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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

The Honorable John C. Hayes, III, Circuit Court Judge

Case No.
04-GS-46-2614-2618
02-GS-46-3232-3234
04-GS-46-200

State of South Carolina, ...Respondent,

v.

Billy Wayne Cope, ...Appellant.

FINAL BRIEF OF APPELLANT

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2.

Whether Cope was denied a fair trial by the exclusion of evidence tending to show that Sanders had bragged about the murder in such a way as to indicate he had acted alone.

3.

Whether, assuming, arguendo, that Sanders' confession and his spree of other similar crimes were all inadmissible against him at a joint trial, due process required that the trial judge grant Cope's motions to sever his trial from Sanders'.

4.

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5.

Whether Cope's confessions should have been suppressed because (a) they were the product of an unlawful arrest without probable cause, and (b) the police interrogated him without counsel after initiation of formal adversarial proceedings, in violation of the Sixth Amendment.

6.

Whether the complete failure of proof on the essential element of an unlawful agreement required the trial judge to grant Cope's motion for a directed verdict of acquittal on the conspiracy count.

STATEMENT OF THE CASE

Appellant Billy Wayne Cope was charged in arrest warrants on November 30, 2001 with the murder of his daughter Amanda, criminal sexual conduct against Amanda and unlawful neglect of all three of his minor children. (R.p. 430, lines 21-24). A York County grand jury indicted him for murder, criminal sexual conduct (three counts) and unlawful neglect of minor children (three counts)(R.p. 81, lines 11-25; R.p. 82, lines 1-6); Indictment Numbers: GS-46-2614 to 2618; GS-46-3232 to 3234; GS-46-1843 to1844; 46-3233 to 34. Subsequent indictments were returned charging Cope and one James Sanders with conspiracy to commit criminal sexual conduct; Sanders was also indicted for the murder of Amanda Cope and two counts of criminal sexual conduct against her. Indictment Numbers: GS-46-199 to 200; GS-46-196; GS-46-197-198. A superseding murder indictment was returned against Cope on July 22, 2004. Indictment number: GS-46-3232. The trial judge, the Honorable John C. Hayes, III, severed the criminal sexual conduct and unlawful conduct charges involving both of Cope's surviving children by order dated August 26, 2004. The state called the remaining charges against Cope and Sanders for trial in the York County Court of General Sessions on September 8th, 2004. (R.p. 894, lines 9-20). The jury convicted both men as charged on September 22, 2004, (R.p. 3675, lines 23-24; R.p. 3676, lines 1-18),

and Judge Hayes sentenced Cope to life imprisonment for murder, 30 years consecutive for one count of criminal sexual conduct, and concurrent terms of 30, 10, and 5 years for the second count of criminal sexual conduct, criminal neglect of a child and conspiracy, respectively. (R.p. 3686, lines 18-25; R.p. 3687, lines 1-6). Following denial of Cope's motion for a new trial, Cope timely served and filed a notice of appeal on September 30, 2004, and this appeal followed.

FACTS

Billy Wayne Cope awoke in his Rock Hill, S.C. home on the morning of November 29, 2001, to find his 12-year-old daughter Amanda dead in her bedroom. (R.p. 2939, lines 1-25). She had been raped, beaten and strangled. Her mother's purse lay open on the bed. (R.p. 3520, lines 16-17; State's Exhibit 16).

Examination of the body would later reveal dried saliva around a bite mark on the child's breast and semen on her sweat pants. (R.p. 1057, lines 20-25; R.p. 1058, lines 1-24; R.p. 1177, lines 8-23). SLED DNA analysis would eventually establish that both the saliva and the semen belonged to a serial burglar and rapist named James Sanders, (R.p. 2240, lines 15-21), who was living just around the corner from the Cope house at the time of Amanda's murder. (R.p. 875, lines 24-25; R.p. 876, lines 1-2) line 1. Authorities would also later discover that Sanders

was linked (by DNA, fingerprints and eyewitness identification) to five other residential assaults between December, 2001 and January, 2002, four of which occurred within less than a mile of the Cope home. (Defense Exhibit 6; R.p. 831, lines 7-25; R.p. 832, line 1).

No evidence of any kind indicated that Cope and Sanders knew one another or that their lives had intersected in any way. On the contrary, the record discloses that at the time of Amanda's murder, Cope was an obese white man who rarely left the house except to go to church or to his part-time job, while Sanders was a muscular African-American man who prowled the nighttime streets of Rock Hill looking for homes to break into and women to assault. Moreover, all of Sanders' other crimes were described by their victims as having been committed by a solitary intruder.

While these facts seemingly represent a straightforward example of the power of DNA technology to solve a crime, the course of the investigation of Amanda Cope's murder proved to be anything but straightforward as the semen and saliva found on Amanda's body and clothing would not be identified as Sanders' until August of 2002, some nine months after her murder. By that time, the state's case against the only suspect the police had previously been able to produce – Amanda's own father – had hardened like concrete.

From virtually the moment of Amanda's death, police had focused their investigation on Cope, primarily because Cope appeared to have been the only adult in the Cope home on the night of Amanda's death and because police were unable to detect any signs of forced entry to the residence. (R.p. 89, lines 8-17). Although investigation would later reveal that Sanders had accomplished each of his other Rock Hill residential assaults without leaving any physical trace of forced entry, this fact – like the fact that the DNA recovered from Amanda Cope belonged to James Sanders – would not become known to authorities for some time.

Cope accordingly emerged very early on as law enforcement's only suspect and was therefore the sole subject of the Rock Hill police department's intense and ceaseless scrutiny in the hours and days after the murder. Interrogated repeatedly by a revolving team of officers at the Rock Hill Law Enforcement Center beginning on the very afternoon of his child's death, Cope was accused of murdering and raping Amanda for hours and hours on end. Indeed, Cope vociferously denied any involvement in Amanda's death some six hundred times during that period. (R.p. 1774, lines 20-25; R.p. 1781, lines 13-19). The following day, however, after protracted overnight interrogation, (R.p. 2954, lines 3-15; R.p. 2961, lines 3-6; R.p. 2987, lines 11-22), little sleep, (R.p. 2968, lines 6-20; R.p. 2973, lines 24-25), and confrontation with polygraph results purporting to

demonstrate his guilt, (R.p. 2975, lines 4 –25; R.p. 29761, lines 1-8),[1] Cope became temporarily convinced that he "must have" raped and murdered his own daughter, (R.p. 2981, line 4), and gave authorities a statement to that effect. (R.p. 2981, lines 9-21). Additional confessions followed as Cope endeavored first to disavow his initial statement, (R.p. 2990, lines 2-23), and then to distance himself from it by characterizing his supposed actions as having taken place in a dream state. (R.p. 2993, line 21-25; R.p. 2994, lines 1- 24). Ultimately, Cope gave authorities a series of bizarre statements, (R.p. 1774, line 22; R.p. 1781, line, 13-15), including a videotaped "re-enactment" of the crime on the child's own bed. (R.p. 1827, lines 13-15). Cope subsequently recanted each one of these statements. Notably, not one had made any reference to Sanders or any other co-conspirator.

In the meantime – while the fact that it was James Sanders, not Billy Wayne Cope, who had left his semen and saliva on Amanda remained undiscovered – law enforcement accumulated a great deal of additional information about Cope that tended to cement their mistaken belief that Cope had committed a horrendous crime against his own child. This information included:

[1] Cope's actual performance on this polygraph test was a hotly contested issue at trial; a defense expert trained by the U.S. Department of Defense Polygraph Institute testified unequivocally that Cope had "passed" this exam, (R.p. 2376, lines 3-7), and that his answers indicated "a strong truthful outcome." (R.p. 2376, line 11). There is no question, however, that on November 30, 2001, the police told Cope that his test results indicated he had been lying when he denied any involvement in the attack on Amanda. (R.p. 2975, lines 4-25; R.p. 2976, lines 1-8).

- police observations of what they later described as Cope's odd, seemingly emotionless behavior after discovery of the child's body, (R.p. 184, lines 15-19);

- Cope's improbable suggestion to the police that Amanda might have accidentally strangled herself on a torn blanket lining,(R.p. 970, lines 5-13);

- the filthy and chaotic environment in the Cope home, which was swarming with cockroaches and strewn with trash, piles of clothing, and unwashed dishes, (R.p. 1001, lines 2-4; R.p. 1300, lines 9-14; State's Exhibit 69 A-G);

- prior criminal convictions of both Cope and his wife for child neglect stemming from their failure to correct grossly unsanitary living conditions in their home two years previously,(Court's Exhibit 3, Joe Hosey, *Deputies Take Neglected Girls*, The Herald, June 18, 1999 at 4A);

- ambiguous autopsy findings regarding chronic inflammation of Amanda's vaginal tract, indicating either natural bacterial infection or, possibly, prior introduction of an irritating object, R.p. 1082, lines 2-25; R.p. 1083, lines 1-25; R.p. 1084, line 1);

- discovery of a towel containing Cope's semen hidden in a hallway near Amanda's door, and his admission that he had masturbated into a towel at

some time prior to the murder, (R.p. 1776, lines 4-23; R.p. 2933, lines 18-21; State's Exhibit 9).

Combined with his confessions and the apparent lack of a forcible breaking at the Cope residence, this very distasteful mass of evidence relating to Cope's character, habits and behavior seemed to amount to an airtight case; the prosecution's confidence is plainly apparent in statements to the news media during the weeks following Cope's arrest. (Court's Exhibit 3, Jennifer Stanley and Wendy Bigham, *Father Charged With Girl's Death*, The Herald, December 1, 2001 at 1A). Thus, even when DNA analysis eventually provided incontrovertible proof that the saliva and semen found on Amanda actually belonged not to her father but to a neighborhood serial burglar and rapist for whom Amanda's murder was but one of several similar "no forced entry" crimes, the prosecution declined to drop the charges against Cope.

Instead, the solicitor simply folded Sanders into the pre-existing case against Cope, and proposed a new theory that both Sanders and Cope had somehow conspired to rape and murder Amanda in tandem. He put this theory into operation by obtaining a new indictment alleging a criminal conspiracy between Cope and Sanders, (R.p. 82, lines 2-3), and then prosecuted both men together in a single trial featuring <u>both</u> Sanders' DNA and Cope's various confessions.

As a means of dealing with the unexpected results of the DNA analysis, this strategy had one marked advantage: it avoided the need to acknowledge any mistakes by the police or the prosecution in their pursuit of Billy Wayne Cope. In particular, it deflected the very uncomfortable question of whether the Rock Hill Police Department had extracted a false confession from the innocent father of a murdered child. But the prosecution's decision to launch a new prosecution of Sanders without abandoning its original prosecution of Cope and to do so at a single joint trial created a series of thorny legal issues. As will be seen, the trial judge resolved almost all of these issues against Cope rather than against Sanders or the state, and in so doing deprived Cope of a fair trial.

In addition, much of the very unpleasant information concerning the Cope family's home life was known before trial not only to the police and the prosecution but also to the general public, thanks to a torrent of news coverage that had inundated the Rock Hill area for several years. (Court's Exhibit 3). This coverage extended far beyond the evidence that would later be adduced at trial, and included detailed recitations of the sordid and unsavory facts behind the Copes' 1999 prosecution for child neglect. (Court's Exhibit 3, Joe Hosey, *Complaint Preceded Children's Removal*, The Herald, June 9, 1999 at 4A). Perhaps most prejudicially of all, news reports published just before the trial alluded to a belated

accusation of sexual abuse by the two younger Cope children, made some three-and-a-half years after his arrest (and disclosed to the news media by means of an unsealed prosecution court filing). (Andrew Dys, *Cope Case Takes A Turn: Solicitor May Seek Death Penalty After Hearing From Two Daughters*, The Herald, August 24, 2004, at 1A).[2]

The jury venire summoned for Cope's trial was not merely exposed to these facts, but also apparently recalled at least some of them, since roughly 90 percent of the jury panel stood when asked whether they had heard about the case. (R.p. 580, line 25; R.p. 581, lines 1-9; R.p. 640, lines 19-21) (defense counsel's uncontradicted estimate of percentage of jury panel responding to court's question). The extent to which the jurors' prior knowledge included inflammatory and inadmissible details about Cope's background or unproven allegations concerning his surviving children cannot be known, since the trial judge permitted no voir dire inquiry into the content of the publicity to which jurors had been exposed. (R.p. 583, lines 15-25; R.p. 584, lines 1-11; R.p. 591, lines 13-25; R.p. 592, lines 1-13); see Mu'min v. Virginia, 500 U.S. 415 (1991), State v. Lucas, 285 S.C. 37, 39-40, 328 S.E.2d 63, 64-65, cert. denied, 472 U.S. 1012 (1985) (upholding refusal to allow voir dire examination regarding content of pretrial

[2] Cope was never in fact prosecuted for any of these supposed assaults on his other two daughters.

publicity). However, it is fair to say that Billy Wayne Cope went on trial in a community, and before a jury, that had been saturated by years of exceptionally prejudicial information.

