APPENDIX

430 S.C. 98
Supreme Court of South Carolina.

The STATE, Respondent,
v.
Larry DURANT, Appellant.

Appellate Case No. 2016-001264
|
Opinion No. 27964
|
Heard May 9, 2019
|
Filed May 6, 2020
|
Rehearing Denied July 8, 2020

Synopsis

Background: Defendant, a church pastor, was convicted in the Circuit Court, Sumter County, W. Jeffrey Young, J., of second-degree criminal sexual conduct of victim who was teenage church member. Defendant appealed, and case was transferred.

Holdings: The Supreme Court, Hearn, J., held that:

prior bad acts evidence of sexual abuse of other teenage girls in same church was admissible to show common scheme or plan;

as matter of first impression, accurate criminal background information on State witness is imputable to State for *Brady* purposes;

State did not accurately disclose State witness's criminal background in violation of *Brady*; but

witness's criminal background was not material for *Brady* purposes.

Affirmed.

****50** Appeal From Sumter County, Roger M. Young, Sr., Circuit Court Judge

Attorneys and Law Firms

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Appellant.

Attorney General Alan Wilson and Assistant Attorney General William F. Schumacher, IV, both of Columbia, and Solicitor Ernest A. Finney, III, of Sumter, for Respondent.

Opinion

JUSTICE HEARN:

***101** Appellant Larry Durant was convicted of second-degree criminal sexual conduct (CSC) for sexually abusing a teenage girl in his church office where he served as the pastor. Durant contends the trial court improperly permitted the State to introduce evidence of prior sexual abuse allegations as evidence of a common scheme or plan under Rule 404(b), SCRE, and that the State committed a *Brady*[1] violation by failing to accurately disclose the criminal history of its witness. Applying the framework announced today in *State v. Perry*, Op. No. 27963, 430 S.C. 24, 842 S.E.2d 654 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 12), we affirm the admissibility of the girls' testimony. Additionally, while the State failed to disclose the criminal background information of its witness, we find this information was not material. Accordingly, we affirm Durant's conviction.

***102 FACTUAL AND PROCEDURAL BACKGROUND**

Durant was the founder and lead pastor at Word International Ministries, a church in ****51** Sumter. He is a double amputee below his knees and is legally blind. In 2013, four teenage girls who belonged to the church accused Durant of sexually assaulting them. Two of the girls were cousins, another was a God-sister, and the fourth was a close friend. The State indicted Durant on one count of second-degree criminal sexual conduct with a minor, stemming from an alleged sexual battery against one of the girls, and three counts of third-degree criminal sexual conduct pertaining to conduct with the other three. However, the State only proceeded to trial on one count.

During jury selection, the trial court mistakenly advised the jury pool that Durant faced all of the indicted criminal sexual conduct charges and a forgery charge. Defense counsel

immediately indicated he had "something to bring up at a later time," and the court held a sidebar. Afterwards, the court explained it erroneously listed the charges Durant faced and instructed the jury not to consider them. Following the jury's dismissal, counsel stated he appreciated the court's curative instruction, but was concerned the jury panel had been tainted. Counsel explained he was "definitely not [asking for] a mistrial," but he was requesting a continuance or a new jury panel. The State responded the court had given a curative instruction almost immediately and clearly stated the charges did not exist. The circuit court acknowledged the mistake was unfortunate but believed the curative instruction "took care of it," and accordingly, denied the motion for a continuance or mistrial.

Because the State sought to call the three other girls who alleged Durant had sexually abused them in a similar fashion, the court held a *Lyle*[2] hearing. According to one, Durant began abusing her when she was 13. She noted that Durant would call her to his office in the back of the church, lock the door, and pray to change her sexual orientation and to protect her against contracting any diseases. She stated that Durant began with oral sex and progressed to vaginal intercourse. ***103** Finally, she testified that Durant had pink pigmentation on his penis.

A second girl testified that Durant began to abuse her when she was 18, and that he would pray for her to make sure she did not contract any diseases and to prevent any harm to her body. She contended Durant digitally penetrated her vagina, which evolved into vaginal intercourse after he said, "God was taking him to a new level." She also testified that Durant would stand behind her during intercourse. She noted that Durant told her that she likely would not be admitted to the college of her choice if she did not have sex with him.

A third girl testified that Durant began abusing her when she was about 14 or 15 years old, and that he would also pray that she would not contract any sexual diseases. Finally, a fourth girl testified that Durant began abusing her when she was 13. She also noted that Durant would pray with her before the abuse, and that his genitalia had pink discoloration. On one occasion when she was pregnant, she stated that Durant told her that he would "bump the seed out." After comparing the similarities and dissimilarities pursuant to *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), the trial court ruled the girls could testify, as the court remarked, "[f]rankly, it's one of the more compelling 404(b) cases I've ever come across."

At trial, the girls testified, as well as another witness, Ulanda McRae, who is one of the girls' mother. McRae is also the daughter of Lizzy Johnson, a woman Durant previously dated. Durant contended that Johnson, who lived in a property purportedly owned by Durant around the time the allegations surfaced, forged a deed conveying that property to Johnson sometime earlier. When the allegations arose, a deed was recorded conveying the property back to Durant. The defense believed these fraudulent transfers served as a motive to fabricate the girls' allegations of sexual abuse. Defense counsel also stressed the lack of DNA, the fact that Durant was a double amputee and legally blind, suffered from erectile dysfunction, and had a chronic sexually transmitted disease that none of the alleged victims contracted.

Initially, the jury indicated they were at an impasse and that one juror refused to vote. ****52** The court gave an *Allen* charge and added that refusing to vote was not an option. Shortly ***104** thereafter, the jury found Durant guilty, and the court sentenced him to 20 years' imprisonment.

A few hours after sentencing, defense counsel received a call from McRae's ex-husband inquiring why he did not question McRae about her prior criminal convictions. Defense counsel did not believe McRae had a criminal background because the State previously had disclosed a report from the National Crime Information Center (NCIC) stating she did not have a criminal record. Counsel conducted a SLED CATCH search[3] using her name, date of birth, and social security number, which revealed numerous prior convictions under nine aliases for offenses such as shoplifting, fraudulent checks, and forgery spanning from 1991-2005.

Thereafter, Durant moved for a new trial, arguing the State's case was based entirely on credibility and the State's failure to disclose McRae's record prevented him from impeaching a critical witness or further developing his defense that Johnson stole the residence owned by Durant, thereby creating the need to fabricate the charges against him. The State responded it had run McRae's criminal history using the NCIC under the name "McCrae" rather than the correct spelling.[4] The State argued its failure to disclose McRae's criminal history did not amount to a *Brady* violation because it was unaware she had one and, in any event, it was immaterial to Durant's guilt. Durant disagreed, asserting the State was in possession of the criminal history for *Brady* purposes because it could have run a proper search but failed to do so.

The circuit court found the State was not in possession of the evidence and that it would not have affected the outcome of the trial. While some of McRae's convictions were likely inadmissible, the court noted it may have allowed one or more into evidence that would have been favorable to the defense, but regardless, the case boiled down to whether the jury believed the testimony of the victim and the three other ***105** witnesses regarding assaults. Thereafter, Durant appealed to the court of appeals, which transferred the appeal to this Court pursuant to Rule 204(b), SCACR.

ISSUES

I. Did the trial court err by admitting testimony of other sexual assaults pursuant to the common scheme or plan exception under Rule 404(b), SCRE?

II. Did the circuit court err in denying Durant's motion for a new trial based on a *Brady* violation?

DISCUSSION

I. Rule 404(b), SCRE

We begin by noting this Court's opinion in *State v. Perry*, which overruled *Wallace* and clarified the proper analysis in determining whether prior acts are admissible pursuant to the common scheme or plan exception. *State v. Perry*, Op. No. 27963, 430 S.C. 24, 842 S.E.2d 654 (S.C. Sup. Ct. filed May 6, 2020) (Shearouse Adv. Sh. No. 18 at 12). The Court emphasized *Lyle's* "logical connection" test, whereby "[t]he State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes 'reasonably tends to prove a material fact in issue.' " *Id.* at 30 (quoting *Lyle*, 125 S.C. at 417, 118 S.E. at 807). To prove a sufficient connection, the State must demonstrate that there is "something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." *Id.* at 27. This requirement filters permissible evidence of prior acts against veiled attempts to introduce propensity evidence. When the State seeks to present this evidence, its burden is a high one, as trial courts must employ "rigid scrutiny." *Id.* at 30. However, while the proper framework no longer reduces a Rule 404(b) analysis to ****53** mathematical exercise where the number of similarities and dissimilarities are counted, the common scheme or plan exception remains viable.

Accordingly, the question then becomes whether the admission of the other three girls' testimony can nonetheless be upheld under *Perry*. While the trial was conducted under *Wallace*—the parties argued for and against admissibility ***106** using that test and the trial court based its decision on it—we now determine whether the evidence would have been admissible under the framework in *Perry*. In answering this question, case law guides our analysis.

In *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984), this Court determined the trial court properly admitted evidence that a defendant had committed previous acts of sexual abuse because the State showed a particularly unique method of committing the attacks. The Court explained:

> All three daughters testified concerning the pattern of this and prior attacks. According to them, these attacks commenced about their twelfth birthday, at which time Appellant began entering their bedroom late at night, waking them, and taking one of them to his bedroom. There he would explain the Biblical verse that children are to "Honor thy Father," and would also indicate he was teaching them how to be with their husbands. The method of attack was common to all three daughters.

283 S.C. at 391, 323 S.E.2d at 773. The Court concluded, "It would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence." *Id.* at 392, 323 S.E.2d at 774.

Because *McClellan* remains good law, we believe the prior acts here are admissible. Durant had a particularly unique method of committing his attacks common to all the girls. While there were differences in their ages and the type of sex act, the method of his attack was more than just similar; instead, evidence of the prior acts "reasonably tend[ed] to prove a material fact in issue." *Lyle*, 125 S.C. at 417, 118 S.E. at 807. Durant exercised his position of trust, authority, and spiritual leadership to hold private prayer meetings with teen girls who had grown up in his church. He told them he was praying for their health and good fortune, and represented that part of this process was touching them sexually and having intercourse. Durant then warned the girls of misfortune if they refused or told anyone. Moreover, he used scripture as a means of grooming the children into performing sex acts, a striking parallel to the defendant in *McClellan*. Indeed, the trial court noted it was one of the more compelling cases of common scheme or plan evidence it had ever seen, and we ***107** agree. These facts demonstrate the requisite logical connection between the prior acts of sexual abuse and the one forming the basis of the crime charged.

II. *Brady*

Durant contends the trial court erred in declining to grant a new trial based on the State's failure to disclose the criminal history of one of its witnesses. The State asserts its failure to provide McRae's criminal history did not amount to a *Brady* violation because it was unaware that she had one, and regardless, the evidence was immaterial because it did not impact the credibility of any of the four witnesses who testified about the sexual abuse Durant committed against them. The State asserts McRae was an immaterial witness whose testimony was cumulative to other evidence presented at trial, and further, Durant never alleged she was involved in the property dispute that caused the victims to report the abuse.

A *Brady* violation occurs when the evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant's guilt or punishment. *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Such a violation is material when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 525, 514 S.E.2d at 325. In other words, the government's evidentiary suppression is so serious as to undermine confidence in the trial's outcome. *Id.* *Brady* applies to both impeachment ****54** and exculpatory evidence. *Id.* at 524, 514 S.E.2d at 324. Importantly, whether the prosecution acted in good or bad faith is irrelevant in determining whether a *Brady* violation occurred. *Brady*, 373 U.S. at 87, 83 S.Ct. 1194.

In this case, the evidence was clearly favorable to Durant, as defense counsel could have used it to impeach McRae. Accordingly, we turn to the second element—that the State possessed the information.

Because of the absence of South Carolina case law on the possession element in this context, we are guided by decisions from two federal circuits. The Third and Fifth Circuits have held the failure to provide information that could be obtained ***108** through a NCIC search is a *Brady* violation. *United States v. Perdomo*, 929 F.2d 967, 969-73 (3d Cir. 1991); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (finding a *Brady* violation where the government did not conduct a NCIC search of one of its witnesses despite assigning no bad motive on the government). Because we find these decisions persuasive, we adopt the reasoning employed therein.

In *Perdomo*, the defendant sought a government confidential informant's criminal record. *Id.* at 968-69. The prosecution conducted an NCIC search, which revealed no prior charges or convictions, but elected not to request local records from the Virgin Islands. *Id.* at 971. When it came to light that the informant had a significant criminal record the day after trial, the defendant moved for a new trial, which the district court denied. *Id.* 968-69. The Third Circuit held the district court erred as a matter of law in concluding the prosecution had no duty to conduct the search and provide the information, and remanded for a new trial. *Id.* at 970-74. In relevant part, the court recognized that "the prosecution, not the defense, is equipped with the resources to accurately and comprehensively verify a witness['s] criminal background." *Id.* at 973. Despite defense counsel's ability to obtain similar information through a public search, the court refused to shift the burden to the defense to obtain *Brady* information.

In *Auten*, the Fifth Circuit held the government violated *Brady* when it decided not to conduct a criminal background search on one of its own witnesses because of time constraints. 632 F.2d at 481. The government asserted that it could not suppress or withhold evidence that it did not know existed. The court rejected this approach, noting, "[W]e do not assign bad motive or bad faith to the prosecution. We do underscore, however, the heavy burden of the prosecutor to be even-handed and fair in all criminal proceedings." *Id.* at 481.

We have cited *Auten* with approval in the past by acknowledging that "information known to investigative or prosecutorial agencies may, under certain circumstances, be imputable to the State." *State v. Von Dohlen*, 322 S.C. 234, 240, 471 S.E.2d 689, 693 (1996), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). While we have also not required the State to conduct a fishing ***109** expedition to discover exculpatory evidence, *see id.* at 241, 471 S.E.2d at 693, requiring the State to provide accurate criminal background information on its own witnesses hardly can be described as such. We recognize that some jurisdictions construe *Brady's* possession requirement narrowly. *See, e.g. United States v. Young*, 20 F.3d 758, 764-65 (7th Cir. 1994) (declining to impute prosecutorial knowledge of a witness' criminal history when the government diligently searched for that information). Some courts have excused the government's failure to disclose if the information is readily available to the public. *See State v. Nikolaenko*, 687 N.E.2d 581, 583 (Ind. Ct. App. 1997) ("[T]he State will not be found to have suppressed material information where that information was available to the defendant through the

exercise of reasonable diligence."). However, we believe the better approach is to hold the State responsible for fulfilling its prosecutorial duties, including the duty to disclose under *Brady*.

This rule is sound, as faulting defense counsel for failing to discover material information about the State's own witnesses "breathes uncertainty into an area that should be certain and sure" because "[s]ubjective speculation as to defense counsel's knowledge or access may be inaccurate." ****55** *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 293 (3d Cir. 2016). Shifting the burden to defense counsel lessens the State's duty to disclose exculpatory evidence and has the risk of adding an additional element to *Brady*. *Id.* ("Adding due diligence, whether framed as an affirmative requirement of defense counsel or as an exception from the prosecutor's duty, to the well-established three-pronged *Brady* inquiry would similarly be an unreasonable application of, and contrary to, *Brady* and its progeny."). We agree with the Third Circuit that "[a]ny other rule presents too slippery a slope." *Id.* at 292.

With this in mind, we move to the facts of this case. Defense counsel first realized that McRae had a criminal history after her ex-husband notified him immediately after trial. The ex-husband expressed bewilderment that defense counsel did not ask about McRae's prior convictions during trial. Thereafter, counsel obtained a SLED background search using McRae's name, date of birth, and social security number, which revealed numerous prior convictions under several different aliases. While we concede this demonstrates the ***110** information was publicly available after paying for a search, this does not end the inquiry. The government not only has greater resources, *Perdomo*, 929 F.2d at 973, but also exclusive access to the NCIC database.[5] Moreover, when the State discloses *Brady* material, the defense has the right to rely on its veracity. We find it entirely unreasonable to shift the burden to the defense to independently investigate the criminal background of each of the State's own witnesses when the State has affirmatively claimed that its witness does not have a criminal background. It is not incumbent on the defense to review the State's NCIC search for misspelled names. While we do not suggest any improper motive by the State, we will not undermine a defendant's due process rights by overlooking and immunizing the State's mistake. Accordingly, we hold as a matter of law that the State was in possession of McRae's criminal background information and failed to accurately disclose it. Nevertheless, to warrant a new trial, Durant must demonstrate the trial court abused its discretion in finding the information was immaterial, a burden he fails to satisfy. *State v. Bryant*, 372 S.C. 305, 316, 642 S.E.2d 582, 588 (2007) (reviewing a *Brady* violation for an abuse of discretion).

Initially, we note McRae's criminal history included several convictions, many of them over ten years old, so it is unlikely that most of them would have been admissible. While we agree with the trial court that McRae's conviction for obtaining a signature under false pretenses likely would have been admissible, the defense never suggested that McRae —as opposed to Johnson—forged the deed. Perhaps more importantly, the State presented cumulative evidence in the form of the girls' testimony. As a result, the jury had ample evidence supporting its verdict. Accordingly, Durant cannot demonstrate the evidence was material because there was not a reasonable probability the result of the proceedings would have been different. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

***111 CONCLUSION**

For the foregoing reasons, we affirm.[6]

AFFIRMED.

BEATTY, C.J., KITTREDGE, FEW, JJ., and Acting Justice James Edward Lockemy, concur.

All Citations

430 S.C. 98, 844 S.E.2d 49

Footnotes

1 *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

2 *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

3 The South Carolina Law Enforcement Division enables public CATCH searches, an acronym for "Citizens Access to Criminal Histories." Sled Catch, https://catch.sled.sc.gov (last visited Sept. 5, 2019).

4 The State later clarified it did not include McRae's social security number in the search because it was not in possession of that information at the time.

5 FBI Criminal Justice Information Services Division, *National Crime Information Center*, https://www.fbi.gov/services/cjis/ncic (last visited Sept. 5, 2019).

6 Durant also contended the trial court erred in denying his motion for a mistrial due to an allegedly tainted jury pool, and his motion for a new trial based on an unconstitutionally coercive *Allen* charge and cumulative error. We affirm these grounds pursuant to Rule 220(b) and the following authorities:

1) As to the alleged tainted jury pool, see *State v. Crim*, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997) (noting a decision to grant or deny a mistrial is reviewed for an abuse of discretion and "[t]he power of the court to declare a mistrial ought to be used with the greatest caution"); *Id.* at 257, 489 S.E.2d at 479 ("An instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced."). Further, the evidence was cumulative, so any purported error was harmless. *State v. Wyatt*, 317 S.C. 370, 373, 453 S.E.2d 890, 891 (1995).

2) As to the *Allen* charge, see *Tucker v. Catoe*, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) ("Whether an *Allen* charge is unconstitutionally coercive must be judged in its context and under all the circumstances."); *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) ("A trial judge has a duty to urge, but not coerce, a jury to reach a verdict."). It is apparent the trial court did not err in directing the juror to fulfill the oath he took at the outset of trial, as the court did not urge the jurors to vote in any specific way. Moreover, the court's suggestion that the jurors would have to deliberate for as long as they wanted to be there that evening does not render the charge coercive. *See Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 454-57, 772 S.E.2d 544, 554-57 (Ct. App. 2015), *cert. denied* (holding an *Allen* charge was not improperly coercive where the court instructed the jury on the Friday before Labor Day that they could deliberate into the night, as well as Saturday, or the following Tuesday).

3) As to the cumulative error doctrine, because the trial court did not commit any reversible errors, we reject Durant's contention that a new trial is warranted. *See State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) ("Respondent must demonstrate more than error in order to qualify for reversal [pursuant to the cumulative error doctrine]. Instead, the errors must adversely affect his right to a fair trial."). Moreover, Durant never argued this ground to the trial court; accordingly, it is not preserved. *See State v. Freiburger,* 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an argument advanced on appeal that was not raised and ruled on below was not preserved for review).

STATE OF SOUTH CAROLINA)
)
COUNTY OF Sumter)

STATE)
VS.)
Larry Durant)
AKA:)
Race: B Sex: M Age: 61)
DOB: DOB SS#: Social Security No.)
Address:)
City, State, Zip:)
DL# * SID#)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2014 -GS- 43 - 0947
A/W#: 2013A4310200767
Date of Offense: 12/26/12-5/10/13
S.C. Code §: 16-3-655(B)
CDR Code #: 0396

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Criminal Sexual Conduct with a Minor in the Second Degree (0-20 years)
In violation of § 16-3-655(B) of the S.C. Code of Laws, bearing CDR Code # 0396
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:
Asst. Atty. General Renee Bane Abee SC Bar # 100017 Defendant Attorney for Defendant 108565 SC Bar #

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections** ☐ **County Detention Center,**
for a determinate term of 20 ~~days/months/years~~ or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____ ; provided that upon the service of _____ days/months/years and or payment
of $ _____ ; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered** **PTUP** _____

Total: $ _____ plus 20% fee: _____ $ _____ _____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED ☐

☐ Set by SCDPPPS Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____
Recipient: _____ Substance Abuse Counseling ☐

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$ 100.00
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§14-1-213 (Drug Court Surcharge)	$150	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$
TOTAL		$ 390
		$ 133.90

Random Drug/Alcohol Testing ☐
Fine may be pd. in equal consecutive weekly/monthly pmts. of $ _____ Beginning _____
$ _____ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk James C. Campbell
Court Reporter: Karen Ambrozitis

Presiding Judge _____
Judge Code: 2134
Sentence Date 5/26/16

SCCA/217 (03/2011)

The Supreme Court of South Carolina

The State, Respondent,

v.

Larry Durant, Appellant.

Appellate Case No. 2018-002125

RECEIVED
JAN 11 2019
SC Court of Appeals

ORDER

Appellant ask this Court to certify this case from the court of appeals pursuant to Rule 204(b), SCACR. The motion to certify is granted.

_____ C.J.
FOR THE COURT

Columbia, South Carolina

January 11, 2019

cc:
E. Charles Grose, Jr., Esquire
Alan McCrory Wilson, Esquire
William Frederick Schumacher, IV, Esquire
Ernest Adolphus Finney, III, Esquire
The Honorable Jenny Abbott Kitchings

The Supreme Court of South Carolina

The State, Respondent,

v.

Larry Durant, Appellant.

Appellate Case No. 2016-001264

ORDER

The time for serving and filing the Petition for Rehearing in the above entitled matter is hereby extended until June 10, 2020.

C.J.
FOR THE COURT

Columbia, South Carolina

May 18, 2020

cc:
Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
E. Charles Grose, Jr., Esquire
William Frederick Schumacher, IV, Esquire
Ernest Adolphus Finney, III, Esquire

The Supreme Court of South Carolina

The State, Respondent,

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Larry Durant, Appellant.

Appellate Case No. 2016-001264

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

J.

James, J., not participating

Columbia, South Carolina

July 8, 2020

cc: Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
E. Charles Grose, Jr., Esquire
William Frederick Schumacher, IV, Esquire
Ernest Adolphus Finney, III, Esquire

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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July 8, 2020

The Honorable James C. Campbell
Clerk of Court, Sumter County
Sumter County Judicial Center
215 North Harvin Street
Sumter SC 29150-4974

REMITTITUR

Re: The State v. Larry Durant
Lower Court Case No. 2014GS4300947
Appellate Case No. 2016-001264

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

DEPUTY CLERK

cc:

Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSION
)
COUNTY OF SUMTER) Warrants: 2013a4310200767/768
) 769/770/772/773
State of South Carolina)
)
Plaintiff,) **MOTION FOR BRADY AND OTHER**
) **FAVORABLE MATERIAL AND**
Vs.) **INCORPORATED MEMORANDUM**
) **OF LAW**
Larry Durant,)
)
Defendant.)

COMES NOW the Defendant, by through his undersigned counsel, and files this Motion for Brady and the others favorable material and incorporated Memorandum of law requiring the production of material to the Defendants within thirty (30) days of the receipt of this request or at least ten (10) days prior to trail. As grounds therefore, the undersigned would show as follows:

1. Under the United States Supreme Court decision in Brady v. Maryland , 373 U.S. 83, 83 S. Ct. 1194 (1963), the Prosecution has an obligation to produce all Brandy material for the Defendant well in advance of the scheduled trial date.

2. Defendants claims under Brady, and its progeny, as well as the language and spirit of Giglio v. United States, 405 U.S. 150, 92 S. Ct 763 (1972); United States v. Tashman, 478 F . 2d 129 (5th Cir., 1973); and Napus v. Illinois, 360 U. S. 264, 79 S. Ct. 1173 (1959); that he/ she is entitled to any and all records, memoranda and documents, as well as statement of the Prosecution and all appropriate state, federal, and local law enforcement agencies as to:

(a) All statements by the defendant, whether oral or written, if written, whether signed or unsigned.

(b) All handwritten notes made by police or other investigating officers of their interview or conversation with the defendant or any other witness.

(c) Any oral, written, or recorded statement made by any person to the Prosecution, Grand Jury or law enforcement agency in connection with this case.

(d) A copy of all tape recordings, audio or video, made by a defendant, witness or any other person in connection with this case. If their tape recordings have been transcribed, then a copy of the transcribed conversation is also requested.

(e) Any and all photographs taken of the defendant or any potion of his body.

(f) Any and all photographs taken at the scene of the alleged crime and/or the alleged victim or prosecuting witness.

(g) Any photographs that have been exhibited to any person for the purpose of establishing the identity of the perpetrator if the crime charged and the name and current address of the person or persons to whom the photographs were shown.

3. Any and all promises, rewards and inducements made to all witness herein, whether or not they have testified before any state or Federal Grand Jury, or other investigative agency, and regardless of whether they will testify at the trail herein.

4. Any and all plea bargains, promises, reward, reductions, dismissals, agreements not to bring criminal charges or any other inducements made to any witness herein, whether or not they have testified before any State or Federal Grand Jury, or other investigative agency, and regardless of whether or not they will testify at trail.

