ORIGINAL

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

---

Appeal from Williamsburg County
The Honorable Howard P. King, Circuit Court Judge

---

**THE STATE,**

**Respondent,**

v.

**BRITTANY EMOESHA EPPS,**

**Appellant.**

Appellate Case No. 2016-001806

RECEIVED
NOV 29 2017
SC Court of Appeals

---

# FINAL BRIEF OF RESPONDENT

---

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit
141 N. Main St.
Sumter, South Carolina 29150
(803) 436-2185

ATTORNEYS FOR RESPONDENT

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii
APPELLANT'S STATEMENT OF ISSUE ON APPEAL ..... 1
RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL ..... 1
STATEMENT OF THE CASE ..... 2
THE MURDER oF JOSEPH BROWN ..... 3
Jessica Jackson's Description of the Cold Blooded Murder ..... 3
The Poorly Planned Cover Up of the Crime ..... 6
The Corroborating Evidence Linking Epps to the Murder ..... 8
ARGUMENT ..... 10
I. Appellant's Confrontation Clause argument is not preserved for review. South Carolina Rules of Evidence prohibit Appellant's impeachment of a State's witness with pending charges that are unsubstantiated, irrelevant, and needlessly distracting to the jury. ..... 10
Standard of Review ..... 10
The Constitutional Argument Is Not Preserved For Review ..... 11
Even on the Merits, the Pending Charges Were Not Admissible ..... 12
How the Issue Arose at Trial: Hatten ..... 13
II. Appellant's Confrontation Clause argument is not preserved for review. In her defense, Appellant improperly called the witness solely for the purpose of impeaching his testimony. Further, the pending charge was irrelevant, highly prejudicial, and only offered as subterfuge to suggest the defense witness was the actual murderer ..... 17
How the Issue Arose at Trial: McKnight ..... 18
McKnight Should Not Have Been Permitted to Testify ..... 20
McKnight's Pending Charge Was Irrelevant ..... 22
THE TRIAL COURT COMMITTED NO ERROR ..... 24
CERTIFICATE OF COMPLIANCE
CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

Federal Cases

*Crawford v. Washington,* 541 U.S. 36 (2004) ........ 13
*Delaware v. Fensterer,* 474 U.S. 15 (1985) ........ 13
*Delaware v. Van Arsdall,* 475 U.S. 673 (1986) ........ 12, 16
*United States v. DeLillo,* 620 F.2d 939 (2d Cir. 1980) ........ 21
*United States v. Duran,* 884 F.Supp. 573 (D.D.C.1995) ........ 21
*United States v. Frappier,* 807 F.2d 257 (1st Cir. 1986) ........ 21
*United States v. Morlang,* 531 F.2d 183 (4th Cir. 1975) ........ 20
*United States v. Peterman,* 841 F.2d 1474 (10th Cir. 1988) ........ 21
*Whitehurst v. Wright,* 592 F.2d 834 (5th Cir.1979) ........ 21

State Cases

*Bakala v. Bakala,* 352 S.C. 612, 576 S.E.2d 156 (2003) ........ 11
*Burgin v. State,* 747 So.2d 916 (Ala. Crim. App. 1999) ........ 21
*Grant v. South Carolina Coastal Council,* 319 S.C. 348, 461 S.E.2d 388 (1995) ........ 11
*Jackson v. Speed,* 326 S.C. 289, 486 S.E.2d 750 (1997) ........ 11
*Jones v. State,* 941 A.2d 498 (Md. 2008) ........ 21
*Smith v. U.S.,* 26 A.3d 248 (D.C. 2011) ........ 21
*State v. Aleskey,* 343 S.C. 20, 538 S.E.2d 248 (2000) ........ 12, 15
*State v. Bailey,* 298 S.C. 1, 377 S.E.2d 581 (1989) ........ 20
*State v. Burgess,* 393 S.C. 396, 712 S.E.2d 1 (Ct. App. 2012) ........ 16
*State v. Cooley,* 342 S.C. 63, 536 S.E.2d 666 (2000) ........ 23
*State v. Dial,* 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013) ........ 11, 15
*State v. Dunbar,* 356 S.C. 138, 587 S.E.2d 691(2003) ........ 11
*State v. Ellefson,* 266 S.C. 494, 224 S.E.2d 666 (1976) ........ 20
*State v. Gaster,* 349 S.C. 545, 564 S.E.2d 87 (2002) ........ 23
*State v. Gracely,* 399 S.C. 363, 731 S.E.2d 880 (2012) ........ 12
*State v. Holder,* 382 S.C. 278, 676 S.E.2d 690 (2009) ........ 23
*State v. Hughes,* 328 S.C. 146, 493 S.E. 2d 821 (1997) ........ 21
*State v. Kelley,* 319 S.C. 173, 460 S.E.2d 368 (1995) ........ 10
*State v. Lee,* 350 S.C. 125, 564 S.E.2d 372 (Ct.App.2002) ........ 11
*State v. McDonald,* 343 S.C. 319, 540 S.E.2d 464 (2000) ........ 10
*State v. McEachern,* 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012) ........ 17
*State v. McWee,* 322 S.C. 387, 472 S.E.2d 235 (1996) ........ 11
*State v. Pipkin,* 359 S.C. 322, 597 S.E.2d 831 (Ct.App.2004) ........ 23
*State v. Saltz,* 346 S.C. 114, 551 S.E.2d 240 (2001) ........ 10
*State v. Schmidt,* 288 S.C. 301, 342 S.E.2d 401 (1986) ........ 23
*State v. Sloan,* 278 S.C. 435, 298 S.E.2d 92 (1982) ........ 20
*State v. Tynes,* 740 S.E.2d 512 (Ct. App. 2013) ........ 23
*State v. Whatley,* 407 S.C. 460, 756 S.E.2d 393 (Ct. App. 2014) ........ 16
*Toole v. Salter,* 249 S.C. 354, 154 S.E.2d 434 (1967) ........ 23