Cope's efforts to right the balance by presenting evidence of his innocence quickly ran into a series of unfair obstacles. First, when Cope sought to introduce evidence placing Sanders' attack on Amanda in the context of the latter's pattern of similar, solitary burglaries and assaults, the trial judge sustained the state's and Sanders' objections. The stated basis of this refusal to allow Cope to present any evidence about the behavior and modus operandi of the man who the state had thrust upon him as a co-defendant was that Sanders' other crimes were insufficiently similar to warrant their admission at a joint trial with Sanders. (R.p. 889, lines 12-25; R.p. 890, lines 1-6). The judge also denied each of Cope's repeated motions to sever his trial from Sanders' so as to obviate any risk that Sanders would be unfairly prejudiced by Cope's introduction of evidence of Sanders' pattern of similar criminal activity. (R.p. 2313, lines, 18-25; R.p. 2314, lines 1-9).

In addition to excluding all of the other crimes evidence that would have revealed Sanders to have been a lone, predatory burglar and rapist operating in the Copes' neighborhood around the time of Amanda's murder, the trial judge also

sustained Sanders' objection to Cope's proffered testimony from a prison inmate, James Hill, who had overheard Sanders bragging to another inmate about the burglary, rape and strangulation of a "little girl in Rock Hill." (R.p. 3429, lines 8-17). Although the surrounding circumstances left little doubt that Sanders was bragging about the murder of Amanda Cope, and neither Sanders' counsel nor the state suggested the existence of any other unsolved burglary-rape-murder of a little girl in Rock Hill for which Sanders might have been claiming credit, the judge sustained Sanders' objection on the ground that the statements overheard by Hill had not been adequately tied to the Cope murder.

Thus deprived of virtually all of the evidence that would have allowed the jury to place Sanders in his actual context, and thereby make a reliable assessment of the likelihood that he would have teamed up with a socially isolated and grossly obese white stranger to assault and murder the latter's 12-year-old daughter, Cope's defense centered on the theoretical implausibility of the state's theory that Sanders and Cope had somehow collaborated in Amanda's rape and murder, and on the counter-intuitive but increasingly well-established science surrounding false confessions. To this end, Cope called a nationally-known expert on false confessions, the social psychologist Saul Kassin, to explain what social science has learned from careful analysis of the increasing number of documented instances of

such confessions in recent years. (R.p. 2446, lines 1-22). However, the trial judge also sustained the prosecution's objection to any discussion by Dr. Kassin of specific cases in which suspects had made confessions to killing family members that were later demonstrated to be false, (R.p. 2439, lines 5-21); in the absence of such real-life examples, Cope was left powerless to respond to the prosecution's seemingly commonsensical argument that no father would ever have confessed to his daughter's murder if he had not actually committed it. (R.p. 3588, line 10-25; R.p. 3589, lines 1-11).

The state's case, for its part, also focused almost exclusively on Cope's confession and on the state's intuitive – though inaccurate – argument that no one would falsely confess to such a serious crime against one's own child. (R.p. 3588, lines 10-25; R.p. 3589, lines 1-11).[3] With respect to its central conspiracy charge, the state relied entirely on the fact that Cope had confessed to a crime that DNA showed Sanders had committed. The state insisted, and jury ultimately agreed, that this troubling admixture of inconsistent evidence actually proved yet another crime – a conspiracy between two men who, for all the evidence showed, had never met

[3] The only significant additional evidence presented against Cope consisted of (1) two vaguely incriminating letters purportedly written from jail by Cope, the authenticity of which was vigorously challenged at trial, (R.p. 1955, lines 23-25; R.p. 1956, lines 1-5; R.p. 1958, lines 20-25; R.p. 1959, lines 1-21), and (2) autopsy evidence, directly challenged by a defense forensic pathologist, that Amanda's internal injuries were consistent with Cope's confession that he sodomized her with a broom handle, (R.p. 2831, lines 1-14).

before the night of Amanda's death. Cope timely moved for a directed verdict of acquittal on this count, and the correctness of the trial judge's denial of that motion is now another issue presented for decision in this very unusual appeal.

The remaining facts necessary for an appreciation of this and the other legal issues raised by this appeal are summarized at the beginning of each argument section.

ARGUMENTS

I. The Trial Court Erred In Denying Cope's Repeated Efforts To Introduce Modus Operandi And Confession Evidence Regarding His Co-Defendant, James Sanders

Amanda Cope was raped and murdered in her Rock Hill home on November 29, 2001. As discussed above, she had been beaten, strangled, and evidently robbed; there were no apparent signs of forced entry. Just thirteen days later, and less than one mile away,(R.p. 767, lines 6 -15; R.p. 876, lines 1-3), Katherine Davis would also be attacked in her home by an intruder who robbed and raped her, (R.p. 770, lines 2-6; R.p. 767, line 24), and who also left no signs of forced entry. (R.p. 767, lines 24-25; R.p. 768, lines 14-16). Four days after that attack, (R.p. 775, lines 15-17), and just under five miles from the Cope home, Sarah Phillips would be assaulted, (R.p. 776, lines 7-9; R.p. 876, line 1-3), when an intruder entered her house, attempted to rape and perhaps rob her, (R.p. 834, lines

10-25; R.p. 835, lines 1-7), and, again left no signs of a forced break-in. (R.p. 778, lines 6-7; R.p. 780, lines 10-11). Three days after the attack on Ms. Phillips, (R.p. 739, lines 18-22), and just four-tenths of a mile from the Cope residence, (R.p. 738, line 25; R.p. 876, line 1-3), Alicia Lowery would be assaulted in a virtually identical manner.(R.p. 740A, lines 14-20; R.p. 749, line 7). And three weeks after the attack on Ms. Lowery, and a few blocks from the Cope residence, Sara Hagman would be robbed and assaulted in her own home by an intruder who left no signs of forced entry. (R.p. 740, lines 13-19; R.p. 753, lines 4- 5; R.p. 738, line 25; R.p. 876, lines 1-3).[4]

Evidence would eventually establish conclusively that James Sanders committed every single one of these crimes.[5] Evidence would also establish that when Sanders attacked these people – in their homes, often without waking other family members, leaving no signs of forced entry – he acted alone. (R.p. 738-751, all lines; R.p. 752-756, all lines; R.p. 767-774, all lines; R.p. 774-786 all lines).

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[4] Cope also proffered evidence regarding a fifth residential break-in committed by Sanders during this same time period and in this same area. In that incident – which occurred on the very same night as the attack on Sara Hagman – an intruder, who left no signs of forced entry, entered the home of the White family but fled upon being detected. Sanders was identified as this intruder based on fingerprints lifted from the scene. (R.p. 109, lines 14-18, Defense Exhibit 5).

[5] DNA would link Sanders to the Hagman and Davis attacks; positive identification would identify him as the attacker on Lowery and Phillips. Sanders' fingerprints were discovered at the White home. (R.p. 879, lines 11-14; Defense Exhibit 5). Sanders was also indicted by the State with respect to each crime. (R.p. 80, lines 9-13; R.p. 879, lines 18-21).

At trial, Cope sought repeatedly to introduce evidence of these other crimes in support of his defense that Sanders, and Sanders alone, had raped and murdered his child. Just as Sanders had attacked these other women – by attempting to sexually assault and rob them, by employing strangulation to subdue them, by entering their homes without leaving any signs of forced entry – so, too, Cope sought to tell the jury, had Sanders attacked Amanda, in the same manner, in the same neighborhood, and during the very same time period. Just as Sanders had attacked these other women – acting alone and as a complete stranger to his victims – so, too, Cope sought to tell the jury, had Sanders attacked Amanda just blocks and days away. Just as Sanders had attacked at least two of his other victims without waking anyone in the house, so, too, Cope sought to tell the jury, had Sanders attacked and killed Amanda as Cope lay sleeping in his bedroom, with a loud mechanical device – a "CPAP" machine required to treat his sleep apnea[6] – strapped across Cope's face. Cope also sought to present testimony from a disinterested inmate who had been incarcerated with Sanders and heard Sanders confess, quite graphically, to raping and murdering a "little girl in Rock Hill." (R.p. 225, lines 8-17).

[6] Cope's CPAP machine, which continuously generated and blew oxygen into his nose and mouth, consisted of an external oxygen generator that made a "loud" whirring sound, (R.p. 2930, line 13), and a mask carrying oxygen from the generator and blowing it across his face. (R.p. 2926, lines 15-19). Cope wore his CPAP mask strapped to his face all night long. (R.p. 2926, line 16).

Despite Cope's repeated efforts to bring forward this critical information, the jury heard none of it. The court first rebuffed Cope's efforts to introduce Sanders' other crimes pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and Rule 404(b), SCRE. The court then denied Cope's motion for a severance in order to introduce the Sanders information as third party guilt evidence. Additionally, the court excluded Sanders' confession on relevancy grounds. In the end, the jury was told nothing of Sanders' pattern of criminal activity, nothing of Amanda's place in that pattern, and nothing of the serial and solitary crime spree in which Sanders had been engaged at the time the brutal attack in this case occurred. The jury also never heard that Sanders had bragged about attacking Amanda in a detailed statement that made no mention whatsoever of any co-conspirator.

Cope was thus prevented from offering any evidence corroborating his claim that Sanders had come into his home, unbeknownst to Cope, and had attacked Amanda without leaving any trace of forced entry. This claim, which was the heart of Cope's defense, appeared dubious, to say the least, absent evidence that Sanders had in fact repeatedly committed exactly such acts in the Copes' Rock Hill neighborhood around the same time and had in fact confessed to the Cope crime. The exclusion of this evidence accordingly undermined Cope's entire defense,

amounted to reversible error under South Carolina law, and a violation of Cope's federal due process rights.

A. The Trial Court Erred In Denying Cope's Motion To Admit Evidence Of Sanders' Other Crimes Pursuant To Rule 404(b), SCRE, And State v. Lyle

The trial court abused its discretion by excluding Cope's proffered evidence of Sanders' other crimes pursuant to Rule 404(b), SCRE, and State v. Lyle, supra. This evidence was Cope's only means by which to prove his vital – but seemingly impossible – contention that Sanders, acting alone, had broken into Cope's home and attacked Amanda without leaving signs of forced entry and without waking her father.

Sanders' prior crimes were admissible under not one but two of the enumerated Lyle/ 404(b) exceptions: they tended to establish the existence of a common scheme or plan and they were probative of the identity of the perpetrator. See State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572, 582 (2005). The crimes were also proved by clear and convincing evidence and their probative value far outweighed any potential prejudicial effect on Sanders' trial. See Fletcher, 363 S.C. at 244-46, 609 S.E.2d at 584. The evidence of Sanders' other crimes thus satisfied every criterion for admission under Lyle and Rule 404(b). Indeed, the exclusion of evidence of Sanders' other crimes directly contravened the purpose of

both Rule 404(b), SCRE, and of Lyle, applying a rule intended to protect a defendant's right to a fair trial, see, e.g., Fletcher, 363 S.C. at 241, 609 S.E.2d at 582, to shore up what would otherwise have been exposed as a weak and misconceived prosecution theory and to entirely frustrate Cope's effort to present a full defense.[7]

1. Evidence Of Sanders' Other Crimes Qualified For Admission Under Two Separate Lyle/ 404(b) Exceptions - To Establish The Existence Of A Common Scheme Or Plan And To Establish The Identity Of The Perpetrator

South Carolina law excludes evidence of a defendant's other crimes when offered to show criminal propensity or bad character of a defendant. State v. Beck, 342 S.C. 149, 536 S.E.2d 679 (2000). Such evidence is admissible, however, when it is necessary to prove a material fact or element of the crime charged. Fletcher, 363 S.C. at 241, 609 S.E.2d at 582. Other crimes may accordingly be introduced when they are offered to prove motive, intent, the absence of mistake, a common scheme or plan, or the identity of the perpetrator. Rule 404(b), SCRE; Lyle, 118

[7] As a threshold matter, it is clear that other crimes evidence may be offered by one defendant against another. In State v. Good, 315 S.C. 135, 432 S.E.2d 463 (1993), the South Carolina Supreme Court affirmed introduction of evidence by one defendant that his co-defendant had previously robbed the murder victim. Rejecting all objections to the admissibility of this evidence, the court noted that "[t]here would be little question about admissibility [of the other crime] if the State had attempted to introduce this evidence," and, as such, "the trial judge did not err in allowing the...[co-defendant] to introduce it," Good, 315 S.C. at 140, 432 S.E.2d at 466. Furthermore, all three parties in this case agreed at trial that a defendant may properly offer other crimes evidence against a co-defendant. (R.p. 79, lines 9-25).

