

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Richland County  
R. Knox McMahon, Circuit Court Judge

RECEIVED  
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MICHAEL SCOTT SIMMONS,

APPELLANT

APPELLATE CASE NO 2016-001975

FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

I. Is the statute criminalizing sexual exploitation of a minor unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution because it is not limited to “visual representations” of *actual* minors or obscenity, and therefore, it has a chilling effect on constitutionally protected speech?

II. Did the trial judge err in finding defense counsel opened the door to unfairly prejudicial character evidence of child pornography videos contained on an external hard drive that were not the subject of the charged offenses where none of the questions on cross-examination elicited testimony concerning the investigator’s examination of the external hard drive and where the solicitor had agreed to permit the jury to know that an external hard drive was seized and had done so through the questioning of the witness during direct examination?

III. Did the trial judge err in failing to suppress evidence seized pursuant to a search warrant because the affidavit in support of the warrant contained only stale information, thus, defeating probable cause as required by the Fourth and Fourteenth Amendments to the Constitution?

IV. In violation of Appellant’s right to due process of law, did the trial judge err in failing to instruct the jury regarding third party guilt where evidence was presented of third party guilt, the jury required instructions regarding how to analyze such evidence, and instructions were necessary to ensure the burden of proof remained on the state in light of the presentation of third party guilt evidence?

## STATEMENT OF THE CASE

On October 8, 2014, a Richland County grand jury indicted Appellant for one count of sexual exploitation of a minor in the second degree (2014-GS-40-6677). R. 532-533. Then, on March 16, 2016, a Richland County grand jury indicted Appellant for five counts of sexual exploitation of a minor in the second degree (2016-GS-40-1720, -1721, -1722, -1723, -1724). R. 535-536; R. 538-539; R. 541-542; R. 544-545; R. 547-548. The state, represented by Lloyd V. Flores and Daniel F. Gourley, II, called the case to trial before the Honorable R. Knox McMahon and a jury on September 6-9, 2016. R. 1. Robert Louis Bank, Jr., Alicia D. Goode, and Aimee J. Zmroczek represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 470, ll. 2-21. On September 16, 2016, Judge McMahon sentenced Appellant to ten years' imprisonment on each count. R. 472, l. 17 – R. 473, l. 8; R. 534; R. 537; R. 540; R. 543; R. 546; R. 549. He ordered the sentences to be served concurrently. R. 472, l. 17 – R. 473, l. 8; R. 534; R. 537; R. 540; R. 543; R. 546; R. 549.

On September 20, 2016, Appellant served his notice of intent to appeal. This brief follows.

## STATEMENT OF FACTS

On November 22, 2013, Kevin Murphy with the Berkeley County Sheriff's Office searched via the internet for computers sharing child pornography using a specific hash value associated with child pornography. R. 90, ll. 15-18; R. 103, ll. 14-17. He learned of a computer with the IP address of 66.57.172.240 sharing portions of videos that Murphy considered to be child pornography. R. 103, ll. 18-25; R. 117, l. 1 – R. 118, l. 23; R. 122, l. 8 – R. 123, l. 5. Murphy learned the IP address was assigned to Time Warner Roadrunner Cable. R. 134, ll. 22-25. *Four months later*, Murphy, through the Attorney General's office, requested subscriber information from Time Warner. R. 135, ll. 1-5. Murphy could not explain why he delayed investigating the case. R. 154, ll. 11-24; R. 256, ll. 1-6. According to Time Warner, the subscriber was Wendy Doiron located a specific address in Columbia, outside of Murphy's jurisdiction. R. 135, ll. 8-21. Due to the jurisdictional matter, Murphy referred the case to Brian Hudak with the Columbia Police Department. R. 136, ll. 3-9; R. 162, l. 22 – R. 163, l. 19; R. 164, ll. 4-6.

*Months later*, in June of 2014, Hudak's coworkers executed a search warrant on the address provided by Time Warner. R. 164, ll. 7-12; R. 170, ll. 4-6. Hudak explained the delay in investigating the referral from Murphy was "due to a high case load" and working cases "that were deemed higher priority." R. 164, ll. 13-21. During the execution of the search warrant, Stephan Narewski spoke with the Doiron family. R. 170, ll. 7-15. Narewski learned Appellant lived with the Doirons as a guest. R. 171, ll. 5-11; R. 400, ll. 9-25. During the trial, the homeowners, Ron and Wendy Doiron, denied downloading child pornography. R. 231, ll. 14-24; R. 255, l. 24 – R. 256, l. 8.

According to April Merrill, all items capable of storing digital data were seized, except a tablet identified as belonging to the Doirons' autistic son. R. 190, ll. 1-12; R. 195, ll. 14-21. Merrill was forced to admit that photographs taken during the execution of the search warrant showed a laptop in the master bedroom, but the return did not show its seizure. R. 204, ll. 1-9. Additionally, the photos showed other items such as an iPhone, and SD card that were not seized. R. 205, ll. 1-9; R. 205, l. 21 – R. 206, l. 17. According to the homeowner, the police seized all digital media items except an iPad, a phone, and a computer. R. 177, ll. 1-18.

After executing the search warrant, Narewski left his contact information with the Doirons for Appellant to contact him. R. 171, ll. 15-16. Later that day, Appellant called Narewski and agreed to provide a statement. R. 171, ll. 16-17; R. 180, ll. 16-24. Appellant denied downloading any illegal videos. R. 177, l. 25 – R. 178, l. 1. However, he admitted he had “a bit torrent that [he] use[d] to download music and Blu-ray movies.” R. 178, ll. 1-3. Appellant testified at the trial consistent with his statement to police.

Appellant explained that he moved to Columbia when he was stationed at Fort Jackson. R. 400, ll. 9-11. He lived next door to the Doirons. R. 400, ll. 9-11. In the spring of 2013, he moved in with them. R. 400, ll. 12-17. Appellant admitted ownership of the desktop, external hard drive, iPhone, and laptop that were found in the room he occupied. R. 401, ll. 9-14. He had had the devices for several years and in numerous locations. R. 401, l. 15 – R. 402, l. 10. Many people had had access to the devices over the years, including friends and family. R. 402, ll. 11-16. Appellant's computer was not password protected. R. 404, ll. 12-24. The desktop was set up in Appellant's room in the Doirons' home, and he permitted others in the house to use it. R. 405, l. 22 – R. 406, l. 1. Appellant recalled Kyle Doiron, the Doirons' teenage son, using his computer often, particularly to watch videos. R. 406, ll. 2-14. Contrary to Kyle's testimony,

Appellant explained that he was not always present when Kyle used his computer. R. 407, ll. 12-20. Appellant denied downloading child pornography, searching for child pornography, or sharing child pornography through a file sharing program.. R. 410, l. 18 – R. 411, l. 18

Jon VanHouten, the forensic computer examiner, conducted “forensic previews” of the seized devices, but he was unable to examine the tablets seized from Kyle’s room due to age or password protection. R. 272, l. 25 – R. 273, l. 2. VanHouten conducted a “full forensic examination” on the computer found in Appellant’s bedroom because the chief investigator requested VanHouten “focus” on the computer. R. 273, ll. 11-15; R. 275, ll. 15-20. VanHouten found no videos or pictures of minors engaged in sexual activity on the computer. R. 275, ll. 9-14. Importantly, VanHouten found no evidence of the child pornography Murphy claimed he obtained through the file sharing program during the initial stage of the investigation. R. 275, l. 21 – R. 276, l. 11. Nevertheless, in the “system volume information” containing internet search history, VanHouten found terms he believed were associated with child pornography. R. 277, ll. 21-22; R. 280, ll. 10-18; R. 281, ll. 20-24; R. 287, ll. 15-18.

In November 2013, seventeen-year old Kyle Doiron lived at home with his father, Ron, and stepmother, Wendy, which was the home where Appellant resided as well. R. 234, ll. 9-10; R. 235, ll. 5-8; R. 400, ll. 12-25. During the execution of the search warrant, the police seized two tablets from Kyle’s bedroom. R. 235, ll. 14-25. Additionally, the police seized a USB drive from his room. R. 236, ll. 8-10. Kyle found the USB drive while walking home from school one day and kept it. R. 236, ll. 11-14. He was unable to remember what was on the drive. R. 236, ll. 11-12. Kyle admitted to using Appellant’s computer, but claimed he used it only once and that Appellant was present. R. 236, l. 24 – R. 237, l. 21. Although familiar with file sharing, Kyle claimed he never engaged in any file sharing activity. R. 239, ll. 19-20. Kyle denied using any

digital device to access child pornography. R. 239, l. 24 – R. 240, l. 4. Kyle claimed he had never received “anything from [his] classmates that might be considered material of individuals engaging in sexual activity.” R. 240, ll. 12-15.