State Rules

Rule 404(b) .......... 22
Rule 404, SCRE .......... 22
Rule 607, SCRE .......... 20, 21
Rule 608, SCRE .......... 13
Rule 609, SCRE .......... 14, 15, 22
Rule 403 .......... 23
Rule 608 (c) .......... 10, 11, 13, 15

## APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in not permitting Appellant to impeach two witnesses concerning their pending charges in violation of Appellant's Sixth Amendment right to confrontation where the probative value of the pending charges was not substantially outweighed by the danger of unfair prejudice?

## RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Appellant's Confrontation Clause argument is not preserved for review. South Carolina Rules of Evidence prohibit Appellant's impeachment of a State's witness with pending charges that are unsubstantiated, irrelevant, and needlessly distracting to the jury.

II. Appellant's Confrontation Clause argument is not preserved for review. In her defense, Appellant improperly called the witness solely for the purpose of impeaching his testimony. Further, the pending charge was irrelevant, highly prejudicial, and only offered as subterfuge to suggest the defense witness was the actual murderer.

## STATEMENT OF THE CASE

In August of 2014, a Williamsburg County Grand Jury indicted Appellant, Brittany Emoesha Epps, for murder and possession of a weapon during the commission of a violent crime. (Record (R). p. 891-892.) Epps proceeded to a jury trial on July 26, 2016, before the Honorable Howard P. King. Epps was represented by Deborah J. Butcher, Esquire. (R. July 26, 2016, p.1.) Assistant Solicitor Kimberly V. Barr represented the State. (R. p.1.)

The jury found Allen guilty of both charges. (R. p. 880, lines 14-22.) In a separate proceeding held on August 24, 2016, Judge King sentenced Epps to forty-five years' imprisonment for murder and a concurrent term of five years' imprisonment for the weapon charge. (R. August 24, 2016, p. 887, lines 3-14; p. 893-894)

This appeal follows.

## THE MURDER OF JOSEPH BROWN

### Jessica Jackson's Description of the Cold Blooded Murder

Jessica Jackson participated in the murder of Joseph Brown with her girlfriend, Brittany Epps, and Jackson was the State's primary witness. Jackson and Epps met in February of 2013 at a group home where they both lived. (R. p. 128, line 3- p. 129, lines 6-7.) Although Jackson was from Myrtle Beach, she traveled back to Williamsburg County to see Epps. (R. p. 129, lines 10-22.) She eventually moved to Williamsburg County to live with Epps at a friend's house. (R. p. 132, lines 4-20.) The friend, Theo McKnight, was in his forties and lived in a four bedroom home with no running water and plywood on the floor. (R p. 133, line 2 – p. 137, line 23.) Neither Epps nor Jackson was employed, and they relied on family for food. (R. p. 137, line 22 - p. 138, line 8.)

Jessica said that the women first met Joseph Brown at the Sonoco gas station. (R. p. 140, lines 15-19.) Epps' aunt had given them a ride, and the women saw the victim in his Cadillac, parked at the station. (R. p. 141, lines 3-9.) Epps approached Brown and asked him where she could "get a good grill." (R. p. 142, lines 3-4.) Jackson testified Brown asked Epps if he could have sex with Jackson for money, and Epps said no. (R. p. 143, lines 2-16.) Brown told Epps if they changed their minds, they could come to his home. (R. p. 143, lines 15-18.) Later, when the women returned to McKnight's house, they discussed tying up the victim and robbing him. (R. p. 145, lines 9-25.)

The women did not see Brown until two weeks later. (R. p. 146, lines 9-14.) On the morning of the shooting, the women decided to walk to Epps' mother's house. (R. p. 149, line 25 – p. 150, line 4.) On the way over, Jackson told Epps she did not want Epps to live with her at McKnight's house anymore because her mother did not like it and it was causing strain on their relationship. (R. p. 150, lines 10-13.) Jackson was trying to apply for housing and encouraged

Epps to get her GED. (R. p. 150, lines 14-19.) Epps' mother eventually dropped the women off at Epps' aunt's house. (R. p. 151, lines 11-20.) The women then walked back to McKnight's house. (R. p. 151, lines 21-25.) At McKnight's, Jackson packed a bag of toiletries so the women could go to Epps' mother's house while she was at work so Jackson could take a shower. Epps told Jackson she felt "like being bad" and then described her plan to rob Brown. (R. p. 156, lines 7-16.) When Jackson asked how Epps planned to rob the victim, Epps said they could overpower him because of his age. (R. p. 157, lines 9-13.)

The women walked to the store to get something to eat and drink and then walked to the building where Brown lived. (R. p. 158 7 – p. 191, lines 21.) When they arrived, Brown was sitting outside in his chair. (R. p. 159, lines 1-3.) The women sat outside with him and talked. Epps reassured Jackson that "she had this." (R. p. 159, lines 6-24.) Brown told the women he had to drive a friend to the store, and he allowed the women to stay in his apartment until he came back. (R. p. 160, lines 3-11.) While he was gone, the women looked through his belongings to find anything of value to steal. (R. p. 160, lines 12-25.) Jackson stole a pack of T-shirts and a pocketknife. (R. p. 160, line 20 – p. 161, line 9.)