S.E. at 807. In this case, Cope produced testimony – from both of the victims of Sanders' other attacks as well an expert – which was probative of both a common scheme and the identity of the perpetrator.

To begin, the level of similarity between Sanders' other crimes and the attack on Amanda Cope exceeds the degree of similarity found in numerous cases wherein these Lyle /404(b) exceptions have been applied. In State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989), for example, a case involving sexual abuse perpetrated while the victim was a foster child in the defendant's home, the Supreme Court upheld admission of evidence that the defendant had sexually abused three other women who had been fostered by the defendant. Even though the other crimes in that case occurred seven years prior to the charged offense, the complainants ranged in age from four to thirteen, the abuse occurred in a variety of locations, and the manner and severity of alleged abuse varied amongst the incidents, the court nonetheless found that the charged offense and the prior crimes were committed in "the same manner under similar circumstances," Hallman, 298 S.C. at 173-175, 379 S.E.2d at 116-117, and thus admissible under Lyle as evidence of a common scheme or plan. Similarly, in State v. Blanton, 316 S.C. 31, 446 S.E.2d 43 (1994), the court rejected a claim by a man convicted of sexually molesting his eight year old granddaughter that the trial judge should have

excluded, as too dissimilar and remote in time, evidence that he had sexually molested two other unrelated females seven and eight years prior to the molestation of his granddaughter, Blanton, 316 S.C. at 32-33, 446 S.E.2d at 439. The Blanton court held that the seven to eight year time difference between the other crimes and the charged offense was not too great for the prior acts to be considered part of a common scheme or plan. Id, 316 S.C. at 32, 446 S.E.2d at 440

The similarity between Sanders' other crimes and the attack on Amanda Cope far exceeds the similarities found in Blanton and Hallman. Indeed, numerous similarities exist between Sanders' other crimes and the charged offense, as established by Cope's detailed in camera proffer. First, Sanders' other crimes all involved breaking into a stranger's home without leaving signs of forced entry, (R.p. 831, lines 11-22; R.p. 1642, lines 8-25; R.p. 1643, lines 1-9; R.p. 3562, lines 12-15), a similarity that ought to bear particularly great weight given that the state suggested throughout the trial that residential break-ins without evidence of forced entry were extremely rare. In addition, all of the proffered crimes occurred between November 29, 2001 and January 12, 2002 – a six-week period, (R.p. 831, lines 12-13), and all but one occurred less than a mile away from the Cope home, (R.p. 831, line 25). Moreover, all the other crimes were committed in private residences, (R.p. 832, lines 8-9; R.p. 852, lines 12-16), all were committed against

complete strangers,(R.p. 833, lines 3-15), and in three of the four other crimes, as in the attack on Amanda, Sanders' utilized choking/asphyxiation, (R.p. 838, lines 5-6), and evidenced a dual motive of theft and sexual assault, (R.p. 834, lines 8-17). Finally, in two of the other crimes, as in the attack on Amanda, Sanders committed or attempted to commit his assaults despite the presence of others in the residence. (R.p. 884, lines 1-7).[8]

South Carolina courts have repeatedly relied on just one or two such similarities when applying Lyle exceptions. See, e.g., Lyle, 118 S.E. at 808 (close geographical concentration of offenses); Beck, 342 S.C. at 136-137, 536 S.E.2d at 683 (concentrated timeline of offenses); Hallman, 298 S.C. at 175, 379 S.E. at 117 (similarity of method of commencing crimes); Blanton, 316 S.C. at 33, 446 S.E. 2d at 439 (similarity in type of abuse perpetrated). The striking commonalities between the attack on Amanda and Sanders' other crimes are accordingly more than sufficient to satisfy the identity and common and scheme exceptions of Lyle and Rule 404(b).

[8] That Sanders actually raped only the two most vulnerable victims – Amanda Cope, a 12 year old girl, and Catherine Davis, a 60 year old, disabled woman – does not detract from the similarities between his other crimes and the charged offense. It does not matter for the purpose of a Lyle analysis that the ultimate extent of each crime may have differed, as long as the crimes "commenced in the same manner under similar circumstances." Hallman, 298 S.C. at 175, 379 S.E.2d at 117.

2. Sanders' Other Crimes Were Established Through Clear And Convincing Evidence

If not the subject of a conviction, other crimes or acts must be established by clear and convincing evidence in order to be admissible. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 04). The other crimes evidence at issue in this case easily meet that standard. Alicia Lowery identified Sanders as her assailant in a line-up. (R.p. 744, lines 22-25; R.p. 745, lines 1-9). Sanders was linked to the attack on Sara Hagman by an identification and by DNA. (R.p. 879, lines 11-12). DNA evidence also linked Sanders to the rape and robbery of Catherine Davis. (R.p. 879, lines 11-12). That Sanders broke into Sarah Phillips' home was established by both in-court and photographic line-up identifications. (R.p. 776, lines 23-25). Indeed, Sanders had been indicted by the state in each of these cases. (R.p.80, lines 9-13; R.p. 879, lines 18-21). For these reasons, the trial court found that there was clear and convincing evidence that Sanders perpetrated the crimes against Ms. Lowery, Ms. Hagman, Ms Phillips, and Ms. Davis. (R.p. 889, lines 12-17; R.p. 891, lines 6-7). This finding is well supported by the evidence and must be affirmed. See State v. Wallace, 364 S.C. 130, 136, 611 S.E.2d 332, 335 (Ct. App. 2005) (trial court's determination of clear and convincing evidence in context of other crimes must not be disturbed on appeal if ruling is supported by any evidence).

3. The Probative Value Of Sanders' Other Crimes Substantially Outweighed Any Prejudicial Effect

Even where evidence satisfies one or more Lyle/ 404(b) exception and is supported by clear and convincing evidence, the evidence is nonetheless inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to a defendant. Rule 403, SCRE; State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001). The evidentiary value to Cope's defense of evidence of Sanders' other crimes, however, substantially outweighed any prejudice to Sanders, such prejudice being marginal at best in light of the DNA evidence that already linked Sanders indisputably to the attack on Amanda.

Evidence of Sanders' other crimes in the two month period following Amanda Cope's murder would have powerfully undermined the state's entire theory of the case against Cope as the prosecution was only able to reconcile the fact that Cope had confessed to a crime that, according to DNA, Sanders had in fact committed, by alleging that Cope and Sanders somehow attacked Amanda together. Due to the total lack of evidence linking Cope and Sanders, the state argued that Cope "had to" have conspired with Sanders given the apparent lack of forced entry into the Cope home. (R.p. 3562, line 15). Evidence that Sanders, acting alone, had, on a number of occasions, broken into Rock Hill homes without leaving any signs of forced entry would therefore have virtually demolished the

state's case. With respect to prejudice, in contrast, Sanders was already undeniably tied to Amanda's attack by the DNA evidence he left behind on her body and her clothing. Sanders' other crimes were thus merely cumulative evidence of his guilt, evidence that paled in comparison to the power of DNA. Any prejudice to Sanders resulting from admission of evidence of his other crimes would accordingly have been, at the very most, incidental. Moreover, as discussed below, any prejudice to Sanders could have been eliminated entirely by granting Cope's request for severance so that Sanders' other crimes could have been admitted as evidence of third party guilt.

B. The Trial Court Erred In Denying Cope's Motion To Sever His Trial From Sanders' So That Information Regarding Sanders' Other Crimes Could Be Admitted As Evidence Of Third Party Guilt

1. Information Regarding Sanders' Other Crimes Would Have Been Admitted As Evidence Of Third Party Guilt In A Severed Trial

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986); California v. Trombetta, 467 U.S. 479, 485 (1984). "Few rights," of course, "are more fundamental that that of an accused to present witnesses" on his behalf. Chambers v. Mississippi, 410 U.S 284, 302 (1973) (citing Webb v. Texas, 409

U.S. 95 (1972). Indeed, "where constitutional rights directly affecting the ascertainment of guilt are implicated," the "ends of justice" must override "mechanistic" application of evidentiary rules. Chambers, 410 U.S. at 302; see also United States v. Scheffer, 523 U.S. 303, 316 n.12 (1998).

For this reason, South Carolina law provides that defendants be permitted to introduce evidence of a third party's guilt whenever such evidence shows facts that are "inconsistent with [the defendant's] own guilt . . . [and] rais[e] a reasonable inference or presumption as to . . . [a defendant's] own innocence."[9] State v. Gregory, 198 S.C. 98, 104-05, 16 S.E.2d 532, 534 (1941); accord State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001); State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (1988). To be sure, "evidence which can have (no) [sic] other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible," Gregory, 198 S.C. 98, 104-05, 16 S.E.2d, 532, 534 (internal citation omitted), nor is evidence lacking "a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." Id. Evidence, however, that does support a claim of innocence, does clearly indicate the guilt of another and is itself supported by credible foundational facts, is admissible by a defendant.

[9] The constitutionality of the South Carolina standard for admission of third party evidence is currently under review by the United States Supreme Court. State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (04), cert. granted, ___ U.S. ___, 126 S.Ct. 34 (2005) (argued February 22, 2006).

Indeed, such evidence becomes essential where, as here, other affirmative evidence of innocence – such as alibi testimony or exonerative forensics – is not available or applicable.

The information that Cope sought to introduce in this case regarding Sanders was precisely such essential evidence. Not just a critical component of his defense, the truth about Sanders was Cope's defense, as it provided the only evidence to be had in support of his claim that someone had broken into his home and attacked his daughter without leaving signs of forced entry and without waking other family members.

Although the admissibility of "other crimes" as third party guilt evidence has not yet been expressly addressed by the South Carolina courts, nothing in South Carolina law indicates that the standard for admitting third party guilt evidence is altered in any way when the proffered evidence relates to a third party's other crime or crimes. In addition, many other courts have addressed this precise question and have reversed convictions in cases very similar to Cope's. In State v. Cotton, 351 S.E.2d 277 (N.C. 1987), for example, the defendant, who was charged with rape and burglary, sought to introduce evidence of two similar attacks committed by an unidentified individual on the same evening and in the same neighborhood as the assault in question. The North Carolina Supreme Court

reversed the trial court's exclusion of this evidence, relying on a standard nearly identical to South Carolina's third party guilt rule. Specifically, the Cotton court ruled that where a series of similar assaults appears to have been committed by a lone third party in a manner and location that suggest that the third party, and not the defendant, could have committed the offense at issue, it is an abuse of discretion to prevent the defendant from presenting those other crimes to the jury. Id. at 280.[10]

Similarly, in State v. Williams, 518 A.2d 234 (N.J. Super. 1986), a New Jersey appellate court reversed the attempted murder conviction of a defendant who had sought to introduce evidence of two other assaults committed nearby both before and after the offense at issue. Although these other assaults were far from identical to the crime with which the defendant was charged, the appellate court ruled that their exclusion nonetheless "eviscerated the defense entirely and denied [the] defendant a fair trial," Id. at 235. Noting that "a lower standard of similarity of offenses is required to justify the use of such evidence by a defendant than is required when the state offers . . . [other crimes] evidence," the Williams court found sufficient correspondence between the charged offense – an outdoor stabbing wherein no sexual assault occurred – and the other crimes – rape

[10] After eleven years in prison, Cotton was eventually exonerated by DNA. See President's DNA Initiative website, located http://www.dna.gov /case_studies/convicted_exonerated/cotton.

abductions wherein only one victim was stabbed and wherein both victims were transported to off-street locations – to rule exclusion of the other offenses reversible error.[11] Id. at 238.

