

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of General Sessions
The Honorable John C. Hayes, III, Circuit Court Judge
Op.No. 4526 (S.C.Ct. App. Filed September 29, 2009)

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S.C. Supreme Court

STATE OF SOUTH CAROLINA,

Respondent,

v.

BILLY WAYNE COPE,

Petitioner.

BRIEF OF RESPONDENT ON CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED ON CERTIORARI

1. Given the State's case against Cope depended on convincing the jury (a) that the burglar and rapist Sanders must have collaborated with Cope in order to rape and murder Cope's daughter and (b) that Sanders could not have entered the Cope home without leaving signs of forced entry unless Cope had let him in , did the Court of Appeals err in upholding the exclusion of proof that the crime at the Cope residence was only the first in a series of burglaries and sexual assaults that Sanders committed nearby, alone, and without leaving any signs of forced entry?
2. Did the Court of Appeals err in upholding the denial of Cope's motion to sever his trial from Sanders trial on the basis of the trial judge's conclusion that Cope's proffered evidence of Sanders modus operandi would have been inadmissible as evidence of third party guilt at a separate trial?
3. Did the Court of Appeals err in affirming the trial court's exclusion of Cope's proffered evidence that Sanders had bragged to fellow prison inmates about the rape and murder of "a little girl in Rock Hill" in such a way as to indicate he had acted alone?
4. Where Cope's defense required the jury to accept the counter-intuitive but well documented fact that criminal suspects can be induced to give false confessions to the murders of close relatives, did the Court of Appeals err in upholding the trial court's refusal to allow Cope's false-confession expert from describing for the jury factually similar cases in which subsequently exonerated suspects had actually made such false confessions?
5. Absent any evidence of an actual agreement between Cope and Sanders -or even that the two men had ever met- did the Court of Appeals err when it reversed itself on rehearing to find the evidence sufficient to prove Cope and Sanders conspired together to rape and murder Cope's daughter?

RESPONDENT'S STATEMENT OF THE CASE

On November 29, 2001, between 2 and 4 a.m., twelve year "Child A", a 160 pound girl, was forcefully sexually assaulted by an object in her vagina and her rectum, severely beaten and strangled to death in her bedroom. Certain salient factors point to the existence of an agreement and conspiracy between her father, Billy Wayne Cope, and James Sanders to commit the sexual acts which ultimately lead to her death. There is substantial circumstantial evidence to support the existence of the conspiracy.¹ The facts are more fully set out in the opinion of the Court of Appeals which is incorporated herein by reference. App.p. 48-51.

On November 29th, 2001, at about 6 A.M., Billy Wayne Cope called York County 911 and reported that he had just discovered his daughter Child A dead in her bed. He reported that she had apparently choked to death as a result of the edging of her blanket (which had become loose for a length of about 6 feet) wrapping itself around her neck. He declined to perform CPR stating that she was "dead - she is cold as a cucumber". ROA 948 - Line 22 and State's Exhibit 15). Child A's mother was not in the home that evening as she was working 3rd shift at a local company.

The first responders indicated that Cope seemed calm and detached and he was seen typing on his computer when they arrived. Cope repeated that she had choked herself on her blanket and stated that she had a history of rolling in her sleep. (ROA 956 - Line 11). He asked one officer "if anything bad was going to happen to him with his daughter being dead in the

¹Particularly, Respondents do not endorse the Petitioner's version of the "facts" set out in their Brief of Petitioner, p. 1-9, the Petition and earlier brief inasmuch as they have been disputed by evidence or expressly rejected by the jury. At most it is a version of their theory.

house." (ROA 981 - Line 14).

Cope gave three interviews over the course of the day to both the Rock Hill Police as well as a SC DSS caseworker. In the first interview at 8 A.M., Cope told Detective Burris that his youngest daughter, Kyla, had gone to bed at 9:30 P.M. the night before and his two older daughters, Child B and Child A, had gone to bed at 12:30 A.M. or so after working on some homework. He stated that when he awoke and Child A did not respond to his call, he went to her room and found her dead with the blanket edging around her neck.

In a subsequent interview, four hours later, to Detectives Burris and Herring, he stated that when she did not respond, he thought the rapture may have come and taken her. He stated that he went to her room and the door was closed and he had to kick it open. He found Child A with her hands at her throat with the green blanket edging around her neck four to five times. He stated she was dressed with her shirt partially up so that one breast was exposed.

At 3:45 P.M. that same day, he and his wife Mary Sue Cope were interviewed at the home of a relative by DSS Caseworker Rebecca Herron. He stated that the prior evening his daughters went to bed at 9:30 P.M. (Kyla), 10:30 P.M. (Child B) and 11:30 P.M. (Child A). He repeated the story of how he had found Child A, stating that her fingers were grasping at the blanket edging wrapped around her throat and he believed that the incident was most likely an accident. (ROA 2945 - Line 15 and State's Exhibit 40).

Throughout the day, the crime scene was secured and processed as best as its filthy condition would allow (witnesses described the home as "uninhabitable", "extreme filth", and "bugs, roaches, all over the place" ROA 1027. See a video of the scene in State's Exhibit #81). The home was inspected for signs of forced entry and the condition of each window and door

was documented with photographs. (State's Exhibits 40 - 52B , 68 - 79, 83.1 and 103; [Testimony of Jerry Waldrop and Todd Gardner] ROA 1237-38, 1532-1580, 1589). None of the windows showed any sign of forced entry at all. Each was inspected including the ground beneath them and the dirt, leaves and cobwebs on and below each of them showed no sign of recent disturbance. (ROA 1580, l. 4). The three doors of the home were examined. One was blocked with furniture and impassable. The rear door was locked and blocked with items that, according to the defendant, were undisturbed from the evening before (ROA 1561, l. 6) The front door was secured with both the thumb lock on the door knob as well as a chain latch the evening before by the two eldest daughters prior to their going to bed (ROA 2079, l. 9).

An autopsy was performed that same morning, the results of which were shared with law enforcement in the early evening. The autopsy revealed that Child A had been struck about the head and abdomen resulting in a subdural hematoma (ROA 1050, l. 18) and internal injuries to the spleen and small intestine (ROA 1107, l. 17). In addition, she had been sexually assaulted with a foreign object both vaginally and rectally causing significant trauma (ROA 1120, l. 3). Later, a more detailed examination of the vagina revealed chronic inflammation for which the pathologist could find no natural cause thus making these finding consistent with prior penetration. (ROA 1082, l. 2 - 1086, l. 9).

Investigators decided to call Cope in to conduct a more in-depth interview in light of this additional information. This interview was taped and admitted into evidence. (State's Exhibit # 39).

At the conclusion of this interview, Cope was arrested and charged with the murder of his daughter, as well as three counts of unlawful neglect for the living conditions to which his three

daughters were exposed.

The next morning, Cope was transported to the Moss Justice Center and administered a polygraph examination. At the conclusion of the exam, he confessed to Detective Mike Baker of the Sheriff's Office that he had killed and sexually assaulted his daughter while in a dream-like state. He stated that he could see images in his head of the attack and asked near the end of the confession if he could plead insanity (Testimony of Mike Baker - ROA 1437 - 1510).

Cope was transported back to the Rock Hill Police Department that Friday afternoon and taken in front of a judge for advice of rights, bond setting and screening for indigency on November 30, 2001. He was found qualified for, and was appointed a public defender. After his bond was set, Cope was booked into the York County Detention Center at the Moss Justice Center.

Over the weekend, Cope was not questioned any further. On Sunday evening, 48 hours after his confession to Detective Baker, he approached a detention center employee and asked her to contact Det. Jerry Waldrop as he had some additional things he "wanted to get off his chest". ROA 166-169.

The next morning, he was transported back to the Rock Hill Police Department and questioned further pursuant to his request of the previous evening. ROA 287, 289. During the course of this questioning, he was returned to the Rich Street residence and gave a video-taped confession which included detailed descriptions and a spontaneous re-enactment of how he strangled and sexually assaulted his daughter with a broomstick. This video was admitted into evidence as State's Exhibit # 83.

Returning to the Rock Hill Police Department, Cope was questioned further about

inconsistencies in his confession and ultimately gave a final written confession acknowledging that he had not only been sexually abusing Child A for some time but had also been abusing his two youngest daughters, Child B and Child C. Cope's confession to prior repeated sexual abuse of Child A was confirmed by the forensic evidence. The Pathologist testified that his exam revealed there was no trace left of Child A's hymen even though a previous exam conducted two years earlier revealed that she had a hymen and that it was intact. He called this "very unusual" for a 12 year old girl (ROA 1073, line 19). He further described that in his opinion Child A lost her hymen prior to the night of her murder and stated that the hymen is typically torn from penetration. Another forensic corroborating factor was the discovery of chronic inflammatory cells in Child A's vagina for which Dr. Maynard could find no natural causes. He described this chronic inflammation as ongoing and consistent with prior penetration. There are also signs of prior repeated penetration of the anus. When describing State's exhibit #22 which depicts Child A's gaped open anus following the assault, the pathologist confirmed that this type of dilatation of the anus was not caused solely by the brutal attack that night but also by prior repeated penetration of the rectum. It was also during Cope's final interview where he admitted that on the night of the murder he masturbated into a wash rag while in Child A's room and placed the wash rag under a bookshelf just outside Child A's room where the police ultimately recovered it (ROA 1809, 1810). The police did not know about this rag until Cope confessed.

The pathologist's examination of Child A revealed that the child had been severely beaten about the head and had sustained significant internal injuries to her spleen, pancreas, and intestinal tract (including her large and small intestines and her colon). In addition, the autopsy revealed that she had suffered a brutal sexual assault with a foreign object that caused deep tissue

hemorrhaging throughout her rectum extending 8 inches up into her rectal canal (see State's exhibit # 35). In the doctor's opinion, the anal injuries could have only been perpetrated through the use of extensive force with a blunt object liked a broom handle, baton, dildo, etc. ROA 1116-17. Child A also suffered extensive hemorrhaging throughout the entire length of her vagina that extended deep into the vaginal walls up to and including the top of the vaginal cavity. ROA 1080. The vaginal hemorrhaging extended past the vaginal walls and to Child A's uterus and ovaries. The doctor also indicated that the vaginal injuries were consistent with the use of a broom handle. ROA 1116-17.

The pathologist observed what appeared to be a bite mark/bruise on the right breast of Child A and swabbed that area of her breast in order to capture any DNA that might be present. ROA 1058.

The doctor noted that the cause of death was manual strangulation and that in his opinion the child's rectal area was cleaned and she was redressed after the assault. ROA 1116-17. Dr. Maynard estimated that the bruises on her neck, breast and head occurred as a result of blows that were struck less than four hours prior to her death and stated that they all were committed at the same time. ROA 2083. In fact, he testified that the hemorrhaging and bruising all over her body occurred within the same time period. The blanket edging played no part in the strangulation of the child. ROA 1057.

The other pertinent facts will be developed as needed throughout the brief.

PRIOR PROCEDURAL HISTORY

The Petitioner, Billy Wayne Cope, was charged in arrest warrants on November 30, 2001 with the November 29, 2001 murder of his twelve (12) year old daughter (hereafter referred

to as "Child A"), criminal sexual conduct against Child A and unlawful child neglect of all three of his minor children; Child A, Child B, and Child C. ROA 430, lines 21-24. The Court of General Sessions for York County indicted Cope for murder, criminal sexual conduct (three counts) and unlawful neglect of minor children (three counts). ROA. 81-82; Indictment Numbers: 04-GS-46-2614 to 2618; 02-GS-46-3232 to 3234; 03- GS-46-1843 to 1844; 46-3233 to 34. Amended Supplemental ROA, p. 30-47.

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

The state called the remaining charges against Cope and Sanders for trial in the York County Court of General Sessions on September 8th, 2004. ROA 894; 9/8/04 Tr. 173, lines 9-20. Cope was represented at trial by A. Philip Baity, James Morton, David Wood and Michael Smith of the York County Bar. Sanders was represented by Leland Greeley of the York County Bar. The prosecution was represented by Solicitor Thomas Pope, Deputy Solicitor Kevin Brackett and Assistant Solicitor Willy Thompson of the Sixteenth Judicial Circuit Solicitor's Office. The trial was held from September 8 through September 22, 2004 before the Honorable Judge John Hayes.

The jury convicted Cope and Sanders as charged on September 22, 2004. ROA

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

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

The Petitioner made an appeal raising six issues. The Petitioner was represented in the appeal by current counsel. On April 2, 2009, the Court of Appeals initially affirmed the convictions for murder, criminal sexual conduct and child neglect and initially reversed the conspiracy conviction, with Judge Short dissenting. The State and Petitioner both made a petitions for rehearing. On September 29, 2009, the Court of Appeals denied the Petitioner's petition and granted the State's petition for rehearing. On the same date, the Court entered a substituted opinion affirming all convictions. State v. Cope, 385 S.C. 274, 684 S.E.2d 177 (S.C. App. 2009).

The Petitioner made a petition for writ of certiorari on December 9, 2009. The Respondent made an initial Return on February 8, 2010. A motion by Petitioner to strike was granted and motion to expedite denied on March 24, 2010 and the Respondent was given twenty days to file an Amended Return. An Amended Return was filed on April 12, 2010. On April 15, 2010 a motion to strike a portion of the petition related to Issue 5 was filed by Respondent and

denied on April 29, 2010 by the Supreme Court.

On March 9, 2012, the South Carolina Supreme Court entered its Order granting the petition for writ of certiorari and set a briefing schedule. State v. Cope, Order (S.C.S.Ct., March 9, 2012)(order granting certiorari). On April 23, 2012, the Brief of Petitioner was served. This briefing follows.

ARGUMENT

- I. The Court of Appeals reasonably applied the appropriate standard of review in concluding that the trial court properly used its discretion concerning the admission of evidence concerning prior bad acts and statements of his co-defendant, James Sanders.

In his first argument, Cope contends that certiorari should be granted to review the rejection of his claim that he should have been allowed to present evidence concerning other crimes allegedly committed by James Sanders, and an alleged statement made by Sanders after incarceration. The trial court properly denied these efforts concluding the “other bad act” evidence failed to satisfy the requirement of Rule 404(b) to be admissible, that the alleged statement in jail was not relevant or admissible, and that the refusal to sever was appropriate. In denying this claim in the appeal, the Court of Appeals concluded:

Mindful of our standard of review, we find no reversible error in the trial court's exclusion of this evidence. Although there are some similarities between the other crimes and Child's assault, there are also many differences. For instance, no other crime resulted in the death of the victim or involved a child. None of the proffered crimes included the brutality of the attack on Child such as anal penetration and assault with a foreign object. We therefore hold Cope has not shown a close degree of similarity between the other bad acts and the charged offenses, much less any logical relation between the assault on and murder of Child and the other incidents in the vicinity allegedly involving Sanders and other victims. Based on these holdings, we affirm the trial court's ruling that Sanders' other crimes are dissimilar to these facts and are therefore inadmissible under Lyle and Rule 404(b), even if reviewed under a lower standard because proffered by a defendant, to show either identity or the existence of a common scheme.

State v. Cope, 385 S.C. 285-286, 684 S.E. 2d 1183-184. App.p. 54-55. (Emphasis added). ²

²The Court of Appeals noted that some states apply a lower standard when the evidence is offered by a defendant rather than the government. As it found, some jurisdictions lower the standard of similarity necessary for admission of evidence of “other crimes” when, as here, a defendant is attempting to introduce the evidence. See State v. Garfole, 76 N.J. 445, 388 A.2d 587, 591 (1978) (stating “a lower standard of degree of similarity of offenses may justly be

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

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

The Trial Court's Order

In denying the admission of the evidence concerning the other bad acts of Sanders, the court determined that the various crimes were too dissimilar to be admitted.³ At the outset, he

required of a defendant using other-crimes evidence defensively than is exacted from the State"); see also United States v. Stevens, 935 F.2d 1380, 1403 (3d Cir.1991) (applying a lower standard and quoting Garfole); United States v. Cohen, 888 F.2d 770, 776 (11th Cir.1989) (finding standard for admission relaxed when the evidence is offered by a defendant). This is sometimes called the "Reverse 404(b) Rule." Jessica Broderick, *Comment and Casenote, Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U.Colo.L.Rev. 587, 587 (2008). Even with a lower standard of similarity, the defendant must still show the other crimes are of a similar nature. See Rivera v. State, 561 So.2d 536, 539-40 (Fla.1990) (recognizing lower standard of admissibility but finding other crimes dissimilar enough to determine trial court did not abuse discretion in excluding evidence).

³The Proffered Evidence

A. *Alicia Lowery - 20 year old Black Female - December 19, 2001 Incident*. [Victim 3].

This occurred in the victim's residence in Rock Hill. Alicia Lowery returned home at 7:00 PM and entered her residence through her back door. Although she lived there with her female cousin, no one else was home at the time. She went straight to the bathroom. When she came out, she noticed the front door was open. As she went to close the door, Sanders, who she did not know and did not have a weapon, forced his way in through the open door. Sanders tackled her. At some point he demanded money. R. 751; 9/8/04 Tr.p. 29. Sanders grabbed a black plastic bag and initially put it over her head but she clawed it off. He then wrapped a throw rug around her head. He attempted to undress her by trying to pull up her shirt and tried to unbuckle her belt. She took a pen out of her back pocket and stabbed him a couple of times. Sanders pushed her back into one of the bedrooms or bathroom and closed the door and he held it

shut from the outside. While she was in that room, she heard her screen door slam and Sanders ran away. R. 739-751; 9/8/04 Tr. 16-29. She later identified Sanders in a line-up and at the hearing. R. 741, 745; 9/8/04 Tr. 19, 23.

