STATE OF SOUTH CAROLINA) COUNTY OF GREENVILLE)))) Plaintiff,) vs.)) ZACHARY HUGHES) Defendant.)	IN THE COURT OF GENERAL SESSIONS THIRTEENTH JUDICIAL CIRCUIT WARRANT NO(S): 2021A2330210207-08 2023A2330208126,27 **RESPONSE TO THE STATE'S MOTION TO PREVENT THE DEFENDANT FROM DEFENDING HIMSELF IN THIS CASE**

COMES NOW, the Defendant, Zachary Hughes ("Zack"), in response to the State's Motion to prevent him from even "present(ing) . . . evidence or argument to the jury of the theory of the defense of others." State's Mem.Supp. Exclusion at 1. In America, defendants in criminal cases have the right to defend themselves, and so does Zack.

The evidence will show that A.M.[1] was sexually abused by her own mother, Christina Parcell, and Bradly Post, Parcell's fiance', over many years. This sexual abuse placed A.M. in "imminent fear of sustaining serious bodily injury:" (1) John Mello, A.M.'s father, reported to the Greenville County Sheriff's Office (GCSO), particularly Investigator Dan Bevill, at the end 2017/beginning of 2018, his concerns that Parcell and/or Post were abusing A.M., and Bevill failed to act; (2) A.M.'s Guardian ad Litem, Vanessa Kormylo, had concerns about Post but, unfortunately, was unable to uncover the sexual abuse until after Parcell died; (3) A few weeks before October 13, 2021, Zack submitted an affidavit in the Family Court proceeding wherein he shared he had concerns about A.M.'s well-being while she was with Parcell, but nothing was done; and (4) Days before October 13,

[1] Investigator Bevill used "A.M." to refer to this child in arrest warrants he obtained for Bradly Post.

2021, Zack reported to the South Carolina Department of Social Services (DSS) concerns he had about A.M. being abused, and DSS did nothing. With A.M.'s father stranded in Italy and subject to arrest on a pending warrant if he returned (a charge which was later dismissed at trial), with the GCSO failing to act on child abuse allegations about which they were made aware years earlier, with the Guardian ad Litem unfortunately being unable to uncover the abuse; and with DSS failing to act after Zack reported abuse, Zack knew he was the only one who could save A.M. from continuing to be sexually abused by her own mother, Parcell, and by her boyfriend, Post. He acted to save A.M., and he did save A.M.

At no time has Zack ever denied killing Parcell in the more than three years this case has been pending. At no time in the last three years have defense counsel ever represented to the Court or the public that Zack did not do it. Instead, in their pleadings and their representations to the Court in hearings, defense counsel have repeatedly, consistently, passionately, and truthfully stated to the Court that Zack is not guilty.

The following explains in detail what Zack did and why, the reasons why child pornography, as evidence of sexual abuse, is admissible and is "extremely valuable"[2] and "highly probative,"[3] why Zack saved A.M. from the serious bodily injury at the hands of her mother and Post, and why Zack is not guilty.

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[2] See statements Assistant Solicitor Jake Hofferth made to the Court during the trial. See *infra,* at p. 29.

[3] See statements this Court made during the trial. See *infra*, at p. 29.

FACTS

John Mello fancies himself as a music industry personality, musician, and music producer. Christina Parcell was a prostitute who advertised on the internet and who sold drugs.[4] In 2012, they had a child together, a daughter, A.M.[5] They never married, and Parcell did not seek custody of or even full visitation rights with A.M. Mello had primary custody of A.M. for most of her first eleven years. However, Parcell had some visitation rights, and A.M. would often spend the night with Parcell during her periods of visitation.

During these custody battles, Parcell developed a romantic relationship with a man named Brad Post, who was old enough to be Parcell's father and who was, or was at least perceived to be, very wealthy. Parcell and Post ultimately got engaged.

Post and Parcell's relationship greatly concerned Mello: Parcell's prior life as a prostitute and a drug distributor coupled with Post's wealth and creepiness prompted Mello to wonder if A.M. was safe when she was with Parcell and Post. She was not.

Post and Parcell sexually abuse and victimize A.M. and another young girl, and Mello Reports It.

[4] Defense counsel will seek to introduce an affidavit prepared by Alex Fields, a firefighter in Greenville County, who told members of the GCSO that Parcell offered to have sex with him for money, and, when he refused, she attempted to sell him drugs.

[5] Members of the GCSO has used "A.M." to describe the minor child in documents it has filed publicly, and defense counsel has adopted this practice in this Motion for the purpose of protecting the minor's identity and/or privacy.

Beginning in 2017 or 2018, when A.M. was merely six or seven years old, and continuing through 2021,[6] Post and Parcell began to sexually abuse and victimize A.M. They took hundreds if not thousands of nude and sexually explicit photographs of her, some alone and some with Parcell also in the nude, along with other sexually explicit and nude photos and/or videos of A.M.'s friend.[7]

In 2017 or early 2018, Mello reported to the GCSO that Parcell and/or Post were abusing A.M. Investigator Dan Bevill with the GCSO investigated the claims, and he and Mello began to clash during his investigation. Ultimately, Bevill determined that Mello's allegations of sexual abuse against Post and/or Parcell were unfounded. In an email he wrote Mello on March 16, 2018, Bevill stated, in part,

> I have complete faith that the judicial system will ultimately act in the best interest of your daughter. . . .A child should never have to endure any abuse at the hands of any parent. . . ever… for any reason. . . . I understand that you feel her mother is more than unfit. You have made that crystal clear. . . . I am an investigator, and a fairly decent one. . . .As of today, this case is officially closed. I presented all the evidence I uncovered to a judge and a warrant was denied due to there being no

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[6] When Investigator Bevill finally discovered evidence of the sexual abuse (more than three years after Mello made his allegations) due to the good police work of others, he listed the period in which Parcell and Post were abusing A.M. as January 1, 2018, through October 19, 2021, six days after Parcell's death.

[7] The State produced sanitized images of child pornography in its discovery productions. As this Court will see, the extent of the harm Parcell and Post caused A.M. and her friend is absolutely critical to Hughes' defense predicated on the doctrine of defense of others theory. Defense counsel will seek to introduce unsanitized versions of these photographs, videos, and/or descriptions thereof during Zack's case-in-chief: the probative value of the harm caused to these children in these photographs and videos is so high no amount of "unfair prejudice" can "substantially outweigh" the probative value of these photographs and videos. See S.C.R.E. 403.

probable cause. . . . I am also going to ask that you refrain from any further contact with me. (Emphasis added).[8]

Bevill wrongly exonerated Parcell and Post and, in so doing, condemned A.M. to several more years of hellish sexual abuse at the hands of her own mother.

Zack Hughes is born, the family moves to Virginia, and the family grows by five

Zack Hughes was born in California in 1992. During Zack's early childhood, his parents, David and Mindy Hughes, sought a different life for their family than the hustle and bustle of California. They moved the family to a small farm in Virginia, where Zack, his parents and his younger, biological brother, Eli lived. In 2005, David and Mindy, who were and are very devout in their Christian faith, became interested in a faith-based movement to adopt orphaned children from Russia. They adopted five orphaned children from Russia, the oldest being a 10 year-old girl named Grace. David and Mindy traveled to Russia to receive these children and brought them to their home in Virginia.

Zack's parents had no idea that the Russian children they adopted had been severely mistreated, and they came to the Hughes family with tremendous psychological and emotional damage, most especially Grace. In short order, the Hughes family learned that Grace was a sociopath, often lying, stealing and displaying an utter lack of empathy towards her family members, both blood and adopted. Zack witnessed Grace lie effortlessly to his parents when they clearly caught her stealing or hurting someone else.

[8] Defense counsel will introduce this email in its case-in-chief should Bevill deny these facts.

He was amazed by how effortlessly she was able to lie at a moment's notice, and how she seemed to have no remorse when her deceit was discovered.

On one occasion, Zack found a notebook Grace used. In it, Grace wrote in detail her plan to kill Zack's parents. Ultimately, David and Mindy contacted Virginia's counterpart to South Carolina's Department of Social Services ("VADSS") for help. Grace fabricated a story of abuse when she was interviewed by VADSS personnel, and amazingly, VADSS launched an investigation into David and Mindy. After a costly and protracted investigation that traumatized David, Mindy, Eli, and Zack, VADSS ceased its investigation and dismissed its allegations against David and Mindy as unfounded.

The Hughes family moves to South Carolina, and Zack Grows as a musician.

