THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

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Appellate Case No. 2018-001684

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The State,..... Respondent,

v.

Michael Cliff Eubanks, ..... Appellant.

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***Initial Reply Brief of Appellant***

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## STANDARD OF REVIEW

The Brief of Respondent ("State's Brief") asserts a number of Cliff Eubanks' questions on appeal are not preserved for appellate review. Mr. Eubanks disagrees. "An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) ("[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court."). This Court has stated:

> There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.

*State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (internal quotations omitted) (citing Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* 57 (2d ed.2002)).

## ARGUMENTS

### *Question I*

***State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), and similar cases, should be overruled (or the holdings in *Schumpert* and similar cases limited) to the extent that those holdings allow a prosecution expert witness to offer an opinion about whether a complaining witness suffers from trauma, when that expert's opinion is largely based on the hearsay statements of the complaining witness, because that type of opinion testimony is inconsistent with *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018) and the *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) line of cases.**[1]

[1] As the threshold matter, the State's Brief combines Cliff Eubanks' Questions I and II into a single argument. In order to keep these two questions separate, Mr. Eubanks will reply to these issues separately.

The State's Brief, at 10-11, asserts "any argument that the testimony provided by Ms. [Samantha] Black or Dr. [Eman] Sharawy impermissibly vouched for or bolstered the testimony of [J.L.] is not preserved for review on appeal" because the trial judge expected additional objections. The State's argument overlooks what actually occurred at trial, which unequivocally demonstrates that the trial judge understood Cliff Eubanks objected to any testimony about J.L. having post-traumatic stress disorder ("PTSD") as improper vouching; however, the trial judge did not recognize the legal error and overruled the objection. *Oxner, Michael H.* and *Rogers, supra.*

When Samantha Black first testified about "[t]rauma focused cognitive behavior therapy," Mr. Eubanks objected. After a bench conference, the trial judge considered the objection outside the presence of the jurors. The trial judge noted, "Mr. Wise made the argument at the bench that by this witness testifying as to treatment that [J.L.] received for the psychological ramifications of the abuse, that constitutes vouching for the witness as prohibited by" *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). Counsel for Mr. Eubanks further explained:

> That is correct. I really don't know what the probative value of this witness' testimony is frankly going to be if it is not to say I treated this child for whatever she determined to be the problem, which is in essence of saying I determined there to be a problem because she was, in fact, abused.

Tr. 292-94.

The trial judge added, "The State indicated at the bench that" another witness "will be testifying about the post-traumatic stress disorder that the child was diagnosed with." The trial judge reasoned, because the second "witness' testimony is going to piggyback on . . . . Ms. Black's testimony. . . . it would be best to go ahead and cross the

PTSD bridge. . . . before we proceed with Ms. Black's testimony." The trial judge understood "Ms. Black is going to testify about the traumatic-based cognitive therapy that she offered the minor, and then some other witness is going to testify as about – as to the actual diagnosis of PTSD." Tr. 294-95.

Mr. Eubanks further explained the objection pertains to the diagnosis of PTSD being secondary to child abuse. The Solicitor represented the witness would not "touch on the fact PTSD was linked to the child's sexual abuse." The Solicitor argued the testimony is admissible pursuant to *Schumpert, State v. Morgan*,[2] and *State v. Barrett.*[3] The trial judge also reviewed *State v. White*, 361 S.C. 407, 605 S.E.2d 540 (2004) and Rule 403, SCRE. Tr. 296-98.

Mr. Eubanks further argued:

> [T]o have an expert come in and testify the child is suffering from post-traumatic stress disorder I think is doing nothing but vouching for the credibility of everything she's said. And I think it is terribly more prejudicial than probative.

Tr. 299.

The trial judge explained the court's understanding of *Kromah*:

> [E]ven in *Kromah* they indicated there are times when a sex abuse therapist can testify as to certain things so long as they don't step over the line and say that based upon their expert opinion they think that the child is being truthful. *Kromah*, to summarize the holding, I think really said we can't have people coming in and pretending to be human like detectors. And so long as these witnesses stay away from any sort of vouching or statement about the veracity of the victim in this case, I do see the State's point that the probative value in this case would outweigh any prejudicial effect. I'm hearing the State is going to stay away from any causation type testimony that while clearly because the child was molested

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[2] *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997), *overruled on other grounds by State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009)

[3] *State v. Barrett*, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016).

> by her stepfather, she began suffering from PTSD. I'm assuming that you're not going to be – your saying that you're not going to be eliciting that kind of testimony correct?

Tr. 299.

The Solicitor re-confirmed the expert testimony would not "link the PTSD to anything in particular." Mr. Eubanks continued to protest:

> [T]reatment going forward is nothing but to me saying we believe the child – she's telling the truth. I don't know what – how treatment going forward is probative of an issue in this case.

Tr. 300.

The trial judge likened the expert testimony about PTSD in this case to an emergency room doctor testifying about a gunshot wound in an assault and battery case and explained:

> They're testifying as to certain symptoms that are consistent with an element of the crime, certain symptoms that are consistent with someone being shot. I really don't see this as being much different even though it's in the behavioral sciences realm.

