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

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**APPEAL FROM YORK COUNTY**
**Court of General Sessions**
**The Honorable John C. Hayes, III, Circuit Court Judge**

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**04-GS-46-2614-2618**
**02-GS-46-3232-3234**
**04-GS-46-200**

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**STATE OF SOUTH CAROLINA**,

Respondent,

v.

**BILLY WAYNE COPE**,

Appellant.

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# AMENDED FINAL BRIEF OF RESPONDENT

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## APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether Cope was denied a fair trial for the rape and murder of his daughter by the exclusion of evidence that his alleged co-conspirator, James Sanders, whose saliva and semen were found on the victim, had also committed numerous other nighttime residential burglaries and assaults in the same time frame and geographic area, and that in each of these other cases Sanders acted alone and left no evidence of breaking into the homes?

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. Whether the trial judge unfairly impaired Cope's defense by preventing his expert witness from describing similar cases in which suspects made demonstrably false confessions to having murdered close family members?

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.?

## RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Billy Wayne Cope, was charged in arrest warrants on November 30, 2001 with the November 29, 2001 murder of his twelve (12) year old daughter, Amanda Cope, criminal sexual conduct against Amanda and unlawful child neglect of all three of his minor children; Amanda, Kyla, and Jessica. R. 430; 8/25/04 Tr. 73, lines 21-24. The Court of General Sessions for York County indicted Cope for murder, criminal sexual conduct (three counts) and unlawful neglect of minor children (three counts). R. 81-82; 8/23/04 Tr. 30, lines 11-25; Tr. 31, lines 1-6; Indictment Numbers: 04-GS-46-2614 to 2618; 02-GS-46-3232 to 3234; 03- GS-46-1843 to1844; 46-3233 to 34. **Amended Supplemental ROA, p. 30-47.**

Subsequent indictments were returned charging Cope and 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: 2004-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: 2004-GS-46-3232. 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. R. 3699-3700

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. 894; 9/8/04 Tr. 173, lines 9-20. Cope was represented at trial by A. Philip Baity, James Morton, David Wood and Michael Smith of the York County Bar. Sanders was represented by Leland Greeley of the York County Bar. The prosecution was represented by Solicitor Thomas Pope, Deputy Solicitor Kevin Brackett and Assistant Solicitor Willy Thompson of the Sixteenth Judicial Circuit Solicitor's Office. The trial

was held from September 8 through September 22, 2004 before the Honorable Judge John Hayes.

The jury convicted Cope and Sanders as charged on September 22, 2004. R. 3675-3677; 9/22/04 Tr. 194, line 23, to 196, line 1. 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. 3686-3687; 9/22/04 Tr. 205, line 18, to 206, line 1. Judge Hayes sentenced Sanders to life for murder, five years for conspiracy, and thirty years for each count of criminal sexual conduct, consecutive.

Cope made a motion for a new trial. R. 3695-3698. Following denial of Cope's motion for a new trial, Cope timely served and filed a notice of appeal on September 30, 2004. Sanders filed a notice of appeal on September 30, 2004. This appeal follows.

The relevant facts will be set out within the argument. Particularly , Respondents do not endorse the Appellant's version of the "facts" set out in their brief inasmuch as they have been disputed by evidence or expressly rejected by the jury. At most it is a version of their theory.

The state's version of the facts are much simpler. Between 2 and 4 a.m. on November 29, 2001, Amanda Cope, a 160 pound 12 year old girl, was brutally assaulted in her vaginal and rectal area, suffered severe beating to body from her head to her abdomen, and strangled to death in her bedroom. This act was accomplished by the combined effort of her father, Billy W. Cope and James Sanders. Evidence supporting this version, as found to be factually true by the jury's verdict, is found throughout this Brief, but particularly in Argument IV, which will not be re-stated herein, but is incorporated by reference.

## ARGUMENT

### I. The trial court properly used its discretion concerning the admission of evidence concerning prior bad acts and statements of his co-defendant, James Sanders.

In his first argument, Cope contends that he should have been allowed to present evidence concerning other crimes allegedly committed by James Sanders, and an alleged statement made by Sanders after incarceration. In addition, he raises the issue of whether his trial should have been severed from Sanders. He argues that the failure to do each of these deprived him of an opportunity to present to the jury his theory that Sanders acted alone in the crime. The trial court properly denied these efforts concluding the "other bad act" evidence failed to satisfy the requirement of Rule 404(b) to be admissible, that the alleged statement in jail was not relevant or admissible, and that the refusal to sever was appropriate.

#### A. The Trial Court Properly Excluded Cope's Proffer of Evidence of Other Crimes James Sanders Committed Under Rule 404(b) and State v. Lyle.

In his brief before this Court, Cope claims that the trial court erred in excluding evidence that co-defendant Sanders committed other crimes subsequent to the November 29, 2001 murder. Cope asserts that this evidence was admissible under SCRE 404(b) to show the existence of a "common scheme or plan" and "identity." The trial judge rejected the showing after a pre-trial hearing on September 8, 2004 based upon the dissimilarity of the crimes. R. 887-890; 9/8/04 Tr. 166-69.

The Proffered Evidence

*A. Alicia Lowery - 20 year old Black Female - December 12, 2001 Incident.*

This occurred in the victim's residence at 224 Whitgreen Street in Rock Hill. Alicia

Lowery returned home at 7:00 PM and entered her residence through her back door. Although she lived there with her female cousin, no one else was home at the time. She went straight to the bathroom. When she came out, she noticed the front door was open. As she went to close the door, Sanders, who she did not know and did not have a weapon, forced his way in through the open door. Sanders tackled her. At some point he demanded money. R. 751; 9/8/04 Tr.p. 29. Sanders grabbed a black plastic bag and initially put it over her head but she clawed it off. He then wrapped a throw rug around her head. He attempted to undress her by trying to pull up her shirt and tried to unbuckle her belt. She took a pen out of her back pocket and stabbed him a couple of times. Sanders pushed her back into one of the bedrooms or bathroom and closed the door and he held it shut from the outside. While she was in that room, she heard her screen door slam and Sanders ran away. R. 739-751; 9/8/04 Tr. 16-29. She later identified Sanders in a line-up and at the hearing. R. 741, 745; 9/8/04 Tr. 19, 23.

*B. Sarah Hagman Lee - 20 year old White Female - January 12, 2002 Incident.*

Around midnight, Sarah Hagman Lee was attacked in her residence at 131 Reid Street (which is within the same block as George White's residence where a burglary had occurred at 10:30 that same night)[1]. Lee answered a knock at her bathroom door while she was in her room watching T.V., thinking it was a roommate. There were a series of knocks without an answer before she went to the door. Sanders pushed his way into her bedroom pushing her back and hitting her head. (This residence is a boarding house that she had recently moved into.) They

[1] Cope proffered evidence regarding the George White residential break-in committed by Sanders around 10:30 that night and within the block as Lee. In that incident, White walked into his living room and saw Sanders. He yelled at him and Sanders fled upon being detected, apparently seeking sanctuary and escape at Lee's . Sanders was identified as this intruder based on fingerprints lifted from the scene. R. 830; 9/8/04 Tr. 109, lines 14-18, Defense Exhibit 5.

wrestled their way back through the bathroom and into the kitchen. Once he had he

her on the ground he kicked her and pushed her, Sanders then got up and went into her bedroom and grabbed her purse which was on her sofa. When he came back into the communal kitchen, which was the only way out of the house, Lee had gotten up and grabbed a baking pan. She then hit Sanders in the head with a pan three times. He dropped her purse and some mace fell out of it. Sanders then got on top of her, but she sprayed Sanders with the mace and he got off of her. As Sanders ran for the door, Lee picked up a screwdriver ( which was not hers and she assumed that Sanders brought with him) and tried to stab him as she grabbed Sanders left foot. Lee stabbed at Sanders at three times and noticed blood running down his neck behind his left ear. Sanders then ran out the door with Lee's purse. Although she did not know him previously, she identified him. She stated he had a toboggan on his head than night that she pulled off during the assault and he was not wearing gloves. She did not know how he entered the house and was not aware of any signs of forced entry. Another female resident was across the hallway during the attack, but would not have been able to see the attack. (The record does nor indicate whether she heard the commotion ore not or whether she called the police). R. 753-766; 9/8/04 Tr. 31-44.

*C. Kathy Davis - Elderly White Female - December 12, 2001 Incident.*

At 11:30 PM, Davis, alone, answered a knock at the door. Sanders, who she was unable to identify, said he had car trouble and asked to use the phone. He then pushed the door open and knocked her down. Sanders asked where she had money and looked everywhere for it, including under the bed and in the mattress . Sanders picked her up and carried her into the bedroom and on to her bed. He kissed on her lips and breast and had vaginal intercourse with

her. He finally got $20 from her purse. He then left after getting the money and pulled out the phone from the wall to get a head start. Subsequently, Sanders was connected to this case by DNA. R. 766-774; 9/8/04 Tr. 44-52.

*D. Sarah Phillips - Adult White Female - December 16, 2001 Incident.*

This occurred in the victim's second floor apartment located at Deerfield Run Apartments on McGee Road in Rock Hill. Sarah Phillips was home with her three daughters that night. She had fallen asleep on her sofa. The TV was on along with the lights and the Christmas tree. She woke up around 1:00 AM with Sanders standing over her. He said nothing and was not out of breath. He had come in through the possibly unlocked patio door and must have climbed up the lattice. She stated that she immediately screamed and he put his hand over her mouth. She wiggled and kicked causing Sanders to put a rocking chair on her attempting to trap her. One of her daughter started coming down the hall yelling. She continued to scream and he let go and ran out the patio sliding glass door. The defendant did not say anything. She stated that the entire event lasted two minutes or a short period of time. He had on a grey sweat shirt and a grey toboggan. She identified Sanders as the culprit. R. 774-786; 9/8/04 Tr. 52-64.

*E. Gregg McCrary - Crime Analysis Expert.*

McCrary testified he had reviewed information about the incidents involving Davis, Phillips Lowery and Hagman. R. 828; 9/8/04 Tr. 107. He also reviewed information about the murder of Amanda Cope.

He contended that there were factors to consider about these incidents including date, location, in-door crime, out-door crime, suspect (known or stranger), forced entry, dual motives, sex, robbery, choking or asphyxia, element, and evidence. R. 831; Id. 110. He considered these

crimes to have a tight temporal pattern from December 12 to January 12. He contended the location revealed that they were all in Rock Hill within miles of each other, which he contended was a family close geographic pattern. He contended that there was significance in committing crimes in door as opposed to out in the public because a private residence would allow the culprit more control of the premises. He considered a stranger factor to be significant and asserted that stranger based rapes were uncommon as opposed to "known relationship." He contended that in the particular cases there was no sign of what he defined as "forced entry." Concerning dual motives based upon his review of the police reports, there appeared to be a consistent pattern of dual motives of sex and forced sex, sexual assault, robbery and money. He noted that in the Phillips incident she had not reported an interest in robbery or money, but he included it as robbery due to the police report. R. 829-836; 9/8/04 Tr. 108-115.

As to this classification, Judge Hayes questioned how McCrary could include robbery as a factor when the victim did not include it in her testimony. R. 836; 9/8/04 Tr. 115. The witness noted that she had not reported it as such. R. 836-37; Id. p. 115-16.

Concerning choking or asphyxial elements, he suggested that some had not reported this, like Davis who he opined was overcome easily due to being disabled, but that Phillips, Lowery, and Hagman (Lee) all had reported this behavior.[2] He also asserts that the offender did not take precautions in avoiding identification because of the presence of DNA or fingerprint at the

[2] It is evident that he also equates this factor with merely putting a hand over a victim's mouth who is screaming. See Phillips. As to Lee, he equates a choke hold for control with choking or asphyxia.

scene.[3]

McCrary felt the Cope murder possessed similar characteristics because it was 17 days before the Davis assault, was an in-door crime, had no forced entry and contended sex and robbery existed because of her pocketbook being on the bed. In addition, he found the presence of asphyxia or choking present. He opined a statistical base about the relationship rapes and that stranger rapes are rare.

McCrary discounted the fact that Cope was charged with raping his daughter because the DNA match was to Sanders, "so the actual sexual assault was not done by Cope." R. 840; 9/8/04 Tr. p. 119, ll. 23-25. He opined that "there is sort of a common scheme and pattern that exists in these cases." R. 845; 9/8/04 Tr.p. 124, ll. 17-21.

On cross-examination, he admitted he had not spoken with the victims nor visited the crime scenes. R. 849-50; 9/8/04 T. 128-29. Importantly, he admitted that he failed to look at other crimes of burglary that occurred in the Rock Hill area during the same time period. R. 851; Id. at p. 130, ll. 9-22. He also admitted that he did not report on Cope whether it was "known or stranger" and had not reviewed the videotape. He admitted that if the father was the "suspect" it would be different from the others.

As to forced entry, he considered it to be physically defeating a lock or door jamb. McCrary admitted that in Davis, Lowery, and Hagman (Lee), the perpetrator pushed the door open, forcing it and then entering.

Concerning Davis, it was pointed out "he kept looking for money", but in Phillips there

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[3] Again, this classification ignores that on one occasion, the DNA match was the result of Sanders being stabbed (Lee).

was no evidence of robbery. Additionally, the hand was put over Phillips' mouth because she was screaming. As to Hagman (Lee), he was unable to state that there was evidence of a sexual assault on her or that it was other than a fight and robbery. R. 858; 9/8/04 Tr. 137.

As to Cope, he felt the mere fact the victim's pocketbook was out of place was evidence of "robbery." R. 858; 9/8/04 Tr. 137.

As to age of victim, although Amanda was 12 years old, the others were all grown women. R. 858-59; 9/8/04 Tr. 137-38.

As to date patterns, he felt that the fact Cope was the earliest, and rejected that if Cope fell within the time frame it would be more substantiated. R. 859; 9/8/04 Tr. 138.

His analysis of choking and asphyxiation next came under assault by Sanders' counsel. Particularly, Davis never indicated any and Phillips only stated the hand was over the mouth to stop screaming (twice), that Lowery described the bag, but not that there was any attempt to strangle, and in White there was nothing except flight. Although Hagman (Lee) spoke about a "choke hold" she never described someone on top of her trying to choke her (as in Cope). Id. at 140.

Concerning Cope, it was pointed out that there was evidence of sexual mutilation in vaginal and rectal trauma, and evidence about a broom stick being used. However, there was no evidence of sexual mutilation (by object) in any of the other cases, although there was some vagina trauma on Davis. He admitted that there was no actual sexual assault on Hagman and others, but they had fiercely resisted. McCrary felt that the two sexually assaulted victims, the 60 year old disabled Davis and 12 year old girl were vulnerable. R. 862-63; 9/8/04 Tr. 141-42.

However, he then admitted as to Phillips, Lowery, Hagman, there was no commonality of

vulnerability by age.

Most importantly, he admitted that one "glaring difference" in the crimes is that Amanda Cope was dead and the others were not. R. 863-64; 9/8/04 Tr. 142-43.

*F. The Court's Order*

In denying the admission of the evidence concerning the other bad acts of Sanders, the court determined that the various crimes were too dissimilar to be admitted. At the outset , he rejected the testimony of expert crime analyst Gregg McCrary who attempted to equate the various crimes, concluding that his testimony was flawed. Particularly, Judge Hayes noted that McCrary did not address whether there were other similar crimes in the Rock Hill area. He stated that the asserted similarities were not significant. He stated that the crimes happening "in doors", to strangers, that no forced entry was arguable but not significant where stealth was used, climbing a lattice or waiting outside in a car for a door to open. R. 887-88; 9/8/04 Tr.p. 166-167. He questioned the concept of dual motives.

The Court did conclude that Cope had proved by clear and convincing evidence that Sanders was involved in the four incidents. R. 889; 9/8/04 Tr.p. 168. However, it felt it failed to rise to the level necessary for admission under Rule 404 to show motive, common scheme or plan. He noted that there were a variety of dissimilarities and when attempted to match up, they cannot be done, even though there are some similarities. He noted that using identity to prove a connection to the crime did not count since there was DNA so identity is not necessary to prove Sanders was at this place. He found that the ages of the victims are dissimilar , but the locales are somewhat similar. He stated that he was not going to catalog them, "but I find that they are dissimilar to the extent that he will not let them in under Rule 404. R. 889-90; 9/8/04 Tr.p.168-

169. The Court further stated that the evidence did not need to be addressed under the balancing test of Rule 403 because he found that the evidence did not meet the level of a common scheme. R. 893; 9/8/04 Tr.p. 172, l. 1-6. See also, R. 2308-2313; 9/16/04 Tr.p. 25-30 - renewed motion to admit and denial at beginning of defense case.

**Standard of Review**

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); State v. Frank, 262 S.C. 526, 533, 205 S.E.2d 827, 830 (1974). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Manning, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997).

Evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001).

