

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SUMTER COUNTY  
Court of General Sessions  
Roger M. Young, Circuit Court Judge

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Appellate Case No. 2016-001264

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**RECEIVED**  
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SC Court of Appeals

The State,..... Respondent

v.

Larry Durant,..... Appellant.

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***Final Brief of Appellant***

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## TABLE OF CONTENTS

Table of Contents .....	i
Table of Authorities .....	iii
Questions Presented .....	1
Statement of Case.....	2
Statement of Facts.....	3
A. Introduction.....	3
B. Pastor Durant and Lizzy Johnson.....	3
C. Property Dispute.....	4
D. Sexual Assault Allegations.....	5
E. The Trial.....	8
1. Preliminary Instructions to the Jury.....	8
2. Pretrial <i>Lyle</i> Hearing.....	10
3. Trial Proceedings.....	12
4. Jury Deliberations – The <i>Allen</i> Charge.....	17
5. Sentencing.....	19
F. Discovery of the Brady Violation and Motion for New Trial.....	19
Arguments .....	23
Question I	
Did the trial judge err when he did not declare a mistrial after telling the jurors that the State charged Pastor Larry Durant with second-degree criminal sexual conduct with a minor, three counts of third-degree criminal sexual conduct, and forgery, when the only the second-degree criminal sexual conduct with a minor was being called to trial?.....	23

Question II

When admitting the testimony of A.R., T.H., and D.B, did the trial judge err when relying on *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), because our Supreme Court’s holding in *State v. Wallace* is contrary to Rule 404(b) and *State v Lyle* and should be overruled?..... 25

Question III

Did the trial judge err in admitting the testimony of A.R., T.H., and D.B. since that testimony was inadmissible under *State v. Wallace* and other valid precedent when the dissimilarities of the witnesses’ testimony outweighed the similarities and the danger of unfair prejudice from the testimony substantially outweighed the probative value? ..... 31

Question IV

After the jurors announced a deadlock, did the trial judge err by giving an *Allen* charge that singled out the sole non-voting juror, directing that juror not to prevent a unanimous verdict, after which the jurors returned a unanimous verdict in less than thirty-four minutes? ..... 34

Question V

Did the trial judge err by denying Pastor Larry Durant’s new trial motion based on a *Brady* violation resulting from the prosecutor not disclosing the prior criminal history of Ulanda McRae when her prior criminal history for dishonesty impeached her credibility? ..... 37

Question VI

Should this Court order a new trial for Pastor Larry Durant based on the Cumulative Error Doctrine? ..... 40

Conclusion ..... 41

Rule 211, SCACR Certification..... 42

## TABLE OF AUTHORITIES

### Cases

<i>Allen v. United States</i> , 164 U.S. 492 (1896).....	18
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	2
<i>Dawson v. State</i> , 352 S.C. 15, 572 S.E.2d 445 (2002).....	35
<i>Estelle v. McGuire</i> , 502 U.S. 62, fn. 5 (1991).....	28
<i>Gibson v. State</i> , 334 S.C. 515, 514 S.E.2d 320 (1999).....	38, 39
<i>Lowenfield v. Phelps</i> , 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).....	36
<i>Michelson v. U.S.</i> , 335 U.S. 469 (1948).....	29
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983).....	29
<i>Old Chief v. U.S.</i> , 519 U.S. 172 (1997).....	29, 33
<i>People v. Molineux</i> , 168 N.Y. 264, 61 N.E. 286 (1901).....	11
<i>State v. Blurton</i> , 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000).....	40
<i>State v. Brooks</i> , 341 S.C. 57, 533 S.E.2d 325 (2000).....	27, 31
<i>State v. Brown</i> , 284 S.C. 407, 326 S.E.2d 410 (1985).....	29
<i>State v. Council</i> , 335 S.C. 1, 515 S.E.2d 508 (1999).....	23, 24
<i>State v. Cox</i> , 781 N.W.2d 757 (Iowa 2010).....	30
<i>State v. Ellison</i> , 239 S.W.3d 603 (Mo. 2007).....	30
<i>State v. Fletcher</i> , 379 S.C. 17, fn. 3, 664 S.E.2d 480, fn. 3 (2008).....	27
<i>State v. Fonseca</i> , 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009).....	28
<i>State v. Fonseca</i> , 393 S.C. 229, 711 S.E.2d 906 (2011).....	28
<i>State v. Forrester</i> , 343 S.C. 637, 541 S.E.2d 837 (2001).....	29
<i>State v. Hallman</i> , 298 S.C. 172, 379 S.E.2d 115 (1989).....	28

<i>State v. Hubner</i> , 384 S.C. 436, 683 S.E.2d 279 (2009).....	26, 28
<i>State v. Johnson</i> , 293 S.C. 321, 360 S.E.2d 317 (1987).....	28
<i>State v. Johnson</i> , 334 S.C. 78, 512 S.E.2d 795 (1999) .....	40
<i>State v. Kenny</i> , 57 S.E. 859 (S.C. 1907).....	30
<i>State v. Langford</i> , 400 S.C. 421, 735 S.E.2d 471 (2012).....	24
<i>State v. Lyle</i> , 125 S.C. 406, 118 S.E. 803 (1923).....	10, 27
<i>State v. McClellan</i> , 283 S.C. 389, 323 S.E.2d 772 (1984) .....	28
<i>State v. Nelson</i> , 31 S.C. 1, 501 S.E.2d 716 (1998) .....	27
<i>State v. Nix</i> , 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986).....	11
<i>State v. Pagan</i> , 369 S.C. 201, 631 S.E.2d 262 (2006) .....	27
<i>State v. Parker</i> , 315 S.C. 230, 433 S.E.2d 831 (1993).....	27
<i>State v. Rivers</i> , 273 S.C. 75, 254 S.E.2d 299 (1979) .....	28
<i>State v. Stokes</i> , 279 S.C. 191, 304 S.E.2d 814 (1983).....	28
<i>State v. Thompson</i> , 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003) .....	24
<i>State v. Timmions</i> , 327 S.C. 48, 488 S.E.2d 323 (1997) .....	27
<i>State v. Tuffour</i> , 364 S.C. 497, 613 S.E.2d 814 (Ct. App. 2005).....	26
<i>State v. Tuffour</i> , 371 S.C. 511, 641 S.E.2d 24 (2007).....	26
<i>State v. Vance</i> , 119 Iowa 685, 94 N.W. 204 (1903).....	30
<i>State v. Wallace</i> , 364 S.C. 130, 611 S.E.2d 332 (Ct. App. 2005).....	11, 26, 31
<i>State v. Wallace</i> , 384 S.C. 428, 683 S.E.2d 275 (2009).....	2, 1, 10, 11, 25, 26, 32, 33
<i>Tucker v. Catoe</i> , 346 S.C. 483, 552 S.E.2d 712 (2001) .....	35, 36
<i>Workman v. State</i> , 412 S.C. 128, 771 S.E.2d 636 (2015) .....	36

**Statutes**

S.C. Code Ann. § 14-7-1330 ..... 18  
S.C. Code Ann. § 16-3-655 ..... 32

**Rules**

Rule 403, SCRE ..... 10, 24, 31, 33  
Rule 404, SCRE ..... 10, 25, 26, 27, 28, 31, 32, 33  
Rule 5, SCRCrimP ..... 20, 37

**Constitutional**

S.C. Const. Art I, § 3 ..... 29  
S.C. Const. Art I, § 15 ..... 29  
U.S. Const. Am. XIV ..... 29

## QUESTION'S PRESENTED

### Question I

Did the trial judge err when he did not declare a mistrial after telling the jurors that the State charged Pastor Larry Durant with second-degree criminal sexual conduct with a minor, three counts of third-degree criminal sexual conduct, and forgery, when the only the second-degree criminal sexual conduct with a minor was being called to trial?

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### Question IV

After the jurors announced a deadlock, did the trial judge err by giving an *Allen* charge that singled out the sole non-voting juror, directing that juror not to prevent a unanimous verdict, after which the jurors returned a unanimous verdict in less than thirty-four minutes?

### Question V

Did the trial judge err by denying Pastor Larry Durant's new trial motion based on a *Brady* violation resulting from the prosecutor not disclosing the prior criminal history of Ulanda McRae when her prior criminal history for dishonesty impeached her credibility?

### Question VI

Should this Court order a new trial for Pastor Larry Durant based on the Cumulative Error Doctrine?