B. *Sarah Hagman Lee - 20 year old White Female - January 12, 2002 Incident.*
[Victim 4].

Around midnight, Sarah Hagman Lee was attacked in her residence which is within the same block as George White's residence where a burglary had occurred at 10:30 that same night). Lee answered a knock at her bathroom door while she was in her room watching T.V., thinking it was a roommate. There were a series of knocks without an answer before she went to the door. Sanders pushed his way into her bedroom pushing her back and hitting her head. (This residence is a boarding house that she had recently moved into.) They wrestled their way back through the bathroom and into the kitchen. Once he had her on the ground he kicked her and pushed her, Sanders then got up and went into her bedroom and grabbed her purse which was on her sofa. When he came back into the communal kitchen, which was the only way out of the house, Lee had gotten up and grabbed a baking pan. She then hit Sanders in the head with a pan three times. He dropped her purse and some mace fell out of it. Sanders then got on top of her, but she sprayed Sanders with the mace and he got off of her. As Sanders ran for the door, Lee picked up a screwdriver (which was not hers and she assumed that Sanders brought with him) and tried to stab him as she grabbed Sanders left foot. Lee stabbed at Sanders at three times and noticed blood running down his neck behind his left ear. Sanders then ran out the door with Lee's purse. Although she did not know him previously, she identified him. She stated he had a toboggan on his head than night that she pulled off during the assault and he was not wearing gloves. She did not know how he entered the house and was not aware of any signs of forced entry. Another female resident was across the hallway during the attack, but would not have been able to see the attack. (The record does not indicate whether she heard the commotion or not or whether she called the police). R. 753-766; 9/8/04 Tr. 31- 44.

Cope also proffered evidence regarding the George White residential break-in committed by Sanders around 10:30 that night [January 12] and within the block as Lee. In that incident, White walked into his living room and saw Sanders. He yelled at him and Sanders fled upon being detected, apparently seeking sanctuary and escape at Lee's . Sanders was identified as this intruder based on fingerprints lifted from the scene. R. 830; 9/8/04 Tr. 109, lines 14-18, Defense Exhibit 5.

C. *K.--- D ---- Elderly White Female - December 12, 2001 Incident. [Victim 1]*

At 11:30 PM, K.D.s, alone, answered a knock at the door. Sanders, who she was unable to identify, said he had car trouble and asked to use the phone. He then pushed the door open and knocked her down. Sanders asked where she had money and looked everywhere for it, including under the bed and in the mattress . Sanders picked her up and carried her into the bedroom and on to her bed. He kissed on her lips and breast and had vaginal intercourse with her. He finally got \$20 from her purse. He then left after getting the money and pulled out the phone from the wall to get a head start. Subsequently, Sanders was connected to this case by DNA. R. 766-774; 9/8/04 Tr. 44-52.

rejected the testimony of expert crime analyst Gregg McCrary who attempted to equate the various crimes, concluding that his testimony was flawed. Particularly, Judge Hayes noted that McCrary did not address whether there were other similar crimes in the Rock Hill area. He stated that the asserted similarities were not significant. He stated that the crimes happening “in doors”, to strangers, that no forced entry was arguable but not significant where stealth was used, climbing a lattice or waiting outside in a car for a door to open. R. 887-88; 9/8/04 Tr.p. 166-167. He questioned the concept of dual motives.⁴

D. Sarah Phillips - Adult White Female - December 16, 2001 Incident. [Victim 2].

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

⁴ *Gregg McCrary - Crime Analysis Expert.*

McCrary testified he had reviewed information about the incidents involving K.D. [Victim 1], Phillips, Lowery and Hagman. R. 828; 9/8/04 Tr. 107. He also reviewed information about the murder of Child A.

He contended that there were factors to consider about these incidents including date, location, in-door crime, out-door crime, suspect (known or stranger), forced entry, dual motives, sex, robbery, choking or asphyxia, element, and evidence. R. 831; Id. 110. He considered these crimes to have a tight temporal pattern from December 12 to January 12. He contended the location revealed that they were all in Rock Hill within miles of each other, which he contended was a family close geographic pattern. He contended that there was significance in committing crimes in door as opposed to out in the public because a private residence would allow the culprit more control of the premises. He considered a stranger factor to be significant and asserted that stranger based rapes were uncommon as opposed to “known relationship.” He contended that in the particular cases there was no sign of what he defined as “forced entry.” Concerning dual motives based upon his review of the police reports, there appeared to be a consistent pattern of dual motives of sex and forced sex, sexual assault, robbery and money. He noted that in the

Phillips incident she had not reported an interest in robbery or money, but he included it as robbery due to the police report. R. 829-836; 9/8/04 Tr. 108-115.

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

Concerning choking or asphyxial elements, he suggested that some had not reported this, like K.D. [Victim 1] who he opined was overcome easily due to being disabled, but that Phillips, Lowery, and Hagman (Lee) all had reported this behavior. [It is evident that he also equates this factor with merely putting a hand over a victim's mouth who is screaming. See Phillips. As to Lee, he equates a choke hold for control with choking or asphyxia.] He also asserts that the offender did not take precautions in avoiding identification because of the presence of DNA or fingerprint at the scene. [Again, this classification ignores that on one occasion, the DNA match was the result of Sanders being stabbed (Lee).]

McCrary felt the Child A murder possessed similar characteristics because it was 17 days before the K.D. [Victim 1] assault, was an in-door crime, had no forced entry and contended sex and robbery existed because of her pocketbook being on the bed. In addition, he found the presence of asphyxia or choking present. He opined a statistical base about the relationship rapes and that stranger rapes are rare.

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

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

As to forced entry, he considered it to be physically defeating a lock or door jamb. McCrary admitted that in K.D. [Victim 1], Lowery, and Hagman (Lee), the perpetrator pushed the door open, forcing it and then entering.

Concerning K.D. [Victim 1], it was pointed out "he kept looking for money", but in Phillips there was no evidence of robbery. Additionally, the hand was put over Phillips' mouth because she was screaming. As to Hagman (Lee), he was unable to state that there was evidence of a sexual assault on her or that it was other than a fight and robbery. R. 858; 9/8/04 Tr. 137.

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

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

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

His analysis of choking and asphyxiation next came under assault by Sanders' counsel.

The trial court concluded that Cope had proved by clear and convincing evidence that Sanders was involved in the four incidents. R. 889; 9/8/04 Tr.p. 168. However, the trial court felt the evidence failed to rise to the level necessary for admission under Rule 404 to show motive, common scheme or plan. Judge Hayes found that there were a variety of dissimilarities and when attempted to match up, they cannot be done, even though there are some similarities. He noted that using identity to prove a connection to the crime did not count since there was DNA so identity is not necessary to prove Sanders was at this place. He found that the ages of the victims are dissimilar, but the locales are somewhat similar. He stated that he was not going to catalog them, "but I find that they are dissimilar to the extent that he will not let them in under Rule 404. R. 889-90; 9/8/04 Tr.p.168-169. The Court further stated that the evidence did not need to be addressed under the balancing test of Rule 403 because he found that the evidence did not meet the level of a common scheme. R. 893; 9/8/04 Tr.p. 172, l. 1-6. See also, R. 2308-2313; 9/16/04 Tr.p. 25-30 - renewed motion to admit and denial at beginning of defense case.

Particularly, K.D. [Victim 1] never indicated any and Phillips only stated the hand was over the mouth to stop screaming (twice), that Lowery described the bag, but not that there was any attempt to strangle, and in White there was nothing except flight. Although Hagman (Lee) spoke about a "choke hold" she never described someone on top of her trying to choke her (as in Child A). Id. at 140.

Concerning Child A, it was pointed out that there was evidence of sexual mutilation in vaginal and rectal trauma, and evidence about a broom stick being used. However, there was no evidence of sexual mutilation (by object) in any of the other cases, although there was some vagina trauma on K.D. [Victim 1]. He admitted that there was no actual sexual assault on Hagman and others, but they had fiercely resisted. McCrary felt that the two sexually assaulted victims, the 60 year old disabled K.D. [Victim 1] and 12 year old girl were vulnerable. R. 862-63; 9/8/04 Tr. 141-42.

However, he then admitted as to Phillips, Lowery, Hagman, there was no commonality of vulnerability by age.

Most importantly, he admitted that one "glaring difference" in the crimes is that Child A was dead and the others were not. R. 863-64; 9/8/04 Tr. 142-43.

Standard of Review

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001).

When this exception is invoked, it is important to recognize that a close degree of similarity between the prior bad acts and the crime charged, by itself, does not satisfy Lyle. Indeed, the mere presence of similarity only serves to enhance the potential for prejudice. State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). The foundation for admissibility transcends mere similarity, for the admission of such evidence under the common scheme or plan exception requires a connection between the extraneous crimes and the crime charged so that proof of the former tends to prove the latter. See State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997) ("A common scheme or plan concerns more than the commission of two similar crimes;

some connection between the crimes is necessary."); State v. Hough, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997) ("The common scheme or plan [exception] concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); State v. Bell, 302 S.C. 18, 27-28, 393 S.E.2d 364, 369 (1990), cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990) (noting that "evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged"); State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged."); State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted." State v. Wallace, 364 S.C. 130, 611 S.E.2d 332 (Ct.App.2005) (finding the trial court erred in admitting evidence of alleged prior bad acts merely because the prior acts were similar to the crime charged; holding instead that the trial court should look beyond mere close similarity to consider the connection between extraneous bad act and the crime charged). Lyle and 404 (b) have set forth a rule of exclusion not inclusion. Lyle, 125 S.C. at 416-17, 118 S.E. at 807.

ANALYSIS

As correctly determined by the trial judge and Court of Appeals, there was no Lyle similarity between the other alleged acts of Sanders and the murder of Child A.⁵ The instant case

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

concerned the middle of the night (between 2 and 4 am. [R. 1115; 9/9/04 Tr.p. 103]) sexual mutilation and murder of the twelve year old female victim through abhorrent injuries to both her vaginal and rectal areas by an object. None of these preliminary factors existed in any of the proffered evidence cases against Sanders. There was saliva, identified to Sanders DNA present around her breast of Child A. No sperm was found in the vaginal area. R. 1078; 9/9/04 Tr.p. 66. There was evidence of a struggle in the bed with significant force consistent with holding Child A down while she was alive. R. 1034-35; 9/9/04 Tr. p 22-23. There were obvious signs of assault on Child A including bruising about the head and abrasions on the back. It appeared that she had been struck from side to side on her head repeatedly. R. 1048-49; 9/9/04 Tr.p. 36-37. There was evidence of strangulation on her neck area. R. 1054-57; 9/9/04 Tr.p. 42-45.

The pathologist rejected the claim that a blanket could have accidentally strangle her based upon the autopsy. R. 1056; 9/9/04 Tr.p. 44. As to the rectal injuries, they were consistent with a blunt object being inserted up to 8 inches into the rectum. R. 1089; 1104-05; 9/9/04 Tr.p. 77, 92-93. Dr. Maynard stated that this object would have been consistent with a broom handle or a dildo. R. 1106-07; 9/9/04 Tr.p. 94-95. He stated the injury could not have been caused by a penis. R. 110; 9/9/04 Tr.p. 106. He also found blows to the abdomen. He opined that Child A was assaulted vaginally, anally and over her entire body with numerous bruises, injuries, and hemorrhages that occurred. The assaults were of a extreme vicious nature to cause the amount of rectal bleeding and were caused by a foreign object with sufficient force to cause deep internal hemorrhages that occurred. R. 1120; 9/9/04 Tr.p. 108. The pathologist described the torquing and deep tissue damage. R. 1120. Her death was the result of strangulation. R. 1120; 9/9/04 Tr.p. 108.

There is no similarity or pattern evident in the Child A assaults that existed in the proffered crimes. No crime resulted in death. No crime involved a child. No crime involved rectal penetration. No crime involved strangulation by hand on the neck. No crime involved similar vaginal penetration and bruising by an object. No crime involved an sexual assault from 2 to 4 am.

The Petitioner seeks to equate “no forced entry” and “lone wolf” as a theme to his showing of similarity to suggest a common scheme but even in his proffers revealed dissimilarity in the entry in the other Sanders crimes which varied from just appearing through an open patio door, to knocking on a door and gaining entry through subterfuge by an assertion of car trouble. Where there was no evidence that theft occurred in the Child A murder, but it appeared that seeking money was the theme in K.D. [Victim 1] and Lee incidents. While a sexual assault occurred in K.D. [Victim 1], it did not possess the mutilation of the vaginal and rectal areas that occurred to Child A.

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

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

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

In his brief before this Court, Petitioner also asserts that under Holmes v. S.C., 547 U.S. 319 (2006), he is entitled to present this evidence. Considerations of relevancy and probativeness affect even a criminal defendant's constitutional right to present a defense. The Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). Holmes addressed a South Carolina rule of evidence preventing a defendant from introducing third party culpability evidence if there is forensic evidence strongly supporting defendant's guilt. Holmes, supra, 547 U.S. at p. __. The Supreme Court recognized that “ ‘[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.’ However, the Constitution guarantees defendants the right to present a defense, which “is abridged by evidence rules that ‘infring[e] upon a weighty interest of the accused’ and are ‘ “arbitrary” or “disproportionate to the purposes they are designed to serve.’ ” The Supreme Court determined the South Carolina rule was arbitrary and thus deprived the defendant of his right to present a meaningful defense. *Id.* at p. 503

Petitioner’s contention is without merit. As the Supreme Court noted in Holmes, “the Constitution permits judges ‘to exclude evidence that is “repetitive ..., only marginally relevant” or poses an undue risk of “harassment, prejudice, [or] confusion of the issues.” ’ Holmes, supra,

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

547 U.S. 319.⁷ Defendant's third party culpability evidence was excluded under the standard rules of admissibility which apply to all evidence by application of Rule 404(b). Further, the attempted showing for using the other act evidence against Sanders was minimally relevant to prove what the defense was seeking it to prove, that Sanders was able to secure entry for his other crimes without a showing of forced entry. The reasoning behind Rule 404(b) is one of relevance balanced against undue prejudice and confusion of the issues. In the trial court's reasoning that the other acts were not sufficiently similar, the trial court reasonably applied standards that did not violate the Constitution and did not deprive him of a meaningful defense.

⁷It is well-established, however, that "the right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' " Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). A criminal defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers, 410 U.S. at 302. Thus, a criminal defendant "does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). "Even relevant and reliable evidence can be excluded when the state interest is strong." Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir.1983). The Supreme Court has indicated its approval of 'well-established rules of evidence [that] permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

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

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

In denying the relief, the Court of Appeals concluded:

Cope sought to introduce evidence of Sanders' other crimes in a separate trial to prove Sanders' guilt and his ability to enter victims' homes without signs of forced entry. The jury in this case was aware Sanders was involved in Child's murder due to the presence of his DNA. The jury was made aware of evidence that the Cope house could have been entered without signs of forced entry as Cope presented testimony from a locksmith that the lock could have been picked or a credit card could have opened the door lock without leaving signs of forced entry. The evidence of Cope's involvement, such as his confessions and the evidence of the lack of forced entry, would still have been admitted in a separate trial. We find the introduction of the evidence of Sanders' other crimes would not have been inconsistent with Cope's guilt, even if offered in a separate trial, and would not have raised an inference as to Cope's innocence. Accordingly, we find no error by the trial court in denying Cope's motion for severance.

State v. Cope, supra. App.p. 63. Respondent submits that a new trial is not warranted where the trial court properly used its discretion in denying the request.

Standard of Review

Motions for severance are addressed to the discretion of the trial court. State v. Nichols,

325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997). "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) (emphasis removed). "A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." *Id.* "An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial." *Id.* (citing People v. Greenberger, 58 Cal.App.4th 298, 68 Cal.Rptr.2d 61, 86 (1997)); see also State v. Dennis, 337 S.C. 275, 281-82, 523 S.E.2d 173, 176 (1999) (the denial of a severance motion will not be reversed absent an abuse of discretion and a showing of resulting prejudice). Furthermore, as murder co-defendants, appellants were not entitled to separate trials by right. State v. Kelsey, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998).

ANALYSIS

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

of a co-conspirator made in furtherance and during a conspiracy are admissible to prove the existence of a conspiracy). “The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime.” State v. Halcomb, 382 S.C. 432, 440, 676 S.E.2d 149, 153 (Ct.App.2009). “ The Petitioner has failed to show any prejudicial “spill-over” effect.

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

The Court of Appeals properly evaluated third party guilt issues consistent with the Court’s earlier analysis set out in State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) as limited by the constitutional analysis set out by the United States Supreme Court in the Holmes v. South Carolina, 547 U.S. 319 (2006) opinion.⁸ Under the Gregory test (affirmed as

⁸ Although the trial and Appellant’s initial brief was written prior to the decision of the United States Supreme Court in Holmes v. South Carolina, concerning an intervening standard of third party guilt, the impact of the decision does not require a different result in this case because an erroneous standard was not applied in this case by the trial court in reaching its decision. In Holmes, the Court ruled that the trial court erred in excluding third-party guilt evidence. Holmes was convicted of murder, first-degree criminal sexual conduct, first-degree burglary, and robbery after 86-year-old Mary Stewart died from complications resulting from a brutal attack in her home. Holmes was convicted and sentenced to death, but a new trial was granted on state post-conviction review. At the second trial, the prosecution relied heavily upon forensic evidence including a palm print, clothing fibers, and DNA. Insisting that the evidence was contaminated and that he was being framed, Holmes sought to introduce evidence that another man committed the crime. The trial court found the evidence inadmissible due to its speculative nature. The South Carolina Supreme Court affirmed, taking a different position than

appropriate by the U.S. Supreme Court and not challenged therein), the evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are

the trial judge, holding that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." State v. Holmes, 361 S.C. 333, 342-343, 605 S.E.2d 19, 24 (2004). The United States Supreme Court reversed.

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

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

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

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

inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.” State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560).