In the context of evidentiary law, Lyle and its progeny protect a defendant from the unrestricted admission of bad act evidence. This preliminary fact-finding by the judge ensures the evidence is subjected to some procedural safeguard before the jury hears it. There are exceptions to the general rule of inadmissibility:

In the present case, Cope is primarily arguing the common scheme or plan exception. When this exception is invoked, it is important to recognize that a close degree of similarity between the prior bad acts and the crime charged, by itself, does not satisfy Lyle. Indeed, the mere presence of similarity only serves to enhance the potential for prejudice. State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). The foundation for admissibility transcends mere similarity, for the admission of such evidence under the common scheme or plan exception requires a connection between the extraneous crimes and the crime charged so that proof of the former tends to prove the latter. Succinctly stated, prior bad act evidence must be relevant to prove the alleged crime. See State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997) ("A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); State v. Hough, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997) ("The common scheme or plan [exception] concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) (noting that "a general similarity ... [is] insufficient to support the common scheme or plan exception"); State v. Bell, 302 S.C. 18, 27-28, 393 S.E.2d 364, 369 (1990), cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990) (noting that "evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged"); State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987)

("Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged."); State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes.

If there is any doubt as to the connection between the acts, the evidence should not be admitted."); State v. Wallace, 364 S.C. 130, 611 S.E.2d 332 (Ct.App.2005) (finding the trial court erred in admitting evidence of alleged prior bad acts merely because the prior acts were similar to the crime charged; holding instead that the trial court should look beyond mere close similarity to consider the connection between extraneous bad act and the crime charged); State v. Carter, 323 S.C. 465, 467, 476 S.E.2d 916, 917-18 (Ct.App.1996) (noting that "[i]n the prosecution of one crime, proof of another direct substantive crime is never admissible unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue"; and further noting that "evidence of prior bad acts must be relevant to prove the alleged crime"); State v. Campbell, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct.App.1994) (holding that "the evidence of prior bad acts must be relevant to prove the alleged crime").

Lyle and 404 (b) have set forth a rule of exclusion not inclusion. As the Supreme Court stated:

> Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission

> should be subjected by the Courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the Court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.

Lyle, 125 S.C. at 416-17, 118 S.E. at 807 (emphasis added).

***ANALYSIS***

Cope relies on opinions from both the Court of Appeals and the South Carolina Supreme Court have focused exclusively on the close degree of similarity between the crime charged and the evidence of the other crime, without mentioning the "system" or relation between the two, which is the crux of the original exception. See, e.g., State v. Hallman, 298 S.C. 172, 175, 379 S.E.2d 115, 117 (1989) ; State v. Blanton, 316 S.C. 31, 32, 446 S.E.2d 438, 439 (Ct.App.1994) ("The prior acts were sufficiently similar to the charged offense to be admissible."). See State v. Wingo, 304 S.C. 173, 176, 403 S.E.2d 322, 324 (Ct.App.1991) (finding the evidence of prior bad acts tended to show common plan or scheme when the experiences of each victim paralleled that of the other victims).[4]

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[4] Other decisions correctly reflect a more narrow interpretation of the common scheme or plan exception. See, e.g., State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) ("When the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."); State v. Parker, 315 S.C. 230, 233, 433 S.E.2d 831, 832 (1993) ("[T]he connection between the prior bad act and the crime must be more than just a general similarity."); State v. Rogers, 293 S.C. 505, 507, 362 S.E.2d 7, 8 (1987) (stating that where the acts are ten years apart and the only connection between the testimony of the two daughters was that the defendant touched them both, the prior bad act evidence should have been excluded), overruled on other grounds by State v. Schumpert, 312 S.C. 502, 506 n. 1, 435 S.E.2d 859, 862 n. 1 (1993); State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (1986) (finding where the robbery could not have been committed without the get-away-car, the relevance of the car theft to the crimes charged was easily perceived); State v. Stokes, 279 S.C. 191, 192-93, 304 S.E.2d 814, 814-15 (1983) (concluding the trial judge erred in admitting testimony from a witness who

His reliance on Hallman and Blanton are grossly misplaced. In Hallman, a sexual conduct case, the court found the evidence of prior acts against the defendant's foster children admissible relying on the similarity of the acts. Particularly, "the prior bad acts here occurred while each of the young women was a foster child to appellant and of similar age to the victim. In each instance, appellant took advantage of this relationship for his sexual gratification." In Blanton , the court found admissible prior acts where all three of the female victims were approximately the same age. Each was subjected to requests both for the performance of cunnilingus and fellatio. All of the alleged activities took place in Blanton's house or his vehicle. In each instance, Blanton took advantage of his relationship with the victim for his sexual gratification.

Here, as correctly determined by the trial judge there was no Lyle similarity between the other acts and Cope.[5] The instant case concerned the middle of the night (between 2 and 4 AM

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speculated that the defendant intended to rape her because there was no connection made between that prior bad act and the act for which the defendant was charged); State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955) (allowing testimony of another sexual act perpetrated against the same victim some hours after the original offense because the crimes were so related to each other that proof of one tended to establish the other); State v. Hubner, 362 S.C. 572, 608 S.E.2d 463 (Ct.App.2005) (stating that the similarity between separate acts must not merely be a similarity in the results; "[r]ather, there must be such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are the individual manifestations"); State v. Carter, 323 S.C. 465, 468, 476 S.E.2d 916, 918 (Ct.App.1996) (reversing defendant's conviction where there was no legal connection between the prior bad act and the crime charged); State v. Campbell, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct.App.1994) (finding absent a connection between the two acts, the testimony of prior drug sales utilizing a similar sales technique precisely the type of evidence Lyle prohibits).

[5]During the pretrial hearing on August 25, 2001, in response to a motion to sever Cope's other charges, Deputy Solicitor Thompson made a statement why then state was not proceeding on Sanders' other charges at the same time because the crimes were too dissimilar to be tried together. R. 884-86; 8/25/04 Tr.p. 163, l. 14 - p. 165, l. 5. In that proceeding, he described traits of dissimilarity in the different crimes.

R. 1115; 9/9/04 Tr.p. 103) nighttime sexual mutilation and murder of the twelve year old female victim through abhorrent injuries to both her vaginal and rectal areas by an object. None of these preliminary factors existed in any of the proffered cases against Sanders. There was saliva, identified to Sanders DNA present around her breast. No sperm was found in the vaginal area. R. 1078; 9/9/04 Tr.p. 66. There was evidence of a struggle in the bed with significant force consistent with holding her down while she was alive. R. 1034-35; 9/9/04 Tr. p 22-23. There were obvious signs of assault on Amanda including bruising about the head and abrasions on the back. It appeared that she had been struck from side to side on her head repeatedly. R. 1048-49; 9/9/04 Tr.p. 36-37. There was evidence of strangulation on her neck area. R. 1054-57; 9/9/04 Tr.p. 42-45. The pathologist rejected the claim that a blanket could have accidentally strangle her based upon the autopsy. R. 1056; 9/9/04 Tr.p. 44. As ro the rectal injuries, they were consistent with a blunt object being inserted up to 8 inches into the rectum. R. 1089; 1104-05; 9/9/04 Tr.p. 77, 92-93. Dr. Maynard stated that this object would have been consistent with a broom handle or a dildo. R. 1106-07; 9/9/04 Tr.p. 94-95. He stated the injury could not have been caused by a penis. R. 110; 9/9/04 Tr.p. 106. He also found blows to the abdomen He opined that Amanda was assaulted vaginally, anally and over her entire body with numerous bruises, injuries, and hemorrhages that occurred. The assaults were of a extreme vicious nature to cause the amount of rectal bleeding and were caused by a foreign object with sufficient force to cause deep internal hemorrhages that occurred. R. 1120; 9/9/04 Tr.p. 108. Her death was the result of strangulation. R. 1120; 9/9/04 Tr.p. 108.

There is no similarity or pattern evident in Cope assaults that existed in the proffered crimes. No crime resulted in death. No crime involved a child. No crime involved rectal

penetration. No crime involved strangulation by hand on the neck. No crime involved similar vaginal penetration and bruising by an object. No crime involved an sexual assault from 2 to 4 am.

The Appellant seeks to equate "no forced entry" as a theme to his showing of similarity to suggest a common scheme but even in his proffers revealed dissimilarity in the entry in the other Sanders crimes from just appearing through an open patio door, to knocking on a door and gaining entry through an assertion of car trouble. Where there was no evidence that theft occurred in the Cope murder, it appeared that seeking money was a theme in Davis and Lee, While a sexual assault occurred in Davis, it did not possess the mutilation of the vaginal and rectal areas that occurred to Cope.

Although the crimes occurred in the Rock Hill area, the victims covered the entire range from 12 to 60 years old. Simply put, unlike Hallman and Blanton, there was no signature style in the burglaries. Each possessed different traits on how Sanders gained entry and the manner that he exited the scene. The other crimes also revealed differences on how Sanders would react when confronted from immediate flight to fight.

Since the crimes failed to show any "common scheme or plan" the Court did not abuse his discretion in disallowing the introduction by Cope. His assertions that this deprived him of his right to show that Sanders, by habit, acted alone in committing crime does not entitle him to enter evidence that simply does not satisfy the evidentiary standards of Lyle and Rule 404(b). Absent a sufficient showing, the Court properly denied admissibility.[6] This issue must be denied.

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[6] As determined by the judge, Sander's identity at the Cope scene was not necessary to be proved by the assistance of other act evidence due to the DNA findings. At issue was the common scheme concept and essentially whether Sanders, in fact, had a "common scheme." The

Appellant, as noted, failed to prove that a "common scheme or plan" but only show that he had committed other crimes by clear and convincing evidence.

### B. The trial court properly denied the motion to sever his case from Sanders after denying the admission of the evidence of Sanders other crimes.

The record reveals that after the trial court denied the admission of the evidence of Sanders other alleged crimes that his counsel moved to sever his case. R. 891-92; 9/8/04 Tr.p. 170-171. Although denied by the Court, counsel Morton asserted that if the court was concerned about the prejudice of the evidence against Sanders that it could be cured by the severance and then the evidence could be admitted as third party guilt. Judge Hayes then declared that he had not considered the prejudice portion of the evidentiary test because he found that it failed to meet the common scheme test. R. 893-94; 9/8/04, Tr.p. 172-173. Respondents submit this denial was not an abuse of discretion.

Motions for severance are addressed to the discretion of the trial court. State v. Nichols, 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997). "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) (emphasis removed). "A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." Id. "An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial." Id. (citing People v. Greenberger, 58 Cal.App.4th 298, 68 Cal.Rptr.2d 61, 86 (1997)); see also State v. Dennis, 337 S.C. 275, 281-82, 523 S.E.2d 173, 176 (1999) (the denial of a severance motion will not be reversed absent an abuse of discretion and a showing of resulting prejudice). Furthermore, as murder co-defendants, appellants were not

entitled to separate trials by right. State v. Kelsey, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998).

First, we reject the argument asserted the joint trial resulted in a "spill-over effect" from evidence admitted against other co-defendant. Because the State alleged the men conspired and acted in concert to commit the substantive crime charged, all of the State's evidence admitted in the joint trial would have been admissible against Cope if he had been granted separate trials. See State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 868 (1993) (noting the State is granted great latitude in introducing circumstantial evidence of a conspiracy from its commencement to its conclusion and that substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the conspiracy's existence, object, and scope); State v. Mikell, 257 S.C. 315, 324, 185 S.E.2d 814, 817-18 (1971) (acts and statements of a co-conspirator made in furtherance and during a conspiracy are admissible to prove the existence of a conspiracy).

Second, the trial court did not deny the admission of the other act evidence based upon the “prejudice” to the co-defendant, but because it was inadmissible because he failed to show the existence of any common scheme or plan, either among the proffered crimes or Cope death. He attempts to bootstrap that these matters may otherwise be admissible as evidence of third party guilt under state law. This argument, though at first blush compelling still does not override the evidentiary inadequacy it suggests.

Although the Appellant’s brief was written prior to the decision of the United States Supreme Court in Holmes v. South Carolina, ____ U.S. ____, 126 S.Ct. 1727 (2006), concerning an intervening standard of third party guilt, the impact of the decision does not require a different result in this case because an erroneous standard was not applied in this case by the trial court in reaching its decision. In Holmes, the Court ruled that the trial court erred in excluding third-party

guilt evidence. Holmes was convicted of murder, first-degree criminal sexual conduct, first-degree burglary, and robbery after 86-year-old Mary Stewart died from complications resulting from a brutal attack in her home. Holmes was convicted and sentenced to death, but a new trial was granted on state post-conviction review. At the second trial, the prosecution relied heavily upon forensic evidence including a palm print, clothing fibers, and DNA. Insisting that the evidence was contaminated and that he was being framed, Holmes sought to introduce evidence that another man committed the crime. The trial court found the evidence inadmissible due to its speculative nature. The South Carolina Supreme Court affirmed, taking a different position than the trial judge, holding that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." State v. Holmes, 361 S.C. 333, 342-343, 605 S.E.2d 19, 24 (2004). The United States Supreme Court reversed.

The Court determined that the exclusion of the third-party perpetrator evidence violated Holmes' federal constitutional rights by the appellate court decision where such evidence was excluded *due to the existence of strong forensic evidence in favor of the Holmes' guilt*. Holmes, 126 S.Ct. at 1735. The Court reasoned that such an approach inappropriately focused on the prosecution's case: "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." Id. the Court concluded that this Court reliance upon the standard of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), was inappropriate and remanded the matter.

The Court's judgement required that third party guilt issues be evaluated consistent with

the Court's earlier analysis set out in State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) as limited by the constitutional analysis set out by the United States Supreme Court in the Holmes opinion.("Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the Gregory rule and other similar third-party guilt rules were designed to further"). Under the Gregory test (affirmed as appropriate by the U.S. Supreme Court and not challenged therein), the ***evidence*** offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560). The Gregory court went on to cite from 20 Am. Jur. 254:

> But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably
> guilty.

Id., 198 S.C. at 104-105, 16 S.E.2d at 535.

The problem with the Appellant's argument is that he was not being denied the opportunity to present this particular evidence because of a lack of severance. Even if severed,

this particular evidence would be inadmissable because it still does not satisfy the Rule 404(b) common scheme threshold. Plainly evidence of Sanders guilt was and would be forthcoming by the admission of his DNA evidence. It was the evidentiary insufficiency that precluded the particular other act evidence from coming in. The Court did not err in denying the severance. The same decision on severance would have resulted had Holmes already been decided. Contrary to the assertions of the Appellant, there is no constitutional mandate that in a separate trial a lower standard of similarity of offenses would be required under Rule 404(b) when evidence is sought to be used by a defendant rather than the state. Rule 404(b), a rule of exclusion in South Carolina does not express that it is a rule for either the state or defense, or only for the state. However, it is only one addressing that evidence of other crimes are not admissible to prove the character of a person in order to show action in conformity therewith. To the extent his attempt is only to show that he acts alone in his crime, i.e "in conformity therewith" he can gain no benefit from a separate trial or otherwise.

He also makes an unpreserved suggestion that even if properly excluded, that Cope should have been allowed a severance solely to allow the entry of the bad act evidence of the crimes without reference to Sanders. Since it was not asked for below as a basis for the timely severance motion, it cannot be considered in the appeal as a matter of state procedure.[7] This issue

[7]This concern was raised for the first time before the beginning of the defense case when he renewed his bad act evidence admission request which was denied. At that time he also suggested that even without saying Sanders that he wanted to introduce evidence that there were such identified crimes as the four previously presented in the area and time period and that a lack of forced entry " to reflect on the credibility of the police." R. 2308-2310; 9/16/04 Tr.p. 25-27. The court again re-iterated that these were not similar crimes. After the denial, he again moved for a severance and renewed the motion asserting that he was severely prejudiced by the inability to prove "motive" by the lack of the other crime evidence. R. 2312-13; id. at 29-30. [ The Appellant failed to state how this suggests a "motive"]. The court continued to deny the motions.

is not preserved for appellate review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

Assuming it was preserved as a basis for a severance request, it simply does not meet the limited purpose that he seeks to admit - to show that the concept of a lack of forced entry is much more common than the police admitted. Again, the circumstances of the these cases merely reveal the facts of those four isolated cases, including ones where the culprit was actually let in through the open door. His interpretation that their wholesale admission now springs as an attempt to impeach a general comment by the police is unfounded. The Appellant has referred to R. 1642-43; 9/13/04 Tr.p. 261-262 to suggest the admission was required. There, in cross-examination, Todd Gardner testified that he had found the Cope residence to be secure when he checked the area around the house with doors locked and windows sealed. Contrary to the assertion in the brief, Gardner stated that he had never processed a residential burglary scene where their were no signs of a forced entry, but declared that "I'm not saying it don't happen, but I'm saying I can't recall working one of them ... [and] I guess its possible . . ." R. 1643. See also, R. 3566; 9/22/04 Tr.p. 84, l. 15. (prosecution closing argument). It is difficult to see how this evidence of isolated cases would impeach Gardner's testimony, suggesting that it had deprived him a right to present a defense. However, any error in failing to admit those matters at trial (an issue not raised in this appeal), would have certainly been harmless error . Similarly, these comment did not warrant a severance to be granted.