On cross examination, Kyle was forced to admit that he got in trouble at school for downloading and sharing illegal movies. R. 244, ll. 11-18. Kyle received the illegal movies on a flash drive and downloaded it to his school computer. R. 244, ll. 11-18. He then used the school’s file sharing program to share the videos. R. 244, ll. 11-18. Although Kyle initially denied ever downloading any pornography, he eventually admitting to downloading and viewing pornography as well. R. 246, ll. 5-13; R. 249, ll. 10-16; R. 250, ll. 2-15.

## ARGUMENT

I. The statute criminalizing sexual exploitation of a minor in the second degree is unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution because it is not limited to “visual representations” of actual minors or obscenity, and therefore, it has a chilling effect on constitutionally protected speech.

### **Relevant facts**

Prior to trial, Appellant moved to dismiss the charges against him because the criminal statute pursuant to which he was charged was unconstitutionally overbroad in violation of the First Amendment to the Constitution. R. 10, ll. 18-23; Supp. R. 1-14. Relying upon Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2001), Appellant argued the state statute was virtually indistinguishable from the federal statute found to be unconstitutional. R. 11, ll. 5-9; Supp. R. 1-14. While the federal statute prohibited “depictions” of minors, the South Carolina statute criminalized “representations” of minors. R. 11, l. 10 – R. 12, l. 21; Supp. R. 1-14. The overly broad language of the statute criminalized possession of images beyond child pornography. R. 12, ll. 2-7; Supp. R. 1-14. Defense counsel explained the problem with the statute was that it criminalized a representation of a minor – the statute did not require the representation to be of an actual minor. R. 21, ll. 6-15; Supp. R. 1-14.

The state sought to distinguish the Ashcroft decision by noting the images at issue in that case “were produced without any real children.” R. 16, ll. 1-17. Additionally, the state relied upon the state statute defining a minor for purposes of the criminal offense. R. 17, ll. 8-10. According to the state, the main difference between the federal and the state statutes was the state statutes made “it clear that minors are individuals who are less than eighteen years of age.” R. 17, ll. 11-14. Finally, the state argued it would be for the jury to determine the ages of the individuals represented in the images. R. 18, l. 23 – R. 19, l. 5. The state planned to rely upon a “permissible inference” found within the statute allowing the trier of fact to infer age from the

“title, text, visual representations, or otherwise.” R. 19, ll. 6-15. Appellant countered that the statutory permissive inference “encourage[d] the jury...to find [Appellant] guilty of conduct that Ashcroft declared could not be criminalized.” R. 21, ll. 16-20.

Judge McMahon denied the motion to declare the statute unconstitutional. R. 74, ll. 16-21. He “believe[d]” the South Carolina statute was “not the type of class that is created that Ashcroft addressed.” R. 74, ll. 21-24.

### **Discussion**

The First Amendment, made applicable to the states through the Fourteenth Amendment, prohibits governments from making any law abridging the freedom of speech. U.S. Const. amend I. “[T]he overbreadth doctrine applies only to First Amendment cases where the challenged law would have a ‘chilling effect’ on constitutionally protected forms of speech.” State v. Bouye, 325 S.C. 260, 265, 484 S.E.2d 461, 464 (1997)(internal quotation omitted)(alteration in original). “It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.” State v. Green, 397 S.C. 268, 276, 724 S.E.2d 664, 668 (2012)(quoting Broadrick v. Oklahoma, 413 U.S. 601, 611-612 (1973)).

The overbreadth doctrine “is predicated on the sensitive nature of protected expression: persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.” New York v. Ferber, 458 U.S. 747, 768 (1982). “[F]or this reason,” the Court permits “persons to attack overly broad statutes even though the conduct of the person making

the attack is clearly unprotected and could be proscribed by a law drawn with requisite specificity.” Id. at 769. “[A] statute is facially invalid if it prohibits a substantial amount of protected speech.” United States v. Williams, 553 U.S. 285, 292 (2008).

The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech. On the other hand, invalidating a law that in some of its applications is perfectly constitutional – particularly a law directed at conduct so antisocial that it has been made criminal – has obvious harmful effects.

Id. at 292-293.

“States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.” Miller v. California, 413 U.S. 15, 18-19 (1973). However, “in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.” Id. at 22-23. “[O]bscene material is unprotected by the First Amendment.” Id. at 23. Nevertheless, there are “inherent dangers of undertaking to regulate any form of expression.” Id. Therefore, “State statutes designed to regulate obscene materials must be carefully limited.” Id. at 23-24. The Court “confine[d] the permissible scope of such regulation to works which depict or describe sexual conduct.” Id. at 24. The question is whether the state statute “is narrowly tailored to achieve the interest for which it was intended.” Green, 397 S.C. at 278, 724 S.E.2d at 668.

The Court provided “[t]he basic guidelines for the trier of fact” concerning obscenity: “(a) whether the average person, applying contemporary standards would find that the work, taken as a whole, appears to prurient interest,” “(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c)

whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” Miller, 413 U.S. at 24. “The Miller standard” provides “an accommodation between the State’s interests in protecting the sensibilities of unwilling recipients from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws.” Ferber, 458 U.S. at 756 (internal quotation omitted).

The Court held that states “are entitled to greater leeway in the regulation of pornographic depictions of children,” however. Id. A state’s interest in protecting the physical and psychological well-being of a child is compelling. Id. at 756-757. “The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” Id. at 757. After analyzing the Miller test against the ills accompanying child pornography, the Court concluded the Miller standard was not a “satisfactory solution to the child pornography problem.” Id. at 761. Ultimately, the Court determined child pornography was “without the protection of the First Amendment.” Id. at 764. Nevertheless, “like obscenity,” there are “limits on the category of child pornography” that “is unprotected by the First Amendment.” Id. According to the Court, “the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed.” Id. “[T]he nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age.” Id. (emphasis in original).

The United States Supreme Court held the federal statute at issue in Ashcroft was “a textbook example of why” the Court “permit[s] facial challenges to statutes that burden expression.” Ashcroft, 535 U.S. at 244. “The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.” Id. Although governments “may pass valid laws to protection children from abuse,” “[t]he prospect

of crime ... by itself does not justify laws suppressing protected speech.” Id. at 245. “It is ... well established that speech may not be prohibited because it concerns subjects offending our sensibilities.” Id. “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear.” Id. Nevertheless, freedom of speech “does not embrace” “defamation, incitement, obscenity, and pornography produced with real children.” Id. at 245-246.

The Ashcroft Court explained the federal statute at issue criminalized images that *appeared* to show a minor engaging in sexually explicit activity without any regard to the obscenity requirements established in Miller. Id. at 246. Specifically, the statute prohibited “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture that is, or appears to be, of a minor engaging in sexually explicit conduct.” Id. at 240 (internal quotation omitted).

The prohibition on “any visual depiction” does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called “virtual child pornography,” which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a “picture” that “appears to be, of a minor engaging in sexually explicit conduct.” The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor “appears to be” a minor engaging in “actual or simulated ... sexual intercourse.”

Id. at 241 (quoting 18 U.S.C. 2256(2)).

Under the federal statute, “[t]he materials need not appeal to the prurient interest. Any depiction of sexually explicit activity, no matter how it is presented is proscribed.” Id. at 246. The prohibition applied “to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse.” Id. The statute did not require “the image be patently offensive.” Id. In fact, the statute prohibited “speech despite its serious literary, artistic, political, or scientific

value.” Id. According to the Court, the statute criminalized “the visual depiction of an idea – that of teenagers engaging in sexual activity – that is a fact of modern society and has been a theme in art and literature throughout the ages.” Id. The federal law prohibited images “so long as the persons appear to be under 18 years of age,” which the Court noted was “higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations.” Id. at 247. The Court also described literature and film that explore teenage sexual activity and the sexual abuse of children. Id. at 247-248. According to the Court, the described films, and hundreds of others like them, explored themes within the wide sweep of the federal statute’s prohibition. Id. at 248. Based upon this reading of the statute, the Court held the federal statute could not “be read to prohibit obscenity, because it lack[ed] the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity.” Id. at 249.