In his brief on the severance issue, Petitioner asserts that the standard for the admission of third party guilt evidence is not altered when the proffered evidence relates to a third party’s other crimes. The Petitioner relies upon three distinguishable cases; State v. Cotton, 351 S.E.2d 277 (N.C. 1987), State v. Williams, 518 S.E.2d 234 (N.J. Super. 1986) and State v. Garfole, 388 A.2d 587, 591 (N.J. 1978). Brief of Petitioner, p. 33-37. None of these cases should that should alter either the result of trial court or Court of Appeals.

Cope's scant treatment of the facts of State v. Cotton conceals the critical distinction from the instant case. In Cotton, the three victims were all attacked on the same evening in their homes in the same neighborhood by a light skinned, black male wearing a blue shirt with white stripes who entered the home through a rear door after extinguishing the exterior light. One victim in the Cotton case picked Cotton from a seven person live line-up as her assailant. The 3rd party guilt evidence that Cotton sought to introduce at his trial concerned the identification by one of the other victims from the exact same line-up of a different person as her assailant.

Ultimately, the fatal flaw in Cope's train of logic in support of the admission of the other crimes under a 3rd party guilt theory is that the state in this case proved Sanders' guilt conclusively in its case in chief. Cope does not seek to establish the guilt of another party but rather seeks to introduce this evidence to support his theory that Sanders might have acted alone.

As set forth in Argument One, the evidence of Sanders' other crimes is so dissimilar from the attack on Child A it can never amount to anything more than the "bare suspicion...or...conjectural inference" that Gregory forbids. If Cotton has any value in helping to decide this case it is to juxtapose a factual scenario where 3rd party guilt evidence is clearly proper to demonstrate the real possibility of a misidentification and actual innocence with a scenario where it is simply intended to try and raise a conjectural inference in support of an alternate theory.

An examination of the facts of the two New Jersey cases of Williams and Garafole cited in support of the defendant's 3rd party guilt argument reveal similar deficiencies. In both of those cases the unique fact patterns are distinguishable from the present case.

State v. Garafole involved a series of six sexual assaults on six young girls that all occurred or commenced within a quarter mile of the same location. The facts of the case are not detailed in the opinion cited however the lower court opinion is referenced and the facts are detailed very well in the dissent. State v. Garafole, 148 N.J. Super. 127 at 139. It is clear that based on the facts of the various assaults the first five and probably all six were committed by the same solo assailant. Indeed, the prosecutor in those cases indicted Garafole for all the attacks in one multi-count indictment. When the prosecutor elected to proceed on only the fifth assault at trial the defendant attempted to introduce evidence of the other assaults to show the same assailant had committed them all. The purpose of this strategy was that Garafole had alibis for four of the six assaults, but not for the assault for which he was being tried.

The Supreme Court of New Jersey in Garafole did not reverse for a new trial in that case despite the abundant similarities between the assaults but rather remanded for the "highly

discretionary determination" as to whether the proffered evidence should be admitted in light of the potential for confusion, misleading of the jury or undue consumption of time. Garafole, like Cotton, is most useful in comparison as to why Sanders subsequent other crimes charges are not sufficiently similar to justify admission.

Finally, appellant cites to the State v. Williams decision that involved an assault on a woman near an alley way in Camden, New Jersey. The victim, a Ms. Brown, originally stated she could not identify her assailant and subsequently identified her ex-boyfriend, the defendant, as her attacker. The defense sought to introduce evidence that a man living near the alley had been charged for a nearly identical assault that occurred before the one on Brown and also charged for another highly similar assault perpetrated after the assault on Brown. Both of these other assaults had occurred at the same location as Brown's and the defendant in those cases lived at the end of the alley at which Brown was assaulted.

Like Cotton and Garafole the crimes in the Williams case were much more similar than the crimes sought to be introduced by Cope. The location, timing, method and manner of assault were virtually identical and it was on this fact that these three decisions primarily turned and it is on this fact that Cope's argument primarily founders. But there is also one other critical distinction: The purpose of the defense's evidence in those cases was to establish direct evidence of the factual impossibility of the defendant's guilt.

If the jury in the Cotton case was convinced that there was only one perpetrator of all three crimes and that two victims identified two different people from the same line-up then there is a reasonable doubt as to the identity of the attacker. If the jury in Garafole believed that the same person perpetrated all six attacks and that the defendant had a valid alibi then Garafole

could not be guilty. If the jury believed that the same person perpetrated the three attacks at that alleyway near 8th Street in Camden, New Jersey then Williams could not be guilty as he was in jail for the 2nd attack when the 3rd attack was committed.

How does this logic apply to the defendant's case? Apparently according to the appellant, if the jury believes that Sanders committed all of the attacks in Rock Hill for which he was charged Cope could not have been guilty of participating in the very first assault in the series which involved his daughter and to which he confessed? This does not logically follow and it is this logical fallacy that justifies Judge Hayes' exclusion of this information under either a 3rd party guilty theory or a 404(b) analysis.

The problem with the Petitioner's present argument is that he was not being denied the opportunity to present this particular evidence (or a defense) because of a lack of severance. Even if severed, this particular other act evidence would not be admissible because it still did not satisfy the Rule 404(b) "common scheme" threshold. As the Court of Appeals concluded:

The evidence of Cope's involvement, such as his confessions and the evidence of the lack of forced entry, would still have been admitted in a separate trial. We find the introduction of the evidence of Sanders' other crimes would not have been inconsistent with Cope's guilt, even if offered in a separate trial, and would not have raised an inference as to Cope's innocence.

Cope, supra. App.p. 63. The jury in this case was well aware Sanders was involved in Child A's murder due to the presence of his DNA. The jury was aware of evidence that the Cope house could have been entered without signs of forced entry as Cope presented testimony from a locksmith that the lock could have been picked or a credit card could have opened the door lock without leaving signs of forced entry. The evidence of Cope's involvement, such as his confessions and the evidence of the lack of forced entry, would still have been admitted in a

separate trial. Plainly evidence of Sanders guilt was and would be forthcoming by the admission of his DNA evidence.

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

He also makes an unpreserved suggestion that even if properly excluded, that Cope should have been allowed a severance solely to allow the entry of the bad act evidence of the crimes without reference to Sanders. Since it was not asked for below as a basis for the timely severance motion, it cannot be considered in the appeal as a matter of state procedure.⁹ This issue

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

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

Assuming it was preserved as an alternate basis for a severance request, the evidence simply does not meet the limited purpose that he seeks to admit it - to show that the concept of a lack of forced entry is much more common than the police admitted. Again, the circumstances of these cases merely reveal the facts of those four isolated cases, including ones where the culprit was actually let in through the open door. His interpretation that their wholesale admission now springs as an attempt to impeach a general comment by the police is unfounded.

The Appellant has additionally referred in his Initial Brief to ROA 1642-43; 9/13/04 Tr.p. 261-262 to suggest the admission of the evidence was required. There, in cross-examination, Todd Gardner testified that he had found the Cope residence to be secure when he checked the area around the house with doors locked and windows sealed. Contrary to the assertion in the brief, Gardner stated that he had never processed a residential burglary scene where there were no signs of a forced entry, but declared that "I'm not saying it don't happen, but I'm saying I can't recall working one of them ... [and] I guess its possible . . ." R. 1643. See also, R. 3566; 9/22/04 Tr.p. 84, l. 15. (prosecution closing argument). It is difficult to see how this evidence of isolated cases would impeach Gardner's testimony, suggesting that it had deprived him a right to present a defense. However, any error in failing to admit those matters at trial (an issue not raised in this appeal), would have certainly been harmless error. Similarly, these isolated comment did not warrant a severance to be granted.

He was not denied the opportunity to present a complete defense under Holmes v. S.C.,

suggests a "motive"]. The court continued to deny the motions.

547 U.S. 319 (2006). The trial judge did not abuse his discretion in denying the severance motions where prejudice was not shown. The jury was not prevented the jury from making a reliable judgment about a co-defendant's guilt nor denying Cope of any specific trial right due to the joint trial.

- III. The Trial Court Did Not Abuse its Discretion In Excluding Evidence Upon The Objection of Co-Defendant James Sanders To Testimony From Inmate James Hill Concerning Sanders' Alleged Admission To Assaulting A "Little Girl In Rock Hill" Where There Was No Testimony From Witness Hill As To Time, Place or Other Circumstances To Connect The Hearsay Evidence To The Murder of Child A. Further, Any Error In The Exclusion of the Proffered Evidence Was Harmless Error Where Sanders Was Jointly Convicted of the Crimes and the Other Circumstances Shown By the Evidence. [Brief of Appellant, p. 45-55] .

The issue before this Court concerns the ability and effect of the use of a trial judge's discretion to exclude evidence that he assesses is inadequately tied to this particular crime and may lead to confusion and injection of collateral issues.¹⁰ By applying an analysis under S.C. Rule of Evidence Rule 403, Judge Hayes concluded that hearsay evidence that Appellant Cope sought to present against co-defendant Sanders was inadequately shown to be connected to this case because it was lacking in "time, place or circumstance." Under Rule 403, the trial judge has discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE . The trial judge did not abuse its discretion in the exclusion of the particular evidence which may have been related to a separate crime other than the instant case and led to confusion of the issues. Further, Respondent asserts, contrary to the untimely assertion of admissibility under Rule 804(b)(3), that the proffer lacked a sufficient showing of corroboration and trustworthiness as required. Alternately, even if the trial court erred in the exclusion as a matter of either state law or under the federal constitution, a new trial is not required where there was a lack of a showing

¹⁰ Certain salient factors are evident, including that it was co-defendant Sanders, *not the State*, that objected to the Hill testimony. When proffered, Cope only asserted that it was "relevant", not that it was admissible under Rule 804(b)(3), SCRE or the federal constitution.

or “probable prejudice” by its exclusion, and necessarily that any alleged error was harmless where Sanders was convicted of the crimes and the evidence presented precluded the assertions suggested in the allegedly overheard jail “comments.”

In his brief before this Court, Petitioner asserts the exclusion of evidence that he acted alone in this crime¹¹ (or a different crime concerning an unidentified girl in Rock Hill) deprived him of a fair trial. He claims it was relevant because it increased the probability that Sanders had acted alone and that Sanders had committed the crime. In addition, Cope asserts that the fact that Hill’s testimony was not highly detailed should not affect its admissibility, only its weight, claiming it was sufficiently tied to this crime. He further asserts that its admission is allowed under Rule 803(b)(3). He further asserts that his constitutional right to present a defense was deprived because the proffered evidence lends credence to his defense theory. For the reasons set forth below, his assertions do not require a new trial.

How the Issue Was Presented At Trial..

The Cope defense team called James Hill as a defense witness concerning a statement purportedly made by co-defendant Sanders to another detainee in late 2002. James Hill had been a pre-trial detainee confined in the segregation unit of the York County Detention facility in the latter couple of months in 2002.¹² ROA 3426, 3428. 9/21/04 Tr. 222, ll. 13-20, p. 224, l. 10-13.

¹¹In his Brief of Petitioner, he describes the Hill comments “about getting away with an apparently solo act of rape-murder that was almost certainly that of [Child A]. Brief of Petitioner, p. 45. However, this assertion was determined by the trial court to be lacking when he ruled the proffer was inadequate as to time, place and circumstance.

¹²Hill testified that he was convicted and sentenced to 18 years for burglary- 2nd on August 28, 2003. ROA 3426, l. 12-25. It is noted that “burglary in the second degree” carries a sentence of “not more than fifteen years . . .” S.C. Code §16-11-312 (1985). At the time of his testimony, he was serving the sentence at Perry Correctional Institution. He claimed he had no

During an in camera hearing, Hill testified that while he was in his cell in 2002, he overheard a conversation by Sanders¹³ and another unidentified detainee/inmate whose name was possibly

Holly. According to Hill's testimony, Sanders and the other unidentified inmate/detainee:

got to the subject of crimes and criminal history and they got to joking about how the . . . police force . . . weren't doing their jobs, that it was easy to get away from them, to delude them [sic], and he made the comment that he was going to get away with what he did to that little girl in Rock Hill, and he went on to describe explicitly what he had done and then in getting away and at the time I didn't think nothing of it.

R. 3429, l. 6-17. Hill stated that Sanders made "remarks about oral and anal sodomy" and "he made remarks, I believe , he said smothering the child." ROA 3429, ll. 19-21. When asked what he had specifically said, Hill quoted Sanders as stating that "his words were that he (Sanders) f____d her. F____d her good." ROA 3430, l. 3-4. Hill further testified that Sanders "alluded to the fact that he had got in through a window in the house and that he had left through the same window and proceeded to go to another individual's house." R. 3431, l. 13-18.¹⁴

Hill also stated that he met Cope [in 2003] four or five months after the discussion he overheard by Sanders. Hill stated he was housed with Cope in the Life Skills Christian Block (F-Unit). Hill claimed he overheard a discussion between Cope and Michael Kennedy about Cope's case. Hill recalled that Kennedy mentioned Sanders's name and said that he was in C-Block. Hill testified that when Sanders' name was mentioned between Cope and Kennedy concerning Cope's case, Hill's memory of the earlier discussion came back. He stated that he then told Cope

other charges pending at the time.

¹³He described Sanders as having a "raspy-ish" "old man's voice." ROA 3428.

¹⁴ As set forth in the harmless error section of this argument, these comments were not supported by the record.

that he had something to tell him and that he was not going to like it. ROA p. 3430-31. Hill stated that he told Cope about the conversation. He said after that, Cope's lawyers got back to him. ROA p. 3431.

On cross-examination by the Solicitor, Hill admitted that he never wrote a letter telling the police or Solicitor about the conversation of Sanders. He admitted that no police or solicitor knew about this conversation. ROA p. 3432.

The Objection by Counsel for James Sanders and Relevance Argument by Cope.

After this proffer and reserving his right to cross-examine Hill, Sanders' counsel [Leland Greeley] objected to Hill's testimony concerning Sanders' admissions as irrelevant "because there has been no identifying characteristics." He noted that there was no identification with this particular case, i.e. the death of Child A. Counsel Greeley noted that Sanders had many allegations against him in regard to other things (implicitly other criminal charges).¹⁵ He contended that there was nothing that made it relevant in this particular case. ROA p.3432-33.

Counsel Wood for Cope argued that the fact that Sanders' DNA was found on the victim makes it relevant to this case. He stated it was "the only little girl we know of with James Sanders DNA was found on." ROA p. 3433, l. 12-15.¹⁶ Judge Hayes emphatically stated to

¹⁵ The context of the "allegations of other things" statement by counsel Greeley is clear. As noted in argument one, Sanders had a series of other criminal charges that he was facing. However, none of those charges involved young children. Assuming arguendo that the statement was made - particularly where the comments were not consistent with the relevant facts in this case - a jury could have been confused and treated it as a different crime committed by Sanders unrelated to the present case. These differences are set out in the harmless error section.

¹⁶ In his brief before this Court, he again asserts that the statement by Sanders should have been admitted under SCRE Rule 804(b)(3) as a "statement against penal interest." See *Brief of Petitioner*, p. 50-53, He asserted this basis for admission for the first time in his *Initial Brief of Appellant*, p. 53-54. However, he never asserted Rule 804(b)(3) argument for admission at trial

counsel Wood that it is the “only one you know of.” ROA 3433, l. 16-17 (emphasis added).

The Trial Court’s Exclusion of the Evidence.

The trial judge sustained Sanders' objection, noting that Hill's proffered testimony did not include any specification by testimony as to "the time, place, or other circumstances" of the crime, accepting Sanders' counsel's assertions. ROA p. 3433, ll. 5-7.

The Decisions of the Court of Appeals

In denying relief, the Court of Appeals concluded the testimony concerning the conversation at the Detention Center was properly excluded. In its initial April 2, 2009 opinion prior to rehearing and revision, the Court of Appeals stated:

Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. Rule 401, SCRE. All relevant evidence is admissible. State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006). Relevant evidence may be excluded if the prejudicial effect of its admission substantially outweighs the probative value of the evidence. Rule 403, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

Cope proffered the testimony of James Hill, who is serving a sentence for burglary. Hill testified he was in his cell in a segregation unit in prison near the end of 2002. Hill recognized Sanders' distinctive voice and overheard Sanders and another inmate laughing about how easy it was to get away with crimes. Sanders allegedly stated he was “going to get away with what he did to that little girl in Rock Hill.” Sanders allegedly “went on to explicitly describe what he had done.” Sanders remarked about oral and anal sodomy and smothering the child.

and it is not preserved for appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."). His sole basis for arguing for admission was relevance. As noted, Judge Hayes rejected the admission of the Hill evidence on the basis that it was not shown by the statement to be this particular crime that was being discussed which could have led to confusion, not that it was admissible or inadmissible under Rule 804(b)(3).

Finally, Sanders “alluded to the fact that he had got in through a window in the house and that he had left through the same window.” Sanders objected to the evidence as irrelevant. The court excluded the evidence as irrelevant because there were no identifying characteristics, noting the testimony did not specify time, place, or other circumstances. We again look to our standard of review and determine the trial court did not abuse its discretion in excluding Hill's testimony.

