Rule 5, SCRCrimP, the trial court has discretion to determine what remedy, if any, is necessary to protect a defendant's rights. Rule 5(d)(2), SCRCrimP, states that if a party fails to comply with Rule 5, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or it may enter such other order as it deems just under the circumstances. Rule 5(d)(2), SCRCrimP; State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996). The remedy, or determination that no remedy is required, will not be reversed absent an abuse of discretion. See Newell, 303 S.C. at 476, 401 S.E.2d at 423 (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 261 at 16 (2d ed. 1982) (adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial court abused its discretion)).

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good

faith or bad faith of the prosecution.” Brady, 373 U.S. at 87. The Brady disclosure rule requires that the prosecution provide the defendant with any evidence in the prosecution’s possession that may be favorable to the accused and material to guilt or punishment. Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence. United States v. Bagley, 473 U.S. 667 (1985); Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. A reasonable probability is shown when the government’s evidentiary suppression undermines confidence in the outcome of the trial. Hyman at 45-46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a request by the accused. United States v. Agurs, 427 U.S. 97 (1976); Hyman at 46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2ds at 356. Thus, “A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.” Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004); see also Kyles v. Whitley, 514 U.S. 419 (1995); Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006).

“In determining the materiality of nondisclosed evidence, this Court will consider it in the context of the entire record.” State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988). “[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable

probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985); State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). This Court in Kennerly further explained: “In a Brady analysis, information is not deemed ‘material’ if the defense discovers the information in time to adequately use it at trial.” Kennerly, 331 S.C. at 453, 503 S.E.2d at 220; see also, State v. Moses, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010) (“Evidence is not considered ‘material’ if the defense discovers the information in time to adequately use it at trial.”). Further, “[t]he lack of demand . . . [of a continuance] is often taken as strong evidence that the discovery violation has not been prejudicial.” 5 Wayne R. LaFave, et. al, Criminal Procedure § 20.6(b) (3d. ed. 2010); see also, Gorham v. Wainwright, 588 F.2d 178 (5th Cir.1979) (denying the defendant’s mistrial motion and holding the defendant was not prejudiced by the prosecution’s failure to turn over certain reports prior to trial because, although defense counsel requested and received a ten minute recess to review the new evidence, he did not request a continuance); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (the trial court’s failure to suppress evidence of a defendant’s oral statements because the prosecution did not disclose the statements pursuant to Rule 5, SCRCrimP, despite a timely request for them, was upheld where the defendant was permitted to view and copy the prosecution’s file and did not request a continuance or recess to review the prosecution’s file).

In the instant case, Appellant fails to prove McCrae’s criminal history rose to the level of a Brady violation. The record indicates the State was unaware of the criminal history.¹² Further, because the state was unaware of McCrae’s record, the evidence was not suppressed by the

¹² In his brief, Appellant argues the State’s “inadvertent oversight” was irrelevant in determining whether a violation occurred and cites to Gibson v. State, 334 S.C. 515, 528, 514 S.E.2d 320, 326 (1999) to support his proposition. (Br. of Appellant p.38). However, Gibson involved a factually-distinguishable situation in which the State disclosed some, but not all of the exculpatory information in its possession. Gibson, 334 S.C. at 526–27, 514 S.E.2d at 325–26.

prosecution. Finally, and most importantly, the evidence was immaterial to Appellant's conviction because it did not impact the credibility of the four victims' testimonies. Notably McCrae's testimony and criminal record were not even relevant to Appellant's theory of the case: trial counsel never alleged McCrae was involved in the property dispute which purportedly caused the victims to report their abuse. McCrae was an unimportant witness whose testimony was cumulative to other evidence presented at trial. Accordingly, the trial judge did not err in finding the State's failure to discover and disclose McCrae's criminal history was not a Brady violation justifying a new trial for Appellant. See Gathers, 295 S.C. at 481, 369 S.E.2d at 143 (1988). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

VI.

This Court should deny Appellant's request for a new trial based on the Cumulative Error Doctrine because said theory is not recognized under South Carolina law. Further, the issue is not preserved for appellate review because Appellant failed to present this ground for relief to the trial judge.

Appellant argues this Court should grant a new trial on the basis of the cumulative error doctrine. This ground was neither raised at trial nor in the motion for new trial and is therefore not preserved for review. The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)

Nonetheless, the cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground. Id.; see also State v. McEachern, 399 S.C. 125, 150, 731 S.E. 2d 604, 617 (Ct. App. 2012) (stating, "even if the court did commit any errors, we believe those errors to be harmless such that Hollie can show neither prejudice, nor that the errors affected her right to a fair trial"). The Constitution entitles a criminal defendant to a fair trial, not a perfect one. State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted).

Further, our courts have addressed the issue of an unpreserved cumulative error doctrine, concluding the doctrine is not recognized when Appellant asks the court to consider any

unpreserved issues for review. See State v. Beekman, 405 S.C. at 238, 746 S.E.2d at 490 (“our appellate courts do not apply the plain error rule”); State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (noting appellant clearly sought for the appellate court to apply the plain error rule and stating as follows: “This Court, however, has routinely held the plain error rule does not apply in South Carolina state courts. Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review. “) As in Beekman and Sheppard, Appellant asks this court to apply the plain error doctrine by combing the record for issues and arguing for the first time on appeal the cumulative effect of these matters deprived him of a fair trial.

Further, despite the numerous issues presented on appeal, the record reflects the trial court exercised its discretion soundly at each instance. When the trial judge informed the jurors of the additional indictments against Appellant, he informed the jurors he was mistaken about those indictments and to disregard his earlier statements. The State presented relevant evidence of Appellant’s other bad acts, and the trial judge properly found said evidence admissible pursuant to Lyle, Wallace, and Rule 404(b), SCRE. When the jurors were unable to reach a verdict, largely because a juror refused to vote, the trial judge issued an Allen charge consistent with state and federal jurisprudence. Finally, the trial judge correctly found the State’s failure to disclose McCrae’s criminal was not a meritorious Brady violation because the State was unaware of said history and it was ultimately irrelevant to the testimonies of Appellant’s four victims.

Appellant’s attempt to stack the deck does not change the equation: the sum of all zeros is still zero. Moreover, the cumulative effect of any errors this Court might find fails to undermine the fact that Appellant did receive a fair trial. This case does not warrant reversal on cumulative error. “As we have stressed on more than one occasion, the Constitution entitles a criminal

defendant to a fair trial, not a perfect one.” Mitchell, 330 S.C. at 199-200, 498 S.E.2d at 647-48 (finding reversal on cumulative error doctrine not warranted). In the case at hand, Appellant received a fair trial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 4, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Honorable Roger M. Young, Circuit Court Judge

RECEIVED
JUN 04 2018
SC Court of Appeals

Appellate Case No. 2016-001264

THE STATE, ...RESPONDENT,

v.

LARRY DURANT, ...APPELLANT.

CERTIFICATE OF COUNSEL

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

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June 4, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-001264

RECEIVED

MAY 17 2018

SC Court of Appeals

The State, ... Respondent

v.

Larry Durant, ... Appellant.

Final Reply Brief of Appellant

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ARGUMENTS

Question I

Did the trial judge err when he did not declare a mistrial after telling the jurors that the State charged Pastor Larry Durant with second-degree criminal sexual conduct with a minor, three counts of third-degree criminal sexual conduct, and forgery, when the only the second-degree criminal sexual conduct with a minor was being called to trial?

The State argues this issue is not preserved for appellate review. Brief of Respondent, p. 17-18. “An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.” *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). All our Supreme Court “has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court.” *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011). Here, trial counsel raised this issue to the trial judge and obtained a ruling prior to the jurors being selected, thereby giving the trial judge a fair opportunity to rule on this issue and grant the relief requested. This issue, accordingly, is preserved for appellate review.

The State additionally argues that “[t]rial counsel did not request a mistrial.” Trial counsel, however, argued that the trial judge announcing the other charges “tainted the jury panel.” Trial counsel expressly asked the trial judge to provide “a new jury panel.” R. 11-13. The less than artful reference to a mistrial notwithstanding, trial counsel moved to terminate the current trial and for the trial court to call the case in front of non-tainted jurors. This request, by definition, is a motion for a mistrial.

The State next argues the trial judge’s curative instruction cured the error and prevented prejudice. Brief of Respondent, p. 19. This argument must be rejected. Cura-

tive instructions do not cure every error in a case because in some situations “it is difficult, if not impossible, to unring a bell.” *State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998) (internal quotations omitted). Once the jurors learned about the other charges, the prejudice was irreversible.

Finally, the State argues, “[A]ny alleged error in failing to order a mistrial is ultimately harmless because a new set of jurors would still have been made aware that Appellant was behind other incidents of sexual assaults against minors and the alleged forgery of the deed.” Brief of Respondent, p. 19. This argument must be rejected. Pastor Durant, of course, does not agree that testimony about the other sexual assaults was admissible. See Brief of Appellant, Questions II and III. Additionally, when Rule 404(b), SCRE testimony is admitted during a trial, the jurors do not learn whether those allegations are the subject of a pending indictment. Here, the trial judge announcing the pending indictments and emphasizing the significance of the grand jury process enhanced the credibility of those witnesses and diminished the role of the jurors in determining the credibility of that testimony.

Question II

When admitting the testimony of A.R., T.H., and D.B, did the trial judge err when relying on *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), because our Supreme Court’s holding in *State v. Wallace* is contrary to Rule 404(b) and *State v. Lyle* and should be overruled?

The State argues, “Appellant’s argument that the Supreme Court will, in the future, find evidence of other bad acts is inadmissible propensity evidence is highly unlikely.”¹ Brief of Respondent, p. 23. The State, however, never addressed Pastor Durant

¹ Pastor Durant does not argue that evidence of other bad acts is never admissible under Rule 404(b), SCRE and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Rather,

pointing out that our Supreme Court, in *State v. Venancio Diaz Perez*, Appellate Case Number 2015-001576, granted Mr. Perez's motion to argue against precedent and convened an oral argument on November 30, 2016, during which Mr. Perez asked the Court to overrule *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).² Over fourteen months after the oral argument, our Supreme Court still has *Perez* under advisement. If our Supreme Court overrules *Wallace* in *Perez*, then Pastor Durant will be entitled to the benefit of that ruling because he preserved this issue at trial and raised it on appeal. R. 83-87. *See, e.g., State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) ("ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved").

Question III

Did the trial judge err in admitting the testimony of A.R., T.H., and D.B. since that testimony was inadmissible under *State v. Wallace* and other valid precedent when the dissimilarities of the witnesses' testimony outweighed the similarities and the danger of unfair prejudice from the testimony substantially outweighed the probative value?

The State argues, "The trial judge did not abuse his discretion in admitting Appellant's prior *convictions* into evidence." Brief of Respondent, p. 27 (emphasis added). In reality, Pastor Durant has not been *convicted* of any of the allegations made by the other complaining witnesses. In fact, the trial judge informing the jurors about the existence of these other pending charges is the very issue Pastor Durant raises in Question I.

he argues for an interpretation of Rule 404(b) that is consistent with *Lyle* and that the Rule 404(b) testimony was not admissible in his case.

² The oral argument in *State v. Perez* is found at <http://media.sccourts.org/videos/2015-001576.mp4> (last viewed Feb. 4, 2018).

The State argues these “other alleged assaults shared *striking similarities* with his current charges.” Brief of Respondent, p. 27 (emphasis added). The purported “striking similarities,” however, militate in favor of excluding the evidence. *See, e.g. State v. Campbell*, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct. App. 1994) (“When the prior bad acts are ‘strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.’”); *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (“When, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.”).

The State, furthermore, never addressed the numerous dissimilarities between the allegations pointed out by Pastor Durant at trial and in his opening brief, at pp. 11, 32-33. As trial counsel pointed out, *Wallace* reduces the inquiry to a “counting contest” or “math equation.” R. 88, 93. At least one Justice hearing the oral argument in *Perez* was concerned about “cherry picking” facts to support admissibility of Rule 404(b), SCRE testimony. Even if *Wallace* survives the ruling in *Perez*, trial courts must be mindful in the application of *Wallace*. The trial judge in this case seemed to believe *Wallace* created a *per se* rule in favor of admitting the Rule 404(b) testimony.

Even if these allegations were admissible under Rule 404(b), SCRE, Pastor Durant additionally challenges the admissibility of the testimony under the Rule 403, SCRE analysis required as part of the *Wallace* analysis.³ Brief of Appellant, pp. 33-34. Alt-

³ The State, as an afterthought in the penultimate sentence of this section of its brief, at p. 28, suggests, “[T]o the extent Appellant argues the prejudicial effect of admitting the other bad act evidence substantially outweighed its probative value, this argument was not made to the trial judge and is not preserved for appellate review.” This suggestion overlooks the fact that the prosecution, as part of its motion to admit the Rule 404(b) evidence, asked the trial judge to consider the Rule “403 balancing test, which is whether or not the danger of unfair prejudice suggest a result based on an improper basis,

though acknowledging this standard in its brief, at pp. 26 and 28, the State never explained why the prosecution's use of this testimony did not violate Rule 403. The prosecution urged the jurors to convict Pastor Durant because of allegations of *all* of the complaining witnesses, including the Rule 404(b) witnesses, thereby creating an unfair danger that Pastor Durant would be convicted based on considerations other than proof of the elements of the crime alleged in the indictment being tried.

Question IV

After the jurors announced a deadlock, did the trial judge err by giving an *Allen* charge that singled out the sole non-voting juror, directing that juror not to prevent a unanimous verdict, after which the jurors returned a unanimous verdict in less than thirty-four minutes?

The State argues, "[T]he trial judge clearly communicated he was not forcing any of the jurors, including the holdout, in any specific manner." Brief of Respondent, p. 30. This assertion is not supported by the record. The trial judge instructed the non-voting juror that s/he must vote with the majority to render a unanimous verdict and that the judge was willing to wait as long as it took to reach that result.

The State's suggestion that the trial judge not knowing the identity of the non-voting juror makes a difference in resolving the question before this Court must be rejected. The trial judge specifically addressed the non-voting juror—not by name but as the sole juror not voting. Based on the record before this Court, there can be no doubt that the non-voting juror was aware s/he was being singled out by the trial judge.

Your Honor, which would be when the probative value is substantially outweighed by danger of unfair prejudice." R. 83, lines 1-6. The trial judge expressly based his decision to admit the evidence on our Supreme Court's opinion in *Wallace*, which mandates "the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." *Wallace*, 384 S.C. at 435, 683 S.E.2d at 278. The issue of whether the prejudicial effect of admitting the Rule 404(b) testimony outweighed the danger of unfair prejudice to pastor Durant was squarely before the trial court.

Finally, pursuant to the trial judge's instructions,

[the] presumption of innocence accompanies the Defendant from the time he is charged throughout the trial and unless and until you reach a verdict of guilt beyond – based on evidence satisfying you of that guilt beyond a reasonable doubt.

R. 699. The non-voting juror should be treated as a juror that is not satisfied the State has negated the presumption of innocence with evidence proving Pastor Durant's guilt beyond a reasonable doubt. The *Allen*⁴ charge instructed the non-voting juror s/he must vote guilty if the other eleven jurors voted guilty.