## STATEMENT OF THE CASE

On June 22, 2013, the Sumter Police Department charged Pastor Larry Durant with second-degree criminal sexual conduct with a minor based on allegations made by K.R. On October 23, 2014, the Sumter County Grand Jury returned a true bill indictment. R. 789.

From May 23 to 26, 2016, the State tried Pastor Durant before the Honorable Roger M. Young, Sr. and a jury. Kinli Bare Abee and David Fernandez of the South Carolina Attorney General's Office represented the State. Shaun Kent, Cameron Blazer, and David Weeks represented Pastor Durant. The jurors convicted Pastor Durant, and Judge Young sentenced him to imprisonment for twenty years. R. 712-32; R. 796.

On May 27, 2016, Pastor Durant moved for a new trial based on a *Brady*<sup>1</sup> violation. R. 786088. On June 8, 2016, Judge Young convened a hearing on the motion. After hearing arguments from counsel, Judge Young denied the motion. R. 734-70.

On June 8, 2017, Pastor Durant filed a notice of appeal. This brief follows.

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<sup>1</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

## STATEMENT OF FACTS

### *A. Introduction.*

Four teenage women, K.R., A.R., T.H., and D.B., alleged sexual assaults by Pastor Larry Durant. All four women were connected to Lizzy Johnson, a former romantic partner of Pastor Durant, who was in an on-going property dispute with Pastor Durant involving cross-allegations of forged property deeds. All four were also connected to Ulanda McRae,<sup>2</sup> Lizzy Johnson's daughter. K.R. and A.R. are both granddaughters of Lizzie Johnson. Ulanda McRae is A.R.'s mother and K.R.'s aunt. T.H. is A.R.'s God Sister. K.R. lived with Ms. Johnson and Ms. McRae and A.R. beginning in July 2012, and K.R. has lived with D.B., as well. T.H. was a frequent visitor of K.R.'s, and all four—K.R., A.R., D.B., and T.H.—are close friends. While K.R., A.R., D.B., and T.H. all made allegations against Pastor Durant, the State only proceeded to trial on the allegations involving K.R.

### *B. Pastor Durant and Lizzy Johnson.*

Pastor Larry Durant is the minister of World International Ministries and presides over services at two locations, a smaller church on Manning Avenue and a larger church on North Guinyard Drive. Because Pastor Durant is legally blind and has had both legs amputated below the knee, he has assistants known as "armor bearers,"<sup>3</sup> who help him before, during, and after services, after which he is often quite tired. The church also has

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<sup>2</sup> Ulanda McRae's name sometimes appears in the trial transcript as Ulanda Riley. In the post-post trial motion hearing, her name appears and Yolanda McRae or Yolanda McCray. As seen in Question V, *infra*, the correct spelling of her name is significant.

<sup>3</sup> "An armor bearer is someone that serves and protects the leaders" of the church. R. 575-76.

many additional employees, including accountant, treasurer, secretary, and superintendent.

Lizzy Johnson met Pastor Durant in 1995 and began attending his church in 1998. She served in various positions in the church including treasurer, secretary, and superintendent. (Ulanda McRae began attending his church in 1999 and also held many positions within the church, including armor bearer. R. 249, 251.) Ms. Johnson admitted that in 1989 she “loaned” her cousin money out of a safe box, resulting in a charge for breach of trust. She was also investigated by federal authorities for stealing money from an apartment complex owned by the church. R. 356-59; 379.

Ms. Johnson once lived at Pastor Durant’s house. They dated and had a sexual relationship for six months to a year. She later moved into another house owned by Pastor Durant. The legal ownership of this property—whether it was Ms. Johnson or Pastor Durant—remained an issue through the trial.<sup>4</sup> Ms. Johnson’s daughter, Ulanda McRae, and her daughter K.R. also lived at this address. Ms. McRae’s niece, A.R. moved in with them in July 2012. Both K.R. and A.R. are Ms. Johnson’s granddaughters. T.H. and D.B. visited Ms. Johnson, Ms. McRae, K.R., and A.R. at this address. K.R., A.R., T.H., and D.B. are all close friends.

***C. Property Dispute.***

Lizzy Johnson lived with Pastor Durant for a while and then moved into another house he owned. Lizzy Johnson claimed Pastor Durant gave her this property. Pastor Durant had purchased the property for \$23,000.00, but it reached a value of \$112,000.00. Lizzy Johnson alleged that Pastor Durant deeded the property to her and forged her

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<sup>4</sup> This will be discussed in more detail, *infra*.

signature on a deed returning it to him. She made these allegations to law enforcement, which resulted in Pastor Durant being charged with forgery. Lizzy Johnson applied for and obtained a \$20,000.00 government grant for making improvements to the property she claims Pastor Durant gave to her. Lizzy Johnson also acknowledged Pastor Durant had evicted her from the residence at one point because she was not paying rent. R. 364-91.

***D. Sexual Assault Allegations.***

On May 19, 2013, Lizzie Johnson and Ulanda McRae claim to have overheard a conversation between A.R. and K.R. detailing sexual abuse by Pastor Durant. Ms. Johnson first confronted Pastor Durant about the abuse allegations over the phone, while Ms. McRae and A.R. listened in. Pastor Durant denied any abuse had occurred. Ms. Johnson later confronted Pastor Durant in person. R. 252-57; 359-63.

K.R. attended Pastor Durant's churches since she was five years old. She attended with her family, including her aunt Ulanda McRae and grandmother Lizzie Johnson, on Tuesdays, Wednesdays, Fridays, and Sundays of each week. A typical Sunday included an 8:00 a.m. worship service at the smaller church on Manning Avenue. After that service concluded at 9:00 a.m., members moved to the bigger church on North Guinyard Drive for Sunday School and the 11:00 a.m. worship service. K.R. claims that in 2012, when she was thirteen years old, Pastor Durant began sexually abusing her in the church offices of both churches. According to K.R., an armor bearer would summon her to the office for prayer to help her "not like girls and not catch[] any diseases." A.R. claimed Pastor Durant inserted his fingers into her vagina in the office of the smaller church. K.R. claimed Pastor Durant inserted his penis into her vagina and had sexual intercourse in the office of the larger church. K.R. claimed the sexual abuse happened

several times a week. R. 21-29. K.R. claimed she did not tell an adult about the alleged abuse because she “was afraid no one would believe.” She acknowledged, “at the time [she] was lying real [sic] bad about having a cell phone and a lot about [her] grades.” R. 227-44. Ms. McRae confirmed that, at the time K.R. frequently lied to get her way. R. 258-59. K.R. acknowledged that she has lived with both A.R. and D.B., that T.H. visited her house, and that the four complaining witnesses are “pretty close.” R. 247 l. 13—248 l. 3.

A.R. began attending both of Pastor Durant’s churches when she was four years old. Her mother is Ulanda McRae, and her grandmother is Lizzy Johnson. She attended church three to five times a week for Bible study, choir rehearsal, praise dancing, and worship services. When she was eighteen years old, A.R. claimed Pastor Durant called her to his office at the larger church “to pray for me to make sure I wouldn’t get any diseases or no kind of harm would come to my body,” including “unmarital pregnancies.” Once inside the office, A.R. claimed Pastor Durant told her to pull down her pants and put his fingers in her vagina. A.R. claimed the sexual activity continued at both churches. A.R. claimed Pastor Durant told her “God was taking him to a new level and we’re going to have to go further in this process.” A.R. claimed Pastor Durant began having sexual intercourse with her when she was eighteen years old. R. 38-56. A.R. said that she “could not tell anyone because they wouldn’t understand” and claimed to be afraid to tell, though she never explained of whom or what she was afraid. She claimed her mother overheard her and K.R. talking about the assaults. She listened when Ms. Johnson called Pastor Durant to confront him and heard Pastor Durant deny the allegations. R. 259-72. A.R. acknowledged that she and K.R. (her cousin) are “close”

(like sisters) and that the two lived together at the time of the allegations. R. 275, ll. 3-16.)