The trial judge did not abuse his discretion in denying the severance motions. His argument must be denied.

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### C. The Trial Court Did Not Abuse its Discretion In Excluding Upon defendant James Sanders Objection Testimony From James Hill Concerning Sanders' Admission To Assaulting A "Little Girl In Rock Hill" Where There Was No Testimony As To Time, Place or Other Circumstances To Connect The Case To The Cope Murder.

James Hill, a convicted burglar serving an 18 year sentence from 2003, was confined with James Sanders in the segregation unit of Perry Correctional facility in Pelzer, South Carolina in 2002. 9/21/04 Tr. 222, ll. 13-20. In camera, he testified at a hearing that he overheard Sanders talking to another inmate. According to Hill's 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. 3429; 9/21/04 Tr. 225, ll. 8-17. Hill stated that Sanders made "remarks 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." R. 3429; Id., Tr. 225, l.19 - p. 226, l. 4; R. 3431; Tr. 227, ll. 13-16. Hill also stated that he met Cope four or five months after that when they were housed together in the Life Skills Christian Block and overheard a discussion about his case and proceeded to tell him what he had just testified about. R. 3430-31; 9/21/06 Tr.p. 226-227.

After this proffer, Sanders' counsel objected to Hill's testimony concerning Sanders' admissions as irrelevant "because there has been no identifying characteristics." He noted that his client had been charged with many allegations and that there was nothing that made it relevant to

this case. R. 3432-33; 9/21/04 Tr. 228, l. 21- p. 229, l. 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. 3433; 9/21/04 Tr. 229, ll. 5-7.[8]

As stated earlier the standard of review is abuse of discretion. The trial judge did not abuse his discretion in this matter. His basis for sustaining defense counsel Greeley's motion for exclusion was that the evidence was deficient because there was no testimony as to time, place or other circumstances. It is evident that the alleged comments in 2002 do not necessarily relate to the Cope case because it neglects to identify the "little girl" only that he had raped a little girl in Rock Hill. He does not state when the rape occurred or that he was even charged with the crime at the time. Simply put, the evidence that he raped a little girl in Rock Hill and left through a window that he entered is insufficient.

Concerning third party evidence, after Holmes, requires under the Gregory test, the ***evidence*** offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941). The trial court, in its discretion concluded that this comment related by

[8] In his brief, he asserts that the statement by Sanders should have been admitted under SCRE Rule 804(b)(3) as a "statement against penal interest." Initial Brief of Appellant, p. 53-54. However, he never asserted at trial this basis for admission and it is not preserved for appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

Hill merely casts a conjectural inference upon Sanders because of its lack of a connection to this incident, particularly where Sanders was the subject of other criminal allegations.[9]

Alternately, assuming the evidence was admissible under Holmes and Gregory, the exclusion of the evidence was harmless error. It cannot be ignored that Sanders was convicted by this jury of both murder and criminal sexual conduct, as well as the conspiracy. An examination of the record in this case reveals that any error in excluding Petitioner's third-party-guilt evidence, if it was error at all, was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). As the Court stated in Rose v. Clark, 478 U.S. 570, 579 (1986), a judgment of conviction should be affirmed "[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt." Even if this Court should find that there was error in the exclusion of the evidence, any error in the exclusion is harmless beyond a reasonable doubt.

In Chapman , the Supreme Court rejected the notion that all constitutional errors at trial necessitated automatic reversal. The Court also held that constitutional errors should be measured against a higher level of scrutiny than non-constitutional errors. Chapman, 386 U.S. at 23, 87 S.Ct. 824. Recognizing that non-constitutional errors can be treated as harmless if there is no "reasonable possibility that the evidence complained of might have contributed to the conviction," the Court in Chapman announced that constitutional errors are harmless only if the

[9] It must be clear that we are not stating that the exclusion of the evidence was proper because of the strong evidence of Cope's guilt or forensic evidence inconsistent with the proffer. Under Holmes, that threshold analysis on admissibility would be error. Instead we are asserting that the evidence itself failed to satisfy the relevance requirement based upon the defects noted by the judge on whether the comment even applied to this case where Sanders, as alleged by Cope, was a serial criminal.

reviewing court is "able to declare a belief that [the error] was harmless beyond a reasonable doubt." Id. (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). Beginning with Chapman and continuing in a line of decisions thereafter, the Supreme Court has formulated a two-part analysis for assessing the import of constitutional errors committed by trial courts. Under the first facet of the Chapman test, the reviewing court determines whether the error is in a class of violations subject to the harmless error rule ("trial errors") or, instead, is within a rather narrow category of errors that require automatic reversal ("structural errors"). Arizona v. Fulminante, 499 U.S. 279 (1991). Structural errors "affect 'the entire conduct of the trial from beginning to end, such that any attempt by a reviewing court to isolate the impact of the error would be fruitless.' Because a "trial error" occurs during the presentation of the case to the jury, the error "may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission (or exclusion) was harmless beyond a reasonable doubt."

Here there was a plethora of evidence that Cope was involved in the death of his daughter. As noted - though challenged - his statements of guilt and re-enactment of the murder and assault with an object support the harmless error assessment. Although not a predicate to the admissibility of the Hill statement under Holmes, on a harmless error analysis, the proffer conflicts and is contradicted by the evidence at trial where the information that he “f---- her” was inconsistent with the lack of semen *in her body* and the alleged entry and exit from the Cope home suggested by the comment as being through the window was inconsistent with the physical makeup of the Cope home where the windows were secured in some fashion by either screens, plastic or being nailed down and where the windows were dirty, sooty and with spider webs that would have been obvious if anyone had climbed in or out. In fact, the evidence revealed that

there was no sign of wiping smudging or anything to suggest that anything had entered through any window. See, R. 988-89, 1236-38; 9/8/04 Tr.p. 267-268. 9/9/04 Tr.p. 224-226.

Although the statement did not indicate any involvement by another person in Sanders acts, that fact alone does not undermine the powerful evidence which suggests the lack of harmful error by its exclusion, if believed. Further, the fact that Hill admitted that when Sanders told him, "I didn't think nothing of it" and later befriended Cope at prison and revealed it to him, makes his credibility in serious question further limits the probative impact by the lack of presentation of this evidence in a harmless error test.

For all these reasons, the assertion must be denied.

**II. The trial judge did not abuse his discretion in limiting the expert testimony of social psychologist, Dr. Saul Kassin, concerning false confessions by disallowing two anecdotal examples, where the expert was able to describe to the jury the concept of "coerced internalized false confessions." The excluded evidence was inadmissible hearsay concerning the Peter Reilly and Gary Gauger cases and any probative value was substantially outweighed by its prejudicial effect.**

The Appellant complains that the trial judge abused his discretion by prohibiting Dr. Saul Kassin, a social psychologist, to include in his opinion testimony concerning the factors involved in the phenomena "false confessions" to include two (2) anecdotal cases involving the confessions of Peter Reilly and Gary Gauger as specific examples of "coerced internalized false confessions." He contends that the failure to admit these examples, which were "similar," was an abuse of discretion because "it **prevented** him from offering a plausible explanation to the jury not only why he was influenced to confess to a murder he did not commit but why he confessed to perhaps the most heinous crime imaginable." *Initial Brief of Appellant*, p. 59. Contrary to the assertion within the brief, although expressly precluded from presenting his interpretation of the anecdotal examples of Gauger and Reilly, the defense was not "prevented" from offering a plausible explanation as to why he was influenced to confess to the murder by the expert witness. Contrary to the assertions in the brief, the exclusion of these two anecdotal "real life" examples, did not leave Cope "powerless" to respond to the State's claim concerning the confession. Initial Brief of Appellant, p. 23.

Assuming arguendo that the trial judge, over the State's objection, properly admitted the expert testimony on false confessions, the excluded anecdotal examples were inadmissible. First, even if relevant, any probative value of the hearsay examples may have been greatly outweighed

by its prejudicial impact because (1) the excluded testimony about Reilly and Gauger would have averted the jury's attention from its focus on both the voluntariness and credibility of Cope's confessions; (2) the introduction of Gauger and Reilly's confessions would have opened the door to collateral evidence for the jury to determine whether either the Gauger or Reilly confessions were actually "false", and; most importantly (3) Dr. Kassin was able to testify about the factors concerning "false confessions", including general examples of "coerced internalized false confessions" without the specific examples. The trial court properly used its discretion in excluding these anecdotal interpretations of the confessions in the Gauger and Reilly cases.

## STANDARD OF REVIEW

Rule 702, SCRE, allows the testimony of an expert witness qualified by knowledge, experience, skill, training, or education to assist the jury to understand the evidence or determine an issue. Even if evidence is admissible under Rule 702, however, it may be excluded under Rule 403, SCRE, if it's probative value is outweighed by its prejudicial effect. State v. McHoney, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001).

The trial court's decision to exclude expert testimony will not be reversed on appeal absent an abuse of discretion. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006); State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law or on a factual conclusion that is without evidentiary support. State v. Price, supra.

To warrant reversal based upon the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice. State v. Douglas, 367 S.C. 498, 507, 626 S.E.2d 59 (S.C. App. 2006). To show prejudice, there must be a reasonable

probability that the jury's verdict was influenced by the challenged evidence or lack thereof. Douglas, supra.

In light of the adoption of the SCRE, the Supreme Court has held that the admission of expert testimony should be analyzed pursuant to Rules 702 and 402, SCRE and the factors outlined in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). Under Rule 702, SCRE, the trial court must find:

> (1) the scientific evidence will assist the trier of fact; (2) the expert witness is qualified; and (3) the underlying science is reliable.[10] The trial judge should determine the reliability of the underlying science by using the *Jones* factors: the publication of peer review of the technique; prior application of the method to the type of evidence involved in the case; the quality control procedures used to ensure reliability; and the consistency of the method with recognized scientific laws and procedures. Council, supra. Further, if the evidence is admissible under Rule 702, SCRE, the trial judge must determine if its probative value is outweighed by its prejudicial effect under Rule 403, SCRE.

**How the Issue was Raised Below**

Prior to the trial, the prosecution became aware that the defense intended to utilize a psychological expert on false confessions. On August 13, 2004, a motion was filed to exclude or limit the testimony. **Amended Supplemental ROA p. 10**. Motion, August 13, 2004. In that preliminary motion, the State asserted that it had learned that the defense intended to call a

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[10] Rule 702, SCRE, states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

psychologist to testify concerning the prevalence of false confessions and factors that make a climate conducive to rendering a false confession. Id. In addition, the State believed that "the witness may be called to describe other cases where false confessions have been made and might be asked his opinion on the voluntariness and/or reliability of the confessions given in the case." Id. The State initially asserted that the "area of expertise does not meet the requirements... concerning admissibility of expert evidence under Rule 702 SCRE and State v. Jones, 259 S.E.2d 120 (1979)." Assuming arguendo admissibility, the State alternatively moved to limit the testimony by the exclusion "of facts from other specific cases or any opinions that such expert may attempt to render that go beyond either the scope of their expertise or the recognized boundaries of that area of expertise." Further, if such testimony was admissible, the State noticed its intent to introduce in cross-examination or reply testimony all the circumstances of this defendant's confessions. Id.

During the defense case, Dr. Saul Kassin, a social psychologist, was offered as an "expert in the area of social psychology of police interrogation." R. 2406-07; 9/16/04 Tr. 124-25.[11] He declared on voir dire that his purpose was not to state that a particular confession is true or false, but "merely to talk about the general principles that lead people to confess to crimes that they did or did not commit. R. 2409; 9/16/04 Tr.p. 127, ll. 16-25.[12]

The State initially objected to the qualification of Dr. Kassin on two (2) grounds. R. 2414-16; 9/16/04 Tr.p. 132, l. 1 - p. 133, l. 15. First, the State contended that this area qualifies

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[11] Dr. Kassin stated he had an article coming out that people cannot distinguish between true or false confessions, including social scientists. R. 2409; 9/16/04 Tr. 121.

[12] In his voir dire, Dr. Kassin admitted that "nobody knows the frequency of false confessions." R. 2411; 9/16/04 Tr.p. 129, ll. 8-9.

as a scientific area that is capable of being ascertained with enough certainty that a jury should rely upon it under the Jones standard. R. 2414-15; 9/16/04 Tr. 132-33. Second, the State contended the evidence was not admissible because Cope had not stated the confessions were false. R. 2415; 9/16/04 Tr.p. 133, ll. 1-15. Finally, the prior witness had opined that polygraphs were more reliable than psychological testimony, yet polygraphs are not admissible. R. 2415; 9/16/04 Tr.p. 133, ll. 10-15.

The defense argued that the testimony would qualify under Rule 702. The trial court then required the defense to make a proffer under the requirements of Jones, supra. R. 2418-2431; 9/16/04 Tr. 133-149. Dr. Kassin declared that the could not state "to a reasonable degree of scientific knowledge that the confession is false." R. 2426; 9/16/04 Tr.p. 144, ll. 5-10. He stated that his testimony would be that false confessions occur and that there are three (3) types of false confessions that bring different psychological dynamics into play. R. 2427, 2429-30; 9/16/04 Tr. 144, 146. The types are voluntary false confessions, coerced compliant confessions, and coerced internalized confessions. Id. He stated that it was his opinion that under certain circumstances a suspect vulnerable to manipulation as a function of stress, fatigue, or drug use is presented with apparently objective unimpeachable false evidence, which the vast majority of false confession evidence cases contain, it can lead people to confess to things they didn't do and to have memories of events that they never experienced. R. 2430-31; 9/16/04 Tr.p. 148, l. 16 - p. 149, l. 8. He stated that he had case studies and examples of that in certain documented cases of false confessions. R. 2431; 9/16/04 Tr. 149, ll. 9-12.

Solicitor Brackett then re-asserted that he felt the testimony would not be useful to the jury because it is "commonsense" and that the facts of the case allow the argument, but asserted a

lack of scientific basis to establish some objective scientific method by which they can analyze the confession any better than they could with their own common sense. R. 2431; 9/16/04 Tr. 149.

The State then re-asserted its motion in limine regarding the mentioning of other particular cases. He asserted that there are numerous confessions given and that if he went into a particular factual scenario, it may require him to contact the other jurisdiction on whether the facts were correct and whether people may still believe these people were guilty.[13] He asserted that injecting these other cases would be "confusing, misleading, and prejudicial" under Rule 403. R. 2433; 9/16/04 Tr.p. 151, ll. 1-3.

Counsel Baity then cited to State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004) which involved Dr. Kassin's testimony and whether he was not allowed to go into specific cases and asserted the Court had sanctioned the idea of the use of examples as appropriate if they had a factual connection with the instant case. The defense asserted it was implicit acceptance of science as assisting the trier of fact because the Court did not reject his opinion outright. R. 2437; 9/16/04 Tr. 155.

Judge Hayes then asked the defense whether the expert was going to testify about any particular cases. R. 2437; 9/16/04 Tr.p. 155, ll. 6-7. Counsel Baity declared that it was not his intent "to call any reference to any specific other case" and that he planned to discuss generally the science that is recognized and certain hallmarks and factors that are common to know cases of false confession. R. 2437; 9/16/04 Tr.p. 155, ll. 10-13.

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[13] See, Kansas v. Marsh, __ U.S. __, 126 S.Ct. 2516 (2006)(Scalia, J. concurring) at 2531-2538 on mischaracterizations of "exonerations" in various studies.

The court then concluded that the evidence would assist the jury and that Dr. Kassin was qualified. The court then stated:

> Court: I find that the probative value is not outweighed by the prejudicial value but the witness cannot testify about particular cases unless they are all focus with this particular case, and you've told me that, you don't know of any.
>
> Baity: I have not, I am not going to ask him about those....

R. 2438-39; 9/16/04 Tr.p. 156, ll. 1-8. The court then reiterated his concern that if he starts justifying from other cases "I'm going to stop him." Counsel Baity stated that there may be a case with similar factors, but not the same as a case with two defendants and DNA on one and a confession on the other. The court reiterated a concern that if counsel presents a horrible string of injustice of individuals in spite of overwhelming DNA evidence and being in jail confessed, then prejudicial value will outweigh prejudicial effect. R. 2428-2430; 9/16/04 Tr. 156-58.

Dr. Kassin then began his testimony before the jury. R. 2441; 9/16/04 Tr.p. 159, l. 1. He testified that the study of confessions draws on different areas of psychology, including social and cognitive psychology. R. 2442; 9/16/04 Tr. 160-61. He stated counsel had provided him with the statements, audio tape and video tape re-enactment, police reports, prior testimony, polygraph examination and protocol to determine if a relevant science could be applied to help understand the materials. R. 2443-44; 9/16/04 Tr. 161-62. He also stated that he would have like to have had a videotape of the entire interrogation, but it was not done. R. 2444; 9/16/04 Tr. 162.