Tr. 301. The trial judge cut off further argument and ruled, "It is circumstantial evidence that explains some of the behavioral characteristics that we heard [J.L.] testify to earlier," and the "probative value of this evidence outweighs any prejudicial effect." The trial judge instructed counsel for Mr. Eubanks, "You do not have to object contemporaneously when they testify." Tr. 301-02.

When the jury returned to the courtroom, Ms. Black testified about the "trauma focused cognitive behavioral therapy" she provided J.L, including the goal "to complete a trauma narrative." Tr. 303-05.

When the State offered Dr. Eman Sharawy as "an expert in child and adolescent psychiatry," the trial judge confirmed the court's understanding that Mr. Eubanks has "an

objection that was put on the record a moment ago." Tr. 308-13. Dr. Sharawy diagnosed J.L. with PTSD "after reviewing Samantha's Black's notes and records" and after interviewing the child. Tr. 314-17.

Just as the record unequivocally shows that the trial judge understood that Cliff Eubanks objected to any testimony about J.L. having PTSD as improper vouching, the record reveals the trial judge's decision to admit the testimony was controlled by an error of law. As discussed in Mr. Eubanks' opening brief, at 30-33, the testimony of Samantha Black and Dr. Eman Sharawy exceeded the parameters of the procedures approved of by *State v. Anderson,* 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) and *State v. Brown,* 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (hereinafter "*Anderson-Brown* procedure"). Ms. Black's treatment was provided at Beyond Abuse, a children's advocacy center, because of the allegations in this case. Dr. Sharawy's diagnosis of PTSD is based on the hearsay statements of J.L., including the trauma narrative, made during Ms. Black's counseling. Dr. Sharawy could not have made this diagnosis if she did not believe J.L. The jurors knew this.[4] This testimony violated the *Kromah* line of cases and *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018).[5] In *Simmons*, our Supreme Court expressly declined to "sanction the State's use of Dr. Simmons as a conduit for this

[4] The State's Brief, at 14 (fn. 3), points out that neither Ms. Black not Dr. Sharawy directly "testified as to the case of the trauma suffered by" J.L. This assertion is disingenuous because Ms. Black's therapy occurred at the children's advocacy center, solely as a result of her allegations of sexual abuse, and included preparation of a trauma narrative detailing the first, last, and most serious allegation of sexual abuse. Tr. 303-05

[5] Ironically, the State's Brief, at 14, cites *Ward v. Commonwealth*, 264 Va. 648, 653, 570 S.E.2d 827, 831 (2002) ("[the doctor's] testimony merely tended to corroborate the victims testimony, in the same way that a doctor's testimony describing a rape victim's physical injuries tends to corroborate the victim's testimony."). The State's Brief, however, completely omits a discussion of *Simmons,* which explains the limits of a doctor's testimony.

glaringly inadmissible hearsay to be brought before the jury." 423 S.C. at 565, 816 S.E.2d at 573. The Court noted, "If this tactic were permitted, the legitimate use of the Rule 803(4), SCRE, medical diagnosis and treatment exception would be undermined and the general approach of Rule 801(d)(1)(D), SCRE, would be thwarted." *Id.* Stated another way, an expert witness "recounting" of a complaining witness' "statements amounted to nothing more than 'hearsay shrouded in a doctor's white coat.'" *Id.* Here, the jurors were very aware that Dr. Sharawy's PTSD diagnosis was based on the trauma narrative that Ms. Black helped J.L. draft.

At trial, the State relied on *Schumpert, Morgan,* and *Barrett.* Our Supreme Court limited the application of these and similar cases by the holdings in *Kromah* and similar cases. As seen above, our Supreme Court approved the *Anderson-Brown* procedure as method for the prosecution to present testimony about trauma symptoms in a limited, non-prejudicial manner. As the State's Brief, at 13, acknowledges *Anderson* considered *Schumpert* and related cases when adopting the *Anderson-Brown* procedure. *Simmons* forbids an expert from basing a diagnosis of sexual trauma on the hearsay statements of the complaining witness. The testimony of Dr. Sharawy and Ms. Black exceeded the permissible limits of *Simmons* and the *Anderson-Brown* procedure. This Court should recognize and apply those limitations. In the alternative, *Schumpert* and similar cases should be overruled or limited to the extend these cases are contrary to the *Kromah* line of cases. This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

*Question II*

**The trial judge erred by admitting evidence of J.L.'s Post-Traumatic Stress Disorder when the "probative value [of this evidence was] substantially outweighed by the danger of unfair prejudice," pursuant to Rule 403, SCRE, and the prosecution used this evidence in its closing argument to bolster the credibility J.L.'s testimony, thereby denying Cliff Eubanks due process of law in contravention of the Fourteenth Amendment to the United States Constitution and Article I, § 3 of the South Carolina Constitution.**