In so doing, the Williams court relied on a case that even more closely resembles this one – State v. Garfole, 388 A.2d 587, 591 (N.J. 1978). In Garfole, a defendant accused of molesting a teenager sought to introduce evidence regarding four other similar assaults. The defendant had an alibi for two of those four other offenses and wanted to argue that, to the extent the similarity of the crimes indicated that one person had committed them all, that person could not have been the defendant. Citing both Wigmore and McCormick and noting that third party other crimes evidence is particularly significant where each of the crimes in question occurs within a "close time sequence" and geographical vicinity, the

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[11] Notably, the level of similarity required in these cases is generally deemed considerably lower than the standard applied to other crimes evidence offered against the accused. While the prosecution must establish a virtually unique modus operandi to introduce such evidence against a defendant, "a lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State." United States v. Stevens, 935 F.2d 1380, 1403 (3rd Cir. 1991) (quoting State v. Garfole, 388 A.2d 587, 591 (N.J. 1978)); accord Perry v. Watts, 520 F. Supp. 550, 560 (N.D. Cal. 1981); State v. Williams, 518 A.2d 234, 238 (N.J. 1986); Commonwealth v. Jewett, 467 N.E.2d 155, 158 (Mass. 1984); People v. Bueno, 626 P.2d 1167, 1169 (Colo. Ct. App. 1981); see also Joan L. Larsen, Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b), 87 NW. U. L. Rev. 651, 660-62 (1993).

Thus, the trial court erred in presuming that its determination that Sanders' other crimes were not sufficiently identical to satisfy the modus operandi Lyle exception foreclosed any analysis of Sander's other crimes under a third party rubric. (R.p. 893, lines 1-6).

Garfole court determined that it had been reversible error to exclude the other crimes information. Id. at 449-453.

Numerous other appellate courts have also found reversible error where material and substantiated evidence of similar third party crimes has been excluded.[12] Significantly, in each of these cases, neither the evidence linking the third party to the proffered other crimes nor the evidence linking the third party to the crime with which the defendant was charged was nearly as strong as the DNA evidence that has linked James Sanders to both the other crimes at issue here and to the brutal attack and murder of Amanda Cope. If, then, as these cases show, it is

[12] See, e.g., United States v. Stevens, 935 F.2d 1380, 1401-06 (3rd Cir. 1991) (reversible error to exclude evidence that victim of similar crime did not identify defendant as assailant); Kucki v. State, 483 N.E.2d 788 (Ind. Ct. App. 1985) (reversible error to exclude fact that third party was suspected of committing similar crimes in the area, even though evidence suggested third party was out of state at time of offense at issue); State v. Burge, 487 A.2d 532, 545 (Conn. 1985) (reversible error to exclude evidence regarding third party who "lived in the vicinity of the scene of the crime . . . [and who] had confessed to the recent commission of a similar assault under similar circumstances at a location near to the place where the victim in this case had been assaulted and killed"); Commonwealth v. Jewett, 458 N.E.2d 769, 771 (Mass. Ct. App. 1984) aff'd 467 N.E.2d 155, 158 (Mass. 1984) (reversible error to exclude evidence that man who resembled defendant had recently committed similar sexual assault under similar circumstances); People v. Bueno, 626 P.2d 1167 (Colo. Ct. App. 1981) (reversible error to exclude information regarding similar crimes from which the defendant had been excluded as a suspect); Commonwealth v. Rini, 427 A.2d 1385, 1388 (Pa. Super. 1981) (reversible error to exclude "evidence that someone else committed a crime which bears a highly detailed similarity to the crime with which the defendant is charged"); State v. LeClair, 425 A.2d 182, 187 (Me. 1981) (reversible error to exclude evidence about similar crime occurring at home of third party on the day following crime at issue); Commonwealth. v. Keizer, 385 N.E.2d 1001, 1003 (Mass. 1979) (reversible error to exclude evidence of a crime committed by similar method while defendant was in custody); State v. Bock, 39 N.W.2d 887, 458 (Minn. 1949) (reversible error to exclude "crimes of a similar nature [that] have been committed by some other person when the acts of such other person are so closely connected in point and time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime charged against him").

reversible error to exclude defense evidence regarding a third party merely suspected of similar crimes, surely it must be reversible error to exclude Cope's evidence, which proved by DNA that a particular third party, James Sanders: (1) was serially and solitarily committing similar crimes at the time of offense at issue, and; (2) participated in the offense at issue. This remains the case – given the extraordinary evidentiary strength of these two connections – even in a jurisdiction such as South Carolina where the nexus between the third party and the crimes at issue must be relatively robust.

Moreover, courts have found that a defendant's right to present third party other crimes evidence is particularly strong when offered to rebut a conspiracy theory by demonstrating the third party's pattern of acting alone. In People v. Cruz, 643 N.E.2d 636, 655 (Ill. 1994), for example, the Illinois Supreme Court reversed a capital rape-murder conviction where, inter alia, the trial court excluded evidence that a third party had committed crimes similar to those with which the defendant had been charged, and that the third party had previously acted alone. Recognizing the heightened need for such evidence when the prosecution argues that the defendant and the third party acted together, the court held that the

exclusion of third party other crimes evidence warranted overturning the defendant's conviction.[13] Id., at 655-656.

Thus, while it may be permissible to exclude third party other crimes evidence where witnesses or other evidence tend to exclude the third party from the crime at issue, see, e.g., Daniel v. State, 395 S.E.2d 638 (Ga. 1990), or where the evidence of third party crimes is inadmissible hearsay, see, e.g., Gates v. United States, 481 A.2d 120 (D.C. 1984), where, as here, the predicate evidence is uncontradicted, entirely competent,[14] highly probative, and essential to the defense, it must be admitted in order to accord the defendant a fair trial.

Finally, even assuming, arguendo, that the trial court properly denied Cope's request to inform the jury of Sanders' other crimes, Cope ought to have been allowed to enter evidence of those crimes without reference to Sanders, as he sought to do in the wake of trial court's expression of concern regarding impact of such evidence on Sanders' fair trial rights. The trial court, however, denied both Cope's efforts to resolve this conflict via severance, (R.p. 891, lines 18-19; R.p. 892, lines 13-25); see Sec. I.B., infra, as well as his proposal to avoid the conflict

[13] After spending almost eleven years on death row, Cruz, like Cotton, was ultimately exonerated by DNA. See President's DNA Initiative website, located at http://www.dna.gov/case_studies/convicted_exonerated/cruz_hernandex.

[14] Cope sought to introduce information regarding Sanders' other crimes via testimony directly from the victims of those crimes and via DNA and fingerprint evidence.

entirely by referring to Sanders' other crimes without mentioning Sanders – i.e. by offering evidence that some unnamed third party was committing a string of assaults and robberies in Rock Hill in which the perpetrator would enter homes without leaving signs of a forced break-in and often without waking other occupants. (R.p. 2308, lines 22-25; R.p. 2309, lines 1-21). This evidence, offered not only as evidence of third party guilt but also to counter the state's arguments that it would have been virtually possible for anyone to enter the Cope home without leaving signs of forced breaking unless Cope had invited them in, was also erroneously excluded by the court.

2. Severance Should Have Been Granted So That Information Regarding Sanders' Other Crimes Could Have Been Admitted As Evidence Of Third Party Guilt

The admissibility of Sanders' other crimes as third party guilt evidence required the trial court to grant Cope's motion for severance. Although criminal defendants who are jointly charged are not entitled to separate trials as a matter of right, State v. Walker, 366 S.C. 643, 656, 623 S.E.2d 122, 128 (2005) (internal citations omitted), severance is required where "there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." Id. at 129; see also State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Dennis, 337 S.C.

275, 523 S.E.2d 173 (1999). Thus, a trial court must "act cautiously in allowing a joint trial[,] . . . consider problems that may arise from a joint trial . . . and . . . assure protection of each defendant's constitutional right[s]," Walker, 366 S.C. at 657 (citing State v. Singleton, 303 S.C. 313, 400 S.E.2d 487 (1991)), and is subject to "a continuing duty at all stages of the trial to grant a severance if prejudice" to a particular defendant will be caused by a joint trial. Schaffer v. United States, 362 U.S. 511, 516 (1960). This duty mandated that the trial court in this case sever the trials of Cope and Sanders; its refusal to do so was reversible error.

a. Severance Must Be Granted Where One Defendant's Constitutional Right To Defend Himself Via The Presentation Of Certain Evidence Or Argument Is In Direct Conflict With A Co-Defendant's Constitutional Right To Defend Himself Via Exclusion Of That Same Evidence Or Argument

The narrow severance issue in this case – granting severance to allow admission of information regarding a co-defendant's other crimes as third party guilt evidence – is a matter of first impression in South Carolina. However, the larger question of how to resolve situations where co-defendants' constitutional rights are at direct odds with one another is a matter that has been addressed by the South Carolina Supreme Court, as well as by courts in other jurisdictions with virtually identical severance standards.

In State v. Green, 269 S.C. 623, 239 S.E.2d 646 (1977), a defendant wanted to comment on his co-defendant's exercise of his right to remain silent. Although the Green court ultimately held that, due to the lack of mutually antagonistic defenses, the trial court did not abuse its discretion by denying severance in that case, the court also recognized that severance is required whenever one co-defendant's right to present certain evidence or argument conflicts with another co-defendant's right to a have that evidence or argument excluded. Id. at 625, 646-47.

Federal courts[15] have similarly held that where a conflict exists between co-defendants' respective trial rights, "for each of the defendants to see the face of Justice[,] they must be tried separately." De Luna v. United States, 308 F.2d 140, 141 (5th Cir. 1962), reh'g denied, 324 F.2d 375 (5th Cir. 1963) (severance required where one co-defendant's right to a fair trial required court to allow him to comment on co-defendant's silence).[16] Largely in the context of cases where a defendant seeks severance in order to call his co-defendant as a witness, these courts have addressed precisely the conflict at issue here: the dilemma that arises

[15] In federal courts, as in South Carolina, the question of severance is left almost entirely to the discretion of the trial judge. See, e.g. Zafiro v. United States, 506 U.S. 534, 541 (1993).

[16] See also United States. v. Mardian, 546 F.2d 973, 980 (D.C. Cir. 1976) (severance required where one co-defendant's need for a continuance based on incapacitating illness of his attorney conflicted with co-defendants' right to speedy trial); Bruton v. United States, 391 U.S. 123, 136-137 (1968) (either severance or exclusion of offending statement is required when government seeks to introduce the statement of non-testifying co-defendant in joint trial); United States v. Truslow, 530 F.2d 257, 261 (4th Cir. 1975) (reversible error to deny severance upon introduction of Bruton statement); United States v. Harris, 409 F.2d 77, 81 (4th Cir. 1969) (same).

when one defendant cannot present essential and otherwise admissible evidence solely because he is being jointly tried. Applying the principle that "a single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial," United States v. Echeles, 352 F.2d 892, 896-97 (7th Cir. 1965) (internal citation omitted), these courts have held that severance must be granted when "a fair trial for . . . [one co-defendant] necessitate[s] providing him the opportunity of getting . . . evidence before the jury" that would be inadmissible in a joint proceeding. Echeles, 352 F.2d at 898. See also Tifford v Wainwright, 588 F.2d 954, 956 (5th Cir. 1979), reh'g denied 592 F.2d 233 (severance required where one co-defendant's right to a fair trial required court to allow him to call other co-defendant as a witness). These courts have also noted that conspiracy charges quite often create such conflicts amongst the rights of the co-defendants. See, e.g., Mardian, 546 F.2d at 977; Echeles, 352 F.2d at 898 (citation omitted); Glasser v. United States, 315 U.S. 60, 76 (1942).

In sum, both South Carolina and federal courts have acknowledged that severance must be granted when a joint trial creates a conflict amongst the constitutional rights of the defendants. In this case, Cope was denied a fair trial by the trial court's exclusion of evidence of Sanders' other crimes, a decision which

was based on Sanders' right to a fair trial. The failure to grant severance in this situation was therefore a violation of well-established law.

b. Cope Was Prejudiced By Exclusion Of Evidence Of Sanders' Other Crimes

Cope was greatly prejudiced by exclusion of evidence of Sanders' other crimes. In fact, exclusion of Sanders' true background distorted the factual landscape so severely that it appeared to the jury that no evidence whatsoever supported Cope's claim that Sanders entered his home and brutally assaulted and murdered his daughter without leaving any apparent signs of forced entry and without waking Cope.