State v. Cope, Op. No. 4526, 2011 WL 902391 (S.C. App. April 2, 2009 (Shearouse Advance Sheet 15, p. 80. (emphasis added). After a petition for re-hearing, the Court of Appeals withdrew the opinion, substituted and refiled a new opinion on September 29, 2009 which revised this section and revised the conclusion and stated:

We again look to our standard of review and determine the trial court did not abuse its discretion in excluding Hill's testimony. See State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) (reiterating the standard of review of a trial judge's ruling on questions concerning the relevancy of evidence and looking for guidance to other jurisdictions that have addressed the particular issue concerning relevancy); State v. Larsen, 91 Idaho 42, 415 P.2d 685, 692 (1966) (noting the potential of abuse from ruling “that a bare, out-of-court confession is ... admissible” and holding “that third-party confessions, made out of court, are admissible only when there is other substantial evidence which tends to show clearly that the declarant is in fact the person guilty of the crime for which the accused is on trial”); People v. Cruz, 162 Ill.2d 314, 205 Ill.Dec. 345, 643 N.E.2d 636, 650 (1994) (reciting the rule that “[a]n extrajudicial declaration not under oath, by the declarant, that he, and not the defendant on trial, committed the crime is inadmissible as hearsay, though the declaration is against the declarant's penal interest,” but allowing an exception “where there are sufficient indicia of trustworthiness of such extrajudicial statements”).

State v. Cope, supra. App.p. 55-56.

Standard of Review.

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001).

The admission or exclusion of evidence is a matter within the trial court's sound

discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of a manifest abuse of discretion accompanied by probable prejudice. State v. Gillian, 373 S.C. 601, 613, 646 S.E.2d 872, 878 (2007). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, [the South Carolina Rules of Evidence], or by other rules promulgated by the Supreme Court of South Carolina.” Rule 402, SCRE; State v. Green, 397 S.C. 268, 286-287, 724 S.E.2d 664, 673 (2012). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE.

Rule 403

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. “Unfair prejudice means an undue tendency to suggest a decision on an improper basis.” State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008) (internal quotation marks omitted). A court weighing the prejudicial effect of evidence against its probative value must base its determination upon the entire record and upon the particular facts

of the case before it. Id.¹⁷

Harmless Error.

Whether an error is harmless depends on the particular circumstances of the case, and therefore a reviewing court must look to the entire record to determine the effect the error had on the verdict. State v. Salley, __ S.C. __, __ S.E.2d __, 2012 WL 2359422, 6 (S.C. 2012); State v. Clark, 315 S.C. 478, 484, 445 S.E.2d 633, 636 (1994) (J. Toal, dissenting). Under evidentiary ruling, probable prejudice must be shown. State v. Gillian, 373 S.C. 601, 613, 646 S.E.2d 872, 878 (2007) State v. Sosebee, 284 S.C. 411, 326 S.E.2d 654 (1985); Rule 103(a) SCRE. Error is harmless where it could not reasonably have affected the result of the trial. State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993); State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct.App.1997). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984). Thus, an insubstantial error not affecting the result of the trial is harmless

¹⁷ The Court of Appeals addressed this balancing in State v. Stephens, __ S.C. __, __ S.E.2d __, 2012 WL 2402767, 3 (S.C.App.,2012). The Court stated:

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. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. 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. Stephens, supra., citing State v. Hamilton, 344 S.C. 344, 357–58, 543 S.E.2d 586, 593–94 (Ct.App.2001) (citations omitted), overruled on other grounds by State v. Gentry, 363 S.C. 93, 107, 610 S.E.2d 494, 502 (2005).

where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see also State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside conviction for insubstantial errors not affecting result). Rule 401 For an appellate court to reverse based on the exclusion of evidence, both error and prejudice must be shown. This burden rest upon the appellant on these non-constitutional evidentiary issues.

This Court recently addressed harmless error analysis in State v. Liverman, __ S.C. __, 727 S.E.2d 422, 427 (2012). The Court re-stated that "a harmless error analysis is contextual and specific to the circumstances of the case." State v. Byers, 392 S.C. 438, 448–49, 710 S.E.2d 55, 60 (2011). No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Reeves, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990). In considering whether error is harmless, a case's particular facts must be considered along with various factors including: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." State v. Clark, 315 S.C. 478, 481, 445 S.E.2d 633, 635 (1994) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). Liverman, *supra*.

"In order for a constitutional error to be harmless, the error must have been harmless beyond a reasonable doubt." *Id.* This means the reviewing court can conclude, beyond a

reasonable doubt, the error did not contribute to the verdict. State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002). See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (recognizing that an insubstantial error not affecting the result of the trial is harmless where “guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached”); State v. Knight, 258 S.C. 452, 454, 189 S.E.2d 1, 2 (1972) (“[A] conviction will not be reversed for nonprejudicial error in the admission of evidence.”).

ANALYSIS

The trial judge did not abuse his discretion in excluding this potentially confusing testimony upon objection of co-defendant Sanders in the discrete circumstances presented in this case.¹⁸ In relying upon Rule 403 and State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), the Court of Appeals recognized that while evidence may be relevant, it may be excluded where the prejudicial value of the evidence is outweighed by its probative value. In Alexander, while recognizing that evidence of the victim’s emotional trauma was relevant to show a lack of consent in a criminal sexual conduct case, the evidence was unduly prejudicial, adopting as a standard in 1991 the language of Rule 403. Particularly, the 1991 Court adopted reliance upon the comments to the rule that “unfair prejudice” within its context means an undue tendency to

¹⁸ “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. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. 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, 357–58, 543 S.E.2d 586, 593–94 (Ct.App.2001) (citations omitted), overruled on other grounds by State v. Gentry, 363 S.C. 93, 107, 610 S.E.2d 494, 502 (2005).

suggest a decision on an improper basis, commonly, though not necessarily on an emotional one.” Id., 303 S.C. 377, 382, 401 S.E.2d 149.

Respondent agrees that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" Rule 401, SCRE. The Petitioner equates he satisfied the relevance test by the reference to the “little girl from Rock Hill” and the existence of DNA evidence of the co-defendant was a sufficient basis to satisfy the relevant prong of Rule 401.

Concerning the Court of Appeals summary assessment of relevance, the Petitioner does not take issue with the lower court’s reliance upon State v. Alexander which reiterated the standard of review of a trial judge's ruling on questions concerning the relevancy of evidence and “looking for guidance to other jurisdictions that have addressed the particular issue concerning relevancy.” He suggests that the court of appeals misapplied the standard in its reliance upon State v. Larsen, 91 Idaho 42, 415 P.2d 685, 692 (1966)¹⁹ and People v. Cruz, 162 Ill.2d 314, 205

¹⁹ In Larsen, the Idaho court applied a similar assessment to the South Carolina rule in Gregory on third party guilt that still applies. The 1966 court in Larsen addressed the issue of whether a defendant is entitled to present evidence of an alternate perpetrator. Larsen, 91 Idaho 42, 415 P.2d 685. The Larsen court held that a defendant must produce a “train of facts or circumstances, as tend clearly to point out some one besides the [defendant] as the guilty party.” Id. at 47–48, 415 P.2d at 690–91. It requires more than just “conjectural inferences” that a party other than the defendant committed the crime. Id. at 48, 415 P.2d at 691. The Larsen court held:

We are not prepared to hold, however, that a bare, out-of-court confession is nevertheless admissible. To do so might have a serious injurious effect on the administration of criminal law for it would open the door to defendants to produce perjured and fraudulent ‘confessions’ by others who, for some unexplained reason, have ‘disappeared’ or are otherwise ‘unavailable’ as witnesses.

‘It is not difficult to see the abuses to which the general admission of such

Ill.Dec. 345, 643 N.E.2d 636, 650 (1994). Brief of Petitioner, p. 50, n. 15. As to Larsen, he notes that while a third party confession was properly excluded in the absence of “other substantial evidence” that the third party was guilty of the crime for which the accused was on trial, whereas the evidence in Cope’s case was that Sanders guilt was overwhelming based upon his saliva being found on Child A’s breast and his semen on her clothing.²⁰ However, Cope ignores that the

testimony might lead. Every one accused of crime would be tempted to introduce perjured testimony concerning statements of some third person, then beyond the jurisdiction of the court, admitting that such third person and not the defendant, had committed the crime in question, and the experience of courts renders it certain that many would yield to such a temptation.’ Brennan v. State, 151 Md. 265, 134 A. 148, 150, 48 A.L.R. 342 (1926).

‘If evidence of this kind was admissible as original testimony for a defendant, it would be impossible to convict any thief, because he could always find witnesses who would testify that they had heard some one who was absent confess to being guilty of the crime. To hold that such evidence was competent would put a premium on fraud, make perjury safe, and place the state at the mercy of criminals. This would make a mockery of the law, and will not be permitted in the courts of Oklahoma.’ Davis v. State, 8 Okl.Cr. 515, 128 P. 1097, 1099 (1913).

State v. Larsen, 91 Idaho 42, 49, 415 P.2d 685, 692 (Idaho 1966).

²⁰ Respondent notes that the analysis used decision in Larsen, was overruled by the Supreme Court of Idaho in State v. Meister, 148 Idaho 236, 22- P.3d 1055 (2009). In Meister, the Idaho court concluded admissibility of other perpetrator evidence should be determined under the rules of evidence, particularly their Rule 403 (the rule of excluding evidence on grounds of prejudice, confusion or waste of time) and Rule 803(b)(3) rather than the prior common law approach of Larsen of generally excluding alternate perpetrator evidence regardless of relevance. The Idaho court then adopted a seven factor test for determining the reliability and corroboration of a statement under Rule 8-03(b)(3). In adopting the test, the Idaho court stated that:

Further, this Court adopts Arizona's test for a trial court to determine whether the third-party confessions are sufficiently corroborated in accordance with I.R.E. 804(b)(3); that test being, whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true. This test is desirable because it prevents the trial judge from substituting himself or herself as the ultimate fact-finder. If the statements clearly establish trustworthiness through

setting in Larsen was different because here the State was still trying to show that the alleged declarant (Sanders) actually was guilty of the crime.

The basis for the Hill evidence exclusion was different, under Cope's theory, the alleged inculpatory statement was only tied to this crime, whereas the trial judge - whose discretion is entitled to deference - found the proffer was not sufficiently tied to the crime against Child A because it lacked "time, place, or other circumstances." The time, place and other circumstance indicia was necessary because the statement did not described a victim other than "little girl," and although it described smothering, it did not specifically state she was killed, did not describe when or where, and suggested that it was an unsolved crime. Where the circumstances were not consistent with the crime, co-defendant Sanders' concern about his other problems reflect a concern that the jury might consider that Sanders committed an additional crime involving a little girl. Thus, the confusion under Rule 403 by its potential admission was real. The prejudicial effect could be seen to outweigh its minimal probative value where Sanders was still being tried as a joint accomplice in the murder of Child A.

As to Cruz, Cope attempts to distinguish the case not by the correctness of the legal ruling in the particular appeal as it relates to the admission of a particular third party's statement, but by the use of anecdotal information that Cruz's death sentence and conviction were reversed and the Cruz was acquitted in a later trial. The standard of law relied upon by the Illinois appellate

corroborating evidence it is within the province of the jury to weigh the testimony and determine where the truth lies. The district court applied the wrong standard to determine whether Lane Thomas' confessions should be excluded.

State v. Meister, 148 Idaho 236, 243, 220 P.3d 1055, 1062 (2009).

court - the rule that “[a]n extrajudicial declaration not under oath, by the declarant, that he, and not the defendant on trial, committed the crime is inadmissible as hearsay, though the declaration is against the declarant's penal interest,” but allowing an exception “where there are sufficient indicia of trustworthiness of such extrajudicial statements” - remains.

What escapes the attention of the Petitioner is that Larsen was a reflection of other court's treatment of the common law standard that South Carolina still applies concerning the admission of alternate perpetrator evidence under the decision in State v. Gregory.²¹ The Court of Appeals was applying the Gregory standard in its assessment through both Larsen and Cruz. The admissibility of evidence of third party guilt is governed by the rule set forth in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). See State v. Burgess, 391 S.C. 15, 22-23, 703 S.E.2d 512, 516 (S.C.App.,2010); State v. Swafford, 375 S.C. 637, 641-43, 654 S.E.2d 297, 299-300 (Ct.App.2007) (affirming application of State v. Gregory). In Gregory, this Court stated:

[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a

²¹ The decision in Holmes v. South Carolina, 547 U.S. 319 (2006) did not overrule this Court's decision in Gregory. The U.S. Supreme Court concluded that it was not the rule of Gregory which offended the defendant's rights. Rather, it was the “radically changed and extended” rule of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), and State v. Holmes, 547 U.S. at 328-31, 126 S.Ct. 1727. In fact, the Supreme Court specifically stated that the rule of State v. Gregory is the type of rule that does not deny a defendant his right to present evidence. 547 U.S. at 328, 126 S.Ct. 1727. Holmes v. South Carolina preserves Gregory as the appropriate standard for evaluating the admissibility of evidence of third party guilt. See also Chambers v. Mississippi, 410 U.S. 284, 294-303, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)

purpose.

198 S.C. at 104–05, 16 S.E.2d at 534–35. Accord, Lorenzen v. State, 376 S.C. 521, 532, 657 S.E.2d 771, 778 (2008).²²

The trial judge did not abuse his discretion in this matter. See United States v. Moore, 27 F.3d 969, 974 (4th Cir.1994) (reviewing for abuse of discretion a district court's ruling on the admissibility of evidence under the Federal Rules of Evidence). His basis for sustaining defense counsel Greeley's motion for exclusion was that the proffered evidence was deficient because there was no testimony as to “time, place or other circumstances.” This was a Rule 403 assessment in its exclusion. The co-defendant’s objection to the testimony was based upon the assertion that the lack of specificity in the comments could be related or infer other actions by Sanders unrelated to the Cope case. As with any Rule 403 assessment they are extremely fact based and unique to the individual case. It is evident that the alleged comments in 2002 do not necessarily relate to the Cope case because the declarant neglected to identify the "little girl" and only that he had raped a little girl in Rock Hill. The declarant did not state when the rape

²² The Fourth Circuit has addressed the admission of such evidence similarly. U.S. v. Lighty, 616 F.3d 321, 358 (4th Cir. 2010). When determining whether evidence of an alternative perpetrator should be admitted at trial, courts have found that such evidence “is relevant, but there must be evidence” of a “connection between the other perpetrators and the crime, not mere speculation on the part of the defendant.” DiBenedetto v. Hall, 272 F.3d 1, 8 (1st Cir.2001); see also United States v. Jordan, 485 F.3d 1214, 1219 (10th Cir.2007) (holding that there must be a nexus between the crime charged and the alleged alternative perpetrator). Alternative perpetrator cases thus balance two evidentiary values: the admission of relevant evidence probative of defendant's guilt or innocence under Rule 401 with the exclusion of prejudicial, misleading, and confusing evidence under Rule 403. Jordan, 485 F.3d at 1218.

occurred or that he was even charged with the same crime at the time. Simply put, the evidence that he raped a little girl in Rock Hill and left through a window that he entered is insufficient to have mandated admission of the evidence.

The Court of Appeals later summary reliance upon the lack of “substantial evidence” to show that the declarant was guilty for the crime for which Cope was accused or the requirement of sufficient indicia of the trustworthiness of the statements addresses the trial court’s discretion in the admission of the evidence. While Petitioner correctly points out that there is no rule of law in South Carolina that limits admission of incriminating statements to highly detailed, the issue here was more related to the unique confusion in the admission related to Sanders other actions and the fact that the State was asserting that Sanders was jointly involved in the killing. It is noted that Sanders alleged statement, like those of Cope, did not include any additional perpetrator. Thus, the particular confusion and misleading potential from the proffer that Sanders feared and the lower court deemed possible by the lack of time, place and other circumstances was powerfully present. The potential for it to be misleading supports the exclusion under the trial judge’s discretion.

Third party guilt evidence theory, after Holmes v. S.C., 126 S.Ct. 1727 (2006), requires that the evidence offered by an accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence. However, evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941). Judge Hayes, in his discretion, concluded that this comment related

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

Rule 804(b)(3) Issue.

In his brief on appeal, Cope raised for the first time that the evidence from Hill was admissible under 804(b)(3). As stated earlier, this failure to assert the issue as a claim for admissibility precludes its consideration on appeal. See, . See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); See State v. McKnight, 352 S.C. 635, 646–47, 576 S.E.2d 168, 174 (2003) (issue must be raised to and ruled upon by trial court to be preserved for review). His sole basis for arguing for admission was relevance. For this reason, the Rule 804(b)(3) issue is not properly before this Court.

Assuming arguendo that the issue is properly before this Court and the trial court did not reject the claim under a Rule 403 assessment, the evidence is still not admissible because it failed to satisfy the requirements for admissibility of Rule 803(b)(3). Cope attempts to flip the burden around by asserting the neither the state nor Sanders defense at trial made a hearsay objection.²³ He is correct, yet he now attempts to use Rule 803(b)(3) for the first time as a rule of inclusion, unlike he did at trial. He broadly claims that he met all three criteria. A view of the record shows that his current assessment is in error.

Rule 804(b)(3) provides:

²³The state never objected to the evidence. Defense counsel for Sanders objected in the midst of the proffer by Cope. As stated above, the Petitioner never argued a Rule 804(b)(3) issue below so the trial judge never addressed the issues that current counsel attempt to articulate.

- (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Nontestimonial statements against the interest of the declarant at the time when made are admissible as an exception to the hearsay rule if the declarant is unavailable and the circumstances show that a reasonable person would not have made the statement unless believing it to be true. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The declaration against penal interest exception has been applied to the determination of whether a third party committed the crime charged instead of the defendant in a criminal case. See State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992). An abuse of discretion standard is applied to a trial judge's ruling on the issue of whether a statement is admissible as a declaration against penal interest. State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996). A defendant seeking to offer a hearsay statement against interest bears the formidable burden of establishing that corroborating circumstances clearly indicate the trustworthiness of the statement. State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001). Exculpatory evidence that is not corroborated with other evidence that clearly shows its trustworthiness is excluded. Forney, 321 S.C. at 359–60, 468 S.E.2d at 645; State v. McKnight, 321 S.C. 230, 467 S.E.2d 919 (1996). Whether a statement has been sufficiently corroborated is a question left to the discretion of the trial judge after considering the totality of the circumstances under which a declaration against penal interest was made. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v.