As seen in Question I above, Mr. Eubanks objected to testimony about PTSD as "terribly more prejudicial than probative" during the testimony of Samantha Black. Tr. 299. The trial judge recognized the court must conduct a Rule 403, SCRE analysis,[6] Tr. 298, ruled the "probative value of this evidence outweighs any prejudicial effect," Tr. 301, instructed counsel for Mr. Eubanks, "You do not have to object contemporaneously when they testify," Tr. 302, and recognized the ongoing objection when qualifying Dr. Eman Sharawy as an expert witness, Tr. 313. This issue, accordingly, is preserved for appellate review. *Oxner, Michael H.* and *Rogers, supra.*

In his opening brief, at 33-34, Mr. Eubanks offered a definition of "unfair prejudice," citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997), *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991), and *State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 168-69 (Ct. App. 2014). The State's Brief not only did not address any of these cases but also never addressed Mr. Eubanks' argument that the prejudicial effect of testimony about PTSD substantially outweighed its probative value. Nor could it because, under the circumstances of this case, the testimony about PTSD conveyed to the jurors that the prosecution's expert witnesses believed J.L. had been

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[6] *See also Schumpert*, 312 S.C. at 506, 435 S.E.2d at 862 ("[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect.").

sexually abused. *Alexander*, 303 S.C. at 382, 401 S.E.2d at 149 ("Applying the test to the unique facts of this case, we hold that the emotional trauma evidence is unduly prejudicial and should have been excluded."). This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

### *Question III*

**The trial judge erred by allowing the prosecution to question J.L. on re-direct examination about her knowledge of an "enormous tub of pornography" in response to defense counsel asking J.L. limited questions about the titles of two iPhone internet searches when this testimony was not relevant, pursuant to Rule 401, SCRE, improper character evidence pursuant to Rule 404(b), SCRE, and the prejudicial effect of the testimony substantially outweighed its probative value, pursuant to Rule 403, SCRE?**

The State's Brief, at 15, argues, "Appellant at no point during trial objected to the testimony as 'improper character evidence' under Rule 404(b), SCRE, and therefore this is not preserved for appellate review." Counsel for Cliff Eubanks, eventually, did raised a Rule 404(b), SCRE at Tr. 648; *see also* corrected Tr. 648, R. *. Even if this issue is not preserved for review under Rule 404(b), SCRE, the Rule 403, SCRE objection is preserved for appellate review. *See* Tr. 270 ("it's more prejudicial than probative"). *Oxner, Michael H.* and *Rogers, supra.* Additionally, it should be noted that the prosecution's theory—at trial and on appeal—for introducing this evidence is that counsel for Mr. Eubanks opened the door, which was addressed during a lengthy *in camera* hearing during the trial. Tr. 268-72.

The State's Brief, at 16, acknowledges that the evidence of an "enormous tub of pornography" was "otherwise improper evidence," but rather argues counsel for Mr. Eubanks opened the door to the evidence by questioning J.L. about statements she made to Heather Bennett, about telephone internet searches, during the child advocacy center

interview, which was part of the police investigation. And, "Additionally, he opened the door to testimony about the remainder of Appellant's collection of pornography by asking questions designed to make it appear to the jury the only time the child saw pornography or was exposed to pornography was when it was on Appellant's cell phone." *Id.* at 17 (citing Tr. 238-244). These statements misrepresent the record.

The record reveals Mr. Eubanks' counsel merely asked about two specific internet searches that J.L. identified in her child advocacy center interview. The record also confirms counsel asked J.L. about telling her mother about these internet searches. *See* Tr. 269, lines 15-18, trial counsel explaining, "It was for the purpose of showing that she could talk to her mother about one thing and did, but then wouldn't talk about the other," *i.e.* the sexual abuse, and arguing, it "is a door that I don't think even came close to open."

Because trial counsel did not open the door to this "otherwise improper evidence," this Court should reverse the trial court, vacate the convictions, and remand for a new trial.[7] The evidence was not admissible because the prejudicial effect substantially outweighed its probative value pursuant to Rule 403, SCRE. As seen in Question II above, Rule 403, SCRE protects an accused from "unfair prejudice" which is an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Alexander*, 303 S.C. at 382, 401 S.E.2d at 149. Although

[7] The State's Brief, at 18-19 (quoting Tr. 266-68), argues "the admission of the tub as well as testimony following objection was entirely harmless in light of the testimony which was admitted without objection. A failure to object before the evidence was introduced does not transform "otherwise improper evidence" into harmless evidence.

arguing the evidence was admissible for a limited purpose, the prosecution used it to launch an emotional and merciless attack on Cliff Eubanks' character.