Question V

Did the trial judge err by denying Pastor Larry Durant's new trial motion based on a *Brady* violation resulting from the prosecutor not disclosing the prior criminal history of Ulanda McRae when her prior criminal history for dishonesty impeached her credibility?

Pastor Durant asserts a *Brady*⁵ violation, but the State begins its argument by reciting a Rule 5, SCRCrimP standard. Brief of Respondent, p. 32. This issue should be resolved under the *Brady* line of cases, including but not limited to *Kyles v. Whitley*, 514 U.S. 419, (1995) and *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006). As the Supreme Court of the United States held:

[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

⁴ *Allen v. United States*, 164 U.S. 492 (1896).

⁵ *Brady v. Maryland*, 373 U.S. 83 (1963).

Kyles, at 437-38 (internal citations omitted).

The State argues, “Appellant fails to prove McCrae’s criminal history rose to a level of a *Brady* violation.” Brief of Respondent, p. 34. The State, however, overlooks the fact that failure to disclose impeachment material constitutes a *Brady* violation. *United States v. Bagley*, 473 U.S. 667, 676 (1985) (“This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.”); *Giglio v. United States*, 405 U.S. 150 (1972). McCrae was a key witness for the prosecution. Impeaching her credibility calls into question the State’s evidence of how the allegations by these complaining witnesses came to the attention of law enforcement, thereby impeaching the State’s entire case, including the credibility of the complaining witnesses.

In footnote 12 of its brief, at p. 34, the State argues Pastor Durant’s case is distinguishable from *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999) because “*Gibson* involved a factually-distinguishable situation in which the State disclosed some, but not all of the exculpatory information in its possession.” The State fails to explain how a complete failure to disclose exculpatory information could ever be mitigating; nor could it.

Question VI

Should this Court order a new trial for Pastor Larry Durant based on the Cumulative Error Doctrine?

In its heading to Argument VI, the State asserts the Cumulative Error Doctrine “is not recognized under South Carolina law.” Brief of Respondent, p. 36. The State not only abandons this assertion in the body of its brief but, in fact, acknowledges, “[T]he cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing a party from receiving a fair trial, and

the cumulative effect of these errors affects the outcome of the trial.” Brief of Respondent, p. 36. This Court, therefore, should not entertain the suggestion that Cumulative Error Doctrine does not exist for review of direct appeals in our state.

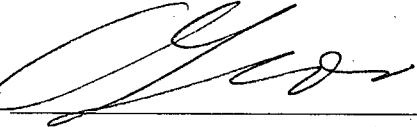
As discussed in Pastor Durant’s opening brief, this Court should order a new trial based on the cumulative error doctrine based on the matters he preserved for appellate review during his trial. Respondent’s brief, at pp. 36-38, however, conflates the “cumulative error doctrine” with the “plain error rule” by misapplying this Court’s analysis in *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 2013). Beekman asked this Court to apply the “cumulative error doctrine” based on his unspecified objections sustained during trial and other alleged errors that he did not object to during trial. Under those circumstances, this Court properly concluded Beekman was attempting to invoke the “plain error rule” that is not recognized in our State. *Id.* 405 S.C. at 236-38, 746 S.E.2d at 489-90. As seen, Pastor Durant raised all issues at trial that he asserted in his opening brief, thereby preserving for appeal the cumulative effect of these issues.

Conflation of the “cumulative error doctrine” and the “plain error rule” seems to be an office-wide misunderstanding within the Attorney General’s Office. Undersigned counsel has encountered the same argument in two other direct appeals. *State v. Michael Beaty*, S.C. Supreme Court Appellate Case Number 2016-001305 and *State v. Nakia Johnson*, Court of Appeals Appellate Case No. 2015-001436. This Court’s guidance, therefore, is needed to resolve this confusion in this case and future cases.

CONCLUSION

For the reasons set forth in the Brief of Appellant and this Reply Brief, this Court should reverse Pastor Durant's convictions and order a new trial.

Respectfully Submitted,

By  _____

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Attorney for Appellant Larry Durant

May 14, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-001264

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SC Court of Appeals

The State,..... Respondent

v.

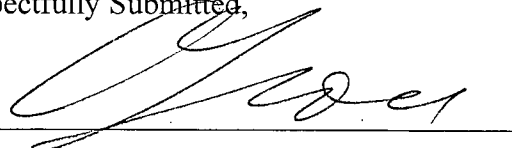
Larry Durant,..... Appellant.

Rule 211, SCACR Certification

This Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully Submitted,

By



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Attorney for the Appellant

May 14, 2018
Greenwood, South Carolina

The Supreme Court of South Carolina

The State, Respondent,

v.

Larry Durant, Appellant.

Appellate Case No. 2018-002125

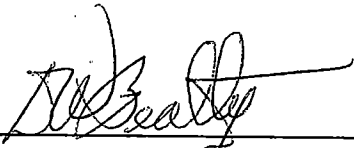
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JAN 17 2019

SC Court of Appeals

ORDER

Appellant ask this Court to certify this case from the court of appeals pursuant to Rule 204(b), SCACR. The motion to certify is granted.



C.J.
FOR THE COURT

Columbia, South Carolina

January 17, 2019

cc:

E. Charles Grose, Jr., Esquire
Alan McCrory Wilson, Esquire
William Frederick Schumacher, IV, Esquire
Ernest Adolphus Finney, III, Esquire
The Honorable Jenny Abbott Kitchings

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

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FEB 15 2019

S.C. SUPREME COURT

Appellate Case No. 2016-001264

The State, ... Respondent

v.

Larry Durant, ... Appellant.

Petition to Argue Against Precedent

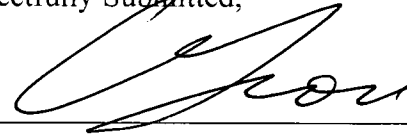
By written order dated January 11, 2019, this Court granted Pastor Durant's petition to certify this case from the Court of Appeals because the primary issue in this appeal is Pastor Durant's request to overrule *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009). Pursuant to Rule 217, SCACR, Pastor Larry Durant now moves this Court for an order allowing him to argue against precedent, including but not limited to this Court's opinion in *Wallace* and opinions following *Wallace*. Additionally, the Court of Appeals opinion in *State v. Wallace*, 364 S.C. 130, 139, fn. 2, 611 S.E.2d 332, 337, fn. 2 (Ct. App. 2005) identifies opinions that are inconsistent with the traditional interpretation of Rule 404(b), SCRE and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

IT IS SO MOVED.

(signature on the next page)

Respectfully Submitted,

By



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February 12, 2019.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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FEB 15 2013

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Roger M. Young, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2016-001264

The State, ... Respondent

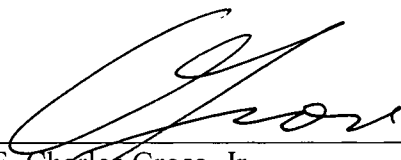
v.

Larry Durant, ... Appellant.

Certificate of Service

I certify that I have served this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

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February 12, 2019

The Supreme Court of South Carolina

The State, Respondent,

v.

Larry Durant, Appellant.

Appellate Case No. 2016-001264

ORDER

The Petition to Argue Against Precedent filed by counsel for appellant is granted.



FOR THE COURT C.J.

Columbia, South Carolina

March 06, 2019

cc: Alan McCrory Wilson, Esquire
E. Charles Grose, Jr., Esquire
William Frederick Schumacher, IV, Esquire
Ernest Adolphus Finney, III, Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Larry Durant, Appellant.

Appellate Case No. 2016-001264

Appeal From Sumter County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 27964
Heard May 9, 2019 – Filed May 6, 2020

AFFIRMED

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood,
for Appellant.

Attorney General Alan Wilson and Assistant Attorney
General William F. Schumacher, IV, both of Columbia,
and Solicitor Ernest A. Finney, III, of Sumter, for
Respondent.

JUSTICE HEARN: Appellant Larry Durant was convicted of second-degree criminal sexual conduct (CSC) for sexually abusing a teenage girl in his church office where he served as the pastor. Durant contends the trial court improperly permitted the State to introduce evidence of prior sexual abuse allegations as evidence of a common scheme or plan under Rule 404(b), SCRE, and that the State

committed a *Brady*¹ violation by failing to accurately disclose the criminal history of its witness. Applying the framework announced today in *State v. Perry*, Op. No. 27963 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 12), we affirm the admissibility of the girls' testimony. Additionally, while the State failed to disclose the criminal background information of its witness, we find this information was not material. Accordingly, we affirm Durant's conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Durant was the founder and lead pastor at Word International Ministries, a church in Sumter. He is a double amputee below his knees and is legally blind. In 2013, four teenage girls who belonged to the church accused Durant of sexually assaulting them. Two of the girls were cousins, another was a God-sister, and the fourth was a close friend. The State indicted Durant on one count of second-degree criminal sexual conduct with a minor, stemming from an alleged sexual battery against one of the girls, and three counts of third-degree criminal sexual conduct pertaining to conduct with the other three. However, the State only proceeded to trial on one count.

During jury selection, the trial court mistakenly advised the jury pool that Durant faced all of the indicted criminal sexual conduct charges and a forgery charge. Defense counsel immediately indicated he had "something to bring up at a later time," and the court held a sidebar. Afterwards, the court explained it erroneously listed the charges Durant faced and instructed the jury not to consider them. Following the jury's dismissal, counsel stated he appreciated the court's curative instruction, but was concerned the jury panel had been tainted. Counsel explained he was "definitely not [asking for] a mistrial," but he was requesting a continuance or a new jury panel. The State responded the court had given a curative instruction almost immediately and clearly stated the charges did not exist. The circuit court acknowledged the mistake was unfortunate but believed the curative instruction "took care of it," and accordingly, denied the motion for a continuance or mistrial.

Because the State sought to call the three other girls who alleged Durant had sexually abused them in a similar fashion, the court held a *Lyle*² hearing.

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

² *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

According to one, Durant began abusing her when she was 13. She noted that Durant would call her to his office in the back of the church, lock the door, and pray to change her sexual orientation and to protect her against contracting any diseases. She stated that Durant began with oral sex and progressed to vaginal intercourse. Finally, she testified that Durant had pink pigmentation on his penis.

A second girl testified that Durant began to abuse her when she was 18, and that he would pray for her to make sure she did not contract any diseases and to prevent any harm to her body. She contended Durant digitally penetrated her vagina, which evolved into vaginal intercourse after he said, "God was taking him to a new level." She also testified that Durant would stand behind her during intercourse. She noted that Durant told her that she likely would not be admitted to the college of her choice if she did not have sex with him.

A third girl testified that Durant began abusing her when she was about 14 or 15 years old, and that he would also pray that she would not contract any sexual diseases. Finally, a fourth girl testified that Durant began abusing her when she was 13. She also noted that Durant would pray with her before the abuse, and that his genitalia had pink discoloration. On one occasion when she was pregnant, she stated that Durant told her that he would "bump the seed out." After comparing the similarities and dissimilarities pursuant to *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), the trial court ruled the girls could testify, as the court remarked, "[f]rankly, it's one of the more compelling 404(b) cases I've ever come across."

At trial, the girls testified, as well as another witness, Ulanda McRae, who is one of the girls' mother. McRae is also the daughter of Lizzy Johnson, a woman Durant previously dated. Durant contended that Johnson, who lived in a property purportedly owned by Durant around the time the allegations surfaced, forged a deed conveying that property to Johnson sometime earlier. When the allegations arose, a deed was recorded conveying the property back to Durant. The defense believed these fraudulent transfers served as a motive to fabricate the girls' allegations of sexual abuse. Defense counsel also stressed the lack of DNA, the fact that Durant was a double amputee and legally blind, suffered from erectile dysfunction, and had a chronic sexually transmitted disease that none of the alleged victims contracted.

Initially, the jury indicated they were at an impasse and that one juror refused to vote. The court gave an *Allen* charge and added that refusing to vote was

not an option. Shortly thereafter, the jury found Durant guilty, and the court sentenced him to 20 years' imprisonment.

A few hours after sentencing, defense counsel received a call from McRae's ex-husband inquiring why he did not question McRae about her prior criminal convictions. Defense counsel did not believe McRae had a criminal background because the State previously had disclosed a report from the National Crime Information Center (NCIC) stating she did not have a criminal record. Counsel conducted a SLED CATCH search³ using her name, date of birth, and social security number, which revealed numerous prior convictions under nine aliases for offenses such as shoplifting, fraudulent checks, and forgery spanning from 1991-2005.

Thereafter, Durant moved for a new trial, arguing the State's case was based entirely on credibility and the State's failure to disclose McRae's record prevented him from impeaching a critical witness or further developing his defense that Johnson stole the residence owned by Durant, thereby creating the need to fabricate the charges against him. The State responded it had run McRae's criminal history using the NCIC under the name "McCrae" rather than the correct spelling.⁴ The State argued its failure to disclose McRae's criminal history did not amount to a *Brady* violation because it was unaware she had one and, in any event, it was immaterial to Durant's guilt. Durant disagreed, asserting the State was in possession of the criminal history for *Brady* purposes because it could have run a proper search but failed to do so.

The circuit court found the State was not in possession of the evidence and that it would not have affected the outcome of the trial. While some of McRae's convictions were likely inadmissible, the court noted it may have allowed one or more into evidence that would have been favorable to the defense, but regardless, the case boiled down to whether the jury believed the testimony of the victim and the three other witnesses regarding assaults. Thereafter, Durant appealed to the

³ The South Carolina Law Enforcement Division enables public CATCH searches, an acronym for "Citizens Access to Criminal Histories." SLED CATCH, <https://catch.sled.sc.gov> (last visited Sept. 5, 2019).

⁴ The State later clarified it did not include McRae's social security number in the search because it was not in possession of that information at the time.

court of appeals, which transferred the appeal to this Court pursuant to Rule 204(b), SCACR.

ISSUES

- I. Did the trial court err by admitting testimony of other sexual assaults pursuant to the common scheme or plan exception under Rule 404(b), SCRE?
- II. Did the circuit court err in denying Durant's motion for a new trial based on a *Brady* violation?

DISCUSSION

I. Rule 404(b), SCRE

We begin by noting this Court's opinion in *State v. Perry*, which overruled *Wallace* and clarified the proper analysis in determining whether prior acts are admissible pursuant to the common scheme or plan exception. *State v. Perry*, Op. No. 27963 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 12). The Court emphasized *Lyle's* "logical connection" test, whereby "[t]he State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes 'reasonably tends to prove a material fact in issue.'" *Id.* at 30 (quoting *Lyle*, 125 S.C. at 417, 118 S.E. at 807). To prove a sufficient connection, the State must demonstrate that there is "something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." *Id.* at 27. This requirement filters permissible evidence of prior acts against veiled attempts to introduce propensity evidence. When the State seeks to present this evidence, its burden is a high one, as trial courts must employ "rigid scrutiny." *Id.* at 30. However, while the proper framework no longer reduces a Rule 404(b) analysis to mathematical exercise where the number of similarities and dissimilarities are counted, the common scheme or plan exception remains viable.

Accordingly, the question then becomes whether the admission of the other three girls' testimony can nonetheless be upheld under *Perry*. While the trial was conducted under *Wallace*—the parties argued for and against admissibility using that test and the trial court based its decision on it—we now determine whether the evidence would have been admissible under the framework in *Perry*. In answering this question, case law guides our analysis.