The Ashcroft Court then sought to explain its earlier ruling in Ferber: “Where the images are themselves the product of child sexual abuse, Ferber recognized that the State had an interest in stamping it out without regard to any judgment about its content.” Ashcroft, 535 U.S. at 249. “Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were ‘intrinsically related’ to the sexual abuse of children.” Id. “In contrast to the speech in Ferber, speech that itself is the record of sexual abuse, the [federal statute] prohibits speech that records no crime and creates no victims by its production.” Id. at 250. As the Court explained, “[v]irtual child pornography is not ‘intrinsically related’ to the sexual abuse of children, as were the materials in Ferber.” Id.

“First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of

freedom, and speech must be protected from the government because speech is the beginning of thought.” Id. at 253. The Court concluded the federal statute covered “materials beyond the categories recognized in Ferber and Miller,” and the Court found “no justification” supporting limiting the freedom of speech. Id. at 257. Thus, the Court determined the statute “abridge[d] the freedom to engage in a substantial amount of lawful speech,” and as a result, was “overbroad and unconstitutional.” Id.

The South Carolina statutory provision concerning second degree sexual exploitation of a minor provides that a person commits the offense if the person knows the character or content of the material and “records, photographs, films, develops, duplicates, produces, or creates digital electronic file material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation” or “distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.” S.C. Code Ann. § 16-15-405.

The pertinent language of the South Carolina statute is virtually indistinguishable from the language of the federal statute. Whereas the federal statute prohibited “any visual depiction” of a minor engaged in a sex act, the state statute prohibits “a visual representation” of a minor engaged in a sex act. South Carolina’s “visual representation” language criminalized materials which appear to be images of minors, but which were created without the abuse of any actual minors just as the federal statute’s “visual depiction” language. As defense counsel argued below, the terms “representation” and “depiction” are synonymous. See Supp. R. 1-14. Despite

the state's contention at trial that the definition of minor as "an individual" requires the use of a "live" minor, there is nothing in the statutory language or case law to support the contention.

In light of the statute's failure to limit its application to only those visual representations of actual minors as required by Ashcroft, and the statute's failure to limit its application to obscenity as required by Miller, the statute is unconstitutionally overbroad. The statute criminalizes a drawing of a minor engaged in sexual activity even if no actual minor were used to render the drawing. The same can be said of each of the "materials" listed in the definitional section of the statutory scheme, including films, digital electronic files, and any "other visual depictions or representations." See S.C. Code Ann. § 16-15-375(2). There is simply no requirement in the statutory provision or in the case law that the state prove the representations or depictions are of *actual* minors.

Adding to the overbreadth of the statutory provision is the permissive inference section. See S.C. Code Ann. § 16-15-405(B). The statute permits "the trier of fact" to "infer that a participant in sexual activity or a state of sexually explicit nudity depicted in material as a minor through its title, text, visual representations, or otherwise, is a minor." Id. In other words, the state is not required to prove the "visual depiction" or "visual representation" involved the use of an *actual* minor and the jury may infer the age of the "visual depiction" or "visual representation" based upon information other than the evidence of the actual age of the "visual depiction" or "visual representation." The inference combined with the statutory language of "depiction" or "representation" prohibits a substantial amount of protected speech as it would include depictions of those older than eighteen, depictions created by digital means, and depictions, such as drawings, in which no actual minor was involved.

In light of the unconstitutionally overbroad statute, the entire statute must be rendered a nullity. Virginia v. Hicks, 539 U.S. 113, 118-119 (2003). “The showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute’s plainly legitimate sweep, suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.” Id. (internal quotations and citations omitted)(emphasis in original). Appellant’s convictions under the statute may not stand due to the unconstitutional, and therefore, unenforceable, nature of the statute.

II. The trial judge erred in finding defense counsel opened the door to unfairly prejudicial character evidence of child pornography videos contained on an external hard drive that were not the subject of the charged offenses where none of the questions on cross-examination elicited testimony concerning the investigator's examination of the external hard drive and where the solicitor had agreed to permit the jury to know that an external hard drive was seized and had done so through the questioning of the witness during direct examination.

### **Relevant facts**

Prior to trial, defense counsel moved to exclude eight videos found on an external hard drive in Appellant's room as unfairly prejudicial and improper character evidence. R. 34, ll. 4-11 R. 34, ll. 17-21; R. 35, ll. 2-9; R. 43, l. 15 – R. 44, l. 6. Defense counsel emphasized that law enforcement did not find the six videos on which the criminal charges were based during the search of the digital storage devices seized pursuant to the search warrant. R. 44, ll. 9-14. The videos found on the external hard drive would “shift the jury's focus” from the criminal charges to uncharged conduct. R. 44, ll. 9-14. Defense counsel emphasized the lack of temporal connection between the charged and uncharged videos. Appellant allegedly shared six videos in November 2013 through a file sharing program ultimately resulting in the charged criminal offenses, but the eight videos appeared to have been downloaded and deleted in April or May of 2013 – several months prior to the alleged file sharing. R. 45, l. 21 – R. 46, l. 2. Additionally, the state could not demonstrate a similarity of the circumstances surrounding the possession of the eight videos and the sharing of the six videos. R. 46, ll. 2-6. Defense counsel emphasized the only similarity between the charged and uncharged videos was the alleged nature of the images – child pornography. R. 47, ll. 22-24. However, the state claimed Appellant disseminated some images and charged Appellant with criminal offense of such. R. 47, ll. 24-25. On the other hand, the state claimed Appellant possessed the other images as those had been found in the deleted space of the external hard drive, but the state had not charged him with possession of child pornography related to those videos. R. 47, ll. 22-25. In short, defense

counsel argued the state, at best, could show a general connection between the uncharged and charged conduct, but could not show the close degree of similarity required under Rule 404(b), SCRE, for the admission of prior bad acts and character evidence. R. 48, ll. 4-14. Further, defense counsel argued the state could not show, by clear and convincing evidence, that Appellant possessed the videos on the external hard drive. R. 48, ll. 15-22. Finally, defense counsel argued, “the prejudicial effect that it would have on Mr. Simmons and his right to a fair trial would be – would substantially outweigh the probative value to the state in this case.” R. 49, ll. 13-16.

Judge McMahon agreed with defense counsel that the eight videos were “more prejudicial than probative.” R. 66, ll. 15-22. Thus, the judge excluded those videos from evidence. R. 66, ll. 21-22.

On direct examination, the state showed VanHouten the search warrant return, which listed the external hard drive as an item seized from the residence. R. 271, ll. 22-24. VanHouten stated he examined those items. R. 271, l. 25 – R. 272, l. 4. Next, the state asked if VanHouten analyzed all of the computers listed. R. 272, ll. 6-7. VanHouten responded:

As far as the actual computer systems, I did a forensic preview. The – when the, when the, the items were brought or when I – when the investigator told me what he was looking for, he specifically pointed out this is one – of the first – this particular item is something we need to focus on. I would go ahead and do a complete forensic image on that because the case agent would know the best about the case itself. The rest of the stuff, the rest of the laptops or computers that were involved, I did -- I conducted a forensic preview.

R. 272, ll. 8-17. VanHouten further explained he conducted a full forensic examination of the HP Pavilion desktop, which was the item listed on the search warrant return that the investigator asked him “to focus on.” R. 273, ll. 11-23. This full examination was conducted because the “submitting agent or investigator said [it] was pertinent to his case.” R. 275, ll. 15-20. The state

asked VanHouten, “In examining the other computers that were seized from the home, you did not do an in-depth analysis like this?” R. 303, ll. 24-25. VanHouten explained he did not conduct full examinations on the other seized items, but conducted “previews” only. R. 304, ll. 1-19.

During cross-examination, VanHouten said he had a list of items to focus on that were seized from Appellant’s room. R. 308, ll. 5-14. Defense counsel then had VanHouten list the “non-focused items,” which included the external hard drive. R. 308, l. 15 – R. 314, l. 1. Defense counsel then questioned VanHouten about the items law enforcement did not seize from the residence, such as the iPad, phone, and computer. R. 314, l. 12 – R. 315, l. 20. Defense counsel made clear he wanted VanHouten to testify – just as he had on direct examination – that there were no full examinations conducted on the non-focus items, which included items not seized from the home and items that were seized from locations in the home other than Appellant’s room. R. 319, ll. 1-6.

After defense counsel cross-examined VanHouten, the state moved to question VanHouten about the videos found on the external hard drive and to show those videos to the jury. R. 326, l. 5 – R. 327, l. 1. The state argued defense counsel opened the door by categorizing the items examined as “focused items and non-focused items.” R. 326, ll. 17-19. The state’s position was that the categorization implied to the jury that VanHouten “fully conducted an examination on these four items and didn’t on these other items, and he has not been able to speak about those items on the external hard drive. R. 326, ll. 19-23. The state “believe[d]” it “must be able to provide a full and complete picture of what was found on those items.” R. 326, l. 24 – R. 327, l. 1.