Dr. Kassin stated that people sometimes falsely confess to crimes they did not commit, but conceded that he could not estimate the numbers, but they knew about post-conviction DNA

exonerations where people had confessed, but don't know about the "invisible number of cases" that led some researchers who reviewed 125 recent false confession cases to suggest they were looking at the "tip of the iceberg." R. 2446; 9/16/04 Tr.p. 164, ll. 14-22.

Dr. Kassin stated that there were several ways to determine that a confession is false, but it is based upon the outcome. In some instances, a person gives a detailed confession and at some point it is discovered the crime never occurred and the person released or not tried. A person may confess in a detailed manner and statements about why they did it, only to later have a culprit come forward and confess or evidence not otherwise available showing his innocence. "There are a whole number of those cases." R. 2447-48; 9/16/04 Tr.p. 165, l. 2-22. Further, "there are a number of cases where scientific evidence, like DNA, shows in fact that the person who gave the confession often a very detailed statement, was not the culprit." R. 2447-48; 9/16/04 Tr.p. 165, l. 18 - p. 166, l. 4.

Dr. Kassin stated that he had studied false confessions for 20 years and concluded he could not estimate how often it happens, although he opined it was with "regular frequency." He said he studied "known case studies" of people found innocent subsequent to confessing and developed three separate groups of false confessions. The first group, "voluntary false confessions" included a sizable number of people who confessed to crimes they did not commit without pressure, which he contended was similar to the *Lindberg* case when 200 confessions were called in. He contended that the reasons varied such as protecting someone else, feeling guilty about not being there for the victim, or wanting attention, such as a high profile case. R. 2448-2451; 9/16/04 Tr. 166-69. Dr. Kassin noted these situations demand corroboration and proof that the confessor knew someone that others did not about the crime.

Dr. Kassin stated that there were two types of police induced confessions. He stated that the easiest to understand was called "coerced compliant false confessions. These are confessions where someone might confess to a crime completely knowing he's innocent but he's in a situation that because of stress and interrogation tactics his situation has gotten so unpleasant that he wants a way out to terminate the bad situation or avoid threatened or implied harm or to gain a reward. Once out of the pressure, according to Kassin, he turns to the lawyer and states that I confessed, but I did not do it. These are the "most common" false confessions. He stated that they were exhibit in the recent Central Park jogger case in 1989. R. 2452-53; 9/16/04 Tr.p. 170, l. 19 - p. 171, l. 1.

At point, the state objected and it was sustained. R. 2453; 9/16/04 Tr.p. 171, ll. 2-3.

**a. <u>In Camera and Proffer</u>**

In camera, the Court declared that he thought he had made it clear that he did not want to hear about sensational cases, but that his ruling was "to give them the tools, not the examples." R. 2453; 9/16/04 Tr.p. 171, ll. 13-23.

Counsel Baity stated that he was attempting to show the jury that this is a recent science heavily dependent on case study. R. 2453-54.

The Court feared he was crossing the line by discussing sensational cases and the probative value has to outweigh the prejudicial. The court stated he should be able to testify what factors he looks at. The defense asserted that a large portion of his science was case specific on other cases he's dealt with. R. 2455; 9/16/04 Tr.p. 173, ll. 5-6.

The court then stated if he can't testify without the examples then he can't testify because of prejudicial value outweighing probative. R. 2455-56; 9/16/04 Tr.p. 173, l. 24 - p. 174, l. 2.

Counsel Baity then suggested a proffer of Dr. Kassin's testimony to allow for a determination of prejudicial value. R. 2457; 9/16/04 Tr. 175.

In the proffer, Dr. Kassin testified about the fact that there were cases where confessions were made by the defendants, contested as soon as they were done because they believed they were going to get a chance to go home afterward, publicly going along and privately maintaining their innocence. He said this was all he wanted to say about the Central Park case. He opined there were experiments that people prefer short-term benefits over long-term benefits which is consistent with the act of confessing to something they did not do as an act of expediency to terminate a short-run bad situation. Dr. Kassin noted the coercion could be subtle and induced under pressure. R. 2458-2460; 9/16/04 Tr. 176-78.

Dr. Kassin testified about "coerced internalized confessions" which in 1985 were difficult to understand because the psychology of memory had not caught up with what the confessions illustrated. In this type, the person who confess to a crime under these interrogation circumstances, but then doubt their own innocence and believe their confession. R. 2459-60; 9/16/04 Tr. 177-78. Dr. Kassin stated they followed a predictable script and with an individual whose memory is vulnerable to manipulation, due to drugs, sleep deprivation, great stress, or fatigue, they are vulnerable to manipulation, and presented with false evidence, has to reconcile his lack of memory of the event with the objective evidence and entertain that they did the act and go through the process of imagining how they did it and ultimately results in the false confession. Dr. Kassin stated the confessions "always sound exactly the same - I guess I did, I must have done it and blocked it out." When exonerated in these cases, "they always follow that pattern" and the common ingredient of the presentation of false evidence puts them over the edge

and disorients them. R. 2461-62; 9/16/04 Tr. 179-80.

Dr. Kassin stated that there were documented cases of this phenomena which he used in creating the classification scheme. R. 2462-63; 9/16/04 Tr.p. 179, l. 25 - p. 180, l. 21. Dr. Kassin discussed a memory study which he opined showed it was possible to make a person think that he was involved in something that he actually was not involved in. R. 2464-65; 9/16/04 Tr. 182-83. Dr. Kassin stated that when he developed the classification scheme in 1985 that they were looking at a whole bunch of cases. R. 2464-65; 9/16/04 Tr. 182-83.

Critical to this appeal, at that point, Dr. Kassin stated in support of his proposition about psychological research on making a person think he was involved in something that he was not involved in:

> A case by the name of, a man by the name of Peter Riley who came home one day and 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 this 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 case.
>
> There was another and I'll just give one more case because it was a very close resemblance to this one, of a 41-year-old man by the name of Gary Geiger of Illinois who comes home to find his parents had been slaughtered and he calls 911. He is then brought in for interrogation. He is administered a polygraph. After extensive

> interrogation he's 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 from 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 but there was a case where he questioned his own memory. And when, what's puzzling about these cases is when he even leaving the situation of the interrogation room and speaks for example to a lawyer, the lawyer says, what happened. He says, well, I don't know. I think I may have done this. They are just not sure. Their memory has been impaired in this way. Yes.

R. 2464-66; 9/16/04 Tr.p. 182, l. 18 - p. 184, l. 7.

Dr. Kassin stated that vulnerability to this memory alteration is based upon something about the person; mentally retarded, highly suggestible, young, naive, stressed, grieve-stricken, fatigued, sleep-deprived, and drugs. R. 2466-68; 9/16/04 Tr. 184-86. He further stated that there are prescribed techniques used to obtain confessions, particularly the Reid Inbau techniques of isolation in the police station (not home or on the street) after the interview has led to a belief of guilt by the police, a positive confrontation (you are guilty, we know you did it...), restricting denials, to implying there may be evidence and bluffing or even lying about the existence of evidence designed to break the subject down. R. 2466-67; 9/16/04 Tr. 184-87. The third process is to provide an escape hatch. In the Reid technique, a form of minimization is used by providing an alternative scenario, as being a good person, but it was provoked or an accident to make a confession seem less bad. R. 2469; 9/16/04 Tr. 187. Dr. Kassin stated these techniques were commonly used based upon his case studies. R. 2469-70; 9/16/04 Tr. 187-88.

Dr. Kassin stated social psychologists had studied people's ability to know when someone is truthful or lying and concluded that experts are not much better than the average person. R. 2470-71; 9/16/04 Tr. 188-89. He opined that people cannot be trained to be better judges of the truth based upon research. Id. He noted that law enforcement technique manuals suggest that if someone is reticent about taking a polygraph that it suggests something to hide and if willing to take it suggests innocence, but is not a guarantee. R. 2471-72; 9/16/04 Tr. 189-90.

Dr. Kassin further described interview techniques taught and used by police based upon psychology to make the confession appear to be a more desirable outcome. He stated if these techniques are taken to an extreme "not only are guilty people confessing" who normally confess within the first two hours, but in the vast majority of the 125 cases of false confessions studied, the interrogations were for more than six hours. R. 2474-75; 9/16/04 Tr. 192-93.

In almost every false confession case there is excessive time in interrogation and the presentation of false evidence. R. 2475; 9/16/04 Tr.p. 193, ll. 2-21. Dr. Kassin described how he knew from case studies the interrogation techniques used. While the ideal situation is a video-tape of all sessions which is done in many jurisdictions, police reports may provide accurate information on time or techniques used. Dr. Kassin stated that there is no reason an interrogation should not be taped. Further, he opined that it had been found to be beneficial to the prosecution to counter frivolous claims of coercion. R. 2476; 9/16/04 Tr. 194.

Dr. Kassin stated that he evaluated a particular confession by using all available information. R. 2477-79; 9/16/04 Tr. 195-97.

Dr. Kassin stated a confession filled with detail is very persuasive. However, he stated that his opinion was that it cannot be determined if a confession is true or false by just looking at

the confession. Instead, the statement needs to be compared to the facts of the case. R. 2479-80; 9/16/04 Tr. 197-98.

Dr. Kassin noted comparing details in the statement needs to be compared with whether the details came from a second-hand source, such as viewing a photograph or overheard police conversations or the news. R. 2481-82; 9/16/04 Tr. 199-200.

Concerning the Cope case, Dr. Kassin stated he learned what went on from the two November 29 police reports, the 3½ hour tape from November 29-20, wherein he asks for a polygraph, the report from Detective Baker who did the polygraph, the statement of Cope, the fact Cope was held over the weekend, then gave a written statement, the video re-enactment, and the statement to Det. Blackwelder. He stated the described techniques were used in the interrogation because he heard them on the tape; including confrontation about guilt, denials not believed, insinuation about other evidence, bluffing and gaiting questions, and minimization with a suggestion of an accident or black out. R. 2483-84; 9/16/04 Tr. 201-02.

Dr. Kassin stated he was concerned about the "excessive length" of the interrogation as a marker of a false confession. Further, the re-enactment occurred after he had been confined for three and ½ days. He felt the videotape statement internally contradicts itself "to a point of absolutely implausible." R. 2484-85; 9/16/04 Tr.p. 202, l. 25 - p. 203, l. 17.

As to the presentation of false evidence, Dr. Kassin stated this came with the polygraph. He had repeatedly adamantly requested a polygraph four or five times. After he agreed he had faith in the polygraph, but after he took it the next day and learned he failed, he had to reconcile his belief in his innocence with the unimpeachable evidence of the polygraph. He then asked about "blacking out." R. 2486; 9/16/04 Tr. 204.

Dr. Kassin opined that the re-enactment did not fit the known facts of the crime and described transitions in his mental state that were not possible. R. 2486-879/16/04. Tr. 204-05.

Dr. Kassin stated that there are common characteristics of the category of coerced internalized false confession with Cope's statements which he described. R. 2487-88; 9/16/04 Tr. 205-06. Dr. Kassin also opined that the later initiated contact after arrest suggested he felt trapped and was looking for a change in his situation. R. 2488-89; 9/16/04 Tr. 206-07.

At the conclusion of this proffer, Judge Hayes stated that he would allow the testimony up to his causes for concern. The court found it was a veiled way of saying it was a false confession, but he said he could not do that and it was not necessary for the jury to hear his concerns because they can analyze it using the technique; bluffing, baiting, minimizing, and black out. However, the court confirmed that he could ask Dr. Kassin what he found - bluffing, etc., but that he could not state his "cause for concern." R. 2490-91.

Solicitor Brackett stated that in the proffer that Dr. Kassin mentioned two cases Gary Geiger and the Riley case and stated he could make the point he made without referencing the facts and circumstances. R. 2491-92; 9/16/04 Tr.p. 209, l. 25 - p. 210, l. 10. The trial court agreed and stated: "I'll have him leave those cases out too." R. 2492; 9/16/04 Tr.p. 210, ll. 7-8.

**b. <u>Jury Testimony After Proffer</u>**

Back in front of the jury, Dr. Kassin similarly testified to the proffer about voluntary false confessions and coerced compliant confessions. R. 2492-96; 9/16/04 Tr. 210-14.

Dr. Kassin then referred to "coerced internalized false confessions" as existing in a number of cases in 1985 where innocent people confessed believed they had actually committed the crime. He stated that the people were convicted and persuaded almost as brain washing. He

stated this happens to people vulnerable to manipulation and "there are a lot of cases just like this." As before, he described those subject to vulnerability as coming from mental retardation, children or those highly suggestible. Also, he said it might be from a bad situation, sleep deprived, or isolation from family, particularly stressed. He said that there is a "predicable sequence" and at some point a vulnerable person is presented with false evidence and told there is objective evidence of their guilt. Since the person does not remember doing it, he has to reconcile the evidence with the lack of memory. "Almost like a script", because there are "lots of cases that follow exactly the same pattern", when confronted with the devastating evidence, the person entertains the idea that "I did this and didn't realize it; could I do it and not know it; could I have blacked out" leading to the idea that they must have done it. R. 2496-98.

At this point, Dr. Kassin stated the person predictably say things like "I must have done it, I guess I did it", because they are not reporting from memory. The person then proceed to an imagination like exercise as to "how would you have done it" which lead to the "coerced internalized false confession" when they say they committed the crime and believe it and give a very detailed confession. R. 2498-99; 9/16/04 Tr. 210.

Dr. Kassin stated the person will then state what, how, who they were with, when and frequently why they did it. R. 2499; 9/16/04 Tr.p. 217, ll. 5-12. All this turns out false. "Again in a number of cases just like this", we later know it is false because of independent evidence shows it was impossible that they did it. He noted many studies show false memories are implanted through various types of strategies having to do with the presentation of false evidence. R. 2499-2500; 9/16/04 Tr. 217-18.

Some of these types of false confessions included statements of being in a "dream state"

and lacking a direct memory or trying to sort it. However, Dr. Kassin stated when a lawyer enters the picture they say they confessed, but weren't sure they did it because they trusted the information given as reliable when it was not. R. 2500-01; Id. p. 218-19.

When he was asked if it had occurred in the past, he declared "there are actual cases, innumerable actual cases where this has happened where we have very textured, detailed confessions including a suspect who said I think I may have done it, I'm not sure, but it looks like I did it, who turns out to be innocent." R. 2500; 9/16/04 Tr.p. 218, ll. 20-25. Dr. Kassin described lab experiments where they can get people to believe something happened and then memory is constructed around the belief. R. 2501-02; 9/16/04 Tr. 219-220.

He again described the types of people who would be vulnerable to manipulation as suffering from great trauma, stress, fatigue or drugs and admit that he may not have a full memory. R. 2502; 9/16/04 Tr. 220.

Dr. Kassin then expounded on interrogation interview techniques commonly used to obtain confessions. He asserted that "we know" what interrogation looks like because of their knowledge of the training manuals, particularly Inbau and Reid.[14] He described the various steps of the Reid technique. The initial interview is non-confrontational and non-accusatory and merely ask questions to observe behavior and see what the suspect knows and how they say it. This is done to determine whether he is telling the truth or lying. R. 2503-04; 9/16/04 Tr. 221-22. The questioning would include provocative baiting questions and the interrogator should look for clues such as fidgeting or eye contact.

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[14] Reid's textbook, Criminal Interrogations and Confessions, is now in its fourth edition. See, "Getting to the Truth: Analysis and Argument in Support of the Reid Technique of Interview and Interrogation", 21 Maine Bar Journal 20 (2006).

The Reid manual suggests that if a polygraph is suggested and the person is willing to take it, this suggests innocence whereas reluctance would be a sign of evasion and guilt, but it is not a guarantee. Similarly, behavior provoking questions, such as "we have DNA samples to send to lab for testing, what are they going to tell us" may reveal signs of innocence or guilt based upon "no problem" or questioning of the test. R. 2506-07; 9/16/04 Tr. 224-225.

Dr. Kassin stated that these reactions are not clear from research, but it is clear that investigators are trained to use these techniques as diagnostic tools. This is similar to a person's willingness to waive their rights and talk because they expressed "they had nothing to hide." R. 2507-09; 9/16/04 Tr.p. 225, l. 24 - p. 227, l. 1.

Dr. Kassin stated that research, however, indicates that police officers and trained interviewers are not better in determining "the truth" accurately any better than the average person where accuracy rates are in the mid-50's. Although the trained professional may be more confident in the judgment, Dr. Kassin opined that studies indicate there is not a higher level of accuracy. R. 2510-12; 9/16/04 Tr. 228-30.

According to Kassin, after the interview process, a multi-step process, suggested by the Reid technique occurs which includes isolating the subject away from a comfortable place at home or with loved ones to an unfamiliar setting to create an unpleasant stressful environment. The goal is to create a setting that the subject would want to change. Then, there is "positive confrontation" by asserting "we know you are guilty" and prevent him from mounting a defense by interruption and persistent questioning. R. 2513-14; 9/16/04 Tr. 231-32. Designed to put the subject in a state of despair, it may include an insinuation of independent evidence.