### *Question IV*

**The trial judge erred by allowing the prosecution to cross-examine Cliff Eubanks about his internet searches of legal adult pornography when such evidence did not "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," pursuant to Rule 401, SCRE, was inadmissible character and propensity evidence pursuant to Rule 404(b), SCRCP, and the "probative value [of this evidence was] substantially outweighed by the danger of unfair prejudice," pursuant to Rule 403, SCRE.**

Cliff Eubanks argues the Deputy Solicitor's cross-examination of him about lawful internet searches of adult pornography was irrelevant, impermissible character evidence, and the danger of unfair prejudice substantially outweighed any probative value. The Solicitor at trial and the State's Brief on appeal, at 20, argues, "The testimony was directly relevant based on the allegations in this case and Appellant's defense that he did not intend certain things to happen with the child victim." A full reading of the transcript reveals the "smoke and mirrors" used by the State to make this argument:

> Q. Well, I mean, now's your chance. Tell me your favorite storylines.
>
> MR. WISE: Your Honor, if I may, I think he has explored this area as far as it needs to be explored.
>
> THE COURT: I understand. I'm going to give him a little bit more latitude. He is on cross. So go ahead.
>
> Q. Tell some of your favorite storylines. Tell me some things – you've got low T. You testified about that. Testosterone.
>
> A. Yes.
>
> Q. Low testosterone. How does that effect you?
>
> A. It is harder for me to like get an – you know, an erection.

Q. But you're still aroused. I mean, like you said, some men like looking at porn.

A. I mean, yeah. I mean, some men like looking at it, but – there was somewhere that I read that, you know, maybe if you start to kind of like looking into magazines and everything, it was boost your testosterone.

Q. What medical journal was that?

A. I mean, I'm not – I'm not no medical person. But, you know, it's something – I was trying to help me and Deanie.

Q. I see. Instead of being with your wife, you looked at porn in hopes that would boost your testosterone. And tell me some of your favorite storylines. What does Cliff Eubanks – I kept asking all your family. You know, what are your sexual interests and desires? What are you attracted to?

MR. WISE: Your Honor, that is going too far beyond anything that's relevant to this case.

MR. SCOTT: From the testimony, Your Honor, he has low testosterone, he has erectile dysfunction, dancing is provocative and –

MR. WISE: Your Honor, if we're going to discuss this in detail, it should be out of the presence of the jury.

(Whereupon, a sidebar was held.)[8]

THE COURT: Mr. Scott, please continue, sir.

Q. All right. I'm going to ask the million dollar question. Are you attracted to young girls?

A. If they're over 18. Yes, sir.

Q. Okay. Over 18. Are you attracted to teens?

A. If they're over 18.

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[8] The State's Brief, at 22 (fn. 4), suggests this issue in not preserved for appellate review because this sidebar was not placed on the record. Nevertheless, it is clear that Mr. Eubanks objected to the relevance of this line of questioning and, as will be seen below, elaborated on this objection immediately prior to the prosecution introducing the internet searches.

Q. Are you attracted to younger looking females?

A. If they're over 18.

Q. I'm not asking you if you're attracted to women over 18. Are you attracted to younger appearing females?

A. No, sir. I mean, you need to describe how –

Q. All right.

A – what you mean by young.

Q. All right. I will. Let me ask you about a couple.

MR. WISE: Your Honor –

THE COURT: This now fair game.

Q. Let me ask you if you've heard of any of these –

MR. WISE: Your Honor, I'd like to be heard.

Tr. 643-45 (footnote added). Once the jurors left the courtroom, the trial judge observed, "Solicitor, I assume that you're wanting to now inquire of the witness about the sites that were recovered off of his cell phone?" The Deputy Solicitor agreed and explained he had been lying in "wait[] for" an opportunity to introduce evidence about intent, arguing Mr. Eubanks had denied being "attracted to younger females" and had "opened the door, at least, for me to question him regarding his familiarity with these" internet searches. Tr. 645-46. Counsel for Mr. Eubanks pointed out that Mr. Eubanks' testimony about his attraction to women "18 and over" did not open the door to evidence about lawful internet searches. Counsel also objected pursuant to Rules 403 and 404(b), SCRE. Tr. 648.[9]

[9] *See also* corrected Tr. 468, R. *.

Neither the Deputy Solicitor at trial nor the Attorney General on appeal has explained how lawful internet searches, which by definition is "18 and over," makes it more probable that Cliff Eubanks is interested in children twelve and under, much less how if makes it more probable that he sexually abused J.L. Rules 401 and 402, SCRE. The State's arguments at trial and on appeal are transparent attempts to disguise propensity evidence at evidence of intent. Our appellate courts consistently exclude character evidence about a propensity to commit a crime. *E.g. State v. Peake*, 302 S.C. 378, 396 S.E.2d 362 (1990); *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998). Even if this Court accepts the State's intent argument under Rule 404(b), SCRE, the prejudicial effect of the evidence substantially outweighs its probative value, and it should be excluded pursuant to Rule 403, SCRE. *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) ("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."). This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

### *Question V*

**The trial judge erred by allowing the prosecutor to call Cliff Eubanks down from the witness stand to demonstrate to the jurors how J.L. was "wiggling" when she sat on his lap, when the only purpose for the demonstration was to humiliate Mr. Eubanks and to obtain fodder for the prosecution's closing argument that repeatedly mocked Mr. Eubanks.**

The State's Brief, at 25, argues this issue is not preserved for appellate review because Mr. Eubanks' "counsel never raised an objection on a specific ground." Yet, the State does not dispute that trial counsel argued this was an unpresented, improper demonstration. Tr. 661-62. *Oxner, Michael H.* and *Rogers, supra.*

