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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2021-000942

THE STATE,RESPONDENT

v.

DENZELL DESHAWN JACKSON,APPELLANT.

INITIAL BRIEF OF RESPONDENT

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The trial judge properly excluded testimony from the victim’s mother, Kenya Bush, that his father “was not worried about” the victim’s disappearance because this testimony was irrelevant to any issue in the case, Ms. Bush lacked personal knowledge of how his father felt about his disappearance, and any information she had about how the father felt was hearsay. Further, many of Jackson’s arguments raised on appeal are procedurally defaulted because they were not presented to the trial judge.....	20
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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge err when he excluded testimony from the alleged victim's mother that the alleged victim's father was not worried about the sudden disappearance of their son where (1) the evidence was relevant to whether the alleged victim was actually dead or had simply fled from justice, (2) the evidence was within the mother's personal knowledge as it was based upon the mother's perceptions of the father, and (3) the evidence was either not hearsay because it was based upon the mother's perceptions or it fell within the state of mind exception to the prohibition against hearsay?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Did the trial judge properly exclude testimony from the victim's mother, Kenya Bush, that his father "was not worried about" the victim's disappearance because this testimony was irrelevant to any issue in the case, Ms. Bush lacked personal knowledge of how his father felt about his disappearance, and any information she had about how the father felt was hearsay. Also, are many of Appellant's arguments raised on appeal procedurally defaulted because they were not presented to the trial judge.

STATEMENT OF THE CASE

Appellant, Denzell Deshawn Jackson, is confined in the South Carolina Department of Corrections (SCDC) as the result of his Aiken County conviction and sentence for murdering Akeem Smalls. On November 11, 2019, the Aiken County Grand Jury indicted him for murder (2019-GS-02-02082), kidnapping (2019-GS-02-02083), and possession of a firearm during the commission of a violent crime (2019-GS-02-02084). *R.* ____-____. His co-defendant, Sha'Kel Dixon, was similarly indicted on the same charges. Jackson and Dixon received a joint trial before the Honorable Clifton Newman and a jury on August 16-20, 2021.¹ Keith Johnson represented Jackson in the trial court, while Assistant Public Defenders Barry Thompson and William McKellar represented Dixon. First Circuit Assistant Solicitors Jacqueline Charbonneau and Ashley Hammack prosecuted the case. *Tr. 1.*

The jury convicted both men of all three charges. *Tr. 808-10.* Judge Newman sentenced Jackson, who smiled or smirked after sentencing, to life imprisonment without the possibility of parole for murder. Judge Newman did not impose sentences for either kidnapping or the weapons charge. *See Tr. 838; 847, lines 5-7; R. ____* (sentencing sheets). Dixon also received a life sentence without the possibility of parole for murder. *Tr. 856.* Jackson timely served and filed a notice of appeal. He filed an Initial Brief of Appellant on June 6, 2022.²

¹ Both men refused the State's offer of a plea bargain. The offer to Jackson was a sentence of forty-five years for not only the murder of Derrick Curry, but also another pending murder charge and drug charges. *Tr. 21, line 21 – 23, line 16.* Dixon was also offered the chance to receive a forty year sentence for this murder and an unrelated charge of failing to stop for a blue light. *Tr. 23, line 20 – 26, line 9.*

² Dixon likewise timely appealed his conviction, and he is represented by Appellate Defense on appeal. On July 27, 2022, Assistant Appellate Defender Adam S. Ruffin filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and petitioned to be relieved. His appeal is currently pending.

STATEMENT OF FACTS

Viewed in the light most favorable to the prosecution, the direct and circumstantial evidence is that Jackson, Dixon, and two co-defendants had an ongoing dispute with Derrick Curry, the victim, for several months. It only ended when they murdered him on April 30, 2019. To underscore the defendants' maliciousness and their total lack of remorse for the murder, the victim's body has never been found because they have refused to disclose its location, even at sentencing. *See Tr. 832; 836-37; 848-50.*³

Kenya Bush testified that Derrick Curry was her twenty-year-old son, and that he lived with her in Graniteville, South Carolina. They saw each other and spoke daily. Around 7:00 am. on April 30, 2019, she went into Derrick's bedroom and spoke with him shortly before she left for work. She reminded him to pull up the carpet in his room, so that she could install linoleum. Ms. Bush left work at noon and called Derrick thirty minutes later. When he told her he had not pulled up the carpet, she asked him why not. He said that he was going to meet "Shaniyah" and would be "right back." Because he did not have a car, he would have been dependent on "Shaniyah," whom Ms. Bush had not met, for a ride home. *Tr. 101-05.*