T.H. attended Pastor Durant's churches with her family on Sundays from age four to sixteen. Her mother sang in the choir and taught Sunday School. A.R. is her God Sister. T.H. claimed Pastor Durant would pray to prevent "[s]exual diseases, breast cancer," and anything that could cause harm. T.H. claimed Pastor Durant would "touch my breasts or fondle in my vagina." According to T.H., Pastor Durant never actually inserted his fingers inside her vagina or had sexual intercourse with her. She claimed the abuse began in 2012 when she was fourteen or fifteen years old, occurred six or seven times, and happened in Pastor Durant's offices at both churches. R. 57-69. T.H. said that she had revealed the abuse to her mother in February 2013. She claimed the abuse stopped when she told A.R. and her mother. On cross-examination, T.H. acknowledged she told law enforcement that the alleged abuse started when she was sixteen, and her courtroom testimony was the first time she claimed it happened when she was younger than sixteen. R. 57-69. T.H. further acknowledged that she is close with K.R., A.R., and D.B. R. 313-16.

D.B. began attending Pastor Durant's churches at a young age with her family. Her mother was an usher, her nephew was an armor bearer, and sister oversaw the daycare. In 2012 or 2013, when she was fourteen or fifteen years old, Pastor Durant began sexually abusing her. She claimed Pastor Durant "prayed and put his fingers inside my vagina when I had bladder issues." She claimed Pastor Durant had sex with her "in his office and at his home." She claimed Pastor Durant said he would "bump the

seed out” after she got pregnant by another man.<sup>5</sup> Pastor Durant arranged for D.B.’s mother to receive \$500.00 to pay for an abortion. D.B. testified Pastor Durant’s penis had a pink discoloration. R. 69-78. D.B. testified that she spoke with Investigator Valerie Williams of the Sumter Police Department in February 2014 and “copied” a statement. D.B. claimed Investigator Williams “put words in [her] mouth.” R. 340-55.

### *E. The Trial.*

#### **1. Preliminary Instructions to the Jury.**

Pastor Durant’s case was called to trial on May 23, 2016, before the Honorable Roger M. Young, Sr. and a jury. During his initial comments to the panel of prospective jurors, Judge Young said:

I should let you know. I don’t have the indictments in front of me to read them to you, but Mr. Durant is charged with criminal sexual conduct with a minor between the ages of 11 and 14. And, also, with three counts of criminal sexual conduct third degree and a charge of forgery.

R. 2, ll. 17-22. The trial judge correctly stated Pastor Durant’s pending charges, R. 789-95, but the prosecution was proceeding only on the second-degree criminal sexual conduct charge involving K.R.

Defense counsel interjected, “Your Honor, I have something to bring up at another point in time.” The trial judge responded, “Pardon?” Defense counsel informed the trial judge, “I’ll bring it up later.” The trial judge continued:

Again, I bring that up just for the purpose of letting y’all [know] this case involves allegations of sexual abuse. So,

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<sup>5</sup> Detective Natalie Kelly of the Sumter Police Department and Investigator Valerie Williams of the Attorney General’s Office interviewed D.B. After confirming that Pastor Durant was not the father of D.B.’s underage pregnancy, they did not conduct an investigation to determine the identity of the father, even though the pregnancy probably resulted from criminal sexual conduct with a minor. R. 454-56.

again, he pled not guilty to those charges. The State has the burden of proving them.

R. 2, l. 23 – 3, l. 5.

The trial judge convened a sidebar. After the sidebar, the trial judge informed the potential jurors:

I have to apologize to y'all and to Mr. Durant. I made a mistake. My law clerk is not with me today. He is getting sworn in. He just passed the bar exam. And he sent me an e-mail with the – what he thought were the charges. He was incorrect. There's only one charge that Mr. Durant is facing, and that is criminal sexual conduct with a minor in the second degree. So I was incorrect in stating those other charges before. So please do not consider that in any way or hold that against Mr. Durant.

R. 3, ll. 6-19. Although a good faith effort to correct an honest mistake, the trial judge's explanation to the jurors was not true.

The trial judge went on to explain the significance of a grand jury indictment. He explained grand jurors “determine if there was probable cause to charge someone with a crime.” And, grand jurors are “sort of a buffer between the State and the person so they can be put on notice of what they are charged with.” The trial judge then read the indictment containing the allegations involving K.R. R. 3, l. 20 – 5, l. 7.

Defense counsel placed the sidebar on the record, moved for a mistrial, and asked “for a continuance or a new jury panel.” Counsel pointed out that the trial judge informed the potential jurors about the other criminal sexual conduct charges in a “situation where the State is actively trying to get these other charges” into evidence. R. 11, l. 5 – 13, l. 5. The trial judge denied the motions for a mistrial or a continuance. R. 14, ll. 5-25. Pastor Durant renewed all motions prior to the jurors being sworn. R. 162-63.

## 2. Pretrial *Lyle* Hearing.

The prosecution moved to introduce evidence of the other crimes pursuant to Rule 404(b), SCRE and *State v. Lyle*.<sup>6</sup> The trial judge convened a pretrial hearing and heard testimony. Specifically, despite choosing to proceed only on the charges involving K.R., the State wanted to introduce evidence of the allegations made by A.R., T.H., and D.B., including their testimony. The State argued the *Lyle* evidence was admissible under our Supreme Court's decision in *State v. Wallace*.<sup>7</sup> The State first argued, "These witnesses talked clearly about similar occurrences of sexual acts with [Pastor Durant], which would be relevant to the criminal sexual conduct with a minor charge." Second, the State argued the "common scheme or plan" exception of Rule 404(b) applied because, under *Wallace*, the State satisfied its burden "to show that the similarities outweigh the dissimilarities in the case." Finally, the State argued Rule 403, SCRE did not exclude the evidence because:

Allowing this testimony in would not suggest that the jury come to a conclusion based on an improper basis, but would rather establish that a common scheme or plan existed by Pastor Durant to lure these younger girls back into his office, to pray for them, Your Honor, and to disguise this sexual assault as prayer for them, for girls that grew up in his church from the time that they were younger.

R. 78-83.

Counsel for Mr. Durant argued in response that the South Carolina rule regarding "common scheme or plan" is the same for charges of criminal sexual conduct with a minor as for other charges. Counsel then provided a classic example of a "common

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<sup>6</sup> *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

<sup>7</sup> *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

scheme or plan” where someone steals a car to facilitate committing other crimes.<sup>8</sup> Counsel discussed the facts and holdings in *Lyle* and the case it relied on, *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901). Counsel argued that the analysis by the Court of Appeals in its earlier decision in *State v. Wallace*<sup>9</sup> “got it right.” He argued admitting the challenged evidence would “allow[] the State of South Carolina to introduce propensity evidence,” which our state’s longstanding “jurisprudence has said that we don’t want to do.” He pointed out that the changing composition of our Supreme Court is likely “to change our analysis of how we look at *Lyle*.” R. 83-95.

Trial counsel additionally argued, even under our Supreme Court’s opinion in *Wallace*, the evidence was not admissible because the dissimilarities outweigh the similarities. He provided the trial judge with five charts illustrating how the dissimilarities outweighed the similarities.<sup>10</sup> The State dismissed the defense charts out of hand and argued simply that our Supreme Court’s opinion in “*Wallace* is still good law” and should control. R. 87-95.

The trial judge believed he was bound by our Supreme Court’s opinion in *Wallace* and concluded, “The similarities, in my analysis, far outweigh any of the dissimilarities.” R. 95-97. The trial judge declared the defense motion a “continuing objection” that protected Pastor Durant for appellate review. R. 279, ll. 6-21.

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<sup>8</sup> See, e.g., *State v. Nix*, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986) (evidence of car theft was admissible as part of a common scheme or plan to accomplish a planned robbery, abduction, and rape).

<sup>9</sup> *State v. Wallace*, 364 S.C. 130, 611 S.E.2d 332 (Ct. App. 2005), reversed by *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

<sup>10</sup> These charts will be discussed in more detail, *infra*.

### 3. Trial Proceedings.

From the very beginning of the trial, the State made it clear that they planned to prove the allegations involving K.R. largely with evidence of the allegations by A.R., T.H., and D.B. During opening statements, the prosecutor told the jurors:

This case, ladies and gentleman, is about power. It's about church abuse. It is about a man who is a pastor in two churches. And it is about a number of female victims, teenagers, who were taken advantage of.

The jurors would "hear from victims," not just K.R., but also A.R., T.H., and D.B. R. 179, ll. 1-4; 180, l. 12 – 181, l. 8.