Just as the authorities found that proposition preposterous enough, before they knew about Sanders' activities, to arrest Cope for Amanda's murder, so, too, must the jury have rejected this seemingly baseless defense from the outset based on the sheer improbability of such a scenario. Indeed, stripped of its factual foundation, Cope's entirely accurate contention that James Sanders was capable of – not to mention, serially committing – precisely the acts his defense alleged, not only failed to support Cope's defense but affirmatively damaged it, causing him and his counsel to lose credibility with the jury from the very first moment of the trial. Compounding this perverse turn of events was the prosecution's exploitation

of the jury's misimpression. Despite what the state's own investigation of Sanders had revealed, state witnesses testified, (R.p. 1642, lines 1-8: R.p. 1643, lines 1-9), and the solicitor argued, (R.p. 3562, line 15), as though the notion of James Sanders breaking into a Rock Hill home without leaving signs of forced entry was patently ridiculous.

Corroboration is vital in any legal proceeding. It is all the more essential in a case where the theory of the defense appears implausible at first blush, and where the prosecution relies upon and exacerbates this false impression. As the South Carolina Supreme Court has recognized, any evidence that buttresses a defendant's otherwise uncorroborated version of events is highly material and can mean the very difference between a guilty verdict and an acquittal. State v. Wiley, 106 S.C. 437, 437, 91 S.E. 382, 382 (1917) (ordering new trial upon discovery of new evidence corroborating manslaughter defendant's previously uncorroborated self-defense claim); see also Roviaro v. United States, 353 U.S. 53, 63-64 (1957) (defendant "faced with the burden of explaining or justifying" his conduct has a "vital need for access to any material witness" that will corroborate his otherwise uncorroborated claims). Failure to sever in this case thus did more than merely "compromise a specific trial right," Walker, 623 S.E.2d at 129, it entirely prevented Cope from exercising his most fundamental of rights – the right to

present a defense. Chambers, 410 U.S at 302; State v. Johnson, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987). State v. Schmidt, 288 S.C. 301, 302, 342 S.E.2d 401 (1986).

C. The Trial Court Erred In Excluding Testimony From James Hill Concerning Sanders' Admission To Assaulting A "Little Girl In Rock Hill"

The trial court's exclusion of evidence of numerous other substantially similar (and solitary) crimes by Sanders, and its failure to grant severance were not the only rulings that deprived Cope of the ability to rebut the state's theory that he and Sanders raped and murdered Amanda in tandem. In addition, the court excluded evidence that Sanders had bragged to fellow prison inmates about "getting away" with an apparently solo act of rape-murder that was almost certainly that of Amanda Cope.

James Hill, a convicted burglar who in late 2002 was confined with James Sanders in the segregation unit of Perry Correctional facility in Pelzer, South Carolina, (R.p. 3426, lines 13-20), testified at a hearing outside the presence of the jury that he overheard Sanders talking to another inmate. According to Hill's sworn testimony, Sanders and the other inmate:

> got to the subject of crimes and criminal history and they got to joking about how the . . . police force . . . weren't doing their jobs, that it was easy to get away from them, to delude them [sic], and he made the comment that he was going to get away with what he did to that little girl in Rock Hill, and he went on

to describe explicitly what he had done and then in . . . getting away.

(R.p. 3429, lines 8-17). Hill also overheard Sanders "remark about oral and anal sodomy" and "smothering the child," specifically quoting Sanders as stating that he (Sanders) "f____d her. F____d her good." Hill further testified that Sanders "alluded to the fact that he had got in through a window in the house and that he had left through the same window and proceeded to go to another individual's house." Id., (R.p. 3429, lines 19-25; R.p. 3430, lines 1-4; R.p. 3431, lines 13-16). Hill prefaced this proffered testimony by describing himself as a reluctant witness who had received no inducement to testify, was then recovering from an unrelated prison stabbing, and could expect only increased threats to his personal safety for incriminating Sanders as he was doing. (R.p. 3427, lines 1-25; R.p. 3428, line 1).

After this proffer, Sanders' counsel objected to Hill's testimony concerning Sanders' admissions as irrelevant "because there has been no identifying characteristics." (R.p. 3432, lines 21-25; R.p. 3433, lines 1-10). The trial judge sustained Sanders' objection, noting that Hill's proffered testimony did not include any specification by Sanders as to "the time, place, or other circumstances" of the crime. (R.p. 3433, lines 5-7).

1. Hill's Testimony Concerning Sanders' Confession Was Relevant And Admissible Under The South Carolina Rules Of Evidence

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; Fed. R. Evid. 401. At issue in the trial of Sanders and Cope was the question of who sexually assaulted and killed 12-year-old Amanda Cope, a victim who certainly could be fairly described as a little girl from Rock Hill. The state's theory was that Cope allowed Sanders – by all evidence a complete stranger – to participate in the sexual abuse and murder of Cope's own daughter. Cope's defense was that Sanders committed the crime by himself.

This defense was strongly supported by Sanders' admission, which was notable for its lack of any reference to an accomplice or co-perpetrator. James Hill's testimony – that Sanders told another inmate that he got away with the sexual assault and killing of a little girl from Rock Hill – clearly tended to increase the probability that Sanders assaulted and killed Amanda, and that he did it the same way he committed all his other crimes: by a stealthy entering without breaking, and alone. The connection to the Amanda Cope murder is especially strong given the total absence of any evidence of any <u>other</u> unsolved rape and

murder of a "little girl from Rock Hill." Sanders' ugly boast was not merely "of consequence" to the case, but, rather, went to its very heart, and Hill's testimony was therefore relevant under Rule 401.

Moreover, no rule of law limits admission of defendants' incriminating statements to highly detailed narratives of the offense charged. Confessions, like any other evidence, are relevant and admissible if there is a logical or rational connection between the confession sought to be presented and the matter of fact in issue at trial. State v. Tufts, 355 S.C. 493, 585 S.E.2d 523 (Ct. App. 2003). Thus, the fact that the statement Hill overheard did not contain still more details regarding the time, place, and circumstances of the attack Sanders was discussing did not render the statement inadmissible. Indeed, incriminating statements lacking specificity are commonly used by the state to link defendants to crimes. See, e.g, State v. Cason, 317 S.C. 430, 431, 454 S.E.2d 888, 889 (Ct. App. 1995) (prosecution witnesses testified the defendant said he "killed a f_____g n____r b___h" in murder trial involving black female victim); State v. Caulder, 287 S.C. 507, 510, 339 S.E.2d 876, 878 (Ct. App. 1986) (witness who had been incarcerated with the defendant testified at trial that defendant stated he thought he "got away with killing this woman"); see also State v. Cheeseboro, 346 S.C. 526, 548, 552 S.E.2d 300, 312 (2001) (defendant's statement regarding robbery of an

establishment with a safe admissible in trial regarding murder that occurred at barbershop with a safe on the premises, despite absence of any other connection between the statement and the crime).

Absent any evidence that Sanders was actually bragging about having gotten away with some unrelated rape and asphyxiation-murder of a different "little girl in Rock Hill," and given the DNA evidence that provided an indisputable link between Sanders and the Amanda Cope murder, his admission was more than sufficiently tied to the Cope case to be considered legally relevant. Indeed, the fact that Sanders' admission provided many, but not all, of the details of this crime went only to the weight the jury should have accorded to the admission, and not to its admissibility. By deeming Hill's testimony irrelevant for lack of specificity, however, and not otherwise analyzing its relevancy, the trial judge improperly constricted the broad standard of relevancy and erroneously excluded admissible and highly probative testimony.

2. Hill's Testimony Concerning Sanders' Confession Satisfied The Hearsay Exception Regarding Statements Against Penal Interest

Although neither the state nor Sanders made any hearsay objection to Hill's testimony at trial, it should be noted that Sanders' admissions as related by Hill's would have been admissible under the hearsay exception of Rule 804(b)(3), SCRE.

Testimony falls within the exception of 804(b)(3) if the moving party can show that: (1) the proffered statements were made by an unavailable declarant; (2) the statement exposed the declarant to criminal liability; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement. Hill's testimony regarding Sanders' statement meets these criteria. First, a witness who invokes his Fifth Amendment right to silence is unavailable for hearsay purposes. Rule 804(a)(1), SCRE; State v. Doctor, 306 S.C. 527, 529, 413 S.E.2d 36, 38 (1992). Sanders asserted his privilege when he declined to testify in his own defense at the joint trial. Second, Sanders' admission that he had raped and murdered a child obviously exposed him to the gravest possible criminal liability.

As for the final provision of the Rule, the question of whether corroborating circumstances indicate that the statement is trustworthy must be determined "after considering the totality of the circumstances under which a declaration against penal interest was made." State v. Kinloch, 338 S.C. 385, 391, 526 S.E.2d 705, 708 (2000). In this case, a totality-of-the-circumstances analysis leads to the conclusion that Sanders' statement is sufficiently corroborated for purposes of 804(b)(3). Hill did not receive any reward for his testimony, and had no motive to testify against Sanders. To the contrary, he had a compelling motive not to testify against Sanders – an apparently well-justified fear of retaliation on the part of a

witness who was still recovering from a prison stabbing at the time of his testimony. See United States. v. Lowe, 65 F.3d 1137, 1146 (4th Cir. 1995) ("declarant's motive in making the statement and whether there was a reason for the declarant to lie" is a factor to be considered in 804(b)(3) analysis); cf. State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001) (affirming exclusion of 804(b)(3) statement because, inter alia, potential witness was friend and roommate of defendant); State v. McKnight, 321 S.C. 230, 235; 467 S.E. 2d 919, 922 (1996) (affirming exclusion of 804(b)(3) statement because witness with a motive to testify against the alleged declarant); State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (Ct. App. 2005)(noting that potential witness was girlfriend of person accused of crime and thus had motive to fabricate exculpatory testimony).

In addition, the truthfulness of the statement's contents is powerfully corroborated by the biological evidence inculpating Sanders, namely the presence of Sanders' semen and saliva on Amanda's clothing and body. See Lowe, 65 F.3d at 1146 ("nature and strength of independent evidence relevant to the conduct in question" is a factor to be considered in 804(b)(3) analysis); cf. State v. Forney, 321 S.C. 353, 359, 468 S.E.2d 641, 645 (1996) (upholding exclusion because "there is no independent evidence corroborating. . . statements that . . .[the

declarant] killed [the victim]"). Thus the requirements of 804(b)(3) are met, and Hill's testimony would have survived any hearsay objection, had one been made.[17]

3. The Exclusion Of Hill's Testimony Violated Cope's Federal Due Process Right To Present A Full Defense And Sixth Amendment Right To Trial By Jury

In addition to violating well-settled principles of South Carolina evidence law, the exclusion of James Hill's testimony also violated Cope's federal due process right to "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. at 690 (internal quotations omitted). This right includes the right to compel the attendance of witnesses at trial and to present those witnesses in defense of the charges brought. Rock v. Arkansas, 483 U.S. 44, 61-62 (1987). It also includes the right to have an impartial jury serve as the trier of all facts necessary for conviction, with the prosecution bearing the burden of proving to the jury guilt beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477-78 (2000). Both of these due process entitlements were transgressed by the exclusion of James Hill's testimony.

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[17] In addition, even assuming, arguendo, that the Hill statement did not satisfy a well-established exception to the hearsay rule under South Carolina law, an exculpatory confession of a third party offered through hearsay, even if state evidentiary rules prohibit its admission, is admissible on due process grounds when the evidence at issue is reliable and highly relevant to a critical issue in the case. State v. Ard, 332 S.C. 370, 382; 505 S.E. 2d 328, 333 (1998) (overruled on other grounds[0]) (citing Green v. Georgia, 442 U.S. 95 (1979)). Where, as here, "constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers, 410 U.S. at 302.

As discussed above "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers, 410 U.S. at 302 (internal citations omitted). Mr. Cope's defense at trial was that Sanders killed Amanda, and that he acted alone, rather than in some kind of conspiracy with Cope. James Hill would have testified that he heard Sanders bragging about his participation in a murder under circumstances that were materially identical to those surrounding Amanda Cope's death. The similarity between Sanders' statement and Amanda's murder lends credence to Cope's defense theory that Sanders did indeed assault and kill Amanda, and that he did so alone. Amanda Cope was sodomized and raped; Sanders bragged that he sodomized and raped his victim. (R.p. 3429, line 19 to 25; R.p. 3430, line 1-4). Sanders bragged that he smothered his victim; Amanda had injuries consistent with strangulation. (R.p. 1045, lines 14-18). Sanders claimed that his victim was a little girl from Rock Hill; Amanda was a little girl from Rock Hill. Sanders also said that he entered through a window, which is consistent with the theory that Sanders entered and exited the Cope residence without leaving apparent signs of forced entry. Most importantly, Sanders' statement did not contain any reference whatsoever to another person – much less the victim's father – observing or participating in the attack and killing. Hill was accordingly a witness whose testimony would have

powerfully substantiated Cope's entire theory of defense. Thus, the unwarranted exclusion of Hill's testimony was not only erroneous under South Carolina evidence law, but also violated Cope's fundamental federal due process right to present witnesses in his defense.