The third step is minimization and create a situation where a confession may be viewed a

desirable or self-serving. R. 2514; 9/16/04 Tr. 232. This may be done by suggesting accident, provocation or excuses to justify that it isn't a cold-blooded crime. Id.

While the goal of the Reid technique is to create enough pressure to have the guilty confess, problems can occur when the pressure filled techniques become extreme and "false confessions" happen under extreme circumstances.

Dr. Kassin then noted that research indicated people who confessed who actually did the crime happens within two hours, yet 80% of the false confessions occur after 6 hours of interrogation. R. 2516; 9/16/04 Tr.p. 234, ll. 18-24. He noted that when fatigued, people are thinking in terms of short term. He noted that lying to the subject, presenting false evidence produces not only false confessions, but false beliefs. Importantly, he said "time is a factor", but there is not a magic line. R. 2516-17; 9/16/04 Tr.p. 234, l. 24 - p. 235, l. 11.

Dr. Kassin stated when looking at a case to determine what techniques were used it varies with the situation. His preference was for a full video from interview through confession, which occurs in some jurisdictions. R. 2517-18; 9/16/04 Tr.p. 235, ll. 16-25. He looks at the material and while false confessions may look real and persuasive, but we now know it scripted and rehearsed after hours of interrogation. Dr. Kassin stated that unless the entire process is viewed, you don't know how it got there by what was said and done to move him from denial to confession. In addition, it is important to now where the details came from because the accurate information that only a perpetrator should know. R. 2518; 9/16/04 Tr. 236.

Dr. Kassin recounted the advantages to recording the entire process. He noted, "in the wake of all the DNA exonerations" "containing false confessions which has astonished a number of researchers" due to the high number, a suggested reform was to video tape the whole process.

He noted one study (Sullivan) had concluded that police found it to be beneficial to defeat frivolous claims that it was coerced when it was not. R. 2519-20; 9/16/04 Tr. 237-38.

Dr. Kassin stated in evaluating a case for research purposes, he found false confessions looked real in detail, motives, but were shown to be false by either the crime never happened, which occurred in numbers of incidents, or a similar crime may lead to evidence they never had, like the murder weapon. R. 2521; 9/16/04 Tr.p. 239, ll. 4-15. Dr. Kassin reported DNA may be used to exonerate a person although the confession was filled with details "and there are a number of cases just like that", which makes it worthy of case study. R. 2521-22; 9/16/04 Tr.p. 239, l. 19- p. 40, l. 4.[15]

Concerning the inclusion of vivid details as to determining the likelihood of a false confession, Dr. Kassin stated the problem is where did the details come from. The entirety of the confession must be viewed. He pointed to "some cases" where very textured stories were given about the crime scene, but afterward learn that they were taken there or overheard conversations or read newspapers. Similarly, the suspect may have learned of the injuries from viewing the photographs. R. 2522-23; 9/16/04 Tr. 242-243.[16] He opined that it was difficult to ask a question without conveying information. However, he noted that a factor in determining whether confession is good is to tell the police something they did not already know which is then corroborated. But he cautioned the source must be known. R. 2524-25; 9/16/04 Tr. 242-43.

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[15] Dr. Kassin was referred back to documented cases of false confession and asked if it was based upon his opinion or scientifically proven and he responded that these people were exonerated, prison doors released as set free..." An objection was sustained and the response ordered to be disregarded. R. 2522; 9/16/04 Tr.p. 249, ll. 5-16.

[16] An objection concerning a specific case was overruled by the court. R. 2523; 9/16/04 Tr.p. 241, ll. 17-23.

Concerning the Cope case, Dr. Kassin declared he had reviewed and read police reports. The transcript of the November 29 audio tape and listed to it, reviewed the polygraph report, and the defendant's statement. Aware that Cope was locked up the weekend, Kassin then stated he reviewed the December 3 statement, video re-enactment and final statement given to Det. Blackwelder. He stated he also read the prior testimony of Detectives Baker, Waldrop, Blackwelder and Captain Cabiness. R. 2525-26; 9/16/04 Tr. 243-44.

Dr. Kassin stated he wished that there would have been a full recording of all that transpired instead of selected recordings. However, he described the interrogation techniques he had described used in Cope's situation. R. 2527-28; 9/16/04 Tr.p. 245, ll. 1-7.

> Q Please tell us what you've seen?
>
> A Well, there is the one technique that creates the most problems that is implicated in the most false confessions and that is the presentation of false evidence. This is that technique that after a period of time for some people it sometimes, it jolts their sense of reality so they become uncertain even about their own innocence. In that case the presentation of false evidence, which is a way of mischaracterizing the evidence and particularly in this case there is a mischaracterization of an item of evidence that the defendant up front, they were asked, he was asked, so it looks like you have a lot of faith in this polygraph and he said yes. He didn't hedge, he gave an answer that was plain and simple: Yes, I believe in the polygraph. He showed no fear of anything to hide at a polygraph. That in some ways became his ultimate source of vulnerability. At that point any polygraph evidence that came in that said to him you failed was going to shake his world. It had to. He believed in the polygraph and he'd been there for awhile. He's been at this trying to deny his

involvement now for close to 24 hours.

Q Were there any other techniques that you saw used in the interrogation in addition to this presentation of the results of the polygraph which may not have been correct?

A That's the big one. The other techniques that are clear from listening to, for example, the first interrogation audio tape, it's clear they used the positive confrontation. It is clear that he was accused of guilt; that in fact these were investigators who had already determined, without having to go through a full investigation, they made a judgment within 24 hours that he was guilty at which point they put blinders on, and at that point anything he said or did became simply support and confirmation for what they already believed. If he denied too adamantly, this was a sigh of being evasive. If he, whereas the Inbau people would say you know he agrees to take a polygraph, that shows he has nothing to hide, maybe you should step back a bit. In this case it looks agreed to take a polygraph was not viewed in that light. He agreed to waive his rights to a lawyer, to silence, he agreed to physical examinations, he was fully cooperative, all the indicia that normally an investigator is trained to look for to suggest maybe I should back up, and yet despite his showing all of that, we began with a positive confrontation; there was persistence, no matter what he said or how he said it every denial was deemed a lie. So from his standpoint how does he extricate himself from this situation. What does he have to do to get out of the situation if every time he says something even as extreme as, I swear to God that did not do anything to my daughter, it's not believed. So the positive confrontation, the refusals to accept denials, the presentation of false evidence, there is a hint of minimization in that tape as well, there is a statement that suggests that maybe what you did was accidental,

> and that maybe it just escalated, so you can see the seeds of all the interrogation techniques being planted right then and there. And of course, this is taking place now shortly after he's been traumatized by what he has seen and at night between 10:45 and 2:30 AM the next morning. So again when you take all of that into account this was an extreme interrogation.

R. 2527-30; 9/16/04 Tr.p. 245, l. 9 - p. 248, l. 1.

## LAW ANALYSIS

### 1. The testimony concerning the Peter Reilly case and the Gary Gauger case were inadmissible hearsay evidence.

At the outset, as evidenced by the entire argument in Appellant's brief, it cannot be disputed that the he contends the evidence set out in the proffer about the Peter Reilly case and Gary Gauger case are being sought to be admitted for "the truth of the matters asserted." Since Kassin asserts that those particular confessions were false, and seeks to testify about the particular circumstances surrounding the taking of those statements, and renders a conclusion of "innocence" suggested therein, his anecdotal testimony is plainly inadmissible as hearsay under SCRE, Rule 801. He has shown the existence of no exception to hearsay which would allow its admission. Further, inherent in his testimony, is the fact that Dr. Kassin was not the interrogator in either case. Since he did not have "personal knowledge"of those matters, his testimony would be inadmissible under SCRE Rule 602.

### 2. The Hearsay Anecdotal Evidence is not Admissible Under Rule 702.

Respondents, assuming arguendo that false confession expert opinion evidence is admissible, assert that providing the specific examples of the Reilly and Gauger case presentation does not make the summaries admissible under the expert opinion rule merely because he has

relied upon them in giving his opinion. An expert witness may not be used as a conduit for the introduction of hearsay testimony for the truth of the matters asserted. See, Engebretsen v. Fairchild Aircraft Corp., F.3d 721 (6th Cir. 1994). See Peterson v. National R.R. Passenger Corp., 365 S.C. 391, 618 S.E.2d 903 (2005). Also, State v. King, 904 A.2d 808 (N.J. 2006) (same). Respondents are not contending that Dr. Kassin could not use the information for his opinion, only that his use does not make the inadmissible then admissible. Compare, Hundley v. Rite-Aid of S.C., 339 S.C. 285, 529 S.E.2d 45 (2000)(an expert may testify as to matters of hearsay for purpose of giving his opinion value, in the discretion of the court).

**3. The Trial Judge Did Not Abuse His Discretion in Limiting the Testimony.**

The admission of the expert opinion is a matter within the discretion of the court. Here, he used SCRE Rule 403 to balance the admission of the hearsay summaries of the two (2) collateral cases to avoid the jury confusion and misdirection caused by this evidence.

First, as revealed by the laborious summary of Dr. Kassin's testimony the hallmark of false confessions and particularly "coerced internalized false confessions" were exhaustively revealed to the jury. Where Dr. Kassin was not limited in generally describing his case studies without reference to particular case names, the tools of his expert opinion were sufficiently presented to the jury. In fact, the record reveals that these tools were specifically applied to Cope's situation where the jury was left to resolve the situation.

Contrary to the claim of Appellant, the limitation did not "prevent him from a plausible explanation" for why he had confessed allegedly falsely. The factors in coerced internalized confessions about the utilization of the Reid technique and factors of vulnerability, length of

interrogation, fatigue, and the alleged presentation of the (disputed) false result of the polygraph were revealed within his opinion. Additionally, the mitigation of "vivid details" and inconsistent evidence was also revealed. It also cannot be argued the jury was unaware of the existence of DNA exonerations and similar non-specific anecdotal factors in rendering an assessment of this opinion.

The trial court did not abuse its discretion where the testimony about Reilly and Gauger were not relevant under Rule 401. In light of Kassin's limitations by his own recognition of an inability to determine true or false confessions, a series of anecdotal cases involving different people and different sets of facts could not be relevant. Cf. State v. Green, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002).

Further, the Appellant misreads State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004) to suggest that "similar" anecdotal cases are admissible. To the contrary, Myers specifically stated "although the Connecticut case was similar, the trial court did not abuse its discretion in excluding the information." Like the situation in Myers, Dr. Kassin did testify about specific cases, but did not use names or where the false confessions were given. It was an additional alternative holding in Myers by the brief description of the Connecticut case which led to the "cumulative" harmless error conclusion.

Further, under the Rule 403 analysis, it is clear the evidence was properly excluded because the probative value of the anecdotal references was substantially outweighed by the prejudicial effect. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). As noted before Judge Hayes, this information would have diverted the jury's attention away from determining the admissibility and reliability of Cope's statements and focus on whether the statements by

Reilly and Gauger were false and whether Reilly and Gauger were actually innocent, in addition as to what techniques were used in those statements. It would have been incumbent upon the State to litigate those confessions and guilt and may have opened the door to the introduction of other similar crime confessions which were "true." These factors would further divert the jury's attention from its proper function. The judge did not abuse his discretion.

The Appellant further argued that the anecdotal evidence should have been admitted because they were "all focus" with the Cope situation. Although potentially similar under the Myers definition, they were not on all focus because of the unique circumstances of the crime where he killed his daughter and confessed and unknown corroborating evidence was developed through the interrogations, such as have slept five (5) hours prior to his "confession", said he used broom to assault her, but was unaware about foreign object use, and was enraged. Nevertheless, similarity in the cases is not the touchstone of admissibility. Whereas the trial court, consistent with Myers reasonably limited the prejudicial effect of specific anecdotal testimony, the court did not abuse its discretion.

**4. Alternately, False Confession Expert Testimony is Not Admissible Under Rule 702 and State v. Jones .**

As an alternative ground, Respondents would submit the lower court erred in the admission of false confession expert testimony. Although this Court has held social science testimony is not required to fully meet the full rigors of expert scientific testimony of State v. Jones, supra and Rule 702 in State v. Douglas, supra, Respondents submit that such testimony fails to satisfy those requirements. See State v. Free, 798 A.2d 83 (N.J. 2002)(Kassin testimony rejected under Frye standard); People v. Kogut, 806 N.Y.S.2d 366 (S.Ct. Nass. Co. 2005)(similar

testimony limited where interrogation technique evidence excluded U.S. v. Adams, 271 F.3d 1236 (10th Cir. 2001)(not admissible); State v. Tellier, 526 A.2d 941 (Me. 1987) (same); State v. Ritt, 599 N.W.2d 802 (Minn. 1999); State v. Davis, 32 S.W.3d 603, 608 (Mo. Ct.App. 2000). Respondents note that similar testimony, though, has been deemed admissible in U.S. v. Hall, 974 F.Supp. 1198 (C.D. Ill. 1997); Miller v. State, 770 N.E.2d 763 (Ind. 2002); Boyer v. State, 825 So.2d 418 (Fla. 1st DCA 2002).

Here, we would submit that the testimony essentially went to the credibility of a witness - the defendant, Billy Cope - and was not a proper subject for an expert witness because it should be left to the province of the jury. See, Paul G. Cassell, Balanced Approachs to the False Confession Problem: A Brief Comment on Ofshe, Leo and Alschuler, 74 Denver U.L. Review 1123 (1997); Nadia Soree, When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony, 32 Am.J.Crim.L. 191 (2005) (summary of jurisdictions positions on admission).

**5. The Exclusion Did Not Prejudice Cope**.

Even if the anecdotal cases were admissible, the exclusion did not prejudice Cope. Although there may be special power to confessions, the jury was made aware of the existence of the phenomena of false confessions and the traits common in the opinion of Dr. Kassin of Cope's statement. Contrary to the assertions, the jury did not need to know that others had falsely confessed to killing a mother or parent, to access how Cope could have confessed to killing his daughter if it was false. The tools of similarity were presented. The jurors were adequately given "case studies" to enable them to assess how a person could be influenced to confess falsely based upon his research. Prejudice by excluding the examples has not been shown.

## 6. Conclusion

For each of the reasons, the was no abuse of discretion in the reasonable limitation. A new trial is not required.

## III. The trial court properly denied the motion to suppress Cope's statements which were not obtained in violation of either the Fourth or Sixth Amendment.

**FOURTH AMENDMENT ISSUE**

### A. The Trial Court Properly Denied the Motion to Suppress his Statements Under the Fourth Amendment Where They Were Taken After a Legal Arrest Supported by Probable Cause for the Murder Warrant and Unlawful Neglect Warrants.

In the first portion of this argument, Cope contends that the statements in which he confessed were the product of an illegal arrest because it was not supported by probable cause. He contends that when he was arrested, the Rock Hill police based their contention only on mere suspicion that he killed his daughter and failed to consider other alternatives. Respondents submit that the trial court properly denied the motion to suppress.

#### 1. How the Trial Court Ruled

A pre-trial suppression hearing was held from August 23-25, 2004. At the conclusion of the hearing, Judge Hayes determined that the warrants for murder and unlawful neglect were supported by probable cause. Particularly, Judge Hayes held:

> As to the particular warrant for murder I have to look at it in the totality of the circumstances in which it was issued which included sworn testimony by the affiant Mrs. Blackwelder to Ms. McNeely which included, at least from my notes, and I think that the murder occurred inside the residence, that the residence was secured, that there was no assertion of any other person had been in the residence other than two little girls, that there were severe injuries, and that had in fact been a sexual assault; that coupled with the language in the affidavit that Mr. Billy Wayne Cope did violate South Carolina by murder, by assaulting Amanda Cope, and that she died as a result of the assault, I find are sufficient facts from which the Magistrate could and that in fact she did issue the murder

> warrant so I find no lack of probable cause and do not, I guess the motion is to quash or set aside or invalidate the warrant, and I refuse to do that.
>
> As to the unlawful neglect, those three are much more specific quite frankly, they were issued by Judge Williams I believe and they follow under the perimeters, within and under the perimeters in which I just stated and also are based on probable cause sufficient that the court will not set those warrants aside either.

R. 492-93; 8/25/04 Tr. 135-36.

**2. The Unlawful Neglect Warrants Contain Sufficient Data to Support Probable Cause and the Arrest Prior to the November 30, 2001 Statements.**

In his brief before this Court, Cope only challenges the sufficiency of the murder warrant. Yet, at the time of the November 30, 2001 statements, he had already been charged and arrested for unlawful neglect of a child. Detective Blackwelder testified that she initially had the murder warrant obtained and served upon Cope before 4:21 a.m. that morning. R. 93-94; 8/23/04 Tr. 42-43, 46. Importantly, after serving the murder warrant, she worked on the unlawful neglect or conduct charges. Det. Blackwelder testified these three warrants for unlawful neglect were signed by Judge Williams in the earlier morning hours around 8 a.m. and served by Vernon Harmon on Cope before he went to the Moss Justice Center to be interviewed by Detective Mike Baker for a polygraph examination. R. 99, 109, 111-13, 2968; 8/23/04 Tr. 48,58, 60-62; 9/20/04 Tr.p. 90, ll. 7-20. Harmon recalled having to wake Cope up that morning to serve him with warrants. R. 221-22; 8/24/04 Tr.p. 62-63.