The State called Detective Natalie Kelly of the Sumter City Police Department. Detective Kelly interviewed K.R. on May 22, 2013, the day after K.R. first reported the allegations to law enforcement. K.R. reported sexual abuse occurred in 2012 and 2013 inside the pastor's office at each of the two locations of World International Ministries. Detective Kelly next interviewed A.R., who reported sexual assaults in 2011 and 2012 in the pastor's office of each of the two churches and at the pastor's home when she was eighteen years old. Detective Kelly interviewed T.H, who reported sexual assaults occurring in the pastor's office at her church when she was sixteen years old. Detective Kelley interviewed D.B., who reported sexual assaults at her pastor's home when she was thirteen years old. After these interviews, Detective Kelly referred the four complaining witnesses for forensic medical exams. R. 187-193. Detective Kelly testified that none of the complaining witnesses alleged that Pastor Durant used a condom. Further, none of the complaining witnesses sought counseling for the alleged sexual abuse. R. 569-70.

Detective Kelly obtained a search warrant for cell phone records for cell phones belonging to Pastor Durant and some of the state's witnesses. The records did not

produce any evidence that corroborated the statements of any of the complaining witnesses. R. 212-13.

Detective Kelly also sought and obtained search warrants for the two church locations and Pastor Durant's home. Based on statements from K.R., she collected

two cans of Febreze Gain scent, one can of Lysol disinfectant spray, vanilla and blossom scent, two bottles of instant hand sanitizer, one suspected hair fiber from the carpet, two DNA swabs from the black leather chair, two DNA swabs from the right side of the desk, two test swabs from the front of the desk, two DNA swabs from the right – the left side of the black couch cushion, two DNA swabs from the right side of the black cushion.

This evidence was packaged by the Sumter Police Department Forensic Unit and sent to the South Carolina Law Enforcement Division ("SLED") for DNA analysis.<sup>11</sup> R. 193-94; 206-11; 224-25.

Jessica Stowe, a forensic serologist at SLED, found acid phosphatase—which is found in semen, vaginal fluid, fecal matter, plant matter, some feminine hygiene products, spermicide, and herbicides—on a hand sanitizer bottle, and forwarded it for DNA testing. Ms. Stowe also examined a dress belonging to K.R. but did not find anything of evidentiary value.<sup>12</sup> R. 290-304.

Jennifer Bartman, a DNA analyst at SLED, testified no STR/DNA identification evidence was found on the hand sanitizer bottle. Ms. Bartman also examined swabs from the leather chair, which contained a mixture of two DNA samples. Although Pastor

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<sup>11</sup> James Tallon, a crime scene technician at the Sumter Police Department assisted in serving the search warrant, collecting evidence based on witness statements, and transferring the evidence to SLED for analysis. R. 281-89.

<sup>12</sup> Valerie Williams, an investigator for the Attorney General's Office, assisted Detective Kelly during this investigation and collected the dress from K.R. for examination. R. 422-26.

Durant could not be excluded as contributing to the DNA mixture, K.R., A.R., and T.H. were excluded. R. 318-30.

The State called K.R., A.R., T.H., Ulanda McRae, and Lizzy Johnson, who testified as described, *supra*.

The State called Investigator Jacob Mitchell of the Sumter Police Department. He photographed Pastor Durant's penis. Pastor Durant cooperated with this process. R. 499-504. The four complaining witnesses gave similar descriptions of discoloration of Pastor Durant's penis, but, as the defense pointed out, these witnesses could have gotten that information from Lizzy Johnson who had been intimate with Pastor Durant. R. 664-66.

Kathy Saunders, a family nurse practitioner at the Sumter County Health Center, performed medical exams on K.R., A.R., and T.H. The examinations of K.R. and A.R. were normal with no indications of sexual trauma. The examination of T.H. was consistent with past penetration. T.H., however, disclosed to Dr. Saunders that she had been sexually active. R. 389-721. None of the complaining witnesses had a sexually transmitted disease.

David Kellin was qualified as an expert in child maltreatment and child abuse dynamics. He had never interviewed any of the complaining witnesses or reviewed any of the investigative materials. He testified about the process of grooming. He distinguished accidental and purposeful disclosure of child sexual abuse. He also testified about the reasons why a child might delay disclosing sexual abuse. The prosecutor wanted Mr. Kellin to connect religion with delayed reporting of sexual abuse,

so he “guess[ed]” religion could “play a role in whether or not someone discloses sexual abuse.” R. 469-81.

The State called Samara Samuels, a notary. Through her, the State introduced evidence of two quit claim deeds—one purporting to deed a property from Pastor Durant to Lizzy Johnson and one purporting to deed the property back from Lizzy Johnson to Pastor Durant. Ms. Samuels testified she notarized the quit claim deed purporting to transfer the property from Pastor Durant to Lizzy Johnson. She claimed her signature was forged on the deed purporting to transfer the property from Lizzy Johnson back to Pastor Durant. R. 493-98.

Pastor Durant called Melvin “Mickey” Dawson, Jr., a forensic document and handwriting examiner to demonstrate that Pastor Durant never transferred the disputed property to Lizzy Johnson. Mr. Dawson examined the two quit claim deeds. He compared the signatures on the quit claim deeds to known handwriting samples of Pastor Durant, Lizzy Johnson, and Samara Samuels. He concluded that Pastor Durant was not the person that signed his name to the two deeds. He concluded that Lizzy Johnson signed both documents. Samara Samuel’s signature on the first and second deeds was not signed by the same person. R. 530-55 Defendant’s Ex. 1, R. 771-73.

Pastor Durant called Myer Mack, who has been a member of Pastor Durant’s churches for twenty years. He is an elder and armor bearer. After a worship service, Mr. Mack would wait outside Pastor Durant’s office door. Often, church members wanted to see Pastor Durant. Sometimes Pastor Durant would accept the visitors, but “a lot of times he [would] be tired and worn out.” When Pastor Durant would receive a visitor, Mr. Mack would wait outside the door, which was never locked, has a window, and is not

sound proof. Most visitors stayed for a short period of time, less than five to ten minutes. If a visitor stayed for a long period of time, he would “find out what was going on because . . . we have other people waiting.” R. 570-79.

Mr. Mack knows Lizzy Johnson, K.R., A.R., T.H., and D.B. All were members of Pastor Durant’s church. They were always together. There were times they would go into Pastor Durant’s office, but Mr. Mack never observed or heard anything inappropriate when they—or anyone else—went into Pastor Durant’s office. R. 579-80.

Elvin Vaughn was also an armor bearer for Pastor Durant. Pastor Durant is legally blind and does not have legs from the knees down. He also knows K.R., A.R., T.H. and D.B., who were always together. He never saw any of the four complaining witnesses meet alone with Pastor Durant. R. 594-602

Arlisa Vaughn, a trustee and the accountant for Pastor Durant’s churches, wrote a check in the amount of \$500.00 payable to D.B.’s mother. Melody Durant, Pastor Durant’s wife who is also a minister at the churches, asked Ms. Vaughn to write the check as a loan. R. 628-35.

Dr. Jason Leonard, M.D. testified that he had been Pastor Durant’s doctor since 2009. Dr. Leonard confirmed that Pastor Durant is legally blind and a double amputee. Pastor Durant has chronic pain in his knees that requires medication and other treatment. Dr. Leonard knew Pastor Durant was diagnosed with erectile dysfunction in 2007 or 2008, which he continued to treat. Finally, Dr. Leonard diagnosed Pastor Durant with a chronic sexually transmitted disease. This sexually transmitted disease remained active the entire time Dr. Leonard treated Pastor Durant. R. 640-46.

During closing arguments, defense counsel reminded the jurors that the trial is about the allegations made by K.R., but the State threw in a “bunch of other people,” even though there were no other charges. Counsel emphasized the lack of physical evidence and pointed out that the first two complaining witnesses, K.R. and A.R., lived together and with Lizzy Johnson. All four complaining witnesses had Lizzy Johnson in common. Lizzy Johnson knew about the discoloration of Pastor Durant’s penis because of her prior intimate relationship. Trial counsel argued that the property dispute with Pastor Durant was Lizzy Johnson’s motive. Trial counsel pointed out that two armor bearers contradicted the allegations. Pastor Durant has a sexually transmitted disease that the complaining witnesses do not have. R. 659-70.

The Solicitor argued, “[Y]es, a lot of this case rest[s] on the testimony of K.R., A.R., T.H., and D.B.” Pastor Durant “was supposed to be their shepherd, but he was nothing but a wolf in sheep’s clothing.” He “went from praying for them to preying on them.” R. 674-75.