Kinloch, 338 S.C. 385, 526 S.E.2d 705 (2000).

Rule 804(b)(3) does not require that the information within the statement be clearly corroborated, it means only that there be corroborating circumstances which clearly indicate the trustworthiness of the statement itself, i.e., that the statement was actually made. State v. Kinloch, 338 S.C. 385 at 389, 526 S.E.2d 705 at 707 (2000). The corroboration requirement “goes not to the truth of the statement's contents, but rather to the making of the statement.” McDonald, 343 S.C. at 323, 540 S.E.2d at 466. The corroboration requirement is a preliminary determination as to the statement's admissibility, not an ultimate determination about the statement's truth. Kinloch, 338 S.C. at 389, 526 S.E.2d at 707. Accord United States v. Salvador, 820 F.2d at 561 (inference of trustworthiness from proffered corroborating circumstances must be strong, not merely allowable, not an insignificant hurdle); United States v. MacDonald, supra (notwithstanding defendant was able to point to a number of corroborating circumstances, he did not demonstrate, finally, that declaration was trustworthy); see also Mueller and Kirkpatrick, Modern Evidence § 8.64 at p. 1393 (1995) (suggesting corroboration requirement may be partly satisfied by additional proof statement was made but that doubts on this score can undercut other corroborative circumstances). Collins, Danny R., South Carolina Evidence 2nd Edition (2000), p. 556-558, citing U.S. v. Lowe, 65 F.3d 1137 (4th Cir. 1995).

The Requirements for Admission under Rule 804(b)(3) were not satisfied.

The Petitioner contends that the requirements of Rule 803(b)(3) were satisfied. However, he had failed in his assessment. In his brief, he first contends that the first prong that the proffered statements were made by an unavailable declarant was satisfied. He contends that Sanders had invoked his right to silence when he declined to testify at his trial and was therefore

unavailable. Brief of Petitioner, p. 51, para. 1. However, Cope never attempted to call Sanders as a witness concerning this particular statement and co-defendant Sanders never refused to testify upon call of the defense. More importantly, Mr. Sanders had not yet invoked any decision not to testify at the time Mr. Cope presented his case. Particularly at the time that James Hill's proffer was made [ROA 3425-3432] Sanders had not yet waived his right to testify. See ROA 2322-2325, 3434.

In State v. Terry, 339 S.C. 352, 355–57, 529 S.E.2d 274, 276–77 (2000), the Supreme Court held that a defendant who elected not to testify in accordance with his Fifth Amendment privilege against self-incrimination was not “unavailable” within the meaning of Rule 804(b)(3), SCRE. Although Rule 804(a)(1), SCRE, defines an “unavailable” witness to include situations in which the declarant is exempted from testifying concerning the subject matter of the declarant's statement by a ruling of the trial judge on the ground of privilege, Cope never asked the trial judge to resolve this issue of “unavailability” at the time the testimony was proffered because he never claimed it was admissible under Rule 804(b)(3).

The Petitioner's reliance on State v. Doctor, 306 S.C. 527, 529, 413 S.E.2d 36, 38 (1982) on the issue of unavailability is misplaced. As the court noted there, the minors asserted their privilege of self-incrimination. Here, there was no affirmative assertion of any privilege at or before the testimony was proffered. The trial judge never made any ruling that Sanders was unavailable at the time of the proffer.²⁴ As has been stated, a ruling by a trial judge is required ,

²⁴ (a) Definition of Unavailability. ‘Unavailability as a witness’ includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement ...”

Rule 804(a)(1), SCRE. The importance is the “ruling” of the trial court that the ground of

which clearly implies that an actual assertion of privilege has been made. U.S. v. MacCloskey, 682 F.2d 468 (4th Cir. 1982) (“the law is clear that a witness is unavailable under Rule 804(a)(1) when he invokes the Fifth Amendment privilege and the claim is sustained by the trial court”). The Federal Rule of Evidence defining unavailability for purpose of certain hearsay exceptions requires that court first rule declarant exempt from testifying on ground of privilege. *Id.* Here, there was no ruling and no assertion of privilege at the time.

Respondent does not question that the alleged statement proffered through Hill, if true, would expose Sanders to criminal liability under the second prong.

It is the third prong of the Rule 804(b)(3) test that the Petitioner likely fails also. In that prong, “[a] statement . . . is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” Rule 804(b)(3), SCRE.²⁵ Cope contends that he satisfied this burden based upon his claim asserted for the first time in the appeal that Hill did not receive any reward for his testimony, had no motive to testify against Sanders and claimed fear from retaliation from Sanders. Brief of Petitioner, p. 51-52. He also claims the “truthfulness” of his statements is shown by the presence of Sanders semen on Amanda’s clothing and saliva on her body. *Id.* Yet Cope must admit that there was no evidence corroborating his claimed entry

privilege was made. Here, there was no ruling - thus no showing under the rule of “unavailability.” Accord State v. Rivas 49 Wash.App. 677, 687, 746 P.2d 312, 318 (Wash.App.,1987), cited with authority in Doctor.

²⁵ See case cited in Annotation, *When do corroborating circumstances clearly indicate trustworthiness of hearsay statement tending to expose declarant to criminal liability and offered to exculpate accused, so as to permit admission of statement under Rule 804(b)(3) of Federal Rules of Evidence (Fed. Rules Evid., 28 U.S.C.A.)*, 125 A.L.R. Fed. 477 (1995) as supplemented (2012).

through a window or other factors forcefully set out in the harmless error section of this portion of the brief which is incorporated herein by reference.

South Carolina has not established a protocol for considering the corroboration and trustworthiness issues related to Rule 804(b)(3) other than considering the totality of the circumstances, recognizing that this preliminary determination is not about the ultimate determination of the statements truth, but whether the statement was actually made. However, in looking at this issue, other courts have developed some guides for addressing the concerns of the rule. In Lowe, the Fourth Circuit concluded to assess the corroborating circumstances of a given statement, a court looks to:

- (1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement,
- (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie,
- (3) whether the declarant repeated the statement and did so consistently,
- (4) the party or parties to whom the statement was made,
- (5) the relationship of the declarant with the accused, and
- (6) the nature and strength of independent evidence relevant to the conduct in question.

Id., at 1146.²⁶

²⁶ In Chambers v. Mississippi, 410 U.S. 284, 300, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) the Supreme Court held that to exclude powerfully exculpatory hearsay statements which have substantial assurances of trustworthiness violated the defendant's right to present evidence in his own defense. In describing the trustworthiness of the evidence, the Court explicitly referred to extrinsic corroboration:

The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case— McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and

Working from the premise that Cope has a formidable burden in establishing the corroborating circumstances, Respondent submits that Judge Hayes did not abuse his discretion in refusing to admit the Hill statement if it is analyzed under a Rule 803(b)(3) standard. The important part of the sentence of Rule 804(b)(3) concerns how and where the statement was made. Here, it was a remark overheard by Hill who was not a participant in the conversation in the jail. In fact, Hill could not accurately identify who he claims Sanders may have been talking to. It is with these initial circumstances that the trustworthiness of the statement comes initially into question. The circumstances therefore do not indicate the trustworthiness of the statement. The relationship between Sanders and the unknown person who it is claimed he was speaking with was never developed and does not indicate whether he was speaking to a close acquaintance or otherwise.

Further, the claim that Sanders was proven to be involved in the particular crime involving Child A did not mandate its admission.²⁷ The corroborating circumstances still must be

proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. ...

Chambers thus supports the argument that to *foreclose* a criminal defendant from using extrinsic corroboration to demonstrate the trustworthiness of exculpatory evidence would violate his or her rights to due process, to present evidence, and to a fair trial. Ironically, these statements would not be admissible as substantive evidence per Fed. R. Evid. 804(b)(3), because McDonald, the declarant in Chambers, was available, was called as a defense witness, and denied he had shot the officer and testified that he had been pressured by defense attorneys into giving the sworn statement. McDonald's other statements presumably would be admissible, however, as prior inconsistent statements to impeach the declarant under Fed. R. Evid. 613. (Mississippi law precluded use of some of the statements because that state adhered at the time to the common law "voucher" rule which precluded impeaching one's own witness.).

²⁷ Defendant sought to admit a co-defendant's guilty plea allocution in which, according to the defendant, the co-defendant shouldered all of the blame. The Fifth Circuit concluded that

shown. In State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996) , the Court concluded that while declarant repeated to several different people that he (not defendant) shot a police officer this did not satisfy the exception where there was no other evidence corroborating the statement and at least one witness testified that declarant denied having committed the crime. Here, it is the manner that the crime was committed which was at issue, not whether Sanders committed the crime. The manner of the crime was the claim that Petitioner was seeking to present.

Further, there was no evidence presented to corroborate that entry was gained through any window and no evidence was presented concerning Sanders “proceeding to another home” that night. In addition there was no evidence of “smothering.” When assessing the corroborating circumstances of a statement, a court can make an assessment of the evidence. *Id.* at 1146 (“Even though the assessment of such evidence is the responsibility of the jury in determining the defendant's guilt, such evidence may also be considered by the court when ruling on the trustworthiness of hearsay, an evidentiary question which is committed to the court for decision.”).²⁸

While the declarant (Sanders) was still exposed to culpability at the time, there is no

because the defendant did not present any evidence that would corroborate his co-defendant's statement it was not an abuse of discretion for the trial judge to have determined the statement was untrustworthy. U.S. v. Vega, 221 F.3d 789, 803–804, (5th Cir. 2000).

²⁸However, statements inculcating the declarant and exculpating the defendant are inherently suspect. See United States v. Silverstein, 732 F.2d 1338, 1346 (7th Cir.1984). There is no clear theory as to what Church's motive was in making these statements, and whether he had reason to lie. As noted by the Sixth Circuit, “ ‘Persons will lie despite the consequences to themselves to exculpate those they love or fear, to inculcate those they love or fear, or because they are congenital liars.’ ” United States v. Noel, 938 F.2d 685, 689 (6th Cir.1991) (quoting Weinstein's Evidence, vol. 4 at § 804(b)(3)[01] (1990)).

showing that the declarant ever repeated the statement nor made a similar statement.²⁹ It was allegedly said in a manner of bragging, potentially about a crime that Sanders was ultimately convicted of (or others). Interestingly, it is the fact that the statement was made to an unknown party - not Hill - and only overheard by Hill which brings the trustworthiness of the statement being said into its strongest question and lack of corroboration. Where is the person that Hill claims Sanders actually spoke with about the incident? Hill never heard the statement again, never repeated the statement to any law enforcement person contemporaneously to the event or later (ROA 3432), and allegedly only claimed that he repeated the statement to Petitioner Billy Wayne Cope whom he admittedly had befriended by 2003. ROA 3430-31. See State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001)(allows exclusion where potential witness was a friend and roommate of defendant). Thus, Hill had a motive to make up the story about Sanders' statement. In Hill's testimony, other than describing Sanders' raspy voice, he makes no claim to ever having spoken with him directly while in the segregation unit. ROA 3431

The requirement of corroborating circumstances was designed to protect against the possibility that a statement would be fabricated to exculpate the accused. It is precisely these concerns which caused the Advisory Committee explained the requirement of corroborating circumstances as follows:

[O]ne senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant.

²⁹Minor contradictions in his story and failure to repeat the same set of facts undermine the declarant's credibility. See, e.g., Noel, 938 F.2d at 688, United States v. Bagley, 537 F.2d 162, 168 (5th Cir.1976).

F.R.Evid. 804(b)(3), Advisory Committee Notes. U.S. v. Lowe 65 F.3d 1137, 1145 -1146.

Respondent urges that its argument in support of the exclusion of the evidence is not based upon the strength of the government's evidence against Cope. Such an assessment would be in violation of the mandates of Holmes v. South Carolina, supra. Rather it is the question of corroboration and trustworthiness under Rule 804(b)(3) for the admission of the evidence that should be the basis for exclusion.

"It is clearly established federal law, as determined by the Supreme Court, that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation." Chambers, 410 U.S. at 302). However, "Chambers ... does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state ... rule excludes favorable evidence." United States v. Sheffer, 523 U.S. 303, 316, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). "While the Constitution ... prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Holmes v. South Carolina, 547 U.S. at 320 (citations omitted).

To determine whether the exclusion of evidence violated the Constitution, the Court considers: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense. The Court must give "due weight to the substantial state interest in preserving orderly

trials, in judicial efficiency, and in excluding unreliable evidence.” Even if the exclusion of evidence amounts to constitutional error, the erroneous exclusion of evidence must have a “substantial and injurious effect” upon the verdict in order to justify relief. See Brecht v. Abrahamson, 507 U.S. 619, 637–39, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); see also Bains v. Cambra, 204 F.3d 964, 976–78 (9th Cir.), cert. denied, 531 U.S. 1037, 121 S.Ct. 627, 148 L.Ed.2d 536 (2000) (Brecht standard applies to federal habeas review of all trial-type errors, regardless of the standard applied in state court). Cf. O'Brien v. Marshall, 453 F.3d 13, 19-20 (1st Cir.2006) (no constitutional violation where defendant's evidence that someone else committed the crime was restricted based on traditional hearsay rules); DiBenedetto v. Hall, 272 F.3d 1, 7-9 (1st Cir.2001) (no constitutional violation where defendant's evidence that others had motive in mob killing and that key government witness was lying to regain favor with mob faction was excluded because it was unreliable and tangential).

However, even if appellant had preserved this constitutional argument for appellate review by a timely assertion at trial when the evidence was proffered and excluded, it is without merit. In Holmes, the Court held that while state and federal rulemakers have broad constitutional latitude to establish rules excluding evidence from criminal trials, the Constitution limits that power by guaranteeing criminal defendants a meaningful opportunity to present a complete defense. 547 U.S. at 324.³⁰ However, there is no constitutional right for a defendant to

³⁰ The Constitution does not prevent trial judges from applying rules of evidence to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). In that case, although the issue was not directly challenged by the parties, the Supreme Court cited with approval 40A Am.Jur.2d, Homicide Section 286, at 136–138 (1999): “[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is

present all favorable evidence. United States v. Scheffer, 523 U.S. 303, 316, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)). Holmes prohibits excluding defense evidence under evidentiary rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve. Holmes, 547 U.S. at 324. "Arbitrary" rules are those that exclude important defense evidence but do not serve any legitimate interests. *Id.* at 325. A rule ensuring that only reliable evidence is presented at trial serves a legitimate interest and does not unconstitutionally abridge the right to present a defense. See United States v. Scheffer, 523 U.S. 303, 309, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). Thus, in Holmes the Court found unconstitutional a South Carolina rule that excluded alternative suspect evidence solely if the trial court concluded that the state had submitted strong evidence, including forensic evidence, of the defendant's guilt. See *id.* at 328-31, 126 S.Ct. 1727. The rule gave no consideration to the probative value of the defendant's alternative suspect evidence. See *id.* at 329, 126 S.Ct. 1727. Here, the probative value or lack of it was the basis of Judge Hayes exclusion of the evidence under the hearsay ruling.

A meaningful opportunity to present a complete defense is not offended by the exclusion of "evidence that is repetitive, only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues." *Id.* at 326-27, 126 S.Ct. 1727 (alterations omitted) (quotation marks omitted). Indeed, in Holmes the Court recognized that " 'well-established rules of evidence [that] permit trial judges to exclude evidence if its probative value is outweighed by

charged.... [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." *Id.* at 327 (footnotes omitted).

certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury' do not normally breach defendants' constitutional rights," and that "one such 'well-established rule' [is] the rule that a court may exclude a defendant's evidence proffered to show that someone else committed the crime in question if that evidence is too speculative, remote, or immaterial." United States v. DeCologero, 530 F.3d 36, 73 (1st Cir.2008) (citing and quoting Holmes, 547 U.S. at 326, 327, 330, 126 S.Ct. 1727); see Holmes, 547 U.S. at 330, 126 S.Ct. 1727. Thus, the Constitution does not prevent a court from reasonably regulating the admission of alternative suspect evidence so long as it serves a legitimate purpose, such as the goal of focusing "the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." Holmes, 547 U.S. at 330, 126 S.Ct. 1727.

For the reasons stated above, the application of Rule 803(b)(3) would not violate the federal constitutional right to present a defense in this circumstance where the conditions had not been met. Further, the rejection for confusion due to a lack of an adequate proffer as to "time, place and circumstances would not violate the constitution where its exclusion was based upon a minimal probative value contrasted against the undue prejudice. His belated assertions are without merit.

The Exclusion of the Particular Evidence Was Harmless Error.

Alternately, assuming the evidence was admissible under Holmes and Gregory, the exclusion of the evidence was harmless error. Simply put, there was no evidence of entry through a window, no evidence of smothering, no evidence of penile penetration of either the vaginal or anal areas, and no evidence that Sanders then went to another house. There was evidence of staging, evidence that Cope claimed his daughter had inadvertently strangled herself with a

blanket was medically wrong, evidence of Cope's masturbation at the time of the incident, evidence consistent with Cope's re-enactment as to how Child A died, evidence of Sanders DNA on her pants that were placed back on her. The failure to admit this questionable and potentially fabricated evidence does not require a new trial.

First, assuming this was state evidentiary law error, as set out below, Cope has failed in his burden to show the alleged evidentiary error was harmful or had "probable prejudice." The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a "manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); State v. Commander, 396 S.C. 254, 262-263, 721 S.E.2d 413, 417 - 418 (2011). This burden to show such prejudice rests upon Cope and he has failed to show how this particular evidence would have favorably affected the result. Stated another way, reversal is not required unless it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. As set forth below, in light of this record, "probable prejudice" cannot be shown."