5. Any offer or grants of immunity in this case to any witness from loss of property, fine forfeiture, prosecution, or punishment it this or any other case.

6. Whether any witness called before the Grand Jury or who had or will give testimony to any investigative agency or at trail has ever been psychiatrically hospitalized or undergone psychiatric examination, treatment, mental status examination or care, and, if so, a list of named and addressed of the psychiatrists, hospitals and copies of any and all relevant records and report.

7. All notes or memoranda by psychiatrists or other medical or mental health examiners of their conversations with the defendants.

8. Any "inconsistent" statements of a particular witness or between witness, whether written or oral, that are known to the Prosecution or any other law enforcement agency.

9. Any and all "rap" sheets or histories of arrests or convictions of any indicated co-conspirator, State witness, defendants, or any co-defendant in relation to this case. Giglio v. U.S., supra

10. In addition, Defendants requests copies of any and all memoranda, reports and correspondence to and from the various law enforcement agencies regarding the investigation herein.

11. Defendants contends that he is entitled to any statements or admissions by a witness for or on behalf or the State with respect to the witness' memory or loss thereof.

12. Defendants contends that this Court should specifically direct the Government in the spirit of fairness and equity to seek and produce for defendant the documents, letters, records, and other items sought, irrespective of the States's determination of whether a witness' statement or a particular letter or exhibit can "help" the defendant. The defendant and his attorney, no the Prosecution, ought to be the judge of his/her defense and the documents relevant thereto and necessary in support of same.

13. To the extent the Defendant is specifically required to demsonstrate the materiality of the requested information, the defendant submits that this requirement is satisfied in this motion. United States v. Angurs, 427 U.S. 97 (1976).

14. Any and all physical or tangible items in the possession, custody, or control of or which could reasonably be brought within the possession, custody or control of the Prosecution, State, Federal or local law enforcement agency.

15. To disclose to counsel for the defense any and all evidence in the actual or constructive possession of the State which is of a favorable character for the defendant in this case and material to the issue of guilt or innocence or to punishment in this case, pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution, including, but not limited to, the following materials:

(a) Any oral, written, or recorded statements made by any person to the police, to the Prosecution, or to the Grand Jury which tends to establish the Defendant's innocence, to mitigate punishment, or to impeach, discredit or contradict the testimony of any witness who the

Government will call at the trial or the cause. Brady v. Maryland, 373 U.S. 83, S. Ct. 1194 (1963).

(b) Any police investigation report made to the police which tends to establish the defendant's innocence, to mitigate punishment, or to impeach , discredit or contradict the testimony of any witness whom the State will call at the trial of the cause. Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793 (1967).

(c) The names and addresses of all witnesses interviewed by the prosecution or any other law enforcement agency who might establish the defendant's innocence, mitigate punishment, or impeach, discredit or contradict the testimony of any witness of the state whether or not he witness may testify at the trial of the cause.

(d) Any information or material which tends to establish the defendant's innocence, to mitigate pundishment, or to impeach, discredit, or contradict the testimony of any witness whom the Government will call at the trial of the cause, Naupe v. Illinois, supra; Giglio v. U.S., supra.

(e) Any scientific or medical report which tends to establish the defendant's innocence, to mitigate punishment or to impeach, discredit or contradict the testimony of any witness whom the State will call a the trial of the cause. Ashley v. Texas, 319 F.2s 80(5th Cir.) cert. Denied, 375 U.S. 931, 84 S. Ct. 331 (1963). This request shall include any reports by or to the State Law Enforcement Division (SLED) criminalistics laboratory, Federal Bureau of Investigation (FBI) laboratories, County Sheriff's Department Laboratory or any other law enforcement laboratory concerning any examination made by said laboratories and/or personnel thereof, of any physical, photographic, oral or written evidence concerning the investigation of this case.

(f) All reports from the State Law Enforcement Division (SLED), Sheriff's Department, or any other law enforcement agency, including the Federal Bureau of Investigation concerning fingerprints checked in connection with this case.

(16) Recognizing that Brady v. Maryland, supra and other authories cited require that information favorable to the defendant be made available, and further recognizing that a genuine disagreement may arise as to whether or not a particular item of evidence is favorable, it will be requested that the Court provide for an in camera inspection of the items sought to be discovered should you feel such items are not favorable to the defendant. Ny permitting the Court to examine the items requested, the legitimate interests of the State will be protected in that no disclosure in excess of Brady, et.al. will occur. Further, it will be requested of the Court that said Order will be a continuing one, and if, prior to or during trial, the prosecution discovers additional evidence or material requested, the prosecution, is hereby requested promptly to notify counsel for the defendant of the existence of the additional evidence or material.

It is further requested that the prosecution promptly respond to the within request by notifying counsel for the defendant of the existence and availability of the information requested herein within (30) days of receipt of this motion and at least ten (10) days prior to trial.

WHEREFORE, the undersigned prays for such Order requiring production of the above listed materials and for that which is just and proper.

BY: _____

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Sumter, South Carolina
July 18, 2013

A Yes, we are.
Q And all of you are pretty close?
A Yes, we are.
MR. KENT: Thank you so much. That's all the questions I have.
THE COURT: Redirect?
MS. ABEE: I have no redirect for this witness, Your Honor.
THE COURT: All right. You may step down.
Next witness.
MR. FERNANDEZ: The State calls Ulanda McRae Riley.
THE BAILIFF: Place your left hand on the Bible, right your right hand, please.

ULANDA MCRAE, after being duly sworn, testified as follows:

THE BAILIFF: Thank you. Come around, please. State your name, spell your last for the record.
THE WITNESS: Ulanda McRae, M-C-R-A-E.

DIRECT EXAMINATION

BY MR. FERNANDEZ:
Q Ms. McRae, tell me, how many children do you have?
A Two.
Q And what are their names?
A A.R. and [sibling's name] .
Q All right. Do you have any nieces or nephews?

A I do.
Q Could you tell me about who they are?
A K.R. , [niece] , [niece] , those are my nieces. Nephews are [nephew] , [nephew] and [nephew] .
Q Thank you. What church did you attend up to 2013?
A Well, Miracle Deliverance Temple, which later changed to Word International Ministries.
Q How long did you attend those churches?
A I started in 1999 up to 2013.
Q And who was the head pastor of those churches?
A Larry Durant.
Q Is Mr. Durant here today?
A Yes, he is.
Q Could you identify him for us?
A He is the gentleman sitting over there in the navy blue suit with the blue shirt on.
Q And tell us a little bit about your church routine. How often would you go to church on a weekly basis?
A On a weekly basis, I could go to church anywhere from three, four times a week. Tuesday would be at Bible study at one of the churches, which is at 710 Manning Avenue, Wednesday could be Bible study at the other church on 1010 North Guinyard, and then Friday night service, we rotate sometimes between 1010 North Guinyard and 710, and on

Sundays, we'd normally have 8:00 o'clock service, regular 11:00 o'clock service and sometimes we would be back that afternoon about 5:00.

Q And who did you bring with you to those church services or Bible study or any time you were visiting either of those churches?

A Well, starting, it would be my children --

Q Okay.

A -- until they got grown. Then my niece and my nephew.

Q When did your niece, K.R. , decide to come live with you?

A K.R. came to live with me in July of 2012.

Q And I think you just said it, but did you bring her to church with you?

A Yes, I did.

Q The church locations, you said there's two locations. Do you remember where they're located?

A Yes.

Q Okay.

A 710 Manning Avenue.

Q Would that be the bigger or the smaller church?

A That was smaller.

Q Where was the bigger church?

A The bigger church is 1010 North Guinyard Drive.

Q And throughout the years you've been involved in this church, what was your role? Did you ever obtain any kind of official role with the church?
A I was the youth director, secretary, armor bearer for Pastor Durant and his wife, altar worker, Sunday School teacher, kitchen committee. I believe that's it.
Q Okay. In particular, the armor bearer designation, what were the responsibilities with that? What's an armor bearer?
A Armor bearer, normally, we assist the pastor, his family on more of a personal level, as well, you know, within ministry.
Q And were there any -- the church service on Sundays, tell me a little bit about what the process would be. Was there ever any time where Pastor Durant would pray for individuals there?
A There would be times during -- after he finished preaching, he called it to make an alter call. And with that, then several people would come up and he would pray then.
Q And what's an altar call? What kind of prayers would be done during the altar call?
A Sometimes it's like an open prayer where he just prayed for someone -- you know, prayed as a whole. And there are other times where he would have a word of

prophesy for them and he may say something to that person directly.

Q Did Mr. Durant ever do private prayer sessions with either your daughter or your niece?

A No, not private prayer with them.

Q Okay. Were you aware of any?

A I wasn't aware of a private prayer.

Q Do you know why you're here today? Do you know why we're all here?

A Yes.

Q Tell me a little about a conversation you overheard your daughter and your niece having?

A Well, it was on May 19th. We just got back from Louisiana. And I just went to the grocery store and came back home. And as I was coming down the hall --

Q Let me interrupt you, ma'am, one second. During this conversation that you overheard -- did you overhear a conversation, first of all?

A Yes.

Q I'm going to be very specific.

A Yes, I did.

Q Where did the conversation occur? Where did you hear it?

A It took place in the bathroom in my house down the hall.

Q And did the -- who was having the conversation? Who were the two girls talking -- or the girls talking?
A My niece, K.R. , my daughter, A.R. .
Q Were they aware that you could hear them?
A No.
Q And during the course of what you overheard in this conversation, did they disclose or did they talk about a sexual assault that had occurred to them -- on them?
A Not to them.
Q Okay. Did they disclose a sexual assault in general?
A Yes, they did.
Q Okay. And during this conversation, did they say where that sexual assault had occurred?
A Yes.
Q And where did they say it had occurred?
A At the church.
Q Okay. Were they specific about where it occurred or just at the church in general?
A They were specific about that church.
Q Okay. Did they say when that sexual assault had occurred?
A I don't recall them saying when.
Q All right. After hearing that conversation -- after overhearing that conversation, what did you do next?
A After I overheard it, they came out the bathroom, and

then I told them to meet me in the kitchen.
Q Did you confront them about that conversation?
A Yes, I did.
Q Okay. And after confronting them with that conversation, did you have another conversation with K.R. and A.R. ?
A Yes, we did.
Q Okay. And during that conversation, did they disclose to you a sexual assault on them?
A Yes, they did.
Q Okay. And when you were discussing this with them, did they tell you where their assaults had happened?
A Yes, they did.
Q And where did they tell you it had happened?
A K.R. told me it happened at 710 Manning Avenue, the church there.
Q Okay.
A And then 1010. A.R. told me it happened at 710 Manning Avenue and 1010 North Guinyard.
Q Okay.
A And at his residence.
Q Okay. Now, did they tell you when the assaults happened?
A No, they didn't say when.
MR. FERNANDEZ: Beg the Court's indulgence.

(Pause.)

BY MR. FERNANDEZ:

Q Okay. After the sexual assaults occurred -- after the sexual assaults were disclosed to you, what was your reaction?

A My reaction? I wanted to cause bodily harm to him.

Q Did you end up confronting the Defendant, Mr. Durant?

A I didn't confront him -- I did end up eventually.

Q Did you call him on the phone that night?

A I did not call him.

Q Okay. Tell us about the phone conversation.

A The phone conversation, my mother called him.

Q Okay. Who's your mother?

A Lizzie Johnson.

Q Okay. Were you a part of that conversation?

A Yes, I was.

Q Did you hear it?

A Yes, I did.

Q And how could you hear it?

A Because I was on the other line.

Q Who else was present during that phone conversation?

A My mother, Lizzie Johnson, was on the phone. I was on another line. My niece, K.R. , and my daughter, A.R. .

Q Okay. Tell us about that conversation, please.

A In the conversation, my mom confronted him, told him what the girls just said and he said that was a lie. Then he asked my mother where was the girls. My mother said, They are right here. So she passed the phone to K.R. , and K.R. asked him, said -- so K.R. said, What are you telling them?

MR. KENT: I'm going to object to the hearsay, Your Honor.

MR. FERNANDEZ: Your Honor, maybe this will help.

BY MR. FERNANDEZ:

Q But without saying what K.R. or A.R. said, can you tell us how the conversation went? In particular, what Mr. Durant said?

A Mr. Durant said it was a lie, that didn't happen. Then he got on the phone with A.R. , the question was asked what was going on. A.R. said --

Q And without saying what A.R. said --

A Yes --

Q -- how the conversation continue?

A It continued with Durant saying, You shouldn't have said that. Y'all need to stop that. Then it was asked where was I. Mr. Durant asked where was I. And I said, I'm here on the phone.

Q Okay.

A And the conversation went between him and I and he

asked me, Why are they saying this or why they doing this to him. And I said -- for the record, I said, excuse my French, I said, Why the fuck are you doing it to them? And he said -- he was like -- and he started crying.

Q Did he say anything else after he began to cry?

A He then said that he wanted to meet with me and the girls. He wanted to apologize to them and say that he was sorry. I said, If you didn't do anything, why do you want to apologize?

Q Okay. When you physically -- did you have a face-to-face meeting with Mr. Durant?

A I did not.

Q As far as you know, who had the face-to-face meeting with him?

A My mother, Lizzie Johnson.

MR. FERNANDEZ: Beg the Court's indulgence.

(Pause.)

MR. FERNANDEZ: No further questions, Your Honor. Thank you, ma'am.

THE COURT: Cross?

MR. KENT: Thank you.

CROSS-EXAMINATION

BY MR. KENT:

Q You had mentioned that -- oh, I'm sorry. How are you?

A I'm doing well. How are you?
Q I apologize. We haven't gotten to meet. My name is Shaun Kent. I'm not going to ask you very many questions, but if I ask you a question and you don't understand, simply tell me you don't understand and I'll rephrase it, okay?
A Okay.
Q The only real question I have is, I think from their questioning, you talked about K.R. came to live with y'all. Why did she come to live with y'all?
A She was staying with my brother in New Jersey. And at the time, his work schedule got hectic, so he asked me if I can keep K.R. and his son, [provides son's name]
Q So that's the only reason she came, just because of the work schedule?
A Yes, that was my understanding.
Q And then, also, there was some question about she was lying really bad back then. What was she lying about that would get her in so much trouble?
A It wasn't something that she would get -- it was what typical teenagers would do. It was not so much that would get her in trouble, but typical of what teenagers do when they want their way.
Q What was it?
A It would be something about grades. I want to play

basketball, so I lie about my grades.

Q Was there anything about cell phones or anything like that?

A Cell phone, she's not supposed to have one. She got one. But it wasn't nothing that would have caused her to go to jail for or anything.

Q I understand. I was just asking the question.

MR. KENT: Thank you so much for your time.

MR. FERNANDEZ: Nothing further, Your Honor.

THE COURT: You may step down.

THE WITNESS: May I be excused?

MR. FERNANDEZ: Yes.

THE COURT: Next witness?

MS. ABEE: Your Honor, the State calls A.R.

A.R.

THE BAILIFF: Place your left hand on the Bible, raise your right hand. State your name, please.

THE WITNESS: A.R.

A.R., after being duly sworn, testified as follows:

THE BAILIFF: Thank you. Come on around, please. State your name, spell your last for the record.

THE WITNESS: A.R. , A.R. .

DIRECT EXAMINATION

BY MS. ABEE:

THE WITNESS: Myer Donnell W-H-A-C-K.

DIRECT EXAMINATION

BY MR. KENT:

Q All right. Mr. Whack, how are you doing, sir?

A Doing fine.

Q Just state your name to the jury one more time, if you will.

A Myer Donnell Whack.

Q Mr. Whack, where are you from?

A I'm from Manning.

Q How long have you lived in Manning?

A Probably all my life, until I graduated from high school.

Q Where did you go to high school?

A Manning High.

Q When did you graduate?

A In 1994.

Q Okay. What do you do currently?

A I'm a CNC technician at Blythewood in Columbia, South Carolina.

MR. KENT: Are y'all having trouble hearing? It's reverberating badly. It's not just me. Let's see if we can turn this microphone.

BY MR. KENT:

Q Let's try that again, Mike. Tell me what you do.

A I'm a CNC technician in Blythewood.
Q I'm going to need you to lean forward a little bit more because now I can't hear you.
A I'm a CNC technician inside Blythewood, south Carolina.
MR. KENT: I'm still hearing the reverberation. Can we take a little break?
THE COURT: Let's see what we can do.
MR. KENT: Technology, sometimes it's great and sometimes it's not.
BY MR. KENT:
Q We're going to try one more time. Tell me again for the third time where do you work or what do you do?
A I work inside Blythewood, South Carolina. I'm a CNC technician.
Q We're good to go. We're going to keep going on that note. How long have you been doing that?
A For like 10 years now.
Q CNC technician. I don't understand what that is.
A I program machines.
Q Okay. Are you married?
A Yes, I am.
Q How long have you been married?
A Right now, it will be seven years in this month right here.

Q Do you have any children?
A Yes, I do.
Q Tell me about your children.
A I have four kids. I have a son that is 21. I have a daughter that's 16, another daughter that is 10 and another daughter that is five.
Q And the two of us, we've known each other for quite some time?
A Right, correct.
Q I've known you for almost a decade, if not longer?
A Right.
Q I'm going to ask you some personal questions as you understand.
A Right.
Q I'm not trying to embarrass you, but if you're on the stand, there's some things that we have to ask you.
A That's fine.
Q I understand that at some point in time, you've had some fraudulent checks charges in your life?
A That's right.
Q You've had several fraudulent check charges?
A That's correct.
Q And you've also had a charge for failure to stop for a blue light?
A Correct.

Q Those are all charges that you've had in your life in your past?
A Right.
Q Some as recently as last year?
A Correct.
Q Sorry to get that out, but sometimes we have to talk about things when you take the stand. I want to talk to you about where do you go to church?
A Word International Ministries.
Q How long have you been at that church?
A For like 20 years.
Q Tell me about the church.
A Oh, it's a wonderful church. I've been there since I was 19 years. I grew up in the church.
Q Where is the church located?
A At 1010 North Guinyard.
Q Do you have position at the church? Is there something you do?
A Yes, I do.
Q What do you do at the church?
A I'm an elder, also, I'm an armor bearer. I'm a sound technician, video. I wear a lot of hats.
Q We're going to talk about those hats and make sure everybody understands.
A Uh-huh.

Q Even though you have a 21-year-old daughter -- or son, you don't look old enough to be call an elder. Explain to the jury why you're called an elder.

A I'm an elder because, you know, pretty much I seek God, you know. I went through the channels of doing the things I needed to do to serve God. You know, I live before God every day. I study my Word and, you know, pretty much, you know, it's just a call God has placed on my life.

Q You're also an armor bearer?

A Of course.

Q We've heard that phrase a lot in this courtroom. Could you explain to the jury what an armor bearer is?

A An armor bearer is someone that serves and protects the leaders. I'm pretty much -- you know, I serve my leader because, you know, at the point, you know, like I said, he could not see. Also he's -- like, you know, almost like he's guide. Make sure, you know, all his personal stuff is together, make sure all his stuff is, you know, ready for Sunday. You know, also, do things outside his house, make sure his grass is cut, car is clean, make sure his clothes is right. As an armor bearer, we do a lot.

Q Do you lie for him?

A No, oh, no.

Q Would you do anything for him? It sounds like you just work for this guy?
A No, I don't. I would not lie.
Q Do you work for him or do you get paid by him?
A No, I not.
Q So why do you do all this stuff?
A Because I believe the man of God that he is. I believe who he is.
Q So you do stuff for him?
A Right.
Q Tell me again about the arm -- so you've known -- how long have you known Larry Durant?
A Approximately, like, 20 years.
Q And as your role as an armor bearer, tell us a normal thing that happens after service, what happens?
A After service, we do to the back. We make sure we wipe him down. Make sure he's fine. He don need anything. The majority of the service sometimes he don't want to see somebody. And if he does want to see somebody, you know, he probably just say hey, I want to see someone. But the majority of time, people come to the door and say I want to see him. And if he really want to see that person, he will say yeah or nay. A lot of times he will be tired and worn out.
Q So when he goes to see somebody, what do y'all do?

You just leave them there and leave for hours?
A No, we're right at the door.
Q What do you mean by right at the door?
A Right at the door. It's like the door is right there. It's like you can't go no farther right there. It's like a brick building. You can hear everything that's inside of the building. It's not like sound proof.
Q So you would stand right outside the door when anybody would go into the room to meet with Pastor Durant?
A Correct.
Q Is that the role of the armor bearer?
A Right.
Q Is it a block -- we haven't heard this door described. Is it a block door? Is there a window on the door? Can you see through the door? What type of door?
A It's a door. It has a window on the door. It's a wood door. I mean, it's not sound proof.
Q So you can hear things that go on on the other side of the door?
A Correct.
Q Have you ever heard anything inappropriate that you thought something was going on in there?
A No.
Q What's longest that you've ever had anybody sit inside of the room with Pastor Durant?

A Maybe about five or 10 minutes, no longer than that.
Q So no one is ever there for a long period of time?
A No, no.
Q What would happen if somebody was in there for a long period of time?
A I would find out what's going on because, you know, we have other people waiting, other people want to see him. You know, what's going on.
Q And we've heard stuff about these doors locking. You would be right there behind the door. Have you heard the door locked?
A No, no, no.
Q Would you be suspicious if you heard the door lock?
A Yes, yes.
Q In your mind, have you heard the door lock?
A Never did.
Q Has there ever been a time where you've walked inside of the room or knocked on the door and gone to talk to Pastor Durant while he's in there meeting with somebody?
A Yes, many times.
Q So there's nothing to stop you from walking in and out?
A Nothing to stop me, no.
Q In the 20 years you've known him, has he ever stopped you and said don't come in here, I'm in the middle of

something or anything like that?
A No.
Q I'm going to talk to you specifically about some folks?
A Okay.
Q Do you know the name Lizzie Johnson?
A Yes, I do.
Q Do you know the name K.R. ?
A Yes, I do.
Q Do you know the name A.R. ?
A Yes, I do.
Q Do you know the name T.H. ?
A Yes, I do.
Q Do you know the name D.B. ?
A Yes, I do.
Q Now, starting with the last four I mentioned, were those members of the church?
A Yes.
Q Would you see all of them hanging around together?
A Yes.
Q Were they always often together?
A Yes.
Q Did you ever see them go inside of the room and talk to the pastor?
A Yes.

Q So that's nothing -- they would go in there and talk to the pastor?
A Yes.
Q At any point in time, did you hear anything while they were inside of the room that you thought was inappropriate?
A Never did.
Q Did you ever see K.R. and A.R. at church at the same time?
A Yes.
Q Anything raise your suspicions while they were at church or anything of that nature?
A No.
Q So your testimony as his armor bearer, you're with him pretty much all the time?
A Pretty much.
Q You or somebody else. Who are some of the other armor bearers at that church?
A We got Elder Vaughn, Missionary Hodge, sometimes it would be Regina Maynard. You know, that's pretty much it.
Q So for a large portion of the time, you're with the pastor?
A Right.
Q And you're with him -- when he's at the church, are you with him pretty much all of the time?

A Yeah.
Q How does he get home?
A Pastor.
Q And you say pastor, his wife?
A His wife.
Q That lovely lady who has been sitting behind him the whole time?
A Yes.
Q So she's usually the one who will take him?
A Yeah.
Q So he doesn't get done with church and just drive himself home?
A No.
Q So somebody is waiting around for him after church?
A Right.
Q And it's generally his wife?
A His wife.
Q I have noticed when we're going in and out of the courtroom, he puts his hand on your shoulder and you guide him and walk him places?
A Right.
Q Why do you do that?
A So I can let him know what's coming up, what's close by so he won't go up and fall and hurt himself.
Q Why would he bump and fall?

A He has two prostheses and he can't see.
Q So this is something you've been doing for a long time?
A For a long time.
Q Or somebody does it?
A Right.
Q Do you ever see him walking and going by himself anywhere?
A No.
Q He always has somebody guiding or leading or taking him somewhere?
A Right.
MR. KENT: Thank you so much, Mr. Whack. Answer anything from the State.
THE COURT: Cross?

CROSS-EXAMINATION

BY MR. FERNANDEZ:
Q Mr. Whack, good morning.
A Good morning.
Q I want to explore a little bit what about it means to be an armor bearer.
A Okay.
Q Just for my own personal edification. I know you talked a little bit about it. I'm going to expand on what you just said if that's okay.

A Uh-huh.
Q I think you did comment that you do -- in addition to your official functions as being an armor bearer, I guess, that's church; is that correct?
A Uh-huh.
Q Would be official -- your official responsibilities would include things that you do at church?
A Right.
Q In addition to those responsibilities, you actually do other things that people would probably consider private duties, personal assistant type jobs. Would that be correct?
A I wouldn't call it private. It's just part of the job because I know his abilities. I know what he can and cannot do by being physically blind and not having legs.
Q Okay. So you consider doing his laundry and all the -- mowing his lawn, those are all things that are part of the church?
A No, I don't laundry.
Q Oh, sorry. I thought you said laundry. I apologize. I thought you said wash clothes, you didn't say that?
A No.
Q So you never do laundry?
A No.
Q Okay.

A Why should I? He has a wife.
Q Okay. So you mow the lawn?
A I mow the lawn, I wash the cars. I get his clothes out.
Q So you said things like washing laundry, that should be what his wife does?
A His wife does.
Q And what other things should his wife should do that you don't do?
MR. KENT: Objection, calls for speculation.
THE COURT: Sustained.
BY MR. FERNANDEZ:
Q You've known the Defendant, Mr. Durant, for how long, 20 years?
A About 20 years.
Q And how old were you when you would have met him?
A I was 19.
Q And did you meet him in school, the same neighborhood, like where would you guys --
A No, I met him by Lizzie Johnson.
Q Okay.
A I met him by Lizzie Johnson because Lizzie Johnson was married into my family by my uncle. I've known her for a while since I was young.
Q Ms. Johnson?