In the unlawful neglect arrest warrants, State Exhibit 2, 8/23/04 Tr. 44 -46, ROA p. 97-99, the following probable cause is set out:

DESCRIPTION OF OFFENSE:

Unlawful Neglect Towards Minor Child 20-7-50

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts: The defendant did violate the SC Code of Law by allowing his seven year old child to live in unsuitable and unsanitary living conditions while at 407 Rich St. in the City of Rock Hill. The residence was observed by affiant and numerous other officers of the Rock Hill Police Dept. It was infested with bugs and lice and has unsuitable food for the minor. The house also had inadequate bathing and toilet facilities.

* Police investigation
* Recovery of evidence

State Exhibit 2 , Arrest Warrant H-023263. **Amended Supplemental ROA**, **p**. **26.**

Judge Hayes opined that this warrant established sufficient probable cause to arrest Cope. R. 493; 8/25/04 Tr. 136. Plainly, the affiant's own observation of the unsanitary conditions she personally observed supported the issuance of this warrant and arrest. [17] A viewing of the subsequent video re-enactment statement implicitly supports the fact that this infestation and viewing of unsanitary conditions would have been obvious to any reasonable person. See Video Re-enactment Tape of December 3, 2001.

The trial judge reasonably applied constitutional law in determining the sufficient of the warrant and the existence of probable cause. R. 491-92; 8/25/04 Tr.p. 134-35. It exists when

[17]Blackwelder described the condition of the house at that time were clothes everywhere, bugs in every room, dried bugs in the refrigerator, and problems in plumbing and unclean house. She stated that she described these facts to Judge Williams when she secured the warrants for unlawful neglect. R. 117; 8/23/04 Tr.p. 66. Blackwelder destroyed her clothes when she returned to her own home because of the lice infestation. Id. at 118.

"the facts and circumstances within the arresting officers knowledge are sufficient for a reasonable person to believe that a crime has been" committed. State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996). The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). The court's ruling will not be disturbed unless a manifest abuse of discretion and probable prejudice are evident. Id. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Wallace, 364 S.C. 130, 135, 611 S.E.2d 332, 335 (Ct.App.2005).

In State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct.App.2000), this Court declared the appellate standard of review in Fourth Amendment cases is limited to determining whether any evidence supports the trial court's finding and the appellate court may only reverse where there is clear error." Green, 341 S.C. at 219 n. 3, 532 S.E.2d at 898 n. 3. Accordingly, this Court should apply an "any evidence" standard to the ruling below. The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest.

Probable cause for an arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996) (finding probable cause for warrantless arrest for murder). Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime. State v. George, Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal. Id.; see also Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223,

225, 13 L.Ed.2d 142 (1964) (a court must consider "whether, at the moment the arrest was made, the officers had probable cause to make it--whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [Appellant] had committed ... an offense.").

In State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005), the court held that "an officer's 'subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause....' " Id. (quoting Devenpeck v. Alford, 543 U.S. 146, 125 S.Ct. 588, 594, 160 L.Ed.2d 537 (2004) (repeating the settled principle that " 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action' "); Whren v. United States, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (quoted in Devenpeck)).

The Appellant has not challenged the probable cause to arrest Cope on the neglect charges where probable cause existed at the time of the arrest and before the inculpatory statements were made on November 30 and December 3. Judge Hayes conclusion is supported by the “any evidence” standard in the warrant. Since there was probable cause to arrest on these independent charges, whether there was adequate probable cause to arrest Cope for murder before the inculpatory statements, it does not undermine their constitutionality under the Fourth Amendment. For this threshold reason, his argument must be denied.

### 3. There is evidence in the record to support the trial court and conclusion that probable cause existed on the murder warrant.

Assuming *arguendo* that this issue needs to be addressed for the Fourth Amendment

claim, Respondents submit that probable cause existed prior to the issuance of the murder warrant. The trial court found that:

1. It was issued based upon sworn testimony by the affiant Blackwelder to Ms. McNeely.
2. The sworn testimony included that the murder occurred inside the residence,
3. That the residence was secured,
4. That there was no assertion of any other person had been in the residence other than two little girls,
5. That there were severe injuries,
6. That had in fact been a sexual assault; that coupled with the language in the affidavit that Mr. Billy Wayne Cope did violate South Carolina,
7. And that assaulting Amanda Cope, and that she died as a result of the assault.

Detective Blackwelder testified that she affirmed to Judge McNeeley under oath that Amanda was dead, that the only people in the home were Cope and his three daughters, that there were no signs of forced entry inside or outside the residence and from the autopsy findings that Amanda Cope, that Billy Cope was the only adult male in the home at the time and that the two other daughters were not capable at that time of inflicting those type of bodily injuries. R. 401-02; 8/23/04 Tr.p. 44-45. Blackwelder stated that she also advised Judge McNeeley of the inconsistent statements that Cope had made concerning when the children went to bed. Id. She noted that Cope had told in the interviews with officers Herring and Waldrop inconsistent statements and that there was no forced entry. R. 408; Id. at 51.

Blackwelder stated that she was authorized to seek the murder warrant after a decision

was made by Lt. Waldrop, Les Herring and Captain Charles Cabiness. R. 91; 8/23/04, p. 40. She stated when she went to the scene that night it revealed to her the close proximity of his bedroom to her bed area of about 12 to 15 feet. R. 116; Id. at 65.

Lt. Jerry Waldrop testified about going to the scene at 7:50 am while the body was still there. He stated that they decided to charge Cope based upon the evidence at the scene, including no signs of forced entry, the severe beatings , the opinion of the pathologists that she had been sexually assaulted and sodomized, that there were no other individuals in the house, as well as Cope's statement that the house was secure and inconsistencies in his statements. He described those as his inability to stick to any line of questioning. R. 192-93; 8/24/04 Tr.p. 33-34. Waldrop confirmed that he personally observed that the widows were secure and saw nothing to indicate that anyone could have crawled through. He further learned that one of the girls had locked the door with a chain latch that night. R. 195; Id. at 36. Like Blackwelder, he described the 10-12 foot distance between Cope's bed and Amanda's area. He found the home in bad condition with clutter all around and that he was difficult to move around because of the disarray. R. 196; Id. at 37. He found that the injuries to Amanda were brutal and would have required a tremendous amount of force and learned from the pathologist that the child had been repeatedly abused over a period of time. Waldrop further found that Cope's initial story to the firefighters at the scene that Amanda was naked and he dressed her varied from a version he told them that she was dressed when he went into the room that morning. R. 197-98; Id. at 38-39. At that time, Cope was asserting to them at the scene that the death was an accident based upon the blanket and that he had warned his 12 year old about it, but Waldrop opined that was very unlikely. R. 199-200; Id. at 40-41. Further, he was aware that Cope had told a number of people that she had

"been dead four hours" which was consistent with Dr. Maynard's later assessment. Id. He stated that the decision to arrest was made by the group, but Captain Cabiness had the deciding vote. R. 209; Id. at 50.

Judge McNeeley of the Rock Hill Municipal Court confirmed that Blackwelder had come to her residence and that she described probable cause under oath. She recalled being told that Cope was at the scene and that there were no other signs of anyone coming in and no other adults present at the house. R. 124; 8/23/04, Tr.p. 73. She recalled being told that there were no windows broken nor any signs of a break-in. R. 124-25; Id. at 73-74. She recalled learning of severe head trauma injuries and that there was evidence of an assault. Id.

This issue must be dismissed on this ground because there is evidence support for the existence of probable cause. This was more than a cause of mere suspicion on the part of the officer and ultimately the judge. Contrary to the apparent assertions of Cope, probable cause need not rise to the level of "beyond a reasonable doubt" and require the exclusion of other hypotheses. The Cope situation was more than merely no sign of forced entry. The type of crime demanded force and Cope was capable, over others present, in supplying such force. Indeed, Cope varied and inconsistent statements about the time he went to bed, his proximity to the violent event, including the admission that she had died four hours earlier when he claimed he found her that morning, albeit later consistent with the pathologist all pushed his involvement to the realm of probable cause. The court below was correct to assess it as such and deny the requested motion to suppress that statements under the Fourth Amendment. [18]

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[18] As argued in the next section, his initiation of the contact with law enforcement should act as a waiver of his rights under the Fourth Amendment and allow the admission of the statements. R. 165-66, 169, 226-27, 287-89. See 8/24/04 Tr.p. 6-7, 10, 67-68, 128-130, State

**4. Since there was probable cause to have Cope arrested under both murder and unlawful neglect warrants, the argument that the statements following the arrests were fruits of a poisonous tree are abrogated.**

Appellant argues the trial court erred by refusing to suppress his statements after his arrest because his arrest was illegal because officers arrested him without a valid murder warrant and without probable cause. Appellant argues his post November 30 statements, which were taken at the jail after his allegedly illegal arrest, should be suppressed as the fruit of the poisonous tree. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996) (finding probable cause for warrantless arrest for murder). Since it is not questioned that he could be arrested for unlawful neglect based upon the crime scene and valid warrant, his fruit of the poisonous tree argument must fail. See United States v. Sprinkle, 106 F.3d 613 (4th Cir.1997) (if suspect's response to illegal stop is itself a new and distinct crime, then police constitutionally may arrest suspect for that crime). Accord United States v. Waupekenay, 973 F.2d 1533 (10th Cir.1992) (although police entered suspect's home illegally, suspect commenced new illegal activity when he aimed semi-automatic rifle at police); State v. Windus, 207 Ariz. 328, 86 P.3d 384 (App.2004) (although officers unlawfully entered defendant's yard, officers did not exploit their unlawful entry to provoke defendant's new, distinct

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Exhibit 3. State v. Council, 335 S.C. 1, 16, 515 S.E.2d 508, 515 (1999) ( defendant waives right to counsel where he initiates contact with the police).

criminal conduct consisting of an aggravated assault and resisting arrest); Clark v. United States, 755 A.2d 1026 (D.C.2000) (even if defendant was under unlawful arrest when he threatened police officer with bodily harm, evidence of that crime would not be suppressed as "fruit of the poisonous tree," as the commission of the threat was an intervening act that purged any taint associated with the unlawful arrest); State v. Miskimins, 435 N.W.2d 217 (S.D.1989) (where defendant's response to unlawful action by police is itself a new, distinct criminal act, there are sound policy reasons for not suppressing this evidence). Alternately, probable cause existed for both. His request was properly denied.

**SIXTH AMENDMENT ISSUE**

**B. The Trial Court Properly Admitted Statements Made After December 1, 2001 Where Cope Initiated Contact With The Police After His "Bond Hearing." The trial court further properly held that Cope's Sixth Amendment rights had not attached at the bond hearing which is not an arraignment or indictment under state law. Alternately, Cope expressly waived his right to counsel.**

The Appellant contends that as a result of his bond hearing before Judge Ray Long on December 1, 2001 at 7:30 a.m., any subsequent interrogation demanded that Cope be provided with counsel prior to the custodial interrogation. Because he was not provided with counsel prior to his December 3, 2001 interrogations[19] he asserts that they must be suppressed under the Sixth Amendment violation. The trial judge rejected the contention. R. 498-502; 8/25/04 Tr.p. 141-145.

During the suppression hearing, the state asserted that under the Differentiated Case

[19]This argument does not impact upon any statement given prior to December 1, 2001, and does not effect the admissibility of the statements given prior to the polygraph or after the arrest, including the Friday, November 30, 2001 consent inculpatory statements given at the polygraph and after to detective Baker and Herring.

Management System (8/25/04 - Exhibit 14) he was automatically screened for a public defender and never invoked his Sixth Amendment right to counsel. Further, he contended that Cope initiated contact with law enforcement on December 2, 2001.

Counsel Morton argued that the statements were coerced, but did not focus on either the 6th Amendment attaching or the same issues, presented by the evidence, but not pressed in argument. R. 496-98; 8/25/06 Tr.p. 139-141.

Judge Hayes rejected the showing by Cope on the involuntariness of his statements. He held that the Circuit Administrative Order was an administrative function at a bond hearing to obtain information concerning the appointment of counsel. More particularly, Judge Hayes found " as an affirmative finding" that it was not an invocation of a desire for counsel. R. 499; 8/25/04 Tr.p. 142, l. 6-7. He further noted that Cope was read Miranda warnings in the neighborhood of a dozen times. . Pertinent to this claim, Judge Hayes stated:

> . . . as to the question of the right to counsel and how it ties into the statements and how it ties into getting in of the form before Judge Long. When an attorney did arrive and Mr. Cope was notified of the presence of the attorney and the attorney's availability, there was an affirmative action taken by Mr. Cope indicating that he did not wish to have counsel introduced into the process at that time and not have him present at that time. In fact, he signed such a statement at 3:10 P.M. . . . on the third of December , and in fact there has been no testimony from Mr. Barrowclough but it was indicated in the testimony that . . .it was confirmed by Mr. Barrowclough by presentation to him of the signed document, State Exhibit 8, and by oral confirmation by Mr. Cope when he was introduced to Mr. Barrowclough.

R. 501-02; 8/25/04 Tr.p. 144-145.

The Sixth Amendment guarantees that in all criminal prosecutions "the accused shall enjoy the right to ... have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "[O]nce a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent

waiver of that right--even if voluntary, knowing, and intelligent under traditional standards--is presumed invalid if secured pursuant to police-initiated conversation," and "statements obtained in violation of that rule may not be admitted as substantive evidence in the prosecution's case in chief." Michigan v. Harvey, 494 U.S. 344, 345, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990) (stating the holding of Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)). Likewise, the South Carolina Supreme Court has held:

> When the Sixth Amendment right to counsel has attached, if police initiate interrogation after a defendant's assertion, at an arraignment or other similar proceedings, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid ***unless the defendant initiates the contact himself.***

State v. Council, 335 S.C. 1, 15-16, 515 S.E.2d 508, 515 (1999)(emphasis added). However, in Council, the Supreme Court also stated: "[t]he Sixth Amendment right attaches only "post-indictment," at least in the questioning/statement setting, citing Michigan v. Harvey, 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293.

The testimony of Judge Ray Long indicated that he had a bond setting on Billy Cope on December 1, 2001. He described that his process is that he would inform the person of his right to an attorney, right to a jury trial, right to a preliminary probable cause hearing and then ask the defendant to sign a fee waiver so that a public defender application can be taken. Judge Long stated that he automatically has the application filled out for all defendant, but I had him sign the waiver, which he does not have to do. He stated that he filled out the form for Cope by asking the questions and I asked him to sign at the end "stating that he told me the truth."Specifically, he stated that Cope did not ask to have the form filled out "because it is something we do on everybody." Judge Long stated that he approved him for a public defender. R. 428-29; 8/25/04,

Tr.p. 71-72. Judge Long stated that at that time he gave Cope his court dates which included his "initial appearance" on December 31, 2001. [20] He states that at the time he had the charges of murder, criminal sexual conduct first degree and three counts of unlawful neglect toward a minor child. R. 430; Id. at 73. Judge Long stated the bond hearing was held around 8 a.m. that morning. R. 432; Id. at 75.

In a recent decision by the Court of Appeals, State v. Anderson, the court concluded that there was a Sixth Amendment violation arising from the signing of paperwork requesting appointment of counsel. Therein the Court stated:

> As additional support for admitting Appellant's statement into evidence, the trial court found that Appellant's signing of the paperwork for a public defender was not enough to invoke his right to counsel. However, pursuant to State v. Council, 335 S.C. 1, 15-16, 515 S.E.2d 508, 515 (1999), we believe signing the paperwork requesting a public defender did invoke Appellant's Sixth Amendment right to counsel.
>
> In Council, the defendant was arraigned on October 14, 1992, and requested the court appoint an attorney to represent him. Id. at 14, 515 S.E.2d at 514. An attorney was appointed to represent the defendant on October 16, 1992, and the defendant made inculpatory statements to the police on October 19, 1992. Id. In discussing the defendant's claim that the October 19th statements were obtained in violation of his Sixth Amendment right to counsel, the court found as follows:"Appellant's Sixth Amendment right to counsel attached on October 14, 1992, when he was arraigned. Further, appellant asserted his right to counsel on October 14, 1992, when he requested appointment of counsel." Id. As in Council, we find that Anderson's Sixth Amendment right to counsel attached at the time of his arraignment, and he invoked that right by requesting a public defender at 11:30 a.m. on June 16, 1998.
>
> Accordingly, we find that Officer Raczinsky's contact with Appellant violated the protections afforded Appellant under the Sixth Amendment. Even if

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[20] *State Exhibit 14* requires the screening of all defendants for public defenders at the bond hearing. **Amended Supplemental ROA, p. 54.** The Initial Appearances are described in the Exhibit, p. 2 as addressing the issue of legal representation and desire for a preliminary hearing and providing discovery. However, it notes that murder cases do not fall in the time tracks.