Ms. Bush began receiving phone calls "between 3:00 and 4:00 [p.m.]" "informing her that Derrick was dead. Also, she called and texted Derrick but he did not respond. Because she was

³ Jackson states that "[a]lthough the police never found a body that was identified as Derrick '60' Curry, the solicitor was undeterred and charged [Jackson] with murder based on the word of Shaniyah Toney." BOA at 8. This is an obvious red herring, since there was nothing deterring the State's charging decision. In a case argued by the undersigned, the South Carolina Supreme Court upheld the murder conviction and death sentence of a defendant thirty-five years ago even though the victim's body has still not been found. *See State v. Owens*, 293 S.C. 161, 359 S.E.2d 275 (1987). (Ironically, Jackson later cites *Owens*). The Court in *Owens* held that the State need not locate a victim's body to prosecute an accused for murder. Rather, "[t]he State must produce proof aliunde of the corpus delicti aside from the extrajudicial confession of the defendant." *Id.* at 167, 359 S.E.2d at 278. The record contains more than sufficient proof aliunde of the corpus delicti of murder here, and Jackson does not allege a failure of proof on appeal.

“flood[ed]” with calls that he was dead, she went to the police department. After she left there, she got on Facebook and located Shaniyah Toney’s home page. She started calling Toney through Messenger and the two women exchanged several text messages. *Tr. 101-05; 110; 258.*

Toney told Ms. Bush that Derrick had her car, and that she would tell Derrick to call Ms. Bush when he picked her up from work at 11:00 pm. Because Derrick did not call, Ms. Bush again contacted Toney. This time, Toney gave Ms. Bush two different stories. She first told Ms. Bush that she had dropped Derrick off at a men’s shop in Graniteville. She then told Ms. Bush that she had left him “in Gloverville in the projects.” Toney added that Derrick was mad because Toney asked him to call Ms. Bush. Although Toney claimed that she had mixed up the locations, Ms. Bush could hear someone giving “information” to her. *Tr. 101-05; 117.* This conversation aroused Ms. Bush’s suspicion. *Tr. 115.*

Ms. Bush never saw or spoke to her son again after that day, no friends or family have had contact with him, he had not given her any indication before April 30th that he was going anywhere, and she has never received “any indication in any [form] whatsoever” that he is alive. *Tr. 105-06.*

Cordajiah Council was Derrick’s girlfriend for two years before he was killed.⁴ They shared a cell phone plan. Cordajiah spoke with Derrick at 9:30 am. on April 30th. He did not indicate that he planned to go anywhere when they spoke, they did not have any argument or disagreement, and they had planned to be together later that day. However, she never saw or heard from Derrick again after that call. She later spoke with Ms. Bush and thereafter with the police about the phone plan. *Tr. 160-62.*

Cordajiah helped police access outgoing calls and text messages from Derrick’s phone,

⁴ She explained that he made rap music and went by the nickname “60.” *Tr. 170-71.*

and she thought his last call was “around like 2:30” on the 30th. Based on her conversation with Derrick on the 30th, she did not have any reason to believe that he would not meet up with her that day. Since April 30th, she has not received any indication from any friends or relatives that they had heard from or spoken to Derrick. Further, she knew Jackson and Dixon, and testified that they were not friends with Derrick. *Tr. 163-65.*⁵

Shaniyah Toney was the principal witness against Jackson and Dixon. Toney testified that she had known Derrick “about four or five months.” She had also known Jackson and Dixon for several years. She started hanging out with them when she came home from college in 2018. She likewise knows both Christian Barnwell and Altashaun Bacon. *Tr. 175-77.* Toney went to a movie in Augusta, Georgia with Derrick and another couple on April 29th. While they were at the movie, Dixon texted her to find out when the movie ended because Jackson and Dixon wanted to kill Derrick. Jackson and Dixon were together at the time, but Toney did not see them after the movie. *Tr. 178-82.*

On the morning of April 30th, Toney was awakened by text messages from Jackson asking her to come to his mother’s home. Although she did not know what he wanted, she drove her white Toyota Avalon to the residence. Jackson, Dixon, Barnwell, and a man nicknamed “Tiga” were sitting outside talking when she arrived. Jackson walked over and got into the passenger side of her car. He was armed with a small, black handgun, identified by Toney as State’s Ex. 107, because “[h]e always keeps a gun on him.” Jackson wanted her to pick up Derrick, take him to her house, and “pretend like I want to have sex with him.” Jackson and