A Ms. Johnson.
Q Okay.
A I've known her since I was young. I met him by him coming to my house. And he said something that startled me. And when it startled me, it came to pass. And from that point on, I was following him since then because I believed who he was by being the man of God he was.
Q Now, would you consider yourself a fairly religious person?
A Very.
Q And I think you said it before, you just kind of touched on it before when you were talking to me, you believe that Pastor Durant is inspired by God; is that correct?
A Yes, he is.
Q So when Pastor Durant says something, you believe it as true?
A Amen, uh-huh.
Q And we agree that God, perhaps, works in mysterious ways?
A Yeah.
Q Okay. And so if Pastor Durant asked you to do something that, perhaps, you find odd or, perhaps, out of order, would you follow it?
A No, I would not.

Q Okay. So you do have a limit as to what you would do?

A Right. If it's not in the will of God, if it's not right I'm not going to do it. Because I'm not going to hinder myself nor my kids.

Q So you believe that Pastor Durant can be wrong sometimes, is that what you're saying?

A We all human.

Q Okay. I'm going to go over a little bit of your record because I know counsel did touch on it. Just correct me if I'm wrong, I just want to talk to you a little bit about it. 2006, you have six counts of fraudulent check; is that right?

A Correct.

Q So you forged checks and submitted them as true?

A Yeah.

Q In 2008, you have another fraudulent check charge?

A Uh-huh.

Q In 2011, you have a failure to stop for blue lights charge?

A Uh-huh.

Q And that means that you actually went -- when police tried to pull you over --

MR. KENT: Objection, Your Honor, you can't get into the details. I think he's answered the question.

MR. FERNANDEZ: Okay. I'll move on.

THE COURT: Go ahead, go ahead.

BY MR. FERNANDEZ:

Q In 2012, you have another fraudulent check charge, that's 2012?

A Yes.

Q And these are convictions, so you've been convicted in court?

A Uh-huh.

Q And 2015, you have another fraudulent check charge, two counts?

A Yeah, I guess so. I don't remember that. If you say so.

Q You don't have any reason to dispute that?

A No.

Q So you do?

A Uh-huh.

Q Now, let me talk a little about the services. And I think --

MR. FERNANDEZ: Permission to approach the witness, Your Honor, to show him a piece of evidence?

THE COURT: Go ahead.

BY MR. FERNANDEZ:

Q I'm going to ask you to identify a few things for me. These are pictures that have already been entered into

evidence. I just want you to take a look at these. The first is marked State's Exhibit No. 1, the second is marked State's Exhibit No. 2 and the third one is marked State's Exhibit No. 3. Would you please tell me if you recognize what these pictures show?

A That's his office.

Q Okay. And when you say his office, whose office is it?

A It was the Apostle's office.

Q And what location -- what church location would this office be?

A 1010 North Guinyard.

Q Okay. Is that his desk, Pastor Durant's desk?

A Yes.

Q Is that another picture of his desk?

A Yes.

Q Tell me what this is a picture of?

A His door.

Q And what material are the walls made of in this church office?

A Brick.

Q Would it be cinder block?

A Yeah.

Q And what material is the door made of?

A Wood.

Q That's wood?
A Uh-huh.
Q And is there a window in the door?
A Uh-huh.
Q Is the window covered up?
A Yes.
Q And is there two signs on the front of the door?
A Yes.
Q And what do the signs say?
A Not not enter.
Q Okay. And the other sign on the doorknob?
A Please knock.
Q Is that true and accurate about how the office generally looks?
A Yeah.
Q And I think you just testified earlier people did frequently obtain private prayer sessions with Mr. Durant after a prayer service?
A I don't call -- we don't call it prayer session.
Q What would you call it?
A It's a meeting.
Q The during these meetings -- and any number of people would go to these meetings, is that what you said before?
A Yeah, I mean, you have people who want to see him after service. Some services, he did not want to be

bothered and some services he's like okay. He wants to see them if people really want to talk to him. Not every service.

Q And you said approximately five to ten minutes these meetings would last?

A Correct.

Q During these meetings, was the door closed?

A Yes.

Q And I think you already testified, but K.R. , A.R. , T.H. and Anissa D.B. , they all attended private meetings when you were standing outside?

A I mean, they came there, but normally five to ten minutes.

Q But they were in closed-door meetings?

A Right.

Q And I think you said that you would have heard everything that was going on outside?

A Correct.

Q And I guess it stands to reason if there were no words being spoken, you would have heard nothing, correct?

A Right.

Q Let me ask you a little about the Defendant, Mr. Durant, himself. Has he -- you said -- do you drive him around?

A Yes.
Q Okay. Has he ever driven a car?
A No.
Q He's never driven?
A Never driver.
Q Do you know if he's ever obtained a driver's license?
A Yes, he has one.
Q He has a driver's license?
A Uh-huh.
Q Okay. Thank you. How does -- you said he reads the word of the Bible. How does he read?
A He doesn't read.
Q Does he use braille or is there a special --
A No, he has phones and iPad. He has people like his wife and myself or other members that reads to him. A lot of things on his iPad has stuff to read to him.
Q So you've never seen him read anything?
A No.
Q Has he ever used a cell phone before?
A No. He know how to talk. He knows how to answer a cell phone, like blue tooth.
Q Does he ever use his fingers --
A No.
Q -- to do things on a cell phone?
A No.

Q You say you've been around him all the time?
A Correct.
Q I mean, you eat lunch him?
A Yes, I have.
Q You wake up -- in fact, during court, you actually usually will lead him around, correct?
A Correct.
Q And estimate how many hours a day you spend with Mr. Durant?
A Well, I mean, I work, too. I have a job.
Q You work normal hours at a job?
A Yeah, I have a job and a family, too, as well.
Q Okay. So not including your hours at work, at least, so is's a nine-to-five-type job?
A Yeah, I work 12 hours a day.
Q You work 12 hours?
A I work 12 hours a day.
Q Not including those times, how often do you spend with Mr. Durant?
A If called during the course of the day -- if I'm at work and I call him and I said, Apostle or Pastor, do you need anything, if needed, I'll go and help out whatever needed, but if he don't need anything, I usually stay home. But if he needed to go anywhere that places of prayer, church, or anything, I'm there.

Q Okay. And he has asked you to go retrieve people for private meetings before? He has asked you to go say hey, this person needs to come --

A They usually come to the door.

Q Have you ever retrieved someone for him?

A No.

Q Never?

A No.

Q And you said before that your role as armor bearer is to serve and protect Mr. Durant?

A Correct.

Q And it's -- is that an important role that you take very seriously?

A Yeah, because that's my leader. That's the one who's hearing from God for me. Of course, I'm going to make sure he's in a safe environment that -- you know, that he's safe and that the pastor is safe, his wife is safe. You know, he can hear from God, of course.

Q So it's your job to keep him safe and protect him?

A Not my job, whoever is the armor bearer.

Q In your role as an armor bearer --

A Right.

Q -- it's your job?

A And every member.

Q I'm sorry, I didn't hear you?

A And every member.
Q Okay.
A Uh-huh.
MR. FERNANDEZ: Beg the Court's indulgence one moment.
(Pause.)
MR. FERNANDEZ: No further questions, Your Honor.
Thank you, Mr. Whack.
THE WITNESS: You're welcome.
THE COURT: Redirect?
MR. KENT: Nothing further, Your Honor.
THE COURT: All right. You can step down.
Next witness.
MR. KENT: Your Honor, we would call Elvin Vaughn to the stand.
THE BAILIFF: Place your left hand on the Bible, raise your right hand, please.
THE WITNESS: Elvin Vaughn.
ELVIN VAUGHN, after being duly sworn, testified as follows:
THE BAILIFF: State your name and spell your last for the record.
THE WITNESS: Elvin Vaughn, V-A-U-G-H-N.
DIRECT EXAMINATION
BY MR. KENT:

Q Mr. Vaughn, how are you doing, sir?
A Pretty good, sir.
Q I'm going to need you to speak loudly and clearly enough so the person on the back end of the jury can hear every word you're saying, okay?
A Absolutely.
Q And Madam Court Reporter is taking down every word that you're saying, so she can't take your head shakes or nods or anything of that nature, so make sure we speak in words, yes and no in answering the questions. Okay?
A Yes.
Q At any point in time, you do not understand the question that I ask or if I speak entirely too fast, simply tell me to stop, slow down, okay?
A Yes.
Q Let's tell the jury a little about yourself. Tell them who you are, where you're from. Just tell them who you are.
A Again, my name is Elvin Vaughn. I'm a minister at Word International Ministries. I'm a truck driver by trade. I'm an armor bearer for Apostle Durant.
Q Let's talk about your background. Are you married?
A Yes, sir, I am.
Q Who are you married to?
A Arlisa Vaughn.

Q How long have you been married?
A Eight years.
Q Do you have any children?
A Absolutely.
Q How many children you have?
A I have five total.
Q Tell us the names and ages of your children.
A [provides names of children]
Q I was about to say don't forget one of your kid's names.
A Yeah.
Q Your wife's not in the courtroom, we'll be okay. How long have you been driving trucks?
A Eighteen years.
Q And you still do that, correct?
A Absolutely.
Q I'm going to get right into it and talk to you a little bit about why you're here today. You mentioned that you're an armor bearer?
A Yes, sir.
Q Explain to the jury what an armor bearer is?
A Basically, armor bearer serves the purpose as prayer to the pastor, whatever needs he or she may need. You kind of serve as -- you serve. You're a server to whatever they need. And what I mean server, I mean to the

degree of, especially in this case, where the Apostle have on legs, he has to be led to different places. He cannot go on his own. He cannot see on his own. He can see to a certain degree, but he cannot see like you and I can see. And I have help with wearing glasses, but he -- it's to the extreme.

Q Are you -- you say you serve at the Pastor's request and you do things for him. Do you cheat, lie and steal for him?

A Absolutely not.

Q Would you cheat, lie or steal for him?

A Absolutely not.

Q Would you do anything that would affect your religion?

A Absolutely not.

Q That's not something that's in your candor. That's not something you would do. Why wouldn't you?

A Well, because, first of all, I fear God and what God would do. And I can't do that. That's just not in my character.

Q Now, in your role as an armor bearer, have you ever -- well, tell me what happens after church sessions.

A Well, what happens normally if we have visitors, visitors, they would be -- they would come and they would greet the pastor, the apostle. For the first time

visitors, that's the normal thing. And when they come back there, an armor bearer is back there at all times. And with that being said, whether it be first time -- like I said, first time visitors, you know, they come.

Q And when you say always back there at all times, is somebody generally with the pastor at all times?

A Absolutely.

Q Why is that? He can't have a moment by himself?

A Well, no, that's not the case. Like I say, for the most part, he can't see.

Q And what about his legs?

A He has none.

Q So that makes it even more difficult?

A Absolutely.

Q And you said he can see some?

A Right.

Q And he can see directly in front of him?

A Right.

Q He has difficulty seeing?

A Absolutely.

Q And he's legally blind?

A Absolutely.

Q And he has no legs from the knees down?

A Absolutely.

Q I'm going to ask you some names. Do you know an

individual by name of K.R. ?
A Yes, sir.
Q Do you know an individual by the name of A.R.
A.R. ?
A Yes, sir.
Q Do you know an individual by the name of T.H.
T.H. ?
A Yes, sir.
Q Do you know a woman by the name of D.B. ?
A Yes, sir.
Q Were they all members of your church?
A Yes, sir.
Q Was this a group that would always hang around together?
A Yes, sir.
Q So this is something that was known that they would hang around together?
A Absolutely.
Q At any point in time, did you ever see them have meetings or talks with Pastor Durant?
A By themselves, no.
Q Explain to the jury what you mean by that.
A Well, when it comes to meetings, like I said, as you said meetings, they -- everyone would want to see the pastor from time to time concerning whatever they're got

going on. And a lot of times, they would last about two, five minutes tops.

Q So they weren't long meetings?

A No.

Q Why weren't they long meetings? Would you feel awkward if there was a long meeting happening?

A Absolutely.

Q Where would you be when these meetings or talks or anybody would meet with the pastor?

A Right by the door.

Q And we've heard testimony, was this the type of church where you couldn't hear anything?

A It's paper thin. The walls are paper thin. You could hear anything going on, you know, conversation-wise. You could hear it. It's just not that silent.

Q If you were sitting outside the room and you heard something or heard something going on, would you have walked in?

A Absolutely.

Q Did you have permission to walk in? Did anyone ever tell you, don't you dare walk into these rooms?

A Yes, sir.

Q You could have always walked in at any point in time?

A Yes, sir.

Q Sometimes, did you just walk in?

A Yes, sir.
Q So there weren't -- did you walk in because there was trouble or just sometimes just walked in?
A Just walked in.
Q And that's something all armor bearers were allowed to do?
A Absolutely.
Q Anybody could walk into the room or walk out whenever they wanted at any point?
A Right.
Q Is it your testimony with these paper thin walls at the church you never heard anything at the church?
A Absolutely not.
Q How would Pastor Durant get home?
A His wife would bring him or -- bring and take him.
Q So she was always at church with him?
A Absolutely.
Q This wasn't a fellow who was just hanging out at church by himself with nobody there just hanging out?
A Not at all.
Q So he was there, he was either with one of you armor bearers. And then when it was time to go home, whenever it was, his wife would take him home?
A Absolutely.
MR. KENT: Thank you so much. Answer any questions

from the State.

THE COURT: Cross?

MS. ABEE: Yes, sir, Your Honor.

CROSS-EXAMINATION

BY MS. ABEE:

Q Mr. Vaughn, you stated that the Defendant can see to a certain degree, right?

A Yes.

Q Have you ever seen him drive?

A No.

Q Do you know whether or not he has a driver's license?

A Yes.

Q So he does have a driver's license?

A Yes.

Q Now, let's talk about, you said that you, essentially, have to help lead him around because he doesn't have legs, right?

A That's correct.

Q But he has prosthetics, doesn't he?

A That's right.

Q And he can talk on his prosthetics, can't he?

A Yes, that's right.

Q In fact, when people have meetings with him, you're not in that room with him then, right?

A Sometimes I am.

Q But sometimes you're not, is that fair?
A That could be fair.
Q So he could move around his office, right?
A To a certain degree.
Q And do you know whether or not the Defendant has any kids?
A Yes.
Q Okay. So he has children?
A Absolutely.
Q Now, you stated that you never saw D.B. or T.H. or K.R. or A.R. have meetings by themselves with the Pastor, right?
A Right.
Q But there are other armor bearers, aren't there?
A Absolutely.
Q It's not just you?
A Absolutely.
Q And you stated that his wife was also at church, right?
A Absolutely.
Q And the Defendant's wife was pretty involved in the church, wasn't she?
A She's the pastor.
Q So there are things that she had to do at the church, as well, right?

A Absolutely.
Q She wasn't back in the meetings with the Defendant, right?
A At times, she would have been.
Q And at times, she's not there, is that fair to say?
A That's fair to say.
MS. ABEE: Your Honor, may I approach?
THE COURT: You may.
BY MS. ABEE:
Q Mr. Vaughn, I'm showing you what's been entered into evidence as State's Exhibit 1, State's Exhibit 2 and State's Exhibit 3. Do you recognize these?
A Yes, I do.
Q Okay. And State's 1 and 2, what are these pictures of?
A The office.
Q Okay. And this is the office at 1010 Guinyard, right?
A Absolutely.
Q Okay. And this is the door of that office?
A I'm not sure about that.
Q Okay. Well, then we won't talk about State's Exhibit 3, but let's talk about 1 or 2. This is the office that you would be standing outside of during those meetings, right?

A Right.
Q And you said that you could hear anything, right?
A Right.
Q Because those walls are paper thin, aren't they?
A Absolutely.
Q Mr. Vaughn, these walls are cinder block, aren't they?
A They are.
Q Okay. And when you were describing to us earlier what an armor bearer was, you said that whatever he needs, you serve him; is that right?
A That's right.

MS. ABEE: Your Honor, I have no further questions.

THE COURT: Redirect?

MR. KENT: Nothing further from this witness.

THE COURT: You may step down.

MS. BLAZER: Your Honor, the Defense calls Keshona Edwards.

THE BAILIFF: Place your left hand on the Bible, raise your right. State your name, please.

THE WITNESS: Keshona Edwards.

KESHONA EDWARDS, after being duly sworn, testified as follows:

THE BAILIFF: Come around up here, please. State your name, spelling your last for the record.

I'm going to get a bird and I'm going to put it in my hand. I'm going to have the bird in my hand and I'm going go to the old man, Old man, is this bird alive or is this bird dead? The old man is going to say, according to the little boy, if he says the bird is alive, the boy is going to crush the bird and show him and laugh. And say haha, the bird's dead. Now, if the old man looks at it and says it's dead, the boy said my plan is just to open my hand and let the bird fly. So he's excited. He's got this master plan.

So he goes up to the old man and he says, Old man, what do you think I have in my hands? The wise old man looks at the boy and he says you have a bird in your hand. The boy gets a grin on his face and he says, Old man, is that bird alive or is that bird dead? The man stops and he pauses, he says it's your hands. It's your hands now.

THE COURT: All right. State ready?

MS. ABEE: Thank you, Your Honor. May it please the Court.

CLOSING ARGUMENT BY MS. ABEE

MS. ABEE: For years of her life, K.R. spent her Sundays in the Defendant's church. But not just her Sundays, her Tuesdays, her Wednesdays, her Fridays, like clock work. She grew up in the Defendant's church. And it was at church that she listened to him read the word of

the Bible and pray for the congregation. But instead of being her shepherd, he was nothing but a wolf in sheep's clothing. Because back in his office he waited. He waited as four young girls were brought in and he sexually assaulted not one, not two, not three, but four young girls in his office under the pretense of prayer. And because he did that, you have to find him guilty.

Now, Judge Young is about to instruct you on the law and ask you to return a verdict of guilty or not guilty. We're asking that you find the Defendant guilty for the crime of criminal sexual conduct with a minor in the second degree. And in order to do that, we had to prove two main things to you throughout this trial. One, that there was a sexual battery. And a sexual battery is any sort of penetration no matter how slight or how little or how long it lasted, any penetration. Secondly, we had to prove to you that that penetration happened between the Defendant and K.R. hen she was somewhere around the ages of 11 and 14. That was our burden of proof to you throughout the course of this trial.

Now, you and I and a lot of people sitting here in this courtroom, we heard all the testimony that came from the stand this week. And yes, a lot of this case rest on the testimony of K.R. and A.R. and T.H. and D.B. . There are no eyewitnesses. But we don't get to

pick who the victims are, and we don't get to pick the location, and we don't get to pick the eyewitnesses. Larry Durant picked that for us when he sexually abused these girls. But even so, their testimony doesn't stand alone. So let's take a look at what we heard throughout this week.

You heard that these four girls, they grew up in this church. These weren't just holiday church goers that went a couple times a year, just on the holidays. They spent their Sundays there and their Tuesdays and their Fridays. They grew up in that church, so did their family members. Their family members were daycare workers, ministers, armor bearers, bookkeepers. Their family was deep in that church, deep in the words of Larry Durant.

But then some things started to change. K.R. told you that instead of just leaving after church, she started to get called back to Pastor Durant's office. Not just called back, brought back. His armor bearers would go to wherever she was, in the parking lot, out in the church and they would get her and ask her to come back because the Defendant wanted to talk to her. And it was back in this office where she got some special attention.

You see, the girls told you about alter calls. Altar calls is when Pastor Durant would open up to the entire church and ask who needed prayer. And people who needed

prayer would come up to the front and he would lay hands on them. He would pray for them right there in front of everybody. But not K.R. , K.R. got special private prayer time because the Defendant needed to pray for diseases. He needed to pray that she wouldn't like girls anymore. And so she was brought back into his office behind this door. This door where it says do not enter. This door with the placard that says meeting in session, please do not disturb or knock. This door where the window is covered in paper. No one can see in. No one can see out. This door would be shut, and it would be locked because the Defendant would tell K.R. to lock it. When she was in there -- and what the Defense wants you to believe are these paper thin walls, but you can see with your own two eyes these are cinder block walls. They're not paper thin.

In this room with the cinder block walls, the praying was a little different, too. Because this praying didn't have words. So as the Defendant put his fingers inside of K.R. 's 13-year-old body, he didn't say anything. He didn't pray anything. As he bent her over his desk, he didn't say anything. He didn't pray anything. He was supposed to be praying for her, but instead, he was preying on her, preying on her innocence. Then when he was confronted with this, he cried. He denied, but then

he apologized. Think about that.

But it wasn't just K.R. . It was D.B. . It was T.H. . It was A.R. . All of these girls, he went from praying for them to preying on them. Preying on their belief in him, preying on their belief in his words because these girls grew up in this church. And yes, perhaps, it was naive. Perhaps, they should have known better, but they were deep in the Word and deep in their belief in Larry Durant.

Now, I know that it might be hard to sit here and think about how a pastor could do that to lifelong members of his congregation. It might be easier to just want to sit here and think that these girls are lying, but in this place, in this courtroom, we are not concerned with what is easy. We are concerned with the facts. We are concerned with the truth, no matter how hard a pill that is to swallow. And the truth in this case points to the guilt of Larry Durant.

Now, you heard from David Kellin this week. David Kellin was qualified as an expert in the area of child abuse dynamics and child maltreatment. Now, he has never met these girls, never met A.R. , T.H. , K.R. , D.B. , has never met any of them, couldn't pick them out of a lineup. He hasn't read a police report in this case, hasn't read a written statement. But what he told us is

that the characteristics of this case are so similar to the characteristics of sexual abuse cases. He knows nothing about the case. He told us about delayed disclosure and how delayed disclosure is extremely common in sexual assault cases. And that's when somebody doesn't tell that they were sexually assaulted right when they were sexually assaulted. Some time passes, just like in this case.

K.R. told you that it started in December of 2012 and she didn't report it until the end of May of 2013, delayed disclosure. David Kellin told you that delayed disclosure even increases when somebody is in a position of authority. Someone is in a trustworthy position. This causes the victims of sexual assault to delay in their disclosure or not disclose at all.

And he also told us about the difference between accidental disclosure and purposeful disclosure. Purposeful disclosure is when someone comes out and says I was sexually assaulted. They report it to the police. They come out and say it. But accidental disclosure is disclosure that comes out as part of a conversation. It didn't intend to come out, but it comes out because what people are talking about. And that's what we're talking about here.

K.R. and A.R. didn't just go up the their aunt

and their mom and say hey, mom, this happened to me. They were talking about it in a bathroom behind a closed door. And they were overheard talking about it. That's how this disclosure came out. They didn't seek out an adult. They didn't seek out the police to try to tell them this happened. They were overheard talking about it. That's because this was an accidental disclosure. They didn't want people to know that this happened to them.

And grooming. We heard about grooming, how grooming is when somebody takes in their victim's family members, tries to become friends with them. Tries to gain their trust, gain their honesty. They want the family members of their victims to trust them in everything they're doing because then, they wouldn't believe that they were perpetrators. And then they test the waters. Once they're in there and they have developed a relationship with the family, they start little by little. First, it starts the touching, no one tells. No one reports to the police. Then it escalates. Fondling of the breasts, digital penetration, full on intercourse. After each one, after each level is tested and no one reports and no one tells, they move on to the next level.

And that is exactly what happened here. These girls told you that it started with prayer. Prayer for the breasts, then moved to the vagina, and then moved to full

on intercourse. Because Larry Durant groomed his victims. He groomed that family to trust him, to trust their kids with him. And they groomed those victims to not tell anyone when they were sexually assault.

And yeah, David Kellin told you, each child is different. Each case of sexual assault is different. He told you that not everyone is ready for therapy and ready for counseling. That in order for counseling and therapy to be productive, you have to be ready to go through it. So yeah, these girls didn't have counseling and didn't have therapy, but that does not mean that this didn't happen to them.

And each girl is different. You heard from these four girls that told you that it happened and you hear from Keshona Edwards who said it didn't happen to her. What's the last thing David Kellin said to us when I was questioning him? That false denials, which is when you say it didn't happen when it did are more common than false reporting. That's what the expert told you.

Now, Mr. Kent just got up here and presented to you their closing argument. He said a whole lot of things and he tried to poke a whole lot of holes in this case, so I want to address them. But it's important to understand they have no burden of proof in this case. They don't have to prove a single thing to you. That burden rests

here with us. Mr. Kent could have sat here at this table, kick up his heels and not said single word throughout the course of this trial. Because that's our burden. But when they do, whey they do decide to say things. When they do decide to put on a case, you get to ask yourself if it makes any sense.

So does it make common sense that Lizzie Johnson is the mastermind of this great lie in order to have a house and she put her daughter and her granddaughter and two other girls she cares about through this? Through days of sitting up here and listening to testimony of embarrassing things. Does it make sense that she put them up to this, for what, a house? It makes no sense. Why would these girls be lying? They get nothing out of this. They have absolutely no motivation to lie.

Does it make sense that this is the type of attention that these girls want? Does it make sense that K.R. K.R. wants to be known as the girl who was sexually assaulted by her pastor? No 14-year-old, 17-year-old, 21-year-old, 40, 50, 60, 70, no one wants to be known as the girl that was sexually assaulted by her pastor. So is that the type of attention she wants? Is that what she's getting out of this lie is attention?

Well, then, maybe she's lying, I don't know, to get out of trouble. Maybe she's in trouble. She says she was

lying about it back then. She said she was lying about good things, right? She was lying about her grades so she could play basketball. She said she was lying about having a cell phone so she could continue to talk on it without it getting taken away. But what does she get out of this lie? She gets nothing but the embarrassment of telling what happened to her in a room full of strangers. If this was a lie, why wouldn't she be telling everybody, screaming it from the roof tops? Why wouldn't she tell every single person in that congregation? Why wouldn't she tell every single police officer? Why would she have waited to tell? She didn't tell because she was embarrassed. She didn't tell because she was scared. She didn't tell because she wanted the Defendant to be right. She wanted him to be right when he told that he could stop her from liking girls because she knew it upset her grandmother. She believed in him and wanted him to be right. He took advantage of all of that.