Defense counsel explained that discussions had taken place off the record regarding how to handle the external hard drive. R. 327, ll. 18-23. The state wanted to ignore the external hard drive. R. 327, l. 24 – R. 328, l. 5. Further, defense counsel explained law enforcement and the state had used the terms “focus items and target items,” and he had simply mirrored that language in his questioning of VanHouten. R. 328, ll. 6-9. Defense counsel “made a point” not to mention the contents of the external hard drive. R. 328, ll. 12-17. The agreement between the defense and the state was to acknowledge the existence of the external hard drive, but to not talk about it. R. 328, ll. 18-24. Defense counsel explained the state elicited testimony from VanHouten that full examinations were conducted on some items and not on others, just as the defense did during questioning of VanHouten. R. 329, l. 20 – R. 330, l. 10.

The state admitted to off-the-record discussions to “agree as to the presence of” the hard drive. R. 328, l. 25 – R. 329, l. 1. The state claimed that “throughout” the cross examination of VanHouten, testimony was elicited that “well, he fully examined all these items, and now he used – there is – there are items that were imaged but not looked at, but now he’s not testified as to what else he had found. It’s, it’s this lingering question that, well, he must not have found anything on the other items.” R. 329, ll. 1-7. The state asserted it had not agreed to the categorization “as fully forensically analyzed” or to “the focus.” R. 329, ll. 9-17.

Judge McMahon ruled, “Based on, based on the question, I think the door has been opened. I think it hamstrings the state not to be allowed to get into the examination of the both desktop and the external hard drive.” R. 332, ll. 15-19. In the judge’s estimation, it went “to the full and complete picture of the forensic computer examination performed by Officer VanHouten” “on the items that were recovered during the course of the search warrant.” R. 333, ll. 13-25.

Thereafter, the state questioned VanHouten regarding his full forensic examination of the external hard drive. R. 335, ll. 1-19. VanHouten found eight videos he believed contained child pornography. R. 343, ll. 23-25. The videos were found in the recycle bin on the hard drive. R. 349, ll. 9-25. The state published the videos to the jury. R. 350, ll. 10-25.

### **Discussion**

“It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.” State v. Page, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008). “[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially.” State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999).

One of the most common areas in which “opening the door” applies is in the context of character evidence. “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” Rule 404(a), SCRE. However, character evidence is admissible when offered by an accused or by the prosecution to rebut the same. Rule 404(a)(1), SCRE. In State v. Major, 301 S.C. 181, 185, 391 S.E.2d 235, 238 (1990), this Court explained “[w]hen the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor has the right to cross-examine him as to particular bad acts or conduct.” The prosecution is restricted “to showing bad character only for the traits initially focused on by the accused.” Id. When Major denied having ever used crack cocaine, the prosecutor was permitted to introduce evidence of a prior conviction for simple possession of cocaine. This Court found Major had made a “clear

attempt ... to communicate to the jury that he [was] not the sort of individual who would become involved in the drug trade.” Id. at 185-186, 391 S.E.2d at 238.

However, in State v. Young, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008), the Court held “Young’s testimony that he hated to see a woman cry did not open the door to the admission of his prior CDV and CSC convictions.” The Court explained the testimony must be read “in its proper context,” which showed “Young was not offering evidence of a specific character trait towards women in general.” Id. Instead, “the isolated statement used to justify admission of the prior CDV and CSC convictions was simply part of Young’s narrative recounting his version of the events that occurred on the night in question.” Id.

Jaleel Page was charged with crimes related to the death and attempted armed robbery of Willie Cunningham. Page, 378 S.C. at 479, 663 S.E.2d at 358. Another individual involved the offense, Terrence McKnight, gave several statements to police implicating Page. Id. at 480, 663 S.E.2d at 358. Page moved to suppress the statement if McKnight did not testify. Id. at 480, 663 S.E.2d at 358-359. The judge denied the motion but ordered the statement to be redacted to replace any mention of Page with “another guy” or the “other guy.” Id. at 480, 663 S.E.2d at 359. McKnight did not testify and his redacted statement was admitted against Page. Id. Page’s lawyer questioned the investigator “extensively about her investigation and the steps leading to the charges and ultimate arrests” of Page and his co-defendants, including McKnight. Id. The cross-examination “attempted to show how the state had very little evidence to link Page to the murder and attempted armed robbery.” Id. In response, the state moved to admit McKnight’s full and complete statement on the basis Page had opened the door to allow the unredacted evidence.” Id. at 480-481, 663 S.E.2d at 359. The judge agreed and admitted the unredacted statement.” Id. at 481, 663 S.E.2d at 359. This Court held the judge erred in finding Page had

opened the door to the admission of the unredacted statement of his non-testifying co-defendant. Id. According to this Court, it was error to find “that Page’s counsel’s zealous representation of his client required the admission of this inadmissible evidence in order to rehabilitate [the investigator]’s investigative techniques.” Id. at 483, 663 S.E.2d at 360.

The Supreme Court held a defendant did not open the door to a witness’s prior consistent statement where the defendant asked “a single, non-substantive question about her prior consistent statement, and then questioned [her] veracity by asking about her prior inconsistent statements.” State v. Foster, 354 S.C. 614, 623, 582 S.E.2d 426, 430 (2003). According to the Court, “counsel here merely asked whether [the witness] had given police a statement consistent with her testimony on direct examination.” Id. Permitting the state to “admit the written statement did not rebut or explain this testimony in any way.” Id. at 623, 582 S.E.2d at 431. The Court explained, “the sole purpose the state had for admitting [the witness]’s prior consistent statement was to rehabilitate its witness and bolster her credibility which was called into question by the cross-examination on her prior inconsistent statements.” Id. at 623-624, 582 S.E.2d at 431.

In State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984), this Court found a defendant had opened the door to his previous participation in two armed robberies because he had questioned an accomplice regarding prior housebreakings. The accomplice had been charged with the same crimes for which Stroman stood trial. However, the accomplice had entered guilty pleas and agreed to testify for the state. After Stroman questioned the accomplice about prior housebreakings, the prosecutor was permitted to question the accomplice about two robberies in which Stroman was an accomplice. Id. at 512-513, 316 S.E.2d at 398-399. This Court held “[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in

explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially.” Id. at 513, 316 S.E.2d at 399(quoting State v. Albert, 277 S.E.2d 439 (N.C. 1981)).

In another case, the South Carolina Supreme Court held a defendant did not open the door to his post-arrest silence when he testified about what he did subsequent to learning he was wanted for arrest. State v. McIntosh, 358 S.C. 432, 446, 595 S.E.2d 484, 491 (2004). According to the state,

McIntosh

Claimed he cooperated with police and thus opened the door to an otherwise improper line of questioning by (1) testifying on direct examination he voluntarily returned to South Carolina and he did not give a statement to police upon his arrest; (2) inferring to the jury he had told his alibi story to authorities by testifying he was staying with Butch Moore when the crimes occurred, but the sheriff had not been able to serve a subpoena on Moore shortly before or during the trial; (3) inferring to the jury he really wanted to speak to police but they did not want to talk to him, as they only once asked for his identification and later served a federal subpoena on him; and (4) testifying on cross-examination before the challenged inquiry “if I knew anything about any of this, I would have been talking to the police. I would have talked to the people in Columbia a long time ago.”

Id. The Court concluded McIntosh “did not, explicitly or implicitly, assert he cooperated with police.” Id. Rather, “[t]he focus of [McIntosh]’s defense, as revealed by his actions before his arrest and at his arrest, as well as his trial testimony, was he was not present when the crimes occurred, knew nothing about the crimes or who was involved, and so had nothing to tell police.”

Id.

None of the questions asked of VanHouten by defense counsel opened the door to the contents of the external hard drive. Defense counsel’s questioning of VanHouten was in service of the defense that Appellant was not guilty because Kyle was the person who had downloaded the child pornography at issue. The questions asked of VanHouten concerned the investigator’s focus on Appellant and neglect of any other member of the Doiron family, particularly, Kyle, as a suspect.