In *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984), this Court determined the trial court properly admitted evidence that a defendant had

committed previous acts of sexual abuse because the State showed a particularly unique method of committing the attacks. The Court explained:

All three daughters testified concerning the pattern of this and prior attacks. According to them, these attacks commenced about their twelfth birthday, at which time Appellant began entering their bedroom late at night, waking them, and taking one of them to his bedroom. There he would explain the Biblical verse that children are to "Honor thy Father," and would also indicate he was teaching them how to be with their husbands. The method of attack was common to all three daughters.

283 S.C. at 391, 323 S.E.2d at 773. The Court concluded, "It would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence." *Id.* at 392, 323 S.E.2d at 774.

Because *McClellan* remains good law, we believe the prior acts here are admissible. Durant had a particularly unique method of committing his attacks common to all the girls. While there were differences in their ages and the type of sex act, the method of his attack was more than just similar; instead, evidence of the prior acts "reasonably tend[ed] to prove a material fact in issue." *Lyle*, 125 S.C. at 417, 118 S.E. at 807. Durant exercised his position of trust, authority, and spiritual leadership to hold private prayer meetings with teen girls who had grown up in his church. He told them he was praying for their health and good fortune, and represented that part of this process was touching them sexually and having intercourse. Durant then warned the girls of misfortune if they refused or told anyone. Moreover, he used scripture as a means of grooming the children into performing sex acts, a striking parallel to the defendant in *McClellan*. Indeed, the trial court noted it was one of the more compelling cases of common scheme or plan evidence it had ever seen, and we agree. These facts demonstrate the requisite logical connection between the prior acts of sexual abuse and the one forming the basis of the crime charged.

II. *Brady*

Durant contends the trial court erred in declining to grant a new trial based on the State's failure to disclose the criminal history of one of its witnesses. The State asserts its failure to provide McRae's criminal history did not amount to a *Brady* violation because it was unaware that she had one, and regardless, the

evidence was immaterial because it did not impact the credibility of any of the four witnesses who testified about the sexual abuse Durant committed against them. The State asserts McRae was an immaterial witness whose testimony was cumulative to other evidence presented at trial, and further, Durant never alleged she was involved in the property dispute that caused the victims to report the abuse.

A *Brady* violation occurs when the evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant's guilt or punishment. *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Such a violation is material when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 525, 514 S.E.2d at 325. In other words, the government's evidentiary suppression is so serious as to undermine confidence in the trial's outcome. *Id.* *Brady* applies to both impeachment and exculpatory evidence. *Id.* at 524, 514 S.E.2d at 324. Importantly, whether the prosecution acted in good or bad faith is irrelevant in determining whether a *Brady* violation occurred. *Brady*, 373 U.S. at 87.

In this case, the evidence was clearly favorable to Durant, as defense counsel could have used it to impeach McRae. Accordingly, we turn to the second element—that the State possessed the information.

Because of the absence of South Carolina case law on the possession element in this context, we are guided by decisions from two federal circuits. The Third and Fifth Circuits have held the failure to provide information that could be obtained through a NCIC search is a *Brady* violation. *United States v. Perdomo*, 929 F.2d 967, 969-73 (3d Cir. 1991); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (finding a *Brady* violation where the government did not conduct a NCIC search of one of its witnesses despite assigning no bad motive on the government). Because we find these decisions persuasive, we adopt the reasoning employed therein.

In *Perdomo*, the defendant sought a government confidential informant's criminal record. *Id.* at 968-69. The prosecution conducted an NCIC search, which revealed no prior charges or convictions, but elected not to request local records from the Virgin Islands. *Id.* at 971. When it came to light that the informant had a significant criminal record the day after trial, the defendant moved for a new trial, which the district court denied. *Id.* 968-69. The Third Circuit held the district court

erred as a matter of law in concluding the prosecution had no duty to conduct the search and provide the information, and remanded for a new trial. *Id.* at 970-74. In relevant part, the court recognized that "the prosecution, not the defense, is equipped with the resources to accurately and comprehensively verify a witness['s] criminal background." *Id.* at 973. Despite defense counsel's ability to obtain similar information through a public search, the court refused to shift the burden to the defense to obtain *Brady* information.

In *Auten*, the Fifth Circuit held the government violated *Brady* when it decided not to conduct a criminal background search on one of its own witnesses because of time constraints. 632 F.2d at 481. The government asserted that it could not suppress or withhold evidence that it did not know existed. The court rejected this approach, noting, "[W]e do not assign bad motive or bad faith to the prosecution. We do underscore, however, the heavy burden of the prosecutor to be even-handed and fair in all criminal proceedings." *Id.* at 481.

We have cited *Auten* with approval in the past by acknowledging that "information known to investigative or prosecutorial agencies may, under certain circumstances, be imputable to the State." *State v. Von Dohlen*, 322 S.C. 234, 240, 471 S.E.2d 689, 693 (1996), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). While we have also not required the State to conduct a fishing expedition to discover exculpatory evidence, *see id.* at 241, 471 S.E.2d at 693, requiring the State to provide accurate criminal background information on its own witnesses hardly can be described as such. We recognize that some jurisdictions construe *Brady*'s possession requirement narrowly. *See, e.g. United States v. Young*, 20 F.3d 758, 764-65 (7th Cir. 1994) (declining to impute prosecutorial knowledge of a witness' criminal history when the government diligently searched for that information). Some courts have excused the government's failure to disclose if the information is readily available to the public. *See State v. Nikolaenko*, 687 N.E.2d 581, 583 (Ind. Ct. App. 1997) ("[T]he State will not be found to have suppressed material information where that information was available to the defendant through the exercise of reasonable diligence."). However, we believe the better approach is to hold the State responsible for fulfilling its prosecutorial duties, including the duty to disclose under *Brady*.

This rule is sound, as faulting defense counsel for failing to discover material information about the State's own witnesses "breathes uncertainty into an area that should be certain and sure" because "[s]ubjective speculation as to

defense counsel's knowledge or access may be inaccurate." *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 293 (3d Cir. 2016). Shifting the burden to defense counsel lessens the State's duty to disclose exculpatory evidence and has the risk of adding an additional element to *Brady*. *Id.* ("Adding due diligence, whether framed as an affirmative requirement of defense counsel or as an exception from the prosecutor's duty, to the well-established three-pronged *Brady* inquiry would similarly be an unreasonable application of, and contrary to, *Brady* and its progeny."). We agree with the Third Circuit that "[a]ny other rule presents too slippery a slope." *Id.* at 292.

With this in mind, we move to the facts of this case. Defense counsel first realized that McRae had a criminal history after her ex-husband notified him immediately after trial. The ex-husband expressed bewilderment that defense counsel did not ask about McRae's prior convictions during trial. Thereafter, counsel obtained a SLED background search using McRae's name, date of birth, and social security number, which revealed numerous prior convictions under several different aliases. While we concede this demonstrates the information was publicly available after paying for a search, this does not end the inquiry. The government not only has greater resources, *Perdomo*, 929 F.2d at 973, but also exclusive access to the NCIC database.⁵ Moreover, when the State discloses *Brady* material, the defense has the right to rely on its veracity. We find it entirely unreasonable to shift the burden to the defense to independently investigate the criminal background of each of the State's own witnesses when the State has affirmatively claimed that its witness does not have a criminal background. It is not incumbent on the defense to review the State's NCIC search for misspelled names. While we do not suggest any improper motive by the State, we will not undermine a defendant's due process rights by overlooking and immunizing the State's mistake. Accordingly, we hold as a matter of law that the State was in possession of McRae's criminal background information and failed to accurately disclose it. Nevertheless, to warrant a new trial, Durant must demonstrate the trial court abused its discretion in finding the information was immaterial, a burden he fails to satisfy. *State v. Bryant*, 372 S.C. 305, 316, 642 S.E.2d 582, 588 (2007) (reviewing a *Brady* violation for an abuse of discretion).

⁵ FBI Criminal Justice Information Services Division, *National Crime Information Center*, <https://www.fbi.gov/services/cjis/ncic> (last visited Sept. 5, 2019).

Initially, we note McRae's criminal history included several convictions, many of them over ten years old, so it is unlikely that most of them would have been admissible. While we agree with the trial court that McRae's conviction for obtaining a signature under false pretenses likely would have been admissible, the defense never suggested that McRae—as opposed to Johnson—forged the deed. Perhaps more importantly, the State presented cumulative evidence in the form of the girls' testimony. As a result, the jury had ample evidence supporting its verdict. Accordingly, Durant cannot demonstrate the evidence was material because there was not a reasonable probability the result of the proceedings would have been different. See *United States v. Bagley*, 473 U.S. 667, 682 (1985) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

CONCLUSION

For the foregoing reasons, we affirm.⁶

⁶ Durant also contended the trial court erred in denying his motion for a mistrial due to an allegedly tainted jury pool, and his motion for a new trial based on an unconstitutionally coercive *Allen* charge and cumulative error. We affirm these grounds pursuant to Rule 220(b) and the following authorities:

1) As to the alleged tainted jury pool, see *State v. Crim*, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997) (noting a decision to grant or deny a mistrial is reviewed for an abuse of discretion and "[t]he power of the court to declare a mistrial ought to be used with the greatest caution"); *Id.* at 257, 489 S.E.2d at 479 ("An instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced."). Further, the evidence was cumulative, so any purported error was harmless. *State v. Wyatt*, 317 S.C. 370, 373, 453 S.E.2d 890, 891 (1995).

2) As to the *Allen* charge, see *Tucker v. Catoe*, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) ("Whether an *Allen* charge is unconstitutionally coercive must be judged in its context and under all the circumstances."); *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) ("A trial judge has a duty to urge, but not coerce, a jury to reach a verdict."). It is

AFFIRMED.

BEATTY, C.J., KITTREDGE, FEW, JJ., and Acting Justice James Edward Lockemy, concur.

apparent the trial court did not err in directing the juror to fulfill the oath he took at the outset of trial, as the court did not urge the jurors to vote in any specific way. Moreover, the court's suggestion that the jurors would have to deliberate for as long as they wanted to be there that evening does not render the charge coercive. *See Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 454-57, 772 S.E.2d 544, 554-57 (Ct. App. 2015), *cert. denied* (holding an *Allen* charge was not improperly coercive where the court instructed the jury on the Friday before Labor Day that they could deliberate into the night, as well as Saturday, or the following Tuesday).

3) As to the cumulative error doctrine, because the trial court did not commit any reversible errors, we reject Durant's contention that a new trial is warranted. *See State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) ("Respondent must demonstrate more than error in order to qualify for reversal [pursuant to the cumulative error doctrine]. Instead, the errors must adversely affect his right to a fair trial."). Moreover, Durant never argued this ground to the trial court; accordingly, it is not preserved. *See State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an argument advanced on appeal that was not raised and ruled on below was not preserved for review).

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In The Supreme Court

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PETITION FOR REHEARING

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I. INTRODUCTION.

In addition to asking this Court to consider the continued validity *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), Pastor Larry Durant presented two federal questions. The first federal question appearing on the record involves a coercive *Allen*¹ charge. In a footnote, pursuant to Rule 220(b), SCACR, this Court misapprehended the right of the non-deliberating juror, singled out by the trial judge’s instruction requiring the juror to vote, to cease deliberations as a way to resist the pressure of the majority. By way of a supplemental citation, Pastor Durant asked this Court to consider *Brewster v. Hetzel*, 913 F.3d 1042 (11th Cir. 2019). Once the rights of the non-deliberating juror are considered in the context of *Brewster*, the need to rehear this matter is apparent. Additionally, the trial judge’s instruction in Pastor Durant’s case did not take into account the comfort of the jurors, including access to food and sleep, and is, therefore, distinguishable from *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015).

Next, although strongly articulating the prosecution’s *Brady*² obligation to provide an accurate criminal history for its witness and acknowledging the nondisclosed “evidence was clearly favorable to Durant, as defense counsel could have used it to impeach McRae,” *Durant*, at 4, this Court misapprehended the materiality of this evidence, overlooked the fact that this case turned on the credibility of the witnesses, and misapplied the appropriate standard for a *Brady* violation by failing to consider the entire record, solely relying on the prosecution’s evidence, excluding from consideration the evidence presented by the defense.

¹ *Allen v. United States*, 164 U.S. 492 (1896).

² *Brady v. Maryland*, 373 U.S. 83 (1963).

Turning the Pastor Durant’s request for this Court to consider the continued validity of *Wallace*, the concurring opinion in *State v. Perez* pointed out this Court’s holding in *Wallace* “so expanded the admissibility of prior bad acts in sexual offense cases that the exception has swallowed the rule.” 423 S.C. 491, 501, 816 S.E.2d 550, 556 (2018) (Hearn, J., concurring). In *State v. Perry*, No. 2017-001965, 2020 WL 2179238 (S.C. May 6, 2020), a divided Court purported to overrule *Wallace* and *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989). The majority in *Perry*, however, succumbed to the temptation of creating a “new framework,” *State v. Cotton*, No. 2017-002402, 2020 WL 2179256, at 1 (S.C. May 6, 2020), for the admissibility of propensity evidence in child sexual offense cases when the prosecution claims a “purpose beyond propensity.” *Perry*, at 8. This Court’s opinions in *Perry*, *Cotton*, and *State v. Durant*, No. 2016-001264, 2020 WL 2179248 (S.C. May 6, 2020) so expanded the admissibility of prior bad acts in child sexual offense cases that the exception to the rule is now the rule, thinly veiled as “new framework,” *Cotton*, at 1, for the admission of propensity evidence in child sexual abuse cases. *Perry* and *Durant* merely changed the vocabulary for admissibility of bad character evidence from “a close degree of similarity,” *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278, to “a particularly unique method of committing” crimes, *Durant*, at 4, without articulating the distinction between those terms.

Our state’s appellate courts are inconsistent in the application of the exception Rule 404(b) and *State v. Lyle* for “a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others.” 25 S.C. 406, ___ 118 S.E. 803, 807 (1923). Perhaps, these inconsistencies result from the absence of cases, since *Lyle*, defining the meaning of this exception. Subsection II(C)(5)

of this petition will request this Court to provide guidance about the meaning of this exception to *Lyle* and Rule 404(b) and define and distinguish the terms “similar,” “quite similar,” “strikingly similar,” “close degree of similarity,” and “particularly unique method.”

Despite a passing reference to Rule 403, SCRE, in *Perry*, at 11, and *Cotton*, at 1, neither of those cases provided any guidance about the role of Rule 403 in “the new framework” for the admissibility of propensity evidence in child sexual abuse offenses, and *Durant* does not mention Rule 403 at all. This Court should provide guidance about the role of Rule 403 under its “new framework” for the admission of propensity evidence in child sex offense cases.

Additionally, this Court completely ignored the role of a limiting instruction in the “new framework” for admissibility of propensity evidence in child sexual offense cases. This Court should provide guidance about the role of a limiting instruction under its “new framework” for the admission of propensity evidence in child sex offense cases.

Finally, this Court summarily dismissed the applicability of the cumulative error doctrine to this case. In doing so, this Court, for the first time, created a new requirement that cumulative error be raised at trial in order to be raised on appeal. This Court should reconsider this new rule.