And we saw her grandmother, Ms. Lizzie. Ms. Lizzie took the stand. And she said some things. She added a little bit of lightness and some stuff really heavy. She said some things that made some people out here laugh, a couple of you laughed and chuckled a little bit at it. But the Defense wants you to think that these girls were laughing because they think this is funny. It didn't look

fun to me when K.R. sat up on that stand and had to describe how Defendant bent her over a desk. It didn't look fun to me when A.R. got up here and had to explain how the Defendant put his fingers in her vagina to cure her from any diseases. It didn't look fun for me when T.H. got up here and talked about how the Defendant would rub her breasts to cure her from any sort of diseases. And it did not look fun to me when D.B. D.B. had to sit up here and tell you, a bunch of strangers, that at the age of 14, she got pregnant and that her Defendant told her that he could bump the seed out of her so she wouldn't be pregnant anymore. And when, surprise, that didn't work paid for her abortion. You saw the $500 check yourself to Johnnie Mae Brayboy, her mother. That didn't look fun me.

They want you to believe that Lizzie Johnson is what, angry at the Defendant for the house. That K.R. is just confused and will do anything that Lizzie Johnson said. You bet they are. Lizze Johnson is angry. She is angry that she took her daughter and granddaughters to that church religiously and that he abused not only her trust, but their trust and faith and belief in this church. So yeah, she is angry. And K.R. , she knows what happened to her, but she is confused. She's confused as to why someone that was supposed to protect her and pray for her

preyed on her. So yeah, the Defense is right, Ms. Lizzie is angry and K.R. is confused, but not for the reasons they want you to believe.

They want you to believe this is some sort of botched investigation. That these are a bunch of crooked police officers that had nothing but tunnel vision, that they focused on one idea to the exclusion of all others and paid no attention to anything else. That is not this case. They talked to everyone. They collected everything they could, even if it wasn't going to help their case, and they turned it all over to the Defense. That polka-dotted dress. You heard that polka-dotted dress was collected years after Kianna had worn it. And she thought she had even washed it between that time, she didn't know. Everyone knowing that it could potentially turn up no evidence, the State still collected it and turned it over.

But instead of focusing on what the State did do, the Defense wants to draw your attention to these little red herrings and these rabbit holes that don't matter. The date on the memorandum. The date on the memorandum doesn't matter. It doesn't matter at all. They want to draw your attention to the fact that a forensic interview wasn't done in this case. But your investigators weren't serving and acting as forensic interviewers. They were acting as investigators. Forensic interviews are done,

you heard, when a child is not clear in their disclosure, that's it's hard to figure out what happened. It's clear to figure out what happened in this the entire time. Forensic interviews are done when children are suggestible. And David Kellin told you himself that the level of suggestibility changes over age. A four-year-old is lot more suggestible than a 14-year-old. An eight-year-old is more suggestible than an 18-year-old. So these girls didn't needed forensic interviews. But this is the type of stuff that the Defense wants you to think about.

They want you to think they had tunnel vision, but when all the signs point in one direction to the Defendant, you have to follow those signs. And they talked about how there is no physical evidence in this case. There is no corroboration. First, it's important to remember that testimony is evidence. That is evidence. Just because you can't hold it in your hand doesn't mean that it is not evidence. So there is plenty of evidence that there is sexual assault in this case.

You heard Dr. Saunders that it's normal to be normal. This isn't just us tweaking some theory for it to fit our case. You heard that in 90 to 93 percent of sexual assault examinations and sexual assault cases, there are no signs of physical evidence or sexual trauma. Because

Dr. Saunders explained to you that it starts to heal, that area of the body starts to heal fast, especially when once you've puberty. She said within hours, within hours any signs of trauma will start to heal.

K.R. had her physical exam 10 days after this was even reported. A.R. was five days after that. T.H. wasn't until the next year, the next calendar year. So yeah, there was no physical signs of this assault, but it's because the science supports that it wouldn't exist.

Then they talked about the chair with no DNA on it. The chair that the girls didn't even tell you that they had sex on, but the cops collected it anyway. There was never an allegation that they had sex on the chair. But what there was an allegation of was how Pastor Durant would clean up afterwards. A.R. told you that he used hand sanitizer to clean up. So they collected that hand sanitizer bottle. They waved a light on it and they did a test. And it tested positive for acid phosphatase, which is found in high concentrations in semen. Exactly just like A.R. told you. She said that he would pull out, ejaculate in his hand and then she'd have to clean him up. And he's clean up with that hand sanitizer. And high levels of acid phosphatase were found on that bottle.

And, yeah, a DNA profile couldn't be developed off of. There wasn't enough to develop a DNA profile. And SLED only tested for female DNA. But once we're done and Judge Young is done instructing you on the law, what you will not hear him say is that there has to be DNA. What you will not hear him say is there has to be physical evidence. And what you will not hear him say is there has to be eyewitnesses. What you will hear him say is that you are the sole determiners of the credibility of what comes out of that stand. What each of these witnesses said. You decide what to believe or whether or not to believe based on what you heard and what you saw here in this courtroom.

Now, I want to talk a little about D.B. . D.B. took the stand and she told you what happened to her. And then the Defense, Ms. Blazer, got up here and she read off the handwritten statement of D.B. . She read where D.B. handwrote that none of this happened to her. That she was strong armed by Valerie Williams, the investigator. The Defense didn't bring this up in their closing. Because even though they read the letter and they introduced it, what did D.B. tell you? She said that her mother got a phone call and said that if D.B. copied down this statement in her handwriting that she wouldn't have to testify. And she told you she didn't

want to testify. So she copied it down. And she doesn't know who it was, but she knew it wasn't Investigator Kelly. She knew it wasn't Investigator Valerie Williams.

But who benefited from that letter? Who, at least, tried to benefit from that letter, that letter trying to make D.B. recant what happened to her was the Defendant. She wrote it so she wouldn't have to testify, but somebody somewhere had her copy it so they could try to ensure that she wouldn't testify. And why, because everything she says is so compelling. And it is so on line to what happened to K.R. and the rest of those girls.

The the great mastermind behind all of this, this deed. The deeds that were forged or not forged. Let's talk about these deeds just a little bit. I didn't want to because I honestly don't think they have anything to do with this case. This isn't a case on forgery, this is a case on sexual assault. But the Defense brought in an expert who looked at copies of these, not with handwriting exemplars, not the originals, but machine photocopies of these. And he said that he could tell that it was the same signature of Ms. Lizzie on both of them. But even on his own report that you'll get to see, at the very end, it says that he wants handwriting exemplars and that he could only say it was most probable because he was looking at

machine copies. Even the Defense's paid expert said that his opinion could change if he looked at the originals. And they want to submit this to you as being 100 percent the truth that Lizzie Johnson signed both of these.

But without looking at the loops in the handwriting and the dots of the I's, you only got to look at basic things and ask yourself common sense. Larry Durant deeded or didn't deed the house to Lizzie Johnson on September the 16th of 2009, and then she allegedly deeded it back to him on the November 1st of 2009.

Why would she do that if she was forging both of them? She would forge the deed to herself and then what, forge his name again and forge the deed back to him? What does she get out of that? She doesn't get anything out of that. Why would she not just forge the deed to herself and let it go? Why would she forge this one? Why would she sign Larry Durant's name on this one? The person who benefits from this one is Larry Durant. And on the back page of this, the person who notarized it is Melody Durant, his wife that's been sitting behind him this entire time.

And even if this is forged, September 16th of 2009, it was filed November the 4th of 2009, and this one was signed November 1st, 2009. So let's say even if Ms. Lizzie forged this deed to herself and then had some

sort of, I don't know, buyer's remorse and wanted to fix it, this deed wasn't even clocked yet at the time that this one was forged. So the house at the time that this one was dated still belonged to Larry Durant. So why would you forge both? The only important date on this is May 31st of 2013. That's when this was filed. That's when this was clocked. That's when Larry Durant had the house in his name with the register of deeds. That's when he could file notice of eviction on Ms. Lizzie. And this is six days, six days after she chose her granddaughters over Larry Durant. That's when this was filed.

Now, let's talk a little bit about the Defense's witnesses. You saw their armor bearers, people in the church. The armor bearers told you that it is their job to protect Larry Durant. It is their job to serve him and that is exactly what they did up on that stand. They tried to protect him. They tried to serve him in every way that they thought they knew that they could. What did they actually give us? We know that they gave us some lies, right? We know that these paper thin walls are actually made out of cinder block. We know that that's the truth. We know that Larry Durant, even though he's legally blind, they told us that he has a driver's license. And one of the first things you do when you get a driver's license is what, an eye test. Check your

vision. They told us Larry Durant had a driver's license.

The Defense talked about this Twitter and these tweets. These tweets, if you remember, Mr. Kent showed A.R. and she said this isn't me. She said this isn't my Twitter. She goes it kind of looks like a picture of me. And you'll be able to see it. It's a black face with a white shirt. She said, I guess that kind of looks like me, but that's not my Twitter handle. I can't remember what it is, but would never capitalize my name like that. They put up Keshona Edwards who said, yeah, this is A.R. 's account. It doesn't say the name A.R. anywhere, but I thought it was A.R. A.R. . Because she's joking about this. But do you remember her testimony? She said that she saw it. And who made her take a screen shot out of it? Her mama. She said her mama made her take a screen shot and then gave it to Pastor Durant. Her mom that was deep in that church, who worked at that church, worked with Larry Durant, attended that church for longer than Keshona even did and Keshona grew up there. That's how that existed. That's how that got into evidence. And A.R. told you herself this is not her. This is not her words.

And then we have the fact that Mr. Durant has an STD and that he has erectile dysfunction, that he can't have sex. We know he has kids, so we know at one point in time

he could have sex, right? Then you heard the doctor say that STDs aren't always transmitted. They're transmitted through some sort of fluid, blood, saliva, semen. And I asked him, the doctor who I'm sure has taken biology classes, I asked him, so if somebody pulled out and ejaculated in their hand, is it likely that an STD would be transferred. He said you can't be positive, but no, it would be a lot less likely than an STD would be transferred. It has to be transferred through the fluid. And thank God, it's not always transferred. Because these girls don't have STDs. But it's because the Defendant -- the only testimony that we've heard of where he ejaculated was in his hand, not inside of those girls.

If this was some big plot and ploy by Lizzie Johnson to get this house back, then there's an issue with that. Because T.H. told her mom in February. This came out in May. So T.H. just must some sort of crystal ball to know that Ms. Lizzie in May was going to want to make these allegations against Mr. Durant, so she said, you know what, I'm going to go ahead and disclose to someone. Y'all, it makes no sense. If she's disclosing in May to her mom and her mom's making a phone call saying that this isn't going to happen anymore and it doesn't happen anymore and then the other allegations come out in May, it just doesn't support that theory. It doesn't

support the theory that all these girls got together, put themselves through this, for what, a house, a house that Ms. Lizzie's telling you she's still living in. She hasn't been ejected from. It is still her house.

You know, the Defense has talked about cooking, cooking dishes. I think they said Ms. Blazer was a fantastic cook, which I believe. But they said when you make a recipe and you leave out some ingredients, it doesn't necessarily taste the same. So when you leave out the salt and the pepper, the chicken isn't as flavorful, but y'all, it's still chicken. It made not be as pretty or it may not taste as good or look as good, but it still is what it is. This case is still a case of sexual assault no matter how pretty it is or how flavorful it is. Just because that chicken doesn't have salt and pepper doesn't mean it's not still chicken. And there just because there wasn't DNA all over the room or semen all over the carpet doesn't mean that this isn't a case of sexual assault. That is a case of sexual assault because K.R. says so and because she gains nothing out of this. This isn't just a he said, she said. It's a he said, she said, she said, she said and she said. All these girls said it because it happened to every single one of them.

But there are two pieces that can't be explained.

You have the underwear. The girls who said that he wears white Fruit of Loom underwear, white little boy's type underwear. You're going to get to look back at these pictures when you're deliberating. The hamper at his house and his dryer. White underwear. Girls got that one right. And then his penis, which Mr. Kent already showed you. They described it as flesh colored and pink. There's a skin pigmentation on it. The girls got that one right, too. It's not because Ms. Lizzie told them, it's because they cause it with their own eyes. The only testimony you heard was that they never said they'd seen a picture of it. They had never seen -- or never heard anyone talk about it. What Mr. Kent says isn't evidence. So he can float as many theories as he wants out there, but that's not evidence. The evidence that you heard is that they had never seen a photo of it. That no one had ever described it or told them about it. Yet, they can describe it perfectly. And they can describe it perfectly because they saw it with their own two eyes when they're having sex with him. They saw it with their own two eyes and their description is spot on.

We had to prove our case to you beyond a reasonable doubt. And a reasonable doubt is not some imaginary doubt or some fanciful doubt. It's not a doubt that just allows Larry Durant to escape penalty of law. It is based on

reason. It is based on common sense. If you can stand here with your feet firmly planted on the ground and say yeah, that guy sexually assaulted K.R. , then you can find him guilty.

Mr. Kent told you a story about when causing a hesitation to act. And that's what a reasonable doubt is, something that causes you to hesitate to act. But nothing caused Larry Durant to hesitate to act when he sexually assaulted those girls. And nothing should cause you to hesitate to act when you go to find him guilty. He was supposed to be there shepherd, but he was nothing but a wolf in sheep's clothing. These girls gained nothing out of making any of this up. Find Larry Durant guilty.

CHARGE OF THE COURT

THE COURT: All right, folks, we are now at the point where we are going to have me explain to you or charge you on what the law is that applies to this kind of case. Do you remember at the beginning of the trial, I told you, you have a job in this trial. And one of my jobs was to preside over the trial and to make sure that each side got a fair trial for our rules of procedure and admissibility, rule on admissibility, things like that. Your job is to consider only the evidence that was before you and presented in this courtroom. You can only consider witnesses or evidence that was presented from the witness

Your Honor

After Two hours and Forty Five the Vote after four attempts is Guilty 8 Not Guilty 3 and One will Not Vote

5/26/16
5:05

COURT'S EXHIBIT
2
KA

(WHEREUPON, State's Exhibit No. 7 has been redacted.)

(WHEREUPON, the alternates came into the courtroom at 2:15 p.m.)

THE COURT: Okay. Now, ladies, once the case is submitted to the jury, you are done. You don't have to come back, call or anything like that. You're free to go for the week. They'll send you a check, I guess, in the mail. Thank you for your service. If anybody calls you about the case or contacts you to talk to you about it, you're free do that. Sometimes the lawyers will call afterwards. They're not doing anything wrong. If you want to talk to them, you can. If you don't want to, you don't have to. Thank you for your jury service this week. Hope you enjoyed it.

(WHEREUPON, the alternates left the courtroom.)

THE COURT: All right. Alternates are discharged. Got all the evidence.

MS. ABEE: Yes, Your Honor.

MR. KENT: Yes, Your Honor. We reviewed that.

THE COURT: Go ahead and tell them they can begin deliberations.

Y'all can be at ease. Don't wander off too far.

(WHEREUPON, the jury began deliberations at 2:16 p.m.)

(WHEREUPON, jury sent out note at 5:11 p.m.)

THE COURT: Well, something different comes up just about every trial, it seems like. Got a note from the jury. The bottom line is they are split, locked up. They told me what their split is, but I'm not going to tell you what it is, but for one thing.

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

MS. ABEE: What?

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

MR. KENT: It would be one of my typical trials then. I'm not asking the break down, but would it still be a hung jury without the one person who wouldn't vote?

THE COURT: Correct.

MR. KENT: You understand why I asked that question?

THE COURT: Uh-huh.

I'm just going to give them a version of an Allen charge and try to explain to them that we need them to continue to work at it and reconsider and consider. And, you know, the standard language about no juror is going to hear anything different and they're as good of a jury as the next one, and please continue to try.

MR. FERNANDEZ: Your Honor, I don't know if this is crazy, but there were two alternates. I know we spoke to one of them, but there might be --

THE COURT: Well, I've discharged them. The law says you're supposed to discharge them.

MR. KENT: Since they're discharged --

THE COURT: If they're gone, that's not an option.

MR. KENT: Your Honor, just for the record, I understand the Court at this point in time, I understand the case law would be interested in giving an Allen charge. On behalf of Mr. Durant, we would object to the Allen charge. We think there's case law that suggest that it may unfairly target the minority jury. I don't know the break down, but just for the record, we object to the Allen charge.

THE COURT: Okay.

MR. KENT: I just wanted to place that on the record.

THE COURT: Anything you want to add by way of suggestions?

MS. ABEE: No, Your Honor.

THE COURT: All right. Bring jury in.

(WHEREUPON, there was an off-the-record discussion.)

(WHEREUPON, the jury entered the courtroom at 5:15 p.m.)

THE BAILIFF: All the jurors are back, sir.

THE COURT: All right. Folks, I got the note that you sent back through the Foreman. It's a little unusual in having -- it's not unusual to have a jury that has difficulty coming to a verdict. I've yet to have one that says somebody won't vote. But let me just give you some words of guidance before I send you back.

Jury duty is a difficult thing. It really is. What we ask people to do is not easy. Some cases are easier than others, but all of them are really hard, if you ask me. First of all, to get two people to agree that the sun rises in the east in the morning is kind of difficult. To get 12 people to come in and listen to a week's worth of testimony and reach a unanimous agreement, well, it's hard. And people see things different ways and, you know, have different interpretations of what it is they believe is the right verdict. I completely understand that.

When we have a situation like this, I like to ask the jury to do two things. First is keep -- I guess the way I

would like to phrase this is consider your position and consider the other side's position. Whether you're in the majority or in the minority at this particular time, I don't want to know. In fact, I would ask that you not tell me what the vote break down is.

But those of you that are in the majority of the vote for one way, consider whether or not the minority's position has merit to it. Just think about it as well, if I were in their shoes, would I see it that way? Those of you that are in the minority position, then I would ask that you do the same thing. Put yourself in the other person's shoes. And sometimes that helps people to see that the other side has merit to it. And again, I'm not trying to say change your mind. You may go into and come out of that little mental exercise with the exact same position. But it's often helpful when you have a difficult decision to make to see if you can see it from the other guy's viewpoint. Maybe that will help you out. That's really about the best guidance that I can give you.

Because if you folks can't make a unanimous decision, then what we'll have to do is come back, get another jury, and we'll have to present, essentially, the same evidence that you heard this week and another 12 people will have to make a decision. I don't have any reason to suspect that there's any 12 better people in Sumter County than

you 12 folks. You guys see how the process went. It was completely a sort of random process which you got picked for jury duty. You know, it was a process we went through to eliminate that nobody knew anybody or knew anything about the case, had any preconceived outcome or had any prejudices. Everybody that's on this jury right now, essentially, said I can be a fair and impartial juror in this case and that I will make a decision based on what I hear in this courtroom and what you, the judge, tell me the law is. That's all what we can ask any 12 jurors to do. That's how you got on this jury. If we have to retry it before another jury, I don't have any reason at all to believe that there are any 12 better folks than you 12 folks to make this same decision. But that's what we'll do if you folks can't come up with a decision. So what I would ask is that you go back and see if you can work on it some more.

If you tell us you can't make a decision, then we'll respect that, but give it another shot in light of what I've told you and see if there's some way that you can come up with a unanimous verdict.

Now, I don't know who the one person is, and I'm not asking who the one person is that won't vote, but that's really not helpful to the situation at all. All that will do is ensure that we have a mistrial if you continue to

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

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

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

(WHEREUPON, the jury left the courtroom at 5:21 p.m.)

(WHEREUPON, Court's Exhibit No. 2 was marked for identification only.)

THE COURT: Okay. Well, carry on.

(WHEREUPON, Court was in recess awaiting a verdict.)

THE COURT: All right. We have everybody now. Let the record reflect the Defendant is in the courtroom.

I understand we have a verdict?

THE BAILIFF: Yes, sir.

THE COURT: Bring the jury in.

(WHEREUPON, the jury entered the courtroom at 5:55 p.m.)

THE BAILIFF: All the jurors are back in the courtroom, Your Honor.

THE COURT: All right. Mr. Foreman, I understand the jury has reached a verdict; is that correct?

THE FOREMAN: Yes, sir, Your Honor.

THE COURT: Is it unanimous?

THE FOREMAN: Yes, sir, Your Honor.

THE COURT: All right. Would you hand it to the bailiff, please.

All right. Publish the verdict.

If the Defendant will arise.

(The Defendant rose.)

VERDICT

THE BAILIFF: The State of South Carolina, County of Sumter in the Court of General Sessions, docket number 2014-GS-43-947. As to the indictment of criminal sexual conduct with a minor in the second degree, we, the jury, find defendant guilty. Signed by Roy --

(Defendant's wife fainted.)

THE BAILIFF: -- Graham, 5/26/16.

Ladies and gentlemen of the jury -- may I have your

me. Thank you, sir.

THE COURT: You're welcome.

MR. KENT: Your Honor, would you mind if he sat back down?

THE COURT: That's fine.

MR. KENT: Thank you, Your Honor. That will end my presentation. I apologize.

SENTENCE OF THE COURT

THE COURT: Okay. Well, the charges in this case were really unlike any I have heard before. The evidence that the State presented was compelling. The Defense made a strong case. And the jury chose to believe the young ladies. I can't disagree with the verdict at all based on what I heard. These charges were monstrous in nature.

The problem that I have with the particular facts in a case like this is you have somebody who was put a position of trust. All ministers are put on a pedestal to some degree or another, and, you know, I've -- I grew up the son of a minister. I've seen all sides of that that can happen both for good and bad. You know, you see how people treat ministers with putting them on a pedestal, believing that ministers are incapable of doing bad. But as you grow up in a family with a minister and hear a lot of things that go on and see a lot of things, you know, you realize that ministers are people. They're humans.

And as such, they fall.

I don't fault anybody for falling from grace, but when you take the position that you have been given by your community and people that believe in you and abuse it to the extent that these young ladies have alleged and that the jury believed, well, then you deserve the maximum in my opinion. The sentence of the Court is 20 years in the Department of Corrections. You'll get credit for any time that you served pretrial. Good luck to you.

MR. KENT: Thank you, Your Honor. You said we would have our 10 days to file post-trial motions?

THE COURT: Correct.

MS. ABEE: Thank you, Your Honor.

THE COURT: If you file something, send it to me in Charleston.

MR. KENT: I'm sorry? I didn't hear you.

THE COURT: I said whatever you file, send a copy to me in Charleston. It doesn't always get forwarded has been my experience.

MR. KENT: Thank you, Your Honor.

MS. ABEE: Thank you, Your Honor.

THE COURT: Okay. Good luck to you.

**********END OF PROCEEDINGS**********

STATE OF SOUTH CAROLINA	**IN THE COURT OF GENERAL SESSIONS**
COUNTY OF SUMTER	**FOR THE THIRD JUDICIAL CIRCUIT**
	DOCKET NUMBER: 2014-GS-43-947
STATE OF SOUTH CAROLINA,	
vs.	
LARRY DURANT,	
Defendant.	**Defendant's Rule 59 Motion and Request for Emergency Hearing**

On May 26, 2016 Defendant Larry Durant was convicted of one count of Criminal Sexual Conduct with a Minor 2nd Degree. He was sentenced to 20 years. The Court allowed Mr. Durant ten (10) days to bring all post-trial motions. Now on his behalf his counsel requests a new trial as well as an expedited hearing based upon the following information:

On his way home at approximately 7:35 p.m., defense counsel received a call from Roland McRae, the ex-husband of Ulanda McRae (aka Vlanda McRae; aka Volanta Riley). Mr. McRae was curious as to the results of the trial. He expressed regret that he was neither contacted nor utilized as a witness. During the course of the conversation he was further concerned that Ms. McRae's prior criminal record was not utilized against her as she took the stand. Perplexed, defense counsel inquired further about her criminal record. Mr. McRae detailed criminal charges that he personally knew that his ex-wife had acquired during the course of their marriage. On May 27, 2016 defense counsel utilized the online search tool "SLED Catch" to verify Mr. McRae's assertions, a copy of which is enclosed.

During the course of the trial, Ulanda McRae was utilized as the State's "outcry" witness. She testified without any mention of her criminal record. More importantly, no criminal record of Ms. McRae was ever turned over to the defense (***On January 14, 2014 defense counsel served discovery requests on the Attorney General's office. In Section 13 of its discovery requests the defendant specifically requested the criminal records of all State potential witnesses. Copy***

enclosed). During the course of the trial, the State of South Carolina provided criminal records on several of their own witnesses ***(for example, the State called Lizzie Johnson to the stand. Immediately before she took the stand, the State gave her criminal record to opposing counsel. What's more, the State also told the court of Ms. Johnson's prior criminal record and inquired whether or not it would be usable. This singular event heightened the defense's already lofty expectations that all reasonable and discoverable evidence had been or would be turned over)*** as well as some of the defense's. The defense had no knowledge of any criminal records of any witness who appeared on behalf of the State of South Carolina. As the court is aware, the defense must rely on the State providing information on their own witnesses. It is the belief of the defense that this is a Brady/Rule 5 violation.

The crux of this entire case was based upon the credibility of the witnesses who testified. As the court is aware, there was no corroborating physical evidence to support the allegations levied by the State's witnesses. Additionally, the State of South Carolina argued vehemently in its closing argument that you must trust the information given by its victims because it was overheard by Ulanda McRae (this witness testified under the name Ulanda McRae. The criminal charge which was levied against her was under the name Ulanda Riley. This individual's name on the State's Witness List was Ulanda McRae). What's more, one of the convictions that the defense was not told of was for **"obtaining signatures under false pretenses"**. As the court is aware, this was the central theory of Mr. Durant's legal defense. If the credibility of the state's "outcry" witness could have effectively been challenged, a different result may have occurred.

Understanding the various spellings of this witness's name, it would be difficult if not impossible for the defense to properly run a records check. Therefore, it is the request of the defense for an emergency hearing to inquire why this information was not properly turned over. The defense would further request the presence of the individual who runs the records checks on behalf of the State of South Carolina.