On the merits, the State's Brief, at 27, argues, "[T]he trial court did not abuse its broad discretion in admitting the demonstration as it was relevant to the issues for the jury to resolve and allowed a 'clear comprehension of the physical facts, certainly much clearer than one would be able to describe in words.'" Yet, the State never explained how this demonstration was relevant to the issues for the jurors to resolve. Nor did it explain how the demonstration allowed a clear comprehension of the physical facts when any purported value of the demonstration was contingent on Mr. Eubanks' ability to perform it. *Consider* Tr. 662 ("If he's able to pull it off, then he's able to pull it off. Let's see if he can do it. Go ahead.") *and* Brief of Respondent at 27 ("Here, this is exactly the purpose of having Appellant demonstrate *to the extent he could* how the child victim was moving on his leg." (emphasis added)). As one court stated:

> The probative value of evidence of the reenactment of a crime depends primarily on its similarity to the events and conditions that existed on the night of the [crime]. To be admissible, demonstrative evidence must satisfy two requirements: first the evidence must be a reasonable representation of that which it is alleged to portray; and second, the evidence must assist the jurors in their determination of the facts of the case, rather than serve to mislead them. Demonstrative evidence must accurately depict what it purports to show. The demonstration must be relevant to an issue in dispute and must have been conducted under at least substantially similar, although not necessarily absolutely identical, conditions as those of the actual occurrence.

*People v. Rivera*, 201 Cal. App. 4th 353, 363-65, 133 Cal. Rptr. 3d 721, 729-31 (2011) (internal citations and quotations omitted) ("It is one thing for the jury to hear a defendant's verbal account of a murder. Watching the defendant strangle a substitute for the victim is more likely to inflame the emotions of the jury and evoke an emotional bias, while having exceedingly negligible probative value, if any, on the issues."). *And see Clark v. Cantrell*, 339 S.C. 369, 384, 529 S.E.2d 528, 536 (2000) ("demonstrative

evidence [is admissible] when the proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE.").

More concerning is the State's unwillingness to discuss appropriate limitations of the prosecution's use of courtroom demonstrations. By contrast, Mr. Eubanks noted our Supreme Court has held some courtroom demonstrations so inflammatory and prejudicial so as to require a new trial, citing *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873, (2007). The State's Brief never addressed *Northcutt's* application to this issue.[10] This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

### *Question VI*

**This Court should grant Cliff Eubanks a new trial based on the Deputy Solicitor's highly inflammatory closing arguments that were a direct and dehumanizing attack on the character of Cliff Eubanks and his cousin Mitchell Eubanks.**

The State's Brief, at 27-31, argues Cliff Eubanks' "argument the solicitor improperly made inflammatory arguments during closing arguments to the jury is not preserved for appeal and does not meet any exception for review without proper preservation." Mr. Eubanks' opening brief, at 39-41, acknowledges trial counsel did not make a contemporaneous objection to the Deputy Solicitor's improper argument. Rather, he argues an exception to the ordinary error preservation rules pursuant to *Toyota of*

[10] The State's only discussion of *Northcutt* is in response to Mr. Eubanks' Question VI.

*Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994), *South Carolina Highway Dept. v. Nasim*, 255 S.C. 406, 179 S.E.2d 211 (1977), *Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937), and *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 259, 509 S.E.2d 269, 272 (1998). The State argues these cases do not apply for two reasons, both of which must be rejected.

First, the State's Brief, at 29, argues, "[A]ll but one case cited by Appellant deals with racially inflammatory remarks the required the granting of a new trial." Thus, by the State's own admission, our state's case law does not require the remarks to be racial in nature for this rule to apply.

Second, the State's Brief, at 30, argues, "*Northcutt* would serve to guide Respondent and Appellant that dehumanizing an appellant in permissible so long as it is based on the record." *This Court should consider the implications of the State's argument.* If this Court affirms on the merits of this issue, then prosecutors will have an unrestricted license to attack the character of defendants and their witnesses. Here, the Deputy Solicitor labeled Mr. Eubanks' cousin as "Mitchell twerking Eubanks," called him "pathetic" for not engaging in a ridiculous courtroom demonstration, and implied he was cowardly for not remaining "to talk to" the Deputy Solicitor after he testified. Tr. 728. Similarly, the Deputy Solicitor mocked Cliff Eubanks and accused Mr. Eubanks of having an "unhealthy addiction" and argued, "I don't know what makes somebody become a Cliff Eubanks." Tr. 726. The Deputy Solicitor called on the jurors to "*find Cliff smirking smiling Eubanks* guilty" of "everything he's done," Tr. 729 (emphasis added), when some of what he had done was viewing lawful pornography. Neither *Northcutt* nor any precedent of our appellate courts sanctions this type of argument. This

Court should invoke the exception to the error preservation rules, reverse the convictions, and remand for a new trial.