Pastor Larry Durant, accordingly, petitions this Court for rehearing.

II. GROUNDS FOR REHEARING.

This Court overlooked or misapprehended the following points and should rehear this case pursuant to Rule 221, SCACR. This petition will begin by discussion the two federal questions in the order they appear in the record.

A. *Allen* Charge (Issue V).

Regarding the *Allen* charge, this Court concluded:

It is apparent the trial court did not err in directing the juror to fulfill the oath he took at the outset of trial, as the court did not urge the jurors to vote in any specific way. Moreover, the court's suggestion that the jurors would have to deliberate for as long as they wanted to be there that evening does not render the charge coercive.

Durant, at 6, fn. 6. This conclusion is error for four reasons.

Frist, pursuant to Rule 208(b)(7), SCACR, Pastor Durant called this Court attention to *Brewster v. Hetzel*, 913 F.3d 1042 (11th Cir. 2019) through a supplemental citation letter dated January 24, 2019; *see also* supplemental citation letter dated June 6, 2012, citing *State v. Taylor*, 427 S.C. 208, 216, 829 S.E.2d 723, 728 (Ct. App. 2019) (citing *Brewster*). *Brewster* reviewed the historical significance of the *Allen* charge, including the importance of not coercing jurors to vote a certain way, and observed, “Pressure on jurors, especially on holdout jurors, is increased when the instructions to keep trying to reach unanimity come from a judge who knows how split the jury is and in which direction.” 913 F.3d 1054-55 (jurors initially divided 9 to 3 for conviction). Here, the trial judge knew the split of the jurors were divided 8 to 3 for conviction, with one juror not deliberating. Court’s Ex. No. 2, R. 776.

Second, the trial judge branded the non-deliberating juror “not helpful to the situation at all” because the juror might “ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision.” The juror singled out by this instruction is similarly situated to the non-deliberating juror in *Brewster*, 913 F.3d at 1047 (“when told that the one juror who wouldn’t vote to convict was doing crossword puzzles, the judge ordered all the reading materials”).

Third, thirty-four minutes after the *Allen* charge, the jurors returned a verdict finding Pastor Durant guilty of second-degree criminal sexual conduct with a minor. R. 711-12. *Cf. Brewster*, 913 F.3d at 056 (“The final circumstance contributing to our conclusion that the verdict was coerced is how quickly the jury unanimously agreed on a verdict after the court’s last instruction and action. A verdict of conviction ‘bounced out’ of the jury room only 34 minutes after the last instruction from the judge” and 18 minutes after removing reading materials.).

Fourth, the trial judge instructed, “So in light of that, let me send you back. However long it is you want to take *this evening*, we’ll be here as long as you want to be here. You know, I’ll leave it at that.” R. 711 (emphasis added). When the trial court gave this instruction, the judge knew the jurors has made four unsuccessful attempts to reach a verdict. R. 776. The trial judge did not offer the jurors dinner, an opportunity to resume deliberations on a later date, or anything else for the comfort of the jurors. Thus, Pastor Durant’s case is distinguishable from *Johnson v. Sam English Grading, Inc.*, where the trial judge made provisions for the jurors’ comfort. 412 S.C. 433, 457, 772 S.E.2d 544, 556 (Ct. App. 2015) (“The trial court’s statement about ordering dinner and about his wife being out of town were not coercive. Additionally, the trial court was not going to force the jury to come back on Saturday; he also offered the option of Tuesday.”).

This Court, accordingly, should rehear this matter, reverse the conviction and sentence, and order a new trial.

B. *Brady* Violation (Issue IV).

This Court strongly articulated, “[T]he failure [of the State] to provide information that could be obtained through a NCIC search is a *Brady* violation.” *Durant*, at 4.³ This Court “agree[d] with the trial court that McRae’s conviction for obtaining a signature under false pretenses likely would have been admissible.” *Id.*, at 6. Yet, this Court concluded Pastor Durant “cannot demonstrate the evidence was material because there was not a reasonable probability the result of the proceedings would have been different,” noting “the defense never suggested that McRae—as opposed to Johnson—forged the deed” and “the State presented cumulative evidence in the form of the girls’ testimony.” *Id.* These conclusions are error for three reasons.

First, this Court did not review the entire record and consider the fact that this case turned on the credibility of witnesses. *E.g. State v. Anderson*, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) (finding prejudice when the “case turned solely on the credibility” of witnesses). The record in Pastor Durant’s case contains a lot of evidence raising reasonable doubts. Dr. Leonard testified Pastor Durant has erectile dysfunction and a chronic sexually transmitted disease. R. 640-46. None of the complaining witnesses had a sexually transmitted disease. Pastor Durant presented the testimony of two “armor bearers,” who testified there would not have been an opportunity for Pastor Durant to commit the sexual assaults, at the church, in a manner described by the four women. R. 570-80, 594-602.

Second, this Court erred by dismissing the importance of McRae to the State’s case because “the defense never suggested that McRae—as opposed to Johnson—forged the

³ Pastor Durant’s *Brady* motion requesting, “All information relevant to the credibility of any State witness,” and “[t]he criminal records, both juvenile and adult, of such witnesses.” R. 778.

deed.” *Durant*, at 6. Pastor Durant’s defense included McRae participating in a conspiracy with Johnson and the four women, all of whom are connected by family and social relationships, to frame him for committing the sexual offenses. As trial counsel pointed out during the hearing on the motion for a new trial, during the State’s “very effective closing argument,” the prosecutor argued the jurors “must believe what the outcry witness [McRae] stated because she happened to overhear it which gives [the State’s] theory credibility, that no one could have made up this entire theory.” R. 739. Trial counsel continued:

The problem with that, of course, as Your Honor yourself mentioned during sentencing, this was a credibility case, and in light of the credibility case, the jury could make a decision of either listening to the defense witnesses or listening to State witnesses. With Yolanda [McRae] as the outcry witness, being able to testify un-cross-examined about her criminal record.

R. 739-40. McRae’s criminal history, accordingly, undermined the credibility of the prosecution’s case.

Third, this Court did not correctly apply the standard for a *Brady* violation articulated in *United States v. Bagley*, 473 U.S. 667, 682 (1985) (“A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”). *Bagley* modified the holding in *United States v. Agurs*, where the Supreme Court observed:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evince is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

427 U.S. 97, 112-13 (1976). As discussed above, this Court did not evaluate McRae’s criminal history “in the context of the entire record,” as the opinion focused exclusively on the State’s case and excluded evidence presented by Pastor Durant. Consideration of Pastor Durant’s evidence is necessary to determine whether the ability to impeach McRae with her criminal record would “undermine confidence in the outcome,” *i.e.* would it “create[] a reasonable doubt that did not otherwise exist.” This case turned on the credibility of the witnesses, and, as seen above, the jurors were deadlocked after four votes. R. 776. Viewing the entire record, it is impossible for any court to say that impeaching the credibility of “outcry witness” with her criminal record would not have created a reasonable doubt.

This Court, accordingly, should rehear this matter, reverse the conviction and sentence, and order a new trial.

C. *Lyle* and Rule 404(b), SCRE (Issues I, II and III).

1. Traditional Application of Rule 404(b), SCRE.

The majority in *Perry* identified *Lyle*,⁴ which predated adoption of the South Carolina Rules of Evidence, as “the classic South Carolina case for understanding the

⁴ *Perry* cites four cases for our state’s continued reliance on *Lyle* for interpreting Rule 404(b), SCRE. The first is *State v. Anderson*, 318 S.C. 395, 403, 458 S.E.2d 56, 60 (Ct. App. 1995) (Howard, J., dissenting) (referring to *Lyle* as “the seminal case”). *Perry*, at 4. The majority in *Anderson* declined to sever the trial of a habitual traffic offense from the trial of driving under suspension (“DUS”) and driving under the influence (“DUI”) charges even though the habitual traffic offense charge required admission of prior convictions for DUS and DUI. The dissent in *Anderson*, citing *Lyle*, would have granted the severance because “the prejudicial effect of the admission of the prior DUI and DUS convictions in the trial on those offenses is obvious.” 318 S.C. at 403, 458 S.E.2d at 60 (Howard, J., dissenting). *Anderson*, accordingly, is more of a “severance case” than a “*Lyle* case.” If this Court decided *Anderson* in 2020, it very likely would require a bifurcated

admissibility of a defendant's other crimes.” *Perry*, at 4. “The substance of” our state’s “common law rules” regarding character evidence are codified in Rule 404, SCRE. *State v. Nelson*, 331 S.C. 1, 6, fn. 7, 501 S.E.2d 716, 719, fn. 7 (1998). Rule 404(b), “limits the use of evidence of other crimes, wrongs, or acts to those enumerated in” *Lyle*. Rule 404(b),

trial because of its holding in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019) (trial court committed error of law when it denied defendant’s motion to bifurcate trial).

The second case, *State v. Odom*, cited *Lyle* in a footnote to explain the State’s initial strategy was “to try [Odom] in Spartanburg County on other similar charges, and use the evidence gathered in the Oconee investigation as ‘prior bad acts’ evidence in the Spartanburg trial.” 412 S.C. 253, 260, fn. 5, 772 S.E.2d 149, 152, fn. 5 (2015). The State switched strategies and tried the Oconee County charges instead. *Odom* did not involve an Rule 404(b), SCRE issue on appeal; however, during a pretrial hearing regarding the State’s change in strategy, the prosecutor conceded, “There was gonna [sic] be potential *Lyle* evidence, and I don’t know that we would have ever gotten it in” if the case was tried in Spartanburg. *Id.*, 412 S.C. at 262, 772 S.E.2d at 153. Thus, other than reaffirming the validity of *Lyle* for interpreting Rule 404(b), *Odom* does not provide any guidance for interpreting that rule.

The third case is *State v. Cope*, 405 S.C. 317, 748 S.E.2d 194 (2013). Although citing *Lyle* as guidance for interpreting Rule 404(b), SCRE, *Cope* relied on *State v. Clasby*, which in turn relied on the *Wallace* test, *i.e.* whether the “similarities outweigh the dissimilarities” determines the admissibility under Rule 404(b). 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009). *Cope*, accordingly, is more of a “*Wallace* case” than a “*Lyle* case,” indicating *Cope* is no longer valid, despite the majority in *Perry* declining to “reconsider[] the results of prior cases.” *Perry*, at 6, fn. 5.

The fourth case, *State v. Nelson*, a leading case prohibiting propensity evidence in child sexual offense cases, rejected the prosecution’s contention the other bad act evidence was admissible “to show motive, intent, and a common scheme or plan.” 331 S.C. 1, 9, 501 S.E.2d 716, 720 (1998). Additionally, *Nelson* cited *State v. Alexander* as an example of when relevant evidence should be excluded when the danger of unfair prejudice substantially outweighs the probative value of the evidence and defining “[u]nfair prejudice” as “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (internal quotations omitted) (citing Fed. R. Evid. 403 advisory committee’s note). Although decided prior to our State adopting Rule 403, SCRE, *Alexander* is often cited when interpreting Rule 403. *E.g.* *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (reversing murder conviction). As discussed in Section II(C)(3), *infra*, this Court should incorporate *Alexander*’s definition of “unfair prejudice” into the Rule 404(b), SCRE analysis.

SCRE, reporter's note. *Lyle* articulated the common scheme or plan exception as "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others." 125 S.C. at ___, 118 S.E. at 807.

Lyle reasoned:

A plan or system common to other crimes was not an essential ingredient of the crime charged. Whether such crime was committed as part of a common plan or system was wholly immaterial, unless proof of such system would serve to identify the defendant as the perpetrator of the particular crime charged or was necessary to establish the element of criminal intent. Proof of a common plan or system, therefore, in this connection is merely an evidential means to the end of proving identity or guilty intent, and involves the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged.

125 S.C. at ___ 118 S.E. at 811 (excluding the Georgia crimes as improper propensity evidence). By focusing on whether the other crimes established identity or criminal intent and focusing on whether the underlying facts of the other crimes offered proof of "an essential ingredient of the crime charged," *id.*, *Lyle* taught the bench and bar how to resist the temptation of using propensity evidence to secure a criminal conviction. In *Nelson*, this Court explained:

In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. *Both rules are grounded on the policy that character evidence is not admissible for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.*

331 S.C. at 6, 501 S.E.2d at 718-19 (internal quotations and citations omitted) (emphasis added).

Traditionally, similarity is *not* a consideration for admissibility under *Lyle* and Rule 404(b), SCRE. Regarding the admissibility of prior crimes, this Court in *Lyle* warned about the dangerous temptation of focusing on similarity, *i.e.* propensity evidence, to secure a criminal conviction:

True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter; but that is the precise inference the general rule was wisely designed to exclude.

Lyle, 125 S.C. at 420, 118 S.E. at 808. In *Lyle*, this Court admitted the Aiken crimes, despite similarity, because of “the inference that the two extraneous crimes were committed within a few town blocks as to distance, and within a few minutes, as to time, of the crime charged, and that they were practically a part of the *res gestae*, each a part of one general scheme of a single expedition.” *Id.* Proof that Lyle committed the other crimes was logically connected to the charged crime “for the purpose of establishing the identity of the accused” and to refute an alibi defense. *Id.*

Under the traditional interpretation of *Lyle*, “[i]f the court does not clearly perceive the connection between the extraneous transactions and the crime charged, that is, its logical relevance, the accused should be given the benefit of the doubt, and the evidence rejected.” *State v. Brooks*, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000). In *Brooks*, the State prosecuted Brooks from forging a check on November 11, 1996. The prosecution contended “evidence that Brooks had committed a prior forgery by writing a check on a closed account on September 25, 1995” was admissible under *Lyle* and as an exception to Rule 404(b), SCRE, to show absence of mistake or accident and intent in the current forgery.” *Id.*, 341 S.C. at 60-61, 533 S.E.2d at 327. Over Brooks’ objection, the trial court ruled “the evidence was proper because the two forgeries were ‘similar in that both

accounts were closed ... and either she knew, or should have known, that the account ... was closed.” *Id.* This Court held the 1995 forgery did not “disprove” Brooks’ defense to the 1996 charge or make it more probable “that Brooks forged *this check* or knew it was forged” and expressly found “the State introduced the prior act to demonstrate that Brooks acted in conformity with her propensity to commit crimes which is in direct contradiction of *Lyle*.” *Id.* 341 S.C. at 62, 533 S.E.2d at 328 (emphasis added) (citing *State v. Hough*, 325 S.C. 88, 480 S.E.2d 77 (1997) (by introducing prior bad act evidence, the State was attempting to demonstrate that because defendant had committed crimes in past, he was doing so on this occasion, precisely type of inference *Lyle* prohibits)).