Defense counsel did not, and would not have, wanted to question VanHouten about the external hard drive as it had been found in Appellant's room. Rather, defense counsel's questions concerned VanHouten's failure to "focus" on any items found outside Appellant's room. The state did not, and could not, point to any question or series of questions asked by defense counsel that opened the door to the previously excluded evidence. In fact, the state and defense counsel discussed how to handle the external hard drive and arrived at a mutually agreeable solution – "ignore it." Several items of evidence mentioned the external hard drive, including the search warrant return, but those references were innocuous without a description of the content of the hard drive. Defense counsel complied with this agreement by mirroring the questions asked on direct examination about the hard drive – simply about its existence. The focus of the examination was on the state's failure to conduct full examinations on any of the digital media devices found outside Appellant's room. Nothing could be gained from making it appear that the state had not conducted a full examination on another device found in Appellant's room. The judge erred in finding defense counsel opened the door to the unfairly prejudicial character evidence contained on the external hard drive.

Briefly, the rules of evidence and case law prohibit the introduction of character evidence except in limited circumstances. The South Carolina Rules of Evidence and case law preclude the introduction of evidence of a defendant's other crimes, wrongs, or acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) identity, (3) a common scheme or plan, (4) the absence of mistake or accident, or (5) intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In fact "[e]vidence 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). As explained by the Court in State v. Wesley Smith, 391 S.C. 353, 361, 705 S.E.2d 491,495 (2011), in order to introduce evidence of some other act

by the defendant under one of the exceptions, the prosecutor must lay a proper foundation.<sup>1</sup> At the outset, the prosecutor must prove by clear and convincing evidence that the defendant committed the other act, if the defendant was not convicted of the act. Id. (citing State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008)). Next, the prosecutor must articulate the logical connection between the other act and one of the five exceptions listed in Rule 404(b), SCRE. Id. (citing State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006)). This requires a showing of how the evidence of the other act will assist the fact-finder in understanding a material issue in the case related to one of the Rule 404(b), SCRE, exceptions. Id. If the trial judge determines the prosecutor has satisfied both requirements, then the judge must determine whether the probative value outweighs the prejudicial effect pursuant to Rule 403, SCRE. Id. (citing State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).

As the arguments at trial demonstrated, the state failed to show that any of the exceptions applied. The state failed to demonstrate a common scheme or plan because there was no connection between the prior bad act and the current crime. See State v. Parker, 315 S.C. 230, 233, 433 S.E.2d 831, 832 (1993); State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). The only “connection” was the nature of the content – child pornography, which was a mere general similarity and could not satisfy the strict requirements of the rule. See State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983); State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009); State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990)(“The evidence must be logically relevant to the particular purpose or purposes for which it is sought to be introduced.”). Further, the state could not show how the external hard drive proved identity as the state had not shown Appellant downloaded the

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<sup>1</sup> Due to the danger this type of evidence poses, “[e]vidence of other crimes must be put to a rather severe test before admission.” State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

pornography onto the external hard drive. See State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006). Finally, the videos found on the external hard drive could not prove motive or intent on Appellant's part in relation to the charged offenses. See State v. Grainger, 275 S.C. 417, 421, 272 S.E.2d 175, 176 (1980); State v. Plyler, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980); State v. Fonseca, 383 S.C. 640, 648, 681 S.E.2d 1, 4 (Ct. App. 2009); State v. Sweat, 362 S.C. 117, 124-125, 606 S.E.2d 508, 512 (Ct. App. 2004).

Additionally, the state failed to prove Appellant downloaded the videos onto the external hard drive by clear and convincing evidence. "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." Fletcher, 379 S.C. at 24, 664 S.E.2d at 483.

In Fletcher, 379 S.C. at 25, 664 S.E.2d at 483-484, our Supreme Court held it was error to admit the testimony of a witness who testified about observing two incidents of alleged child abuse where the prosecution presented no evidence that the defendant was the person who engaged in the abuse despite evidence in the record that the defendant was at least present at the time of the alleged abuse. See also, State v. Pierce, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997)(finding error where witnesses testified about the victim having a split lip and swollen eye but there was no evidence the defendant inflicted the injuries); State v. Cutro, 332 S.C. 100, 106, 504 S.E.2d 324, 327 (1998)(holding it was error to admit the death of another child and the injuries of a third child due to a lack of evidence that the defendant had caused the death or injuries despite the children having died and acquired the injuries while in her and her husband's care).

This case differed sharply from other cases where this Court has found clear and convincing evidence of the prior bad act. See State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013)(finding clear and convincing evidence of a prior bad act where the parties related their positions during a hearing and written motions and a brief, the proffered testimony was very specific and appeared credible); State v. Martucci, 380 S.C. 232, 257, 669 S.E.2d 598, 611 (Ct. App. 2008)(finding clear and convincing evidence where the witness testified about his direct observations of prior incidents and other witnesses testified about bruises and burns in this homicide by child abuse case); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004)(finding clear and convincing evidence where the alleged victim testified that the defendant previously assaulted her, the defendant was arrested and incarcerated, and another witness testified to having seen bruises on the alleged victim's arm following the assault).

The trial judge ruled correctly initially when he excluded the videos because the danger of unfair prejudice substantially outweighed any probative value. Even 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. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). The first step requires a determination of the probative value of the evidence. The second step requires an evaluation of the danger of unfair prejudice resulting from the introduction of the evidence. The third step requires balancing of the probative value and unfair prejudice. “When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v.

Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that “[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one”).

The starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. “‘Probative’ means ‘[t]ending to prove or disprove.’” State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, “[p]robative value’ is the measure of the importance of that tendency to the outcome of a case.” Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. “The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.” State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). “‘Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.’” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6<sup>th</sup> Cir. 1993)). “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180 (1997); see also United States v. Mohr, 318 F.3d 613, 619-620 (4<sup>th</sup> Cir. 2003)(explaining unfair prejudice is “prejudice that damages an opponent for reasons other than its probative value, for instance, an

appeal to emotion”). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230; see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that “[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one”). Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

The probative value of the videos on the external hard drive was very low. The videos were found on an external hard drive in Appellant’s room and were not the subject of the charged offenses. The videos were not like the videos comprising the charged offenses, were not found on the same device, and were not closely connected in time. The prejudicial effect of the videos was dangerously high. The videos showed what was obviously child pornography, unlike the videos of the charged offenses for which the ages of the actors in the videos was less clear. The videos on the external hard drive were longer than the videos recovered through the file sharing program, exposing the jurors to more graphic episodes of child pornography. The danger was unfairly high that the jury would decide the case on emotion as no one could argue the emotional toll of watching child pornography would have on a jury. Balancing the low probative value of the videos against the extremely high danger of unfair prejudice results in a conclusion that the videos were not admissible under Rule 403, SCRE. The trial judge correctly ruled as such during the pre-trial motions hearing. However, the judge erred in allowing the jurors to see the videos when he determined defense counsel had opened the door through his cross-examination of VanHouten.

III. The trial judge erred in failing to suppress evidence seized pursuant to a search warrant because the affidavit in support of the warrant contained only stale information, thus, defeating probable cause as required by the Fourth and Fourteenth Amendments to the Constitution.

**Relevant facts**

Defense counsel explained Murphy found “what he believe[d] to be” child pornography on November 22, 2013. R. 26, ll. 10-14. Then, on February 21, 2014, Murphy contacted Hudak. R. 26, ll. 14-18. Months later, on June 12, 2014, Hudak’s colleague, Narewski, sought a search warrant. R. 26, ll. 18-19. Law enforcement relied solely on the information obtained by Murphy on November 22, 2013, to get the search warrant on June 12, 2014. R. 26, ll. 19-23. Thus, defense counsel argued, the information allegedly supporting the search warrant was “stale” and could not provide probable cause to justify a search. R. 27, ll. 1-3. Citing State v. Winborne, 273 S.C. 62; 254 S.E.2d 297 (1979), defense counsel argued the facts contained within the search warrant affidavit were not closely related in time to the issuance of the warrant. R. 27, ll. 11-24. Based on this staleness, defense counsel moved to suppress all evidence gathered pursuant to the search warrant. R. 28, l. 20 – R. 29, l. 3.

According to the affidavit in support of the search warrant, a law enforcement officer explained he had “received information in the form of an affidavit and a data disk containing several files that depict children engage in sexual acts including penetration.” R. 486-493. The affiant explained the files “were obtained through law enforcement investigation activity by SGT K Murphy of the Berkeley County Sheriff’s Office.” R. 486-493. Further, the affiant expressed a “belief” that “Computer records / file structures” were present and available on the computer equipment located at the home described in the warrant based “upon training and experience gained investigating Internet Crimes Against Children (ICAC) as a member of the South Carolina ICAC Task Force for more than four years.” R. 486-493. In addition to that affidavit,

the warrant application included an affidavit signed by Murphy on February 21, 2014. R. 486-493.