The exclusion of the Hill testimony also transgressed Cope's Sixth Amendment right to trial by jury. This right "is fundamental to the American scheme of justice," Duncan v. Louisiana, 391 U.S. 145, 149 (1968), and an essential element of the jury's responsibility for assessing the truth of every accusation is "determining the weight and credibility of witness testimony," United States v. Scheffer, 523 U.S. 303, 313 (1998) (citations omitted); Washington v. Texas, 388 U.S. 14, 22 (1967). Given that Hill's testimony was relevant and admissible, the jury should have heard his testimony, evaluated his credibility, and determined the appropriate weight to be accorded his testimony. By preventing the jury from performing this vital function, the trial judge usurped the fact-finding role of the jury and, consequently, violated Cope's right to a jury trial.

II. The Trial Court Erred In Excluding Testimony By The Defense False Confession Expert About Two Other Cases Of "Coerced Internalized" False Confessions That Were Substantially Similar To The Cope Case

The trial court made yet another critical error that deprived Cope of evidence essential for a complete defense when it precluded Dr. Saul Kassin, the defense

expert on false confessions, from testifying about two particular false confession cases – those of Gary Gauger and Peter Reilly. In barring this testimony, the court failed to follow its own articulated rule that testimony about other false confession cases would be admissible if these cases were "on all fours" with the Cope case. By failing to even analyze the similarities among the three cases, the court abused its discretion. This abuse of discretion prejudiced Cope because it prevented him from offering a plausible explanation to the jury not only for why he was influenced to confess to a murder he did not commit, but also for why he confessed to perhaps the most heinous crime imaginable – the rape and murder of his own child.

In order to educate the jury on the phenomena of false confessions, the various types of false confessions, and the factors that can lead people to confess to crimes they did not commit, Cope proffered Dr. Kassin, one of the leading experts in the subject, as an expert defense witness. After a lengthy voir dire, the trial court qualified Dr. Kassin as a false confession expert, and found that his testimony would assist the jury, that the underlying science was sufficiently reliable, and that the probative value of Dr. Kassin's testimony was not outweighed by any prejudicial effect. (R.p. 2437, lines 22 to 25; R.p. 2438 lines 1-6). The court limited Dr. Kassin's testimony in one critical respect, however, holding that

he could not testify about "particular cases" of false confessions unless they were "on all fours with this particular case." (R.p. 2438, lines 4-6). This limitation grew out of the court's concern that if Cope's counsel elicited a "litany of horror cases" of wrongful convictions based on false confessions, the prejudicial value of such cases would outweigh the probative value of Dr. Kassin's testimony. (R.p. 3638, lines 8-22).

In the course of Dr. Kassin's testimony before the jury, Dr. Kassin made reference to the infamous Central Park Jogger case, a case in which five teenage defendants confessed to and were convicted of rape and attempted murder before being exonerated by DNA evidence.[18] This mention of the Central Park Jogger case drew an objection from the state and a sharp rebuke by the judge outside of the presence of the jury:

> I thought I made it clear that I did not want testimony that, I hate to use the word sensational, but borders on sensational. I don't want this jury put in fear that they are going to have to live the rest of their lives if they put an innocent man in jail because the joggers and all this other stuff happened. I want them, if you want to help the jury, then I thought my ruling was given them the tools not the examples, I thought that's what I ruled.

(R.p. 2453, lines 17-23). Instead of conceding that Dr. Kassin would not testify about other cases, defense counsel then asked the judge to delay his ruling until the

[18] For an in depth description of the facts of the Central Park Jogger case, see Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA Age, 82 N.C.L.Rev. 891, 891- 901 (Mar. 04).

court heard a full proffer of Dr. Kassin's testimony. The court granted this request. (R.p. 2457, lines 1-15).

During this proffer, Dr. Kassin described a particular type of false confession – the coerced internalized false confession. As Dr. Kassin explained, such confessions occur when "individuals would not only confess to a crime" under interrogation, but also "come to doubt their own innocence and then ultimately confess to something they didn't do and believe that confession." (R.p. 2460, lines 4-7). Coerced internalized confessions, Dr. Kassin further explained, follow a "predictable script." (R.p. 2460, line 9). They involve individuals whose memories are vulnerable to manipulation – perhaps because they are sleep-deprived, or exhausted, or grieving – who are then presented with false evidence of their guilt. (R.p. 2460, line 11-16). In trying to reconcile the fact that he has no memory of committing a crime with "apparently unimpeachable objective evidence of their guilt," (R.p. 2460, line 24), the vulnerable suspect, according to Dr. Kassin, then "entertains the idea that he committed this act" and somehow repressed his memory of it or blocked it out. (R.p. 2461, lines 5 –12). The suspect accordingly begins to imagine how he would have committed this act, and ultimately confesses falsely to the crime in tentative language such as "I must have done this" or "I guess I did that." (R.p. 2461, lines 14-17). In each case of coerced

internalized false confessions, Dr. Kassin explained, the common ingredient is that the "presentation of false evidence puts them over the edge." (R.p. 2461, lines 21-22).

During this proffer, Dr. Kassin discussed two cases of coerced internalized false confessions that bore striking resemblances to Cope's first inculpatory statement. In the first case, one Peter Reilly confessed to murdering and sexually assaulting his mother:

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

(R.p. 2464, lines 18-25; R.p. 2465, lines 1-9). The second case described by Dr. Kassin was that of Gary Gauger, an Illinois man who was convicted of murdering both of his parents and sentenced to death:

> There was another and I'll just give you one more case because it bears a very close resemblance to this one, of a 41 year old man by the name of Gary Geiger [sic] who comes home to find his parents slaughtered and he calls 911. He is then brought in

> for interrogation. He is administered a polygraph. After extensive interrogation he is told that he failed the polygraph. At which point he starts to conclude that I must have done it and I blacked out. Ultimately, he confesses to bringing, to coming up behind his parents, yanking their heads back by the hair, and slitting their throat. It turns out that the surveillance tape later picked up a motorcycle gang in which one of the members was bragging about this particular murder in detail and knew all about it and so he was again exonerated.

(R.p. 2466, lines 10-25; R.p. 2467, line 1).

Dr. Kassin then testified that Cope's case, like those of Gauger and Reilly, contained many of the classic ingredients of a coerced internalized false confession: a vulnerable fatigued subject who is confronted with false evidence of his guilt that causes him to doubt his memory, to hypothesize about how he would have killed his family member, and ultimately to confess that he must have killed his family member (R.p. 2487, lines 14 to 25; R.p. 2488, lines 1-24).

After this proffer, the state objected to Dr. Kassin making any mention of the Gauger and Reilly cases. (R.p. 2492, lines 1-6). The judge, without analyzing whether the particular cases were "on all fours" with the Cope case, sustained the objection. (R.p. 2492, lines 7-8).

A. The Trial Court Abused Its Discretion By Excluding Testimony About Two Cases That Were Substantially Similar To The Cope Case

A trial court's ruling "to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion." Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 952 (2002). An abuse of discretion occurs, however, when the ruling rests on an error of law or a factual conclusion that is without evidentiary support, Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). Moreover, a court's ruling on the admissibility of expert testimony is an abuse of discretion where the exclusion of such evidence is "manifestly arbitrary, unreasonable, or unfair." Ellis v. Davidson, 358 S.C. 509, 524 595 S.E.2d 817, 825 (S.C. App. 04). Here, the trial court abused its discretion because it failed to follow its own rule, and arbitrarily excluded any testimony about two cases which were "on all fours" with the case before it.

The cases of Gary Gauger and Peter Reilly are identical in many respects with the Cope case. These similarities include: (1) that all represent "coerced internalized" false confessions, a relatively rare type of false confession during which an innocent and vulnerable defendant, when confronted with seemingly unassailable evidence of his guilt, begins to doubt his own memory and actually comes to believe that he might have committed the crime; (2) that Gauger, Reilly

and Cope were all vulnerable, sleep-deprived, grief-stricken relatives of the victims; (3) that all three men were presented with what was purported to be powerful evidence of their guilt; (4) that the trigger for all three confessions was the same – all three men were told they had failed a polygraph test; (5) that all three, when they began to confess, used tentative language like "I might have" or asked interrogators if they could have killed the victims but not remembered doing so; (6) that all three eventually confessed to murdering loved ones – Gauger to killing both his parents, Reilly to killing and sexually assaulting his mother, and Cope to killing and sexually assaulting his daughter, and; (7) that all three men recanted their confessions. In preventing Dr. Kassin from mentioning the Gauger and Reilly cases, the trial court not only failed to compare the facts of the Cope case to those cases, it gave no legally sufficient reason for its decision. Such a baseless decision is the essence of arbitrariness.

State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004), does not require a different result, notwithstanding the fact that Myers was another case in which Dr. Kassin was called to testify about false confessions. As in this case, the trial court in Myers qualified Dr. Kassin and permitted him to testify, but precluded him from testifying about particular cases unless those cases were identical to the Myers case. When Dr. Kassin sought to discuss two cases – a false confession case from

Indiana and the very same Peter Reilly case at issue here, the trial court precluded him from doing so. Id., at 50-51, 596 S.E.2d at 493-4. The South Carolina Supreme Court affirmed the trial court's decision, holding that the exclusion of the Indiana case was not an abuse of discretion because the case was so dissimilar. The court also held that the exclusion of the Reilly case was not error because, although the case was similar, Dr. Kassin was permitted to briefly talk about the case, and in light of his other testimony, Myers was not prejudiced by the exclusion. Id.

Myers can thus be distinguished because the Gauger and Reilly cases were not merely "similar" to the Cope case but were, in fact, nearly identical in many respects. All three interrogations followed the same script, and used the identical ploy of a "failed" polygraph test, to convince a defendant who claimed he had no memory of murdering a loved one that he might have done so by blocking out any memory of the crime. Moreover, unlike in Myers, Dr. Kassin was not permitted to testify at all about these cases at trial. As a result, the jury in this case was deprived of the essential information it needed to understand the circumstances that give rise to a coerced internalized false confession, and that innocent defendants can be – and have been – persuaded to confess not only to murder, but to raping and killing their own family members.

B. The Exclusion of Testimony Regarding The Gauger And Reilly Cases Prejudiced Cope

The prejudice suffered by Cope as a result of the trial court's exclusion of Dr. Kassin's testimony is easily appreciated when one considers the special power of confession evidence and the difficulty that defendants who falsely confess have in winning exoneration at trial. Confessions are perhaps the most powerful type of evidence in a court of law. Arizona v. Fulminante, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence...The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct") (citing Bruton, 391 U.S. at 139-40). As one commentator has put it, "the introduction of a confession makes the other aspects of a trial in court superfluous," C.T. McCormick, Handbook of the Law of Evidence at 316 (2d. ed. 1972).

Experimental research across a range of settings has demonstrated that juries tend implicitly to believe confessions and to view them as dispositive evidence of guilt. This is so even if the confessions are completely uncorroborated by other evidence, contain significant errors, and fail to lead police officers to any evidence that they did not already know. See Saul M. Kassin & Gisli Gudjonnson, The

Psychology of Confessions: A Review of the Literature and Issues, 5 Psychol. Sci. in the Public Interest at 56 (04) (discussing studies). Studies of actual cases also support the proposition that juries often accept confessions uncritically. In the two largest studies of proven false confessions, false confessors who pled not guilty and took their cases to trial were convicted by juries between 73% and 81% of the time. Richard A. Leo and Richard S. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. L. & Crimin. 429, 491-496. (1988); Drizin & Leo, 82 N.C.L.Rev. at 996.

Juries so readily convict innocent defendants in false confession cases because false confessions are counterintuitive – jurors simply cannot imagine that they would ever confess to a crime they did not commit. For this reason, jurors give little credence to a defendant's naked claim that his confession is false. But it is becoming increasingly clear that people do, indeed, falsely confess in such situations and with alarming frequency. In fact, false confessions are emerging as one of the leading causes of wrongful convictions; of the first 130 known post-conviction DNA exonerations in the past 15 years, 35 (or nearly 27%) have involved false confessions. Benjamin N. Cardozo School of Law, The Innocence

Project, at http://www.innocenceproject.org/causes; see also Drizin & Leo, 82 N.C.L.Rev. 891 (documenting 125 proven false confessions).