Even if considered as "constitutional error" an examination of the record in this case reveals that any alleged error in excluding Petitioner's third-party-guilt evidence, if it was error at all, was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). As the Court stated in Rose v. Clark, 478 U.S. 570, 579 (1986), a judgment of conviction should be affirmed "[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt."

In Chapman, the Supreme Court rejected the notion that all constitutional errors at trial

necessitated automatic reversal. The Court also held that constitutional errors should be measured against a higher level of scrutiny than non-constitutional errors. Chapman, 386 U.S. at 23, 87 S.Ct. 824. Recognizing that non-constitutional errors can be treated as harmless if there is no "reasonable possibility that the evidence complained of might have contributed to the conviction," the Court in Chapman announced that constitutional errors are harmless only if the reviewing court is "able to declare a belief that [the error] was harmless beyond a reasonable doubt." Id. (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). Beginning with Chapman and continuing in a line of decisions thereafter, the Supreme Court has formulated a two-part analysis for assessing the import of constitutional errors committed by trial courts. Under the first facet of the Chapman test, the reviewing court determines whether the error is in a class of violations subject to the harmless error rule ("trial errors") or, instead, is within a rather narrow category of errors that require automatic reversal ("structural errors"). Arizona v. Fulminante, 499 U.S. 279 (1991). Structural errors "affect 'the entire conduct of the trial from beginning to end, such that any attempt by a reviewing court to isolate the impact of the error would be fruitless.' Because a 'trial error' occurs during the presentation of the case to the jury, the error 'may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'"

The exclusion of the proposed evidence of third party guilt was harmless beyond a reasonable doubt. It cannot be ignored that Sanders was convicted by this jury of both murder and criminal sexual conduct, as well as the conspiracy with Cope. Chapman v. California, 386 U.S. 18, 24 (1967). There was a plethora of evidence that Cope was involved in the death of his daughter. As noted - though challenged - Cope's personal statements of guilt and the

re-enactment of the murder and assault with an object support the harmless error assessment.

Although not a predicate to the admissibility of the Hill statement under Holmes, in a harmless error analysis, the proffer conflicts with and is contradicted by the other evidence at trial where the alleged comment by Sanders that he "f--- her" was inconsistent with the lack of semen in her body and the claimed alleged entry and exit from the Cope home suggested by the comment as being through the window was inconsistent with the physical makeup of the Cope home (where the windows were secured in some fashion by either screens, plastic or being nailed down and where the windows were dirty, sooty and with spider webs that would have been obvious if anyone had climbed in or out). In fact, the evidence revealed that there was no sign of wiping smudging or anything to suggest that anything had entered through any window. See, R. 988-89, 1236-38.

Although the Hill-Sanders statement did not indicate any involvement by another person in Sanders' acts, that fact alone does not undermine the powerful evidence which suggests the lack of harmful error by its exclusion. Further, the fact that Hill admitted that when Sanders told him, "I didn't think nothing of it" and later that Hill later befriended Cope at prison and revealed it to him (and apparently no one else), makes Hill's credibility in serious question which further limits the probative impact by the lack of presentation of this evidence in a harmless error test. The conviction must be affirmed.

The assumption that Sanders' alleged statement to an unknown person, which was allegedly overheard by James Hill, has anything to do with the rape and murder of Child A is speculation. In fact, a close look at Mr. Hill's testimony shows that most of the alleged statement contradicts the facts in this case.

Nowhere in Mr. Hill's testimony does he allege that Sanders said he actually killed the child. Hill simply said, "He (Sanders) made remarks of, I believe, he said smothering the child." "Smothering" simply indicates the covering of the airway for some period of time. In rape cases, sadly, it is not unusual for the assailant to cover the nose and mouth of a victim for some period of time during the crime. This is often accomplished with a hand, a pillow or other object. Its purpose may be to prevent the victim from screaming and/or identifying the perpetrator. It is not always fatal. Here Mr. Hill did not testify that Sanders smothered her to death. A further indication that the term "smothering" used by Mr. Hill was not fatal is the fact that right after Hill allegedly heard Sanders describe the crime, Hill said, "at the time I didn't think nothing of it." In addition, the evidence presented during the trial indicates Amanda Cope was strangled to death not smothered.

Mr. Hill's claim that Sanders said he entered and exited through a window was also strongly contradicted by the evidence produced at trial. It was completely inconsistent with the Cope home where the windows were secured in some fashion by either screens, plastic or being nailed down and where the windows were dirty, sooty and with spider webs that would have been obvious if anyone climbed in or out. In fact, the evidence revealed that there was no sign of wiping, smudging or anything to suggest that anything had entered through any window including no sign of disturbed leaves or debris on the ground outside each window. (State's Exhibits 40 - 52B , 68 - 79, 83.1 and 103; [Testimony of Jerry Waldrop and Todd Gardner] ROA 1237-38, 1532-1580, 1589). None of the windows showed any sign of forced entry at all. Each was inspected including the ground beneath them and the dirt, leaves and cobwebs on and below each of them showed no sign of recent disturbance. (ROA 1580, l. 4)

The heart of Mr. Hill's testimony claims that Sanders "made remarks about oral and anal sodomy." Hill testified Sanders specifically said, "he f ____d her." This is completely inconsistent with the lack of semen or saliva in her vaginal or anal areas. It should also be noted that neither the charges against Sanders nor the evidence produced at trial alleged or indicated oral sex. Sanders' semen was only found on the exterior of Child A's pants which were placed back on Child A after the sexual assault. However, Cope's semen was found in a rag on the floor just outside Child A's bedroom under a bookshelf where Cope told police he threw it. (It was during Cope's final interview where he admitted that on the night of the murder he masturbated into a wash rag while in Child A's room and placed the wash rag under a bookshelf just outside Child A's room where the police ultimately recovered it). (ROA 1809, 1810). The police did not know about this rag until after Cope confessed. It should also be noted that Dr. Maynard, the pathologist who performed the autopsy, testified that the severe injuries to Child A's vagina and anal cavity were produced by a hard foreign object and not a penis. ROA 1116-17.

Not only does Hill's testimony regarding Sanders' alleged statement contradict the facts of this case, it fails to address any key circumstances surrounding the case. Hill's testimony does not identify the particular victim, the time frame of the assault, the fact that the victim was murdered, or whether Sanders was charged or uncharged at the time of the statement. Hill never testified whether Sanders committed these acts alone or with someone else. At the time Sanders is alleged to have made these statements, Cope had already been incarcerated on these charges for about one year, yet Hill never testified that Sanders said someone else was charged. Hill never testified that Sanders said anything about the brutality of the attack. Finally, Hill never

claims that Sanders said anything about staging the crime scene after the rape. There is no mention by Hill that the edging from the blanket was wrapped around the child's neck, that her clothing was placed back on her, or that her private areas were cleaned up after the attack.

The credibility of James Hill is also very questionable. This type of "snitch" testimony is often examined with scrutiny by the court . James Hill is a convicted felon who claimed at the time of his testimony that he had served 2 years of an 18 year sentence for "burglary second". It should be noted that burglary second carries a maximum penalty of 15 year. Obviously, Hill is serving 18 years for more than just "burglary second". His sworn testimony begins with deceit. It should also be noted that the same solicitor's office that was trying Cope and Sanders prosecuted Hill which resulted in his 18 year sentence. Hill was in his cell in segregation when he claims to have heard a conversation between Sanders and another inmate in which they were "joking" about how they could get away with crimes. While Hill claims to remember Sanders and his part of the conversation, Hill cannot remember the other person involved in the conversation with Sanders and provides none of the information provided by the unknown person. When asked to identify the other person, Hill could only say, "I believe it was Holly, but I'm not sure." By forgetting the other party to the conversation, Hill conveniently prevents anyone from corroborating his claim. Add that to the fact he never reported any of this to the police or the prosecutors prior to his testimony at trial and Hill's credibility must be questioned. Hill's testimony simply provided Hill with a brief escape from the monotony of his 18 year sentence and a chance to thumb his nose at the police and the prosecution in his home county.

The trial judge correctly withheld the testimony of James Hill. The description James Hill gave of Sanders' alleged out of court statements conflicts with the facts of this case much

more than they resemble them. The only resemblance is that a young girl was sexually assaulted in Rock Hill. All other factors are either different or conflict with facts in evidence. It is mere conjecture to associate Sanders' alleged highly undetailed statements with this case. Hill's testimony is irrelevant. It does not provide any identifying characteristics or any specification as to the time, place, or other circumstance of the crime. Hill's testimony regarding Sanders' statement does not satisfy the hearsay exception regarding statements against penal interest (Rule 804 (b) (3), SCRE). Sanders' alleged statement cannot expose him to any criminal liability because it does not provide enough information to be linked to any specific crime especially this one. Additionally, there are no corroborating circumstances that clearly indicate the trustworthiness of the statement. Hill is a convicted felon who began his testimony in a deceitful manner and provided a statement devoid of any real detail.

The exclusion of Hill's testimony did not violate Cope's federal due process right to present a full defense. Cope presented numerous witnesses including several expert witnesses during the trial. Hill's testimony regarding Sanders' alleged statement is vague at best. Since there is no solid link between the alleged statement and the crime at hand it would be improper to admit Hill's testimony.

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

The trial court and court of appeals properly found no reversible error in the limited exclusion of two claimed anecdotal examples by Dr. Saul Kassin, a social psychologist, involving the confessions of Peter Reilly and Gary Gauger as specific examples of “coerced internalized false confessions.” The trial court properly used its discretion in excluding these anecdotal interpretations of the confessions in the Gauger and Reilly cases. In denying relief, the Court of Appeals addressed this issue as follows:

Dr. Kassin proffered testimony about Peter Reilly, who falsely confessed to murdering and sexually assaulting his mother, and Gary Gauger, who falsely confessed to murdering his parents. In both of these cases, the defendants denied involvement, were administered polygraphs and told they failed, believed they must have somehow committed the crimes, and confessed. The trial court refused to allow Dr. Kassin to testify regarding specific cases of false confession unless they were “on all fours” with this case and ultimately refused to allow the testimony. The trial court in this case conscientiously considered the proffered anecdotal evidence before excluding this testimony. The theories underlying the study of coerced internalized false confessions were exhaustively presented to the jury. Dr. Kassin explained the techniques used by interrogators that can lead to false confessions and informed the jury that there were “innumerable actual cases” of coerced internalized false confessions. Therefore, we find the exclusion of the testimony regarding the specific details of the Reilly and Gauger cases does not constitute reversible error.

State v. Cope, supra., at 289-290. App.p. 58-59.

The Appellant complains that the trial judge abused his discretion by prohibiting Dr. Saul Kassin, a social psychologist, to include in his opinion testimony concerning the factors involved in the phenomena “false confessions” to include two (2) anecdotal cases involving the

confessions of Peter Reilly and Gary Gauger as specific examples of “coerced internalized false confessions.”³¹ Solicitor Brackett stated that in the proffer that Dr. Kassin mentioned two cases Gary Geiger and the Riley case and stated he could make the point he made without referencing the facts and circumstances. R. 2491-92; 9/16/04 Tr.p. 209, l. 25 - p. 210, l. 10. The trial court agreed and stated: “I’ll have him leave those cases out too.” R. 2492; 9/16/04 Tr.p. 210, ll. 7-8.

³¹ During a proffer, Dr. Kassin stated in support of his proposition about psychological research on making a person think he was involved in something that he was not involved in:

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

There was another and I’ll just give one more case because it was a very close resemblance to this one, of a 41-year-old man by the name of Gary Geiger of Illinois who comes home to find his parents had been slaughtered and he calls 911. He is then brought in for interrogation. He is administered a polygraph. After extensive interrogation he’s told that he failed the polygraph. At which point he starts to conclude that I must have done it and I blacked out. Ultimately he confesses to bringing, to coming up from behind his parents, yanking their heads back by the hair, and slitting their throat. It turns out that the surveillance tape later picked up a motorcycle gang in which one of the members was bragging about this particular murder in detail and knew all about it and so he was again exonerated but there was a case where he questioned his own memory. And when, what’s puzzling about these cases is when he even leaving the situation of the interrogation room and speaks for example to a lawyer, the lawyer says, what happened. He says, well, I don’t know. I think I may have done this. They are just not sure. Their memory has been impaired in this way. Yes.

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

He contends that the failure to admit these examples, which were “similar,” was an abuse of discretion because “it prevented him from offering a plausible explanation to the jury not only why he was influenced to confess to a murder he did not commit but why he confessed to perhaps the most heinous crime imaginable.” Brief of Petitioner, p. 64. Contrary to the assertion within the brief, although expressly precluded from presenting his interpretation of the anecdotal examples of Gauger and Reilly, the defense was not “prevented” from offering a plausible explanation as to why he was influenced to confess to the murder by the expert witness. Contrary to the assertions in the brief, the exclusion of these two anecdotal “real life” examples, did not leave Cope “powerless” to respond to the State’s claim concerning the confession.

Assuming arguendo that the trial judge, over the State’s objection, properly admitted the expert testimony on false confessions, the excluded anecdotal examples were inadmissible. First, even if relevant, any probative value of the hearsay examples may have been greatly outweighed by its prejudicial impact because (1) the excluded testimony about Reilly and Gauger would have averted the jury’s attention from its focus on both the voluntariness and credibility of Cope’s confessions; (2) the introduction of Gauger and Reilly’s confessions would have opened the door to collateral evidence for the jury to determine whether either the Gauger or Reilly confessions were actually “false”, and; most importantly (3) Dr. Kassin was able to testify about the factors concerning “false confessions”, including general examples of “coerced internalized false confessions” without the specific examples. The trial court properly used its discretion in excluding these anecdotal interpretations of the confessions in the Gauger and Reilly cases.

STANDARD OF REVIEW

Rule 702, SCRE, allows the testimony of an expert witness qualified by knowledge,

experience, skill, training, or education to assist the jury to understand the evidence or determine an issue. Even if evidence is admissible under Rule 702, however, it may be excluded under Rule 403, SCRE, if it's probative value is outweighed by its prejudicial effect. State v. McHoney, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001). The trial court's decision to exclude expert testimony will not be reversed on appeal absent an abuse of discretion. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006); State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law or on a factual conclusion that is without evidentiary support. State v. Price, *supra*. In light of the adoption of the SCRE, the Supreme Court has held that the admission of expert testimony should be analyzed pursuant to Rules 702 and 402, SCRE and the factors outlined in State v. Jones, 273 S.C. 723, \

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

It cannot be disputed that the Petitioner contends the evidence set out in the proffer about the Peter Reilly case and Gary Gauger case are being sought to be admitted for "the truth of the matters asserted."³² Since Dr. Kassin asserts that those particular confessions were false, and

³²Respondents incorporate by reference its summary of the evidence and procedural history related to Dr. Kassin set out in the *Final Brief of Respondent*, p. 33-53.

Dr. Kassin before the jury testified about voluntary false confessions and coerced compliant confessions. R. 2492-96; 9/16/04 Tr. 210-14.

Dr. Kassin then referred to "coerced internalized false confessions" as existing in a number of cases in 1985 where innocent people confessed believed they had actually committed the crime. He stated that the people were convicted and persuaded almost as brain washing. He stated this happens to people vulnerable to manipulation and "there are a lot of cases just like this." As before, he described those subject to vulnerability as coming from mental retardation, children or those highly suggestible. Also, he said it might be from a bad situation, sleep deprived, or isolation from family, particularly stressed. He said that there is a "predicable sequence" and at some point a vulnerable person is presented with false evidence and told there is objective evidence of their guilt. Since the person does not remember doing it, he has to reconcile the evidence with the lack of memory. "Almost like a script", because there are "lots

of cases that follow exactly the same pattern”, when confronted with the devastating evidence, the person entertains the idea that “I did this and didn’t realize it; could I do it and not know it; could I have blacked out” leading to the idea that they must have done it. R. 2496-98.

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

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

Some of these types of false confessions included statements of being in a “dream state” and lacking a direct memory or trying to sort it. However, Dr. Kassin stated when a lawyer enters the picture they say they confessed, but weren’t sure they did it because they trusted the information given as reliable when it was not. R. 2500-01; Id. p. 218-19.

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

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

Dr. Kassin then expounded on interrogation interview techniques commonly used to obtain confessions. He asserted that “we know” what interrogation looks like because of their knowledge of the training manuals, particularly Inbau and Reid. He described the various steps of the Reid technique. The initial interview is non-confrontational and non-accusatory and merely ask questions to observe behavior and see what the suspect knows and how they say it. This is done to determine whether he is telling the truth or lying. R. 2503-04; 9/16/04 Tr. 221-State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991)22. The questioning would include provocative baiting questions and the interrogator should look for clues such as fidgeting or eye contact.

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

Dr. Kassin stated that these reactions are not clear from research, but it is clear that

investigators are trained to use these techniques as diagnostic tools. This is similar to a person's willingness to waive their rights and talk because they expressed "they had nothing to hide." R. 2507-09; 9/16/04 Tr.p. 225, l. 24 - p. 227, l. 1.

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

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

The third step is minimization and create a situation where a confession may be viewed as desirable or self-serving. R. 2514; 9/16/04 Tr. 232. This may be done by suggesting accident, provocation or excuses to justify that it isn't a cold-blooded crime. Id.

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

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

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

Dr. Kassin recounted the advantages to recording the entire process. He noted, "in the wake of all the DNA exonerations" "containing false confessions which has astonished a number of researchers" due to the high number, a suggested reform was to video tape the whole process. He noted one study (Sullivan) had concluded that police found it to be beneficial to defeat frivolous claims that it was coerced when it was not. R. 2519-20; 9/16/04 Tr. 237-38.