When Brown returned, his nephew was with him. (R. p. 165, lines 1-4.) Epps and the nephew, Arthur Gamble, discussed the engine in Brown's Cadillac. The conversation also turned to Brown's ability to take care of himself in spite of his age and the crime in the area. (R. p. 165, lines 10-24.) To prove he could take care of himself, Brown pulled a gun from his pocket to show the women. (R. p. 165, lines 2-24.)

The women agreed to go with Brown to a cookout at his nephew's house. (R. p. 168, lines 1-4.) Brown placed his gun in the glove compartment of the car and drove the women in his Cadillac. (R. p. 199, line 25 – p. 170, line 8.) Jackson had second thoughts about robbing Brown

after seeing his gun and agreeing to go to the cookout. (R. p. 170, line 13 – p. 171, line 3.) The trio stayed at the cookout for approximately two hours before they left together. (R. p. 171, lines 20-24.) As they were leaving, the women got into the car while Brown remained outside and spoke to his family members. At this point, Epps told Jackson she planned to shoot Brown. (R. p. 172, line 19 – p. 173, line 18.) Epps wanted to kill Brown to steal his gun and his car. (R. p. 175, lines 2-5.) The plan was for Jackson to cut the straps off of her purse, wrap them around Brown's neck to "be a distraction," and then Epps would take the gun from the glove compartment and shoot him. (R. p. 175, line 8 – p. 176, line 8.) The women decided they would lead Brown to a deserted area, and then when Epps used the code words "take off," Jackson would strangle him with her purse straps. (R. p. 177, lines 7 – 12.)

Epps told Brown to drive down a dark road to drop them off where they supposedly lived. Brown became suspicious and started to get agitated. (R. p. 180, line 6 – p. 181, line 13.) As he approached the driveway of an abandoned mobile home, Epps used the code words and Jackson put the purse straps around Brown's neck. (R. p. 181, line 11 – p. 183, line 15.) Because her hands were sweaty, Jackson let go of the straps, and then Brown and Epps both struggled to get the gun. (R. p. 183, lines 17-21.) In the struggle for the gun, Epps accidentally shot Jackson in the thumb. (R. p. 183, line 24 – p. 184, line 4.) Jackson saw that the car was going to crash into the woods, so she jumped out of the car. (R. p. 184, lines 5-6.) Jackson thought she heard two more shots. (R. p. 184, lines 10-14.)

Once Jackson realized she was shot she began panicking. (R. p. 188, line 20 – p. 189, line 6.) Epps got out of the car and walked to the other side of the field near where the car crashed. (R. p. 189, lines 3-11.) Epps was angry with Jackson for panicking and called her derogatory names. (R. p. 190, lines 2-10.) When they finally turned their attention to Brown, the women

realized he was still alive, so Epps shot him again. (R. p. 190, line 22 – p. 191, line 12.) Epps told Jackson she needed help putting the body in the trunk. Jackson protested at first, but then helped her move Brown from the driver's side to the trunk of the Cadillac. (R. p. 192, line 12 – p. 193, line 19.) The plan was to take his body to Epps' grandmother's property and throw his body into the swamp. (R. p. 201, lines 3-16.) At some point during the commotion, Jackson took the gun from Epps and put it back in the glove compartment. (R. p. 210, lines 2-10.)

The women realized the Cadillac was bogged down in the mud, so Epps went into the abandoned mobile home and found two pieces of wood to wedge under the tires. (R. p. 199, line 7 – p. 200, line 4.) They were unsuccessful in moving the car. (R. p. 200, lines 14-22.) They decided to walk to their neighbors ask for help with pulling the car out of the woods, and also to call 911 for Jackson's finger. (R. p. 202, line 7 – p. 205, line 19.)

**The Poorly Planned Cover Up of the Crime**

A neighbor testified Epps and Jackson knocked on her door late the night of the murder. (R. p. 37, lines 15-25.) Epps told the neighbor she needed to use her phone to call for an ambulance because her friend had been shot in the hand in a hunting accident. (R. p. 38, line 21 – p. 39, line 15.) Epps told the neighbor they had been on her father's land hunting with antique guns when the accident happened. Because her phone was not working, the neighbor sent the women across the street to another house to ask for a telephone. (R. p. 42, line 12 – p. 43, line 23.)

When Officer Craig Staggers, of the Kingstree Police Department, arrived on the scene, he found two women: Epps was wearing sweats and Jessica Jackson was wearing athletic shorts, a bra, and had her shirt wrapped around her injured hand. (R. p. 50, lines 12-25.) Epps told Staggers the women were hunting squirrels when Jackson accidentally shot herself in the hand.

(R. p. 52, lines 12-20.) When Staggers asked Epps why they did not drive to the hospital, Epps told him their car was bogged down at Windy's Club. (R. p. 52, line 24 – p. 53, line 3.) Epps also said she gave the gun back to her uncle. (R. p. 53, lines 7-15.) Staggers found the story suspicious because the women had not driven directly to the hospital and could not produce the gun. (R. p. 56, lines 20-24.) EMS arrived and transported Jackson to the hospital shortly after midnight. (R. p. 51, lines 4-20.) Epps told Staggers she would walk to her aunt's house, which was located in a nearby subdivision, and get a ride home from there. (R. p. 61, line 17 – p. 63, line 5.)