Zack and his family moved to the Upstate of South Carolina when he was a teenager. As a young boy, Zack had shown a tremendous aptitude for music, specifically piano performance, and he nurtured this aptitude with the help of his parents. Zack won first prize in the prestigious Southeastern Piano Festival Arthur Fraser International Piano Competition while still in high school. In winning the competition, Zack earned the privilege of performing as a soloist with the South Carolina Philharmonic Orchestra for a performance of Beethoven's Emperor Concerto, and he did so in 2011.

Eventually, Zack's gift received the ultimate recognition when he was granted admission into one of the most prestigious performing arts institutions in the world, The

Juilliard School.[9] Zack applied to Juilliard for piano performance in 2010, and he ultimately received a Bachelors of Music. The year Zack applied, only 7.2% of the applicants, all highly talented, young pianists, were accepted. Zack was not only accepted that year, but he was also given scholarships to enable him to attend.

While at Juilliard, Zack continued to evolve as a musician. Among his many accomplishments was being chosen to play in the Kyoto International Music Festival. Only about 15-20 students from around the world were invited to participate, and Zack was the only one chosen from the United States.

Zack was graduated from Juilliard, and he pursued a professional career in piano performance upon graduation. He was the principal pianist for the Knoxville Symphony for the 2017-18 season. Although he loves music and was grateful to have a career in music, the values David and Mindy instilled in him, especially for service to others, called Zack to leave the music world, at least temporarily. In 2018, Zack volunteered to serve in the United States Marine Corps.

Zack volunteers for the Marine Corps

Although he enlisted, Zack's recruiter saw the promise Zack had and arranged for him to apply to Officer Candidate School (OCS). In Tennessee, a board convenes three

[9] "Founded in 1905, The Juilliard School is a world leader in performing arts." education.https://www.google.com/search?client=safari&rls=en&q=julliaird&ie=UTF-8&oe=UTF-8

times a year to evaluate the applications of those who apply to OCS. Zack was the only applicant from Tennessee during his cycle to be chosen worthy to attend OCS.

For OCS candidates, the Marine Corps emphasizes three metrics to evaluate physical fitness of candidates: pull ups, sit-ups, and a three-mile run. A 300 was a perfect score. Zack scored a 294.

Unfortunately, three weeks into OCS, Zack suffered stress fractures in both of his legs, and he had to withdraw. At the time of his injury, Zack's superiors told him he was in the top 3% of his OCS class, which was comprised of approximately 400 candidates. They encouraged him to come back once he healed.

Zack's Return to South Carolina

While Zack was recovering from his injury, one of his former piano teachers contacted him with a request. The teacher knew a woman named Jeannette Winn who lived in Greenville. Winn's church had just received a gift of one of the highest quality pianos in the world, and Winn was looking for a pianist who was worthy of playing its inaugural performance at the church. The friend recommended Zack to Winn, and Zack agreed to do the piano performance at the church in 2019.

In time, Zack and the Winn family developed a friendship, and Zack shared with the family a goal he had long had. Zack admired Beethoven, and he had a dream of performing all 32 of Beethoven's sonatas by memory during the 250th anniversary of his

birth, 2020. The Winns and their church immediately supported this idea, and Zack knew then he would not return to the Marine Corps.

The Covid-19 pandemic arrives and Zack meets John Mello

The Covid-19 pandemic arrived in the Winter and Spring of 2020, and stalled Zack's plans to perform Beethoven's 32 sonatas in the Winns' church. Determined to bring music to the people during the pandemic and needing to make a little money, Zack decided to perform on the streets of downtown Greenville. During one evening while Zack was performing downtown, up walked John Mello and his daughter, A.M. Mello told Zack that A.M. loved Clair de Lune, and requested that Zack play it for her. He happily obliged, and Mello and Zack developed a friendship.

In early October of 2020, Mello and Zack celebrated Zack's birthday. The conversation was jovial and light-hearted until the end of the evening. A.M. was with her mother on a trip, and Mello told Zack he was always worried about A.M. when she was alone with her mother. Mello told Zack that he would be moving to Italy with A.M. when she returned. Mello did just that, in violation of a court order, unbeknownst to Zack.

Zack and Mello have little communication until April of 2021, when Parcell takes A.M.

Zack was relieved when Mello and A.M. moved to Italy. Mello was interesting and a good conversationalist, but he could be loud. Also, he was glad that Mello and A.M. were pursuing a better life in Italy. Communication between Zack and Mello slowed and became sporadic, as both moved on with their lives.

Zack was determined to keep his dream of performing Beethoven's 32 sonatas alive, and he found a partner to help in Tom Strange. Strange was associated with the Sigal Music Museum in Greenville, and he offered to facilitate the recording of Zack's performances of the Sonatas. In 2021, Zack and Strange began this ambitious project. Zack practiced multiple hours a day to try to meet the hectic performance schedule he and Strange constructed. He immersed himself in the project, and the project was evolving beautifully and on schedule. To make money, Zack also was working at restaurants downtown.

In April of 2021, Mello's communications with Zack increased markedly: Parcell had come to Italy, and she took A.M. from Mello and back to Greenville.

Parcell returns with A.M. to Greenville and to Post in April of 2021

Parcell, bankrolled by Post,[10] travelled to Italy several times to retrieve A.M. and return her to Greenville so Post and Parcell could continue to victimize her.[11] Ultimately,

[10] Evidence that defense counsel introduced on cross-examination in the State's case-in-chief show that Post was likely funding Parcell's custody quest in Family Court in South Carolina as well as aspects of her Italy trips, such as security for the trips.

[11] In her 2016 deposition, which defense counsel will offer not for its truth, see *State v. Vick*, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009) (citations omitted ("It is well settled that evidence is not hearsay unless offered to prove the truth of the matter asserted."), Parcell told opposing counsel that Post had ended their relationship the day before the deposition because he did not want "drama" with Mello. Now, Post was willing to stay the course, likely because he knew Mello had an active warrant in Greenville County which would be served on him if he returned to the United States, which effectively stranded Mello in Italy. Parcell also was now willing to stay the course, even though she had abandoned any attempt to gain custody of A.M. in three prior family court cases.

Parcell hired a lawyer in Italy and was able to convince an Italian judge that A.M. should be returned to Greenville and to her mother.

According to Vanessa Kormylo, the Guardian ad Litem in the family court case Parcell and Post brought against Mello when he and A.M. left for Italy, Post proposed marriage to Parcell almost immediately after she and A.M. disembarked from the plane. Kormylo thought Post had a "creep factor," especially because he refused to accept her invitation to meet with her.

Shortly after their return to Greenville, Parcell and A.M., along with Parcell's sister, Lutina, moved to 122 Canebrake Drive in Greenville County. Post "came to the home every day,"[12] and Parcell was sleeping with A.M. in the same bed every night.[13] Mello was in Italy and certain to be arrested on a pending warrant in Greenville County for violating a family court order if he returned, and A.M. was at the mercy of Parcell's and Post's whims and desires with no one to protect her, not Investigator Bevill, not Guardian ad Litem Vanessa Kormylo, not even her own Aunt Lutina.

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[12] On cross-examination, Lutina Parcell provided defense counsel with a combative and inconsistent answer when asked if she told police that Post came to the house "every day." On cross-examination of Investigator Jarrad Sparkman, Sparkman, when reminded that Lutina Parcell in her recorded interview said that Post came to the house every day, acknowledged that the recorded interview accurately conveyed statements Lutina Parcell gave.

[13] Again, Lutina Parcell equivocated on cross-examination when asked if A.M. had her own room and/or whether her sister slept in the same room and/or bed as A.M. On cross-examination of Investigator Sparkman, defense counsel elicited from him that the recorded interview of Lutina Parcell, in which she stated that Christina Parcell and A.M. shared a room and or slept in the same bed, accurately preserved her statements.

Zack begins to learn about Parcell and Post from Mello in April of 2021

Beginning when A.M. was taken in April of 2021, Mello shared with Zack details of his relationship with Parcell, of his concerns about Post, and of his observations of Parcell. Mello told Zack that Post spent much time at Outman's Cigar Bar on Orchard Park Drive in Greenville.[14] Mello told Zack that friends of Mello told Mello that Post had made comments about how attractive A.M. was but he preferred children who were younger, and he was into child pornography. Finally, Mello shared with Zack an email from a common friend he and Post had, wherein the friend told Mello that Post and Parcell were trying to recruit bikers to kill Mello.