### *Question VII*

**The trial judge erred by not continuing the trial to allow time for examination of Cliff Eubanks' iPhone 5, thereby denying Mr. Eubanks his due process right to a fair trial and his Sixth Amendment rights to present a complete defense and confront and cross-examine J.L. about observing sexually explicit movies on this phone.**

The State Brief, at 31-34, argues the trial judge did not abuse his discretion for not granting Cliff Eubanks' "motion for a continuance to have a cell phone examined which was in [his] possession until just before trial" when he "gave no reasons why he could not have had the phone examined prior to trial." This assertion is not accurate. Trial counsel explained he did not appreciate the significance of the evidentiary value of the cell phone prior to trial:

> [J.L.] did say in the forensic interview it was an iPhone. And maybe I didn't pay close enough attention to what phones they were analyzing. But it wasn't until I talked to my client a couple of weeks ago when I realized they did not have the phone that he actually had at about the time that this allegation was made.

Tr. 94. And, "I did not know they didn't get this phone from him." Tr. 96.

The State's Brief, at 32, also argues Mr. Eubanks never indicated his expert would be able to examine the phone." This assertion is not correct. Counsel for Mr. Eubanks explained "[r]eplacing the screen would have enabled the State to examine the [phone] but they declined to pay for the new screen." Motion for a New Trial, R. *.

The State's Brief, at 33, argues "analysis of the phone would have provided minimal benefit to Appellant." This argument is entirely speculative and not based on anything contained in the record. This Court should reverse the trial court, vacate the

convictions, and remand this case for a new trial. If this Court concludes the current record does not contain enough information to reverse the trial judge, then Mr. Eubanks respectfully requests this Court not to make any findings outside the record that could impair his ability to pursue this claim in post-conviction relief.[11] S.C. Code Ann. § 17-27-10, *et. seq.*

### *Question VIII*

**The trial judge erred by not continuing the remainder of the trial until the following Monday so that Cliff Eubanks could call Dr. Joanne Brownlee as a witness to reply to Deanie Eubanks' testimony and corroborate Mr. Eubanks' medical condition.**

The State's Brief, at 34, argues this issue is not preserved for appeal because, on the final day of trial, counsel for Cliff Eubanks "did not initially raise any issue related to Dr. Brownlee" but rather "moved for a directed verdict on all charges, presumably because he had rested his case." This argument must be rejected because it overlooks the fact that the proceedings resumed on that Friday morning in chambers where a number of issues were discussed. When the proceedings resumed on the record, the trial judge stated, "You wanted to raise another issue Mr. Wise?" Tr. 681-84. Although trial counsel moved for a directed verdict "[f]irst," Tr. 684-88, the following exchange occurred on the record, preserving this issue for appeal, when the trial judge reminded:

> Technically, you had not rested before you made your directed verdict motion, but you did indicate ***in chambers*** that you did not intend to call additional witnesses.

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[11] The State's Brief, at 33, argues Mr. Eubanks "made a strategic decision regarding the iPhone." This argument invites this Court to pre-judge post-conviction claims without a complete record. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) ("Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." (emphasis original)).

> MR. WISE: Now that you mention that, we did contact Dr. Brownlee this morning. Her office is closed. He actually went to Laurens County Hospital to see about if they were online there or something, but nothing had come in on that. In lieu of that, I would actually request the Court continue this case to Monday so that we can have Dr. Brownlee available.

Tr. 688 (emphasis added). The trial judge heard arguments and ruled on the issue, thereby preserving it for appeal. Tr. 688-91. *Oxner, Michael H.* and *Rogers, supra.*

On the merits, the State does not argue that Dr. Brownlee's testimony was not relevant to the issues presented to the jurors to respond to the testimony of Deanie Eubanks, who testified on the Thursday morning of trial. Rather, the State's Brief, at 35-36, argues counsel for Mr. Eubanks did not exercise "due diligence" because "[i]nstead of attempting to obtain the testimony of Dr. Brownlee while her offices were clearly open on Thursday afternoon, he waited until later in the day and first thing Friday when the officer were closed to try to contact her." This Court should note that the trial judge did not recess until 6:40 p.m. on Thursday afternoon. Tr. 677. Thus, the opportunity to contact Dr. Brownlee on Thursday afternoon was limited or non-existent. Additionally, the length of the continuance requested by counsel for Mr. Eubanks (one business day) was minimal in comparison to the length of this trial and the sentence ultimately imposed by the trial court. This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

### *Question IX*

**The trial judge erred by not excluding juror Tony Bailey from the jury panel after Mr. Bailey, a real estate agent, revealed he had sold a house to a relative of J.L, who was present in the courtroom for the trial, when this information was not available to Cliff Eubanks prior to jury selection and would have been the basis of a peremptory strike had this information been disclosed timely.**

The State's Brief, at 37, argues this issues is not preserved for appellate review because counsel for Mr. Eubanks did not "object to the trial court's determination not to excuse the juror" and "only raised this issue in post-trial motions." The merits of this issue are based on information Tony Bailey disclosed to the trial judge ***after*** he was sworn as a juror. After opening statements, the trial judge excused all of the jurors, except Mr. Bailey. When the trial judge offered the parties "additional voir dire," counsel for Mr. Eubanks asked to approach the bench to express his concerns. Tr. 124-26. When Mr. Eubanks raised this matter as grounds for a new trial, R. *, the trial judge's order denying the motion for a new trial treated the matter as properly raised at the bench conference and addressed the merits, R *. *Oxner, Michael H.* and *Rogers, supra.* This Court should reverse the trial court, vacate the convictions, and remand this case for a new trial.