#### **4. Jury Deliberations – The *Allen* Charge.**

The jurors began deliberating at 2:16 p.m. At 5:11 p.m., the trial judge announced “something different” had occurred and summarized a note from the jurors:

Your Honor, after two hours and 45 minutes, presumably, and it says the vote is after four attempts, and it tells me what the break is between guilty and not guilty, but the unusual thing is they have one juror who will not vote....

I’ve never had that. And I don’t know how to deal with that other than bring them in, give them an Allen charge, ask them to try and tell them not voting is just not an option. They need to vote guilty or not guilty, but not voting doesn’t do anything. I’m completely open to suggestions on it. It’s such a baffling thing, I’m almost certain that it would be unique.

R. 705, l. 23 – 706, l. 19; Court’s Ex. 2, R. 776.

The State suggested substituting one of the alternate jurors for the juror refusing to vote, but the trial judge already had discharged the alternates. Defense counsel objected to the trial judge giving an *Allen*<sup>13</sup> charge because “there’s case law that suggest[s] that it may unfairly target the minority juror.” R. 707, ll. 7-21. The jurors returned to the courtroom at 5:15 p.m., and the trial judge gave an *Allen* charge which concluded with the following admonition:

Now, I don’t know who the person is, and I’m not asking who the person is that won’t vote, but that’s really not helpful to the situation at all. All that will do is ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision. So that’s not a helpful process and really under the process we have, we need all 12 people to vote. I don’t care how you vote, but it really does – it really is necessary for you to vote in order for us to have a verdict. Whether it’s guilty or not guilty, it’s got to be unanimous one way or the other. So we do need you to participate whoever this person is at this point is saying I’m not voting.

So in light of that, let me send you back. However long it is you want to take this evening, we’ll be here as long as you want to be here. You know, I’ll leave it at that.

And Mr. Foreman, go ahead and send your jury back and see what you can come up with.

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<sup>13</sup>*Allen v. United States*, 164 U.S. 492 (1896). S.C. Code Ann. § 14-7-1330 provides:

When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.

R. 708, l. 5 – 711, l. 15.

The jury resumed deliberations at 5:21 p.m. At 5:55 p.m., the jurors returned to the courtroom—only thirty-four minutes after they were previously sent out to resume deliberation—with a verdict finding Pastor Durant guilty of second-degree criminal sexual conduct with a minor. R. 711, l. 16 – 712, l. 24.

### **5. Sentencing**

By sentencing, it was clear that even the trial court had come to believe that the trial was about the allegations involving all four women. During sentencing, the trial judge stated:

Well, the *charges* in this case were really unlike any I've heard before. The evidence that the State presented was compelling. The defense made a strong case. And the jury chose to believe the young *ladies*.

R. 731, ll. 9-13 (emphasis added).

The trial judge sentenced Pastor Durant to the maximum sentence of imprisonment for twenty years. R. 732; 796.

### **F. *Discovery of Brady Violation and Motion for New Trial.***

Immediately following the verdict, Ronnie McCray called defense counsel and asked why his ex-wife, Yolanda McCray, “was allowed to testify without mentioning of her prior record.” Defense counsel was not aware of any prior record. Based upon the name and the information provided by Mr. McCray, defense counsel ran a SLED catch, which was attached as an exhibit to the motion. Under the name “Yolanda McCray,” the SLED catch revealed numerous aliases and an extensive criminal record. Defense counsel summarized:

In 1991, she had a simple assault charge under the [name] Vlonta Riley. In 1993, she had a shoplifting conviction under the name Yolanda Riley out of Myrtle Beach. In 1995, she had a fraudulent check charge under the name Yolanda S. Riley out of Clarendon County. In 1995, there was a forgery arrest under the name Yolanda Riley out of the Manning police department.

In 1997, she has a conviction for driving under suspension under the name Vlanda, V-l-a-n-d-a, S. Riley. That was a conviction, res, sir. In 1999 under the name Ulanda, U-l-a-n-a Shoantela, S-h-o-a-n-t-e-l-a, Riley, there was another fraudulent check charge conviction out of Sumter, South Carolina. In 2001, under the name that I just mentioned, Ulanda Shoantela Riley, the highway department, she had a speeding as well as driving under suspension conviction. In 2004, under the name Ulanda, U-l-a-n-d-a, Riley, she has a conviction for obtaining signature under false pretenses which she was convicted. In 2004, under Wanda Riley, for Manning, South Carolina, there was a forgery arrest.

R. 735-38.

Counsel reminded the trial judge, because of the complete lack of physical evidence in the case, the trial turned entirely on the credibility of the witnesses. As trial counsel pointed out at the hearing, the trial court even mentioned witness believability during sentencing. Attacking the credibility of Lizzie Johnson—including the evidence of forged property deeds—was central to Pastor Durant’s defense at trial. The State in turn relied heavily on the credibility of the Ms. McRae, including in its “very effective” closing argument. Counsel argued “that we should have been allowed to cross-examine on” this criminal history. Under the defense theory, Ms. McRae’s criminal history, including the conviction for obtaining signature under false pretenses, was very relevant. Counsel noted that Pastor Durant’s original Rule 5, SCRCrimP and *Brady* motions “specifically request[ed] records of” each witness. Counsel argued that the failure to

disclose this information was not “harmless error” because “this is a credibility case.” The jurors deliberated for over four hours and “came back initially with a hung jury.” R. 738-43.

The State acknowledged Ulanda McRae’s criminal history. The prosecutor stated the witness’s name “is Yolanda McCrae [sic], M-c-r-a-e,” but the State requested her criminal history under the spelling “M-c-C-r-a-e.” The State did not use the witness’s social security number to request her criminal history. The State contended it “had no idea Yolanda McCray had had a prior criminal history.” The State argued there was not a *Brady* violation. R. 734-49.

Defense counsel pointed out “allowing good faith mistakes still hamper[s] people’s rights.” Counsel reviewed the elements of a *Brady* violation. He first argued, “The evidence was favorable to [Pastor Durant] because it goes 100 percent to our legal defense.” Second, it was in the possession of the prosecution because “they have the right to run an NCIC search” and had the ability to talk to their key witness. Also, the witness’s social security number was on her witness statement. Third, although a good faith mistake, the prosecution suppressed the evidence. It “wasn’t given to us so that we could properly cross-examine” Ulanda McRae “because of their mistake.” Fourth, “It was material to guilt” because “[t]his is a credibility case.” R. 749-54.

The trial judge reasoned, “[T]he only real question is was it an inadvertent oversight, and, if so, did it rise to the level of being material, such to the point that it would affect a real question of guilt or punishment.” The trial judge acknowledged he probably would have allowed the evidence, which “clearly would have been favorable to” Pastor Durant. He found, “The State did not have this in their possession. It wasn’t

known to them. They didn't suppress it." The trial judge then ruled, "It would have been an impeachment issue about whether or not this lady actually overheard them, and so I find it was not a violation of *Brady* requirements to disclose this record, and so the motion for a new trial is denied." 24. R. 755-57.

## ARGUMENTS

### Question I

**Did the trial judge err when he did not declare a mistrial after telling the jurors that the State charged Pastor Larry Durant with second-degree criminal sexual conduct with a minor, three counts of third-degree criminal sexual conduct, and forgery, when the only the second-degree criminal sexual conduct with a minor was being called to trial?**

In his initial remarks to the jurors, the trial judge incorrectly stated the charges that were to ultimately be before the jury. Specifically, he stated that Pastor Durant was charged with “criminal sexual conduct with a minor between the ages of 11 and 14. And, also, with three counts of criminal sexual conduct third degree and a charge of forgery.” While all these charges were pending against Pastor Durant, the State had chosen to pursue only the charge of criminal sexual conduct with a minor. Trial counsel objected. The judge then attempted to cure this misstatement by explaining he was mistaken, that Pastor Durant was facing only the one count. The trial judge then gave more credence than due to an indictment when he described the function of the grand jury as to “determine if there was probable cause to charge someone with a crime” and a “sort of a buffer between the State and the person so they can be put on notice of what they are charged with.” R. 3, l. 20 – 5, l. 7.

Pastor Durant moved for a mistrial. “The decision to grant or deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law.” *State v. Council*, 335 S.C. 1, 12–13, 515 S.E.2d 508, 514 (1999). “In order to receive a mistrial, the defendant must show error and resulting prejudice.” *Id.* Pastor Durant established “error and resulting prejudice,” and the trial judge’s denial of the of the mistrial motion

and request to continue was “an abuse of discretion amounting to an error of law.” The trial judge, prosecutor, and defense counsel agreed it was error to tell the jurors about the other pending charges. The trial judge’s announcement of the other charges is more prejudicial than the “single reference to warrants that existed against” the accused in *State v. Thompson*, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003). The trial judge, instead of the prosecutor, introduced the jurors to other bad acts not admissible under Rule 403, SCRE and *Lyle* for the reasons discussed in Questions II and III, *infra*.