Samuel Barr, who had been hanging out at Windy's Club before its closing, heard a call go out on his police scanner that shots had been fired on Kendall Park Road. (R. p. 68, lines 2-17.) Because he was curious, Barr drove back out toward Kendall Park Road and Windy's Club to see what happened. (R. p. 68, lines 14-24.) As he approached Windy's, Barr noticed a car bogged down in the woods across the road. (R. p. 66, line 13 – p. 70, line 21.) As he was looking at the car in the woods, Epps walked up to him and said, "Look what my girlfriend made me do. She made me drive my car in the woods." (R. p. 71, lines 3-21.) Epps then walked off in the direction of a nearby neighborhood. (R. p. 112, lines 11-17.)

Investigator Kennedy responded to the call of the accidental gunshot victim sometime about 12:30 am. (R. p. 310, line 6 – p. 311, line 17.) When he arrived in the neighborhood, the ambulance had taken Jackson to the hospital and no one was present. (R. p. 311, lines 8-13.) One of the earlier responding officers told Kennedy that Epps mentioned a car being bogged down near Windy's club, so he drove to the area to investigate. (R. p. 311, line 21 p. 312, line 20.) Kennedy found the Cadillac stuck in the woods, noticed the car door open, and saw blood on the interior and the trunk. (R. p. 315, line 8 – p. 318, line 23.) The officers attempted to open the

trunk, but could not. Kennedy arranged to tow the Cadillac to the impound lot for further investigation, while he looked into the whereabouts of the victim. (R. p. 320, line 21 – p.321, line 18.) One of the deputies found Jackson's purse and identification in the back seat. (R. p. 319, lines 16-22.) After talking to the victim's family, Kennedy decided to try the trunk of the car again, and was able to pry open the trunk enough to see the victim's body inside. (R. p. 324, lines 14-24; p. 325, line 19 – p. 326, line 6.)

On March 31, Kennedy attended a search of the home of Vanity Epps (Appellant's aunt). (R. p. 333, lines 4-21.) In the grassy area in front of Ms. Epps' house, Kennedy noticed a Cadillac key fob on the ground. (R. p. 334, lines 15-25.) The key chain and fob had distinctive branding of a former Cadillac dealership and phone number from Arizona. (R. p. 338, lines 4-17.)

**The Corroborating Evidence Linking Epps to the Murder**

Arnold Gamble was the victim's nephew, and hosted the cookout the day of the shooting. (R. p. 95, line 10 – p. 96, line 7.) Gamble confirmed that at about 3:00 pm that afternoon, Brown left the cookout in his Cadillac and then later returned, driving the same Cadillac, accompanied by Epps and Jackson. (R. p. 96, line 14 – p. 99, line 12.) The trio stayed at the cookout until approximately 9:30 pm, and Gamble made plans to see his uncle the following morning. (R. p. 99, line 16 – p. 100, line 16.) When they left in the Brown's car, Gamble confirmed Brown was driving, Epps was in the front passenger seat, and Jackson was in the back seat behind the driver. (R. p. 100, line 19 – p. 101, line 6.) Gamble learned of his uncle's death the next day, when the sheriff's department notified him about finding his body. (R. p. 102, line 19 – p. 103, line 11.)

The State's pathologist testified the only signs of injury to the body of Joseph Brown were the gunshot wounds to his head. (R. p. 458, line 20 – p. 503, line 5.) The eighty-seven year old victim was five feet, ten inches tall and weighed one hundred seventy-six pounds. (R. p. 460, lines 8-12.) One bullet wound indicated the bullet entered the left temple and exited behind the left ear. That wound was not fatal. (R. p. 462, line 16 – p. 463, line 9.) Another gunshot wound entered the bony area above the right eyebrow, traveled through the sinuses and the face and stopped in the left side of the victim's neck. (R. p. 463, line 23 – p. 464, line 25.) The third wound entered on the top of the victim's head, through the brain, and ended in the base of the skull. (R. p. 465, lines 9-18.) The victim's toxicology report came back negative for drugs and alcohol. (R. p. 475, lines 2-10.)

The purse straps in the rear floorboard of the Cadillac contained the DNA of Jackson and Joseph Brown. (R. p. 541, line 6 – p. 543, line 11.) Jackson's DNA was present on her the red shorts she was wearing the night of the murder, a plastic bag found in the backseat floorboard of the Cadillac. (R. p. 543, line 22 – p. 544, line 24.) Jackson's DNA was also on the center of the back seat. (R. p. 547, line 22 – p. 548, line 15.) The camouflaged hoodie found on the passenger floorboard of the front seat contained a mixture of DNA from Jackson and Epps. (R. p. 550, line 9 – p. 551, line 13.)

Jackson first told police she hurt her hand in a hunting accident. (R. p. 214, lines 14-26.) She then changed her story and told investigators the victim tried to rape her. (R. p. 214, line 24 – p. 215, line 1.) When the police didn't believe Jackson was able to place the body in the trunk by herself, she then said Epps was present, but had nothing to do with the shooting. (R. p. 215, line 7 – p. 216, line 2.) Not long after her incarceration, she told the officers about their plan to rob and kill Brown. (R. p. 216, line 25 – p. 218, line 16.)