In *Hough*, the State prosecuted Hough for the burglary of a warehouse and larceny of “two power saws and two flashlights.” 325 S.C. at 90, 480 S.E.2d at 78. This Court held testimony “concerning [Hough’s] prior instances of stealing to obtain crack money” was inadmissible as part of the *res gestae* and under *Lyle*. *Id.* 325 S.C. at 93, 480 S.E.2d at 80. This Court held “testimony concerning the subsequent sale of the saws and purchase of crack cocaine was properly admitted” because it “provides a motive for Hough to have committed the crime and would therefore be admissible under *Lyle*.” *Id.*, 325 S.C. at 95–96, 480 S.E.2d at 81.⁵

⁵ This Court also held the evidence “Hough bought one rock of crack cocaine with money used from the sale of the saws is simply insufficient to draw an inference that [he] ‘had a crack problem,’” as the Solicitor alleged during the State’s opening statement. *Hough*, 325 S.C. at 94, 480 S.E.2d at 80; *see also Robinson v. California*, 370 U.S. 660 (1962) (held state law which made ‘status’ of narcotic addiction a criminal offense for which offender might be prosecuted at any time before he reformed, and upon conviction required imprisonment of at least 90 days in a county jail, inflicted a ‘cruel and unusual punishment,’ in violation of the Fourteenth Amendment).

Because of cases like *Hough* and *Robinson*, this petition must address the shocking statement made by the dissent in *Perry*: “[C]hild molesters’ behavior is often repetitive and

Our Court of Appeals “has held that testimony of a prior drug sale [four days earlier] using a similar sales technique is not relevant to prove a single charge of distribution.” *State v. Carter*, 323 S.C. 465, 468, 476 S.E.2d 916, 918 (Ct. App. 1996) (citing *State v. Campbell*, 317 S.C. 449, 454 S.E.2d 899 (Ct.App.1994). The Court of Appeals recognized, “[T]he State was not trying to prove a common scheme or plan, but was instead trying to convince the jury that because Carter sold crack cocaine [] on January 14th, he was selling crack cocaine on January 18th.” *Id.* “This is the precise type of inference prohibited by *Lyle*.” *Id.* *Campbell* applied an identical analysis.⁶

lends itself to establishing a pattern,” noting “certain sex crimes, such as criminal sexual conduct with a minor (via pedophilia), have made the short list of those crimes singled out for a specific diagnosis in the psychiatric community” in “the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V).” *Perry*, at 26, fn. 37 (Kittredge, J., dissenting). This statement is shocking for at least three reasons. First, if the underlying concern is a medically diagnosable condition, then treatment should be favored over incarceration. Second, it applies a blanket diagnosis in child sex offense cases without requiring any proof that a particular person meets the diagnostic criteria of the diagnosis. Third, acceptance of this approach—labeling those accused of a child sex offense as mentally ill without a mental health evaluation—would completely abandon any limitation on the admissibility of propensity evidence in child sex offense cases. This statement also represents the first slide down a slippery slope embracing the temptation to use propensity evidence to solidify a criminal conviction. The DSM-V also contains diagnoses for alcohol and substance abuse disorders, kleptomania, and antisocial personality disorder. *But see. State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) (psychiatrist’s testimony regarding defendant’s antisocial personality disorder was not relevant, and, if relevant, should have been excluded as tending to confuse the jury), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

⁶ The Court of Appeals’ opinion in *Wallace* called attention to our state’s sometimes inconsistent *Lyle* precedent and cited *Campbell* as “correctly reflect[ing] a more narrow interpretation of the common scheme or plan exception.” 364 S.C. at 139, 611 S.E.2d at 337. It is difficult to reconcile this Court denying *certiorari*, on July 26, 1995, in *Campbell*, 317 S.C. at 451, 454 S.E.2d at 901 (“Here, the testimony is of prior drug sales utilizing a *similar* sales technique. However, this is not enough to satisfy *Lyle*.” (emphasis added)), so soon after this Court, on March 27, 1995, decided *State v. Raffaldt*, 318 S.C. 110, 114, 456 S.E.2d 390, 392 (1995) (“Here, the record shows that the method of marijuana dealing between Raffaldt and Burchett was *quite similar* to the cocaine conspiracy. We find that the evidence of prior drug dealing between Raffaldt and Burchett, which gave rise to the

Returning to child sex offense cases, in *State v. Stokes*, Stokes “allegedly committed the lewd act when the child came to his home to purchase a frozen fruit-flavored treat sold to neighborhood children by appellant and his wife.” 279 S.C. 191, 192, 304 S.E.2d 814, 814 (1983). Over Stokes’ objection, “the trial judge allowed another child to testify [Stokes] had once offered her money to ‘meet him at the railroad tracks’” and speculate Stokes’ “purpose of the meeting, she was allowed to speculate that [he] intended to rape her.” *Id.* This Court reversed the conviction and held:

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. The record does not reveal any connection between the complained of evidence and the crime charged.

Id., 279 S.C. at 193, 304 S.E.2d at 815 (internal quotations omitted).

In fact, in other contexts, this Court recognized similarities inherently involved in child sex offense cases. In *Anderson, supra*, this Court approved of a procedure initially endorsed by the Court of Appeals in *State v. Brown*, of the prosecution “call[ing] and independent expert” who “did not examine” the child “to testify to the characteristics of victims” of child sex abuse. In *Brown*, the Court of Appeals approved of testimony by an independent expert explaining:

[C]hildren delay disclosing abuse for a number of reasons, including: (1) fear of consequences to themselves, the perpetrator, or someone the child loves; (2) the child’s age; (3) the child’s relationship to the perpetrator; (4)

cocaine transactions, was admissible as a common scheme or plan.” (emphasis added)). Likewise, it is difficult to reconcile *Raffaldt* with *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (“When, as here, the previous alleged bad act is *strikingly similar* to the one for which the appellant is being tried, the danger of prejudice is enhanced.” (emphasis added)). For this reason, Section II(C)(5), *infra*, asks this court to define and distinguish the terms “similar,” “quite similar,” “strikingly similar,” “close degree of similarity,” and “particularly unique method.”

a lack of vocabulary or language to describe what has happened to them; (5) threats by the perpetrator; (6) grooming by the perpetrator; and (7) the perpetrator's normalization of the abusive conduct. [The expert] further explained that most disclosures happen accidentally, and children generally reveal more details over time throughout the disclosure process. When children suffer chronic abuse, [the expert] stated it is more difficult for them to sort out the timing of individual incidents and the order in which they occurred. [The Expert] also explained that having a close and trusting relationship with the perpetrator can have a very strong impact on whether a child feels like he or she can disclose the abuse. Finally, [the expert] testified that child abuse victims will sometimes tolerate sexual abuse to maintain a relationship, particularly if the perpetrator is someone they love and trust.

411 S.C. 332, 337-38, 768 S.E.2d 246, 249 (Ct. App. 2015), *abrogated on other grounds* by *State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018). It is inconsistent for this Court, on one hand, to recognize child sex abuse cases contain dynamics so similar—including “grooming” and “close and trusting relationship with the perpetrator,” which often includes a perpetrator in a position of authority—that an expert who never examined the child is capable of providing testimony that can assist jurors and, then, on the other hand, say that a similarly situated accused “had a particularly unique method of committing his attacks.” *Durant*, at 4. As will be discussed in detail below, this Court’s opinions in *Perry*, *Durant*, and *Cotton* are not faithful to the *Lyle*, the Court of Appeals Opinion in *Wallace*, *People v. Romano* 84 A.D. 318, 319, 82 N.Y.S. 749, 749 (App. Div. 1903), or *People v. Molineux*, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901).

2. *State v. Wallace* and this Court’s Adoption of Special Rule in Child Sex Offense Cases.

The majority opinion in *Perry* cites with approval to the Court of Appeals’ opinion in *Wallace*. *State v. Wallace*, 364 S.C. 130, 139, 611 S.E.2d 332, 337 (Ct. App. 2005), *reversed by State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009). Thus, it is important to understand the history of *Wallace*. As this petition will demonstrate, although the

majority opinion in *Perry* was generous in its praise of the Court of Appeals' opinion in *Wallace*, it was unfaithful to both the substance and spirit of that opinion. The Court of Appeals in *Wallace* reasoned:

In this case, the trial court did not address any connection between the two crimes to establish if the allegations by the victim's sister were admissible. The court instead ruled, "it goes to a common scheme or plan because of the close degree of similarity between the conduct, with regards to the two victims." When the State was asked to explain why the testimony was essential to its case, the solicitor responded:

This is technically a credibility case, that's what it is. It's one witness's word against potentially another witness's word. The evidence would be relevant and would be essential to the State's case because it is a piece of evidence, just like any other piece of evidence, that goes to prove or disprove the case. And this is strictly a credibility case: Therefore, this testimony is necessary to, again, prove the victim's allegations.

This argument could be used to admit testimony of any prior crime when a defendant is accused of a subsequent but similar crime. It falls far short of the threshold for the admission of a prior crime under the common scheme or plan exception to *Lyle*. Accordingly, the trial court erred in admitting the evidence on this basis.

364 S.C. at 141, 611 S.E.2d at 338. The Court of Appeals further reasoned, "It was also error for the trial judge to attempt to limit the testimony of the sister so that there *would* be a close similarity between the prior bad act and the crime charged" because "[t]he law should not permit a trial judge to make similar that which is different by redacting a part of the testimony." 364 S.C. at 141, 611 S.E.2d at 338 (emphasis original) (internal quotations omitted). The Court of Appeals concluded, "In addition to finding the admission of the sister's testimony error, we find the admission was not harmless" because "the outcome of this case rested on the credibility of the victim and Wallace." *Id.* 364 S.C. at 142, 611 S.E.2d at 338-39.

Regarding the requirement of a connection between the crime charged and the other bad act, the Court of Appeals opinion in *Wallace* documented the inconsistent interpretation of Rule 404(b), SCRE and *Lyle* by our state's appellate courts:

Wallace argues that numerous opinions from both this court 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) (“We find the evidence of prior bad acts bears such close similarity to the offense charged in this case that its probative value clearly outweighs its prejudicial effect.”); *State v. McClellan*, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (“Such evidence is inadmissible ‘unless the close similarity of the charged offense and the previous act enhances the probative value of the evidence so as to overrule the prejudicial effect.’ ”); *State v. Patrick*, 318 S.C. 352, 356 457 S.E.2d 632, 635 (Ct.App.1995) (“There are sufficient similarities between the Georgia case and present case to apply the *Lyle* common scheme or plan exception.”); *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.”); *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).

According to Wallace, 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 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)⁷ (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).

Wallace is correct that some of the appellate decisions appear to focus exclusively on the alleged close similarity between the other crime and the crime charged, while others look beyond mere close similarity to consider the system or connection between the two. Nevertheless, sorting out any apparent inconsistencies in the appellate decisions of this state is not the province of this court. See *M & T Chems., Inc. v. Barker Industries, Inc.*, 296 S.C. 103, 109, 370 S.E.2d 886, 890 (Ct.App.1988) (stating that an intermediate appellate court has no authority to change existing law, but maintaining that the supreme court may want to grant certiorari and modify previous decisions).

364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2 (internal footnote added). Thus, the Court of Appeals in *Wallace* invited this Court to overrule the cases listed in the opening paragraph of footnote 2, to wit: *Hallman*, *McClellan*, *Patrick*, *Blanton*, and *Wingo*.

Significantly, the Court of Appeals in *Wallace* further recognized, “[T]he appellate courts of this state have refused to recognize a specific exception to the inadmissibility of prior bad act evidence in criminal sexual conduct cases.” *Id.* 364 S.C. at 139, 611 S.E.2d at 337 (citing *Nelson*).

⁷ On the same day as its opinion in *Wallace*, this Court reversed the Court of Appeals in *Hubner* based on its holding in *Wallace*. *State v. Hubner*, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009).

This Court reversed the Court of Appeals in *Wallace* and held (1) “When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity;” (2) “When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b);” and (3) “A close degree of similarity establishes the required connection between the two acts and no further ‘connection’ must be shown for admissibility.” 384 S.C. 428, 433-34, 683 S.E.2d 275, 277-78. This Court’s opinion in *Wallace*, requiring trial courts to weigh similarities and differences of bad acts not only abandoned the requirement of logical relevancy of the other crime but also led to the practice of prosecutors and criminal defense lawyers quibbling over the number and types of similarities and differences—much like what occurred in Pastor Durant’s Rule 404(b), SCRE hearing (R. 83-95)—limited only by the attorneys’ creativity. This approach allows courts to engage in a result-oriented process of cherry-picking facts to support admissibility or inadmissibility.

The dissent in *Wallace* demonstrated this Court has “repeatedly held in non-sexual offense cases that, the mere presence of similarity only serves to enhance the potential for prejudice,” observed this Court’s “cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a common scheme or plan under Rule 404(b), SCRE, have, in effect, created an exception to the rule’s exclusion of propensity evidence,” and recommended that, if this Court is “to permit the admission of propensity evidence in these types of cases, then [it] should propose a new

rule of evidence, and encourage public comment.” 384 S.C. at 435-36, 683 S.E.2d at 279 (Pleicones, J., dissenting).

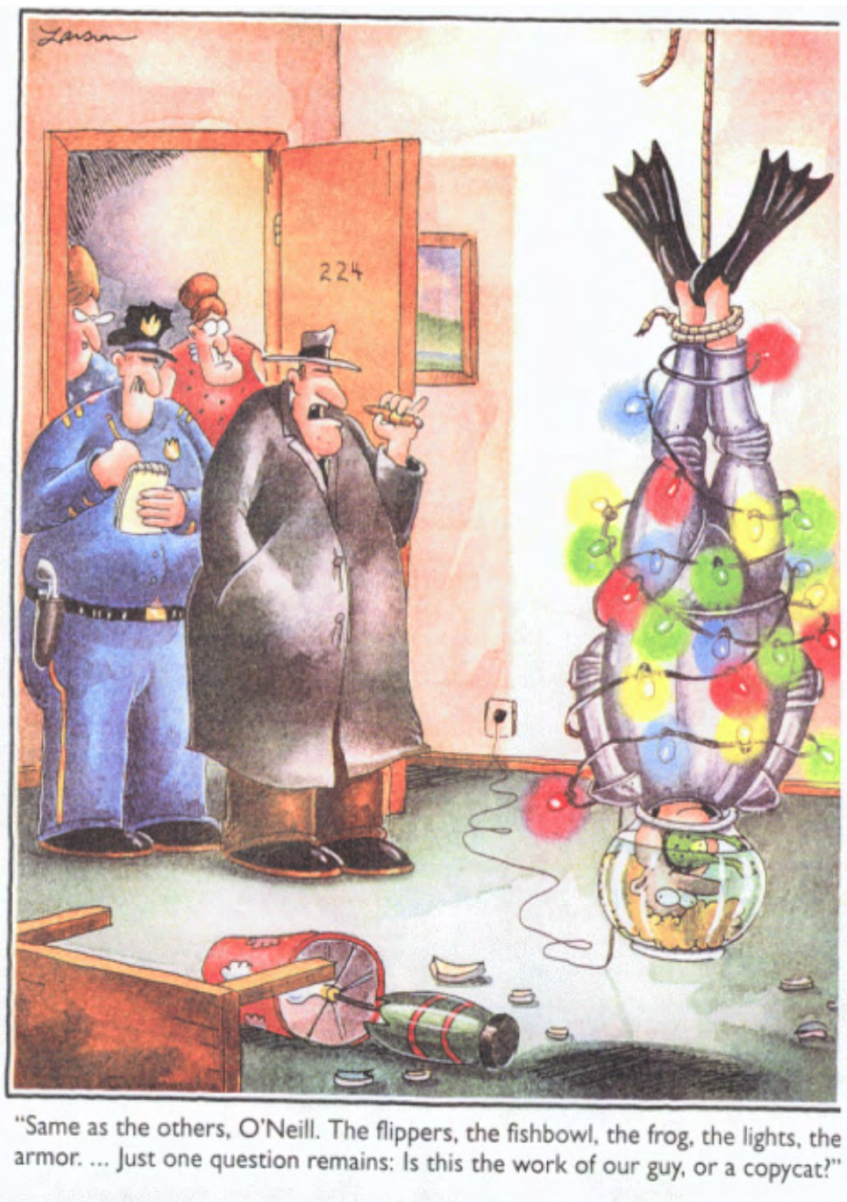
The concurring opinion in *Perez* echoed the dissent in *Wallace*, asserting, “*Wallace* broadened the common scheme or plan exception to such an extent that it no longer has a meaningful exclusionary effect in sexual offense cases.” 423 S.C. at 502, 816 S.E.2d at 556. And, “Without requiring a greater degree of connection beyond only a mere similarity, the exception has been enlarged such that it has become simply a means to prove a defendant’s criminal propensity.” *Id.* 423 S.C. at 502-03, 816 S.E.2d at 556-57. The concurring opinion in *Perez* opinion recognized “this Court has repeatedly warned of the prejudicial dangers stemming from the introduction of prior bad acts which are similar to the one for which the defendant is being tried” and recommended, “[a]bsent an amendment to our rules of evidence creating a different categorical rule for sexual offenses, [this Court should] apply the common scheme or plan exception equally to sexual and nonsexual offenses alike.” *Id.*

Against this backdrop, this Court agreed to consider *Perry*, *Durant*, and *Cotton* and granted motions to argue against the precedent, pursuant to Rule 217, SCACR.