While it is true that “the trial judge should exhaust other methods to cure possible prejudice before aborting a trial,” *Council*, 335 S.C. at 13, 515 S.E.2d at 514, sometimes a “curative instruction [] only make[s] the situation worse.” *Id.* 335 S.C. at 12, 515 S.E.2d at 513. In the case at hand, the trial judge telling the jurors, “I made a mistake,” did not cure the prejudice because the judge, in fact, stated the charges correctly, and the testimony of A.R., T.H., and D.B. exposed the curative instruction as a sham. The trial judge telling the trial jurors that the grand jury is a “buffer between the State and the person” accused of a crime compounded the prejudice by bolstering the testimony of A.R., T.H., and D.B. by implying their allegations had been somehow vetted by the grand jury. Announcing the forgery charge implied the State had resolved the cross-allegations of forged property deeds in favor of Lizzy Johnson, even though the prosecution had never even conducted its own handwriting analysis. R. 524-25. The trial judge’s effort to explain the mistake failed “to safeguard the rights of” Pastor Durant. *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

The trial judge erred by announcing the other charges. The curative instruction—an obvious sham—made matters worse when the judge discussed the significance of a grand jury indictment. This Court should order a new trial.

## Question II

**When admitting the testimony of A.R., T.H., and D.B, did the trial judge err when relying on *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), because our Supreme Court’s holding in *State v. Wallace* is contrary to Rule 404(b) and *State v Lyle* and should be overruled?**

The State alleged Pastor Durant sexually assaulted A.R., T.H., and D.B in a manner similar to the allegations made by K.R. The South Carolina Supreme Court’s decision in *State v. Wallace* was the trial judge’s sole basis for admitting the testimony of A.R., T.H., and D.B. That decision, of course, *overruled* the earlier Court of Appeals decision. Defense counsel correctly pointed out the retirements of Chief Justice Jean Toal, Justice E.C. Burnett, and Justice John H. Waller, creates questions about the continued validity of *Wallace*. In *State v. Venancio Diaz Perez*, Appellate Case Number 2015-001576, our Supreme Court granted Mr. Perez’s motion to argue against precedent and convened oral arguments on November 30, 2016, during which Mr. Perez asked the Court to overrule *Wallace*. The decision in *Perez* is still pending.

Chief Justice Costa Pleicones dissented from the Supreme Court’s decision in *Wallace*, saying he would have affirmed the Court of Appeals’ opinion, which was written by now Justice Kaye Hearn. In his dissent in *Wallace*, then Justice Pleicones noted our Supreme Court’s “cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a ‘common scheme or plan’ under Rule 404(b), SCRE, have, in effect, created an exception to the rule’s exclusion of propensity evidence.” *Wallace*, 384 S.C. at 435-36, 683 S.E.2d

at 279. *See also State v. Hubner*, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009) (Pleicones J. dissenting) (“For the reasons given in my dissent in *State v. Wallace* . . . I respectfully dissent.”).

During the *Perez* oral argument, both Chief Justice Pleicones and Justice Hearn indicated they might adhere to their prior opinions in *Wallace*. Based on his detailed prior opinion rejecting propensity evidence, Justice John Kittredge likely will vote to overrule *Wallace*. *See State v. Tuffour*, 364 S.C. 497, 504, 613 S.E.2d 814, 818 (Ct. App. 2005) (“The appellate courts of this state have unwaveringly adhered to the rule of exclusion of prior bad act evidence to show criminal propensity or that the defendant is a bad person unworthy of the presumption of innocence.”) *vacated by State v. Tuffour*, 371 S.C. 511, 641 S.E.2d 24 (2007) (“Tuffour pled guilty to a lesser-included offense and was sentenced to time served under the same indictment which was the subject of Tuffour’s 2002 conviction and this appeal.”).

The Supreme Court’s holding in *Wallace*, accordingly, is inconsistent with the traditional Rule 404(b), SCRE analysis.<sup>14</sup> Under the traditional Rule 404(b) analysis for a common scheme or plan, the testimony of A.R., T.H., and D.B. would not be admissible. Our Supreme Court observed in *State v. Nelson*:

In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. *Both rules are grounded on the policy that character evidence is not admissible for purposes of proving that the accused possesses a criminal*

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<sup>14</sup> The Court of Appeals’ opinion in *Wallace*, identified inconsistent approaches to our state’s Rule 404(b) analysis. 364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2.

*character or has a propensity to commit the crime with which he is charged.*

31 S.C. 1, 6, 501 S.E.2d 716, 718-19 (1998) (internal quotations and citations omitted) (emphasis added). Traditionally, admissibility under *Lyle, supra*, and Rule 404(b) is *not* determined by similarity. Regarding the admissibility of prior crimes, our Supreme Court warned in *Lyle*:

True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter; but that is the precise inference the general rule was wisely designed to exclude.

*Lyle*, 125 S.C. at 420, 118 S.E. at 808. “The substance of these common law rules has now been codified in” Rule 404, SCRE. *Nelson*, 331 S.C. at 6, fn. 7, 501 S.E.2d at 718-19, fn. 7.

Under the traditional interpretation of the rule, “[i]f the court does not clearly perceive the connection between the extraneous transactions and the crime charged, that is, its logical relevance, the accused should be given the benefit of the doubt, and the evidence rejected.” *State v. Brooks*, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000). *See also State v. Fletcher*, 379 S.C. 17, 25, fn. 3, 664 S.E.2d 480, 484, fn. 3 (2008) (“Prior acts must be so intimately connected to the crimes charged that their introduction is appropriate to complete the story of the crime charged.”); *State v. Pagan*, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006) (“To be admissible, the bad act must logically relate to the crime with which the defendant has been charged.”); *State v. Timmions*, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997) (“A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary.”); *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) (“noting that “a general

similarity . . . [is] insufficient to support the common scheme or plan exception.”); *State v. Johnson*, 293 S.C. 321, 234, 360 S.E.2d 317, 319 (1987) (Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged.”); *State v. Stokes*, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) (“The ‘common scheme or plan’ exception requires more than a mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted.”).

The South Carolina Supreme Court’s holding in *Wallace*, and similar appellate court decisions of this state,<sup>15</sup> effectively created a rule *allowing* admission of prior bad acts against individuals other than the alleged victim in the case to demonstrate general propensity in direct contravention of Rule 404(b), SCRE. *See Wallace, supra*, (Pleicones J. dissenting); *State v. Fonseca*, 383 S.C. 640, 647, 681 S.E.2d 1, 4 (Ct. App. 2009) (“Although *Lyle* does not distinguish between sexual offenses and non-sexual offenses, the common trend in South Carolina is to apply the *Lyle* exceptions differently to sexual offenses.”) *affirmed by State v. Fonseca*, 393 S.C. 229, 711 S.E.2d 906 (2011).

South Carolina’s rule allowing admission of propensity evidence in child sexual abuse cases violates due process under the United States and South Carolina Constitutions. Although the Supreme Court of the United States has not addressed “whether a state law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime,” *Estelle v. McGuire*,

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<sup>15</sup> *E.g. State v. Hubner*, 384 S.C. 436, 683 S.E.2d 279 (2009); *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989); *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984); and *State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979).

502 U.S. 62, 75, fn. 5 (1991), the High Court has recognized the unfair danger of admitting such evidence by explaining:

Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. *The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.*

*Michelson v. U.S.*, 335 U.S. 469, 475-76 (1948) (internal citations omitted) (emphasis added). *See also Old Chief v. U.S.*, 519 U.S. 172, 182 (1997) (holding the exact nature of a prior crime too prejudicial to be admissible even though it was an element of the current offense).

Further, it is well settled that a state can decide a constitutional issue on adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). South Carolina has a tradition of deciding constitutional issues based on adequate and independent state grounds. *See, e.g., State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985) (chemical castration is cruel and unusual punishment pursuant to S.C. Const Art I, §15); *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) (“The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.”). Article I, Section 3 of the South Carolina Constitution guarantees due process of law.