## ARGUMENT

**I. Appellant's Confrontation Clause argument is not preserved for review. South Carolina Rules of Evidence prohibit Appellant's impeachment of a State's witness with pending charges that are unsubstantiated, irrelevant, and needlessly distracting to the jury.**

The trial court committed no error when he prohibited the impeachment of two witnesses with evidence of pending charges against them. This Court must consider the admissibility of the pending charges differently for witness Hatten, called during the State's case in chief, and witness McKnight, called by the defense. Appellant argues on appeal the trial court's limitation on her scope of examination of Hatten and McKnight violated her rights under the Confrontation clause, but this issue was never raised to the trial court. *See* IBOA at 9. Instead, Appellant argued the charges were admissible under South Carolina Rule of Evidence 608 (c) as evidence of motivation to misrepresent the facts. (R. p. 265, lines 4-8; p. 274, lines 1-6.)

In the case of Hatten, the court found the pending charges were not of any significance to show bias in his identification of a key fob for the automobile he once owned. (R. p. 275, line 14 – p. 280, line 10.) The trial court also determined the charges were not relevant, and were unduly prejudicial, so he properly limited Appellant's cross examination on the magistrate level charges. (R. p. 278, line 3 – p. 279, line 24.)

### Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. *State v. Kelley*, 319

S.C. 173, 177, 460 S.E.2d 368, 370 (1995). "As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed on appeal." *State v. Dial*, 405 S.C. 247, 256, 746 S.E.2d 495, 499 (Ct. App. 2013).

**The Constitutional Argument Is Not Preserved For Review**

The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal. *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691(2003); *State v. Lee*, 350 S.C. 125, 564 S.E.2d 372 (Ct.App.2002). Our courts have "consistently refused to apply the plain error rule." *Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) (citations omitted). Instead, we have held: "it is the responsibility of counsel to preserve issues for appellate review." *Id.*

The issue preservation requirement applies to assertions of constitutional violations as well. In *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003), the court held that "[a] due process claim raised for the first time on appeal is not preserved." *Id.* at 625, 576 S.E.2d at 163 (*citing Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995)). And in *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), where appellant asserted violations of due process and his Eighth Amendment rights, the court said, "this issue is not preserved for review because at trial, appellant never cited any constitutional basis for his request to give a parole eligibility charge." *Id.* at 391, 472 S.E.2d at 238 (citations omitted).

At no point during the trial proceedings did Appellant raise a Confrontation clause issue to the trial court in support of her argument the pending criminal charges against both witnesses should be admitted. Appellant only argued Rule 608(c), SCRE, permitted the impeachment of Hatten to show evidence of bias. (R. p. 274, lines 1-6.) The trial court gave a lengthy analysis of the application of Rule 608(c) to the facts at hand. (R. p. 278, line 3 – p. 279, line 16.) Epps

sought only to have the pending charges admitted for the purpose of impeaching Hatten's credibility, without specifying she was relying on the Confrontation Clause in making her request. Appellant failed to put the trial judge on notice that she was making a Confrontation Clause argument. Because the trial judge did not have the opportunity to rule upon Confrontation Clause rationale, the issue is not preserved for appeal. However, even on the merits, Appellant cannot show the trial court abused his discretion in limiting her questioning of Hatten.

**Even on the Merits, the Pending Charges Were Not Admissible**

"A defendant demonstrates a Confrontation Clause violation when he is prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias . . . from which jurors . . . could draw inferences relating to the reliability of the witness." *State v. Gracely*, 399 S.C. 363, 372, 731 S.E.2d 880, 884 (2012). "The right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. On the contrary, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." *State v. Aleskey*, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000) (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)).

Although Appellant addresses the Confrontation Clause as it applies to both witnesses, the limitation on her right to confront Hatten, as a State's witness, is entirely different from the limitation on her right to confront McKnight, her own witness. "The principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and

particularly its use of ex parte examinations as evidence **against the accused**." *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (emphasis added). Generally speaking, the Confrontation Clause guarantees an opportunity for effective **cross-examination**, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis added).

"Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. However, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than a conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." Rule 608(b), SCRE (emphasis added). In the discretion of the court, specific instances may be inquired into on cross-examination if the specific instances concern "the witness' character for truthfulness or untruthfulness." *Id*

**How the Issue Arose at Trial: Hatten**

The State elected to call Mark Hatten, who was the previous owner of Joseph Brown's Cadillac. Hatten sold the car to the victim in 2012, and he could identify the car key, key chain, and remote key fob. Hatten's testimony was limited in relevance to the ownership and identification of the Cadillac and its component parts. (R. p. 264, lines 16-20.)

Appellant sought to impeach Hatten's credibility with pending charges pursuant to Rule 608, SCRE. (R. p. 265, lines 4-8.) Appellant argued the pending charges gave Hatten a bias toward the State because he might receive leniency on the pending charges if he testified favorably to the State on the identification of the Cadillac's keychain and remote control. (R. p. 265, line 12 – p. 266, line 6.) The State then proffered the testimony of Hatten. (R. pp. 266-273.) In his proffer, Hatten identified the key chain, which contained the logo and telephone

information of the Arizona dealership from where the Cadillac was purchased. (R. p. 268, line 16 – p. 269, line 15.)

When questioned about his pending charges, Hatten testified he did not believe he had any pending charges. Hatten explained the assault and battery charge was never filed and a malicious injury to property charge involved a $25 fine, which he paid. (R. p. 273, lines 1-20.) When the court asked Appellant what the charges had to do with his identification of the car, keychain, and remote, Appellant argued the charges gave him motive to lie to help the State. (R. p. 274, line 18 – p. 275, line 10.) Appellant also acknowledged she was unable to provide a certified copy of the pending charges to prove they were actually pending. (R. p. 274, lines 15-16.) Appellant conceded, however, the charges were not admissible pursuant to Rule 609, SCRE. (R. p. 280, lines 5-8.)