The information Mello told Zack about Parcell was even more disturbing. According to Mello, Parcell was a prostitute, and he provided Zack proof in the form of online ads Parcell had posted years earlier offering to engage in sexually explicit conduct for money.[15]

Mello was no angel, and Zack knew it. Zack did not accept at face value information Mello provided him. However, the more he got to know Mello and heard and learned about Parcell and Post, the more Zack believed A.M. was most safe with Mello. Mello even told Zack at one point, "A.M. is the only good thing in my life, and I love her so."

[14] Sergeant Shannon McHale with the GCSO seized in November of 2021 from Post's locker at Outman's some of the devices that contained child pornography.

[15] The State introduced evidence of these ads in their case-in-chief.

Online sex ads were not the only proof that Mello had that Parcell and Post posed a danger to A.M. Mello gave Zack the transcript of a 2016 Parcell deposition from a family court case with Mello. In the deposition, Parcell asserted her 5th Amendment Right to Remain Silent when she was asked questions about being a prostitute and about drug use. Mello also provided Zack with other graphic photos of Parcell engaged in sex acts as well as evidence that Parcell had an online alter ego, Caroline Warren, that she used to entice men to have sex with her for money. Additionally, Mello gave Zack an affidavit from a man named Alex Fields. Fields was a firefighter whom Parcell propositioned for sex and drugs in exchange for money in 2018.

Zack had additional proof that A.M. was being sexually abused besides just Mello's statements, Parcell's deposition, Parcell's online sex advertisements and graphic photos, and Alex Fields' affidavit. Zack knew Parcell even if he had never met her.

Zack realizes that Parcell is a sociopath, just like Grace

The details Mello shared about Parcell's ability to lie on the spot, her lack of remorse, and her complete ruthlessness dovetailed exactly with what Zack had lived through with Grace years earlier. Parcell too was a sociopath. Zack remembered how horrifying it was to live with Grace while both were siblings, or peers, in the home. He could not imagine the hellish plight that A.M. was enduring being subservient to an authority figure, her mother, with this same personality. Anything was possible. Might Parcell even sell A.M. to Post as a prostitute?

Zack travels to Italy in May of 2021

The burden of digesting the information Mello shared with him about A.M.'s plight and the stress associated with his music project was starting to negatively affect Zack. Mello could tell in their communications, and he suggested that Zack visit him in Italy for a break. At first, Zack rejected the idea, but he soon realized that a break might do him good.

While Zack was in Italy, Mello had online video calls with A.M., who was staying with Parcell. Zack was shocked. A.M. had gained what looked to be 20 pounds since he had last seen her, she was listless, and she lacked enthusiasm for anything. "I can see the spark dying in her eyes," Mello told Zack repeatedly.

Zack now had additional corroboration for his belief that A.M. was being abused besides Mello's statements, Parcell's online sex ads and graphic sex photos, Parcell's deposition transcript, Alex Field's affidavit, and her unique sociopathic characteristics. He had his own observations of dramatic change in A.M.'s personality and appearance. Zack became convinced that A.M. was being sexually abused, and he was right.

Zack tries to save A.M.

While Mello and A.M. were in Italy and after Parcell transported A.M. back to Greenville, Zack tried to help Mello keep A.M. safe: he contacted lawyers on Mello's behalf to obtain representation for him in family court when he was able to return, he cleaned Mello's house so he and A.M. would have a suitable place to live when they

returned to Greenville, and he agreed to pick up Mello from the airport when he was able to return. Unfortunately, none of these measures served to make A.M. any safer.

Zack did more to try to save A.M. In June and July of 2021, Zack mailed publicly available, pornographic images of Parcell to Parcell, her neighbors, Post, and Kormylo in the hopes that these mailings would prompt Parcell to realize that at least some people knew what she was doing to A.M. Zack also hoped these mailings would prompt law enforcement, the Guardian ad Litem and the Family Court to more fully investigate A.M.'s homelife and discover the abuse. Zack was wrong. The recipients of the mailings did not act on them.

Zack submitted an affidavit to the Guardian ad Litem and the Family Court on September 21, 2021, in which he alleged that A.M. needed to be with Mello for her own good. The affidavit had no impact whatsoever.

In a last-ditch effort, Zack called DSS at the end of September/beginning of October of 2021, and reported to DSS personnel that A.M. was being abused. DSS did nothing.

With Mello in Italy, with law enforcement and the Family Court not acting to stop Post and Parcell, with the knowledge that Post and Parcell had unfettered access to A.M. every day, and with the knowledge that Parcell was a sociopath and Post was a wealthy fan of child pornography, Zack knew he was A.M.'s only chance at survival. "I thought I had to act to save the child's life. I told myself I can't go on with my great life, and leave her to drown." Zack went about saving A.M.

both on her own and as Post's proxy. Zack did what the GCSO, the guardian ad litem, the Family Court, and DSS were unable or unwilling to do: he defended A.M. and her friend from Parcell and Post. But for Zack acting, A.M., at least, would still be in danger to this very day.

Investigator Dan Bevill finally acts after a co-worker uncovers evidence

On October 19, 2021, Post met with Investigator Jarrad Sparkman of the GCSO for a follow-up, recorded interview in connection with Parcell's death investigation. Sparkman seized Post's cell phone, and searched it pursuant to a search warrant.[18] During the search, police discovered numerous images of child pornography involving Parcell and A.M.. Sparkman contacted Bevill to investigate this new criminal activity he had uncovered.

Bevill immediately obtained a warrant for Post for Sexual Exploitation of a Minor 3rd degree, warrant ending in 735, for one photograph he saw involving A.M. Bevill now knew that A.M. had been the victim of sexual abuse, but "did not know. . .the extent of the sexual abuse that A.M. was subject to and who from." See Bevill's report. He knew A.M. was in danger, and he had to move quickly.

After obtaining the warrant, Bevill deployed the GCSO's FASIT team to arrest Post. FASIT stands for the "Fugitive Apprehension Specialized Investigative Team," and its

[18] Sparkman testified on cross-examination that he seized Post's cell phone during the interview.

"purpose is to track( ) down subjects wanted for recently committed, serious violent crimes." See GCSO Facebook page. FASIT deputies arrested Post at his house, 24 Rivoli Lane, in Greenville County on the same day Sparkman discovered the child pornography, October 19, 2021.

Other deputies, including Bevill, later that day executed a search warrant at Post's house, and found multiple electronic devices, at least one of which contained more child pornography involving A.M. Police also observed a guest bedroom with a pink alarm clock, a doll house, and girls' toys.[19]

Clearly, Bevill knew that the danger to A.M. had not subsided, even though Post was in custody and Parcell was deceased. He sent a deputy to wake up A.M. in the middle of the night and remove her from her home and her Aunt. He took A.M. into emergency protective custody (EPC).

The next day, October 20, 2021, Bevill continued to work to eliminate the danger to A.M.. He attended, and presumably testified before, a family court hearing wherein the Family Court ordered that A.M. remain in EPC. In so doing, the Family Court presumably found that there was probable cause to believe that

> by reason of abuse or neglect the (A.M.'s) life, health, or physical safety (was) in substantial and imminent danger if the (she) (was) not taken into emergency protective custody, and there (was) not time to apply for a court order. . . .

[19] Post testified that he has no daughters or granddaughters.

S.C. Code Ann. Section 63-7-620(A)(1) (emphasis added). Six days after Parcell died and the day after Post was arrested, the harm to A.M. was so severe, as evidenced by the images and videos law enforcement seized from Post's devices, that the Family Court found that her "life, health, or physical safety" was still "in substantial and imminent danger."[20]

Bevill, although years too late, did more to try to protect A.M. on October 20, 2021. He obtained more warrants for Post based on images of child pornography he found on devices belonging to Post:

- Warrant ending in 780, Sexual Exploitation of a Minor, First Degree, in violation of S.C. Ann. Section 16-15-395(a), with an incident date of October 1, 2020. This warrant states, in part, that the sexually illicit image "depicts a nude prepubescent minor (A.M.) and a nude adult female (Parcell)." The offense in this warrant is a violent crime under SC. Code Ann. Section 16-1-60;

- Warrant ending in 781, Sexual Exploitation of a Minor, First Degree, in violation of S.C. Ann. Section 16-15-395(a), with an incident date of October 1, 2020. This warrant states, in part, that the sexually illicit image "depicts a nude prepubescent minor (A.M.) and a nude adult female (Parcell)." The offense in this warrant is a violent crime under SC. Code Ann. Section 16-1-60;

- Warrant ending in 782, Sexual Exploitation of a Minor, First Degree, in violation of S.C. Ann. Section 16-15-395(a), with an incident date of October 1, 2020. This warrant states, in part, that the sexually illicit image "depicts a nude prepubescent minor (A.M.) and a nude adult female (Parcell)." The offense in this warrant is a violent crime under SC. Code Ann. Section 16-1-60;

- Warrant ending in 783, Sexual Exploitation of a Minor, First Degree, in violation of S.C. Ann. Section 16-15-395(a), with an incident date of October 1, 2020. This warrant states, in part, that the sexually illicit image "depicts a nude prepubescent minor (A.M.) and a nude adult female (Parcell)." The offense in this warrant is a violent crime under SC. Code Ann. Section 16-1-60; and

[20] Defense counsel has sought to obtain the pleadings and transcripts for this EPC hearing, but these records are sealed in the Family Court.