Other state courts that have addressed the admissibility of propensity evidence in child sexual abuse cases have held that introducing this type of propensity evidence violates the due process clauses of state constitutions. For example, “[b]ased on Iowa's history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental conceptions of fairness, . . . the Iowa Constitution prohibits admission of prior bad acts evidence based solely on general propensity.” *State v. Cox*, 781 N.W.2d 757, 768 (Iowa 2010). In reaching this conclusion, the Iowa Supreme Court reviewed its state’s “policy against admissibility of general propensity evidence stems from a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds.” *Id.* at 767 (internal quotations omitted). The Iowa Supreme Court further noted, “The general rule prohibiting propensity evidence was firmly established in Iowa courts at common law.” *Id.* at 764 (citing *State v. Vance*, 119 Iowa 685, 686, 94 N.W. 204, 204 (1903)). Likewise, the Missouri Supreme Court “act[ed] consistently with a long line of cases holding that the Missouri constitution prohibits the admission of previous criminal acts as evidence of a defendant's propensity” and invalidated a state statute admitting this type of evidence in child sexual abuse cases. *State v. Ellison*, 239 S.W.3d 603, 607-08 (Mo. 2007).

The same considerations are just as firmly rooted in South Carolina’s common law. Our Supreme Court decided *Lyle* in 1923 based on our state’s precedent. *See also State v. Kenny*, 57 S.E. 859, 861-62 (S.C. 1907) (“Logically, the commission of an independent offense is not proof, in itself, of the commission of another crime.... Without [an] obvious connection it is not only unjust to the prisoner to compel him to acquit

himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury.”).

The South Carolina Supreme Court’s decision in *Wallace*, allowing propensity evidence in child sexual abuse cases is in direct contravention of the common law approach to propensity evidence, as codified in Rule 404 (b), SCRE, and violates United States and State due process and accordingly should be overruled. This Court should order a new trial.

### Question III

**Did the trial judge err in admitting the testimony of A.R., T.H., and D.B. since that testimony was inadmissible under *State v. Wallace* and other valid precedent when the dissimilarities of the witnesses’ testimony outweighed the similarities and the danger of unfair prejudice from the testimony substantially outweighed the probative value?**

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Rule 404(b), SCRE. The State has the burden of establishing one of these exceptions. If the Court determines the evidence to be admissible as an exception to Rule 404(b), then “it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case.” *Brooks*, 341 S.C. at 62, 533 S.E.2d at 328. *See also* Rule 403, SCRE.

Under our Supreme Court’s opinion in *Wallace*:

When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the

similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).

384 S.C. at 433, 683 S.E.2d at 277-78 (internal citation omitted). The Court in *Wallace* identified five factors to be considered when determining admissibility of propensity evidence in child sexual abuse cases:

[T]he trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery.

384 S.C. at 433–34, 683 S.E.2d at 278. Our Supreme Court “emphasize[d] that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.” *Id.* The prosecutor correctly listed five factors set forth in *Wallace*. R. 80, ll. 3-10.

Defense counsel was also correct when he stated *Wallace* reduced the analysis to a “math equation.” Defense counsel provided the trial judge with five charts showing the “similarities verses the dissimilarities” in the allegations of the four complaining witnesses. Chart one pointed out that A.R. was eighteen and T.H. was sixteen when the assaults allegedly occurred, meaning the two witness had reached the age of consent. See S.C. Code Ann. § 16-3-655. Counsel reminded the trial judge that K.R. claimed Pastor Durant said the sexual activity would help her not to prefer women over men, but some of the complaining witnesses prefer men over women. Chart two compared the locations

of the alleged assaults, the clothing worn by Pastor Durant during the alleged assaults, and the type of sexual acts allegedly involved. Chart three compared whether Pastor Durant made any threats, whether the complaining witnesses were aware of Pastor Durant's prosthetic legs, and whether the door was locked during the alleged assaults. Chart four compared the location of the alleged assaults, duration of the alleged assaults, the presence or lack of conversation during the alleged assaults, and the different descriptions of how Pastor Durant purportedly cleaned up after the sexual activity. Chart five compared whether or not the complaining witnesses claimed Pastor Durant gave them money. R. 87-93.

Counsel argued the *Lyle* witnesses should be excluded under *Wallace*, but the trial judge disagreed. As *Wallace* continued to recognize, "Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant." 384 S.C. at 435, 683 S.E.2d at 278-79 (2009). Regarding this analysis, the United States Supreme Court has specifically held that the relevant propensity evidence must be excluded when "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." *See Old Chief*, 519 U.S. at 181.

While the prosecutor in this case argued in the pretrial hearing that "[a]llowing this testimony in [the trial] would not suggest that the jury come to a conclusion of an improper basis," R. 83, ll. 6—8, the prosecutor's opening statement and closing

argument, instead, urged the jurors to convict Pastor Durant *because of* these other crimes. Admitting the testimony of A.R., T.H., and D.B. created a danger the jurors would convict Pastor Durant based on the other allegations rather than based on proof beyond a reasonable doubt of the elements of the crime charged in the indictment involving K.R.

Even if *Wallace* were to remain good law, the trial court misapplied it in this case and erred in admitting evidence. The trial court should have excluded the *Lyle* witnesses because of dissimilarities outweighed the similarities. Even if these witnesses were admissible under *Lyle*, the trial judge should have excluded the testimony because the prejudicial effect substantially outweighed the probative value and increased the danger of the jurors convicting Pastor Durant on an improper basis. This Court, therefore, should order a new trial.

#### Question IV

**After the jurors announced a deadlock, did the trial judge err by giving an *Allen* charge that singled out the sole non-voting juror, directing that juror not to prevent a unanimous verdict, after which the jurors returned a unanimous verdict in less than thirty-four minutes?**

After deliberating for three hours, the jury sent out a note, saying that they were deadlocked and that there was one juror who refused to vote. The trial judge commented that he had never encountered or even heard of such a situation. His proposed solution was to give an *Allen* charge and tell them that “not voting is just not an option. They need to vote guilty or not guilty, but not voting doesn’t do anything.” R. 705-06; Court’s Ex. 2, R. 776.

The State suggested substituting one of the alternate jurors for the juror refusing to vote, but the trial judge already had discharged the alternates. Defense counsel

objected to the trial judge giving an *Allen* charge, warning of case law suggesting it may “unfairly target the minority juror.” R. 707, ll. 7-21. The jurors returned to the courtroom at 5:15 p.m., and the trial judge gave an *Allen* charge which concluded with the following admonition:

Now, I don't know who the person is, and I'm not asking who the person is that won't vote, but that's really not helpful to the situation at all. All that will do is ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision. So that's not a helpful process and really under the process we have, we need all 12 people to vote. I don't care how you vote, but it really does – it really is necessary for you to vote in order for us to have a verdict. Whether it's guilty or not guilty, it's got to be unanimous one way or the other. So we do need you to participate whoever this person is at this point is saying I'm not voting.

So in light of that, let me send you back. However long it is you want to take this evening, we'll be here as long as you want to be here. You know, I'll leave it at that.

And Mr. Foreman, go ahead and send your jury back and see what you can come up with.

R. 708, l. 5 – 711, l. 15. The jury was then sent out to resume deliberations. Thirty-four minutes later, they returned to the courtroom with a verdict finding Pastor Durant guilty of second-degree criminal sexual conduct with a minor. R. 711, l. 16 – 712, l. 24.

“The trial judge has the duty to urge, but not coerce, a jury to reach a verdict. An *Allen* charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other's views.” *Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (internal citation omitted). “Whether an *Allen* charge is unconstitutionally coercive must be judged ‘in its context and under all the circumstances.’” *Id.* (citing *Tucker v. Catoe*, 346 S.C. 483, 491,

552 S.E.2d 712, 716 (2001) and *Lowenfield v. Phelps*, 484 U.S. 231, 237, 108 S.Ct. 546, 550, 98 L.Ed.2d 568, 577 (1988)). *Tucker* identified four “factors to determine whether the given *Allen* charge was unconstitutionally coercive.” In *Tucker*, the presence of two of the four factors warranted granting a new trial. *Id.* These factors are (1) whether the charge spoke “specifically to the minority juror(s),” (2) whether the judge included language requiring the jurors to reach a verdict, (3) whether the judge inquired into “the jury’s numerical division, which is generally coercive,” and (4) the length of time after the instruction until the jurors return a verdict. *Tucker* 346 S.C. at 492, 552 S.E.2d at 716. Applying the *Tucker* factors in this case militates in favor of ordering a new trial for Pastor Durant. The trial judge specifically addressed the non-voting juror, directed that juror not to prevent a unanimous verdict, and implied the trial judge would require the jury to deliberate—all night if necessary—until the jurors returned a unanimous verdict. The jurors then returned a unanimous verdict in less than thirty-four minutes.