Moreover, jurors in the Cope case needed not only to learn that false confessions occur as a general matter, they also had a second misimpression to overcome before being in a position to fairly and reliably evaluate Cope's defense. This was the natural misimpression that people cannot be influenced to confess to crimes as grievous as murder or rape, and especially not where the victims are members of the defendants' own families.

Again, only studies of documented false confessions, highlighted through expert testimony, can assist juries in this regard. In fact, studies of proven false confessions show that the overwhelming majority of documented false confession cases occur in murder cases. Drizin & Leo, 82 N.C.L.Rev. at 947 (101 of 125 (81%) proven false confessions are to murder). As only an expert can explain, this is because it is in the most serious cases that police officers are most likely to push the envelope with their interrogation tactics. As far as the belief that no innocent person could be influenced to confess to killing or raping a loved one, this is where Dr. Kassin's testimony would have been most critical. Like Cope's case, both the Gauger and the Reilly confession cases were "coerced internalized false confessions" in which defendants were presented with false evidence of their guilt

in the form of polygraph results. Such evidence, Dr. Kassin would have explained, is a proven trigger for false confessions – it has been known to cause defendants to doubt their own memory of the events and, through a police-encouraged process of trying to visualize how the crimes were committed, lead them to believe that they might have killed their loved ones. Without these case studies, jurors had no frame of reference to enable them to accept that Cope, or for that matter anyone, could be influenced to confess to killing a loved one.

Juries expect defendants to tell a story about what happened that makes sense, a story that possesses "narrative integrity." See, e.g., Old Chief, 519 U.S. at 183. Defendants who tell the jury a story with missing pieces inevitably are convicted. The trial court's decision to preclude Dr. Kassin from testifying about two similar cases in which defendants falsely confessed to killing loved ones under nearly identical circumstances thus prevented the defense from filling a critical piece of its defense theory. This decision was an abuse of discretion which should result in a reversal of Cope's conviction.

III. The Trial Court Erred In Denying Cope's Motion To Suppress His Statements Because Those Statements Were Obtained In Violation of Cope's Fourth and Sixth Amendment Rights

A. The Trial Court Erred In Denying Cope' Motion To Suppress His Statements Under The Fourth Amendment

At approximately 10:15 p.m. on November 29, 2001, Lts. Herring and Waldrop picked up Cope at his mother's home to question him about Amanda's death (R.p.271 , line 15-16). For the next three and one-half hours, the officers pressured Cope to confess to Amanda's murder. (R.p. 273, line 21-23). Cope adamantly asserted his innocence some 600 times, (R.p. 1781, lines 13-19), repeatedly telling the police that he had no knowledge of the circumstances of his daughter's death, and imploring them to give him a polygraph test. (R.p. 2965, line 13 to 25; R.p. 2966, line 2).

Nonetheless, at approximately 3:00 a.m. on November 30, 2001, the Rock Hill authorities decided to place Cope under arrest for the murder of his daughter. (R.p. 91, line 3 –25; R.p. 92, line 25). Lt. Blackwelder then typed up a warrant for Cope's arrest and went to the home of Magistrate Margy McNeely to present the warrant. Although not a single fact in support of probable cause appear on the face of the warrant, Lt. Blackwelder testified that she verbally communicated to Magistrate McNeely the basis for her belief that Cope killed Amanda, specifically telling the magistrate: (1) that Cope appeared to be the only adult in the home at

the time of girl's death; (2) that there were no signs of forced entry inside or outside the residence; and (3) that Cope had made some inconsistent statements as to what time his children went to bed on the night of the murder. (R.p. 89, lines 6-21; R.p. 95, lines 3-25). Lt. Blackwelder did not tell Magistrate McNeeley that Cope had persistently and vehemently denied any knowledge of the circumstances of his daughter's death (R.p. 133, lines 9-12). Magistrate McNeely authorized the warrant and Cope was served at 4:21 a.m. (R.p. 93, lines 22-25).

The next morning, Cope was transported by Lt. Herring to the York County Sheriff's Office for a polygraph test to be administered by Det. Baker. (R.p. 2968, lines 7 to 20). When this test was over, Det. Baker informed Cope that he had failed the test, and proceeded to interrogate him for some two and a half hours. (R.p. 2975, line 6 to 25; R.p. 2976, line 10). During this interrogation, Cope made his first confession to killing Amanda. (R.p. 477, lines 2-16).

Over the next several days, Cope continually revised or attempted to revise this initial incriminating statement. On December 3, 2001, he told Capt. Cabaniss and Lt. Blackwelder that he "didn't do it". (R.p. 2998, lines 9-16). When Cope realized the police would not accept his recantation, however, he changed his statement, and claimed to have unintentionally harmed Amanda while in a dream state. (R.p. 3322, lines 1-17). Immediately after Cope gave this second "dream"

statement, Rock Hill officers transported Cope to his home and had him "re-enact" Amanda's murder, on videotape, creating a third statement. (R.p. 1800, lines 12-17). Unsatisfied, Capt. Cabaniss pressed Cope to make yet another statement wherein Cope would confess to killing Amanda intentionally. This Cope eventually did, at 4:55 p.m. on December 3, 2001, creating a fourth and final incriminating statement.

All of these statements were a direct result of Cope's illegal arrest and accordingly ought to have been suppressed.

1. Cope Was Arrested Without Probable Cause

Probable cause to support an arrest exists when "the facts and circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested." State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996). In assessing the totality of the circumstances, a reviewing court "must examine the facts individually in their context to determine whether rational inferences can be drawn from them" that support a finding of probable cause. United States v. Martinez-Cigarroa, 44 F.3d 908, 911 (10th Cir. 1995). Reviewing courts must consider not only the facts supporting the finding of probable cause, but also those that militate

against that finding. United States v. Valenzuela, 365 F.3d 892, 897 (10th Cir. 2004).

A police officer's mere intuition, or even strong or reasonable suspicion, does not amount to probable cause. Henry v. United States, 361 U.S. 98, (1959); United States v. Gray, 137 F.3d 765, 769 (4th Cir.) (en banc), cert. denied, 525 U.S. 866. See also, State v. Dupree, 319 S.C. 454, 458-459, 462 S.E.2d 279, 282 (1995) (defining probable cause in context of warrantless search). Such "hunches," no matter how important a role they may play in police work, cannot be used to justify investigative detentions that go beyond the limits of a Terry stop. See Terry v. Ohio, 392 U.S. 1, 27, (1968). Nor can a court find probable cause by piling "hunch upon hunch." Valenzuela, 365 F.3d 892 at 897.

In this case, the Rock Hill police based their contention that there was probable cause to arrest Cope upon "facts and circumstances" that amounted to nothing more than mere suspicion. No reasonable officer, without rushing to judgment, could have concluded that Cope probably murdered his daughter. Instead, the officers investigating the murder determined that Cope "must have" murdered Amanda based on inferences they made from the lack of forced entry, coupled with the fact that Amanda's injuries had to have been inflicted by an adult. However, the police failed to consider two other reasonable explanations for the

apparent lack of forced entry: (1) that an adult intruder entered the house without leaving such signs, or (2) that a person within the house let an adult intruder in.

Indeed, arrests based solely on no signs of forced entry are rarely, if ever, supported by probable cause. See, e.g. People v. Ellis, 476 N.E.2d 22 (Ill. Ct. App. 1985) (lack of signs of forced entry fails to establish anything beyond a mere hunch or suspicion that defendant committed the arson of his home; this hunch "overlooked the possibility that the house could have been entered through a door or window which negligently had been left open"). It is for this reason that courts have generally insisted that there be some additional evidence, usually in the form of physical or forensic evidence, to support a finding of probable cause in cases involving lack of forced entry. See, e.g., Johnson v. State, 722 S.W.2d 417, 419-420 (Tx. Ct. Crim. App. 1986) (en banc) (probable cause found for murder arrest where there were no signs of forced entry, plus "reliable information from a credible source" that the attacker was a black male who would be blood spattered, and appellant appeared to have blood on his white pants); Winston v. State, 131 S.W.3d 333 (Ark. 2003) (probable cause found where there was no forced entry plus the defendant was the last person seen at the scene on the night of the murders, defendant's girlfriend gave a gun she owned to police officers, and told

them that "she and Winston were the only people who knew where the gun was kept and that Winston had told her to hide the gun after the murders occurred").

At the time they sought the arrest warrant in this case, the Rock Hill police had no actual evidence linking Cope to the murder. Cope had denied committing the murder hundreds of times during the interrogation prior to his arrest, there was no physical or forensic evidence or eyewitness testimony linking Cope to any crime and Cope's two other daughters, whose room was directly adjacent to Amanda's, said they had not heard or seen anything unusual. Although Cope gave a few arguably inconsistent statements to the police regarding the children's bedtimes, these statements were unrelated to the crime and did not support the conclusion that Cope raped and murdered his own child.

2. All Of Cope's Statements Were Fruits Of His Illegal Arrest

"[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed," United States v. Bayer, 331 U.S. 532, 540 (1947). For this reason "a later confession always may be looked upon as fruit of the first," id., and all of Cope's statements must be deemed products of his illegal arrest, Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979).

In this case, "the cat was out of the bag" as soon as Cope made his first statement. Indeed, it was uncontroverted at trial that each of Cope's statements lead inexorably to the next – his second ("dream") statement was given in an effort to mitigate the incriminating aspects of the first; his third (videotaped) statement was given in response to a demand that Cope re-enact the second statement, his fourth statement was given in response to law enforcement's insistence that he modify his second and third statements to eliminate any "dream" scenario. Thus, all of Cope's confessions – arguably one single protracted and continually revised statement – should have been suppressed.

B. The Trial Court Erred In Denying Cope's Motion To Suppress All Statements Made After December 1st Under The Sixth Amendment

On December 1, 2001, Cope was presented at a hearing presided over by Summary Court Judge Ray Long. (R.p. 426, 427,428, 429, 430, 431). During this hearing, the judge set Cope's bond and informed him of his rights to an attorney, a jury trial, and a preliminary hearing. (R.p. 427, lines 2-5). The judge filled out Cope's application to determine whether he qualified for a public defender, and asked Cope to sign the form. (R.p. 427, lines 3-24). At the end of the hearing, Judge Long deemed Cope eligible for a public defender, (R.p. 429, lines 8-10),

gave him information regarding his next court date, and informed him that a public defender would represent him thereafter. (R.p. 429, lines 12-20).

While Cope's first incriminating statement pre-dated this hearing, each of the subsequent statements was obtained after and without the presence – or the legitimate waiver of – Cope's counsel. Those statements must accordingly be suppressed.

Indeed, Cope's right to counsel with respect to at least some of those statements was not merely ignored – it was intentionally undermined by law enforcement. During the interrogation session that produced Cope's final statement, Cope's attorney, Assistant Public Defender B.J. Barrowclough, arrived at the police station and asked to speak with Cope. (R.p. 2559, lines 23-25). Although Capt. Cabaniss, the leader of the Cope investigation and one of his key interrogators, was immediately informed that Cope's attorney had arrived, Cope was not allowed to meet with Barrowclough for almost three hours, (R.p. 2564, lines 17-18). By the time Cope was allowed to meet his attorney, Cabaniss had succeeding in getting Cope to sign a statement waiving his right to an attorney, which Cabaniss himself had written out.

1. Mr. Cope's December 3rd Statements Were Obtained In Violation Of Cope's Sixth Amendment Right To Counsel

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. Embodying a "recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself," Moulton v. Maine, 474 U.S. 159, 169 (1985) (quoting Johnson v. Zerbst, 304 U.S. 458, 462-463(1938)), the right to counsel is considered "indispensable to the fair administration of our adversarial system of criminal justice," Moulton 474 U.S. at 168, and accordingly applies "at every stage of a criminal proceeding where substantial rights . . . may be affected." Mempa v. Rhay, 389 U.S. 128, 134 (1967).