⁵ On cross-examination, Jackson elicited that Cordajiah did not know Toney before April 30th. Rather, Cordajiah had looked her up on Facebook and had a conversation with her. Cordajiah told Toney that everyone was looking for Derrick and they were saying that he was last seen driving Toney’s car. Toney never told Cordajiah that he was dead. Rather, she claimed that after she and Derrick had sex, he dropped her off at work. *Tr. 165-67.*

Dixon would then enter the room and beat up Derrick. *Tr. 183-89; 242.*

Jackson briefly exited the car and spoke to Dixon. Both men then got into the car, with Jackson in the passenger seat and Dixon sat in the back seat. Dixon also had a black gun that resembled Jackson's. With Jackson seated next to her, Toney contacted Derrick on Messenger and told him she would loan her car to him if he showed. After dropping off Jackson and Dixon at her house, Toney went to pick up Derrick at a Graniteville McDonald's. Because Derrick was not there when she arrived, she started texting him. He finally arrived about 30 or 40 minutes later. (See State's Ex. 6, McDonald's' surveillance video). By the time he arrived it was close to lunch time and Toney had to be at work, an IHOP, by 2:50 pm, for a 3:00-10:00 pm. shift. *Tr. 189-96; 299.*

Derrick got into the driver's seat. He had his phone and a black book bag with him. A "big and long" gun, which Toney identified as State's Ex. 106, protruded from the bag. He stopped at a gas station and then drove to Toney's house. Derrick had never been to her house. Once they arrived, she led him to her bedroom, and he shut the door.⁶ Neither her mother nor her siblings were home. They began "kissing and touching." When Derrick went to the bathroom to put on a condom, Toney went into her sister's bedroom "to get a pin for [her] hair." Jackson and Dixon were hiding in her sister's closet. Jackson signaled for her to get out, and she returned to her room. *Tr. 196-207; 243.*

She and Derrick "started to get sexual[]" and began undressing. Ultimately, however, she told him that she did not want to have intercourse and she was already late for work. So, while Derrick sat on the bed, she got up, went to her closet, and got her work clothes. Jackson and Dixon, who were both wearing gloves, opened the door and entered the room as she was

⁶ He left his bag, gun, and phone in her car. *Tr. 214.* Toney did not warn him that he was in danger on the way to her house because she was scared. *Tr. 291.*

dressing. Jackson was armed. Dixon had a large pink, plastic “tote” and a black trash bag. Jackson immediately shot Derrick in the eye. A second shot went into the bedroom wall. Derrick “started crying blood and just fell over” dead without uttering a sound. The first shot had caused Derrick’s eyeball to fall on the floor and Dixon laughed about it. *Tr. 208-12.*

As Toney began crying, Jackson and Dixon picked up Derrick’s body and put it the pink tote. Most of Derrick’s body fit in the tote, but his legs hung out of it.⁷ Jackson and Dixon also took the covers and sheets from the bed, as well as Derrick’s clothes and put these items in the trash bag. Dixon kept Derrick’s shoes. They then put the pink tote and the trash bag in the trunk of Toney’s car, which they had moved into the garage. Toney asked why they had killed Derrick, but they just ordered her to get into her car, which she did. *Tr. 212-14; 28-20.*

Jackson drove the car to the home of Barnwell’s mother, while Toney was in the passenger seat and Dixon was in the back seat.⁸ “[T]he ride was quiet.” Jackson had called Barnwell before they left, and Barnwell and Bacon were waiting on them when they arrived. Barnwell and Bacon had come in Bacon’s “silver two door” car. Jackson and Dixon got out of Toney’s car and Jackson told Barnwell “I’ve got something for you.” When he and Dixon opened the trunk of Toney’s car, all four men started laughing. Toney started crying but quickly stopped when Dixon warned her that “you better stop crying before we kill you too.” *Tr. 220-24.*

The men continued laughing about Derrick’s murder, and one man said “he was gonna have fun with [Derrick]. He was gonna use [Derrick’s] body as a target and he was gonna chop [Derrick] up.” Barnwell and Bacon eventually took the pink tote and the garbage bag and put them in the trunk of Bacon’s car. Jackson, Dixon, and Toney then went to the residence of

⁷ Ms. Bush testified Derrick was 5’11” tall and weighed 120 pounds. *Tr. 101, line 23 – 102, line 1.*

⁸ This residence is across the street from Duke’s Bar-B-Que.