> the police re-entered the room at the behest of Appellant's aunt, Officer Raczinsky admitted that he initiated the conversation with Appellant by asking him if "anything had changed" since the last time the two had spoken. Thus, the trial court erred in admitting Appellant's statement about the "drug deal" because it was made after Appellant had invoked his Sixth Amendment right to counsel and was pursuant to a conversation he did not initiate.

Anderson, supra.

Unlike Anderson and Council, there are a number of distinguishing factors. First, both opinions suggest that the defendants therein were "arraigned." Here, the Appellant was at a bond hearing. In fact, he was not arraigned even before the August 23, 2004 hearing. At that time, counsel for Cope waived arraignment. R. 80-81; 8/23/04 Tr.p. 29-30. Second, contrary to the situation in Anderson, the actions by the magistrate were required under the Differentiated Case Management System and the signing of the forms was deemed a ministerial act by the Judge and did not indicate a desire for counsel. In fact, Judge Long declared that the signing of the form was merely to show he had told the truth in the process. Respondents acknowledge that a review of the form in State Exhibit 10 (8/25/06) is styled "affidavit of indigency and application for counsel," and read on the second page " . . .and request that counsel be appointed to represent me."

Therefore, assuming the applicability of Council and Anderson, the Sixth Amendment right to counsel attached. However, Respondents would submit that absent an "indictment" and "arraignment," or even the "initial appearance" of the DCM System, those decisions may likely be in error because formal prosecution had not begun.

**1. Cope initiated contact with law enforcement subsequent to his bond hearing which acts as a waiver of his Sixth Amendment right to counsel.**

Even if there was a Sixth Amendment right to counsel which attached on Saturday, December 1, 2001, it was waived by his initiated contact to law enforcement on Sunday, December 2, 2001 at 10:25 PM. The record from the hearing revealed that Correction Officer Helen McGee was walking through the booking area and Cope was knocking on the door trying to get someone's attention. When she asked what he wanted, Cope told her that he needed to speak to a Detective in Rock Hill about some things he had done to his children. R. 166; 8/24/04 Tr.p. 7. She stated that she did not initiate the contact with him and was coming through the restroom door when she heard the knocking. At the time, he was in a booking cell. She stated that she told him that she would let Lt. Walden know and advised him . She stated that she contemporaneously made a statement of that contact. R. 168-69; 8/24/04 Tr. 9-10, State Exhibit 3.[21]

Lt. Herring stated that on Sunday night December 2, 2001, in the evening hours he received a call reflecting that Cope wanted to talk to him again. R. 286; 8/24/04 Tr.p. 127. He stated that he informed the dispatcher to tell the jailers at the Moss Judicial Center that we'd make arrangements the following Monday to come get Cope and talk to him. He told him that it could wait. R. 287, 289; Id. at 128, 130.

Det. Blackwelder testified that she went to speak with Cope on Monday, December 3, 2001 because of the page Lt. Herring had received that Cope wanted to talk with them again. She stated that she mirandized Cope again after Cabiness, Dugan and Hanoka had picked him up and

[21] There was also testimony that on December 1 when being transported to the bond hearing, Cope made a similar request that " he felt he had done something wrong and wanted to talk to the Detective Division again, according to Vernon Harmon. R. 226; 8/24/04 Tr.p. 67. However, he never relayed that information and it pre-dated the bond hearing.

brought him back. She stated that she asked him if he wanted to talk to them and he said yes and she mirandized him at that time. R. 386-88; 8/25/04 Tr.p. 29-31. She stated that Cope said that he "did wish to speak with us and that he was the one who made contact asking to speak with us." R. 388; Id. at 31, l. 2-3. She stated that then when Cabiness came in Cope again represented to them that he was the one who that initiated contact and not us and asked him if he wanted to talk to us and he said yes. R. 390; 8/25/04 Tr.p. 33.

During the interview of Cope on December 3, 2004, she became aware that an attorney, B. J. Barrowclough, was outside who was saying that he represented him. R. 398; 8/25/04 Tr.p. 41. She stated that Cope indicated that he did not wish to see that lawyer. He made a note that stated "I Billy Cope do not wish to talk with my lawyer - B.J. Barrowclough at this time' and signed it at 3:10 PM. State Exhibit 8. R. 314-15; 8/24/04 Tr.p. 155

Capt. Cabiness described the December 3, 2001 interview. He stated he had learned of the contact to Lt. Herring the night before and getting him transported. He described their decision to have him come to Det. Blackwelder's office. After confirming that she had given him his rights, Cabiness confirmed with Cope that he had sent word that he wanted and that he did want to talk with them. R. 297; 8/24/04 Tr.p. 138. He told Cabiness after he again went over his rights with him that what he told the officers on Friday was not the truth. He testifies that after a new statement was completed, Cope agreed to go back to the crime scene to show what happened that night. R. 303-04; 8/24/04 Tr.p., 144-145. After the going to the crime scene, they returned around 1:30 PM. During this interview of Cope, he received a page that Barrowclough was in the lobby and indicated that he represented him and wanted to talk to him. Up to that point, Cope had not indicated a desire for a lawyer and had not (re)asserted his rights. After a discussion with the

Solicitor's Office, he asked Cope if he had an attorney and he said no. he told him that Barrowclough was in the lobby and wanted to talk with him and Cope told Cabiness that he wanted to go ahead and finish this and talk to us before he talked with Barrowclough. R. 312; 8/24/04 Tr.p. 153. He stated that after a phone call, he confirmed in writing that he did not want to speak with the attorney. R. 313; 8/24/04 Tr.p. 154.

Cabiness stated that at 5 P.M. he went out to the lobby and got Barrowclough and brought him back to the office where the interviews were conducted. He introduced them and shred the document with the lawyer and confirmed to him that he had been aware that the lawyer was in the lobby and wished to talk with them. R. 314-15, 319; 8/24/04 Tr.p. 155-156, 160. Cabiness denied that any inducement were made to coerce Cope to not speak with Barrowclough. R. 315-16; 8/24/04 Tr.p. 156- 57. He stated that the statement was signed at 4:55 PM . At that time Cope then met with his counsel. Id. See also, R. 332-38; 8/24/04 Tr.p. 173-179.

It cannot be disputed that Cope initiated the contact by making the request at the Detention Center for the police to contact him on Sunday, the day after his Sixth Amendment right had attached under Anderson. Because of this initiated contact, he has waived his right to counsel during the further discussions and interrogation. a criminal suspect's rights are not violated when the suspect, not the police, "initiates further communication, exchanges, or conversations with the police." State v. Howard, 296 S.C. 481, 489, 374 S.E.2d 284, 288 (1988) (citing Edwards, 451 U.S. at 485, 101 S.Ct. 1880). Finally, the Supreme Court has held that, after it has been determined that the waiver was valid, the analysis is over:

> [o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a

conviction, the analysis is complete and the waiver is valid as a matter of law. State v. Drayton, 293 S.C. 417, 426, 361 S.E.2d 329, 334-335 (1987) (citing Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). See State v. Binney, 362 S.C. 353, 608 S.E.2d 418 (2005) (waiver of right).

The waiver of his 6th Amendment right was valid. He was aware of his right to have counsel assist him in the numerous earlier waivers before his bond hearing. Assuming his request for appointed counsel at the bond hearing was real, he chose to forego counsel and initiate a request to have the police meet with him to follow up on the statements he had given that earlier. This was not police initiated interrogation, but Cope initiate. The analysis need go no further.

The attempted intervention by B.J. Barrowclough during the last statement is a "red herring" since Cope had already initiated and waived his 6th Amendment right to counsel at the time of the interviews. See Moran v. Burbine, 475 U.S. 412, 422, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) ("Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right"). In Moran, an attorney hired by the suspect's sister had been trying to contact the suspect and was told by the police, falsely, that they would not begin an interrogation that night. Id., at 416-418, 106 S.Ct. 1135. The suspect was not aware that an attorney had been hired for him. Id., at 417, 106 S.Ct. 1135. The Supreme Court rejected an analysis under which a different result would obtain for "the same defendant, armed with the same information and confronted with precisely the same police conduct" if something not known to the defendant--such as the fact that an attorney was attempting to contact him--had been different. Id., at 422, 106 S.Ct. 1135. Here, Cope had already initiated contact and waived his right to a

counsel by that initiation. His waiver was valid as long as he chose not to re-assert it. His complaint otherwise lacks a viable constitutional foundation.

For all the foregoing reasons, the statements entered after Sunday December 2, 2001 are admissible under the Sixth Amendment. His complaint otherwise must be denied.

## IV. The trial court properly denied the motion for a directed verdict related to the criminal conspiracy between Cope and Sanders where circumstantial evidence existed that there was an agreement.

In his brief and argument below, Cope contends that this charge lacked any proof. He contends that where there was no direct evidence of any connection between Sanders and Cope, the court erred by determining the basis for the charge was inference upon inference to develop the conspiracy. Contrary to the claims of Cope there was sufficient evidence to connect Cope and Sanders to the sexual assault upon the body. The mere fact that Cope's series of confessions about the murder and assault by a broom like object upon Amanda and the existence of Sanders DNA from his saliva upon her breast contemporaneous to the physical assaults and DNA on her pants conclusively eliminate the possibility of a conspiracy as Cope suggests. Although Amanda's body serves as the connection between the two, the door reveals agreement and conspiracy as supported by the circumstantial evidence. Simply put, the connection and overt act are revealed by allowing the entry by Cope of Sanders into the home where Sanders commits acts upon Amanda and Cope combines with him. The mere fact that Cope did not include Sanders in his statements is not dispositive of this issue. The trial court was correct in allowing the jury to consider the evidence and make the decision.

On November 29, 2001, between 2 and 4 am, twelve year Amanda Cope, a 160 pound girl, was forcefully sexually assaulted by an object in her vagina and her rectum, severely beaten

and strangled to death. Certain salient factors point to the existence of an agreement and conspiracy between her father and James Sanders to commit the sexual acts which ultimately lead to her death. There is substantial circumstantial evidence to support the existence of the conspiracy.

1. Cope tells Jessica that morning that her sister Amanda had been dead for four hours, revealing before any law enforcement involvement his knowledge of the time of death. This four hour time frame is later repeated to law enforcement. It was consistent with the pathologist findings. R. 2083; 9/15/04 Tr.p. 48.
2. Amanda has a bite mark on her breast with saliva. The mark reveals an injury contemporaneous to other injuries near the time of death between 2 and 4.
3. Cope gives statement that he got up at 3 a.m. and checked on the girls, consistent with the range of the time of death. R. 1448-49, 1472-73, 1771-72; 9/13/04 Tr.p. 67-68, 91-92. 9/14/04 Tr.p. 49-50, 76-77. Video, Exhibit 7. **(On file with Court).**
4. Sanders DNA is consistent with the saliva located on the breast of Amanda at the time of the assault and death. R. 2242; 9/15.904 Tr.p. 207.
5. The windows into Amanda room were not disturbed. R. 1566-69; 9/13/04 Tr.p. 187-188. The windows and doors around the house reveal no forced entry by the lack of signs of damage or tampering to doors or disturbance of dust, dirt spider webs to the sealed windows and screens. R. 988-990, 1531, 1538-1580; 9/8/04 Tr.p. 267-269, R. 1237; 9/13/04 Tr.p. 150, 157- 99.
6. Jessica specifically recalls Amanda locking the front door by latching the chain on the front door the evening of the incident. Jessica locked the back door. R. 2079;

9/15/04 Tr.p. 44. The door requires a chain to be unlatched from the inside for entry. State Exhibit 41 E ( photograph of door and chain). Jessica recalls that the door was already unlocked when the ambulance and police arrived shortly after they awoke that morning and learned her sister had died. R. 2084; 9/15/04 Tr.p. 49.

7. Cope's statements reveal knowledge about factors of the assault and injuries to Amanda consistent with forensic evidence . Further, Cope stated that they would not find semen at the crime scene and then later subsequently revealed the presence of a rag he used to masturbate. R. 1806, 1810; 9/14/04 Tr.p. 84, 88.

8. Cope admitted staging the scene to make it appear to be an accident by placing the blanket around his daughter's neck, a historical factor in Cope relationship with his daughter that he had warned her about, something that Sanders would have been unaware of to suggest an accident. R. 1803; 9/14/04 Tr.p. 81. Video, State Exhibit 7. The scene was also staged by the cleanup of the area and body where she was clothed after the rectal assault and the area was cleaned of feces or traces of the assault, and the door were placed together to make it appear to be an accident, something that a sole intruder would have no reason to do, yet Cope would have reason to do should one of his daughters or another arrive at the scene before he wakes up to shed guilt away from himself. R. 1332, 1803-04; 9/10/04 Tr.p. 62, 9/14/04 Tr.p. 81-84.

9. The house was full of clutter and debris to make passage difficult once inside and particularly if dark. R. 1582-94; 9/13/04 Tr.p. 201-213. ( testimony describing

photographs of inside house); Video State Exhibit 7. Jessica testified that lights were shut off by her that night. R. 2079-80; 9/15/04 Tr.p. 44-45.

9. The locked entry by the door was the only manner that Sanders could have entered the house. Cope had to assist Sanders entry for the assault by opening the door and showing his way through the clutter to Amanda's room.

10. The closet in Amanda's room was too small and cluttered for anyone to hide in. R. 2076; 9/15/04 Tr.p. 41 (Jessica testifies that Amanda's closet was messy and had bags of clothes and stuff in it and that she could not get into closet). She also stated that she was in the room with Amanda for 20 minutes after her father had gone to bed. R. 2078; 9/15/04 Tr.p. 43.

Simply put, the evidence provided by the body of Amanda placed Cope and Sanders together at that time of the assault and death. Since the scene was staged subsequently to the death, it is evident that a cover-up had begun before the police had arrived at the scene while Cope was claiming accident, even though Sanders was present and involved . It is equally powerful circumstantial evidence that locking of the doors required it to be unlocked and opened for someone to be let in.

At the outset of the case in the opening argument, the state laid the foundation for its case on conspiracy. Amanda Cope was brutally penetrated in her vagina and rectum during the hours between 2 and 4 AM. At 6 a.m. , law enforcement receives a 911 call where Cope, devoid of emotion states that his daughter is dead - "cold as a cucumber." R. 948; 9/8/04 Tr.p. 227, State Exhibit 15. At that time Cope claims he last saw his daughter alive at two clock and then changes it to one o'clock. R. 949; 9/9/04 Tr.p. 228, l. 7-8. He contended at that time she must

have strangled upon a piece of the blanket. He had even claimed he had previously warned her about this fact. Id. *A 12 year old female who weighs over 160 pounds was alleged to have wrapped herself in a blanket and choked resulting in her accidental death*. R. 956, 970, 980, 998-99, 1161, 1201, 1284, 1292; 9/8/04 Tr.p. 235, 249, 259, 277-278, 9/9/04 Tr.p. 149, 189, 9/10/04 Tr.p. 13, 21. He initially declared that she had been dead for four hours, albeit claiming inconsistently to being asleep until before 6 a.m. , which was consistent with the later determined actual time of death. R. 956, 963, 1159; 9/8/04 Tr.p. 235, 242, 9/9/04 Tr.p. 147.

Once police and EMS arrive, Cope begins to make a series of inconsistent statements about her state of undress at the time he found her that morning, from being naked when he found her ( R. 959, 1159; 9/8/04 Tr.p. 238, l. 1-17, 9/9/04 Tr.p. 147), to being clothed and straightening her clothes, where evidence revealed that her clothes had been put on her by someone else. The inconsistent statements and obvious staging of the crime scene became a theme to the trial. The was odd behavior when the police found her clothed with the blanket around her neck when they arrived on the scene. R. 988; 9/9/04 Tr.p. 267. Further , while at the hospital during the collection process, Cope told Detective Burris that he knew there would be an autopsy and if his skin was found underneath his daughter's fingernails, it was because she had scratched his back that night. R. 1205; 9/8/04 Tr.p, 193.

Cope also initially told the police that the house was secure with the windows closed and there were no signs of any break-in. R. 1285; 9/10/04 Tr.p. 14. [This was supported by law enforcement testimony. R. 1237-38; 9/9/04 Tr.p. 225-226].

The variety of statements about the event and Cope's demeanor did not make sense that morning. Compare, State Exhibit 15 (911 Call) **(On file with Court)**, with R. 963, 969-70, 971,

994-98; 9/8/01 Tr.p. 242, 248-249, 250, 274-275, 277. Cope even inquired whether he would be in trouble with the law because his daughter was found dead in the house. R. 981, 990; 9/8/04 Tr.p. 260, 269.