Respectfully Submitted,

SHAUN C. KENT
CAMERON BLAZER
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Manning, South Carolina
May 27, 2016

STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS

COUNTY OF SUMTER 2014-GS-43-00947

STATE OF SOUTH CAROLINA)
) TRANSCRIPT OF RECORD
-vs-)
) June 8, 2016
LARRY DuRANT,)
) Sumter, South Carolina
Defendant.)

B E F O R E:

The Honorable Roger M. Young, Judge.

A P P E A R A N C E S:

Kinli Abee, Assistant Attorney General
Attorney for the State

Shaun Kent, Esquire
Attorney for the Defendant

Reported By:

Amanda Kelly Haffenden, RPR, CRR
Circuit Court Reporter for the
Ninth Judicial Circuit

(June 8, 2016.)

MR. KENT: As you're aware, we've given a copy to your law clerk, we filed a defense Rule 59 and a request for emergency hearing.

On May 26, 2016, we concluded the trial of the State of South Carolina versus Larry DuRant. He was found guilty and convicted. He was given 20 years by Your Honor. At the conclusion, you allowed us to have ten days for any necessary post-trial motions.

Your Honor, at the conclusion, literally as I was driving home that evening, I received a phone call from Ronnie McCray. Mr. McCray asked me pretty pointedly why I did not utilize him as a witness. He had been interviewed by us. He asked very pointedly why he was not utilized as a witness. We had a conversation about that.

Thereafter, he made a subsequent conversation about the fact that his ex-wife, Yolanda McCray, who was the outcry witness utilized by the State of South Carolina, was also related to K.R. as well as A.R., two of the victims who testified in the trial. He informed that he was shocked that Ms. McCray was allowed to testify without mentioning of her prior criminal record.

My exact response was I didn't think Ms.

McCray had a prior criminal record, and he said, Well, I'm her ex. I know for a fact she has a criminal record.

I went back to the office. I contacted Ms. Blazer. I told her -- and I actually put Mr. McCray on the telephone with Ms. Blazer so he could hear that part, so she could get that part of the conversation. At that point in time, I wasn't back to my office yet I do not believe. I think the very next morning I ran a public SLED catch. Based upon the name and the information that was given to me by Mr. Riley, I ran a SLED catch, which I've included in a copy of my memo.

The SLED cache indicated -- we ran a SLED cache under the name Yolanda McCray, as well as the date of birth, DOB . We put in the social security number that was included inside of her witness statement. When we did that, there were several aliases that came up: Wanda Shoantela Riley; Yolanda Shoantela Riley; Volanda S. Riley; Volanda Riley; Yolanda Shoantela Riley; Yolanda S. Riley; Yolanda Riley, and Wanda Riley and Vlonta, V-l-o-n-t-a, Riley.

When we ran the SLED catch again, the public records check, several criminal charges came up immediately, including things --

THE COURT: What were they?

MR. KENT: And I'm going to go through

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

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

THE COURT: What year was that?

MR. KENT: That was in 2004, Your Honor.

THE COURT: What was the conviction again?

MR KENT: It doesn't show the conviction. It just shows there was an arrest. It doesn't show a disposition as of this point.

Yes, sir. The obtaining goods under false pretenses was a separate conviction, a six-year conviction, and then there was -- in 2005, out of Marion, South Carolina, under Wanda Riley, there was a financial transaction card fraud that was dismissed and nolle prossed, and that would be the extent of the record.

THE COURT: Nothing since 2005?

MR. KENT: No, sir, Your Honor.

THE COURT: All right.

MR. KENT: So then we immediately pulled that.

As the Court is aware, one of the central cruxes of the defense offered on behalf of Mr. DuRant was obtaining signature under false pretenses. One of our central defenses was a forgery allegation against Lizzy Johnson, that there was a forgery allegation being utilized, that there was a false signature that was utilized, and these false signatures, what was happening was our theory --

THE COURT: Yolanda McCray, was she the grandmother?

MR. KENT: No, Your Honor. Lizzy Johnson was

the grandmother. Yolanda McCray is the actual mother.

THE COURT: Of the victim?

MR. KENT: Of the victim's sister -- victim's cousin.

THE COURT: Okay.

MR. KENT: The central important issue is also the outcry witness. As you're aware, during the State's closing argument, the Attorney General's closing argument, which was, candidly, a very effective closing argument, during their closing argument, one of the things that they argued very effectively was the fact that one of the reasons you should not believe the theory offered by the defense and should believe the theory -- or even if you don't believe a lot of the things that were said, one of the things you can believe is the outcry witness just happened to overhear this conversation, so you must believe what the outcry witness stated because she happened to overhear it which gives their theory credibility, that no one could have made up this entire theory.

The problem with that, of course, as Your Honor yourself mentioned during sentencing, this was a credibility case, and in light of the credibility case, the jury could make a decision of either listening to the defense witnesses or listening to State witnesses. With

Yolanda McCray as the outcry witness, being able to testify un-cross-examined about her criminal record, including our central theory of defense, obtaining signature under false pretenses, and the fact that they are related to Lizzy Johnson, who we're saying specifically was embroiled in this forgery, that is our theory, that this is the type of information that we should have been allowed to cross-examine on.

Your Honor, I am not sitting up here specifically saying that I believe the Attorney General's office hid anything from us whatsoever. I'm not saying that. I'm not saying that on the record that I believe they hid anything whatsoever from us. What I am saying is this is information that we were entitled to in proffer, entitled to. As you're aware, Your Honor, I have included inside of my packet my Rule 5, which was sent not to Ms. Abee, but was sent to the attorney who had the case before her, Kelly Hall, Assistant Attorney General, and that was sent on January 14, 2014.

Included inside of that packet was a specific request, on line 13, which I specifically request the criminal records of the juvenile and adult of such witnesses. Your Honor, this, of course, is bolstered by the fact -- and this is one of the reasons we do not believe the Attorney General's office hid anything from

us. As you're aware, during the course of the trial, what would happen is the Attorney General's office handed us criminal rap sheets and records as individuals were getting ready to testify.

At one of the points what they did is when Ms. Johnson got ready to testify, Lizzy Johnson, as you remember, the grandmother in this situation, before she testified, they properly handed us a rap sheet, and they said, This is something on her rap sheet. We're not sure if we're going to be able to get into it, and we had a hearing in front of Your Honor about her prior criminal record, and we did that on several other witnesses.

I do not believe that this is a situation where they were trying to hide things; and, number two, I don't think they knew what our legal defense was so they wouldn't understand how important the obtaining signature under false pretenses was until I would make the theory, and I didn't make the theory unless after this woman had already testified.

But the point is, they were giving us criminal records as these individuals were testifying. None were given on behalf of Yolanda McCray, and I believe they'll tell you honestly they didn't know she had a criminal record either. I don't think that makes it excusable. This woman was allowed to testify in front

of a jury without mention of her criminal record in a case which is all about credibility.

That would be the basis of my motion. I made a 59 motion. Your Honor, on top of that, looking at the course of the trial, there were a lot of issues, shall we say, with some of the things, some of the pretrial motions that I made that you've already heard and utilized. There was a lot of pretrial motions made about certain evidence that was not given in a timely manner, the taking a picture of Mr. DuRant's penis, the problems that we had with the testimony of Allie Williams, which went to the credibility also; the issues about the abortion issue.

All of these things go with credibility, and so it is our belief, Your Honor, that it is proper at this point in time to grant our 59 motion for a new trial on behalf of Mr. DuRant because this is a credibility case. This isn't one of those typical cases where -- I know at some point the Court of Appeals made the comment that it's harmless error, that the other evidence against would be overwhelming.

As you're also aware, Your Honor, this wasn't a situation where the jurors stayed out for about five or ten minutes. The jurors stayed out a length of time in excess of four hours. They actually came back initially

with a hung jury. At that point in time, we gave an Alan charge, which we objected to, objected to the Alan charge, and after the Allen charge, they came back with a verdict.

Your Honor, to say this is not paramount or not an issue in the case I think would just be incorrect, and that would be our position on the motion, Your Honor.

THE COURT: Okay.

MR. KENT: Thank you, sir.

THE COURT: Who's arguing for the State?

MS. ABEE: I am, Your Honor.

May it please the Court: Your Honor, first off, as an officer of the Court, I do have to correct something that I have incorrectly stated in my motion that I've literally discovered sitting here, flipping through it for the 50th or 60th time.

I state that factually as requested that the rap sheet be run under Yolanda McCray via the e-mail, which I attached as attachment A, that's M-c-r-a-e. In reviewing the e-mail again, I requested it under Yolanda McCray, same last name, but M-c-C-r-a-e, Your Honor. There was typo in my request. Same date of birth. That was an error on my part, Your Honor; however, the analysis is still the same.

In order to state we violated Brady, Your

Honor, under Gibson v. State, there were several things that have to be shown: First, that the evidence was favorable to the accused; two, that it was in the possession of or known to the prosecution; three, it was suppressed by the prosecution; and, four, it was material to guilt or punishment, Your Honor.

Mr. Kent was correct in stating that we had no idea that Yolanda McCray had a prior criminal history or a prior record in this case. We turned over other witnesses, similar convictions, Your Honor. We certainly would have done so with Ms. McCray had we known that she did, in fact, have a record.

Secondly, Your Honor, we would contend that it wasn't suppressed by the prosecution, also that it wasn't material to the guilt or to the punishment, Your Honor. Regardless of what Ms. McCray testified to, being the outcry witnesses, there were several other witnesses throughout the trial that did testify to the exact same thing, so it wasn't just Ms. McCray.

She testified mainly in three different parts throughout the trial. First she testified to the church and its runnings and what armor bears were and typical Sunday behaviors that were testified to by several different people throughout the trial, so that alone -- that testimony wasn't material to the guilt or the

punishment, Your Honor.

Secondly, the disclosure itself, Mr. Kent raises that. During closing arguments, we did state that this was an accidental disclosure, that the children didn't go to a parent or go to law enforcement to purposefully disclose. They were overheard, and take out Ms. McCray's testimony, and the children, victims, would still have testified to that, Your Honor.

So there still would have been the testimony that they were talking in a bathroom, someone overheard them, questioned them, and that is what led to their disclosure, Your Honor, so that point was still made throughout the trial. And, finally, Ms. McCray testified to the fact that the defendant was called on the phone after the disclosure was made, which two of the victims as well as the grandmother also testified to, Your Honor.

So we contend there isn't a Brady violation, Your Honor; however, if the Court does determine that there was a Brady violation and that we somehow withheld information that we had, we then turn to State v. Taylor, Your Honor, which then goes into the different criteria that has to be met in order to grant a new trial based on newly discovered evidence, which the rap sheet and prior record of Yolanda McCray would, in fact, be newly discovered evidence at this point in time.

There are five different things that have to be proven: One, that the evidence would probably change the result if a new trial is had, that -- two, it has been discovered since trial; three, cannot have been discovered before trial; four, is material to the issue of guilt or innocence; and, five, is not merely cumulative or impeaching.

Your Honor, that is exactly what this is on that prong number five. It is merely impeaching of Yolanda McCray, who, as Your Honor might remember, was one of the quicker witnesses that testified. In fact, the defense counsel and I had a conversation prior to her testifying, where he said, Is she going to be long? Are you keeping her short? And he said, Yeah, she'll be short, Your Honor.

So there's a failure to meet the five prongs of State v. Taylor to obtain a new trial based on after discovered evidence, Your Honor. It is merely impeaching of that witness, and, again, it's unlikely to change the result if a new trial is had; therefore, we ask that you deny the defense attorney's motion at this time.

THE COURT: Reply?

MR. KENT: If I may, Your Honor, and I was just seeing if they were saying Mr. DuRant was in the courtroom. I apologize.

Your Honor, what becomes interesting -- and I was going to make a point, so I'm now even a little bit more confused, and I appreciate the candor to the Court, but in relying on the legal analysis put forth inside of the Attorney General's motion, the Attorney General in their motion states that, Despite a good effort to ascertain witness record, the prosecution was not in possession of Yolanda McCray's criminal record due to her use of a fake name.

I guess I need, for clarification purposes, are they saying that the brief is incorrect, that she didn't provide a fake name or did provide a fake name? Why that becomes interesting is it's going to change my argument I make to the Court right now. If they're saying that she provided a fake name, of course, that's a different analysis, that this individual provided fake information to the Attorney General's office.

THE COURT: I wasn't clear on that. Are you saying the name is incorrect in the brief or the name was incorrect in what you asked it to be requested?

MS. ABEE: I'll be happy to clarify, Your Honor. Her name is Yolanda McCrae, M-c-r-a-e. I requested M-c-C-r-a-e. So the record, the rap sheet that Mr. Kent talks about, specifically the 2004 conviction, I believe, is under Yolanda Riley, R-i-l-e-y, which is not

the name that we would have requested. Even had it been spelled properly, it still would have been a separate name.

THE COURT: Doesn't it show up on her social security number too?

MS. ABEE: We weren't in possession of her social security number, Your Honor. We ran her name, the fact she's a black female, and her date of birth is what we ran the rap sheet under.

THE COURT: So did you not run it under the social security number, or you ran it and nothing showed up?

MS. ABEE: I did not run it under the social security number, Your Honor.

THE COURT: Just under the incorrect name?

MS. ABEE: The name, the date of birth, and black female, yes, sir.

MR. KENT: Thank you, Your Honor, for the clarification, and, again, I just want to make sure we're clear for the record. So we're not saying Yolanda McCray gave a fake name to the Attorney General's office. I just want to be --

MS. ABEE: That is correct. She gave the name Yolanda McCray. We did not have Yolanda Riley run as a rap sheet, so I guess the better phrase would be

under a different name.

THE COURT: Do we know that the person that had these prior convictions is, in fact, Yolanda Riley?

MR. KENT: Yes, we do, Your Honor. And now, just to change course a little bit, to go with the analysis that the Attorney General's office just gave, that almost becomes a little bit bigger of a problem. It kind of spits into the face of the brief that they just put forth to say that we wouldn't have had this and it's a good faith error.

I was a solicitor for quite some time. As a prosecutor for quite some time, one of the things we do is, when a defense attorney puts on their own witnesses -- one of the things we do is, Well, I need your person's name, birth date, and social security number so I can run the proper background check or proper rap sheet.

Number two: When you meet with individuals, one of the things that you often ask them is do you have a criminal record that we need to worry about that you could be impeached upon? I find it a little bit strange. I'm not sure what their policy is, but I find it a little bit strange that we don't run a social security number with an individual because of the problems that they just said. You can misspell a name.

Looking at what they've said, you can't say it wasn't in our possession because you did it incorrectly. It should have been in your possession, as you see from ours. When we ran the name that was on the State's witness list is where we ran the name from. We ran the name and spelling from the State's witness list, and the social security number was garnered from the witness statement, so these are things they had in their possession.

So they were able to run a proper rap sheet, they just did it incorrectly, so they can't say this wasn't information that wasn't in our possession we shouldn't have turned over. This was clearly information that wasn't in our possession.

Your Honor, the fear of allowing a good faith -- and I said very clearly, as to this issue and I think I put it in writing, I trust Ms. Abee knows that this was a good faith mistake, but the fear in allowing good faith mistakes still hamper people's rights, because if we were to simply allow it and say, Well, we just spelled the person's name wrong. We didn't run a social security number. We didn't do any better checks and balance to make sure we had the right information, that's a problem.

When a person gets on the stand, as the Court

rules very clearly, their credibility comes on the stand with them. If we are allowing the State of South Carolina to say, Oops. Sorry. We didn't run a proper rap sheet. We don't have one. Let's just assume they don't have a record, you can see the danger that could happen.

They spelled the name wrong, so you can't sit here -- and I'm arguing against their brief because one of the things they argued in their brief is this is information that just wasn't in their possession.

Additionally, Your Honor, taking what they have stated as far as Brady violations, number one: The evidence was favorable to the accused. Well, clearly, it is favorable to the accused because it goes 100 percent to our legal defense. This isn't something where we're saying, Well, we should have been able to get into an assault and battery or a shoplifting. This is obtaining signatures under false pretenses, what exactly our legal defense is.

Number two: It was in the possession or known to the prosecution. It's our position, based upon what they just said, it would have been in their possession and known to the prosecution because they have the right to run an NCIC search, which I don't have, and they have the actual individual who had a criminal record

and she was in a position that they could have talked to her.

Number three: It was suppressed by the prosecution, and I want to be careful how I say this. I am not saying that they intentionally hid something from us, but the word suppressed has multiple meanings. By suppressed, it means it wasn't given to us so that we could properly cross-examine them on it. I don't think they tried to hide it, but it was suppressed because of their mistake.

Number four: It was material to guilt or punishment. This is a credibility case, Your Honor. If there was any other scintilla of evidence whatsoever other than people's word -- and this was a word case. This was our word versus this other individual's word, which is why I had such a problem and I made all the pretrial motions. This is 100 percent material.

The outcry witness was able to get on the stand unfettered, without any cross-examination, without any knowing of her very lengthy criminal record. To say that I -- Your Honor, you sat in here for four days in the trial when people had criminal records, both of us, not only myself, but Mr. Fernandez did a very good job of when witnesses testified and going very effectively through their criminal record, and I did the same when we

had Lizzy Johnson on the stand.

We were going into the criminal records of individuals who testified. To simply allow someone to get on the stand without mention of their criminal record in a credibility case and then effectively argue in a closing argument that you must believe this information. Why must you believe this information? And they didn't say this, but you can see the argument: Some people have criminal records, but you got to believe this lady. She just overheard the information.

And I'm going to pause while my client comes into the courtroom.

Just so the record is clear, at this point in time, Larry DuRant has been escorted into the courtroom. On behalf of my client, I had no problem, and I said on the record that I had no problem with us beginning the hearing without him present. If you'll give me about 30 seconds, I'll explain what's happened up to this point in time.

THE COURT: Sure.

(Brief pause.)

MR. KENT: And, Your Honor, that would be our reply as to that issue. I do believe that this is material. To say in a credibility case that that's information that's not important is preposterous. It

would be -- again, as I said earlier, it would be one thing if we were to sit here and say the jury came back in ten minutes. The evidence was overwhelming. There was DNA evidence. There was eyewitnesses. There was a lot of other information that the jury could have relied on.

In this situation, all the jurors had to rely on at all was the testimony of witnesses; hence, credibility becomes a central issue, and you, Your Honor, yourself even mentioned during sentencing this was a credibility case. You could have seen it going either way. They chose to utilize the testimony of the individuals for the State and relied upon that credibility.

Thank you so much, Your Honor.

THE COURT: Anything else from the State?

MS. ABEE: Very briefly, Your Honor. Even assuming, as Mr. Kent says, that this is merely the word and credibility case, we're talking about the credibility and the word of the victims who testified as to their sexual assaults, Your Honor.

This is an outcry witness. What she testified to was that she overheard them disclosing or talking about their sexual assaults, so this impeachment material has no material effect on the case itself, Your

Honor, because if this was one of the victims and she had a record that wasn't disclosed, I could certainly see how that would change -- or at least could potentially have a change in the outcome of the case as far as being impeachment material, Your Honor, but this was an outcry witness.

This was one of several witnesses that the State called, Your Honor, and any of her convictions that were not in the State's possession are just merely impeachment material, and they are not material to the case, Your Honor, nor do we contend that they would change the outcome of the case because of her limited scope in testimony and what she testified to, so we would still stick by our argument that a new trial should be denied on that basis.

THE COURT: All right. Well, I don't think it sounds like there's any evidence, or even suggestion, that the State's conduct was intentional in this case, so the only real question is was it an inadvertent oversight, and, if so, did it rise to the level of being material, such to the point that it would affect a real question of guilt or punishment?

You know, nobody is going to get a perfect trial. It's nice to think we do them, but you do the best you can, and mistakes get made. It does look like

in this case the State sent a name with a typographical error in it. It came back as showing there were no priors when, in fact, the witness had priors.

Now, all of the priors that got listed were over ten years, and while they are of a witness and not a party, there is a real question as to whether or not they would have been admissible at trial. I can't say that they would or they wouldn't at this point, but they were all over ten years of age.

The Court has more discretion on a non-defendant witness to allow older ones in, and I think I may have even allowed one in on an older conviction of another witness. Nevertheless, the real question is, you know, was there a lot of other evidence of guilt and would the impeachment value of this have made a difference on a close-call sort of case?

The State did not have this in their possession. It wasn't known to them. They didn't suppress it. The evidence clearly would have been favorable to the accused, to have that sort of impeachment available for a witness, but, really, it boils down to would this have affected the outcome of the trial? And it's very difficult to look at that sort of thing and figure out what's in the jury's mind, but you did have, you know, one young lady who made the

accusation; three other young ladies, who, you know, supported what she said by way of 404(b) evidence.

It was really a question of whether or not you believed them as opposed to whether or not you believed the mother who said she overheard two of the girls talking about it, because that just set in the chain of events that led to his ultimate arrest.

But the real question is, you know, these girls made that accusation, and you either believe them or you didn't believe them. Same thing, you either believed the defendant or you didn't believe the defendant. The issue of Yolanda McCray's testimony was -- you know, I guess the correct legal phrase in this is sort of immaterial, but it certainly didn't rise to the level of, I think, putting at issue a serious question of impeachment as to the young ladies, the four girls, especially the victim in this case. It would have been an impeachment issue about whether or not this lady actually overheard them, and so I find that there was not a violation of Brady requirements to disclose this record, and so the motion for a new trial is denied.

MR. KENT: Thank you so much, Your Honor. Could I put one more thing on the record as to that issue?

THE COURT: Sure.

MR. KENT: And I understand the Court has consistently used the phrase that was impeachment, and I understand the Court's ruling on that argument, just to make sure I'm covered for the record.

The Court has consistently, as well as the Attorney General's office, said that we wanted to use this as impeachment material. It's not only impeachment material, this is actually our legal defense, is what I want to make sure I'm clear about. This was our legal defense as to the obtaining signature under false pretenses, so I want to make sure that specific part of her record, which was a 2004 conviction in which she was given five years probation, and understanding it wouldn't have been outside of the ten-year window, it would have been within the ten-year window and would have been admissible --

THE COURT: And I'm saying even if it had been admissible -- and I may very well have let it in because I think I let in another witness who had an older than ten-year conviction.

MR. KENT: Yes, sir.

THE COURT: I'm just saying this was apparently inadvertent, and I don't think that this was something that the case would have turned on. I understand your theory that it would have and the jury

should have known it. I get that.

MR. KENT: And I just want to make sure -- not to argue with Court at all, but just to make sure that if another Court is reading this down the road that they understand our position. It's not impeachment material. It's necessary for us to flesh out our legal defense and make sure it's clear that there were two witnesses who were central in this case: Lizzy Johnson and Yolanda McCray, who happen to both be related and both have problems with obtaining signatures, which specifically went to our theory of the forgery, to point to the theory of stealing the residence, and stealing the residence would have created this cavalcade of necessity for these charges to come out.

That's what we want to make sure -- we're not saying that it's just impeachment material, that it's necessary for Mr. DuRant to have the right present his full legal defense, and he wasn't allowed to present his full legal defense. At this point, I understand the Court's position about the Attorney General's office didn't have them in their possession, I believe they did, because just to say that, Oh, we didn't run the rap sheet correctly, I think the standard is did or could have, reasonably, and they reasonably could have.

I mean, if we are allowed to have prosecutors

just misspell things, say, Oops, I misspelled that. I didn't have it, and the Courts have looked at that over and over when they say, Well, I didn't go to the officer and get this properly, or, I didn't get this information properly from the officer the way that I should.

That would be my position. I don't want to argue with the Court. I just want to make sure I'm clear on the record.

THE COURT: All right. Anything else while we're here?

MR. KENT: While we're here, Your Honor, you had given me, graciously, an amount of time to renew all my post-trial motions, and I just want to say very clearly I just renew any motions made during the course of trial, all the motions during that were made during pretrial. You've heard our motion for a new trial, and I just --

THE COURT: I think you've made them abundantly correctly at the right time, but I understand the need -- sometimes, you know, you get these things and you go, How many times do you have to make the same motion throughout a trial?

And, you know, you go, well, the rules say this, and then there is case law that says this and then sometimes it sounds like you get a panel that says, well,

we're just going to hear it because we want it.

MR. KENT: And I know for a fact I did not renew any post-trial motions, my directed verdict motion or any of the motions I made, so at this point in time, in light of the fact that the Court is giving me ample time, I've renewed all motions made during the course of trial as well as my directed verdict motion as well as my pretrial motions and so forth.

THE COURT: And they're all, again, denied for the reasons stated previously.

MR. KENT: And I would, at this point in time -- and I understand Court gave their sentence, and I understand the rationale for the Court's sentence. At this point in time, since I'm allowed to, I'd make a motion for the Court to reconsider the sentence that they gave for 20 years.

That popped in my head rationally as Mr. DuRant was walked into the courtroom, rolled into the courtroom, in a wheelchair. His prosthetic legs were taken away from him. As you know, the actuary tables, the amount of time that he's going to live in prison -- I had thought about requesting an appellate bond. It's my understanding from Ms. Blazer that an appellate bond would not be appropriate in this situation in light of the time he was given.

I would ask the Court to reconsider the sentence of 20 years. In light of this case, again, I can't hold more than what -- it was a credibility case, and I understand the Court said that also.

I'd ask you to reconsider the 20-year sentence based upon his age, based upon his health. A 20-year sentence in this situation is a life sentence, so I would just ask the Court to reconsider the sentence they set at 20 years.

THE COURT: Well, as I said, if you believed what the girls had to say, then his acts were reprehensible, those of a predator, and society needs protection from people that did what he was convicted of doing, and, in my opinion, the maximum sentence was entirely justified based on the evidence that came out at trial, so the motion is denied.

MR. KENT: Thank you, Your Honor.

THE COURT: Anything else?

MS. ABEE: Nothing from the State, Your Honor.

MR. KENT: That covered everything on behalf of Mr. DuRant, Your Honor.

THE COURT: All right. Thank you.