- Warrant ending in 784, Sexual Exploitation of a Minor, First Degree, in violation of S.C. Ann. Section 16-15-395(a), with an incident date of October 1, 2020. This warrant states, in part, that the sexually illicit image "depicts a nude prepubescent minor (A.M.) and a nude adult female (Parcell)." The offense in this warrant is a violent crime under SC. Code Ann. Section 16-1-60;

A.M. was not the only child Bevill sought to protect on October 20, 2021. Bevill saw image(s) of A.M.'s friend in Post's devices, and he made contact with her parents to alert them of her victimization.

Bevill continued his investigation of Post and Parcell. On November 23, 2021, Bevill discovered even more disturbing images of child pornography involving A.M.

> On 11/23/21, I (Bevill) conducted a follow up on this investigation. I reviewed portions of the forensic analysis that were already completed. I selected 2 additional images for charging purposes. One image depicted Christina Parcell manipulating her daughter's vagina with her fingers. Due to both of her hands being captured in the image, the image being taken with a similar model of phone as Post, and the image being taken in Post's house, I believe that Post was an active participant in the act. I obtained a warrant for Criminal Sexual Conduct with a Minor 3rd degree.

See Bevill's Report. Both Parcell and Post were "active participant(s) in the act." *Id.* Finally, the offense contained in this warrant is a violent crime under S.C. Code Ann. § 16-1-60, and requires mandatory sex offender registry under S.C. Code Ann. § 23-3-430(C)(2)(f).

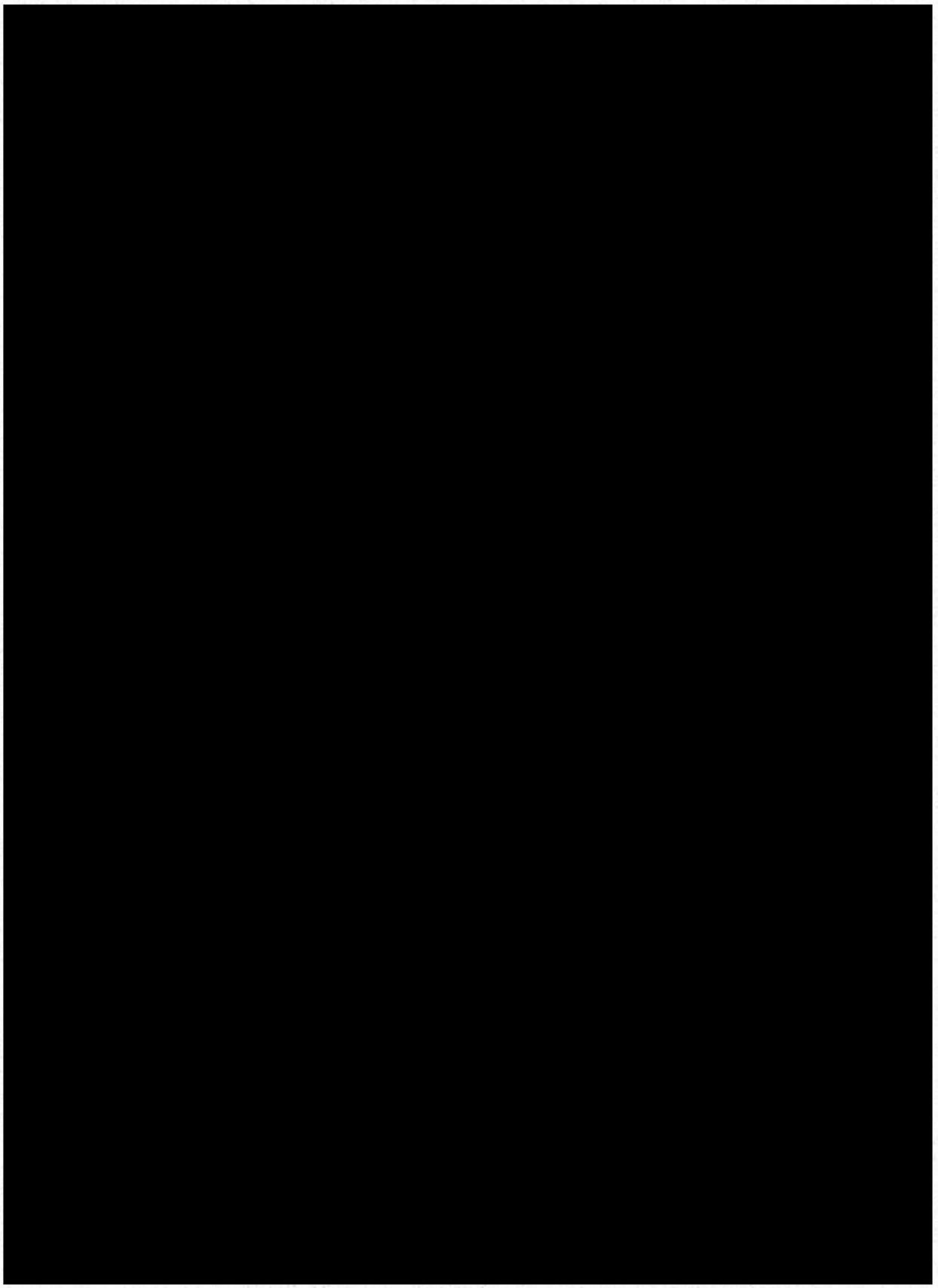
Investigator Bevill, a member of the prosecution team, both in his reports and in sworn testimony affirmed that Parcell and Post repeatedly perpetrated violent crimes and/or

crimes involving sexual abuse on A.M., Parcell's own daughter, from at least January 1, 2018, until October 19, 2021, six days after Parcell's death.

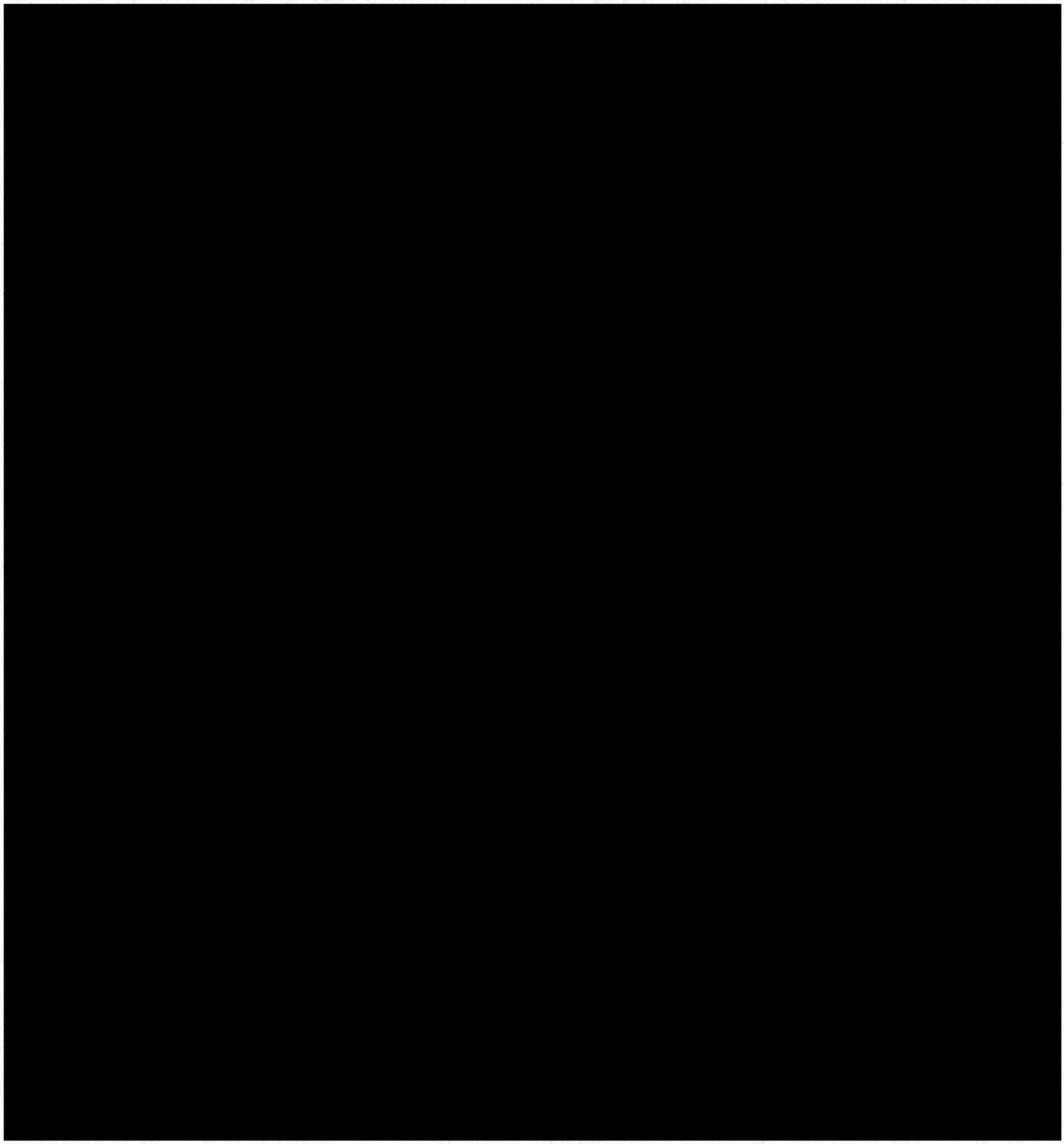
More Disturbing Images Reveal More about the Harm A.M. Suffered