According to Murphy's affidavit, he "was conducting investigations into the sharing of 'child pornography' files" on a file sharing network on November 22, 2013. R. 486-493. He also explained how he identified an IP address on that date that was sharing such files. R. 486-493. Within an hour, Murphy had downloaded six files from the computer at the IP address and claimed those files contained "a visual representation of a minor engaging in sexual activity" as defined by statute. R. 486-493. Murphy explained he traced the IP address to Time Warner/Road Runner. R. 486-493.

Then, on February 2, 2014, Murphy, through the Attorney General, served process on Time Warner/Road Runner to obtain the physical address and subscriber associated with the target IP address. R. 486-493. Eight days later, on February 10, 2014, Time Warner/Road Runner provided Murphy with the subscriber's name and physical address. R. 486-493. Murphy provided all of this information to Hudak on February 21, 2014. R. 486-493. However, neither Hudak nor anyone from the Columbia Police Department sought a search warrant until June 13, 2014. R. 486-493. The search warrant listed no additional investigation conducted between November 22, 2013, and February 2, 2014, or between February 21, 2014, and June 13, 2014. R. 486-493.

The state responded that the "crimes were alleged to have occurred on November 22, 2013." R. 30, ll. 11-12. However, the state argued that child pornography cases were different, and, therefore different rules should apply. R. 31, ll. 6-9. According to the state, different rules were necessary because in cases involving child pornography, an individual may "delete that

information so that that might not be found at some point down the road.” R. 31, ll. 9-11.

Another reason counseling against staleness, per the state, was that

[A] typical child pornographer is one that collects these types of images: a person who has a library, who wants to hold on to that information and be able to access it at any time. And so no matter how much time goes on, that library will exist because he has it. The other types of individuals who view and download and use child pornography are people who download it and then delete it.

R. 31, ll. 15-21.

The state also relied on the ability of “forensic technology” to find information on computers. R. 31, ll. 22-23. The state elaborated on this point:

[B]ecause our computers are so big these days, this information remains on the computer well after the time a video or an image is deleted. And so addressing staleness from the perspective of whether or not a real probability that evidence of child pornography will exist on a computer several months or even years into the future is a real probability where these devices do not overwrite areas of the computer that are marked for deletion. And they exist for many, many months and even years after the user has gone to those websites or viewed those videos.

R. 31, l. 24 – R. 32, l. 9. The state concluded that “under the circumstances of this case, there was a real probability that based on the information” obtained by Murphy “that evidence would exist on devices” at the specific address obtained by Murphy. R. 32, ll. 15-21.

In denying Appellant’s motion to suppress, the judge relied upon the “distinctive nature of child pornography cases” making it “less likely” “that information supporting probable cause” would “become stale even when there exists substantial delays between the receipt of the child pornography and the issuance of a search warrant.” R. 76, ll. 1-8. According to the judge, “collectors and traders of child pornography share common characteristics that separate said crimes from other criminal acts.” R. 76, ll. 10-12. The judge was persuaded because other “courts often reject staleness challenges based on widespread expert opinion that collectors of

child pornography store and retain their collections for extended periods of time.” R. 76, ll. 12-16. The judge concluded that “[s]taleness [was] not an issue” in the case. R. 77, l. 3.

### **Discussion**

The Fourth Amendment provides that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891). The essence of the Fourth Amendment is to protect a person’s right to be free from unreasonable government intrusions in his own home. Kyllo v. United States, 533 U.S. 27, 31 (2001). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998). The exclusionary rule prohibits the use of evidence obtained through an unlawful search and/or seizure. Wong Sun v. United States, 371 U.S. 471, 484-485 (1963); State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); State v. Nelson, 336 S.C. 186, 192 n.3, 519 S.E.2d 786, 789 n.3 (1999); State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996).

“Generally, police seizures are *per se* unreasonable within the meaning of the Fourth Amendment unless such seizures are accomplished pursuant to judicial warrants issued *upon probable cause*.” State v. Rodriguez, 323 S.C. 484, 490, 476 S.E.2d 161, 165 (Ct. App. 1996)(emphasis added). “[T]he police must, whenever practicable, obtain advance judicial

approval of searches and seizures through the warrant procedure.” Terry v. Ohio, 392 U.S. 1, 20 (1968).

The Fourth Amendment also requires an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV. The South Carolina Code mandates that a search warrant “shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant.” S.C. Code Ann. § 17-13-140 (1985). “The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citing State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)). A magistrate may issue a search warrant only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). “The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued.” Dupree, 354 S.C. at 684, 583 S.E.2d at 441 (citations omitted). Oral testimony may also be used in to supplement search warrant affidavits which are facially insufficient to establish probable cause. See State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). However, “sworn oral testimony, standing alone, does not satisfy the statute.” State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000) (citing State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987)).

“A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” State v. Kinloch, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014). “The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of

knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983); see also State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002)(“This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”). Put another way, there must be “a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved.” State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

In terms of a court’s review of the magistrate’s decision, “[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed.” State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). In determining whether a substantial basis exists, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6 (1978).

“In order for an affidavit in support of a search warrant to show probable cause, it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.” State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979)(internal quotation omitted). “The reason for this rule is that probable cause, with time, dissipates.” Id. Relying upon State v. Baker, 251 S.C. 108, 160 S.E.2d 556 (1968), in which the Supreme Court held that a “search warrant had to be executed within a reasonable time,

depending upon the circumstances,” the Court concluded that the timing of information obtained used to justify the issuance of a warrant “should be sufficiently short to justify the conclusion that the evidence is likely still at the place where it was seen.” Winborne, 273 S.C. at 65, 254 S.E.2d at 298. Where the police failed to provide in the search warrant application a date on which the confidential informant allegedly saw drugs at a particular residence, the Court concluded there was “no evidence from which a magistrate” or the reviewing court could “determine how long ago the evidence was seen.” Id. Thus, “the affidavit was defective” and the evidence must be suppressed. Id.

According to this Court, there is “no fixed standard or formula establishing a maximum allowable interval between the dates of events recited in an affidavit and the date of a search warrant.” State v. Thompson, 363 S.C. 192, 206, 609 S.E.2d 556, 564 (Ct. App. 2005)(citing United States v. McCall, 740 F.2d 1331, 1336 (4th Cir. 1984)).

While the lapse of time involved is an important consideration and may in some cases be controlling it is not necessarily so. There are other factors to be considered, including the nature of the criminal activity involved, and the kind of property for which authority to search is sought. Obviously, a highly incriminating or consumable item of personal property is less likely to remain in one place as long as an item of property which is not consumable or which is innocuous in itself or not particularly incriminating.

State v. Corns, 310 S.C. 546, 550-551, 426 S.E.2d 324, 326 (Ct. App. 1992)(quoting United States v. Steeves, 525 F.2d 33 (8th Cir. 1975)). Nevertheless, “delay in seeking and obtaining a search warrant may invalidate it.” Steeves, 525 F.2d at 38. “It is axiomatic by now that under the fourth amendment the probable cause upon which a valid search warrant must be based must exist at the time at which the warrant is issued, not at some earlier time.” Id. at 37.

Recognizing that a sixty-day delay between the time an informant allegedly saw items connected to armed robberies and the issuance of a search warrant was “long,” this Court held

the delay was not so great as to invalidate the warrant as a matter of law. Corns, 310 S.C. at 551, 426 S.E.2d at 326. This Court explained “the delay was occasioned by the fact that the officers had information further criminal activity may occur and the house was thus under surveillance and the execution of a warrant may have interfered with this surveillance.” Id. at 550, 426 S.E.2d at 326. Additionally, this Court was persuaded that “the items sought by the warrant,” which “were ski masks, clothing and weapons used in an armed robbery” “were not incriminating in themselves and that people who own pistols generally keep them at home or on their persons.” Id. at 550-551, 426 S.E.2d at 326. In another case, this Court found probable cause for a search warrant where the informant claimed to have seen the defendant in possession of crack cocaine within the past 72 hours. Thompson, 363 S.C. at 206, 609 S.E.2d at 564. In support of this conclusion, this Court was persuaded by the fact “that the information received from the informant was not an isolated incident” and the officer had informed the magistrate that the defendant “was the subject of an ongoing narcotics investigation conducted during the several months prior to obtaining the warrant.” Id. Of particular importance to this Court was “the continuous nature of alleged drug activity.” Id. at 207, 609 S.E.2d at 564.