The solicitor explained that they were unaware of any charges against Hatten, having performed a criminal records check four days prior to the start of trial. (R. p. 276, lines 14-23.) Regardless, however, the State argued that pending charges of this minor significance did not present the requisite relevance under a 403 analysis and would instead be highly prejudicial to suggest the witness would lie to the jury about the identification of dealership information on the keychain. (R. p. 277, line 4 – p. 278, line 2.)

Trial court analyzed admissibility under 608(c) and determined the pending charges, which were questionable at best, presented no motive, bias, or prejudice to misrepresent the facts. (R. p. 279, lines 16.) The trial court went on to find the evidence of pending charges was inadmissible because the prejudicial effect substantially outweighed its probative value. (R. p. 279, lines 17-24.)

Appellant argues Mark Hatten's pending charges in Williamsburg County were evidence of motive for him to lie on the stand. (R. p. 265, lines 4-8.) However, Appellant fails to demonstrate any tangible link between the disposition of the charges, which Hatten claimed were long since effectuated, and his testimony in this case. Appellant presents no evidence whatsoever that Hatten's testimony would in any way benefit him in prior assault and battery charge and malicious injury to property charges. In fact, Hatten denied knowing anything about the charges when he proffered his testimony to the court. (R. p. 273, lines 2-16.) The charges were magistrate level charges and the solicitor knew nothing about the charges until Appellant brought them to her attention. (R. p. 274, line 8 – p. 316, line 4.)

Neither the law enforcement agency with responsibility for the charges nor the prosecuting entity was the same for the two matters, so any connection is speculative. *See State v. Dial,* 405 S.C. 246, 256, 746 S.E.2d 495, 500 (Ct. App. 2013). Appellant failed to present anything more specific for the trial court's consideration other than it appears the magistrate's level offenses arose before Appellant's trial and were dismissed or adjudicated by the magistrate before Appellant's trial. It is unknown why the charges were showing as still pending from Appellant's records search, but the statements of the solicitor and the testimony of Hatten clearly show no motivation to testify favorably for the State in exchange for some kind of leniency. Where Appellant fails to present any evidence and merely speculates as to Hatten's bias or motivation for testifying, a trial court does not abuse its discretion in limiting the cross-examination. *Id; see also Alesksey*, 343 S.C. at 34, 538 S.E.2d at 255 (finding that dismissed drug charges are not admissible as prior bad acts under Rule 609, "[n]or are the dismissed indictments evidence of 'bias, prejudice or any motive to misrepresent' under Rule 608(c)).

The sole purpose of Hatten's testimony was to identify the keychain and fob found in the yard of Appellant's aunt as belonging to the Cadillac he owned before Joseph Brown. (R. p. 264, lines 16-25.) The keychain was distinctive because it advertised the dealership in Arizona where Hatten's mother originally purchased the car before giving it to Hatten. (R. p. 268, line 16 - p. 269, line 17.) The information about the dealership was clearly visible on the keychain and the title work to the car showed Mark Hatten as the owner. (R. p. 270, lines 3 – 16.) Hatten simply had no reason to lie about his recognition of the keychain.

The trial court correctly determined the possible existence of pending charges did not have a legitimate tendency to show bias on the part of Hatten in favor of the State. The incidents occurred before Appellant's trial, do not relate to Appellant or bias in favor of anyone, and do not otherwise relate to his credibility. *See State v. Burgess*, 393 S.C. 396, 712 S.E.2d 1 (Ct. App. 2012) (stating that while incidents documented in law enforcement officer's employment records might show the officer was hot-tempered, the trial court properly denied cross-examination about the matters because they did not show bias or otherwise relate to credibility where the incidents occurred after the defendant's arrest and did not relate to the defendant or the manner of the defendant's apprehension).

Moreover, no prejudice is shown and any error in the exclusion of the evidence is harmless. *See Delaware v. Van Arsdall*, 475 U. S. 673, 684 (1986) (finding the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to harmless-error analysis); *see also State v. Whatley*, 407 S.C. 460, 468 – 69, 756 S.E.2d 393, 397 (Ct. App. 2014) (stating a violation of the Confrontation Clause is subject to a harmless error analysis and whether error is harmless depends on a number of factors, including the importance of the witnesses' testimony in the State's case, whether the

testimony is cumulative, the presence of corroborating or contradictory testimony of the witness on significant points, the extent of cross-examination conducted by the defendant, and the strength of the State's case.); *State v. McEachern*, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012) (stating that a violation of the Confrontation Clause is subject to harmless error analysis). The prosecution in this case could prove ownership of the car and its place of purchase through the title work. The keychain had distinctive markings from the Arizona dealership. As such, Hatten's supposed motivation to falsely testify would be thwarted by a plain visual inspection of the keychain. Regardless of whether the jury heard about Hatten's previous charges, the admissibility of the keychain into evidence rendered the limitation harmless.

**II. Appellant's Confrontation Clause argument is not preserved for review. In her defense, Appellant improperly called the witness solely for the purpose of impeaching his testimony. Further, the pending charge was irrelevant, highly prejudicial, and only offered as subterfuge to suggest the defense witness was the actual murderer.**

Appellant is constitutionally guaranteed an effective cross-examination of the witnesses against her. Appellant is **not** constitutionally guaranteed an unlimited direct examination of a witness she elects to call at trial in her own defense. As noted earlier, however, Appellant did not raise a Confrontation Clause concern at trial. Instead, the trial court ruled on the admissibility of the pending charges in accordance with the rules of evidence. In her defense, Appellant improperly called McKnight solely for the purpose of impeaching his testimony with a pending murder charge and with the testimony of Schain McCrea. Appellant has no Confrontation Clause protection for a witness she called. Further, the trial court properly found the pending murder charge was inadmissible. The pending charge was highly prejudicial and irrelevant to McKnight's testimony, unless Appellant sought to use the pending charge to cast McKnight as

the actual killer. Appellant is not permitted to use the pretense of impeachment evidence as subterfuge to introduce otherwise inadmissible information to the jury.