The hundreds, if not thousands of images and videos of A.M. on Post's devices tell much of the story of the continuous, profound, and violent harm Post and Parcell did to A.M. Defense counsel seek to introduce evidence of the child pornography to most accurately demonstrate to the jury both the extreme and serious harm Parcell and Post perpetrated on A.M. and the extreme danger A.M. was in as of October 13, 2021. Below are some descriptions of some of the narrowly tailored exhibits defense counsel will likely seek to introduce. These descriptions will be preceded by the device which housed them and the last five characters of file name under which the image or video appears:

- Post's IPhone



- SEM1A,[21] a thumb drive that Post was concealing in a locker at Outman's Cigar Bar on Orchard Park Drive in Greenville County:



[21] "SEM" stands for then deputy now Sergeant Shannon McHale.

[22] This full file name in particular is descriptive.

[redacted]

The Trial Begins

On Monday, February 10, 2025, the Court conducted an *in camera* hearing of Brad Post's testimony: the Court justifiably was concerned that Mr. Post would assert his 5th Amendment Right to Remain Silent to questions on cross-examination. During cross-examination, defense counsel asked Post, "isn't it true that you worked with Ms. Parcell to create and distribute child pornography?" Rather than asserting his Right to Remain Silent, Post testified, "No."[24] No!

Defense counsel immediately moved the Court to allow Zack to introduce the child pornography evidence because Post had "opened the door" by falsely denying that he and Parcell had ever produced child pornography when hundreds or thousands of child

[23] These exhibits and other images and videos located on Post's devices show no indications that Parcell was an unwilling participant or forced to engage in this conduct: many videos only show A.M. and Parcell, and Parcell can be seen coming from behind the camera, indicating no third party was present to operate it. Finally, the State has not produced any evidence, either in the discovery or at trial, to suggest that Parcell ever called police to report this abuse or did anything to protect her daughter. As unfathomable and unnatural as it truly is, Parcell preyed on her own daughter, and she worked with her boyfriend and later fiance' Post to commit hundreds if not thousands of violent crimes on A.M. over many years.

[24] These quotations come from a transcript of the testimony.

pornographic images on Post's devices proved just the opposite. The Court quickly denied the Motion and continued to bar defense counsel from using this evidence.

The State's case began on Tuesday, February 11, 2025. In its opening statement, the State told the jury that Zack was charged with murder, that murder involved "an angry heart," and the State "has to show that the Defendant was mad."[25]

In addition to Post's pretrial testimony, Vanessa Kormylo's testimony has a special bearing on the child pornography evidence. During her direct examination, the State asked Kormylo[26]

STATE: Had you been asked to make the recommendation, would you have recommended (A.M.) to stay with Christina Parcell?

KORMYLO: Yes. . . . So at the time, yes. That would have been my recommendation if we had gone to trial before the mother's murder (emphasis added)?

Immediately after her testimony, defense counsel sought to ask Kormylo on cross-examination what her recommendation would have been after Parcell passed. The State objected, and defense counsel argued that, once again, the State had "opened the door" to

[25] These quotations come from defense counsel's notes.

[26] The following comes from transcripts of portions of the trial the court reporter graciously agreed to transcribe over the weekend.

the child pornography evidence. The Court denied the motion, but allowed defense counsel to question Kormylo under proffer.

DEFENSE COUNSEL: [W]hat was your opinion on October 13, 2021 and/or before?

KORMYLO: That she should remain in the custody of her mother.

DEFENSE COUNSEL: If you knew then what you know now--- and let me be very specific. If you knew then that Christina Parcell was producing and engaged in the production of child pornography with her daughter, would you have a different view?

KORMYLO: Yes.

DEFENSE COUNSEL: In fact, isn't it true that if you knew then what you know now, you would have gotten her out of that house --- out of her custody as soon as soon as you could? Isn't that true?

KORYMLO: I probably would have gotten Christina out of the house since it was Tina's house, and I would have wanted her to have custody.

DEFENSE COUNSEL: But you would have separated her from her mother as soon as possible; isn't that true?

KORMYLO: Yes.

The State rested its case on Friday, February 14, 2025.

ARGUMENT

Zack has a right to defend himself, and the child pornography evidence is clearly and unequivocally admissible: it is the best and most reliable evidence of the harm that Parcell and Post perpetrated on A.M., and the existence, the extent, and the type of harm A.M. suffered is essential to the jury's determination both as to whether the State has met its burden of proof on the murder charge and whether Zack's killing of Parcell was justified. Further, the State, both in its opening statement and in evidence it introduced through witnesses in its case-in-chief, whether intentionally or inadvertently, has made the child pornography evidence admissible.

In this section, the brief will discuss, not in part but wholistically, why this evidence is admissible under the South Carolina Rules of Evidence.

Relevance: the Starting Point

S.C.R.E. 402 reads:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South

Carolina. Evidence which is not relevant is not admissible. See also, *State v. White*, 437 S.C. 490, 495, 879 S.E.2d 21, 24 (Ct. App. 2022) (citing S.C.R.E. 402 and stating "[e]vidence that is relevant is admissible unless it is excluded by the United States Constitution, the South Carolina Constitution, South Carolina's statutes and rules of evidence, or other rules promulgated by the South Carolina Supreme Court.") (Emphasis added).

S.C.R.E. 401 defines what evidence is "relevant."

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Further, "the test for relevancy is not stringent, and its standard is not difficult to vault. (Citation omitted) . . . . Indeed, evidence that carries the probative weight of a feather tips a balanced scale and assists the jury in arriving at the truth of an issue." *White*, 437 S.C. at 495, 879 S.E.2d at 24 (Ct. App. 2022). See also, *State v. Sweat*, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004) (citation omitted) ("Evidence which assists the jury in arriving at the truth of an issue is relevant. . . .").

Relevance: The Element of Malice

The State has charged Zack with, inter alia, murder. "'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. In the context of murder, "malice" is defined as "the intentional doing of a wrongful act

without just cause or excuse (emphasis added.)" *State v. Sellers*, 442 S.C. 140, 146, 898 S.E.2d 116, 119 (2024) (affirming the trial court's use of this definition of "malice," and justifying its holding, in part, by stating "[u]nder the State's clearly-articulated burden of proof and the trial court's definition of malice, *the State* was required to prove beyond a reasonable doubt that Sellers acted 'without just cause or excuse.'").

As the State aptly conceded during its case-in chief, "I will say that malice. . . is an element the State is charged with proving, and evidence to that effect, obviously, (is) extremely valuable.".[27] The State went onto say that "the actions the State is alleging that Mr. Hughes took obviously during this incident but afterwards are highly probative to show a state of mind . . . ."[28] The Court agreed with the State. In overruling defense counsel's objection to a graphic photograph the State sought to introduce, the Court justified admitting the photograph.