At trial, the state and the presiding judge relied upon United States v. Johnson, 865 F.Supp.2d 702 (D. Md. 2012) to conclude that due to the nature of child pornography cases, Appellant’s staleness argument must fail. In Johnson, 865 F.Supp.2d at 706, the District Court relied upon what it found to be a “consensus among courts” “that information supporting probable cause is less likely to become stale” “[w]ith regards to child pornography” because “collectors and traders of child pornography share common characteristics that separate said crimes from other criminal acts.” Of particular importance, Johnson relied upon “widespread expert opinion that collectors of child pornography store and retain their collections for extended

periods of time.” Id.

The District Court for the District of Oregon agreed with the government that “in a number of cases involving investigations of child pornography possession, staleness arguments have been rejected relative to evidence accumulated more than one year before the execution of the search warrant.” United States v. Greathouse, 297 F.Supp.2d 1264, 1271 (D. Ore. 2003). However, the court explained that “in each instance cited, the government also had other, more recent evidence of continuing criminal activity to bolster probable cause and freshen the older information.” Id. In Greathouse, the officer “indicated in his affidavit that child pornography collectors routinely maintain their materials for long periods of time.” Id. at 1272. Nevertheless, the officer who made the statement “was unable to specify the source of this assumption” and it appeared “to be based upon a generalized sense developed through informal conversations with other agents,” “not based upon any empirical data or studies.” Id.

In the present case, the search warrant affidavit offered no such expert opinion on which the magistrate, the trial judge, or this Court could rely. In fact, the search warrant affidavit did not even include an opinion by the officers regarding the conduct of alleged collectors of child pornography. Certainly, the state offered no expert opinion during the course of the pre-trial hearing, but relied merely upon case law from other jurisdictions in which those courts had relied upon expert opinion. When arguing this point to the trial judge, the state talked about the “typical child pornographer” who collects and keeps “a library.” R. 31, ll. 14-19. This was said to support the state’s argument that despite the terribly long delay between the commission of the alleged crime and the search warrant execution, there was reason to believe evidence of the crime still existed. However, the state completely undercut this argument by admitting that “[t]he other types of individuals who view and download and use child pornography are people

who download it and then delete it.” R. 31, ll. 19-21. Essentially, the state’s argument was that probable cause determinations in child pornography cases were divorced from any temporal considerations because some child pornographers hoard their collections and some delete their collections. Under the state’s formulation, anyone suspected of possessing or disseminating child pornography at any point in the past would be subject to a search of his person, home, papers, and effects *at any time*.

Unlike the officers in Corns, law enforcement investigating Appellant had no information that future crimes were likely to be committed and the items sought were not those that would not be readily recognized as criminal. The police sought child pornography, which would be immediately recognized as illegal. Therefore, child pornography, the items the police sought, were not the type that a person would keep, like the ski masks and clothing sought in Corns. Law enforcement also had no information about on-going criminal activity related to Appellant, like the police did in Thompson. There was no allegation that the police maintained Appellant under surveillance or attempted to download additional items from the target IP address. The police had no informant claiming a continuous course of conduct, which may excuse a delay between the alleged crime and the application for the search warrant. See United States v. Zimmerman, 277 F.3d 426, 435 (3rd Cir. 2002)(explaining the affidavit failed to allege or demonstrate that “Zimmerman was engaged in a ‘continuing offense’ of acquiring pornography and keeping it in his home” but claimed only “that six and at least ten months earlier Zimmerman had one piece of adult pornography”).

Law enforcement waited months to refer the case to the proper jurisdiction with no explanation for the delay. Law enforcement then waited months to apply for a search warrant, explaining the delay was because case was not a “high priority” for law enforcement. There was

no on-going investigation or reason to believe criminal conduct was continuing. The information provided to the magistrate was stale, and the trial judge erred in failing to suppress all evidence obtained pursuant to the search warrant.

IV. In violation of Appellant's right to due process of law, the trial judge erred in failing to instruct the jury regarding third party guilt where evidence was presented of third party guilt, the jury required instructions regarding how to analyze such evidence, and instructions were necessary to ensure the burden of proof remained on the state in light of the presentation of third party guilt evidence.

### **Relevant facts**

During the trial, the defense presented evidence that Kyle was the real culprit. The defense established that during the time when child pornography was shared from the specific address, the teenage Kyle resided there as well. R. 234, ll. 9-10; R. 235, ll. 5-8; R. 400, ll. 12-25. Additionally, the defense established that Kyle had access to Appellant's computer, which was not password protected and stayed in Appellant's unlocked room. R. 236, l. 24 – R. 237, l. 21; R. 260, ll. 9-11; R. 408, ll. 7-9. Kyle and his parents admitted Kyle often stayed at home alone. R. 242, ll. 9-13; R. 260, l. 12 – R. 261, l. 7; R. 407, l. 21 – R. 408, l. 6. Finally, the defense revealed Kyle had downloaded illegal movies and shared those through a file sharing program. R. 244, ll. 11-18. Kyle even admitted to viewing pornography online, but denied viewing child pornography. R. 246, ll. 5-13; R. 249, ll. 10-16; R. 250, ll. 2-15. During closing argument, defense counsel highlighted this compelling evidence against Kyle, particularly when juxtaposed against the state's weak case against Appellant. R. 432, l. 3 – R. 434, l. 13.

It was no surprise then that defense counsel requested a jury charge on third party guilt. R. 415, ll. 7-16. Specifically, Appellant requested the jury be instructed as follows concerning third party guilt:

The defendant contends that there is evidence before you indicating that someone other than he or she may have committed the crime or crimes, and that evidence raises a reasonable doubt with respect to the defendant's guilt. In this regard, I charge you that a defendant in a criminal case has the right to rely on any evidence produced at trial that has a rational tendency to raise a reasonable doubt with respect to his/her own guilt. I have previously charged you with regard to the state's burden of proof, which never shifts to the defendant. The defendant does not have to produce evidence that proves the guilt of another, but may rely

on evidence that creates a reasonable doubt. In other words, there is no requirement that this evidence proves or even raises a strong probability that someone other than the defendant committed the crime. You must decide whether the state has proven the defendant's guilt beyond a reasonable doubt, not whether the other person or persons may have committed the crime(s).

R. 506-508. However, Judge McMahon refused to charge the jury as to how to use the evidence of third party guilt that has been presented and argued to them. R. 418, ll. 4-5. Judge McMahon thought such an instruction was "a charge on the facts." R. 418, ll. 5-6. He was aware of "no South Carolina case" identifying "third party guilt as an appropriate charge." R. 418, ll. 6-9.

### **Discussion**

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt – including the element that the defendant is the actual perpetrator. In re Winship, 397 U.S. 358 (1970); Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013). The law to be charged is determined from the evidence presented at trial. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996); see also State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "The office and purpose of instructions are to enlighten the jury and to aid them in arriving at a correct verdict." State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944). "If there is any evidence to support a jury charge, the trial judge should grant the requested charge. The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). When a requested instruction is supported by the evidence and correctly states the applicable law, the judge is duty-bound to give it. Brown v. Smalls, 325 S.C. 547, 554-555, 481 S.E.2d 444, 448 (Ct. App. 1997)(citing Singletary v. South Carolina Dep't of Educ., 316 S.C. 153, 447 S.E.2d 231 (Ct. App. 1994)); see also State v. Peer, 320 S.C. 546, 553,

466 S.E.2d 375, 380 (1996). “Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error.” *Id.* at 555, 481 S.E.2d at 448; see also *State v. Burris*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999)(holding that a “trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence”).

Appellant is unaware of any reported cases from South Carolina discussing jury instructions regarding third party guilt.<sup>2</sup> Therefore, an examination of cases regarding analogous instructions is helpful to resolve Appellant’s issue on appeal.

One obvious place to start is with South Carolina’s jurisprudence governing jury instructions regarding the defense of alibi. The South Carolina Supreme Court ordered a new trial where a judge refused to charge a jury on the law of alibi. *State v. Robbins*, 275 S.C. 373, 271 S.E.2d 319 (1980). Robbins was charged with robbing a store. *Id.* at 374, 271 S.E.2d at 319. He testified that he had been at the store on the night it was robbed, but this was prior to 10 p.m. *Id.* at 375, 271 S.E.2d at 320. The store was robbed at 10:45 p.m. *Id.* Robbins testified that he was at home when the robbery allegedly took place. *Id.* The Court explained that “[a] charge on the defense of alibi is not required when an accused person merely denies committing the criminal act.” *Id.* However, an alibi instruction is necessary when the accused claims to have been elsewhere at the time of the commission of the criminal act. *Id.* Because Robbins

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<sup>2</sup> In *State v. Tindall*, 379 S.C. 304, 313, 665 S.E.2d 188, 193 (Ct. App. 2008), this Court held Tindall was not entitled to a jury instruction on third party guilt where the evidence offered raised only a conjecture as to the guilt of a third party. In other words, an instruction on third party guilt was unnecessary because there was no evidence to support the charge. *Id.* Additionally, this Court held the trial judge’s instruction on “mere presence” “adequately charged the law as determined from the evidence presented at trial.” *Id.* at 313-314, 665 S.E.2d at 193-194. The South Carolina Supreme Court reversed this Court’s opinion in *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010), but did not address the request for a jury instruction on third party guilt.