3. *State v. Perry* and the Adoption of a “New Framework” for the Admissibility of Propensity Evidence in Child Sex Offense Cases.

The majority opinion in *Perry* purports to return to the reasoning of *Lyle*, stating its “focus is on restoring the integrity of the Rule 404(b) analysis.” *Perry*, at 6, fn. 5. In reality, *Perry* articulated a “new framework,” *Cotton*, at 1, for the admissibility of propensity evidence in child sex offense cases by endorsing the admissibility of propensity evidence when the prosecution claims a “purpose beyond propensity.” *Perry*, at 8. Although acknowledging “evidence the defendant committed similar criminal acts has the

inherent tendency to show [] propensity,” the majority opinion in *Perry* gratuitously declares, “The stepdaughter’s testimony was clearly relevant because if Perry committed similar acts of sexual abuse against a minor in the past, he was more likely to have done it this time too.” *Perry*, at 2-3. This *Far Side* Cartoon by Gary Larson exposes the fallacy this assertion and illustrates the inherent danger of unfair prejudice of propensity evidence:



Thus, the similarity of the crimes does not make it more probable that “our guy” committed this crime as opposed to “a copycat.” Proof of the identity of the person recently

stealing this particular set of armor, however, would establish “a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others.” *Lyle*, 125 S.C. at ___, 118 S.E. at 807; *cf. Nix*, 288 S.C. at 496, 343 S.E.2d at 629 (“car theft occur[ing] within a short time, approximately two hours, before the robbery” was “so related to the charged crimes that they constitute evidence that there was a common scheme or plan between the crimes” as the stolen car was used to commit “the armed robbery, kidnapping and rape”).

The majority in *Perry* even addressed the concern raised by the Court of Appeals in *Wallace*, regarding trial courts “limit[ing] the testimony [] so that there *would* be a close similarity between the prior bad act and the crime charged,” *Wallace*, 364 S.C. at 141, 611 S.E.2d at 338 (emphasis original), by decreeing “[s]imilarity can be important to meeting that burden” of admissibility but is no longer required. *Perry*, at 11. Going forward, prosecutors will have three options: (1) the accused has “a particularly unique method of committing” crimes, *Durant*, at 4; (2) the similarities are “important to meeting that burden” of admissibility, *Perry*, at 11, but the trial court does not need to consider differences; or (3) the absence of similarity is irrelevant because the State claims a “purpose beyond propensity,” *Perry*, at 8, under the “new framework” for admissibility of propensity evidence in child sex offense cases. Prosecutors no longer will wonder, “There was gonna [sic] be potential *Lyle* evidence, and I don’t know that we would have ever gotten it in.” *Odom*, 412 S.C. at 262, 772 S.E.2d at 153 (quoting the prosecutor).

In its zeal to create a “new framework” for admission of propensity evidence in child sex abuse cases, the majority in *Perry*, at 8, accepted the government’s invitation to chase a red herring when it cited *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000),

while ignoring the limitations this Court has placed on admissibility of evidence under *Benton* to avoid unfair prejudice caused by propensity evidence. As the majority in *Perry* pointed out, *Benton* affirmed the admission of prior burglary convictions to prove an the element of first-degree burglary under S.C. Code Ann. § 16-11-311(A)(2). *Benton*, however, imposed limitations on the use of the evidence:

To ensure a defendant is not convicted on an improper basis while allowing the State to prove the elements of first degree burglary, the trial court should limit evidence to the prior burglary and/or housebreaking convictions, as it did here. Particular information regarding the prior crimes should not be admitted. Additionally, the trial court, as it did here, should, on request, instruct the jury on the limited purpose for which the prior crime evidence can be considered.

338 S.C. at 156, 526 S.E.2d at 230-31 (citing Rule 105, SCRE). This Court subsequently limited the number of prior burglary convictions the prosecution could introduce to establish the elements of first-degree burglary. *State v. James*, 355 S.C. 25, 32, 583 S.E.2d 745, 748 (2003) (“trial court did not weigh the probative value of the seven prior convictions against their prejudicial impact”).

This Court recently distinguished *Benton* and *James* in *Cross* when it recognized “the inherently prejudicial stigma a prior sex-related offense undoubtedly carries.” 427 S.C. at 478, 832 S.E.2d at 288 (trial court committed error of law when it denied defendant’s motion to bifurcate trial). Notably, *Benton* and *James* do not allow the prosecution to introduce facts of the prior burglaries. By contrast, the very nature of the exceptions to Rule 404(b) allows the government to introduce the underlying facts of the other bad acts.⁸ *Benton*, accordingly, does not support the “new framework” for the

⁸ In fact, outside of the *Benton* context, when presented with *Lyle* evidence, jurors ordinarily are not told whether the other bad act resulted in a conviction or is subject of a pending criminal charge. This reality is precisely why this Court erred when it did not

admissibility of propensity evidence in child sex abuse cases. *Cross*, in fact, stated, “Our holding has no effect upon questions of admissibility of a prior conviction when introduction of such evidence is sought pursuant to Rule 404(b), SCRE.” 427 S.C. at 484, 832 S.E.2d at 291. The majority opinion in *Perry* does not explain why the *Benton-James-Cross* line of cases is now applicable to the “new framework,” *Cotton*, at 1, in child sex offense cases.⁹

Benton, *James*, and *Cross*, however, illustrate the significance of two glaring omissions in this Court’s “new framework” for admitting propensity evidence in child sex offense cases, to wit: (1) the absence of any meaningful guidance from this Court regarding the role of Rule 403, SCRE, and (2) the failure of this Court to discuss the role of a limiting instruction. Each of these omissions are discussed below.

First, *Benton* employed a Rule 403, SCRE analysis, and the holdings in *James* and *Cross* turned on Rule 403. By contrast, *Perry*, *Durant*, and *Cotton* omit the role of Rule 403 when determining the admissibility of other bad acts. The majority in *Perry*, in passing, stated, “The State must also convince the trial court that the probative force of the

reverse the trial court for mistakenly announcing the other charges to the jurors (Issue I). *Durant*, at 6, fn. 6. The curative instruction did not “unring the bell.” *State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998) (internal quotations omitted); cf. *Cross*, 427 S.C. at 832 S.E.2d at 290 (“limiting instructions are sometimes insufficient to cure the danger of unfair prejudice”). Additionally, that trial judge’s announcement is cumulative to the inherently prejudice propensity evidence admitted in the trial is grounds to reverse, not affirm. *See, e.g., State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989) (“The State contends that any error here was harmless in that Thomas’ testimony was merely cumulative to Victim’s. To the contrary, it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.”).

⁹ Based on *Cross*, it is foreseeable that an accused move—and a trial court will grant a motion—for a bifurcated trial of a first-degree burglary charge when the prosecution relies on prior burglary convictions as an element of the crime.

evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes.” *Perry*, at 11, (citing Rule 403, SCRE). Perhaps because it revered the convictions, *Perry* did not offer any meaningful explanation of Rule 403 under this Court’s “new framework” for the admissibility of propensity evidence in child sex abuse offenses. The telling sign that the trial courts are free to disregard (or gloss over) the Rule 403 in child sex offense cases is this Court mentioning Rule 403 in *Cotton*, without providing any Rule 403 analysis, despite acknowledging it was applying a “new framework” specific to child sex offense trials. This Court failed to cite Rule 403 at all in *Durant*, let alone provide any analysis under the “new framework.” This Court should incorporate definition of “unfair prejudice,” set forth in *Alexander* into Rule 404(b), SCRE analysis.

Second, *Benton*, *James*, and *Cross* all recognize the significance of a limiting instruction. Prior to *Perry*, *Durant*, and *Cotton*, this Court required an instruction limiting the use of Rule 404(b) evidence. *State v. Timmons*, 327 S.C. 48, 54-55, 488 S.E.2d 323, 326 (1997) (“general rule is that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered”). The exception to the requirement of a limiting instruction is when “evidence of another crime formed part of the *res gestae*.” *Id.*, 327 S.C. at 55, 488 S.E.2d at 327; *see, e.g., Nix*, 288 S.C. at 496, 343 S.E.2d at 629 (“car theft occur[ing] within a short time, approximately two hours, before the robbery” was “so related to the charged crimes that they constitute evidence that there was a common scheme or plan between the crimes” as the stolen car was used to commit “the armed robbery,

kidnapping and rape”).¹⁰ The other bad acts held admissible in *Durant* and *Cotton* were not a part of the *res gestae*. Thus, the bench and bar would benefit from this Court stating whether a limiting instruction is part of the “new framework” for the common scheme or plan exception to Rule 404(b) in child sex offense cases. If a limiting instruction is still required under new framework” specific to child sex offense trials, then this Court should articulate the language of such instruction that would eliminate the inherent danger of unfair prejudice resulting from propensity evidence. *But see, Cross*, 427 S.C. at 832 S.E.2d at 290 (“limiting instructions are sometimes insufficient to cure the danger of unfair prejudice”). It seems easy to craft an instruction limiting the use of another bad act to identity, motive, or absence of misstate. It seems much more difficult to craft a limiting instruction for limiting the use of evidence admitted precisely because it is similar without further exacerbating the danger of unfair prejudice from propensity evidence. Or, this Court could avoid the impossible challenge by recognizing similarity plays no role in determining whether the two crimes are a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others. Such an approach is faithful to *Lyle*, *Molineux*,¹¹ *Romano*, and the Court of Appeals opinion in *Wallace*.

¹⁰ Pastor Durant consistently offered *Nix* as a classic example of the common scheme or plan exception to Rule 404(b), SCRE. R. 86; Final Brief of Appellant, at 10-11, fn. 8; Oral Argument, beginning at 5:20.

¹¹ The dissent in *Perry* attempts to distinguish *Molineux* because “the motive behind each murder was entirely distinct.” *Perry*, at 24, (Kittredge, J., dissenting). The dissent in *Perry*, however, does not attempt to distinguish *Romano* where robbery was the motive of both crimes.

Next, the majority's praise of the Court of Appeals' opinion in *Perry* suggests a majority of this Court believes it should have affirmed the Court of Appeals in *Wallace*. This Court's "new framework" specific to child sex offense trials, however, would not have excluded the bad character evidence in *Wallace*. Wallace's stepdaughter alleged the sexual abuse began when she was twelve years old and continued until she reported the abuse when she was in the ninth grade. *Wallace*, 364 S.C. at 133, 611 S.E.2d at 334. The Trial Court admitted testimony of the stepdaughter's older sister who alleged Wallace began sexually abusing her when she was in the "sixth or seventh grade" and "continued until she moved out of the family home during her second semester in college." *Id.*, 364 S.C. at 134-35, 611 S.E.2d at 334-35. Under *Perry* and *Durant*, a court could conclude Wallace had "a particularly unique method of committing" crimes and admit the evidence under this Court's "new framework" for the admissibility of propensity evidence in child sex offense cases.

Additionally, the "new framework" adopted in *Perry*, *Durant*, and *Cotton* would not have excluded the evidence in *Romano* and *Molineux*. In *Romano*:

The crime of which the defendant was convicted was committed by throwing snuff in the eyes of the complainant at the time of the robbery. The prosecution, for the purpose, as it now claims, of establishing the identity of the defendant, offered proof to show that about three weeks prior to the commission of the offense for which the defendant was on trial he committed another robbery at the same place, upon another person, by the use of the same means.

84 A.D. 318, 319, 82 N.Y.S. 749, 749 (App. Div. 1903). Under *Perry* and *Durant*, a trial court could conclude Romano had "a particularly unique method of committing" crimes and admit the evidence. Such a result would be unfaithful to *Romano*'s admonition:

There is always more or less of similarity between the commission of independent crimes of this class, and in many instances features that are

common to one are found in the other; and yet it has never been supposed that, where there was separation as to time and no connection established beyond that of place and similarity, the first crime was admissible to establish any of the elements which constituted the other.

84 A.D. at 320, 82 N.Y.S. at 750.

The Court of Appeals opinion in *Wallace* summarized the facts in *Molineux*,

The defendant was accused of murder by sending poison contained in a bottle of Bromo Seltzer through the mail to the director of the Knickerbocker Athletic Club. The director, Harry Cornish, believing the silver “Tiffany’s” bottle holder containing the bottle of Bromo Seltzer to be a Christmas gift, took it to his home. Thereafter, a member of his household, Katharine Adams, took some of the bottle's contents to relieve a headache and died. At trial, the State sought to introduce into evidence that the defendant was responsible for the previous death of Henry Barnet, who died at the Knickerbocker Athletic Club after taking a dose of a powder he had received in the mail the month before Cornish received his bottle. Both powders were in fact cyanide of mercury, a rare and deadly poison. The evidence of the prior crime was admitted in the trial court.

364 S.C. at 137-38, 611 S.E.2d at 336 (internal citations omitted). By applying “a particularly unique method” test, the “new framework” created by *Perry*, *Durant*, and *Cotton* would hold this evidence admissible. The New York Court of Appeal, of course, held the other crime inadmissible and reversed the conviction, warning:

Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which, he is charged. It therefor predisposes the mind of the juror to believe the prisoner guilty.

Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901). Regarding the common scheme or plan, *Molineux* observed:

It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one

sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. Underhill, in his work on Criminal Evidence (section 88), thus states this exception to the general rule: ‘No separate and isolated crime can be given in evidence. In order that one crime may be relevant as evidence of another, the two must be connected as parts of a general and composite scheme or plan. Thus the movements of the accused prior to the instant of the crime are always relevant to show that he was making preparations to commit it. Hence on a trial for homicide it is permissible to prove that the accused killed another person during the time he was preparing for or was in the act of committing the homicide for which he is on trial. And, generally, when several similar crimes occur near each other, either in time or locality,—as, for example, several burglaries or incendiary fires upon the same night,—it is relevant to show that the accused, being present at one of them, was present at the other, if the crimes seem to be connected. Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. This connection must clearly appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt, and the evidence rejected. The minds of the jurors must not be poisoned and prejudiced by receiving evidence of this irrelevant and dangerous description.’

168 N.Y. at 305-06, 61 N.E. 286 at 299. Thus, *Perry*, *Durant*, and *Cotton* are unfaithful to *Romano* and *Molineux*.

Finally, the dissent in *Perry* observed, “[I]n affirming the admission of Rule 404(b) common scheme or plan evidence in *Durant* and *Cotton*, [Perry’s] decision overruling *Wallace* may not foreshadow a significant change in the admission of Rule 404(b) evidence in our trial courts.” *Perry*, at 12 (Kittredge, J., dissenting). In reality, the decisions in *Perry*, *Durant*, and *Cotton*, foreshadow the expanded admission of propensity evidence under this Court’s “new framework” specific to child sex offense trials.

4. *State v. Durant*.

During the Rule 404(b), SCRE hearing, the State represented, “The specific exception in this case that we’re contending this evidence is admissible under is the

common scheme or plan exception.” R. 79. The other Rule 404(b) exceptions—motive, identity, the absence of mistake or accident, and intent—were not an issue in the case.¹² Thus, the only issue should be whether the testimony of the other three girls is “a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others.” *Lyle*, 125 S.C. at ___, 118 S.E. at 807. Instead of analyzing this issue under *Lyle*, this Court purportedly considered “whether the admission of the other three girls’ testimony can nonetheless be upheld under” its “new framework” for admissibility of propensity evidence in child sex offense cases. *Durant*, at 3. Although this Court purported to abandon the “mathematical exercise [endorsed by *Wallace*] where the number of similarities and dissimilarities are counted,” *Durant*, at 3, the opinion in *Durant* merely changed the vocabulary for admissibility of bad character evidence from “a close degree of similarity,” *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278, to “a particularly unique method of committing” crimes, *Durant*, at 4, without articulating the distinction between those terms.

As this Court noted, Pastor Larry Durant’s trial was “conducted under *Wallace*.” *Durant*, at 3.¹³ He, accordingly, argued against the continued validity of *Wallace* and engaged in a “mathematical exercise” approved by *Wallace*, illustrating the dissimilarities outweighed the similarities, even providing the trial judge with five charts illustrating how the dissimilarities outweighed the similarities. R. 83-95. After declaring Pastor Durant

¹² None of the other exceptions to Rule 404(b), SCRE are even arguably implicated by the evidence in the case. As the dissent in *Perry* acknowledged, “Where, as here, the question is whether the sexual abuse occurred at all, and not who the perpetrator was, the identity exception does not apply.” *Perry*, at 23 (Kittredge, J., dissenting).

¹³ At trial, pastor Durant argued the other allegations were not admissible even under *Wallace*, which is Question III in this appeal.

“had a particularly unique method of committing his attacks common to all the girls,” this Court conceded “there were differences in their ages and the type of sex act,” *Durant*, at 4, and ignored five charts comparing dissimilarities and similarities. In doing so, this Court most certainly did not employ the same analysis regarding age as the majority did in *Perry* that allowed the majority and dissent to quibble over whether there was a meaningful difference in the ages of the girls at the time of the assaults. Compare *Perry*, at 8 (“This is a clever attempt to make dissimilarities sound similar, but assaulting one child beginning at age five to seven and another at age ten or eleven is not a similarity. Perry began assaulting the stepdaughter at age nine, which is not similar to age five. Age nine may be similar to ten, but in terms of the age at which a sexual predator begins sexually assaulting a daughter, ages nine and seven hardly seem to show ‘a close degree of similarity.’”) with *Perry*, at 18 (Kittredge, J., dissenting) (“In its pursuit to show dissimilarities, the majority implies there was a large gap in the age of onset of abuse among the children.”). Candidly, this Court should explain, under its “new framework” for admissibility of propensity evidence in child sex offense cases, how its quibbling over similarities and dissimilarities in age is any different from the “mathematical exercise [endorsed by *Wallace*] where the number of similarities and dissimilarities are counted.” *Durant*, at 3. This approach has the ultimate effect of allowing courts to engage in a result-oriented process of cherry-picking facts supporting admissibility, while ignoring factors militating against admissibility.

Additionally, this Court did not provide Pastor Durant with any notice or an opportunity to respond to the allegation that he “had a particularly unique method of committing his attacks,” *Durant*, at 4, as this Court had not previously articulated this test.

At a hearing to determine whether he has “a particularly unique method of committing his attacks,” presumably, the prosecution would be required to present evidence that no other pastor or church leader has ever committed a child sex offense in a manner similar enough to undermine the “uniqueness” of Pastor Durant’s alleged assaults. Now that undersigned counsel understands this Court’s focus on *McClellan*, see Subsection II(C)(6), *infra*, at a hearing, Pastor Durant would point out this Court’s comparison of the allegations against him with *McClellan* undermines any argument that either he or McClellan had “a particularly unique method of committing [their] attacks.”

Consider also the Court of Appeals’ opinion in *Hubner*, cited with approval in footnote 2 of the Court of Appeals opinion in *Wallace*, which this Court reversed the same day it overruled the Court of Appeals in *Wallace* because of this Court’s holding in *Wallace*. *Hubner*, a child sex offense case, involved the admissibility of a prior sexual assault. How would this Court resolve *Hubner* today? Presumably, this Court would not employ a “mathematical calculation” to determine whether the similarities outweigh the dissimilarities. Would it quibble over the similarities or dissimilarities as the majority and dissent did in *Perry*? Would it ignore the dissimilarities identified by the Court of Appeals but ignored by this Court in *Wallace* and, instead, declare *Hubner* “had a particularly unique method of committing his attacks,” as it did in *Durant*, at 4. We may never know the answer to these questions because the majority opinion in *Perry* declined to “reconsider[] the results of prior cases,” other than *Hallman*. *Perry*, at 6, fn. 5. This inquiry not only questions the accuracy of labeling any crime “particularly unique,” but also illustrates why similarity has never been the test for “a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to

establish the others.” *Lyle*, 125 S.C. at ___, 118 S.E. at 807; *see also* Larson, *Far Side Cartoon*, *supra*, at p. 21.

This Court’s holding in *Durant* is unfaithful to the Court of Appeals opinion in *Wallace* for four significant reasons. First, as noted above, the Court of Appeals in *Wallace* rejected the State’s contention that, in a credibility case, *Lyle* “testimony is necessary to [] prove the victim’s allegations,” noting, “This argument could be used to admit testimony of any prior crime when a defendant is accused of a subsequent but similar crime.” And, “It falls far short of the threshold for the admission of a prior crime under the common scheme or plan exception to *Lyle*.” 364 S.C. at 141, 611 S.E.2d at 338. Pastor Durant’s trial turned on the credibility of the witnesses, a fact our appellate courts ordinarily consider when discussing harmless error, a the Court of Appeals did in *Wallace*, 364 S.C. at 142, 611 S.E.2d at 338-39 (“In addition to finding the admission of the sister’s testimony error, we find the admission was not harmless” because “the outcome of this case rested on the credibility of the victim and Wallace.”); *see also* *Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (finding prejudice when the “case turned solely on the credibility” of witnesses). Second, the Court of Appeals in *Wallace* recognized, “The law should not permit a trial judge to make similar that which is different” 364 S.C. at 141, 611 S.E.2d at 338. *Durant* committed this error when it declared Pastor “Durant had a particularly unique method of committing his attacks common to all the girls” and then proceeded to ignore the “differences in their ages and the type of sex act.” *Durant*, at 4. Third, *Durant* relied on *McClellan*, despite the Court of Appeals opinion in *Wallace* inviting this Court to overrule *McClellan*. 364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2; *see also* Subsection II(C)(6), *infra* (discussing *McClellan*). *Fourth*, and perhaps most significant, the Court of Appeals

in *Wallace* recognized, “[T]he appellate courts of this state have refused to recognize a specific exception to the inadmissibility of prior bad act evidence in criminal sexual conduct cases.” *Id.* 364 S.C. at 139, 611 S.E.2d at 337 (citing *Nelson*). *Perry*, *Durant*, and *Cotton*, however, expressly created a “new framework” for the admissibility of propensity evidence in child sex offense cases.

The majority in *Perry* stated, “The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant’s propensity to commit similar crimes.” *Perry*, at 11 (citing Rule 403, SCRE). Perhaps because it revered the convictions, *Perry* did not offer any meaningful explanation of Rule 403 under this Court’s “new framework” for the admissibility of propensity evidence in child sex offense offenses. If, as the majority in *Perry* suggests, Rule 403 remains an important part of the Rule 404(b) analysis, then *Durant* did not fully “determine whether the evidence would have been admissible under the framework in *Perry*,” *Durant*, at 3, because its opinion in *Durant* does not even cite Rule 403, let alone provide any analysis applying Rule 403 under this Court’s “new framework” for the admissibility of propensity evidence in child sex offense cases.

As discussed above, *Parry*, *Durant*, and *Cotton* did not discuss the role of a limiting instruction under this Court’s “new framework” for the admissibility of propensity evidence in child sex offense cases. Prior to the “new framework,” this Court required a limiting instruction, except when the other bad act is part of the *res gestae*, which is not the situation here. *Timmons*, *supra*. Pastor Durant’s trial judge did not provide a limiting instruction. Nor did the trial court limit the prosecution’s use of the evidence. From the

very beginning of the trial, the State made it clear that they planned to prove its case through the allegations of all four women. During opening statements, the prosecutor told the jurors would “hear from victims,” stating:

This case, ladies and gentleman, is about power. It’s about church abuse. It is about a man who is a pastor in two churches. And it is about a number of female victims, teenagers, who were taken advantage of.

R. 179-81. During its closing argument, the State argued, “[Y]es, a lot of this case rest[s] on the testimony of” the four women. And, Pastor Durant “was supposed to be their shepherd, but he was nothing but a wolf in sheep’s clothing.” He “went from praying for them to preying on them.” R. 674-75. By sentencing, it was clear that even the trial court had come to believe that the trial was about the allegations involving all four women, when the trial judge stated:

Well, the *charges* in this case were really unlike any I’ve heard before. The evidence that the State presented was compelling. The defense made a strong case. And the jury chose to believe the young *ladies*.

R. 731 (emphasis added). Because of these statements by the prosecutor and the trial judge, this Court should address the role of a limiting instruction under its “new framework” for the admissibility of propensity evidence in child sex offense cases. As discussed in Subsection II(C)(3), *supra*, this Court should craft a limiting instruction that will eliminate the danger of unfair prejudice resulting from admitting propensity evidence.

5. **This Court should provide definitions of “a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others” and the terms “similar,” “quite similar,” “strikingly similar,” “close degree of similarity,” and “particularly unique method.”**

As the Court of Appeals pointed out in footnote 2 of its opinion in *Wallace*, our state’s appellate courts have been inconsistent in the application of the exception in *Lyle*

and Rule 404(b), SCRE for “a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others.” Perhaps, these inconsistencies result from the absence of cases, since *Lyle*, actually defining the meaning of this exception, rather than reciting it in shorthand. Cases recognizing an exception to the requirement of a limiting instruction when the other bad act is part of the *res gestae* provide guidance. *E.g. State v. Johnson*, 306 S.C. 119, 126–27, 410 S.E.2d 547, 552 (1991) (evidence of the other crime “had a direct bearing on and related to the commission of the murder of the trooper such that it formed part of the *res gestae*”); *Timmons*, 327 S.C. at 55, 488 S.E.2d 323, 327 (1997) (exception to the requirement of a limiting instruction is when “evidence of another crime formed part of the *res gestae*.”); *Nix*, 288 S.C. at 496, 343 S.E.2d at 629 (“car theft occur[ing] within a short time, approximately two hours, before the robbery” was “so related to the charged crimes that they constitute evidence that there was a common scheme or plan between the crimes” as the stolen car was used to commit “the armed robbery, kidnapping and rape”). Although this *Lyle* exception is likely broader than *res gestae*, *res gestae* is useful for establishing when a common scheme or plan embracing the commission of two or more crimes is truly so related to each other that proof of one tends to establish the others.

The majority in *Perry*, at 11, stated “[s]imilarity can be important” when determining admissibility. *Durant*, at 4, for the first time, articulated “a particularly unique method” test. *But see Wallace*, 384 S.C. at 435-36, 683 S.E.2d at 279 (Pleicones, J., dissenting) (this Court has “repeatedly held in non-sexual offense cases that, the mere

presence of similarity only serves to enhance the potential for prejudice”).¹⁴ The bench and bar would benefit from this Court clarifying the terminology courts use for admissibility of *Lyle* evidence. The lack of “a close degree of similarity” militated against admissibility in *Perry*, at 8. Yet, crimes involving “similar” techniques are inadmissible, *Campbell*, 317 S.C. at 451, 454 S.E.2d at 901, while crimes that are “quite similar” are admissible, *Raffaldt*, 318 S.C. at 114, 456 S.E.2d at 392, but a prior bad act that is “strikingly similar” to the charged crime is inadmissible because it enhances the danger of unfair prejudice, *Gore*, 283 S.C. at 121, 322 S.E.2d at 13. In addition to distinguishing these terms, the Court should define a “particularly unique method,” which presumably does not involve “similar” or “strikingly similar” techniques.

¹⁴ The dissent in *Perry*, at 23, considered “modus operandi” as a category of common scheme or plan. Most courts consider modus operandi as an identity exception and require a clear connection between the crimes. *E.g. Woodlee v. Commonwealth*, 306 S.W.3d 461, 465 (Ky. 2010) (“The modus operandi exception requires acts that mark the crime as that of a specific person who may be unknown until caught, but who is identified by the distinctive nature of his or her acts. Examples include well-known criminals such as Jack the Ripper; the BTK (bind, torture, kill) strangler; and the Unabomber. By their distinct criminal methods, each of them signed off on their crimes. While modus operandi may not require commonalities as blatant as those listed above, there must be some peculiar or distinct commonalities that show that the crimes were committed by the same person.”); *People v. Kimbrough*, 138 Ill. App. 3d 481, 486–87, 485 N.E.2d 1292, 1297 (1985)(internal citations omitted) (“If evidence of other crimes is offered to prove modus operandi, there must be some clear connection between the other crime and the crime charged which creates a logical inference that if defendant committed one of the acts, he may have committed the other act. This inference of identity does not arise from the mere fact that the crime charged and the other crime share certain common features or marks of similarity, for it may be that these similarities are shared not only by the crime charged and defendant's other crime, but also by numerous distinct crimes committed by persons other than the defendant. Rather, the inference is created when both crimes share peculiar and distinctive common features so as to earmark both crimes as the handiwork of the defendant. There must be some distinctive features that are not common to most offenses of that type.”). *See also* Larson *Far Side* Cartoon, *supra*, at p. 21.