- - -

(Whereupon, the proceedings were concluded.)

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RECEIVED

JAN 28 2019

S.C. SUPREME COURT

January 24, 2019

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *State of South Carolina v. Larry Durant*
Court of Appeals Appellate Case Number 2016-001264

Dear Mr. Shearouse:

Pursuant to Rule 208(b)(7), SCACR, Larry Durant calls this Court's attention to *Brewster v. Hetzel*, No. 16-16350, 2019 WL 272835 (11th Cir. Jan. 22, 2019), regarding Question IV raised in this appeal.

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

With kindest regards, I am

Yours very truly,

E. Charles Grose

E. Charles Grose, Jr. By: Laura Wingard paralegal

cc: Pastor Larry Durant
William F. Schumacher, IV, Esquire

The Grose Law Firm, LLC

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June 13, 2019

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *State of South Carolina v. Larry Durant*
Appellate Case Number 2016-001264

Dear Mr. Shearouse:

Pursuant to Rule 208(b)(7), SCACR, Larry Durant calls this Court's attention to *State v. Billy Lemurces Taylor,* Appellate No. 2016-000549, 2019 WL 2441231 (S.C. Ct. App. June 12, 2019), regarding Question IV raised in this appeal.

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

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Pastor Larry Durant
William F. Schumacher, IV, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
Jun 10 2020
S.C. SUPREME COURT

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

Appellate Case No. 2016-001264

The State, ...Respondent

v.

Larry Durant,.....Appellant.

PETITION FOR REHEARING

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I. INTRODUCTION.

In addition to asking this Court to consider the continued validity *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), Pastor Larry Durant presented two federal questions. The first federal question appearing on the record involves a coercive *Allen*[1] charge. In a footnote, pursuant to Rule 220(b), SCACR, this Court misapprehended the right of the non-deliberating juror, singled out by the trial judge's instruction requiring the juror to vote, to cease deliberations as a way to resist the pressure of the majority. By way of a supplemental citation, Pastor Durant asked this Court to consider *Brewster v. Hetzel*, 913 F.3d 1042 (11th Cir. 2019). Once the rights of the non-deliberating juror are considered in the context of *Brewster*, the need to rehear this matter is apparent. Additionally, the trial judge's instruction in Pastor Durant's case did not take into account the comfort of the jurors, including access to food and sleep, and is, therefore, distinguishable from *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015).

Next, although strongly articulating the prosecution's *Brady*[2] obligation to provide an accurate criminal history for its witness and acknowledging the nondisclosed "evidence was clearly favorable to Durant, as defense counsel could have used it to impeach McRae," *Durant*, at 4, this Court misapprehended the materiality of this evidence, overlooked the fact that this case turned on the credibility of the witnesses, and misapplied the appropriate standard for a *Brady* violation by failing to consider the entire record, solely relying on the prosecution's evidence, excluding from consideration the evidence presented by the defense.

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[1] *Allen v. United States,* 164 U.S. 492 (1896).

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

Turning the Pastor Durant's request for this Court to consider the continued validity of *Wallace*, the concurring opinion in *State v. Perez* pointed out this Court's holding in *Wallace* "so expanded the admissibility of prior bad acts in sexual offense cases that the exception has swallowed the rule." 423 S.C. 491, 501, 816 S.E.2d 550, 556 (2018) (Hearn, J., concurring). In *State v. Perry*, No. 2017-001965, 2020 WL 2179238 (S.C. May 6, 2020), a divided Court purported to overrule *Wallace* and *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989). The majority in *Perry*, however, succumbed to the temptation of creating a "new framework," *State v. Cotton*, No. 2017-002402, 2020 WL 2179256, at 1 (S.C. May 6, 2020), for the admissibility of propensity evidence in child sexual offense cases when the prosecution claims a "purpose beyond propensity." *Perry*, at 8. This Court's opinions in *Perry*, *Cotton*, and *State v. Durant*, No. 2016-001264, 2020 WL 2179248 (S.C. May 6, 2020) so expanded the admissibility of prior bad acts in child sexual offense cases that the exception to the rule is now the rule, thinly veiled as "new framework," *Cotton*, at 1, for the admission of propensity evidence in child sexual abuse cases. *Perry* and *Durant* merely changed the vocabulary for admissibility of bad character evidence from "a close degree of similarity," *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278, to "a particularly unique method of committing" crimes, *Durant*, at 4, without articulating the distinction between those terms.

Our state's appellate courts are inconsistent in the application of the exception Rule 404(b) and *State v. Lyle* for "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others." 25 S.C. 406, ___ 118 S.E. 803, 807 (1923). Perhaps, these inconsistencies result from the absence of cases, since *Lyle*, defining the meaning of this exception. Subsection II(C)(5)

of this petition will request this Court to provide guidance about the mearing of this exception to *Lyle* and Rule 404(b) and define and distinguish the terms "similar," "quite similar," "strikingly similar," "close degree of similarity," and "particularly unique method."

Despite a passing reference to Rule 403, SCRE, in *Perry*, at 11, and *Cotton*, at 1, neither of those cases provided any guidance about the role of Rule 403 in "the new framework" for the admissibility of propensity evidence in child sexual abuse offenses, and *Durant* does not mention Rule 403 at all. This Court should provide guidance about the role of Rule 403 under its "new framework" for the admission of propensity evidence in child sex offense cases.

Additionally, this Court completely ignored the role of a limiting instruction in the "new framework" for admissibility of propensity evidence in child sexual offense cases. This Court should provide guidance about the role of a limiting instruction under its "new framework" for the admission of propensity evidence in child sex offense cases.

Finally, this Court summarily dismissed the applicability of the cumulative error doctrine to this case. In doing so, this Court, for the first time, created a new requirement that cumulative error be raised at trial in order to be raised on appeal. This Court should reconsider this new rule.

Pastor Larry Durant, accordingly, petitions this Court for rehearing.

II. GROUNDS FOR REHEARING.

This Court overlooked or misapprehended the following points and should rehear this case pursuant to Rule 221, SCACR. This petition will begin by discussion the two federal questions in the order they appear in the record.

A. *Allen* Charge (Issue V).

Regarding the *Allen* charge, this Court concluded:

> It is apparent the trial court did not err in directing the juror to fulfill the oath he took at the outset of trial, as the court did not urge the jurors to vote in any specific way. Moreover, the court's suggestion that the jurors would have to deliberate for as long as they wanted to be there that evening does not render the charge coercive.

Durant, at 6, fn. 6. This conclusion is error for four reasons.

Frist, pursuant to Rule 208(b)(7), SCACR, Pastor Durant called this Court attention to *Brewster v. Hetzel*, 913 F.3d 1042 (11th Cir. 2019) through a supplemental citation letter dated January 24, 2019; *see also* supplemental citation letter dated June 6, 2012, citing *State v. Taylor*, 427 S.C. 208, 216, 829 S.E.2d 723, 728 (Ct. App. 2019) (citing Brewster). *Brewster* reviewed the historical significance of the *Allen* charge, including the importance of not coercing jurors to vote a certain way, and observed, "Pressure on jurors, especially on holdout jurors, is increased when the instructions to keep trying to reach unanimity come from a judge who knows how split the jury is and in which direction." 913 F.3d 1054-55 (jurors initially divided 9 to 3 for conviction). Here, the trial judge knew the split of the jurors were divided 8 to 3 for conviction, with one juror not deliberating. Court's Ex. No. 2, R. 776.

Second, the trial judge branded the non-deliberating juror "not helpful to the situation at all" because the juror might "ensure that we have a mistrial if you continue to refuse to even vote even if the 11 other folks do reach a unanimous decision." The juror singled out by this instruction is similarly situated to the non-deliberating juror in *Brewster*, 913 F.3d at 1047 ("when told that the one juror who wouldn't vote to convict was doing crossword puzzles, the judge ordered all the reading materials").

Third, thirty-four minutes after the *Allen* charge, the jurors returned a verdict finding Pastor Durant guilty of second-degree criminal sexual conduct with a minor. R. 711-12. *Cf. Brewster*, 913 F.3d at 056 ("The final circumstance contributing to our conclusion that the verdict was coerced is how quickly the jury unanimously agreed on a verdict after the court's last instruction and action. A verdict of conviction 'bounced out' of the jury room only 34 minutes after the last instruction from the judge" and 18 minutes after removing reading materials.).

Fourth, the trial judge instructed, "So in light of that, let me send you back. However long it is you want to take *this evening*, we'll be here as long as you want to be here. You know, I'll leave it at that." R. 711 (emphasis added). When the trial court gave this instruction, the judge knew the jurors has made four unsuccessful attempts to reach a verdict. R. 776. The trial judge did not offer the jurors dinner, an opportunity to resume deliberations on a later date, or anything else for the comfort of the jurors. Thus, Pastor Durant's case is distinguishable from *Johnson v. Sam English Grading, Inc.,* where the trial judge made provisions for the jurors' comfort. 412 S.C. 433, 457, 772 S.E.2d 544, 556 (Ct. App. 2015) ("The trial court's statement about ordering dinner and about his wife being out of town were not coercive. Additionally, the trial court was not going to force the jury to come back on Saturday; he also offered the option of Tuesday.").

This Court, accordingly, should rehear this matter, reverse the conviction and sentence, and order a new trial.

B. *Brady* Violation (Issue IV).

This Court strongly articulated, "[T]he failure [of the State] to provide information that could be obtained through a NCIC search is a *Brady* violation." *Durant*, at 4.[3] This Court "agree[d] with the trial court that McRae's conviction for obtaining a signature under false pretenses likely would have been admissible." *Id*., at 6. Yet, this Court concluded Pastor Durant "cannot demonstrate the evidence was material because there was not a reasonable probability the result of the proceedings would have been different," noting "the defense never suggested that McRae—as opposed to Johnson—forged the deed" and "the State presented cumulative evidence in the form of the girls' testimony." *Id*. These conclusions are error for three reasons.

First, this Court did not review the entire record and consider the fact that this case turned on the credibility of witnesses. *E.g. State v. Anderson*, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) (finding prejudice when the "case turned solely on the credibility" of witnesses). The record in Pastor Durant's case contains a lot of evidence raising reasonable doubts. Dr. Leonard testified Pastor Durant has erectile dysfunction and a chronic sexually transmitted disease. R. 640-46. None of the complaining witnesses had a sexually transmitted disease. Pastor Durant presented the testimony of two "armor bearers," who testified there would not have been an opportunity for Pastor Durant to commit the sexual assaults, at the church, in a manner described by the four women. R. 570-80, 594-602.

Second, this Court erred by dismissing the importance of McRae to the State's case because "the defense never suggested that McRae—as opposed to Johnson—forged the

[3] Pastor Durant's Brady motion requesting, "All information relevant to the credibility of any State witness," and "[t]he criminal records, both juvenile and adult, of such witnesses." R. 778.

deed." *Durant*, at 6. Pastor Durant's defense included McRae participating in a conspiracy with Johnson and the four women, all of whom are connected by family and social relationships, to frame him for committing the sexual offenses. As trial counsel pointed out during the hearing on the motion for a new trial, during the State's "very effective closing argument," the prosecutor argued the jurors "must believe what the outcry witness [McRae] stated because she happened to overhear it which gives [the State's] theory credibility, that no one could have made up this entire theory." R. 739. Trial counsel continued:

> The problem with that, of course, as Your Honor yourself mentioned during sentencing, this was a credibility case, and in light of the credibility case, the jury could make a decision of either listening to the defense witnesses or listening to State witnesses. With Yolanda [McRae] as the outcry witness, being able to testify un-cross-examined about her criminal record.

R. 739-40. McRae's criminal history, accordingly, undermined the credibility of the prosecution's case.

Third, this Court did not correctly apply the standard for a *Brady* violation articulated in *United States v. Bagley*, 473 U.S. 667, 682 (1985) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). *Bagley* modified the holding in *United States v. Agurs,* where the Supreme Court observed:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evince is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

427 U.S. 97, 112-13 (1976). As discussed above, this Court did not evaluate McRae's criminal history "in the context of the entire record," as the opinion focused exclusively on the State's case and excluded evidence presented by Pastor Durant. Consideration of Pastor Durant's evidence is necessary to determine whether the ability to impeach McRae with her criminal record would "undermine confidence in the outcome," *i.e*. would it "create[] a reasonable doubt that did not otherwise exist." This case turned on the credibility of the witnesses, and, as seen above, the jurors were deadlocked after four votes. R. 776. Viewing the entire record, it is impossible for any court to say that impeaching the credibility of "outcry witness" with her criminal record would not have created a reasonable doubt.

This Court, accordingly, should rehear this matter, reverse the conviction and sentence, and order a new trial.

C. *Lyle* and Rule 404(b), SCRE (Issues I, II and III).

1. Traditional Application of Rule 404(b), SCRE.

The majority in *Perry* identified *Lyle*,[4] which predated adoption of the South Carolina Rules of Evidence, as "the classic South Carolina case for understanding the

[4] *Perry* cites four cases for our state's continued reliance on *Lyle* for interpreting Rule 404(b), SCRE. The first is *State v. Anderson*, 318 S.C. 395, 403, 458 S.E.2d 56, 60 (Ct. App. 1995) (Howard, J., dissenting) (referring to *Lyle* as "the seminal case"). *Perry*, at 4. The majority in *Anderson* declined to sever the trial of a habitual traffic offense from the trial of driving under suspension ("DUS") and driving under the influence ("DUI") charges even though the habitual traffic offense charge required admission of prior convictions for DUS and DUI. The dissent in *Anderson*, citing *Lyle*, would have granted the severance because "the prejudicial effect of the admission of the prior DUI and DUS convictions in the trial on those offenses is obvious." 318 S.C. at 403, 458 S.E.2d at 60 (Howard, J., dissenting). *Anderson*, accordingly, is more of a "severance case" than a "*Lyle* case." If this Court decided *Anderson* in 2020, it very likely would require a bifurcated

admissibility of a defendant's other crimes." *Perry*, at 4. "The substance of" our state's "common law rules" regarding character evidence are codified in Rule 404, SCRE. *State v. Nelson*, 331 S.C. 1, 6, fn. 7, 501 S.E.2d 716, 719, fn. 7 (1998). Rule 404(b), "limits the use of evidence of other crimes, wrongs, or acts to those enumerated in" *Lyle.* Rule 404(b),

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trial because of its holding in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019) (trial court committed error of law when it denied defendant's motion to bifurcate trial).

The second case, *State v. Odom*, cited *Lyle* in a footnote to explain the State's initial strategy was "to try [Odom] in Spartanburg County on other similar charges, and use the evidence gathered in the Oconee investigation as 'prior bad acts' evidence in the Spartanburg trial." 412 S.C. 253, 260, fn. 5, 772 S.E.2d 149, 152, fn. 5 (2015). The State switched strategies and tried the Oconee County charges instead. *Odom* did not involve an Rule 404(b), SCRE issue on appeal; however, during a pretrial hearing regarding the State's change in strategy, the prosecutor conceded, "There was gonna [sic] be potential *Lyle* evidence, and I don't know that we would have ever gotten it in" if the case was tried in Spartanburg. *Id*., 412 S.C. at 262, 772 S.E.2d at 153. Thus, other than reaffirming the validity of *Lyle* for interpreting Rule 404(b), *Odom* does not provide any guidance for interpreting that rule.

The third case is *State v. Cope*, 405 S.C. 317, 748 S.E.2d 194 (2013). Although citing *Lyle* as guidance for interpreting Rule 4040(b), SCRE, *Cope* relied on *State v. Clasby*, which in turn relied on the *Wallace* test, *i.e*. whether the "similarities outweigh the dissimilarities" determines the admissibility under Rule 404(b). 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009). *Cope,* accordingly, is more of a "*Wallace* case" than a "*Lyle* case," indicating *Cope* is no longer valid, despite the majority in *Perry* declining to "reconsider[] the results of prior cases." *Perry*, at 6, fn. 5.

The fourth case, *State v. Nelson*, a leading case prohibiting propensity evidence in child sexual offense cases, rejected the prosecution's contention the other bad act evidence was admissible "to show motive, intent, and a common scheme or plan." 331 S.C. 1, 9, 501 S.E.2d 716, 720 (1998). Additionally, *Nelson* cited *State v. Alexander* as an example of when relevant evidence should be excluded when the danger of unfair prejudice substantially outweighs the probative value of the evidence and defining "[u]nfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (internal quotations omitted) (citing Fed. R. Evid. 403 advisory committee's note). Although decided prior to our State adopting Rule 403, SCRE, *Alexander* is often cited when interpreting Rule 403. *E.g. State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (reversing murder conviction). As discussed in Section II(C)(3), *infra,* this Court should incorporate *Alexander's* definition of "unfair prejudice" into the Rule 404(b), SCRE analysis.

SCRE, reporter's note. *Lyle* articulated the common scheme or plan exception as "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others." 125 S.C. at ___, 118 S.E. at 807. *Lyle* reasoned:

> A plan or system common to other crimes was not an essential ingredient of the crime charged. Whether such crime was committed as part of a common plan or system was wholly immaterial, unless proof of such system would serve to identify the defendant as the perpetrator of the particular crime charged or was necessary to establish the element of criminal intent. Proof of a common plan or system, therefore, in this connection is merely an evidential means to the end of proving identity or guilty intent, and involves the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged.

125 S.C. at ___ 118 S.E. at 811 (excluding the Georgia crimes as improper propensity evidence). By focusing on whether the other crimes established identity or criminal intent and focusing on whether the underlying facts of the other crimes offered proof of "an essential ingredient of the crime charged," *id.*, *Lyle* taught the bench and bar how to resist the temptation of using propensity evidence to secure a criminal conviction. In *Nelson*, this Court explained:

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

331 S.C. at 6, 501 S.E.2d at 718-19 (internal quotations and citations omitted) (emphasis added).

Traditionally, similarity is ***not*** a consideration for admissibility under *Lyle* and Rule 404(b), SCRE. Regarding the admissibility of prior crimes, this Court in *Lyle* warned about the dangerous temptation of focusing on similarity, *i.e*. propensity evidence, to secure a criminal conviction:

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

Lyle, 125 S.C. at 420, 118 S.E. at 808. In *Lyle*, this Court admitted the Aiken crimes, despite similarity, because of "the inference that the two extraneous crimes were committed within a few town blocks as to distance, and within a few minutes, as to time, of the crime charged, and that they were practically a part of the *res gestae*, each a part of one general scheme of a single expedition." *Id.* Proof that Lyle committed the other crimes was logically connected to the charged crime "for the purpose of establishing the identity of the accused" and to refute an alibi defense. *Id*.

Under the traditional interpretation of *Lyle*, "[i]f the court does not clearly perceive the connection between the extraneous transactions and the crime charged, that is, its logical relevance, the accused should be given the benefit of the doubt, and the evidence rejected." *State v. Brooks*, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000). In *Brooks*, the State prosecuted Brooks from forging a check on November 11, 1996. The prosecution contended "evidence that Brooks had committed a prior forgery by writing a check on a closed account on September 25, 1995" was admissible under *Lyle* and as an exception to Rule 404(b), SCRE, to show absence of mistake or accident and intent in the current forgery." *Id*., 341 S.C. at 60-61, 533 S.E.2d at 327. Over Brooks' objection, the trial court ruled "the evidence was proper because the two forgeries were 'similar in that both

accounts were closed ... and either she knew, or should have known, that the account ... was closed.'" *Id*. This Court held the 1995 forgery did not "disprove" Brooks' defense to the 1996 charge or make it more probable "that Brooks forged *this check* or knew it was forged" and expressly found "the State introduced the prior act to demonstrate that Brooks acted in conformity with her propensity to commit crimes which is in direct contradiction of *Lyle.*" *Id*. 341 S.C. at 62, 533 S.E.2d at 328 (emphasis added) (citing *State v. Hough,* 325 S.C. 88, 480 S.E.2d 77 (1997) (by introducing prior bad act evidence, the State was attempting to demonstrate that because defendant had committed crimes in past, he was doing so on this occasion, precisely type of inference *Lyle* prohibits)).

In *Hough,* the State prosecuted Hough for the burglary of a warehouse and larceny of "two power saws and two flashlights." 325 S.C. at 90, 480 S.E.2d at 78. This Court held testimony "concerning [Hough's] prior instances of stealing to obtain crack money" was inadmissible as part of the *res gestae* and under *Lyle. Id*. 325 S.C. at 93, 480 S.E.2d at 80. This Court held "testimony concerning the subsequent sale of the saws and purchase of crack cocaine was properly admitted" because it "provides a motive for Hough to have committed the crime and would therefore be admissible under *Lyle.*" *Id*., 325 S.C. at 95–96, 480 S.E.2d at 81.[5]

[5] This Court also held the evidence "Hough bought one rock of crack cocaine with money used from the sale of the saws is simply insufficient to draw an inference that [he] 'had a crack problem,'" as the Solicitor alleged during the State's opening statement. *Hough*, 325 S.C. at 94, 480 S.E.2d at 80; *see also Robinson v. California*, 370 U.S. 660 (1962) (held state law which made 'status' of narcotic addiction a criminal offense for which offender might be prosecuted at any time before he reformed, and upon conviction required imprisonment of at least 90 days in a county jail, inflicted a 'cruel and unusual punishment,' in violation of the Fourteenth Amendment.

Because of cases like *Hough* and *Robinson*, this petition must address the shocking statement made by the dissent in *Perry*: "[C]hild molesters' behavior is often repetitive and

Our Court of Appeals "has held that testimony of a prior drug sale [four days earlier] using a similar sales technique is not relevant to prove a single charge of distribution." *State v. Carter*, 323 S.C. 465, 468, 476 S.E.2d 916, 918 (Ct. App. 1996) (citing *State v. Campbell,* 317 S.C. 449, 454 S.E.2d 899 (Ct.App.1994). The Court of Appeals recognized, "[T]he State was not trying to prove a common scheme or plan, but was instead trying to convince the jury that because Carter sold crack cocaine [] on January 14th, he was selling crack cocaine on January 18th." *Id*. "This is the precise type of inference prohibited by *Lyle.*" *Id*. *Campbell* applied an identical analysis.[6]

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lends itself to establishing a pattern," noting "certain sex crimes, such as criminal sexual conduct with a minor (via pedophilia), have made the short list of those crimes singled out for a specific diagnosis in the psychiatric community" in "the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V)." *Perry*, at 26, fn. 37 (Kittredge, J., dissenting). This statement is shocking for at least three reasons. First, if the underlying concern is a medically diagnosable condition, then treatment should be favored over incarceration. Second, it applies a blanket diagnosis in child sex offense cases without requiring any proof that a particular person meets the diagnostic criteria of the diagnosis. Third, acceptance of this approach—labeling those accused of a child sex offense as mentally ill without a mental health evaluation—would completely abandon any limitation on the admissibility of propensity evidence in child sex offense cases. This statement also represents the first slide down a slippery slope embracing the temptation to use propensity evidence to solidify a criminal conviction. The DSM-V also contains diagnoses for alcohol and substance abuse disorders, kleptomania, and antisocial personality disorder. *But see. State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) (psychiatrist's testimony regarding defendant's antisocial personality disorder was not relevant, and, if relevant, should have been excluded as tending to confuse the jury), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

[6] The Court of Appeals' opinion in *Wallace* called attention to our state's sometimes inconsistent *Lyle* precedent and cited *Campbell* as "correctly reflect[ing] a more narrow interpretation of the common scheme or plan exception." 364 S.C. at 139, 611 S.E.2d at 337. It is difficult to reconcile this Court denying *certiorari*, on July 26, 1995, in *Campbell*, 317 S.C. at 451, 454 S.E.2d at 901 ("Here, the testimony is of prior drug sales utilizing a ***similar*** sales technique. However, this is not enough to satisfy *Lyle.*" (emphasis added)), so soon after this Court, on March 27, 1995, decided *State v. Raffaldt*, 318 S.C. 110, 114, 456 S.E.2d 390, 392 (1995) ("Here, the record shows that the method of marijuana dealing between Raffaldt and Burchett was ***quite similar*** to the cocaine conspiracy. We find that the evidence of prior drug dealing between Raffaldt and Burchett, which gave rise to the

Returning to child sex offense cases, in *State v. Stokes*, Stokes "allegedly committed the lewd act when the child came to his home to purchase a frozen fruit-flavored treat sold to neighborhood children by appellant and his wife." 279 S.C. 191, 192, 304 S.E.2d 814, 814 (1983). Over Stokes' objection, "the trial judge allowed another child to testify [Stokes] had once offered her money to 'meet him at the railroad tracks'" and speculate Stokes' "purpose of the meeting, she was allowed to speculate that [he] intended to rape her." *Id.* This Court reversed the conviction and held:

> 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. The record does not reveal any connection between the complained of evidence and the crime charged.

Id., 279 S.C. at 193, 304 S.E.2d at 815 (internal quotations omitted).

In fact, in other contexts, this Court recognized similarities inherently involved in child sex offense cases. In *Anderson*, *supra*, this Court approved of a procedure initially endorsed by the Court of Appeals in *State v. Brown*, of the prosecution "call[ing] and independent expert" who "did not examine" the child "to testify to the characteristics of victims" of child sex abuse. In *Brown*, the Court of Appeals approved of testimony by an independent expert explaining:

> [C]hildren delay disclosing abuse for a number of reasons, including: (1) fear of consequences to themselves, the perpetrator, or someone the child loves; (2) the child's age; (3) the child's relationship to the perpetrator; (4)

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cocaine transactions, was admissible as a common scheme or plan." (emphasis added)). Likewise, it is difficult to reconcile *Raffaldt* with *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) ("When, as here, the previous alleged bad act is ***strikingly similar*** to the one for which the appellant is being tried, the danger of prejudice is enhanced." (emphasis added)). For this reason, Section II(C)(5), *infra*, asks this court to define and distinguish the terms "similar," "quite similar," "strikingly similar," "close degree of similarity," and "particularly unique method."