“was submitting to the court that he was elsewhere at the time of the robbery,” he was entitled to an alibi instruction. Id. at 376, 271 S.E.2d at 320.

The failure of trial counsel to request an alibi instruction where the evidence supports such a charge violates the Sixth Amendment right to the effective assistance of counsel. The South Carolina Supreme Court held “[i]t is well settled that counsel’s rejection of an alibi charge when the defendant claims that he was in another place at the time of the commission of the criminal act constitutes deficient representation under an objective standard of reasonableness.” Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1984)(citing Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992)). The failure to give an alibi charge, where the defendant claims to be at another place, is reversible error.” Riddle, 308 S.C. at 363, 418 S.E.2d at 309. In Roseboro v. State, 317 S.C. 292, 293-295, 454 S.E.2d 312, 313 (1995), the Court found trial counsel’s intentional failure to request an alibi instruction “because he felt the alibi testimony ‘did not come off too well in front of the jury’” was deficient performance prejudicing the defendant. Trial counsel testified at the PCR hearing that he made a tactical decision not to request an instruction as to alibi “to focus the jury’s attention on the state’s failure to meet its burden of proof rather than place more emphasis on the alibi testimony by requesting an alibi charge.” Id. at 293-294, 454 S.E.2d at 313. The Court found counsel’s strategy “invalid” under an objective standard of reasonableness because “[a]n alibi charge places no burden on a criminal defendant but emphasizes that it is the state’s burden to prove the defendant was present and participated in the crime.” Id. at 294, 454 S.E.2d at 313. According to the Court, the prosecutor’s “disparagement” of the defendant’s alibi during closing argument further rendered counsel’s strategy unreasonable because an alibi charge would have corrected any impression the defendant had any burden of proof at trial. Id.

Recently, the Court, in a divided opinion, held defense counsel's failure to request an alibi instruction was deficient performance, but found the failure did not prejudice the defendant in light of the jury charge as a whole. Gibbs v. State, 403 S.C. 484, 495-496, 744 S.E.2d 170, 176 (2013). The majority concluded that the jury charge requiring the state to prove identity beyond a reasonable doubt defeated the defendant's argument concerning prejudice. Id. In a powerful dissent, Chief Justice Toal and Justice Beatty concluded defense counsel's failure was prejudicial to Gibbs. Id. at 496, 744 S.E.2d at 176 (C.J. Toal, dissenting). The dissent explained the evidence of Gibbs' guilt was not overwhelming and the identity of the assailant was conflicting. Further, the alibi charge was necessary to correct any indication by the state in closing that Gibbs had any burden of proof and to rebuff the prosecutor's disparagement of Gibbs' alibi witnesses. Id. at 498-499, 744 S.E.2d at 177-178.

Another obvious useful area of the law in which to seek guidance is the law governing self-defense instructions. The trial court must charge self-defense if there is any evidence in the record "from which it can be reasonably inferred" that the accused acted in self-defense. State v. Burkhart, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002); State v. Wigington, 375 S.C. 25, 649 S.E.2d 185, 188 (Ct. App. 2007). To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or

losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978).

In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the South Carolina Supreme Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

Further, the South Carolina Supreme Court has long held that a trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989). As recognized in Fuller, there is a "body of common law self-defense" and trial judges must "consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." Fuller, 297 S.C. at 443, 377 S.E.2d at 330.

In Fuller, the defendant solicited a prostitute. Id. at 441, 377 S.E.2d at 329. However, when the pair arrived at the prostitute's trailer, they discovered it was occupied. The defendant then left. Id. When the defendant later returned to the prostitute's trailer, he found a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id. Two men approached the defendant's car and asked him "what he was 'trying to do to that white lady.'" Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

The defendant fired a warning shot allowing him to drive away. Unbeknownst to the defendant, the street was a dead end. Id. at 442, 377 S.E.2d at 330. Due to the men blocking his escape, the defendant ultimately crashed his car against a rail. Id. The two men yelled, “we’re going to take care of you.” Id. The defendant thought he saw something shiny in one of the men’s hands and fired four shots at them, killing both. Id. No gun was found on the men. Id.

The trial judge only instructed the jury on the basic elements of self-defense. Id. The Court held it was error to only give the general charge when the defendant “repeatedly requested additional charges.” Id. at 443, 377 S.E.2d at 330. The Court found the trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general charge. First, the trial judge failed to charge the jury that the defendant had the right to act on appearances. Id. at 443-44, 377 S.E.2d at 330-31(citing State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955)). Second, the trial judge failed to charge the jury that “words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense.” Id. (citing State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)). Third, the trial judge failed to charge that an individual has no duty to retreat “if by doing so he would increase his danger of being killed or suffering serious bodily injury.” Id. (citing State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920)).

The South Carolina Supreme Court held a trial judge erred in failing to charge on the specific elements of self-defense that were applicable to the defendant’s theory in State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). As stated by the Court, “[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant.” Id. The Court found the instruction given in Day incomplete because the trial judge failed to instruct the jury that the defendant had the right to judge the conduct of the deceased more harshly than otherwise because of the deceased’s drug consumption. Id.; see

also State v. Hendrix, 270 S.C. 653, 660-661, 244 S.E.2d 503, 507 (1978)(including the intoxication of the deceased under its analysis of the imminent peril element of self-defense and stating intoxication would provide a basis for the defendant to judge the conduct of his adversary more harshly than otherwise).

With those principles in mind concerning analogous legal concepts, a review of third party guilt jurisprudence and its purpose in a criminal trial dictates that a trial court instruct a jury on third party guilt where supported by the evidence. South Carolina's third party guilt evidence rule provides 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; 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. ... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts and 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.

State v. Gregory, 198 S.C. 98, 104-105, 16 S.E.2d 532, 534-535 (1941).

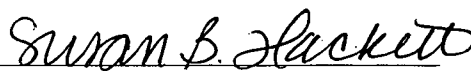
One commentator, Thomas Lundy, explained that “[w]hen the defense relies on a theory of third party guilt, the jury may improperly view the trial as a question of whether or not the third party has been proven guilty. Hence, it is crucial that the instructions caution the jurors against shifting the burden of proof to the defendant.” Thomas Lundy, Jury Instruction Corner, Champion September/October 2003, at 42. Lundy explained that “[b]ecause the defendant has a right to an instruction on his or her theory of the case, ... there should be a right to instruction on third party guilt when appropriate.” Id. In short, “a defendant who relies on the defense theory of third party

culpability should be permitted to obtain instruction upon this theory notwithstanding the fact that it may be generally encompassed within the general instruction on the prosecution's burden to prove guilt beyond a reasonable doubt." Id. at 42-43. Lundy explained "[t]he most important role of a third party guilt instruction is to assure the jurors understand that the defense has no burden to prove that the third party is guilty." Id. at 43. The "third party evidence need not show substantial proof of a probability that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt." Id. As presented earlier, Lundy described "the function of the third party guilt instruction" as "analogous to an instruction on alibi – it must assure that the jurors do not place the burden on the defense to prove its theory of the case." Id.

The trial judge erred in refusing to instruct the jury regarding third party guilt where Appellant presented evidence of the guilt of a third party – Kyle – and the instruction was necessary to ensure the jury knew how to evaluate the evidence, particularly regarding placing the burden of proof on the prosecution. The requested instruction served to explain the type of evidence presented. Additionally, the requested instruction would ensure the jury did not shift the burden of proof to the defendant in light of the evidence presented. Due to the presentation of third party guilt evidence, it was necessary to ensure the jury understood their job during deliberations was to evaluate the state's evidence against Appellant and not to focus on whether there was evidence of Kyle's guilt proven beyond a reasonable doubt. The question for the jury was not whether Appellant or Kyle was guilty. However, without clarifying instructions, the jury could not determine what it was supposed to do with the evidence of third party guilt or on whom to place the burden of proof in light of the evidence of third party guilt presented.

**CONCLUSION**

Appellant respectfully requests this Court reverse the rulings by the trial court and remand his case for a new trial.

  
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ATTORNEY FOR APPELLANT

This 10th day of April, 2018.

CERTIFICATE OF COUNSEL

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

April 10, 2018

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