**How the Issue Arose at Trial: McKnight**

At the close of the State's case, Appellant informed the court she intended to call Theodore McKnight, primarily so she could impeach his testimony with a pending murder charge, as well as with the testimony of a jailhouse informant named Schain McCrea. (R. p. 584, lines 5-19.) The matter was discussed in chambers and then the trial court put the discussion on the record. (R. p. 584, lines 5 – 22.) No Confrontation Clause issue was asserted or ruled upon in the record; the court instead ruled on the impeachment issue. The trial court ruled any testimony regarding McKnight's pending murder charge was not allowed, but did permit Appellant to impeach the credibility of McKnight with jailhouse informant McCrea's testimony. (R. p. 584, line 19 – p. 585, line 14.) The court then said it would give an instruction to the jury limiting the testimony only for the purpose of assessing McKnight's credibility, and not for the truth of McCrea's allegations. (R. p. 585, lines 14-22.) The trial court also instructed Appellant she could not argue the substance of McCrea's claims in her closing argument, but could only argue the inconsistency between what McKnight supposedly told McCrea and what McKnight testified to at trial. (R. p. 585, line 22 – p. 586, line 4.)

Appellant called McKnight, and he testified he knew Appellant and Jessica Jackson, that they lived with him briefly in 2014, and they appeared to be involved with each other romantically. (R. p. 751, line 20 – p. 754, line 24.) McKnight consistently testified he was not present during the murder of Joseph Brown and had nothing to do with the crime. (R. p. 755, line 3 – p. 758, line 16.) Repeatedly during his testimony, Appellant asked questions of McKnight

suggesting McKnight and Jackson committed the murder together, but McKnight maintained his innocence. (R. p. 757, line 2 – p. 758, line 16.)

Appellant then called Schain McCrea, who was incarcerated at the Williamsburg County Detention Center at the same time as McKnight. (R. p. 775, line 4 – p. 777, line 10.) McCrea said he talked to McKnight during their shared recreation time at the detention center. (R. p. 777, lines 7-23.) McCrea testified McKnight admitted he and Jackson dropped Appellant off and then the pair intended to rob the victim but "somehow they ended up killing him. (R. p. 779, line 10 – p. 780, line 19.) McCrea said McKnight never told him who actually "shot him or whatever." (R. p. 780, lines 22-23.)

On cross examination, McCrea admitted he recently sought out a "telephone buddy" during his incarceration and was put in touch with Brittany Epps' mother. (R. p. 785, lines 1-10.) McCrea spoke to Epps' mother three times a week for approximately a year leading up to Appellant's trial. (R. p. 785, lines 1-18.) However, the week before the trial, McCrea for the first time mentioned McKnight's statements to Epps' mother, and then agreed to talk to Epps' attorney. (R. p. 785, line 1 – p. 787, line 21.) McCrea also admitted that when officers interviewed him about his conversations with McKnight, McCrea initially told them McKnight did not know anything about the details of who shot the victim. (R. p. 788, line 19 – p. 792, line 7.) McCrea also admitted he talked to Epps' mother on an illegal contraband cell phone from within the prison. (R. p. 794, line 4 – p. 795, line 25.) McCrea admitted McKnight never gave him specific details of the crime, but said he "put two and two together" and "knew [McKnight] had something to do with it." (R. p. 797, lines 2-22.)

**McKnight Should Not Have Been Permitted to Testify**

Whether the trial court erred in his ruling the defense could call McKnight solely for the purpose of impeachment is not before this court. However, Respondent must address the issue before determining whether the court's subsequent limitation of McKnight's impeachment was appropriate. Formerly, in South Carolina, the State could not impeach its own witness through a prior inconsistent statement. *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982); *State v. Ellefson*, 266 S.C. 494, 224 S.E.2d 666 (1976). The reasons underlying the common law were, first, that the party by calling the witness to testify vouches for the trustworthiness of the witness, and second, that the power to impeach is the power to coerce the witness to testify as desired, under the implied threat of blasting the character of the witness if the witness does not. *State v. Bailey*, 298 S.C. 1, 3, 377 S.E.2d 581, 583 (1989). With the adoption of Rule 607, SCRE, however, either party is allowed to attack the credibility of a witness, including the party calling the witness. Rule 607 is not unlimited, nevertheless. Despite Rule 607's permissive impeachment of a witness by either party, the rule does not go so far as to permit the use of the rule as a subterfuge to present otherwise inadmissible evidence to the jury. *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975).