> a lack of vocabulary or language to describe what has happened to them; (5) threats by the perpetrator; (6) grooming by the perpetrator; and (7) the perpetrator's normalization of the abusive conduct. [The expert] further explained that most disclosures happen accidentally, and children generally reveal more details over time throughout the disclosure process. When children suffer chronic abuse, [the expert] stated it is more difficult for them to sort out the timing of individual incidents and the order in which they occurred. [The Expert] also explained that having a close and trusting relationship with the perpetrator can have a very strong impact on whether a child feels like he or she can disclose the abuse. Finally, [the expert testified that child abuse victims will sometimes tolerate sexual abuse to maintain a relationship, particularly if the perpetrator is someone they love and trust.

411 S.C. 332, 337-38, 768 S.E.2d 246, 249 (Ct. App. 2015), *abrogated on other grounds by State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018). It is inconsistent for this Court, on one hand, to recognize child sex abuse cases contain dynamics so similar—including "grooming" and "close and trusting relationship with the perpetrator," which often includes a perpetrator in a position of authority—that an expert who never examined the child is capable of providing testimony that can assistor jurors and, then, on the other hand, say that a similarly situated accused "had a particularly unique method of committing his attacks." *Durant*, at 4. As will be discussed in detail below, this Court's opinions in *Perry*, *Durant*, and *Cotton* are not faithful to the *Lyle*, the Court of Appeals Opinion in *Wallace*, *People v. Romano* 84 A.D. 318, 319, 82 N.Y.S. 749, 749 (App. Div. 1903), or *People v. Molineux*, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901).

2. *State v. Wallace* and this Court's Adoption of Special Rule in Child Sex Offense Cases.

The majority opinion in *Perry* cites with approval to the Court of Appeals' opinion in *Wallace*. *State v. Wallace*, 364 S.C. 130, 139, 611 S.E.2d 332, 337 (Ct. App. 2005), *reversed by State v. Wallace,* 384 S.C. 428, 683 S.E.2d 275 (2009). Thus, it is important to understand the history of *Wallace*. As this petition will demonstrate, although the

majority opinion in *Perry* was generous in its praise of the Court of Appeals' opinion in *Wallace,* it was unfaithful to both the substance and spirit of that opinion. The Court of Appeals in *Wallace* reasoned:

> In this case, the trial court did not address any connection between the two crimes to establish if the allegations by the victim's sister were admissible. The court instead ruled, "it goes to a common scheme or plan because of the close degree of similarity between the conduct, with regards to the two victims." When the State was asked to explain why the testimony was essential to its case, the solicitor responded:
>
> > This is technically a credibility case, that's what it is. It's one witness's word against potentially another witness's word. The evidence would be relevant and would be essential to the State's case because it is a piece of evidence, just like any other piece of evidence, that goes to prove or disprove the case. And this is strictly a credibility case: Therefore, this testimony is necessary to, again, prove the victim's allegations.
>
> This argument could be used to admit testimony of any prior crime when a defendant is accused of a subsequent but similar crime. It falls far short of the threshold for the admission of a prior crime under the common scheme or plan exception to *Lyle.* Accordingly, the trial court erred in admitting the evidence on this basis.

364 S.C. at 141, 611 S.E.2d at 338. The Court of Appeals further reasoned, "It was also error for the trial judge to attempt to limit the testimony of the sister so that there *would* be a close similarity between the prior bad act and the crime charged" because "[t]he law should not permit a trial judge to make similar that which is different by redacting a part of the testimony." 364 S.C. at 141, 611 S.E.2d at 338 (emphasis original) (internal quotations omitted). The Court of Appeals concluded, "In addition to finding the admission of the sister's testimony error, we find the admission was not harmless" because "the outcome of this case rested on the credibility of the victim and Wallace." *Id.* 364 S.C. at 142, 611 S.E.2d at 338-39.

Regarding the requirement of a connection between the crime charged and the other bad act, the Court of Appeals opinion in *Wallace* documented the inconsistent interpretation of Rule 404(b), SCRE and *Lyle* by our state's appellate courts:

> Wallace argues that numerous opinions from both this court 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) ("We find the evidence of prior bad acts bears such close similarity to the offense charged in this case that its probative value clearly outweighs its prejudicial effect."); *State v. McClellan,* 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) ("Such evidence is inadmissible 'unless the close similarity of the charged offense and the previous act enhances the probative value of the evidence so as to overrule the prejudicial effect.' "); *State v. Patrick,* 318 S.C. 352, 356 457 S.E.2d 632, 635 (Ct.App.1995) ("There are sufficient similarities between the Georgia case and present case to apply the *Lyle* common scheme or plan exception."); *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."); *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).
>
> According to Wallace, 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 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)[7] (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).
>
> Wallace is correct that some of the appellate decisions appear to focus exclusively on the alleged close similarity between the other crime and the crime charged, while others look beyond mere close similarity to consider the system or connection between the two. Nevertheless, sorting out any apparent inconsistencies in the appellate decisions of this state is not the province of this court. *See M & T Chems., Inc. v. Barker Industries, Inc.,* 296 S.C. 103, 109, 370 S.E.2d 886, 890 (Ct.App.1988) (stating that an intermediate appellate court has no authority to change existing law, but maintaining that the supreme court may want to grant certiorari and modify previous decisions).

364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2 (internal footnote added). Thus, the Court of Appeals in *Wallace* invited this Court to overrule the cases listed in the opening paragraph of footnote 2, to wit: *Hallman, McClellan, Patrick, Blanton*, and *Wingo*.

Significantly, the Court of Appeals in *Wallace* further recognized, "[T]he appellate courts of this state have refused to recognize a specific exception to the inadmissibility of prior bad act evidence in criminal sexual conduct cases." *Id.* 364 S.C. at 139, 611 S.E.2d at 337 (citing *Nelson*).

[7] On the same day as its opinion in *Wallace*, this Court reversed the Court of Appeals in *Hubner* based on its holding in *Wallace*. *State v. Hubner*, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009).

This Court reversed the Court of Appeals in *Wallace* and held (1) "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity;" (2) "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b);" and (3) "A close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility." 384 S.C. 428, 433-34, 683 S.E.2d 275, 277-78. This Court's opinion in *Wallace*, requiring trial courts to weigh similarities and differences of bad acts not only abandoned the requirement of logical relevancy of the other crime but also led to the practice of prosecutors and criminal defense lawyers quibbling over the number and types of similarities and differences—much like want occurred in Pastor Durant's Rule 404(b), SCRE hearing (R. 83-95)—limited only by the attorneys' creativity. This approach allows courts to engage in a result-oriented process of process of cherry-picking facts to support admissibility or inadmissibility.

The dissent in *Wallace* demonstrated this Court has "repeatedly held in non-sexual offense cases that, the mere presence of similarity only serves to enhance the potential for prejudice," observed this Court's "cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a common scheme or plan under Rule 404(b), SCRE, have, in effect, created an exception to the rule's exclusion of propensity evidence," and recommended that, if this Court is "to permit the admission of propensity evidence in these types of cases, then [it] should propose a new

rule of evidence, and encourage public comment." 384 S.C. at 435-36, 683 S.E.2d at 279 (Pleicones, J., dissenting).

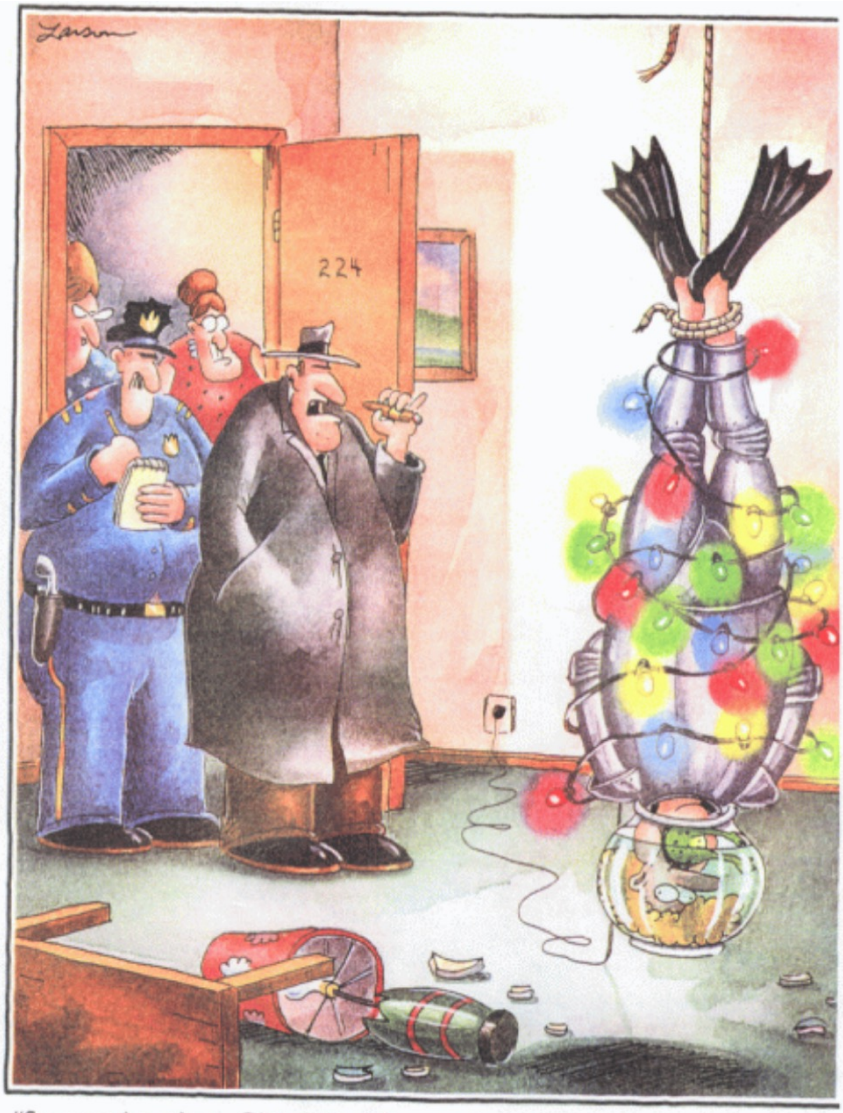
The concurring opinion in *Perez* echoed the dissent in *Wallace*, asserting, "*Wallace* broadened the common scheme or plan exception to such an extent that it no longer has a meaningful exclusionary effect in sexual offense cases." 423 S.C. at 502, 816 S.E.2d at 556. And, "Without requiring a greater degree of connection beyond only a mere similarity, the exception has been enlarged such that it has become simply a means to prove a defendant's criminal propensity." *Id*. 423 S.C. at 502-03, 816 S.E.2d at 556-57. The concurring opinion in *Perez* opinion recognized "this Court has repeatedly warned of the prejudicial dangers stemming from the introduction of prior bad acts which are similar to the one for which the defendant is being tried" and recommended, "[a]bsent an amendment to our rules of evidence creating a different categorical rule for sexual offenses, [this Court should] apply the common scheme or plan exception equally to sexual and nonsexual offenses alike." *Id*.

Against this backdrop, this Court agreed to consider *Perry, Durant,* and *Cotton* and granted motions to argue against the precedent, pursuant to Rule 217, SCACR.

3. *State v. Perry* and the Adoption of a "New Framework" for the Admissibility of Propensity Evidence in Child Sex Offense Cases.

The majority opinion in *Perry* purports to return to the reasoning of *Lyle*, stating its "focus is on restoring the integrity of the Rule 404(b) analysis." *Perry*, at 6, fn. 5. In reality, *Perry* articulated a "new framework," *Cotton*, at 1, for the admissibility of propensity evidence in child sex offense cases by endorsing the admissibility of propensity evidence when the prosecution claims a "purpose beyond propensity." *Perry*, at 8. Although acknowledging "evidence the defendant committed similar criminal acts has the

inherent tendency to show [] propensity," the majority opinion in *Perry* gratuitously declares, "The stepdaughter's testimony was clearly relevant because if Perry committed similar acts of sexual abuse against a minor in the past, he was more likely to have done it this time too." *Perry*, at 2-3. This *Far Side* Cartoon by Gary Larson exposes the fallacy this assertion and illustrates the inherent danger of unfair prejudice of propensity evidence:



"Same as the others, O'Neill. The flippers, the fishbowl, the frog, the lights, the armor. ... Just one question remains: Is this the work of our guy, or a copycat?"

Thus, the similarity of the crimes does not make it more probable that "our guy" committed this crime as opposed to "a copycat." Proof of the identity of the person recently

stealing this particular set of armor, however, would establish "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others." *Lyle,* 125 S.C. at ___, 118 S.E. at 807; *cf. Nix,* 288 S.C. at 496, 343 S.E.2d at 629 ("car theft occur[ing] within a short time, approximately two hours, before the robbery" was "so related to the charged crimes that they constitute evidence that there was a common scheme or plan between the crimes" as the stolen car was used to commit "the armed robbery, kidnapping and rape").

The majority in *Perry* even addressed the concern raised by the Court of Appeals in *Wallace*, regarding trial courts "limit[ing] the testimony [] so that there *would* be a close similarity between the prior bad act and the crime charged," *Wallace*, 364 S.C. at 141, 611 S.E.2d at 338 (emphasis original), by decreeing "[s]imilarity can be important to meeting that burden" of admissibility but is no longer required. *Perry*, at 11. Going forward, prosecutors will have three options: (1) the accused has "a particularly unique method of committing" crimes, *Durant*, at 4; (2) the similarities are "important to meeting that burden" of admissibility, *Perry*, at 11, but the trial court does not need to consider differences; or (3) the absence of similarity is irrelevant because the State claims a "purpose beyond propensity," *Perry*, at 8, under the "new framework" for admissibility of propensity evidence in child sex offense cases. Prosecutors no longer will wonder, "There was gonna [sic] be potential *Lyle* evidence, and I don't know that we would have ever gotten it in." *Odom*, 412 S.C. at 262, 772 S.E.2d at 153 (quoting the prosecutor).

In its zeal to create a "new framework" for admission of propensity evidence in child sex abuse cases, the majority in *Perry*, at 8, accepted the government's invitation to chase a red herring when it cited *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000),

while ignoring the limitations this Court has placed on admissibility of evidence under *Benton* to avoid unfair prejudice caused by propensity evidence. As the majority in *Perry* pointed out, *Benton* affirmed the admission of prior burglary convictions to prove an the element of first-degree burglary under S.C. Code Ann. § 16-11-311(A)(2). *Benton,* however, imposed limitations on the use of the evidence:

> To ensure a defendant is not convicted on an improper basis while allowing the State to prove the elements of first degree burglary, the trial court should limit evidence to the prior burglary and/or housebreaking convictions, as it did here. Particular information regarding the prior crimes should not be admitted. Additionally, the trial court, as it did here, should, on request, instruct the jury on the limited purpose for which the prior crime evidence can be considered.

338 S.C. at 156, 526 S.E.2d at 230-31 (citing Rule 105, SCRE). This Court subsequently limited the number of prior burglary convictions the prosecution could introduce to establish the elements of first-degree burglary. *State v. James*, 355 S.C. 25, 32, 583 S.E.2d 745, 748 (2003) ("trial court did not weigh the probative value of the seven prior convictions against their prejudicial impact").

This Court recently distinguished *Benton* and *James* in *Cross* when it recognized "the inherently prejudicial stigma a prior sex-related offense undoubtedly carries." 427 S.C. at 478, 832 S.E.2d at 288 (trial court committed error of law when it denied defendant's motion to bifurcate trial). Notably, *Benton* and *James* do not allow the prosecution to introduce facts of the prior burglaries. By contrast, the very nature of the exceptions to Rule 404(b) allows the government to introduce the underlying facts of the other bad acts.[8] *Benton*, accordingly, does not support the "new framework" for the

[8] In fact, outside of the *Benton* context, when presented with *Lyle* evidence, jurors ordinarily are not told whether the other bad act resulted in a conviction or is subject of a pending criminal charge. This reality is precisely why this Court erred when it did not

admissibility of propensity evidence in child sex abuse cases. *Cross*, in fact, stated, "Our holding has no effect upon questions of admissibility of a prior conviction when introduction of such evidence is sought pursuant to Rule 404(b), SCRE." 427 S.C. at 484, 832 S.E.2d at 291. The majority opinion in *Perry* does not explain why the *Benton-James-Cross* line of cases is now applicable to the "new framework," *Cotton*, at 1, in child sex offense cases.[9]

Benton, *James*, and *Cross*, however, illustrate the significance of two glaring omissions in this Court's "new framework" for admitting propensity evidence in child sex offense cases, to wit: (1) the absence of any meaningful guidance from this Court regarding the role of Rule 403, SCRE, and (2) the failure of this Court to discuss the role of a limiting instruction. Each of these omissions are discussed below.

First, *Benton* employed a Rule 403, SCRE analysis, and the holdings in *James* and *Cross* turned on Rule 403. By contrast, *Perry*, *Durant*, and *Cotton* omit the role of Rule 403 when determining the admissibility of other bad acts. The majority in *Perry*, in passing, stated, "The State must also convince the trial court that the probative force of the

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reverse the trial court for mistakenly announcing the other charges to the jurors (Issue I). *Durant*, at 6, fn. 6. The curative instruction did not "unring the bell." *State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998) (internal quotations omitted); cf. *Cross*, 427 S.C. at 832 S.E.2d at 290 ("limiting instructions are sometimes insufficient to cure the danger of unfair prejudice"). Additionally, that trial judge's announcement is cumulative to the inherently prejudice propensity evidence admitted in the trial is grounds to reverse, not affirm. *See, e.g.*, *State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989) ("The State contends that any error here was harmless in that Thomas' testimony was merely cumulative to Victim's. To the contrary, it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.").

[9] Based on *Cross*, it is foreseeable that an accused move—and a trial court will grant a motion—for a bifurcated trial of a first-degree burglary charge when the prosecution relies on prior burglary convictions as an element of the crime.

evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes." *Perry*, at 11, (citing Rule 403, SCRE). Perhaps because it revered the convictions, *Perry* did not offer any meaningful explanation of Rule 403 under this Court's "new framework" for the admissibility of propensity evidence in child sex abuse offenses. The telling sign that the trial courts are free to disregard (or gloss over) the Rule 403 in child sex offense cases is this Court mentioning Rule 403 in *Cotton*, without providing any Rule 403 analysis, despite acknowledging it was applying a "new framework" specific to child sex offense trials. This Court failed to cite Rule 403 at all in *Durant*, let alone provide any analysis under the "new framework." This Court should incorporate definition of "unfair prejudice," set forth in *Alexander* into Rule 404(b), SCRE analysis.

Second, *Benton, James*, and *Cross* all recognize the significance of a limiting instruction. Prior to *Perry, Durant*, and *Cotton*, this Court required an instruction limiting the use of Rule 404(b) evidence. *State v. Timmons*, 327 S.C. 48, 54-55, 488 S.E.2d 323, 326 (1997) ("general rule is that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered"). The exception to the requirement of a limiting instruction is when "evidence of another crime formed part of the *res gestae*." *Id*., 327 S.C. at 55, 488 S.E.2d at 327; *see, e.g*., *Nix,* 288 S.C. at 496, 343 S.E.2d at 629 ("car theft occur[ing] within a short time, approximately two hours, before the robbery" was "so related to the charged crimes that they constitute evidence that there was a common scheme or plan between the crimes" as the stolen car was used to commit "the armed robbery,

kidnapping and rape").[10] The other bad acts held admissible in *Durant* and *Cotton* were not a part of the *res gestae*. Thus, the bench and bar would benefit from this Court stating whether a limiting instruction is part of the "new framework" for the common scheme or plan exception to Rule 404(b) in child sex offense cases. If a limiting instruction is still required under new framework" specific to child sex offense trials, then this Court should articulate the language of such instruction that would eliminate the inherent danger of unfair prejudice resulting from propensity evidence. *But see*, *Cross*, 427 S.C. at 832 S.E.2d at 290 ("limiting instructions are sometimes insufficient to cure the danger of unfair prejudice"). It seems easy to craft an instruction limiting the use of another bad act to identity, motive, or absence of misstate. It seems much more difficult to craft a limiting instruction for limiting the use of evidence admitted precisely because it is similar without further exacerbating the danger of unfair prejudice from propensity evidence. Or, this Court could avoid the impossible challenge by recognizing similarity plays no role in determining whether the two crimes are a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others. Such an approach is faithful to *Lyle*, *Molineux,*[11] *Romano,* and the Court of Appeals opinion in *Wallace*.

[10] Pastor Durant consistently offered *Nix* as a classic example of the common scheme or plan exception to Rule 404(b), SCRE. R. 86; Final Brief of Appellant, at 10-11, fn. 8; Oral Argument, beginning at 5:20.

[11] The dissent in *Perry* attempts to distinguish *Molineux* because "the motive behind each murder was entirely distinct." *Perry*, at 24, (Kittredge, J., dissenting). The dissent in Perry, however, does not attempt to distinguish *Romano* where robbery was the motive of both crimes.

Next, the majority's praise of the Court of Appeals' opinion in *Perry* suggests a majority of this Court believes it should have affirmed the Court of Appeals in *Wallace*. This Court's "new framework" specific to child sex offense trials, however, would not have excluded the bad character evidence in *Wallace*. Wallace's stepdaughter alleged the sexual abuse began when she was twelve years old and continued until she reported the abuse when she was in the ninth grade. *Wallace*, 364 S.C. at 133, 611 S.E.2d at 334. The Trial Court admitted testimony of the stepdaughter's older sister who alleged Wallace began sexually abusing her when she was in the "sixth or seventh grade" and "continued until she moved out of the family home during her second semester in college." *Id*., 364 S.C. at 134-35, 611 S.E.2d at 334-35. Under *Perry* and *Durant*, a court could conclude Wallace had "a particularly unique method of committing" crimes and admit the evidence under this Court's "new framework" for the admissibility of propensity evidence in child sex offense cases.

Additionally, the "new framework" adopted in *Perry, Durant*, and *Cotton* would not have excluded the evidence in *Romano* and *Molineux*. In *Romano*:

> The crime of which the defendant was convicted was committed by throwing snuff in the eyes of the complainant at the time of the robbery. The prosecution, for the purpose, as it now claims, of establishing the identity of the defendant, offered proof to show that about three weeks prior to the commission of the offense for which the defendant was on trial he committed another robbery at the same place, upon another person, by the use of the same means.

84 A.D. 318, 319, 82 N.Y.S. 749, 749 (App. Div. 1903). Under *Perry* and *Durant*, a trial court could conclude Romano had "a particularly unique method of committing" crimes and admit the evidence. Such a result would be unfaithful to *Romano's* admonition:

> There is always more or less of similarity between the commission of independent crimes of this class, and in many instances features that are

> common to one are found in the other; and yet it has never been supposed that, where there was separation as to time and no connection established beyond that of place and similarity, the first crime was admissible to establish any of the elements which constituted the other.

84 A.D. at 320, 82 N.Y.S. at 750.

The Court of Appeals opinion in *Wallace* summarized the facts in *Molineux,*

> The defendant was accused of murder by sending poison contained in a bottle of Bromo Seltzer through the mail to the director of the Knickerbocker Athletic Club. The director, Harry Cornish, believing the silver "Tiffany's" bottle holder containing the bottle of Bromo Seltzer to be a Christmas gift, took it to his home. Thereafter, a member of his household, Katharine Adams, took some of the bottle's contents to relieve a headache and died. At trial, the State sought to introduce into evidence that the defendant was responsible for the previous death of Henry Barnet, who died at the Knickerbocker Athletic Club after taking a dose of a powder he had received in the mail the month before Cornish received his bottle. Both powders were in fact cyanide of mercury, a rare and deadly poison. The evidence of the prior crime was admitted in the trial court.

364 S.C. at 137-38, 611 S.E.2d at 336 (internal citations omitted). By applying "a particularly unique method" test, the "new framework" created by *Perry, Durant*, and *Cotton* would hold this evidence admissible. The New York Court of Appeal, of course, held the other crime inadmissible and reversed the conviction, warning:

> Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which, he is charged. It therefor predisposes the mind of the juror to believe the prisoner guilty.

Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901). Regarding the common scheme or plan, *Molineux* observed:

> It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one

> sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. Underhill, in his work on Criminal Evidence (section 88), thus states this exception to the general rule: 'No separate and isolated crime can be given in evidence. In order that one crime may be relevant as evidence of another, the two must be connected as parts of a general and composite scheme or plan. Thus the movements of the accused prior to the instant of the crime are always relevant to show that he was making preparations to commit it. Hence on a trial for homicide it is permissible to prove that the accused killed another person during the time he was preparing for or was in the act of committing the homicide for which he is on trial. And, generally, when several similar crimes occur near each other, either in time or locality,—as, for example, several burglaries or incendiary fires upon the same night,—it is relevant to show that the accused, being present at one of them, was present at the other, if the crimes seem to be connected. Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. This connection must clearly appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt, and the evidence rejected. The minds of the jurors must not be poisoned and prejudiced by receiving evidence of this irrelevant and dangerous description.'

168 N.Y. at 305-06, 61 N.E. 286 at 299. Thus, *Perry, Durant*, and *Cotton* are unfaithful to *Romano* and *Molineux.*

Finally, the dissent in *Perry* observed, "[I]n affirming the admission of Rule 404(b) common scheme or plan evidence in *Durant* and *Cotton*, [*Perry's*] decision overruling *Wallace* may not foreshadow a significant change in the admission of Rule 404(b) evidence in our trial courts." *Perry*, at 12 (Kittredge, J., dissenting). In reality, the decisions in *Perry, Durant*, and *Cotton*, foreshadow the expanded admission of propensity evidence under this Court's "new framework" specific to child sex offense trials.

4. *State v. Durant*.