This Court should avoid the ridiculous exercise of distinguishing these terms by recognizing similarity plays no role in determining whether the two crimes are a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others. Such an approach is not only faithful to *Lyle*, *Molineux*, *Romano*, and the Court of Appeals opinion in *Wallace*, but also required to guard against courts engaging in a result-oriented process of cherry-picking facts to support its decision and then seeking refuge under one of these inconsistent holdings to defend its decision.

6. *State v. McClellan*.

This Court's opinions in *Perry*, *Durant*, and *Cotton* depend on "*McClellan* remain[ing] good law." *Durant*, at 4. Although generously praising the Court of Appeals' opinion in *Wallace*, *Perry* overlooks footnote 2 in that Court of Appeals' opinion in *Wallace* that included *McClellan* on the list of cases it invited this Court overrule. Under these circumstances, this Court's reliance on *McClellan* in *Perry*, *Durant*, and *Cotton* requires a closer look at *McClellan*.

McClellan actually involved the admission of two categories of other bad acts. The first category involved "testimony [by McClellan's daughter (the victim)] regarding prior attacks" by McClellan "to show the continued illicit intercourse forced upon her by" McClellan. 283 S.C. at 392, 323 S.E.2d at 774. In affirming the admission of this testimony, this Court relied on *Whitner's* holding "the common scheme exception to the *Lyle* rule 'is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties.'" *Id.* (citing *Whitner*, 228 S.C.

at 265, 89 S.E.2d at 711). Footnote 2 of the Court of Appeals’ opinion in *Wallace* cited *Whitner* as an example of a case “reflect[ing] a more narrow interpretation of the common scheme or plan exception.” 364 S.C. at 39, fn.2, 611 S.E.2d at 337, fn.2. *McClellan* also cited *State v. Richey* for the same proposition as *Whitner*. 88 S.C. 239, ___, 70 S.E. 729, 730 (1911) (affirming admission of evidence of “continued illicit intercourse between the same parties”); *see also State v. Brooks*, 235 S.C. 344, 111 S.E.2d 686 (1959) (vidence that defendant had had intercourse with companion at same time and place as with prosecutrix was relevant to issue of consent of prosecutrix and competent evidence of defendant’s guilt) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Pastor Durant has never contended that this category of evidence—continued illicit conduct between the same parties, including evidence of grooming—should be prohibited by Rule 404(b)’s common scheme or plan exception. *See, e.g., Oral Argument*, beginning at 32:30. This Court, accordingly, should not overrule this *Whitner*, *Richey*, *Brooks*, and this portion of *McClellan*.

The second category of bad character evidence admitted in *McClellan* is problematic, which is affirming the admission of testimony by *McClellan*’s other two “daughters [] concerning the pattern of this and prior attacks” involving them. 283 S.C. at 391, 323 S.E.2d at 773. In *McClellan*, this Court did not cite any authority linking the admissibility of this category of evidence to *Lyle* or Rule 404(b), SCRE. The only case arguably cited by *McClellan* for the admissibility of evidence of another accuser is *State v. Rivers*,¹⁵ which actually held inadmissible the testimony of the other witness because this

¹⁵ *Rivers*, despite excluding the propensity evidence, is still problematic for its role in recognizing a special rule in child sex offense cases, which will be discussed below.

Court was “[u]nable to clearly perceive the connection between the acts as required by *Lyle*,” 273 S.C. 75, 79, 254 S.E.2d 299, 301 (1979). That this section of *McClellan* “focused exclusively on the close degree of similarity between the crime charged and the evidence of the other crime” is the very reason the Court of Appeals opinion in *Wallace* included *McClellan* on the list of cases it recommended this Court overrule. 364 S.C. at 139, Fn. 2, 611 S.E.2d at 337, fn. 2.

Pastor Durant included this Court’s opinions in *Hubner*, *Hallman*, *McClellan*, and *Rivers* as examples of cases similar to this Court’s opinion in *Wallace* “creat[ing] a rule allowing admission of prior bad acts against individuals other than the alleged victim in the case to demonstrate general propensity in direct contravention of Rule 404(b), SCRE.” Final Brief of Appellant, at 28, fn. 15. Undersigned counsel, therefore, must address his confusion during the oral argument, beginning at 6:14, regarding the continued validity of *McClellan*. Regrettably, counsel was thinking of the portion of *McClellan* holding admissible evidence of continued illicit conduct between the parties. Counsel, perhaps unsuccessfully, attempted to correct this confusing later on in the oral argument, beginning at 34:41.

Actually overruling *Wallace*, in addition to overruling *Hallman*, requires overruling the cases following *Wallace* (such as this Court’s opinion in *Hubner*), *McClellan*, and the other cases cited in the opening paragraph of footnote 2 of the Court of Appeals opinion in *Wallace*. When it declined to “reconsider[] the results of prior cases,” other than *Hallman*, the majority opinion in *Perry*, at 6, fn. 5, was unfaithful to both the substance and spirit of the Court of Appeals’ opinion in *Wallace*.

7. Lack of Consent from the General Assembly.

Article V, § 4A of our state's constitution provides:

All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.

This Court thus recently recognized, “[T]he South Carolina Constitution limits this Court’s power to promulgate rules governing practice and procedure in the courts of this State.” *State v. Beaty*, 423 S.C. 26, 41, 813 S.E.2d 502, 510 (2018). As seen, the concurring opinion in *Perez* cautioned, “Absent an amendment to our rules of evidence creating a different categorical rule for sexual offenses, [this Court should] apply the common scheme or plan exception equally to sexual and nonsexual offenses alike.” 423 S.C. at 503, 816 S.E.2d at 55 (Hearn, J., concurring); *see also Wallace*, 384 S.C. at 436, 683 S.E.2d at 279 (Pleicones, J., dissenting) (“if this Court is] to permit the admission of propensity evidence in these types of cases, then [it] should propose a new rule of evidence, and encourage public comment).

Comparing the Federal Rules of Evidence and the South Carolina Rules of Evidence reveals the legislative intent underlying the respective rules. When our state adopted Rule 404(b), SCRE, “the purposes for which evidence of other crimes may be admitted” was more limited than Fed. R. Evid. Rule 404(b), as our rule “limits the use of evidence of other crimes, wrongs, or acts to those enumerated in” *Lyle*. Rule 404(b), SCRE, reporter’s note. Even under the more inclusive federal rule, Congress had to amend the Federal Rules of Evidence to add Rules 413 and 414 to allow admission of propensity

evidence in sex offense cases. That Congress amended the federal rules is evidence that Fed. R. Evid. 404(b) did not allow the admission of propensity evidence in sex offense cases. *Cf. Bailey v. S.C. State Election Comm’n*, No. 2020-000642, 2020 WL 2745565, at 2 (S.C. May 27, 2020) (“if existing law already permitted all voters to vote by absentee [ballot in the June 9, 2020 primary] in the face of [the COVID-19] pandemic, it would have been unnecessary for the Legislature to change the law”).

Finally, the majority opinion in *Perry* does not reconcile how adopting the “new framework” for admissibility of propensity evidence in child sex offense cases can be reconciled with *Beatty* and the dissent in *Cross*, 427 S.C. at 489, 832 S.E.2d 294 (Few, J., dissenting) (“It is regrettable, however, this Court is creating this rule without following the procedure to which we are constitutionally bound.”).

8. Future Implications if this Court Does Not Grant Rehearing.

This Court’s “the new framework” for the admissibility of propensity evidence in child sexual abuse offenses will spark future litigation. As evidenced by the disagreement between the majority and dissent in *Perry*, the “new framework” has not eliminated quibbling over similarities and dissimilarities. *Compare Perry*, at 8 (stating the age of the children is not substantially similar) *with Perry*, at 18 (Kittredge, J., dissenting) (“In its pursuit to show dissimilarities, the majority implies there was a large gap in the age of onset of abuse among the children.”). The criminal defense bar will request hearings regarding the application of the newly announced “particularly unique method,” demanding the prosecution call witnesses and present evidence to establish the “particular uniqueness.” As discussed above, the defense bar will ask trial courts to distinguish the terms “similar,” “quite similar,” “substantially similar,” “strikingly similar,” “close degree

of similarity,” and “particularly unique method.” The resulting confusion will generate calls for this Court to revisit the continued validity of *Perry*, *Durant*, *Cotton*, *McClellan*, and the “results” in other cases this Court declined to reconsider in *Perry*, at 6, fn. 5; and see 364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2.

Unless this Court grants rehearing and addresses the roles of Rule 403, SCRE and a limiting instruction under its “new framework,” then prosecutors will argue Rule 403 and limiting instructions are no longer applicable, while the criminal defense bar will argue Rule 403 should exclude the evidence, even if admissible under the “new framework,” and no limiting instruction can cure the danger of unfair prejudice of propensity evidence. *But see Cross*, 427 S.C. at 832 S.E.2d at 290 (“limiting instructions are sometimes insufficient to cure the danger of unfair prejudice”).

The defense bar will attack this Court’s “the new framework” for the admissibility of propensity evidence in child sexual abuse offenses as a violation of due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution. Although the Supreme Court of the United States has not addressed “whether a state law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime,” *Estelle v. McGuire*, 502 U.S. 62, 75, fn. 5 (1991), the High Court has recognized the unfair danger of admitting such evidence by explaining:

Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. *The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general*

record and deny him a fair opportunity to defend against a particular charge.

Michelson v. U.S., 335 U.S. 469, 475-76 (1948) (internal citations omitted) (emphasis added). *See also Old Chief v. U.S.*, 519 U.S. 172, 182 (1997) (holding the exact nature of a prior crime too prejudicial to be admissible even though it was an element of the current offense).

Additionally, other state courts that have addressed the admissibility of propensity evidence in child sexual abuse cases have held that introducing this type of propensity evidence violates the due process clauses of state constitutions. For example, “[b]ased on Iowa's history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental conceptions of fairness, . . . the Iowa Constitution prohibits admission of prior bad acts evidence based solely on general propensity.” *State v. Cox*, 781 N.W.2d 757, 768 (Iowa 2010). In reaching this conclusion, the Iowa Supreme Court reviewed its state’s “policy against admissibility of general propensity evidence stems from a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds.” *Id.* at 767 (internal quotations omitted). The Iowa Supreme Court further noted, “The general rule prohibiting propensity evidence was firmly established in Iowa courts at common law.” *Id.* at 764 (citing *State v. Vance*, 119 Iowa 685, 686, 94 N.W. 204, 204 (1903)). Likewise, the Missouri Supreme Court “act[ed] consistently with a long line of cases holding that the Missouri constitution prohibits the admission of previous criminal acts as evidence of a defendant's propensity” and invalidated a state statute admitting this type of evidence in child sexual abuse cases. *State v. Ellison*, 239 S.W.3d 603, 607-08 (Mo. 2007). These same considerations are just as firmly rooted in South Carolina’s common law. *Lyle*; *see also State v. Kenny*, 57 S.E. 859, 861-62 (S.C. 1907) (“Logically, the

commission of an independent offense is not proof, in itself, of the commission of another crime.... Without [an] obvious connection it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury.”).

9. Summary.

For the forgoing reasons, this Court should rehear this case and reconsider its “new framework” for the admissibility of propensity evidence in child sex offense cases when the prosecution claims a “purpose beyond propensity,” *Perry*, at 8.¹⁶ When doing so, this Court should keep in mind that its “new framework” for the admissibility of propensity evidence in child sex offense cases “would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent.” *Commonwealth v. Bujanowski*, 418 Pa. Super. 163, 172, 613 A.2d 1227, 1232 (1992). Once the Court considers the matters raised in this petition, the need to reverse Pastor Larry Durant’s conviction and sentence will be apparent. This Court should also address the roles of limiting instructions and Rule 403, SCRE in the admissibility of other bad act evidence under Lyle and Rule 404(b).

¹⁶ Pastor Durant notes the State petitioned for rehearing in *Perry*. Although Pastor Durant does not want to interfere with Mr. Perry’s new trial, he cannot ignore the role of the *Perry* opinion in this Court’s “new framework” for the admissibility of propensity evidence in child sex offense cases. Pastor Durant is informed and believes Mr. Cotton will petition for rehearing. This Court, accordingly, has discretion to rehear all three cases. In *Perry*, this Court need not look past the remoteness of the prior offense to realize there is not a common or logical connection.

D. Cumulative Error (Issue VI).

This Court declined to apply the cumulative error doctrine to because it concluded “the trial court did not commit any reversible errors.” *Durant*, at 6, fn. 6. Once this Court reconsiders its holdings on the *Lyle*, *Brady*, and *Allen* charge issues, this conclusion no longer will be valid.

The cumulative error doctrine “provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial.” *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999); and see *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) (cumulative error of solicitor’s improper argument and improperly excluded evidence warranted reversal), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002). In *Durant*, this Court, for the first time,¹⁷ required that the cumulative error doctrine be raised to the trial court, in addition to the objections to the other error. This this Court is going to impose such a requirement, then it should provide guidance about how such an objection should be raised. Would raising it in a post-trial motion be sufficient? Or would it be necessary to litigate cumulative error outside the presence of the jurors each time counsel objects?

(conclusion on next page)

¹⁷ Undersigned counsel was trial counsel in *Blurton* and has no recollection of raising cumulative error in the trial court in addition to the other objections.

III. CONCLUSION.

For the reasons set forth in Pastor Larry Durant's Final Brief of Appellant, the Final Reply Brief of Appellant, and this Petition for Rehearing, this Court should rehear this case, enter an order reversing his convictions and sentences, and remand for a new trial.

Respectfully Submitted,

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Attorney for Pastor Larry Durant

June 10, 2020
Greenwood, South Carolina

The Supreme Court of South Carolina

The State, Respondent,

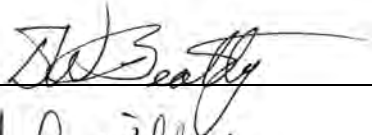
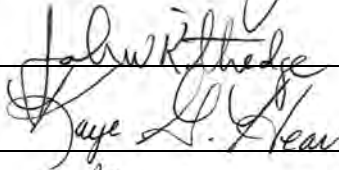
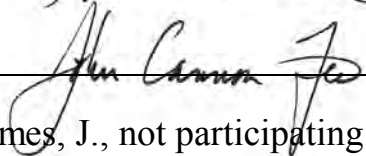
v.

Larry Durant, Appellant.

Appellate Case No. 2016-001264

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

	_____ C.J.
	_____ J.
	_____ J.
	_____ J.

James, J., not participating

Columbia, South Carolina

July 8, 2020

cc: Alan McCrory Wilson, Esquire
 John Benjamin Aplin, Esquire
 E. Charles Grose, Jr., Esquire
 William Frederick Schumacher, IV, Esquire
 Ernest Adolphus Finney, III, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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CHIEF DEPUTY CLERK

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July 8, 2020

The Honorable James C. Campbell
Clerk of Court, Sumter County
Sumter County Judicial Center
215 North Harvin Street
Sumter SC 29150-4974

REMITTITUR

Re: The State v. Larry Durant
Lower Court Case No. 2014GS4300947
Appellate Case No. 2016-001264

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

DEPUTY CLERK

cc:

Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
E. Charles Grose, Jr., Esquire
William Frederick Schumacher, IV, Esquire
Ernest Adolphus Finney, III, Esquire