The trial court actually considered the question of whether McKnight should be allowed to testify at all in light of the Fourth's Circuit's ruling in *Morlang*. (R. p. 585, lines 1-9.) The court concluded, however, that *Morlang* was inapplicable to the instant case because in *Morlang*, the State sought to introduce testimony solely for the purpose of impeaching the witness and not the defense. (R. p. 585, lines 5-9.) However, the State respectfully submits the trial court's interpretation of *Morlang* as inapplicable to the defense was error. Other jurisdictions have held evidence that is inadmissible for substantive purposes may not be purposely introduced under the

pretense of impeachment. *See, e.g., Burgin v. State*, 747 So.2d 916, 918-921 (Ala. Crim. App. 1999) (recognizing an abuse of Rule 607 when a party calls the witness for the primary purpose of placing before the jury substantive evidence which is otherwise inadmissible); *Smith v. U.S.*, 26 A.3d 248 (D.C. 2011) (impeachment of one's own witness cannot be permitted where employed as a mere subterfuge to present to the jury evidence not otherwise admissible); *Jones v. State*, 941 A.2d 498, 509 (Md. 2008) (finding the State had a "legitimate" purpose in calling witness to stand other than solely for impeachment testimony). *See also United States v. Peterman,* 841 F.2d 1474, 1479 n.3 (10th Cir. 1988), *United States v. Frappier*, 807 F.2d 257, 259 (1st Cir. 1986); *Whitehurst v. Wright*, 592 F.2d 834, 839 (5th Cir.1979); *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir. 1980).

In South Carolina, the court holds the defense to the same standard it holds the State in prohibiting a party to call a witness it knows will invoke the Fifth Amendment. *See State v. Hughes*, 328 S.C. 146, 152, 493 S.E. 2d 821, 823 (1997); *see also United States v. Duran*, 884 F.Supp. 573 (D.D.C.1995) (neither defendant nor government may ask questions of witness solely for purpose of requiring witness to invoke privilege before jury). The same logic applies when the defense seeks to call a witness solely for the purpose of impeachment and when the impeachment evidence is subterfuge to introduce highly prejudicial information otherwise inadmissible. Here, Appellant knew McKnight would deny involvement in the crime when she called him to the stand. His testimony offered nothing of value to Appellant's case other than affording Appellant the opportunity to suggest McKnight's involvement in the crime with the nature of her questions. McKnight should not have been permitted to testify at all. Appellant enjoyed a benefit from McKnight's limited testimony to which she was not entitled.

**McKnight's Pending Charge Was Irrelevant**

In allowing Appellant to call McKnight solely for the purpose of impeaching his testimony with the testimony of McCrea, the trial court granted Appellant more leniency than she was entitled. Appellant certainly cannot now claim the court violated her right to confront a witness against her when she called the witness during the defense's case. Appellant's attempt to introduce McKnight's pending murder charge was apparently part of her strategy to portray McKnight and Jackson as the perpetrators of the crime, thereby improperly offering character evidence in violation of Rule 404, SCRE.

The trial court ruled that any questioning regarding McKnight's pending murder charge, which was alleged to have occurred two years after the murder of Joseph Brown, was not permitted. (R. p. 584, lines 10-25.) Although the issue appears to have been discussed in chambers, the reasoning for the trial court's decision was not placed on the record. However, because McKnight had not been convicted of the crime, the pending charge was not properly admissible pursuant to Rule 609, SCRE. Because the defense called the witness, the pending charge was not admissible as evidence of bias pursuant to Rule 608(c) because McKnight did not testify on behalf of the State. Finally, 608(b)(1), SCRE, is also inapplicable because Appellant sought to inquire into McKnight's charge during her **direct examination** of the witness. Further, Rule 404(b) specifically prohibits the type of evidence Appellant sought to elicit here. Rule 404(b) says "evidence of other crimes, wrongs, or acts is **not admissible** to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE (emphasis added).

If the charges were not properly admissible for impeachment under Rules 607, 608, and 609, and were not admissible under Rule 404 as evidence of other wrongs to prove McKnight's

character as a killer, then Appellant's only avenue for admission of the pending charge, against her own witness, was claiming the charge was highly relevant and not unduly prejudicial, thereby surviving a SCRE Rule 403 analysis.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, 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. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009); *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Tynes*, 402 S.C.211 740 S.E.2d 512 (Ct. App. 2013). Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing *Toole v. Salter*, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation. *See State v. Pipkin*, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct.App.2004).

Neither the relevance nor the probative value of the pending murder charge is preserved for review. Although Appellant now argues McKnight's testimony was important "in light of Appellant's insistence that he was present and likely involved in Brown's death," (IBOA at 9),

Appellant has not explained how the murder charge, which had nothing to do with Joseph Brown's murder and occurred two years later, had any relevance to his testimony. Appellant was not entitled to introduce irrelevant and prejudicial evidence of a pending murder charge against her own witness. Appellant's claim is without merit.

**THE TRIAL COURT COMMITTED NO ERROR**

Appellant was not entitled to impeach the credibility of two witnesses with pending charges because the charges were irrelevant, unfairly prejudicial and confusing, and in the case of McKnight, not properly admissible as impeachment evidence. In ruling on the limitations of impeachment, the court committed no error. The record before this Court supports the trial court's finding. The judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

BY:
SUSANNAH R. COLE
SC Bar No. 68383

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-0265

ATTORNEY(S) FOR RESPONDENT

November 29, 2017.
Columbia, South Carolina

**STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

RECEIVED
NOV 29 2017
SC Court of Appeals

Appeal from Williamsburg County
The Honorable Howard P. King, Circuit Court Judge

**THE STATE,**

**Respondent,**

v.

**BRITTANY EMOESHA EPPS,**

**Appellant.**

Appellate Case No. 2016-001806

## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

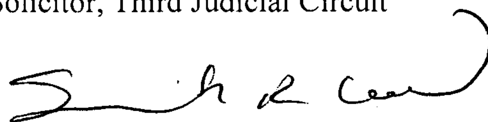
ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit



BY:______________________
SUSANNAH R. COLE

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

November 29, 2017