Dr. Kassin stated in evaluating a case for research purposes, he found false confessions looked real in detail, motives, but were shown to be false by either the crime never happened,

seeks to testify about the particular circumstances surrounding the taking of those statements, and renders a conclusion of “innocence” suggested therein, his anecdotal testimony is plainly inadmissible as hearsay under SCORE, Rule 801. He has shown the existence of no exception to hearsay which would allow its admission. Further, inherent in his testimony, is the fact that Dr. Kassin was not the interrogator in either case. Since he did not have “personal knowledge” of those matters related to Geiger and Reilly, his testimony would be inadmissible under SCORE Rule 602.

2. The Hearsay Anecdotal Evidence is not Admissible Under Rule 702.

Respondents, assuming arguendo that false confession expert opinion evidence is admissible, assert that providing the specific examples of the Reilly and Gauger case presentation

which occurred in numbers of incidents, or a similar crime may lead to evidence they never had, like the murder weapon. R. 2521; 9/16/04 Tr.p. 239, ll. 4-15. Dr. Kassin reported DNA may be used to exonerate a person although the confession was filled with details “and there are a number of cases just like that”, which makes it worthy of case study. R. 2521-22; 9/16/04 Tr.p. 239, l. 19- p. 40, l. 4.

Concerning the inclusion of vivid details as to determining the likelihood of a false confession, Dr. Kassin stated the problem is where did the details come from. The entirety of the confession must be viewed. He pointed to “some cases” where very textured stories were given about the crime scene, but afterward learn that they were taken there or overheard conversations or read newspapers. Similarly, the suspect may have learned of the injuries from viewing the photographs. R. 2522-23; 9/16/04 Tr. 242-243. He opined that it was difficult to ask a question without conveying information. However, he noted that a factor in determining whether confession is good is to tell the police something they did not already know which is then corroborated. But he cautioned the source must be known. R. 2524-25; 9/16/04 Tr. 242-43.

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

Dr. Kassin stated he wished that there would have been a full recording of all that transpired instead of selected recordings. However, he described the interrogation techniques he had described used in Cope’s situation. R. 2527-28

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

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

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

First, as revealed by the laborious summary of Dr. Kassin's testimony set forth in the Final Brief of Respondents, pages 33-53, the hallmark of false confessions and particularly "coerced internalized false confessions" were exhaustively revealed to the jury. Where Dr. Kassin was not limited in generally describing his case studies without reference to particular case names, the tools of his expert opinion were sufficiently presented to the jury. In fact, the record reveals that these tools were specifically applied to Cope's situation where the jury was left to resolve the situation.

Contrary to the claim of Petitioner, the limitation did not "prevent him from a plausible

explanation” for why he had confessed allegedly falsely. The factors in coerced internalized confessions about the utilization of the Reid technique and factors of vulnerability, length of interrogation, fatigue, and the alleged presentation of the (disputed) false result of the polygraph were revealed within his opinion. Additionally, the mitigation of “vivid details” and inconsistent evidence was also revealed. It also cannot be argued the jury was unaware of the existence of DNA exonerations and similar non-specific anecdotal factors in rendering an assessment of this opinion.

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

Further, the Petitioner misreads State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004) to suggest that “similar” anecdotal cases are admissible. To the contrary, Myers specifically stated “although the Connecticut case was similar, the trial court did not abuse its discretion in excluding the information.” Like the situation in Myers, Dr. Kassin did testify about specific cases, but did not use names or where the false confessions were given. It was an additional alternative holding in Myers by the brief description of the Connecticut case which led to the “cumulative” harmless error conclusion. Accord, State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

Further, under the Rule 403 analysis, it is clear the evidence was properly excluded because the probative value of the anecdotal references was substantially outweighed by the

prejudicial effect. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). As noted before Judge Hayes, this information would have diverted the jury's attention away from determining the admissibility and reliability of Cope's statements and focus on whether the statements by Reilly and Gauger were false and whether Reilly and Gauger were actually innocent, in addition as to what techniques were used in those statements. It would have been incumbent upon the State to litigate those confessions and guilt and may have opened the door to the introduction of other similar crime confessions which were "true." These factors would further divert the jury's attention from its proper function. The judge did not abuse his discretion.

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

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

As an alternative ground, Respondents would submit the lower court erred in the admission of false confession expert testimony. Although this Court has held social science testimony is not required to fully meet the full rigors of expert scientific testimony of State v.

Jones, supra and Rule 702 in State v. Douglas, supra, Respondents submit that such testimony fails to satisfy those requirements. See State v. Free, 798 A.2d 83 (N.J. 2002)(Kassin testimony rejected under Frye standard); People v. Kogut, 806 N.Y.S.2d 366 (S.Ct. Nass. Co. 2005)(similar testimony limited where interrogation technique evidence excluded U.S. v. Adams, 271 F.3d 1236 (10th Cir. 2001)(not admissible); State v. Tellier, 526 A.2d 941 (Me. 1987) (same); State v. Ritt, 599 N.W.2d 802 (Minn. 1999); State v. Davis, 32 S.W.3d 603, 608 (Mo. Ct.App. 2000). Respondents note that similar testimony, though, has been deemed admissible in U.S. v. Hall, 974 F.Supp. 1198 (C.D. Ill. 1997); Miller v. State, 770 N.E.2d 763 (Ind. 2002); Boyer v. State, 825 So.2d 418 (Fla. 1st DCA 2002).

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

5. The Exclusion Did Not Prejudice Cope.

Even if the anecdotal cases were admissible, the exclusion did not prejudice Cope. In its conclusion, the Court of Appeals concluded that there was no reversible error. Although there may be special power to confessions, the jury was made aware of the existence of the phenomena of false confessions and the common traits of Cope's statement in the opinion of Dr. Kassin . Contrary to the assertions, the jury did not need to know that particularly Reilly or Geiger or

others had falsely confessed to killing a mother or parent, to assess how Cope could have confessed to killing his daughter if it was false. The tools of similarity were presented. The jurors were adequately given “case studies” to enable them to assess how a person could be influenced to confess falsely based upon his research. Prejudice by excluding the examples has not been shown. The issue should be denied.

- V. The Court of Appeals correctly concluded that the trial court properly denied the motion for a directed verdict related to the criminal conspiracy between Cope and Sanders the purpose of committing the crime of criminal Sexual Conduct upon Child A where substantial circumstantial evidence existed that there was an agreement.

In its final opinion, the Court of Appeals rejected the claim regarding the failure to grant a motion for a directed verdict concerning the criminal conspiracy charge. The indictment for criminal conspiracy charged that Cope “ on or about November 29, 2001, willfully and unlawfully unite, combine, conspire, confederate, agree and/or have tacit understanding with James Edward Sanders for the purpose of committing the crime of criminal Sexual Conduct upon Child A, the victim being twelve years of age at the time in violation of 16-17-410.” Indictment 2004-GS-46-0200. Amended Supplemental ROA, p. 43. He contends that since there was no direct evidence of any connection between Sanders and Cope, the trial court erred by determining the basis for the charge was inference upon inference to develop the conspiracy. Contrary to the claims of Cope, there was sufficient evidence to connect Cope and Sanders to the sexual assault upon the body. In assessing this issue, the Court of Appeals concluded:

We recognize that in the present case there was no direct evidence of an agreement between Cope and Sanders. The State's evidence of a conspiracy was entirely circumstantial, including: (1) forensic evidence that the bite mark where Sanders' DNA was found was inflicted within the same two-hour time frame as the injuries that Cope confessed to inflicting; (2) Sister's testimony that she and Child locked the doors before they went to bed and testimony that there was no evidence of forced entry; (3) the deduction from the forensic evidence that Sanders was present in a secure private home after the residents had retired for the night; (4) testimony that the house was full of debris and passage inside, particularly at night, would have been difficult for someone not familiar with the residence; (5) statements by Cope revealing knowledge about the factors of the assault and injuries to Child consistent with forensic evidence; (6) evidence that Cope delayed calling the police after he claimed to have fatally strangled and choked Child; and (7) evidence that Cope staged the scene to make Child's death appear to have been an accident.

Nevertheless, in the present case, the DNA evidence on Child's body, along with Cope's admissions about his interactions with Child shortly before she died, place Cope and Sanders together at the time of the assault on Child and her resulting death. Likewise, the testimony regarding lack of forced entry and the cluttered condition of the home constitute evidence that Sanders, who had no known connection with Cope's family, received assistance to navigate his way to Child's bedroom. Finally, Cope's staging of the crime scene after Child died is evidence that a cover-up had begun before Cope called the police to his home on the pretext that Child had accidentally strangled herself, notwithstanding compelling forensic evidence that Sanders was present and actively participating during the same time period in which her death was determined to have occurred. Although each of these factors alone may have supported only a mere suspicion of a conspiracy between Cope and Sanders, it is our view that when considered together, they yield the requisite level of proof of "acts, declarations, or specific conduct" by the alleged conspirators to withstand a directed verdict motion on this charge. See State v. Hernandez, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009) (reversing a conviction for trafficking and noting "the State failed to present any evidence such as acts, declarations, or specific conduct to support [an] inference" that the petitioners had knowledge that drugs were being transported).

State v. Cope, *supra*, 383 S.C. at 295-296, 684 S.E.2d at 188. App.p. 65-66.³³

³³Respondent notes that this issue was not presented in a petition for rehearing by Cope after the state's petition for rehearing was granted and the September 29, 2009 opinion was issued affirming the judgement on this claim. An earlier motion to dismiss this issue was denied by the Court. Respondent still maintains that this issue is not properly presented on certiorari due to this procedural default on Petitioner's part when he failed to raise this issue in his own petition for rehearing. The requirement of filing a petition for rehearing from a ruling of the Court of Appeals is a requirement. Doe ex rel Roe v. Orangeburg School District No. 2, 335 S.C. 556, 561 n.8, 518 S.E.2d 259, 261 n.8 (1999) (specific issue not raised in petition for rehearing to the Court of Appeals was not preserved for review before the Supreme Court) As stated in the treatise on South Carolina appellate practice, there are two prerequisites to preserving an issue for consideration by the Supreme Court on writ of certiorari (1) the issue must have been raised in the initial arguments to the Court of Appeals, and (2) the issue must have been raised in the petition for rehearing before the Court of Appeals. Hon. Jean Hoefer Toal, et al, *Appellate Practice in South Carolina* 77 (2nd Ed. 2002). See also Sloan v. Dep't of Transp., 365 S.C. 299, 618 S.E.2d 876 (2005); State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999)(Court of Appeals did not address issue and petitioner did not raise issue in petition for rehearing); Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 496 S.E.2d 17 (1998) (issue not ruled on by Court of Appeals and upon which rehearing is not sought is not preserved for this Court's review); Norton v. Opening Break of Aiken, Inc., 319 S.C. 469, 462 S.E.2d 861 (1995)(only those questions raised in the Court of Appeals and in a petition for rehearing shall be included in a petition for a writ of certiorari). The Petitioner failed to comply with this rule. Under a similar default. His co-

There is substantial circumstantial evidence to support the existence of the conspiracy.

1. Cope tells Child B that morning that her sister Child A had been dead for four hours, revealing, before any law enforcement involvement, his knowledge of the time of death. This four hour time frame is later repeated to law enforcement. It was consistent with the pathologist findings. R. 2083; 9/15/04 Tr.p. 48.

2. Child A has a bite mark on her breast with saliva. The bite mark reveals an injury contemporaneous to other injuries that resulted in her death near the time of death between 2 and 4 am.

3. Cope gives statement that he got up at 3 a.m. and checked on the girls, consistent with the range of the time of death. R. 1448-49, 1472-73, 1771-72; 9/13/04 Tr.p. 67-68, 91-92. 9/14/04 Tr.p. 49-50, 76-77. Video, Exhibit 7. (On file with Court).

4. Sanders DNA is consistent with the saliva located on the breast of Child A at the time of the assault and death. R. 2242; 9/15/04 Tr.p. 207.

5. The windows into Child A's room were not disturbed. R. 1566-69; 9/13/04 Tr.p. 187-188. The windows and doors around the house reveal no forced entry by the lack of signs of damage or tampering to doors or disturbance of dust, dirt or spider webs on the sealed windows and screens. R. 988-990, 1531, 1538-1580; 9/8/04 Tr.p. 267-269, R. 1237; 9/13/04 Tr.p. 150, 157- 99.

6. Child B specifically recalls Child A locking the front door by latching the chain on the front door the evening of the incident. Child B locked the back door. R. 2079; 9/15/04 Tr.p. 44. The door requires a chain to be unlatched from the inside for entry. State Exhibit 41 E (photograph of door and chain). Child B recalls that the door was already unlocked when the ambulance and police arrived shortly after they awoke that morning and learned her sister had died. R. 2084; 9/15/04 Tr.p. 49.

7. Cope's inculpatory statements reveal knowledge about factors of the assault and injuries to Child A consistent with forensic evidence. Further, while Cope initially stated that they would not find semen at the crime scene, he later revealed the presence of a rag that he used to masturbate just outside of Child A's room. R. 1806, 1810; 9/14/04 Tr.p. 84, 88.

8. Cope admitted staging the scene to make it appear to be an accident by placing the blanket around his daughter's neck, a historical factor in Cope relationship with his daughter that he had warned her about, something that Sanders would have been unaware of to suggest an accident. R. 1803; 9/14/04 Tr.p. 81. Video, State Exhibit 7. The

defendant's certiorari proceeding was dismissed.

scene was also staged by the cleanup of the area and body where she was clothed after the rectal assault, the area was cleaned of feces or traces of the assault, and the doors were placed together to make it appear to be an accident, something that a sole intruder would have no reason to do, yet Cope would have reason to do should one of his daughters or another arrive at the scene before he wakes up to shed guilt away from himself. R. 1332, 1803-04; 9/10/04 Tr.p. 62, 9/14/04 Tr.p. 81-84.

9. The house was full of clutter and debris to make passage difficult once inside and particularly if dark. R. 1582-94; 9/13/04 Tr.p. 201-213. (testimony describing photographs of inside house); Video State Exhibit 7. Child B testified that lights were shut off by her that night. R. 2079-80; 9/15/04 Tr.p. 44-45.

10. The locked entry by the door was the only manner that Sanders could have entered the house. Cope (or someone inside the home) had to assist Sanders entry for the assault by opening the door, unlatching the door, and showing his way through the clutter to Child A's room.

11. The closet in Child A's room was too small and cluttered for anyone to hide in. R. 2076; 9/15/04 Tr.p. 41 (Child B testifies that Child A's closet was messy and had bags of clothes and stuff in it and that she could not get into closet). She also stated that she was in the room with Child A for 20 minutes after her father had gone to bed. R. 2078; 9/15/04 Tr.p. 43. Thus, neither Sanders nor Cope could have been hiding in Child A's room when the sexual assault occurred.

12. Cope falsely claimed in the 911 call that his daughter had likely strangled herself, when he later admits that he had staged this particular matter by placing the blanket around her neck after he re-dressed her.

The evidence on the body of Child A and her clothing placed Cope and Sanders together at that time of the assault and death. Since the crime scene was admittedly staged subsequently to the death, it is evident that a cover-up had begun before the police had arrived at the scene. Cope was initially and falsely claiming an accidental death of Child A as strangling herself by her bed clothing, even though Sanders was present and involved as proven by his DNA on her breast. It is equally powerful circumstantial evidence that locking of the doors required it to be unlocked and opened for someone to be let in, which provided the only entry into the home that night.

How This Issue Was Raised at Trial

At the conclusion of the State's case, defense counsel Morton, on behalf of Cope, made a motion for a directed verdict of acquittal on the conspiracy charge. R. 2295-97; 9/16/04 Tr.p. 12, l. 24 - p. 14, l. 16. He asserted that the State's case to link Cope and Sanders was that there was no forced entry and because Sanders' DNA was found on Child A's leg. R. 2296; 9/16/04 Tr.p. 13, ll. 1-7. Counsel Morton contended that for a conspiracy there had to be an agreement which may be implied, but cannot be based upon speculation. He noted that there were various ways to enter the house, as shown by Sanders' other entries. He stated that the mere combination of the fact of no evidence of forced entry, of Sanders DNA on the victim's leg, and of Cope being home, is not evidence of an agreement. R. 2296; 9/16/04 Tr.p. 13, ll. 3-11. Counsel noted that he asked Cabiness about any evidence from family, friends, phone records, emails, or computers about any indication that Cope and Sanders knew each other. R. 2296; 9/16/04 Tr.p. 13, l. 20 - p. 14, l. 2. He contended that this failure to show a meeting of the minds to commit criminal sexual conduct was shown by the failure to prove any connection between Cope and Sanders other than the fact that Cope was home and Sanders' DNA was found on his daughter's body. R. 2297; 9/16/04 Tr.p. 14, ll. 8-16.

The Trial Court's Denial

Judge Hayes denied the motion without argument from the State. R. 2297; 9/16/04 Tr.p. 14, ll. 17-20. Judge Hayes found "some direct evidence and substantial circumstantial evidence." R. 2298; 9/16/04 Tr.p. 15, ll. 2-4. In addition to the evidence cited by Morton, Judge Hayes emphasized the testimony of one young girl [Child B] that Child A had chained the door, and the circumstantial evidence that someone took the chain from where Child A had it and removed the chain during the night. Further, Judge Hayes noted the evidence that Cope was at home that

night and Sanders was in the home that night. He concluded there was direct and substantial circumstantial evidence. R. 2298; 9/16/04 Tr.p. 15, ll. 11-23.

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

As to the conspiracy charge, counsel Greeley asserted there was no evidence of the two men having any contact, any association, or even knowing each other. R. 2300; 9/16/04 Tr. 17. He contended that the evidence, in the light most favorable to the State, shows statements of what one defendant says he did and how he carried it out, but that Cope never mentioned Sanders in regard to the crime. He asserted that semen and saliva merely raises a suspicion of Sanders involvement. R. 2301; 9/16/04 Tr. 18. Judge Hayes denied the motions as to Sanders. R. 2307-08; 9/16/04 Tr. 24-25.