Our Supreme Court considered a similar situation when it reversed a conviction in *Workman v. State* where the trial judge impermissibly directed an *Allen* charge to the minority jurors and said:

*I cannot accept any report at this time that you cannot agree on a unanimous verdict in this case. I am of the opinion that you have not deliberated sufficiently long that I could in good conscience accept that report. And I tell you frankly it will take considerably more time before I am convinced that you cannot reach a verdict.*

I therefore, humbly beseech you to return to your jury room, continue your deliberations *with the hope that you can arrive at a unanimous verdict within a reasonable time.*

412 S.C. 128, 132, 771 S.E.2d 636, 639 (2015) (emphasis supplied by the court). Here, the trial judge branded one juror “not helpful to the situation at all” because the juror

might “ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision.” And then the trial judge required, “However long it is you want to take this evening, we’ll be here as long as you want to be here.” The *Allen* charge, accordingly, was unconstitutionally coercive to a single juror.

The trial judge erred in giving an unconstitutionally coercive *Allen* charge that singled out the minority juror, included language requiring the jurors to reach a verdict (implying that they would only be released for the day once a verdict was reached), and which resulted in a guilty verdict less than thirty-four minutes later. Therefore, this Court should order a new trial.

#### Question V

**Did the trial judge err by denying Pastor Larry Durant’s new trial motion based on a *Brady* violation resulting from the prosecutor not disclosing the prior criminal history of Ulanda McRae when her prior criminal history for dishonesty impeached her credibility?**

Prior to trial, defense counsel filed Rule 5, SCRCrimP and *Brady* motions which “specifically request[ed] records of” each witness. The day after Pastor Durant’s trial concluded, trial counsel received a phone call alerting him that Ulanda McRae—a crucial State’s witness—had a criminal record which had not been disclosed to him by the State. Trial counsel then ran a SLED catch based upon the information provided—name “Yolanda McCray”—and learned that Ms. McRae had an extensive criminal history. Ms. McRae’s criminal record included charges and convictions under several aliases<sup>16</sup> for simple assault, shoplifting, multiple fraudulent check charges, multiple forgery charges, multiple driving under suspension charges, and obtaining a signature under false

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<sup>16</sup> Vlonta Riley, Yolanda Riley, Yolanda S. Riley, Vlanda S. Riley, Ulanda Shoantela Riley, Ulanda Riley, and Wanda Riley.

pretenses. Based upon the results of the SLED catch, trial counsel filed a motion for new trial alleging a *Brady* violation by the State. The trial court heard and denied this motion. The trial court erred in denying this motion.

“*Brady* is based on a sense of fairness, and a belief that society gains when a defendant is accorded a fair trial. The focus is not on the misconduct of the Prosecutor, but on the fairness of the procedure.” *Gibson v. State*, 334 S.C. 515, 528, 514 S.E.2d 320, 326–27 (1999) (internal quotations omitted). *Gibson*, accordingly, held:

A *Brady* claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.

*Id.*, 334 S.C. at 524, 514 S.E.2d at 324 (internal citations omitted). Further, “[t]his rule applies to impeachment evidence as well as exculpatory evidence.” *Id.* [C]onstitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* 334 S.C. at 525, 514 S.E.2d at 325.

While the trial court applied the correct test as set forth in *Gibson*, it erred in its application of the test. The trial judge correctly concluded the witness’s prior criminal history was favorable to Pastor Durant and material to the determination of guilt. The trial judge, however, erred in concluding the State was not in possession of the criminal history and, therefore, did not suppress it. The trial judge incorrectly focused on the “inadvertent oversight” of the prosecutor. Whether a prosecutor’s failure to reveal *Brady* evidence is “due to negligence or an intentional act” is irrelevant in determining whether a *Brady* violation occurred. *Gibson v. State*, 334 S.C. at 528, 514 S.E.2d at 326. As trial

counsel argued, the State has access to the NCIC database. The State requested criminal histories for other witnesses and, in fact, requested a criminal history for this witness under an incorrect name. The State was therefore in possession of Ms. McRae's criminal history. The trial judge also erred by suggesting a *Brady* violation does not apply to impeachment evidence—*Gibson* in fact clearly states that *Brady* does apply to impeachment evidence. *Gibson*, 334 S.C. at 524, 514 S.E.2d at 324.

Once it is determined, as in this case, that evidence favorable to the accused was in possession of and suppressed by the State, the question then becomes whether the suppressed evidence was material to the defense and whether its suppression resulted in a constitutional error. Trial counsel specifically requested criminal histories of all witnesses. Under *Gibson*,

favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonably probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

334 S.C. at 525, 514 S.E.2d at 325. Such a “reasonable probability” is demonstrated “when the Government's evidentiary suppression undermines confidence in the outcome of the trial.” *Id.*

Here, suppression of the evidence undermines the confidence in the outcome of the trial. The trial judge and defense counsel agreed that the case turned on the credibility of the witnesses. As trial counsel argued, “one of the central cruxes” of Pastor Durant's defense was Lizzy Johnson forging the two property deeds, which provided the motive for her, the four children, and Ulanda McRae to fabricate the allegations of sexual abuse. Because her criminal history was suppressed, the State allowed the jurors to believe Ulanda McRae was a model citizen and, therefore, a credible witness. The State

relied heavily on the testimony of Ulanda McRae in its closing, saying that “one of the reasons you should not believe the theory offered by the defense” was Ulanda McRae “just happened to overhear this conversation” between K.R. and A.R. Because of the State’s *Brady* violation, Pastor Durant was unable to present crucial impeachment evidence regarding Ulanda McRae.

The State failed to comply with its obligations pursuant to *Brady* when it suppressed material evidence in its possession that was favorable to Pastor Durant, thereby violating his due process rights. This Court should order a new trial.

#### **Question VI**

**Should this Court order a new trial for Pastor Larry Durant based on the Cumulative Error Doctrine?**

Each of the foregoing arguments independently entitles Pastor Durant to a new trial. This Court, however, should not overlook the cumulative error doctrine, which “provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial.” *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). *And see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002) (cumulative error of solicitor’s improper argument and improperly excluded evidence warranted reversal).

Pastor Durant’s questions on appeal are intertwined. The trial judge informed the jurors about the other charges pending against Pastor Durant, with which the State was not proceeding at that time. The trial judge’s attempt to correct the error failed when the prosecution called the other complaining witnesses. The prosecution’s theory of the case not only linked the credibility of the four complaining witnesses but also portrayed Pastor

Durant as a “wolf in sheep’s clothing” “preying” on his flock. The credibility of those witnesses was also intertwined with the credibility of Ulanda McRae. Telling the jurors about Ulanda McRae’s crimes of dishonesty likely would have unraveled the prosecution’s case. Even after the State asked the jurors to convict Pastor Durant because of the *Lyle* witnesses, the jurors deliberated for three hours and announced a deadlock. Without the *Lyle* witnesses and/or with the successful impeachment of Ulanda McRae, the jurors likely would have acquitted Pastor Durant. The trial judge’s singling out of a juror following the *Allen* charge and threat to hold the jurors through the night until they returned a unanimous verdict further undermines the confidence in the verdict.

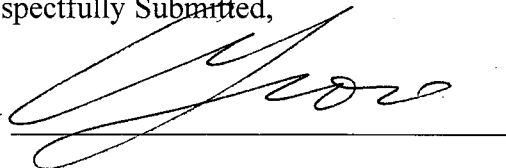
Because of the cumulative effect of these errors, this Court should order a new trial.

### CONCLUSION

For the foregoing reasons, this Court should reverse Pastor Durant’s convictions and order a new trial.

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May 14, 2018  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of General Sessions  
Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-001264

**RECEIVED**  
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SC Court of Appeals

The State,..... Respondent

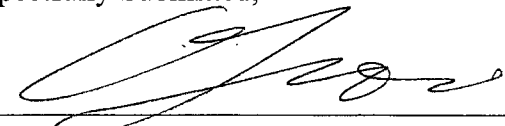
v.

Larry Durant,..... Appellant.

**Rule 211, SCACR Certification**

This Final Brief of Appellant complies with Rule 211(b), SCACR.

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