> Clearly, this pictures are relevant to the issue of malice. . . . They establish circumstances of the crime scene, and I know they're going to be corroborated. . . . I think they are highly relevant, particularly to the crime scene and also the issue of malice. So that's my ruling.[29]

The child pornography shows that Zack did not act with malice because he had "just cause and excuse" when he took Parcell's life to save A.M. Parcell and Post sexually abused A.M. for years. The police failed to stop it, the guardian ad litem was unable to uncover it, the Family Court failed to stop it, and DSS failed to stop it. Zack knew of the

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[27] This quotation comes from the transcript.

[28] *Id.*

[29] *Id.*

sexual abuse, and he was right. Zack did not act with an "angry heart." He acted to save A.M.

Put another way, the State must prove beyond a reasonable doubt that he acted "without just cause or excuse" when he killed Parcell for a jury to convict Zack of murder. Therefore, the child pornography is "a fact of consequence" for the jury to consider in determining whether Zack acted with malice when he killed Parcell, and it constitutes "[e]vidence which (would) assist() the jury in arriving at the truth. . . ." *Sweat*, 362 S.C. at 126, 606 S.E.2d at 513 (citation omitted). See also, *United States v. Martinez-Turcio*, 494 F. Appx. 354, 364 (4th Cir. 2012) (citation omitted) (finding evidence relevant because "the facts revealed through this testimony were also 'of consequence,' Fed.R.Evid. 401(b), because their 'existence ... provide[d] the fact-finder with a basis for making some inference, or chain of inferences, about an issue that is necessary to a verdict. . . ."). Parcell and Post produced and shared the child pornography, and the child pornography is relevant because it goes directly to whether or not Zack acted with malice (which he did not), a necessary and essential element of the murder charge.

Relevance: The Defense of Others

Zack killed Parcell to save A.M. That is the truth, and he will be asserting the defense of others in his case in chief, which is his right as a defendant on trial.

Under South Carolina law, in the defense of others context, the defender stands in the shoes of the defended. "[O]ne is not guilty of taking the life of an assailant who assaults

a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997) (citations omitted). See also, *State v. McCarty*, 437 S.C. 355, 370–71, 878 S.E.2d 902, 910 (2022) ("[A] person has the right to act in defense of another person if the person being protected would have had the right to kill the assailant in self-defense."); *State v. Sales*, 285 S.C. 113, 114, 328 S.E.2d 619, 620 (1985) ("The intervenor assumes the rights and limitations of the person he acts to protect. (Citation omitted)"). In essence, this trial is really about the State v. A.M.: if A.M. could have acted in self-defense to kill Parcell, so could Zack act to save her.

> Self-defense has four elements.
>
> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

McCarty, 437 S.C. at 369, 878 S.E.2d at 909–10 (citation omitted). Contrary to the State's Motion, the fourth element does not apply to this case because Zack defended A.M. in her home, a place where A.M. had no duty to retreat. See *State v. Wiggins*, 330 S.C. 538, 548 n. 15, 500 S.E.2d 489, 494 n.15 (1998) ("There is no duty to retreat where an attack occurs

in one's home or place of business."). If A.M. had no duty to retreat, then neither did Zack. See *State v. Norris*, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) ("The right of the father to defend his daughter is coextensive with the right of the daughter to defend herself."); *State v. Sales*, 285 S.C. 113, 114, 328 S.E.2d 619, 620 (1985) ("A person attacked on his own premises, without fault, has the right to claim immunity from the law of retreat. (Citation omitted). Therefore, the appellant's sister had no duty to retreat. The intervenor assumes the rights and limitations of the person he acts to protect. (Citation omitted). The appellant thus had no duty to retreat, and the jury should have been so charged.").

The child pornography that police seized from Post's devices directly and unequivocally proves the second and third elements of self-defense: that A.M. was "actually in imminent danger of sustaining serious bodily injury," and "the circumstances were such as would warrant a (woman) of ordinary prudence, firmness and courage to strike the fatal blow in order to save (herself) from serious bodily harm or losing her own life." *McCarty, supra*, at p 31-32. Parcell and Post abused A.M. hundreds, if not thousands of times over many years, and a defense expert, Dr. David Corwin, will testify, in part, that this type of abuse irrevocably damages the brain of a child. See c.f., S.C. Code Ann. § 16-11-430 (defining "Great bodily injury" for stand your ground purposes as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ.") (Emphasis added).

The "Except" language in S.C.R.E. 402

> When evidence is found relevant—as it is here—the next question is whether any rule of evidence or provision of law operates to exclude the evidence. *See* Rule 402, SCRE (providing "relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina"). A (party) seeking to have relevant evidence excluded must point to some rule of evidence or other provision of law that supports the exclusion.

State v. Jenkins, 436 S.C. 362, 392, 872 S.E.2d 620, 636 (2022). "[T]he burden [is] on the opponent of the evidence to establish [its] inadmissibility." *State v. Gray*, 438 S.C. 130, 144, 882 S.E.2d 469, 476 (Ct. App. 2022) (internal quotation marks and citations omitted).

An Except: S.C.R.E. 403?

Rarely, S.C.R.E. 403 can operate to exclude evidence that is otherwise relevant. See *United States v. Cooper*, 482 F.3d 658, 663 (4th Cir. 2007) (citations and internal quotation marks omitted) ("Rule 403 exclusion should be invoked rarely, because the general policy of the Federal Rules ... is that all relevant material should be laid before the jury."). S.C.R.E. 403 reads

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"'Probative value' is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. (Citation omitted). [T]he more essential the evidence, the greater its probative value. (Citation omitted)" *Gray*, 438 S.C. at 143–44, 882 S.E.2d at 476. "'Unfair prejudice means an undue tendency to suggest decision on an improper basis.'" *State v. Heath*, 433 S.C. 506, 514, 860 S.E.2d 673, 677 (Ct. App. 2021) (citation omitted). "[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of unfair prejudice that substantially outweighs the probative value of the evidence." *Heath*, 433 S.C. at 514, 860 S.E.2d at 677 (citations and internal quotation marks omitted) (emphasis in original).

Cases involving child sexual abuse are especially heinous, and the evidence in these cases is often gut-wrenching. That does not mean this evidence is inadmissible.

> Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder. (Citation omitted). A trial [court] is not required to exclude relevant evidence merely because it is unpleasant or offensive.

Heath, 433 S.C. at 514, 860 S.E.2d at 677 (Citation omitted). See *United States v. Bartunek*, 969 F.3d 860, 863 (8th Cir. 2020) (citations and internal quotation marks omitted) ("Relevant evidence in a child pornography case often is disturbing, yet that alone cannot be the reason to exclude the evidence."). See also, c.f., *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008) (citation omitted) (admitting photographs from a child's autopsy in a homicide by child abuse case and stating "[a] trial judge is not

required to exclude relevant evidence merely because it is unpleasant or offensive."). Further, Rule 403 "does not protect (the State)[30] from devastating evidence in general. The (child pornography is) disturbing because the alleged crimes themselves were extraordinarily disturbing. Rule 403 is not a shield to keep juries from learning details of horrific crimes." *United States v. Heatherly*, 985 F.3d 254, 266 (3rd Cir. 2021) (citation omitted).

Numerous courts in South Carolina and elsewhere have admitted relevant pornography evidence, including child pornography evidence, over Rule 403 objections because the danger for unfair prejudice did not substantially outweigh the evidence's probative value. In *State v. Heath*, the State charged Heath with multiple counts of Criminal Sexual Conduct with a Minor.

> At trial, Heath's biological daughter (Victim) testified he sexually abused her multiple times when she was six or seven and threatened to kill her or her mother if she told anyone. . . . Victim explained the most recent incident occurred on April 26, 2015. . . . She recalled Heath took off her clothes and rubbed his genitals against her buttocks while watching pornography on his iPad. She testified State's Exhibit 22 was a screenshot from the video Heath watched while he assaulted her.

[30] The original language in *Heatherly* reads Rule 403 "does not protect the Defendant from devastating evidence in general." In *Heatherly* and in the other cases cited in this section of the brief, the court applied the 403 analysis when the Government sought to introduce child pornography against the Defendant. The argument for inclusion of evidence in the Rule 403 context when a defendant seeks to introduce it against the Government is even more compelling. See generally, c.f., *Miranda v. Arizona*, 384 U.S. 436, 460, (1966) ("[T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors. . . .").

> Victim explained she ran out of Heath's bedroom and sent a text message explaining what happened to her aunt. Her aunt contacted Victim's mother, who called the police.

Heath, 433 S.C. at 510–11, 860 S.E.2d at 675.