The Sixth Amendment right to counsel is thus triggered "at or after the time that judicial proceedings have been initiated 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,'" Fellers v. United States, 540 U.S. 519, 523 (04) (quoting Brewer v. Williams, 430 U.S. 387, 398 (1977); Kirby v. Illinois, 406 U.S. 682, 689 (1972)). Because Cope's December 1st initial appearance represented the commencement of "adversary proceedings," and because the December 3rd interrogation of Cope represented a "critical stage"

of the prosecution, Cope's December 3rd statements were obtained in violation of his Sixth Amendment rights and ought to have been suppressed.

a. The December 3rd Interrogation Represented A Critical Stage In the State's Prosecution of Cope

The Sixth Amendment right to counsel encompasses events prior to trial such as the interrogations at issue in this case. Indeed, the Supreme Court has recognized that a defendant has an especially great need of the assistance of his counsel when he is confronted, pre-trial, "by his expert adversary," United States v. Ash, 413 U.S. 300, 310 (1973); see also Wade, 388 U.S. at 224 (noting that the Sixth Amendment right to counsel extends to pre-trial events because "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pre-trial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality"). The "Sixth Amendment [therefore] guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State," Michigan v. Jackson, 475 U.S. 625, 632 (1986) (quoting Moulton, 474 U.S. at 176).

b. The December 1st Initial Hearing Constituted The Beginning Of "Adversary Proceedings" Against Cope

Even though South Carolina has not yet considered this precise question, other states – and many federal courts – have been uniform and unambiguous in holding that the Sixth Amendment right to counsel attaches at an initial hearing. See, e.g., O'Kelley v. State, 604 S.E.2d 509, 512 (Ga. 04)("[W]e. . . hold that an initial appearance hearing . . . is a formal legal proceeding wherein the Sixth Amendment right to counsel attaches"); State v. Lagarde, 917 So. 2d 623 (La. Ct. App. 2005) ("Under Louisiana law, a defendant's right to counsel guaranteed by the State Constitution attaches no later than the defendant's initial appearance or first judicial hearing"); State v. Tucker, 626 A.2d 1105, 1119 (N.J. 1993); United States ex rel. Dove v. Thieret, 693 F. Supp. 716, 723 (C.D. Ill. 1988) ("Normally, unless the prosecution is involved prior to the initial hearing, that is the point when the state begins to prosecute and the defendant gains the right to the presence of counsel"); State v. Barrow, 359 S.E.2d 844, 847 (W. Va. 1987) ("An adversary judicial criminal proceeding is instituted against a defendant where the defendant after his arrest is taken before a magistrate . . . and is, inter alia, informed . . . of the complaint against him and of his right to counsel."); cf. United States v. Moreno, 122 F. Supp. 679, 681 (E.D. Va. 2000) ("Because defendant had not been arrested, indicted, arraigned, or made an initial appearance . . . at the time of the interview, no Sixth Amendment right to counsel . . . existed.") (emphasis supplied); United

States v. Walker, 148 F.3d 518, 529 (5th Cir. 1998) (rejecting a defendant's argument that his right to counsel attached in November of 1995 when his initial hearing did not occur until August 5, 1996).

The fact that Cope's initial appearance was largely administrative and did not itself require the presence of counsel is irrelevant with respect to this analysis. "The question whether [a proceeding] signals the initiation of adversary judicial proceedings . . . is distinct from the question [of] whether the [proceeding] itself is a critical stage requiring the presence of counsel." Jackson, 475 U.S. at 629-30 n.3. Nor does it matter that Cope failed to ask for his lawyer on December 3rd and in fact ultimately acceded to the state's strong invitation to decline counsel's assistance. Jackson, 475 U.S. at 633 n.6 (1986) ("We presume that the defendant requests the lawyer's services at every critical stage of the prosecution"); Brewer, 430 U.S. at 404 ("the right to counsel does not depend upon a request by the defendant"); Carnley v. Cochran, 369 U.S. 506, 513 (1962) ("it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request").

2. Cope Was Prejudiced By The Violation Of His Sixth Amendment Rights

True enough, in order to establish a Sixth Amendment violation, courts generally require that a defendant show not only that his right to counsel had

attached and that the time period during which he was deprived of counsel was a "critical stage" in the prosecution, but also that he was, in some way, adversely affected or prejudiced by this deprivation. See Alston v. Garrison, 720 F.2d 812, 817 (4th Cir. 1983). That is, "a judgment may stand only when there is no reasonable possibility that the [practice] complained of might have contributed to the conviction," Garrison, 720 F.2d at 81 (quoting United States v. Hasting, 461 U.S. 499, 506 (1983)). However, it is not necessary that the demonstrated prejudice be outcome-determinative – the defendant need only show that the government's disregard for his right to counsel "imposed . . . [an] additional effort or burden on the defense." Briggs v.Goodwin, 698 F.2d 486, 494 (D.C. Cir. 1983). Indeed, "[m]ere possession by the prosecution of otherwise confidential knowledge about the defendant's strategy or position is sufficient in itself to establish detriment to the criminal defendant." Id. In this case – where the prosecution's entire case rested largely on Cope's incriminating statements – in particular the videotaped "re-enactment" of the crime – the absence of counsel on December 3rd resulted in substantial prejudice to Cope.

3. Suppression Is The Only Appropriate Remedy For The Sixth Amendment Violation In This Case

Sixth Amendment relief must be "tailored to the injury suffered" and designed to "neutralize the taint" of that injury. Morrison, 449 U.S. at 668. Under

the circumstances presented here – where authorities intentionally kept a represented person from consulting with counsel and where the statements obtained in the absence of counsel were highly damaging, the only appropriate remedy ought to have been to deprive the government of the "fruits of its transgression[s]." Id. at 669; cf. Morrison, 449 U.S. at 669 n.2 (rejecting dismissal as Sixth Amendment remedy where there was "no claim of continuing prejudice which could not be remedied by a new trial or suppression of evidence). This is not simply a case where the "constable blundered" by failing to appreciate that Cope had a right to counsel; this is a case "where the constable planned an impermissible interference with the right to the assistance of counsel." United States v. Henry, 447 U.S. 264, 270, 275 (1980); see also Brewer, 430 U.S. at 399 (Sixth Amendment violated where police "deliberately and designedly" set out to interview defendant in the absence of counsel).

IV. The Trial Court Erred In Denying Cope's Motion For A Directed Verdict On The Conspiracy Charge

This state's decision to charge Cope with conspiracy was one of expediency – there was simply no other way, short of admitting a grievous error, for authorities to reconcile the fact that Cope had confessed to a crime that Sanders had clearly committed. Thus the conspiracy charge went forward despite the fact that not a shred of evidence existed to connect Cope, an obese, reclusive white man, with

Sanders, an African American sexual predator. Rather, the conspiracy charge was based solely upon the inference that there "had to be" a conspiracy between Cope and Sanders in order for the state's case to make any sense. (R.p. 916, lines 20-22). Thus the state ultimately prosecuted Cope for conspiracy merely by "piling inference upon inference," contrary to South Carolina law. State v. Barroso, 320 S.C. 1, 9, 462 S.E.2d 862, 868 (S.C. App. 1995), rev'd on other grounds, 328 S.C. 268, 493 S.E.2d 854 (1997). The court should therefore have granted Cope's motion for a directed verdict on the conspiracy count.

Criminal conspiracy is defined by statute as a "combination between two or more persons for the purpose of accomplishing and unlawful object" S.C. Code Ann. §16-1-7-410 (2003). The essence of a conspiracy charge is the agreement or combination. State v. Crawford, 362 S.C. 627, 608 S.E.2d 886, 891 (S.C. 2005). A formal or express agreement is not necessary to prove a conspiracy; a tacit or mutual understanding which results in the willful, intentional adoption of a common design is sufficient. Id. Although an agreement can accordingly be proven by circumstantial evidence, see State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402 (2001), courts must nonetheless ensure that the existence of an agreement is not proven merely by "piling inference upon inference," Barroso, 320 S.C. at 9.

Similarly, once the existence of a conspiracy is established, the state must prove beyond a reasonable doubt at least a slight connection between the defendant and the conspiracy in order to convict the defendant of knowingly participating in the conspiracy. Id. This connection is required to prevent the jury from concluding that a conspiracy exists and that the defendant was a part of it by "bridging an evidentiary gap with rank speculation." Goldsmith v. Witkowski, 981 F.2d 697, 703 (4th Cir. 1993), cert. denied, 509 U.S. 913 (1993).

South Carolina precedent therefore holds that conspiracy convictions must rest upon something beyond the fact that each defendant is individually implicated of the substantive offense underlying the conspiracy charge. For example, in State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997), the South Carolina Supreme Court affirmed the reversal of a defendant's conviction for conspiring to distribute crack cocaine, even though the state presented evidence that Mouzon was present on the street with drug dealers at a location where drug transactions were taking place. When the drug transaction soured and the purchaser tried to flee the scene in his car, several men scattered and grabbed bottles to throw at the car to stop it from leaving. Mouzon went behind his house and was seen by one of the bottle-throwers with a gun in his hand shortly after the fatal shots were fired. Id. at 202, 920. The Court found that, at the most, the state showed the existence of "similar

or parallel objectives between similarly situated people," when what is needed is "proof they intended to act together for their shared mutual benefit within the scope of the conspiracy charged." Id., at 206, 922 (quoting United States v. Evans, 970 F.2d 663 (10th Cir. 1992), cert. denied, 507 U.S. 922 (1993)); see also State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993). Accordingly, "[t]he mere fact that two persons happened to be doing the same thing at the same time does not compel the conclusion that there was a conspiracy," William Shepard McAninch & W. Gaston Fairey, The Criminal Law of South Carolina, 476 (4th ed.2002).[19]

That actual proof of both an agreement and some connection between the co-conspirators is necessary to secure a conspiracy conviction is illustrated by cases in which South Carolina courts found sufficient evidence to affirm conspiracy convictions. See, e.g., Crawford, supra, (conspiracy conviction affirmed where defendant, the father of one co-conspirator and uncle to another, was in vehicle immediately after burglary and fled scene after car was stopped; police found flashlights, bolt cutters, and gloves in car); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989) (conspiracy conviction affirmed where defendant knew co-

[19] McAninch's viewpoint has deep roots in South Carolina law, as shown by State v. Ameker, 73 S.C. 330, 339, 53 S.E. 484, 487 (1906), wherein the South Carolina Supreme Court affirmed the following conspiracy jury instruction given by a trial court judge:

> "[S]uppose, Mr. Foreman, that you and the gentleman on your left would go out in the streets of Orangeburg and commit an assault and battery on some other person, that would be an unlawful act, but it would not be a conspiracy, unless there was an agreement between you to do the act before doing it. It is an agreement to do an unlawful act that is the gist of the whole matter."

conspirator, was seen running from area where victim's body was found, bloodhounds tracked victim's scent to co-defendant's house, and defendant admitted that he had agreed to be lookout for co-conspirator); State v. Clark, 286 S.C. 432, 334 S.E.2d 121 (1985) (conspiracy conviction affirmed where defendant found near scene of housebreaking, lied about knowing co-conspirator who was actually his cousin, and admitted co-defendant told him about larceny plans but denied participation). No such evidence existed in this case.

The trial court did not fulfill its legal obligation to ensure that an agreement between Cope and Sanders was not proven merely by "piling inference upon inference" in this case. On the contrary, it allowed the state to tell the jury in closing argument, that a conviction could rest upon inference alone:

> If I convince you that Mr. Cope is guilty beyond a reasonable doubt . . . and I convince you that Mr. Sanders is guilty . . . then they had to do it together. They can't both be guilty of these crimes and not have done it together . . . I don't know what kind of relationship these men had. I don't know the extent of it. I don't know. I don't have to know. All I have to do is satisfy each of you that each one of them is guilty and if they were both guilty, then they had to do it together.

(R.p. 3560, lines 8 to 15).

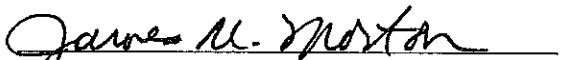
This argument erroneously invited the jury to find Cope guilty of conspiracy despite the absence of any evidence showing the essential element of a conspiracy charge – an agreement – and despite the lack of any evidence connecting Cope and

Sanders. In the absence of such evidence, the trial court should have directed a verdict in Cope's favor.

CONCLUSION

The Court should reverse the conviction and remand to the York County Court of General Sessions for a new trial.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, III, Circuit Court Judge

Case No. 2004-GS-46-2614
2004-GS-46-3232; 2004-GS-46-200; 2004-GS-46-3233
2004-GS-46-3234

The State of South Carolina.....Respondent,

versus

Billy Wayne Cope.....Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Appellant complies with SCACR 211(b).

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