### *Question X*

**The trial judge erred by denying Cliff Eubanks' motion for a new trial, without convening a hearing and taking testimony, after Cliff Eubanks learned that juror Tony Bailey is friends on Facebook with Darlene Newsome and Jared Hunnicutt when Mr. Bailey did not disclose this information in response to the voir dire questions by the trial court.**

In his opening brief, at 48-51, Cliff Eubanks argues the trial judge erred by not convening a hearing to determine whether juror Tony Bailey intentionally concealed his relationships with Darlene Newsome and Jared Hunnicutt. Although the State's Brief, at 40-41, acknowledges Mr. Eubanks challenged Mr. Bailey's failure to disclose his relationships with two people, the State never explained why the trial judge did not err by not inquiring into the relationship between Mr. Bailey and Darlene Newsome. Nor could

it because the trial judge was obligated to convene a hearing pursuant to *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013).

The State's Brief focuses on Mr. Bailey's relationship with Investigator Hunnicutt and relies on a post-trial email from the Deputy Solicitor to the trial judge, which states:

> [Assistant Solicitor] Julie Kate [Kenney] was able to speak with Inv. Jared Hunnicutt regarding the Foreman showing up as one of his Facebook "friends." Hunnicutt indicated he has no idea who this guy was but received the friend request a few days after the Eubanks trial ended.

R. *; *see also* order denying motion for new trial, fn. 1, R. *. As pointed out in Mr. Eubanks' opening brief, at 49, reliance on an email from the Deputy Solicitor was error because "[a]court cannot consider facts appearing only in argument of counsel." *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (citing *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct.App.1986). *Cf. McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). Rather, the appropriate procedure was for the trial judge to convene a hearing. *McCoy, supra*. This Court should remand this case for the circuit court to conduct that hearing.

### *Question XI*

**The trial judge erred by declining to charge second degree-assault and battery as a lesser-included offense of third-degree criminal sexual conduct with a minor.**

The State Brief, at 44, relies on *State v. Hernandez*, S.C.S.Ct. Op. No. 27923 (filed October 23, 2019) for the proposition that second-degree assault and battery is not a lesser included offense of third-degree criminal sexual conduct with a minor because the General Assembly did not identify it as a lesser offense in S.C. Code Ann. § 16-3-600 and "[a]s a result, it would not be a lesser included offense even if it would have

previously been considered a lesser included offense under prior case law." *Hernandez*, however, merely held that the statutory offense of assault and battery of a high and aggravated nature "is not a lesser included offense of" criminal sexual conduct. *Hernandez* did not address whether or not second-degree assault and battery is a lesser included offense of third-degree criminal sexual conduct with a minor.

The State's Brief, at 42-44, additionally argues second-degree assault and battery does not satisfy the elements test to be a lesser included offense of third-degree criminal sexual conduct with a minor. Cliff Eubanks' opening brief, at 51-54, argues second-degree assault and battery does, in fact, meet the elements test to be a lesser included offense of third-degree criminal sexual conduct with a minor. This Court must resolve that debate.

### *Question XII*

**This Court should reverse Cliff Eubanks' convictions and sentences and order a new trial based on the cumulative error doctrine.**

As discussed in Mr. Eubanks' opening brief, this Court should order a new trial based on the cumulative error doctrine based on the matters he preserved for appellate review during his trial. The State's Brief, at 44-45, however, conflates the "cumulative error doctrine" with the "plain error rule" by misapplying this Court's analysis in *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 203). Beekman asked this Court to apply the "cumulative error doctrine" based on his unspecified objections sustained during trial and other alleged errors that he did not object to during trial. Under those circumstances, this Court properly concluded Beekman was attempting to invoke the "plain error rule" that is not recognized in our state. *Id.* 405 S.C. at 236-38, 746 S.E.2d at 489-90. As seen, with one exception based on case law, Mr. Eubanks raised at trial all of

the issues set forth in his opening brief. Specific objections to the issues are all that is required to invoke the cumulative error doctrine on appeal.

This case is similar to *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000), *reversed on other grounds by State v Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002). This Court observed:

> While we agree that the assistant solicitor's comments were improper, they do not mandate reversal alone. However, the cumulative effect of this error, when coupled with the exclusion of the previously discussed evidence, warrants reversal. *Cf. State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"). The prosecutor accused Blurton of a recent fabrication, an accusation which could not have been seriously made if the trial court had properly admitted the taped telephone conversations between Blurton and Mayfield. In that regard, the closing arguments served to exacerbate the error in excluding evidence critical to Blurton's defense.