A. STANDARD OF REVIEW FOR DIRECTED VERDICT

“A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged.” State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). “When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the state.” *Id.* “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.” *Id.* at 292–93, 625 S.E.2d at 648;

State v. Kelsey, 331 S.C. at 62, 502 S.E.2d at 69 (1998). “In ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight.” Kelsey, 331 S.C. at 62, 502 S.E.2d at 69 (1998); State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011).³⁴

³⁴ In Odems, the Court looked to State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) and State v. Lollis, 343 S.C. 580, 581, 541 S.E.2d 254, 255 (2001) concerning the sufficiency of circumstantial evidence.

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the State accused Bostick of killing his neighbor, Polite, and burning down her home. The State presented the following evidence against Bostick: (1) investigators found personal items belonging to Polite, including a watch and two sets of car keys, in a burn pile located on the Bostick family property; (2) Bostick's shoes contained a pattern that matched gasoline, and gasoline was the accelerant used to start the house fire; (3) and investigators found blood on the clothes Bostick was wearing the day of the murder, but that evidence could not be matched to Polite's DNA. Id. at 141–42, 708 S.E.2d at 778. However, the State never introduced a motive or a murder weapon into evidence. Id. Thus, “the evidence presented by the State raised, at most, a mere suspicion that Bostick committed this crime.” Id. at 142, 708 S.E.2d at 778.

In State v. Lollis the Court reviewed a court of appeals' decision affirming a circuit court's refusal to direct a verdict on a charge of second degree arson.. Lollis lived in a mobile home with his common law wife, Tammy Burgess. Id. at 582, 541 S.E.2d at 255. Burgess confessed to setting fire to the home and claimed that Lollis had no knowledge of her plans. Id. According to Burgess, she burned the home in order to erase the couple's mortgage debt. Id. However, the State charged both Lollis and Burgess in the arson of the mobile home. Id.

The State relied on four pieces of circumstantial evidence to convict Lollis: (1) the marital relationship between Burgess and Lollis; (2) Lollis's alleged financial trouble; (3) the fact that Lollis placed his personal valuables from the home in a storage room one day prior to the fire; and (4) Lollis's possession of the storage room key on the day of the fire. Id. at 584, 541 S.E.2d at 256. However, alternate evidence showed that Lollis was current on his mortgage at the time of the fire. Lollis, 343 S.C. at 585, 541 S.E.2d at 257. Moreover, Lollis testified he had no reason to burn down his home because of extensive remodeling being done at the time of the fire, and that he moved his belongings into storage in order to protect them from damage due to that remodeling work. Id. at 582–83, 541 S.E.2d at 255.

This Court held that the State's evidence did not “reasonably tend” to prove Lollis's guilt: First, Burgess admitted to starting the fire without assistance from Lollis, without his knowledge, and the State presented no evidence of an agreement between them. Second, the State presented no evidence of Lollis' financial trouble.... Furthermore, Lollis did not have insurance on his personal property lost in the fire. Finally, Lollis presented a plausible explanation for placing valuables in the storage room on the day of the fire—he was trying to protect them from drywall dust as he remodeled his home. Id. at 585, 541 S.E.2d at 257 (holding that a mere arousal of suspicion is an improper basis to deny a motion for directed verdict).

CONSPIRACY

Criminal conspiracy is statutorily defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C.Code Ann. § 16-17-410 (2003); accord State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003). The gravamen of the offense of conspiracy is the agreement, or combination. State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (S.C. App. 2005); State v. Dasher, 278 S.C. 454, 298 S.E.2d 215 (1982); see also State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001) ("The essence of a conspiracy is the agreement.").

A formal or express agreement need not be established. Horne at 381, 478 S.E.2d at 293. "A tacit, mutual understanding, resulting in the willful and intentional adoption of a common design by two or more persons is sufficient, provided the common purpose is to do an unlawful act either as a means or an end." *Id.* (citation omitted). "The mere fact that two persons happened to be doing the same thing at the same time does not compel the conclusion that there was a conspiracy." William Shepard McAninch & W. Gaston Fairey, *The Criminal Law of South Carolina*, 476 (4th ed.2002). In State v. Mouzon, 321 S.C. 27, 467 S.E.2d 122 (Ct.App.1995), the defendant appealed his conviction for conspiracy to distribute crack cocaine. One witness testified that on the night in question, several individuals, including the defendant, were present where drug transactions were taking place. *Id.* at 32, 467 S.E.2d at 125. The Court reversed the conviction, holding:

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

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

In State v. Miller, 223 S.C. 128, 74 S.E.2d 582 (1953), the Court notes: "Often proof of conspiracy is necessarily by circumstantial evidence alone." Id. at 133, 74 S.E.2d at 585. Professor McAninch observes, "The agreement might be difficult to establish by direct evidence if none of the co-conspirators will talk. Consequently, the cases in this jurisdiction, as well as others, which hold that the agreement can be established by circumstantial evidence are legion." McAninch & Fairey, *Criminal Law In South Carolina* (2d Ed.), p. 476. See, State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980) (sufficiency of circumstantial evidence to convict on conspiracy); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (sufficiency of evidence for a criminal conspiracy); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989). Because the actus reus of conspiracy is the agreement, the evidence must prove the agreement, not the object thereof. State v. Crawford, 362 S.C. 627, 641 S.E.2d 886, 893 (2005).

THE EVIDENCE AGAINST COPE

At the outset of the case in the opening argument, the state laid the foundation for its case on conspiracy. Child A was brutally penetrated in her vagina and rectum during the hours between 2 and 4 AM. At 6 a.m., law enforcement receives a 911 call where Cope, devoid of emotion, states that his daughter is dead - "cold as a cucumber." R. 948; 9/8/04 Tr.p. 227, State Exhibit 15. At that time, Cope claims he last saw his daughter alive at two clock and then

changes it to one o'clock. R. 949; 9/9/04 Tr.p. 228, l. 7-8. He contended at that time she must have strangled upon a piece of her blanket. He had even claimed he had previously warned her about this fact. Id. A 12 year old female who weighs over 160 pounds was alleged to have wrapped herself in a blanket and choked resulting in her accidental death. R. 956, 970, 980, 998-99, 1161, 1201, 1284, 1292; 9/8/04 Tr.p. 235, 249, 259, 277-278, 9/9/04 Tr.p. 149, 189, 9/10/04 Tr.p. 13, 21. He initially declared that she had been dead for four hours, albeit claiming inconsistently to being asleep until before 6 a.m. , which was consistent with the later determined actual time of death. R. 956, 963, 1159; 9/8/04 Tr.p. 235, 242, 9/9/04 Tr.p. 147.

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

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

The variety of statements about the event and Cope's demeanor did not make sense that

morning. Compare, State Exhibit 15 (911 Call) (On file with Court), with R. 963, 969-70, 971, 994-98; 9/8/01 Tr.p. 242, 248-249, 250, 274-275, 277. Cope even inquired whether he would be in trouble with the law because his daughter was found dead in the house. R. 981, 990; 9/8/04 Tr.p. 260, 269.

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

presence of any fecal matter. Id. Importantly, he noted all the injuries to Child A occurred within a short time prior to her death. As to her abdominal injuries, he noted that they could have been caused by a 300 pound man kneeling on the abdomen or back with sufficient force, even if the victim was lying in the bed. R. 1119; 9/9/04 Tr.p. 107.

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

The next day, Cope agreed to take a polygraph test. Before the test, he gave an exculpatory statement and continued to assert getting up at 3 a.m., but denied checking on Child A. R. 1448-49; 9/13/04 Tr.p. 67-68. After the test, he was advised of the result that he failed. R. 1461; 9/13/04 Tr.p. 80. Cope then began an evolving series of inculpatory statements. R. 1469, 1472-76; 9/13/04 Tr.p. 88, 91-95. At that point he admitted killing Child A and that he jammed a broom inside her rectum and vagina after he had gotten up in the middle of the night with an erection, went to her room, masturbated over her, and got enraged after she woke up and saw him doing it. He claimed he slammed her head into a video game as he straddled his 300 pound body on her, hit her with his fist, and described using his hands to choke her. Id. He stated that she was already dead when he used the broom on her. Oddly, he volunteered that he deleted his internet files from his computer after the incident. R. 1478; 9/13/04 Tr.p. 97. See also, R. 1770-72;

9/14/04 Tr.p. 49-48-50 (Herring statement - 11/30/01 @ 2 P.M.) .

Days later, Cope changed his story to suggest that he woke up and acted out beating and smothering his daughter, and ultimately penetrating her with a broom vaginally and rectally because he was upset with an old girlfriend who had aborted his child. R. 1798-99; 9/14/04 Tr.p. 76-77 (Cabiness statement - 12/3/01 @ 9:45 am) . This led to the crime scene video reenactment where Cope acted out his recollection of the event with revealing force and corrections, going through the scene and physically demonstrated his violence toward his daughter. Video - State Exhibit 7. Subsequently, he gave another statement which provided new corroborating evidence, including a towel rag that he masturbated into located just outside the bedroom door. R. 1808-09; 9/14/04 Tr.p. 87-88.

At 4:55 PM on December 3, 2001, Cope gave his final statement to Cabiness. In that statement, he abandoned his “dream concept” and asserted that he woke up about 3 a.m. and went into Child A’s room, used a dildo on her, and masturbated, cleaning it off the floor with a towel. While using the dildo while she was on her stomach, she woke up, and he tried to keep her from seeing him. Cope jumped on top of her, hit her in the head, and strangled her until she went limp. R. 1816-1820; 9/14/04 Tr.p. 94-98 (Dec. 3, 2001 Cabiness Statement @ 4:55). He described using the blanket to “make it look like she had strangled herself.” After he jumped off the bed, he wiped off the dildo with a towel, put it between the mattress, and arranged the doors to Child A’s room so that they would lock together and his other daughters would not wake up in the morning and see her. Id. [Evidence was also presented about disputed writings made by him to Amy Simmons where he stated that “I killed [Child A].” R. 1956, 1958; 9/14/04 Tr.p. 233, 235.] State Exhibit 9. (On file with Court).

Subsequently, the DNA from the saliva upon Child A's breast and the semen on her pants came back connected to James Sanders. R. 2240-42; 9/15/04 Tr.p. 205 - 207. [Cope's DNA was found on the towel he stated in his statement he used when he masturbated. R. 2241; 9/15/04 Tr.p. 206.] Cope had not mentioned anyone else being involved in either the assault or death of Child A in any inculpatory statement.

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

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

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

Furthermore, the crime scene was staged. Why would an unknown intruder just happen to wrap a particular item (the blanket piece) around the victim's neck to make it appear accidental,

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

ANALYSIS

The Petitioner contends that the State failed to prove the existence of an actual agreement between Cope and Sanders concerning the sexual conduct of Child A. Contrary to his claim, this was not piling on inference upon inference, but the natural presentation of a circumstantial evidence case. It was a reasonable review of the circumstantial evidence led to this conclusion; not suspicion or speculation, but proof taken in the light most favorable to the prosecution. There is substantial circumstantial evidence to support the existence of a conspiracy (and agreement) to commit criminal sexual conduct upon Child A on November 29, 2001. Contrary to the assertions of Cope, the connection was made in the evidence that Sanders and Cope were both involved in the sexual acts by the admissions by Cope of his personal involvement, and the evidence of Sanders simultaneous presence (Sanders DNA). The evidence also supports the fact that Cope admits getting up at 3 am, a time when the assaults and death are determined to have occurred.

The knowledge of particular injuries from the deadly assaults by Cope, and the actual DNA connection with Sanders' saliva, put them together with Child A at the same time. The non-forced entry through the door, circumstantially proven by the earlier chain-locked door being unlocked from the inside, shows that Cope opened the door for Sanders and led him to his daughter. (Child B stated she and Child A closed the door and latched it that evening). Cope's admissions of having prior sexual conduct with Child A while she was asleep since the beginning of October is further evidence that Cope was not acting as a guardian for his daughter, but rather saw her as a tool for his sexual gratification.

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

The complaint that this analysis was only created by "piling inferences upon inferences" is an overstatement of the nature of the assessment in this case. An agreement in conspiracy may be proven by circumstantial evidence. Unlike Mouzon, where a number of individuals were selling drugs at a similar location, the actions of Cope and Sanders shown were not separate but necessarily in combination, because it took Cope to allow the entry into the home by unlocking the door, it took Sanders to bite the Child, it took Cope and Sanders to ejaculate their semen on her pants (Sanders) and in a washrag(Cope). It took Cope to stage the scene during the gap between the death and false report about the manner of death which he staged - a factor unknown

to Sanders.

Recently, in State v. Odems, the Court addressed an issue concerning review of circumstantial evidence. In that case, as stated earlier, the court held that the circumstantial evidence did not “tend to prove” the guilt. Suggesting that only a mere suspicion was shown in Odems, the court reversed where the evidence reflected a reasonable hypothesis that the defendant’s involved occurred only after the crime.

The Petitioner may attempt to rely upon Odems in contending that a showing of substantial circumstantial evidence demands that there can only be one inference from each item of circumstantial evidence. This would be a misreading of Odems.³⁵ As the Court of Appeals correctly concluded, directed verdict review must rely upon reasonable inferences taken in the light most favorable to the state. The setting in Cope goes well beyond the concerns of mere

³⁵ “ A conspiracy may be shown by circumstantial evidence, from which a common design may be inferred[.]” Mitchell v. State, 363 Md. 130, 145, 767 A.2d 844 (2001). Criminal conspiracy rarely can be proved by direct evidence; the agreement may be inferred from circumstantial evidence, specifically the overt conduct of the parties. State v. Avila, 147 Ariz. 330, 336, 710 P.2d 440, 446 (1985). “The agreement or the unlawful design of [the] conspiracy may be proved by circumstantial evidence without the necessity of showing that the conspirators met and actually agreed to commit the offense which was the object of the conspiracy.” (People v. Superior Court (Quinteros), 13 Cal.App.4th 12, at p. 20-21, 16 Cal.Rptr.2d 462 (1993) (“While mere association does not prove a criminal conspiracy [citation], common gang membership may be part of circumstantial evidence supporting the inference of a conspiracy. [Citation.] The circumstances from which a conspiratorial agreement may be inferred include ‘the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationship of the parties [and] the interests of the alleged conspirators....’ [Citation.]); State v. Butler, 165 Wash.App. 820, 834, 269 P.3d 315, 322 (Wash.App. Div. 3d, 2012) (“the State can use circumstantial evidence to show the agreement. . . .This circumstantial evidence can be in the form of declarations, acts, conduct, or by a concert of action.”). The existence of a formal agreement between the parties need not be proved; it is sufficient to show that they are knowingly engaged in a mutual plan to do a forbidden act.” State v. Taylor, 132 Conn.App. 357, 366-367, 31 A.3d 872, 878 (Conn.App.,2011)

speculation to matters of proof. Under Cope's theory of review, there could never be only circumstantial evidence to prove the existence of an agreement in a conspiracy unless there was direct evidence of the agreement. Such is not and cannot be the test. As this case shows, the agreement may exist by the multiple actions by the parties. The timing of the sexual assault on Child A, the locked door for entry being unlocked by someone on the inside, the admissions by Cope of his own assault upon Child A, Sanders' presence upon Child A proven by the presence of DNA, Cope's presence at the same time proven by his statement and the admission of the choking and Cope's staging of the scene and then calling in a false report hours later after clean-up and staging. The fact that neither Cope nor Sanders admitted actions by the other is not the test. The facts proved their mutual involvement in this tragedy. This is an appropriate, reasonable hypothesis and the Petitioner has not adequately suggested another based upon the evidence that was presented to the jury.

The Petitioner casts aspersions against the prosecution that the decision to charge Cope with conspiracy was solely a matter of expediency to essentially save face from bringing the prosecution initially against Cope.. The Petitioner's claim ignores the prosecution's obligation to seek justice and to seek the truth concerning the matters. The case against Cope, as well as Sanders, was based upon the facts presented to the prosecution. The reality that the facts led to both Cope and Sanders was ultimately inevitable despite the Petitioner's wishes otherwise.

His claim must be denied.

CONCLUSION

For all the foregoing reasons, the appeal must be dismissed and the judgments affirmed..

Respectfully submitted,

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By:


DONALD J. ZELENKA
ATTORNEYS FOR RESPONDENT

July 23, 2012.

CERTIFICATE OF SERVICE

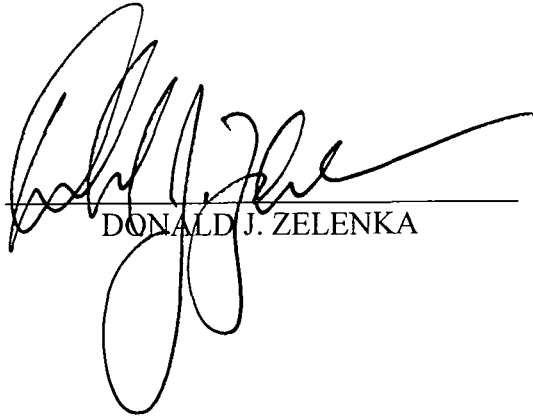
I, Donald J. Zelenka, hereby certify that I have served the Brief of Respondent on Certiorari in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

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This 23rd day of July, 2012



DONALD J. ZELENKA



ALAN WILSON
ATTORNEY GENERAL

July 23, 2012

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
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RECEIVED

26
JUL 26 2012

S.C. SUPREME COURT
pm 7-23-12

Re: The State v. Billy Wayne Cope
Appellate Case No. 2009-143966

Dear Mr. Shearouse:

Enclosed please find original and fourteen (14) copies of the *Brief of Respondent* in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosures

cc: James M. Morton, Esquire
Michael B. Smith, Esquire
David I. Bruck, Esquire
Sandi Wofford, Victims Assistance