The pathologist, Dr. Maynard came to the scene and the possibility of a sexual assault was evident to him leading to a later autopsy. R. 1120; 9/9/04 Tr.p. 108. The autopsy reveals brutal rape and injury where her rectal cavity is bruised by an object like either a dildo or a broomstick being jammed in up to 8 inches. R. 1116-17; 9/9/04 Tr.p. 104-105. He opines that this could not be done with a penis. [Oddly, Cope claims in the video re-enactment to have tossed out his dildo after the incident, but later a dildo is found in his room [ R. 1614; 9/13/04 Tr.p. 233] and Cope is also unable to identify or locate a broomstick that he says he used in the inculpatory confession]. According to Dr. Maynard, her vaginal area had significant injuries which were done by an object by more force than a normal sexual act. R. 1080; 9/9/68. No sperm was found in the vaginal area. R. 1090; 9/9/04 Tr.p. 69. Amanda also suffered from severe head injuries and brain swelling and there is a bite upon her breast. R. 1058; 9/9/04 Tr.p. 46. [The saliva around the bite mark is later determined to be consistent with Sanders]. Dr. Maynard also opined that her cause of death by strangulation could not have been caused by a blanket. R. 1057; 9/9/04 Tr.p. 45. Importantly to the staging concept, her body appeared to have been cleaned up after the assault. R. 1116-17; 9/9/04, Tr.p. 104, 105. He noted that it was uncommon that fecal material would not be in the soiled pants and that fecal material would usually be brought out and left around the anal opening in similar assaults. R. 1117; 9/9/04 Tr.p. 105. He further stated that when he was at scene he examined the bedding and did not see the presence of any fecal matter. Id. Importantly ne noted all the injuries to Amanda occurred within

a short time prior to her death. As to her abdominal injuries, he noted that the they could have been caused by a 300 pound man kneeling on the abdomen or back with sufficient force even if the victim was lying in the bed. R. 1119; 9/9/04 Tr.p. 107.

In his series of early exculpatory statements, Cope continued his assertion of accident and that he had slept until 6 am. R. 1208, 1221; 9/9/04 Tr.p. 196, 209. His room is within close proximity of the victim's room, yet he contended that he would not be able to hear matter based upon his sleep machine noise. R. 1210-11, 1215; 9/9/04 Tr.p. 198-199, 203. Although initially stating he slept through the night, he later asserts at some time that he got up at sometime and went to the bathroom and checked on the girls. The pathologist ultimately determined that death occurred between 2 and 4 am.

Next day, he agrees to take a polygraph test. Before the test, he gives an exculpatory statement continuing to assert getting up at 3 a.m., but denied checking on Amanda. R. 1448-49; 9/13/04 Tr.p. 67-68. After the test, he is advised of the result that he failed. R. 1461; 9/13/04 Tr.p. 80. Cope then begins on an evolving series of inculpatory statements. R. 1469, 1472-76; 9/13/04 Tr.p. 88, 91-95. At that point the admits killing Amanda and that he jammed a broom inside her rectum and vagina after he had gotten up in the middle of the night with an erection, went to her room, masturbated over her and got enraged after she woke up and saw him doing it and slammed her head into a video game as he straddled his 300 pound body one her, hit her with his fist and described using his hands to choke her. Id. He stated that she was already dead when he used the broom on her. Oddly, he volunteered that he deleted his internet files from his computer after the incident. R. 1478; 9/13/04 Tr.p. 97. See also, R. 1770-72; 9/14/04 Tr.p. 49-48-50 (Herring statement - 11/30/01 @ 2 P.M.) .

Days later, Cope changed his story to suggest that he woke up and acted act beating and smothering his daughter and ultimately penetrating her with a broom vaginally and rectally because he was upset with an old girlfriend who had aborted his child. R. 1798-99; 9/14/04 Tr.p. 76-77 (Cabiness statement - 12/3/01 @ 9:45 am) . This leads to the crime scene video re-enactment where Cope acts out his recollection of the event with revealing force and corrections as he went through the scene and physically demonstrated his violence toward his daughter. Video - State Exhibit 7. Subsequently, he gives another statement which provide new corroborative evidence including a towel rag that he masturbated into that was located at the scene. R. 1808-09; 9/14/04 Tr.p. 87-88.

At 4:55 PM on December 3, 2001, Cope gives his final statement to Cabiness. In that statement, he abandoned his "dream concept" and asserted that he woke up about 3 a.m. and went into Amanda's room, used a dildo on her and masturbated, cleaned it off the floor with a towel. While using the dildo while she was on her stomach, she woke up and he tried to keep her from seeing him and he jumped on top of her and started hit her in the head and strangled her until she went limp. R. 1816-1820; 9/14/04 Tr.p. 94-98 (Dec. 3, 2001 Cabiness Statement @ 4:55). He described using the blanket to "make it look like she had strangled herself." After he jumped off the bed, he wiped off the dildo with the towel and put it between the mattress, arranged the doors to Amanda room so that they would lock together so his other daughters would not wake up in the morning and see her. Id. [22] **State Exhibit 9. (On file with Court).**

Subsequently, the DNA from the saliva upon Amanda's breast and the semen on her

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[22]Evidence was also presented about disputed writings made by him to Amy Simmons where he stated that "I killed Amanda." R. 1956, 1958; 9/14/04 Tr.p. 233, 235.

pants comes back connected to James Sanders. R. 2240-42; 9/15/04 Tr.p. 205 - 207. [23] Cope had not mentioned another else being involved in either the assault or death of Amanda in any inculpatory statement.

Sanders lived only about one block away from Cope, but the record contained no prior evidence of any existing relationship between them. However, the bruising and injuries on Amanda's breast where the saliva was found occurred around the time of her death so that there is now a temporal connection with Amanda and Sanders being inside the house together at the time she died. Now there is the combination of this evidence linking both Sanders and Cope to the crime that resulted in the criminal sexual conduct of Amanda and ultimately her death by place and time.

The state's theory then becomes that based upon the circumstantial evidence the only logical explanation is that Cope served up his daughter that fateful night for his and Sanders own perverse pleasures and did it together. This is more than inference upon inference, it is the only logical conclusion from the evidence.

Supportive of this concept was the fact that the house itself showed no signs any entry through windows and that the doors were locked before the children went to bed. Further as revealed in the video, the home was in complete chaotic clutter and that anyone entering, particularly in the night hours with lights on or off, would need a guide to get to any room through the clutter and junk on the floor.

Furthermore, the crime scene staged. Why would an unknown intruder wrap a particular

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[23]Cope's DNA was found on the towel he stated he used when he masturbated. R. 2241; 9/15/04 Tr.p. 206.

item around the victim's neck to make it appear accidental for a 160 pound person, when that item was consistent with what Cope indicated that he had warned her about. How would Sanders know this and why would an unknown intruder even care to do this where the violence would be inevitably revealed. Why would Cope ever want to cover up how Sanders solitary involvement in the case and clean up the scene where there was no evidence of feces from the rectal penetration, remove the object used (broom or dildo). The evidence leads to the logical conclusion that Sanders was let in from the previously locked door by Cope while his wife was working the night shift. This evidence leads to the logical conclusion that they were together in the event of sexual conduct. This circumstantial evidence leads to a showing of the existence of a conspiracy to commit sexual conduct on his daughter.

**How This Issue Was Raised at Trial**

At the conclusion of the State's case, defense counsel Morton, on behalf of Cope, made a motion for a directed verdict of acquittal on the conspiracy charge. R. 2295-97; 9/16/04 Tr.p. 12, l. 24 - p. 14, l. 16. He asserted that the State's case to link Cope and Sanders was that there was no forced entry and because Sanders' DNA was found on Amanda's leg. R. 2296; 9/16/04 Tr.p. 13, ll. 1-7. Counsel Morton contended that for a conspiracy there had to be an agreement which may be implied, but cannot be based upon speculation. He noted that there were various ways to enter the house, as shown by Sanders' other entries. He stated that the mere combination of the fact of no evidence of forced entry, of Sanders DNA on the victim's leg, and of Cope being home is not evidence of an agreement. R. 2296; 9/16/04 Tr.p. 13, ll. 3-11. Counsel noted that he asked Cabiness about any evidence from family, friends, phone records, emails, or computers about any indication that Cope and Sanders knew each other. R. 2296; 9/16/04 Tr.p. 13, l. 20 - p. 14, l. 2.

He contended that this failure to show a meeting of the minds to commit criminal sexual conduct was shown by the failure to prove any connection between Cope and Sanders other than the fact that Cope was home and Sanders' DNA was found on his daughter's body. R. 2297; 9/16/04 Tr.p. 14, ll. 8-16.

Judge Hayes denied the motion without argument from the State. R. 2297; 9/16/04 Tr.p. 14, ll. 17-20. Judge Hayes found "some direct evidence and substantial circumstantial evidence." R. 2298; 9/16/04 Tr.p. 15, ll. 2-4. In addition to the evidence cited by Morton, Judge Hayes emphasized the testimony of one young girl [Jessica Cope] that Amanda had chained the door and circumstantial evidence that someone took the chain from where Amanda had it and removed the chain over the night. Further, Judge Hayes noted that Cope was home that night and Sanders was in the home that night. He concluded there was direct and substantial circumstantial evidence. R. 2298; 9/16/04 Tr.p. 15, ll. 11-23.

On behalf of James Sanders, counsel Greeley made a similar direct verdict motion. He stated that while the DNA evidence may be direct evidence that Sanders and the victim were in contact with each other. However, he contended that the fact the alleged semen was found on her pants and saliva on her breast were locations of mobility. He stated that there was no circumstantial evidence which placed Sanders inside the house unless the assumption is made that the contact occurred inside the house. R. 2299; 9/16/04 Tr. 16.

As to the conspiracy charge, counsel Greeley asserted there was no evidence of the two men having any contact, any association, or even knowing each other. R. 2300; 9/16/04 Tr. 17. He contended that in the light most favorable to the State shows statements of what one defendant says he did and how he carried it out, but never mentioned Sanders in regard to the

crime. He asserted that semen and saliva merely raises a suspicion of Sanders involvement. R. 2301; 9/16/04 Tr. 18. Judge Hayes denied the motions as to Sanders. R. 2307-08; 9/16/04 Tr. 24-25.

**The Indictment**

The indictment for criminal conspiracy charged that Cope " on or about November 29, 2001, willfully and unlawfully unite, combine, conspire, confederate, agree and/or have tacit understanding with James Edward Sanders for the purpose of committing the crime of criminal Sexual Conduct upon Amanda Cope, the victim being twelve years of age at the time .... in violation of 16-17-410." Indictment 2004-GS-46-0200. **Amended Supplemental ROA, p. 43.**

**A. STANDARD OF REVIEW FOR DIRECTED VERDICT**

On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004); State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct.App.2003); State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Rosemond, 356 S.C. 426, 589 S.E.2d 757 (2003); State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003); see also State v. Ballington, 346 S.C. 262, 551 S.E.2d 280 (Ct.App.2001) (stating judge should deny motion for directed verdict if there is any direct or substantial circumstantial evidence which reasonably tends to prove accused's guilt, or from which his guilt may be fairly and logically deduced). On

the other hand, a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003); State v. McCluney, 357 S.C. 560, 593 S.E.2d 509 (Ct.App.2004); State v. Padgett, 354 S.C. 268, 580 S.E.2d 159 (Ct.App.2003). The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002).

**CONSPIRACY**

Criminal conspiracy is statutorily defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C.Code Ann. § 16-17-410 (2003); accord State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003); State v. Follin, 352 S.C. 235, 573 S.E.2d 812 (Ct.App.2002) cert. denied, State v. Horne, 324 S.C. 372, 478 S.E.2d 289 (Ct.App.1996). The gravamen of the offense of conspiracy is the agreement, or combination. State v. Dasher, 278 S.C. 454, 298 S.E.2d 215 (1982); see also State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001) ("The essence of a conspiracy is the agreement."). "In criminal conspiracy it is not necessary to prove an overt act. The gist of the crime is the unlawful combination. The crime is then complete, even though nothing further is done." Ferguson at 303, 70 S.E.2d at 356 (citing State v. Ameker, 73 S.C. 330, 53 S.E. 484 (1906)).

A formal or express agreement need not be established. Horne at 381, 478 S.E.2d at 293. "A tacit, mutual understanding, resulting in the willful and intentional adoption of a common design by two or more persons is sufficient, provided the common purpose is to do an unlawful act either as a means or an end." Id. (citation omitted). Professor McAninch explains: "The 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). In State v. Ameker, 73 S.C. 330, 53 S.E. 484 (1906), the Court stated the necessity of the agreement in approving the following instruction::

> "[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."

Id. at 339, 53 S.E. at 487.

Similarly, in State v. Mouzon, 321 S.C. 27, 467 S.E.2d 122 (Ct.App.1995), the defendant appealed his conviction for conspiracy to distribute crack cocaine. One witness testified that on the night in question, several individuals, including the defendant, were present where drug transactions were taking place. Id. at 32, 467 S.E.2d at 125. We reversed the conviction, holding:

> [T]o prove conspiracy, it is not enough that a group of people separately intend to distribute drugs in a single area, nor enough that their activities occasionally or sporadically place them in contact with each other. What is needed is proof they intended to act together for their shared mutual benefit within the scope of the conspiracy charged.

Id. at 32-33, 467 S.E.2d at 125. See State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993) (holding it is not enough for the offense of conspiracy that a group of people separately intend to distribute drugs in a single area, nor that their activities occasionally or sporadically place them in contact with each other).

Once a conspiracy has been established, evidence establishing beyond a reasonable doubt the connection of a defendant to the conspiracy, even though the connection is slight, is sufficient

to convict him with knowing participation in the conspiracy. Horne, 324 S.C. at 382, 478 S.E.2d at 294. The conspiracy is proven by overt acts committed in furtherance of the conspiracy. Amerson, 311 S.C. at 319-20, 428 S.E.2d at 873. However, overt acts are not necessary for a conspiracy conviction. "It is axiomatic that a conspiracy may be proved by direct or circumstantial evidence or by circumstantial evidence alone." Horne, 324 S.C. at 381, 478 S.E.2d at 294. In State v. Miller, 223 S.C. 128, 74 S.E.2d 582 (1953), the Court notes: "Often proof of conspiracy is necessarily by circumstantial evidence alone." Id. at 133, 74 S.E.2d at 585. McAninch observes, "The agreement might be difficult to establish by direct evidence if none of the co-conspirators will talk. Consequently, the cases in this jurisdiction, as well as others, which hold that the agreement can be established by circumstantial evidence are legion." McAninch & Fairey 476. See, State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980) (sufficiency of circumstantial evidence to convict on conspiracy); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (sufficiency of evidence for a criminal conspiracy); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Follin, 352 S.C. 235, 573 S.E.2d 812 (Ct.App.2002).

**Conclusion**

As stated above, there is substantial circumstantial evidence to support the existence of a conspiracy to commit criminal sexual conduct upon Amanda Cope on November 29, 2001. Contrary to the assertions of Cope, the connection was made in the evidence that Sanders and Cope were both involved in the sexual acts by the admissions (Cope) and the evidence (Sanders). The evidence also supports the fact that Cope admits getting up at 3 am, a time when the assaults and death are determined to have occurred. The knowledge of particular injuries from the deadly assaults by Cope and the actual DNA connection with Sanders saliva put them together with

Amanda. The non-forced entry, circumstantially proven by the earlier chain locked door being unlocked from the inside shows that Cope opened the door for Sanders and led him to his daughter. Cope's admissions of having sexual conduct with Amanda previously while she was asleep since the beginning of October, is further evidence that Cope was not acting as a guardian for his daughter but rather saw her as a tool for his sexual gratification.

This case is far different from the cases cited by Cope involving several individuals who happen to be involved in similar crimes at the same time like Mouzon and Amaker. Here, the act of sexual conduct on Amanda, due to the unique timing of the bruise and saliva could not have occurred without the aid and acquiescence of Cope. His complaint is without merit and must be dismissed. The trial court was correct in allowing this jury to decide whether the state had proved beyond a reasonable doubt its existence.

## CONCLUSION

For all the foregoing reasons, the judgement of convictions for murder, criminal sexual conduct and conspiracy must be affirmed.

Respectfully submitted,

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DONALD J. ZELENKA

ATTORNEYS FOR RESPONDENT

August 17, 2007.

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

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**APPEAL FROM YORK COUNTY**
**Court of General Sessions**
**Honorable John C. Hayes, III, Circuit Court Judge**

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**04-GS-46-2614-2618**
**02-GS-46-3232-3234**
**04-GS-46-200**

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**STATE OF SOUTH CAROLINA,**

Respondent,

v.

**BILLY WAYNE COPE,**

Appellant.

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**AMENDED CERTIFICATE OF COMPLIANCE**

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

This 17th day of August, 2007.

**DONALD J. ZELENKA**
Assistant Deputy Attorney General

**ATTORNEY FOR RESPONDENT**

## CERTIFICATE OF SERVICE

**I, Donald J. Zelenka,** hereby certify that I have served the ***Amended Final Brief of Respondent*** in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

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