Id. 342 S.C. at 512-13, 537 S.E.2d at 297-98. Mr. Eubanks believes any one of the issues raised in this appeal entitles him to a new trial. However, as discussed in his opening brief, at 54-55, many of the issues raised in this appeal are linked to other issues raised in this appeal, and the prejudice from these overlapping issues combined to deny Cliff Eubanks a fair trial.

### *Question XIII*

**This Court should clarify the procedure to be followed when the court reporter assigned to record a trial accepts employment with one of the parties that participated in that trial prior to completing the trial transcript.**

The State's Brief, at 46, argues this Court "should decline the opportunity to issue what is at most an advisory opinion" and "the issue was addressed by this Court in ruling

on [Mr. Eubanks'] motions prior to briefing." As will be discussed below, this issue is not fully addressed, and the State currently questions the reliability of the transcript.

Addressing this ongoing issue would not be an advisory opinion for three reasons. First, litigants in this Court are required to object to procedural irregularities and obtain a final ruling in order to preserve such an issue for further appellate review. *E.g. State v. McMillian*, 349 S.C. 17, 20, 561 S.E.2d 602, 603 (2002) (reversing after Court of Appeals "[a]rguments proceeded over the objection of counsel for" the appellant in the absence of a quorum).

Second, the change in employment of this court reporter created problems in other cases, meaning this Court's guidance is still needed. *E.g.* State's Motions dated March 26, 2019, *State v. Charles Tillman,* Appellate Case No. 2018-000495. When "an issue raised is capable of repetition but generally will evade review, the Court can address the issue." *Nelson v. Ozmint*, 390 S.C. 432, 434, 702 S.E.2d 369, 370 (2010).

Third, even after Court Administration reviewed the transcript and made corrections, Mr. Eubanks challenged two pages of the transcript that resulted in three additional corrections. The State's Brief, at 46, acknowledges that the court reporter corrected three errors after Mr. Eubanks' second challenge to the transcript.

Finally, the State, even now, questions the reliability of the transcript. In his Statement of Facts, Mr. Eubanks called this Court's attention to inconsistent testimony by State's Expert Shauna Galloway-Williams:

> Ms. Galloway-Williams initially testified, "[W]e would expect that a child or an adult is going to tell every single detail or every single event that they've experienced related to child abuse at one time." Tr. 378. Later she testified disclosure can be tentative, "which is where most children's disclosures fall, where they share some pieces of information but not all of it." She does not "expect a child to report every single detail of his or her

> abuse in one interview." Age, frequency of abuse, comfort level with the interviewer, knowledge of anatomy, and sexual knowledge could be factors. Children might delay disclosure of sexual abuse because of fear or relationship with the alleged perpetrator. Tr. 379-83.

Brief of Appellant, at 18-19.

The State's Brief counters:

> Contrary to [Mr. Eubanks'] assertion, it clearly appears Ms. Galloway-Williams misspoke or ***the transcript was inaccurate*** when she testified "So we refer to disclosure as a process, meaning that we would expect that a child or an adult is going to tell every single detail or every single even that they've experienced related to child abuse at one time."

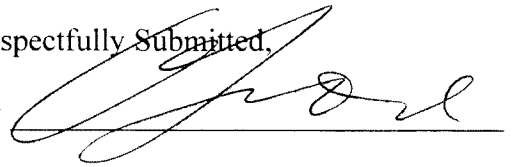
Brief of Respondent, at 9 (fn. 2) (emphasis added). The State, however, has not challenged the transcript even though it expressly questions the accuracy of the transcript.

## CONCLUSION

For the reasons set forth in the Brief of Appellant and this Reply Brief, this Court should reverse the trial court, vacate Cliff Eubanks' convictions and sentences, and remand this case for a new trial. In the alternative, this Court should remand this case for a hearing to determine whether juror Tony Bailey had undisclosed relationships with Investigator Jared Hunnicutt and Darlene Newsome.

Additionally, this Court should provide guidance about the procedure to be followed when the court reporter assigned to record a trial accepts employment with one of the parties that participated in that trial prior to completing the trial transcript.

Respectfully Submitted,

By 

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***Attorney for Michael Cliff Eubanks***

December 2, 2019.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge



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Appellate Case No. 2018-001684

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The State,..... Respondent,

v.

Michael Cliff Eubanks, ..... Appellant.

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**Certificate of Service**

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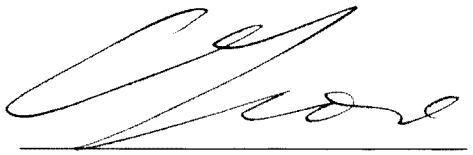
I certify that I have served Mr. Eubanks Initial Reply Brief of Appellant and Second Designation of Metter to be Included in the Record on Appeal, on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

William M. Blitch, Jr., Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211



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December 2, 2019

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December 2, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *State of South Carolina v. Michael Cliff Eubanks*
Appellate Case No. 2018-001684

Dear Ms. Kitchings:

Enclosed please find Mr. Eubanks Initial Reply Brief of Appellant and Second Designation of Metter to be Included in the Record on Appeal, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Mr. Cliff Eubanks
William M. Blitch, Jr., Esquire

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