The State offered into evidence pornographic images police seized from Heath's I-pad, and this evidence was especially disturbing. The trial court admitted the following evidence over Heath's Rule 403 objections.

> Detective Phipps, an expert in forensic examination of digital devices, testified he extracted Exhibit 38—an image—from Heath's iPad and that someone viewed the pornographic video on December 2, 2014. Exhibit 38 was a screenshot from a pornographic video with the watermark "incesttv.com" on the bottom of the image. Detective Phipps explained incesttv.com was a website that included adult roleplaying and involved incest, including father-daughter role-play. Exhibits 22 and 36 were admitted subject to Heath's prior objections. Exhibit 22 was a screenshot of a pornographic video, which contained the watermark "DaughterDestruction.com." Exhibit 36 contained a screenshot from a pornographic video and contained no watermark. Detective Phipps testified Exhibits 22 and 36 were accessed on Heath's iPad on April 26, 2015. He explained "daughterdestruction.com" was a website for "hardcore" pornography. . . .

Heath, 433 S.C. at 512, 860 S.E.2d at 676 ("Heath did not object to any of Detective Phipps's testimony regarding the watermarks."). The jury ultimately convicted Heath on all counts.

On appeal, Heath argued, in part, that the trial court abused its discretion when it admitted this pornographic evidence, but the Court of Appeals disagreed.

> We find the trial court did not abuse its discretion in admitting these photographs because the court weighed the photographs' probative value against the danger of unfair prejudice. Since these exhibits corroborate Victim's testimony about the circumstances surrounding how Heath sexually assaulted her, evidence supports the

> trial court's finding that these photographs were highly probative. . . . The corroboration of Victim's testimony of the events regarding her abuse was extremely probative. While the photographs do not paint Heath in a positive light, because they were part of the circumstances surrounding the crime, they were not unfairly prejudicial.

Heath, 433 S.C. 506, 515, 860 S.E.2d 673, 677–78 (citations omitted).

Like the victim in *Heath*, the photographs corroborate Zack's belief that A.M. was being sexually abused: after receiving all the information from Mello and after receiving corroboration from documents and his own personal observations, Zack believed Parcell and Post were sexually abusing A.M., and he was right!

The child pornography in Zack's case is even more probative than the pornography evidence in *Heath*, however. The child pornography evidence does more than just corroborate Zack's well-founded beliefs. It directly undermines the States' ability to prove malice beyond a reasonable doubt, an essential element of murder. See *supra*, at pp. 28-30. It also firmly establishes Zack's justification in defending A.M. as her alter ego by satisfying elements two and three of self-defense. See *supra*, at pp. 31-32. Therefore, any prejudice this evidence causes the State is not "unfair" because it is "part of the circumstances surrounding the crime." *Heath*, 433 S.C. 506, 515, 860 S.E.2d 673, 677–78 (citations omitted). And even if the prejudice to the State was "unfair," it would be impossible for the "unfair prejudice" to "substantially outweigh" the evidence's probative value because the probative value is so high. See *State v. Carpenter*, No. 2021 WL 1998486, at *1 (Ct. App. 2021) (unpublished) (citations omitted) (affirming the trial court's admission of evidence showing Carpenter had sexual preferences involving feces and urine

over Carpenter's 403 objection, and stating "[w]e further find the circuit court did not abuse its discretion in finding under Rule 403, SCRE, that the danger of unfair prejudice did not substantially outweigh the evidence's probative value. Although this evidence was disturbing, it was clearly relevant to the alleged abuse the witnesses reported experiencing and highly probative given the uncommon nature of the alleged abuse.").

In *United States v. Evans*, 802 F.3d 942 (8th Cir. 2015), federal law enforcement officers executed a search warrant at Evan's home and found more than 23,000 images and 1,300 video files of child pornography. A federal grand jury indicted Evans in a multi-count indictment, alleging he unlawfully possessed and transported child pornography.

At trial, the Government sought to introduce 14 images and 22 video clips of child pornography police found on Evans' devices. Evans stipulated to the fact that the Government had located child pornography on his devices, and he objected pursuant to Rule 403 to the Government's attempt to show the jury 36 pieces of child pornography. Evans wanted the Court to greatly reduce the amount of images and videos the Government could publish to the jury as well as the durations of these publications. The district court overruled Evans' objection, he was convicted, and he appealed.

On appeal, the Eighth Circuit Court of Appeals affirmed the district court. The *Evans* court recognized the uncomfortable and possibly traumatic effect the child pornography would have on jurors, but that, alone, did not warrant exclusion. "Images and videos depicting child pornography are by their very nature disturbing, and viewing such

depictions is highly likely to generate an emotional response. But that alone cannot be the reason to exclude the evidence." *Evans*, 802 F.3d at 946 (citation omitted).

> The *Evans* Court approved of the district court's balancing analysis under Rule 403.
>
> The court also took into consideration the impact this evidence may have on the jury, recognizing the legitimate goal of "trying to spare the jury the trauma." Ultimately, the court concluded there was "no risk of any sort of undue delay or cumulative evidence being presented," and stated that "it strikes me that this number of images is within the range of what would be appropriate."

Evans, 802 F.3d at 945. "On this record, we cannot say that publication of the images and video clips to the jury was unfairly prejudicial." *Evans*, 802 F.3d at 946.

Like the Government in *Evans*, Zack does not wish to show the jury each and every image or video that comprise the more than 16,000 images and/or videos on Post's devices. He is prepared to show a small, discrete number of videos and images,[31] and, under the circumstances this discrete "number of images (would be) within the range of what would be appropriate." *Evans*, 802 F.3d at 945.

However, the child pornography arguably is even more probative in Zack's case than it was in *Evans*. Evans stipulated that there was evidence of child pornography on his devices, and such a stipulation reduced the probative value of the actual child pornography.

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[31] Defense counsel also has retained Clark Walton of Reliance Forensics. Mr. Walton has a J.D., and he has testified as a forensic expert on numerous occasions. Walton has reviewed images and videos contained on Post's devices, and he is prepared to describe to the jury what he has seen. Zack believes that the actual images and videos must be published to the jury, and any substitution for the actual images and videos would run afoul of S.C.R.E. 1002 and 1004.

See *United States v. Long*, 92 F.4th 481, 487 (3d Cir. 2024) (internal quotation marks and citations omitted) ("[S]tipulations can reduce the probative value of exhibits.. . . "). To the contrary, the State has foolishly and repeatedly denied the existence of Parcell's victimization of A.M. as captured in the images and videos of child pornography. E.g., State's Mot. for Gag Order at 2 ("Defense counsel brazenly alleges that the victim of this murder, Parcell, "produced, directed, and participated...[in child pornography]. . . ." Not only is the allegation inadmissible, it cannot be proven by the defendant and is wholly unsubstantiated.(emphasis added)."). The State's unwillingness to admit that Parcell sexually abused her own daughter, evidence that undermines Zack's murder charge and establishes his right to defend A.M., makes the child pornography even more probative and essential to the jury's "the solemn duty of acting as the fact-finder. (Citation omitted)." *Heath*, 433 S.C. at 514, 860 S.E.2d at 677.

Finally, in *United States v. Heatherly*, 985 F.3d 254 (3rd Cir. 2021), the Court stated

> Child-pornography cases test our legal system's commitment to fairness. That is doubly true of cases involving child rape and sexual abuse. Though the details to follow are unsettling, to do justice we must describe the facts explicitly, without flinching.

Heatherly, 985 F.3d at 259.

> Dylan Heatherly and William Staples frequented an internet chat room where users regularly shared child pornography. One chat-room user repeatedly live-streamed himself raping and sexually abusing his six-year-old nephew. Heatherly and Staples encouraged him as he did so. And they repeatedly asked users for other child-pornography videos too.

Heatherly, 985 F.3d at 258.