During the Rule 404(b), SCRE hearing, the State represented, "The specific exception in this case that we're contending this evidence is admissible under is the

common scheme or plan exception." R. 79. The other Rule 404(b) exceptions—motive, identity, the absence of mistake or accident, and intent—were not an issue in the case.[12] Thus, the only issue should be whether the testimony of the other three girls is "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others." *Lyle*, 125 S.C. at ___, 118 S.E. at 807. Instead of analyzing this issue under *Lyle*, this Court purportedly considered "whether the admission of the other three girls' testimony can nonetheless be upheld under" its "new framework" for admissibility of propensity evidence in child sex offense cases. *Durant*, at 3. Although this Court purported to abandon the "mathematical exercise [endorsed by *Wallace*] where the number of similarities and dissimilarities are counted," *Durant*, at 3, the opinion in *Durant* merely changed the vocabulary for admissibility of bad character evidence from "a close degree of similarity," *Wallace*, 384 S.C. at 433, 683 S.E.2d at 278, to "a particularly unique method of committing" crimes, *Durant*, at 4, without articulating the distinction between those terms.

As this Court noted, Pastor Larry Durant's trial was "conducted under *Wallace*." *Durant*, at 3.[13] He, accordingly, argued against the continued validity of *Wallace* and engaged in a "mathematical exercise" approved by Wallace, illustrating the dissimilarities outweighed the similarities, even providing the trial judge with five charts illustrating how the dissimilarities outweighed the similarities. R. 83-95. After declaring Pastor Durant

[12] None of the other exceptions to Rule 404(b), SCRE are even arguably implicated by the evidence in the case. As the dissent in *Perry* acknowledged, "Where, as here, the question is whether the sexual abuse occurred at all, and not who the perpetrator was, the identity exception does not apply." *Perry*, at 23 (Kittredge, J., dissenting).

[13] At trial, pastor Durant argued the other allegations were not admissible even under *Wallace,* which is Question III in this appeal.

"had a particularly unique method of committing his attacks common to all the girls," this Court conceded "there were differences in their ages and the type of sex act," *Durant*, at 4, and ignored five charts co paring dissimilarities and similarities. In doing so, this Court most certainly did not employ the same analysis regarding age as the majority did in *Perry* that allowed the majority and dissent to quibble over whether there was a meaningful difference in the ages of the girls at the time of the assaults. *Compare Perry*, at 8 ("This is a clever attempt to make dissimilarities sound similar, but assaulting one child beginning at age five to seven and another at age ten or eleven is not a similarity. Perry began assaulting the stepdaughter at age nine, which is not similar to age five. Age nine may be similar to ten, but in terms of the age at which a sexual predator begins sexually assaulting a daughter, ages nine and seven hardly seem to show 'a close degree of similarity.'") *with Perry*, at 18 (Kittredge, J., dissenting) ("In its pursuit to show dissimilarities, the majority implies there was a large gap in the age of onset of abuse among the children."). Candidly, this Court should explain, under its "new framework" for admissibility of propensity evidence in child sex offense cases, how its quibbling over similarities and dissimilarities in age is any different from the "mathematical exercise [endorsed by *Wallace*] where the number of similarities and dissimilarities are counted." *Durant*, at 3. This approach has the ultimate effect of allowing courts to engage in a result-oriented process of cherry-picking facts supporting admissibility, while ignoring factors militating against admissibility.

Additionally, this Court did not provide Pastor Durant with any notice or an opportunity to respond to the allegation that he "had a particularly unique method of committing his attacks," *Durant*, at 4, as this Court had not previously articulated this test.

At a hearing to determine whether he has "a particularly unique method of committing his attacks," presumably, the prosecution would be required to present evidence that no other pastor or church leader has ever committed a child sex offense in a manner similar enough to undermine the "uniqueness" of Pastor Durant's alleged assaults. Now that undersigned counsel understands this Court's focus on *McClellan, see* Subsection II(C)(6), *infra*, at a hearing, Pastor Durant would point out this Court's comparison of the allegations against him with *McClellan* undermines any argument that either he or McClellan had "a particularly unique method of committing [their] attacks."

Consider also the Court of Appeals' opinion in *Hubner*, cited with approval in footnote 2 of the Court of Appeals opinion in *Wallace*, which this Court reversed the same day it overruled the Court of Appeals in *Wallace* because of this Court's holding in *Wallace*. *Hubner*, a child sex offense case, involved the admissibility of a prior sexual assault. How would this Court resolve *Hubner* today? Presumably, this Court would not employ a "mathematical calculation" to determine whether the similarities outweigh the dissimilarities. Would it quibble over the similarities or dissimilarities as the majority and dissent did in *Perry*? Would it ignore the dissimilarities identified by the Court of Appeals but ignored by this Court in *Wallace* and, instead, declare Hubner "had a particularly unique method of committing his attacks," as it did in *Durant*, at 4. We may never know the answer to these questions because the majority opinion in *Perry* declined to "reconsider[] the results of prior cases," other than *Hallman*. *Perry*, at 6, fn. 5. This inquiry not only questions the accuracy of labeling any crime "particularly unique," but also illustrates why similarity has never been the test for "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to

establish the others." *Lyle*, 125 S.C. at ___, 118 S.E. at 807; *see also* Larson, *Far Side* Cartoon, supra, at p. 21.

This Court's holding in Durant is unfaithful to the Court of Appeals opinion in *Wallace* for four significant reasons. First, as noted above, the Court of Appeals in *Wallace* rejected the State's contention that, in a credibility case, *Lyle* "testimony is necessary to [] prove the victim's allegations," noting, "This argument could be used to admit testimony of any prior crime when a defendant is accused of a subsequent but similar crime." And, "It falls far short of the threshold for the admission of a prior crime under the common scheme or plan exception to *Lyle.*" 364 S.C. at 141, 611 S.E.2d at 338. Pastor Durant's trial turned on the credibility of the witnesses, a fact our appellate courts ordinarily consider when discussing harmless error, a the Court of Appeals did in *Wallace*, 364 S.C. at 142, 611 S.E.2d at 338-39 ("In addition to finding the admission of the sister's testimony error, we find the admission was not harmless" because "the outcome of this case rested on the credibility of the victim and Wallace."); *see also Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (finding prejudice when the "case turned solely on the credibility" of witnesses). Second, the Court of Appeals in *Wallace* recognized, "The law should not permit a trial judge to make similar that which is different" 364 S.C. at 141, 611 S.E.2d at 338. *Durant* committed this error when it declared Pastor "Durant had a particularly unique method of committing his attacks common to all the girls" and then proceeded to ignore the "differences in their ages and the type of sex act." *Durant*, at 4. Third, *Durant* relied on *McClellan*, despite the Court of Appeals opinion in Wallace inviting this Court to overrule *McClellan*. 364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2; *see also* Subsection II(C)(6), *infra* (discussing McClellan). *Fourth*, and perhaps most significant, the Court of Appeals

in *Wallace* recognized, "[T]he appellate courts of this state have refused to recognize a specific exception to the inadmissibility of prior bad act evidence in criminal sexual conduct cases." *Id.* 364 S.C. at 139, 611 S.E.2d at 337 (citing *Nelson*). *Perry, Durant*, and *Cotton*, however, expressly created a "new framework" for the admissibility of propensity evidence in child sex offense cases.

The majority in *Perry* stated, "The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes." *Perry*, at 11 (citing Rule 403, SCRE). Perhaps because it revered the convictions, *Perry* did not offer any meaningful explanation of Rule 403 under this Court's "new framework" for the admissibility of propensity evidence in child sex offense offenses. If, as the majority in *Perry* suggests, Rule 403 remains an important part of the Rule 404(b) analysis, then *Durant* did not fully "determine whether the evidence would have been admissible under the framework in *Perry,*" *Durant*, at 3, because its opinion in *Durant* does not even cite Rule 403, let alone provide any analysis applying Rule 403 under this Court's "new framework" for the admissibility of propensity evidence in child sex offense cases.

As discussed above, *Parry, Durant*, and *Cotton* did not discuss the role of a limiting instruction under this Court's "new framework" for the admissibility of propensity evidence in child sex offense cases. Prior to the "new framework," this Court required a limiting instruction, except when the other bad act is part of the *res gestae*, which is not the situation here. *Timmons, supra.* Pastor Durant's trial judge did not provide a limiting instruction. Nor did the trial court limit the prosecution's use of the evidence. From the

very beginning of the trial, the State made it clear that they planned to prove its case through the allegations of all four women. During opening statements, the prosecutor told the jurors would "hear from victims," stating:

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

R. 179-81. During its closing argument, the State argued, "[Y]es, a lot of this case rest[s] on the testimony of" the four women. And, Pastor Durant "was supposed to be their shepherd, but he was nothing but a wolf in sheep's clothing." He "went from praying for them to preying on them." R. 674-75. By sentencing, it was clear that even the trial court had come to believe that the trial was about the allegations involving all four women, when the trial judge stated:

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

R. 731 (emphasis added). Because of these statements by the prosecutor and the trial judge, this Court should address the role of a limiting instruction under its "new framework" for the admissibility of propensity evidence in child sex offense cases. As discussed in Subsection II(C)(3), *supra*, this Court should craft a limiting instruction that will eliminate the danger of unfair prejudice resulting from admitting propensity evidence.

5. This Court should provide definitions of "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others" and the terms "similar," "quite similar," "strikingly similar," "close degree of similarity," and "particularly unique method."

As the Court of Appeals pointed out in footnote 2 of its opinion in *Wallace*, our state's appellate courts have been inconsistent in the application of the exception in *Lyle*

and Rule 404(b), SCRE for "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others." Perhaps, these inconsistencies result from the absence of cases, since *Lyle*, actually defining the meaning of this exception, rather than reciting it in shorthand. Cases recognizing an exception to the requirement of a limiting instruction when the other bad act is part of the *res gestae* provide guidance. *E.g. State v. Johnson*, 306 S.C. 119, 126–27, 410 S.E.2d 547, 552 (1991) (evidence of the other crime "had a direct bearing on and related to the commission of the murder of the trooper such that it formed part of the *res gestae*); *Timmons*, 327 S.C. at 55, 488 S.E.2d 323, 327 (1997) (exception to the requirement of a limiting instruction is when "evidence of another crime formed part of the *res gestae*."); *Nix,* 288 S.C. at 496, 343 S.E.2d at 629 ("car theft occur[ing] within a short time, approximately two hours, before the robbery" was "so related to the charged crimes that they constitute evidence that there was a common scheme or plan between the crimes" as the stolen car was used to commit "the armed robbery, kidnapping and rape"). Although this *Lyle* exception is likely broader than *res gestae*, *res gestae* is useful for establishing when a common scheme or plan embracing the commission of two or more crimes is truly so related to each other that proof of one tends to establish the others.

The majority in *Perry,* at 11, stated "[s]imilarity can be important" when determining admissibility. *Durant,* at 4, for the first time, articulated "a particularly unique method" test. *But see Wallace,* 384 S.C. at 435-36, 683 S.E.2d at 279 (Pleicones, J., dissenting) (this Court has "repeatedly held in non-sexual offense cases that, the mere

presence of similarity only serves to enhance the potential for prejudice").[14] The bench and bar would benefit from this Court clarifying the terminology courts use for admissibility of *Lyle* evidence. The lack of "a close degree of similarity" militated against admissibility in *Perry*, at 8. Yet, crimes involving "similar" techniques are inadmissible, *Campbell*, 317 S.C. at 451, 454 S.E.2d at 901, while crimes that are "quite similar" are admissible, *Raffaldt*, 318 S.C. at 114, 456 S.E.2d at 392, but a prior bad act that is "strikingly similar" to the charged crime is inadmissible because it enhances the danger of unfair prejudice, *Gore*, 283 S.C. at 121, 322 S.E.2d at 13. In addition to distinguishing these terms, the Court should define a "particularly unique method," which presumably does not involve "similar" or "strikingly similar" techniques.

[14] The dissent in *Perry*, at 23, considered "modus operandi" as a category of common scheme or plan. Most courts consider modus operandi as an identity exception an require a clear connection between the crimes. *E.g. Woodlee v. Commonwealth*, 306 S.W.3d 461, 465 (Ky. 2010) ("The modus operandi exception requires acts that mark the crime as that of a specific person who may be unknown until caught, but who is identified by the distinctive nature of his or her acts. Examples include well-known criminals such as Jack the Ripper; the BTK (bind, torture, kill) strangler; and the Unabomber. By their distinct criminal methods, each of them signed off on their crimes. While modus operandi may not require commonalities as blatant as those listed above, there must be some peculiar or distinct commonalities that show that the crimes were committed by the same person."); *People v. Kimbrough*, 138 Ill. App. 3d 481, 486–87, 485 N.E.2d 1292, 1297 (1985)(internal citations omitted) ("If evidence of other crimes is offered to prove modus operandi, there must be some clear connection between the other crime and the crime charged which creates a logical inference that if defendant committed one of the acts, he may have committed the other act. This inference of identity does not arise from the mere fact that the crime charged and the other crime share certain common features or marks of similarity, for it may be that these similarities are shared not only by the crime charged and defendant's other crime, but also by numerous distinct crimes committed by persons other than the defendant. Rather, the inference is created when both crimes share peculiar and distinctive common features so as to earmark both crimes as the handiwork of the defendant. There must be some distinctive features that are not common to most offenses of that type."). *See also* Larson *Far Side* Cartoon, *supra*, at p. 21.

This Court sould avoid the ridiculous exercise of distinguishing these terms by recognizing similarity plays no role in determining whether the two crimes are a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others. Such an approach is not only faithful to *Lyle*, *Molineux, Romano,* and the Court of Appeals opinion in *Wallace*, but also required to guard against courts engaging in a result-oriented process of cherry-picking facts to support its decision and then seeking refuge under one of these inconsistent holdings to defend its decision.

6. *State v. McClellan.*

This Court's opinions in *Perry, Durant*, and *Cotton* depend on "*McClellan* remain[ing] good law." *Durant*, at 4. Although generously praising the Court of Appeals' opinion in *Wallace, Perry* overlooks footnote 2 in that Court of Appeals' opinion in *Wallace* that included *McClellan* on the list of cases it invited this Court overrule. Under these circumstances, this Court's reliance on *McClellan* in *Perry*, *Durant*, and *Cotton* requires a closer look at *McClellan*.

McClellan actually involved the admission of two categories of other bad acts. The first category involved "testimony [by McClellan's daughter (the victim)] regarding prior attacks" by McClellan "to show the continued illicit intercourse forced upon her by" McClellan. 283 S.C. at 392, 323 S.E.2d at 774. In affirming the admission of this testimony, this Court relied on *Whitner's* holding "the common scheme exception to the *Lyle* rule 'is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties.'" *Id.* (citing *Whitner*, 228 S.C.

at 265, 89 S.E.2d at 711). Footnote 2 of the Court of Appeals' opinion in *Wallace* cited *Whitner* as an example of a case "reflect[ing] a more narrow interpretation of the common scheme or plan exception." 364 S.C. at 39, fn.2, 611 S.E.2d at. 337, fn.2. *McClellan* also cited *State v. Richey* for the same proposition as *Whitner*. 88 S.C. 239, ___, 70 S.E. 729, 730 (1911) (affirming admission of evidence of "continued illicit intercourse between the same parties"); *see also State v. Brooks*, 235 S.C. 344, 111 S.E.2d 686 (1959) (vidence that defendant had had intercourse with companion at same time and place as with prosecutrix was relevant to issue of consent of prosecutrix and competent evidence of defendant's guilt) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Pastor Durant has never contended that this category of evidence—continued illicit conduct between the same parties, including evidence of grooming—should be prohibited by Rule 404(b)'s common scheme or plan exception. *See, e.g*., Oral Argument, beginning at 32:30. This Court, accordingly, should not overrule this *Whitner*, *Richey, Brooks*, and this portion of *McClellan*.

The second category of bad character evidence admitted in *McClellan* is problematic, which is affirming the admission of testimony by McClellan's other two "daughters [] concerning the pattern of this and prior attacks" involving them. 283 S.C. at 391, 323 S.E.2d at 773. In *McClellan*, this Court did not cite any authority linking the admissibility of this category of evidence to *Lyle* or Rule 404(b), SCRE. The only case arguably cited by *McClellan* for the admissibility of evidence of another accuser is *State v. Rivers*,[15] which actually held inadmissible the testimony of the other witness because this

[15] *Rivers,* despite excluding the propensity evidence, is still problematic for its role in recognizing a special rule in child sex offense cases, which will be discussed below.

Court was "[u]nable to clearly perceive the connection between the acts as required by *Lyle*," 273 S.C. 75, 79, 254 S.E.2d 299, 301 (1979). That this section of *McClellan* "focused exclusively on the close degree of similarity between the crime charged and the evidence of the other crime" is the very reason the Court of Appeals opinion in *Wallace* included *McClellan* on the list of cases it recommended this Court overrule. 364 S.C. at 139, Fn. 2, 611 S.E.2d at 337, fn. 2.

Pastor Durant included this Court's opinions in *Hubner, Hallman, McClellan*, and *Rivers* as examples of cases similar to this Court's opinion in *Wallace* "creat[ing] a rule allowing admission of prior bad acts against individuals other than the alleged victim in the case to demonstrate general propensity in direct contravention of Rule 404(b), SCRE." Final Brief of Appellant, at 28, fn. 15. Undersinged counsel, therefore, must address his confusion during the oral argument, beginning at 6:14, regarding the continued validity of *McClellan*. Regrettably, counsel was thinking of the portion of *McClellan* holding admissible evidence of continued illicit conduct between the parties. Counsel, perhaps unsuccessfully, attempted to correct this confusing later on in the oral argument, beginning at 34:41.

Actually overruling *Wallace*, in addition to overruling *Hallman*, requires overruling the cases following *Wallace* (such as this Court's opinion in *Hubner*), *McClellan*, and the other cases cited in the opening paragraph of footnote 2 of the Court of Appeals opinion in *Wallace*. When it declined to "reconsider[] the results of prior cases," other than *Hallman*, the majority opinion in *Perry*, at 6, fn. 5, was unfaithful to both the substance and spirit of the Court of Appeals' opinion in *Wallace.*

7. Lack of Consent from the General Assembly.

Article V, § 4A of our state's constitution provides:

> All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.

This Court thus recently recognized, "[T]he South Carolina Constitution limits this Court's power to promulgate rules governing practice and procedure in the courts of this State." *State v. Beaty*, 423 S.C. 26, 41, 813 S.E.2d 502, 510 (2018). As seen, the concurring opinion in *Perez* cautioned, "Absent an amendment to our rules of evidence creating a different categorical rule for sexual offenses, [this Court should] apply the common scheme or plan exception equally to sexual and nonsexual offenses alike." 423 S.C. at 503, 816 S.E.2d at 55 (Hearn, J., concurring); *see also Wallace*, 384 S.C. at 436, 683 S.E.2d at 279 (Pleicones, J., dissenting) ("if this Court is] to permit the admission of propensity evidence in these types of cases, then [it] should propose a new rule of evidence, and encourage public comment).

Comparing the Federal Rules of Evidence and the South Carolina Rules of Evidence reveals the legislative intent underlying the respective rules. When our state adopted Rule 404(b), SCRE, "the purposes for which evidence of other crimes may be admitted" was more limited than Fed. R. Evid. Rule 404(b), as our rule "limits the use of evidence of other crimes, wrongs, or acts to those enumerated in" *Lyle.* Rule 404(b), SCRE, reporter's note. Even under the more inclusive federal rule, Congress had to amend the Federal Rules of Evidence to add Rules 413 and 414 to allow admission of propensity

evidence in sex offense cases. That Congress amended the federal rules is evidence that Fed. R. Evid. 404(b) did not allow the admission of propensity evidence in sex offense cases. *Cf. Bailey v. S.C. State Election Comm'n*, No. 2020-000642, 2020 WL 2745565, at 2 (S.C. May 27, 2020) ("if existing law already permitted all voters to vote by absentee [ballot in the June 9, 2020 primary] in the face of [the COVID-19] pandemic, it would have been unnecessary for the Legislature to change the law").

Finally, the majority opinion in *Perry* does not reconcile how adopting the "new framework" for admissibility of propensity evidence in child sex offense cases can be reconciled with *Beaty* and the dissent in *Cross*, 427 S.C. at 489, 832 S.E.2d 294 (Few, J., dissenting) ("It is regrettable, however, this Court is creating this rule without following the procedure to which we are constitutionally bound.").

8. Future Implications if this Court Does Not Grant Rehearing.

This Court's "the new framework" for the admissibility of propensity evidence in child sexual abuse offenses will spark future litigation. As evidenced by the disagreement between the majority and dissent in *Perry*, the "new framework" has not eliminated quibbling over similarities and dissimilarities. *Compare Perry*, at 8 (stating the age of the children is not substantially similar) *with Perry*, at 18 (Kittredge, J., dissenting) ("In its pursuit to show dissimilarities, the majority implies there was a large gap in the age of onset of abuse among the children."). The criminal defense bar will request hearings regarding the application of the newly announced "particularly unique method," demanding the prosecution call witnesses and present evidence to establish the "particular uniqueness." As discussed above, the defense bar will ask trial courts to distinguish the terms "similar," "quite similar," "substantially similar," "strikingly similar," "close degree

of similarity," and "particularly unique method." The resulting confusion will generate calls for this Court to revisit the continued validity of *Perry, Durant, Cotton, McClellan*, and the "results" in other cases this Court declined to reconsider in *Perry*, at 6, fn. 5; *and see* 364 S.C. at 139, fn. 2, 611 S.E.2d at 337, fn. 2.

Unless this Court grants rehearing and addresses the roles of Rule 403, SCRE and a limiting instruction under its "new framework," then prosecutors will argue Rule 403 and limiting instructions are no longer applicable, while the criminal defense bar will argue Rule 403 should exclude the evidence, even if admissible under the "new framework," and no limiting instruction can cure the danger of unfair prejudice of propensity evidence. *But see Cross*, 427 S.C. at 832 S.E.2d at 290 ("limiting instructions are sometimes insufficient to cure the danger of unfair prejudice").

The defense bar will attack this Court's "the new framework" for the admissibility of propensity evidence in child sexual abuse offenses as a violation of due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution. Although the Supreme Court of the United States has not addressed "whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime," *Estelle v. McGuire*, 502 U.S. 62, 75, fn. 5 (1991), the High Court has recognized the unfair danger of admitting such evidence by explaining:

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

> *record and deny him a fair opportunity to defend against a particular charge.*

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

Additionally, other state courts that have addressed the admissibility of propensity evidence in child sexual abuse cases have held that introducing this type of propensity evidence violates the due process clauses of state constitutions. For example, "[b]ased on Iowa's history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental conceptions of fairness, . . . the Iowa Constitution prohibits admission of prior bad acts evidence based solely on general propensity." *State v. Cox*, 781 N.W.2d 757, 768 (Iowa 2010). In reaching this conclusion, the Iowa Supreme Court reviewed its state's "policy against admissibility of general propensity evidence stems from a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds." *Id*. at 767 (internal quotations omitted). The Iowa Supreme Court further noted, "The general rule prohibiting propensity evidence was firmly established in Iowa courts at common law." *Id*. at 764 (citing *State v. Vance,* 119 Iowa 685, 686, 94 N.W. 204, 204 (1903)). Likewise, the Missouri Supreme Court "act[ed] consistently with a long line of cases holding that the Missouri constitution prohibits the admission of previous criminal acts as evidence of a defendant's propensity" and invalidated a state statute admitting this type of evidence in child sexual abuse cases. *State v. Ellison*, 239 S.W.3d 603, 607-08 (Mo. 2007). These same considerations are just as firmly rooted in South Carolina's common law. *Lyle*; *see also State v. Kenny*, 57 S.E. 859, 861-62 (S.C. 1907) ("Logically, the

commission of an independent offense is not proof, in itself, of the commission of another crime…. Without [an] obvious connection it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury.").

9. Summary.

For the forgoing reasons, this Court should rehear this case and reconsider its "new framework" for the admissibility of propensity evidence in child sex offense cases when the prosecution claims a "purpose beyond propensity," *Perry*, at 8.[16] When doing so, this Court should keep in mind that its "new framework" for the admissibility of propensity evidence in child sex offense cases "would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent." *Commonwealth v. Bujanowski*, 418 Pa. Super. 163, 172, 613 A.2d 1227, 1232 (1992). Once the Court considers the matters raised in this petition, the need to reverse Pastor Larry Durant's conviction and sentence will be apparent. This Court should also address the roles of limiting instructions and Rule 403, SCRE in the admissibility of other bad act evidence under Lyle and Rule 404(b).

[16] Pastor Durant notes the State petitioned for rehearing in *Perry*. Although Pastor Durant does not want to interfere with Mr. Perry's new trial, he cannot ignore the role of the *Perry* opinion in this Court's "new framework" for the admissibility of propensity evidence in child sex offense cases. Pastor Durant is informed and believes Mr. Cotton will petition for rehearing. This Court, accordingly, has discretion to rehear all three cases. In *Perry*, this Court need not look past the remoteness of the prior offense to realize there is not a common or logical connection.

D. Cumulative Error (Issue VI).

This Court declined to apply the cumulative error doctrine to because it concluded "the trial court did not commit any reversible errors." *Durant*, at 6, fn. 6. Once this Court reconsiders its holdings on the *Lyle, Brady*, and *Allen* charge issues, this conclusion no longer will be valid.

The cumulative error doctrine "provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999); *and see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) (cumulative error of solicitor's improper argument and improperly excluded evidence warranted reversal), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002). In *Durant*, this Court, for the first time,[17] required that the cumulative error doctrine be raised to the trial court, in addition to the objections to the other error. This this Court is going to impose such a requirement, then it should provide guidance about how such an objection should be raised. Would raising it in a post-trial motion be sufficient? Or would it be necessary to litigate cumulative error outside the presence of the jurors each time counsel objects?

(conclusion on next page)

[17] Undersigned counsel was trial counsel in *Blurton* and has no recollection of raising cumulative error in the trial court in addition to the other objections.

III. CONCLUSION.

For the reasons set forth in Pastor Larry Durant's Final Brief of Appellant, the Final Reply Brief of Appellant, and this Petition for Rehearing, this Court should rehear this case, enter an order reversing his convictions and sentences, and remand for a new trial.

Respectfully Submitted,

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