At trial, the Government sought to introduce videos a police officer had preserved from a chatroom wherein Heatherly and Staples were watching and participating by encouraging the abuser. The videos were horrific.[32]

> Exhibit 2 runs for two minutes and shows a man vaginally penetrating a four-year-old girl. The jury watched a five-second clip of it at normal speed.
>
> Exhibit 3 is a five-and-a-half-minute-long compilation of "hurtcore," a subgenre involving the "torture or pain and the sexual assault of children." App. 236. Many of the clips show a man vaginally or anally raping a three- or four-year-old girl. One clip shows a man urinating on that toddler's face. Yet another shows a man ejaculating on the vaginal area of a four-to-six-year-old girl. The jury watched this video on fast forward for thirteen seconds.
>
> Exhibit 4 runs for a minute and a half and shows a man anally raping a four-to-six-year-old boy. The Government did not show this video to the jury.
>
> Exhibit 5 runs for almost eight minutes and shows an eight-year-old girl performing oral sex on a man. Near the end, the man forces his penis into her mouth and then ejaculates on her face. The jury watched part of this video on fast forward for twelve seconds.
>
> Exhibit 6 runs for three and a half minutes, showing Augusta grabbing, hitting, and forcing his nephew to perform oral sex on him. The jury watched a ten-second clip at normal speed.
>
> Exhibit 7 is a nine-minute recording of Augusta's live abuse of his nephew. Blackadar captured only part of the twenty-two-minute livestream. During that part, six-year-old Victim-1 performs oral sex on Augusta. Augusta then puts his nephew in his lap, masturbates him, penetrates the boy's anus with his finger, and then puts that finger into the boy's mouth. The jury watched the first two minutes of that video on fast forward over thirteen seconds.
>
> Exhibit 8 is a three-and-a-half-minute-long compilation of adults sexually abusing prepubescent children. The Government did not show this video to the jury.

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[32] "A word before we go on: The descriptions of the Zoom videos that follow are horrifying. Though often we can resolve legal issues without subjecting the reader to the graphic and disturbing details of the [child] pornography, those details are unavoidable when we confront a fact- and context-specific challenge under Rule 403." *Heatherly*, 985 F.3d at 264 (internal citations and quotation marks omitted.)

> Exhibit 10 is a thirteen-minute-long compilation of adults sexually abusing babies. Parts show men forcing their penises into their victims' mouths. One part shows a tied-up baby being anally penetrated. The jury watched the first five seconds at normal speed, then a seven-minute ***2** clip on fast forward over the course of ten seconds.

Heatherly, 985 F.3d at 264–65. Despite Heatherly's and Staples' 403 objections, the district court admitted the videos, and the jury convicted them.

On appeal, the *Heatherly* court acknowledged the grotesque nature of the facts of the case but reaffirmed its commitment to fairness. "Child-pornography cases test our legal system's commitment to fairness. That is doubly true of cases involving child rape and sexual abuse. Though the details to follow are unsettling, to do justice we must describe the facts explicitly, without flinching." *Heatherly*, 985 F.3d at 259.

Although the district court provided a very scant 403 analysis prior to admitting this evidence, the *Heatherly* court affirmed the district court's decision to admit the videos.

> Rule 403 bars not all prejudice, but only *unfair* prejudice. It does not protect defendants from devastating evidence in general. The exhibits were disturbing because the alleged crimes themselves were extraordinarily disturbing. Rule 403 is not a shield to keep juries from learning details of horrific crimes. . . . So (the Government) needed to give the jury a snapshot so that the jury could match the commentary to the visual events. That snapshot was the evening of July 22. Having heard descriptions and seen clips of the child pornography streamed that evening, the jury could better grasp the scope of the alleged conspiracy and the tacit agreement driving it. To do that, it had to see those videos firsthand. And jurors had to see the videos themselves, not just hear descriptions or stipulations. . . ., Both defendants claimed at some point that they were not really interested in child pornography but visited the room because they wanted to watch other men masturbate. If the jury had believed those defenses, it might have doubted whether the defendants really agreed to request child pornography. But the horrific videos demolished those defenses. . . .

Heatherly, 985 F.3d at 266–67.

Like the jury in *Heatherly*, Zack's jury "should not be shielded. . . from learning details of horrific crimes" Parcell and Post perpetrated on A.M. and her friend. Unlike the evidence in *Heatherly*, the child pornography does not "demolish" Zack's defenses against malice and for the defense of others, it solidifies them. For the jury to fully appreciate, evaluate, and understand the "imminent danger of seriously bodily injury" A.M. actually faced and Zack's "just cause" for acting, the jury "ha(s) to see those videos firsthand." *Heatherly*, 985 F.3d at 266.

Other "Excepts?"

Likely few, if any, other provisions of law could possibly serve to exclude the child pornography evidence. For example, Zack will not be offering for their truth the few statements that are on these videos, so the hearsay prohibition does not apply. Defense counsel will be prepared to respond should the State attempt to use other legal tenants to exclude this essential evidence.

The State has "opened the door."

Zack has a right to defend himself, and the child pornography evidence is clearly admissible. However, even if this Court were to somehow conclude that evidence that undercuts the State's ability to prove an essential element of murder, malice, and establishes a complete defense for Zack, defense of others, is inadmissible, this evidence should still be admitted. "[O]therwise inadmissible evidence may be properly admitted

when opposing counsel opens the door to that evidence." *State v. Shands*, 424 S.C. 106, 124, 817 S.E.2d 524, 533 (Ct. App. 2018) (internal quotation marks and citations omitted). "When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." *State v. McEachern*, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012) (internal quotation marks and citations omitted). Moreover, a party can "open the door" in his opening statement, even before that party has had an opportunity to offer any evidence. See generally, *United States v. Spotted Bear*, 920 F.3d 1199, 1201 (8th Cir. 2019) (referencing a defense lawyer's opening statement as evidence the defendant "opened the door," and stating "[w]hen a criminal defendant creates a false or misleading impression on an issue, we have held the government may clarify, rebut, or complete [the] issue with what would otherwise [be] inadmissible evidence. . . . "); *State v. Wood*, 580 S.W.3d 566, 577 (Mo. 2019) (internal quotation marks and citations omitted) ("[A] party can open the door to the admission of evidence with a theory presented in an opening statement, or through cross-examination.").

In *Shands*, the State tried Shands on attempted murder and other charges related to a domestic altercation he had with his wife. "At trial, Shands elicited testimony during the cross-examination of numerous witnesses to show that he had never reacted violently before." *Shands*, 424 S.C. at 124, 817 S.E.2d at 533. To rebut this idea, that Shands was not a violent person, the State introduced proof of a murder conviction Shand had obtained decades earlier, and the Court admitted the conviction over Shands objection. The jury convicted Shands, and he appealed.

On appeal, the Court of Appeals affirmed, even though it explicitly held that the conviction was not admissible under S.C.R.E. 609, and the State failed to demonstrate how the unfair prejudice associated with the conviction did not substantially outweigh the conviction's probative value. "Because Shands opened the door about his past non-violent actions, the State was entitled to rebut his assertions with evidence of his prior conviction for a violent felony." *Shands*, 424 S.C. at 124, 817 S.E.2d at 533 (citation omitted).

The State has clearly "opened the door" to the child pornography evidence. In its opening statement, the State told the jury that Zack "acted with an angry heart." No. Zack acted to save A.M. It was not about vengeance. It was about protection.

Further, the State elicited evidence that Parcell was a good mother by asking Vanessa Kormylo if she would have recommended that A.M. live with her mother prior to October 13, 2021. Parcell was a bad mother, and defense counsel should be allowed to enter the child pornography evidence "in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." *McEachern*, 399 S.C. at 137, 731 S.E.2d at 610 (internal quotation marks and citations omitted). The State obviously will object to defense counsel's introduction of this evidence, but "one who opens the door to evidence cannot complain of its admission." *Shands*, 424 S.C. at 124, 817 S.E.2d at 533 (citing *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991).

CONCLUSION

Throughout the prosecution of this case, the State's paranoia over the child pornography evidence has reared its ugly head: the State has denied the existence of evidence that shows Parcell abused her own daughter, even though it has produced to defense counsel countless videos and photographs that prove it. The State even unsuccessfully tried to abridge Zack's and defense counsel's First Amendment rights by moving the Court to silence, or gag, defense counsel on this topic. Now, the State asks this Court to prevent Zack from even offering any defense to these charges.

This Court has expressed its reluctance to admit the child pornography evidence in this trial. It is defense counsel's most firm conviction and sincere belief, after researching this issue and doing their utmost to explain to the Court the applicable law, that this essential and highly probative evidence is admissible because it shows that Zack was justified in defending A.M. For if this Court deems this evidence entirely inadmissible, it will not only deprive Zack of his right to a fair trial by eviscerating both his ability to undermine the State's proof of an essential element (malice) and his right assert the viable defense of others. This exclusion also will deny the jury its opportunity to execute its "solemn duty of acting as the fact-finder" to "arriv(e) at the truth." *Heath* and *Sweat*, *supra*. Defense counsel merely asks the Court to allow Zack to defend himself, apply the law to this evidence and to properly admit it so, no matter what the jury's verdict, Zack, the State, and the public will know that the jury had the information it needed to find the truth and render a just verdict.

Respectfully submitted,

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