Jackson's mother and obtained cleaning supplies.⁹ Barnwell and Bacon had remained behind. *Tr. 224-28.*

Next, the group returned to Toney's house and, with no one else home, they cleaned up the blood in her bedroom as best they could. The bloody rags and other items were tossed into a garbage bag, which was placed in the trunk off Toney's car. The group then went to the residence of Barnwell's mother and obtained a clean shirt for Tony to wear to work because hers had Derrick's blood on it. Jackson and Dixon took her to the IHOP after she had changed into the clean shirt. She was at least two or three hours late getting there and her manager said something to her about it. Toney did not know what happened to the bloody items in the trash bag or what became of Derrick's body. Nor did she know what Jackson and Dixon did with her car after she got to work. *Tr. 228-36; 299-300.*¹⁰

Toney confirmed that she had misled Ms. Bush and Cordajiah about what had truly happened when they contacted her looking for Derrick because she was scared. Although she got off work at 11:00 pm., Jackson and Dixon did not return to the IHOP until around midnight. Jackson was driving and Dixon was now in the passenger seat. They still had Derrick's book bag, and Dixon kept Derrick's gun and his shoes. Toney got into the back seat, and Jackson drove to the house of Barnwell's mother. Barnwell and Bacon were standing outside when they arrived. After Jackson "wiped down" Toney's car, he took the steering wheel cover and the rag used to clean the car and put both items in a fire that was burning. *Tr. 236-43; 259-61; 265; 268;*

⁹ Jackson had telephoned her earlier and asked if she had anything that would clean blood. *Tr. 227.*

¹⁰ Morgan Blacks, the general manager at IHOP, confirmed that Toney arrived two hours late for work and came in at 5:00 pm. Her shift ended at 11:00 pm. Toney never worked another shift after the 30th even though she had been scheduled to do so. *Tr. 314-15.* Ms. Blacks had not noticed anything unusual in Toney's demeanor that night. *Tr. 318.*

285-87.

Jackson was mad at Toney for texting Ms. Bush earlier. So, he directed Toney to contact Ms. Bush again and tell her she had dropped Derrick off on a street with which Toney was unfamiliar. Although Ms. Bush questioned Toney about the street, Toney could not answer with Jackson, Dixon and Barnwell standing around her, and with Jackson telling her what to say. Finally, all three men got into a car belonging to “Turk.” When Toney asked if they knew a road that she could take to Greenwood, they told her a road. As she began driving away, their car followed her. However, they stopped following her after she did not take the road they had suggested.¹¹ She then drove as fast as she could to Greenwood where her child’s father, Elijah Stone, lived. *Tr. 244-48; 255.*

Following her grandmother’s advice, Toney did not return to Aiken until she was represented by counsel. Her attorney, Jerry Screen, Esquire, reached out to law enforcement and Toney cooperated by giving several statements. When she was shown photographic lineups, she identified Jackson (see State’s Ex. 2), Dixon (see State’s Ex. 3), Barnwell (see State’s Ex. 4), and Bacon (see State’s Ex. 5). She also surrendered her car to police for processing, although she had washed it when she was in Greenwood. She likewise positively identified Jackson and Dixon at trial. *Tr. 248-56; 294-95; 309; 428-29.*

Inv. Savanna Williams, of the Aiken County Sheriff’s Office, testified that she was the lead investigator on this case, which was originally classified as a “missing person[] case.” Inv. Williams spoke with Ms. Bush and Cordajiah Council on April 30, 2019. These women provided her with Derrick’s physical description, his phone number, and that he was with Toney. They also told her of Toney’s Facebook page. Inv. Williams soon learned that Toney worked at the

¹¹ She was afraid that they would kill her if she followed the road. She was also afraid to go home for the same reason. *Tr. 247, lines 11-16; 24; 248, lines 19-21.*

IHOP off Whiskey Rd. and, from this information, discovered Toney's home address. *Tr. 421-24.*

Although members of the Sheriff's Office did not locate Toney at her Aiken County home, Mr. Screen contacted the Office on her behalf on May 2 or 3, 2019. He thereafter met with Inv. Williams and told her about "some of the events that may [have] occurred." *Tr. 425-26.* Meanwhile, officers checked area hospitals to no avail. Also, Inv. Williams immediately obtained a search warrant for the service provider for Derrick's cell phone, AT&T. Based on what Ms. Bush had said of Derrick's activities, she also obtained the surveillance video from McDonald's (State's Ex. 6). The video showed Toney's vehicle and Derrick, who was carrying "some type of bag" at approximately 2:25 pm. on April 30th. *Tr. 426-28.*

Inv. Williams interviewed Toney in Mr. Screen's presence on May 10, 2019, and Toney gave a recorded statement without any promises to her. Toney was cooperative and admitted her involvement in the murder. She also told Inv. Williams that the murder occurred in her home, and she implicated Jackson and Dixon. She thereafter identified both men from photographic lineups. She was shown photographic lineups with known associates, other than Barnwell and Bacon, but she did not identify any of those other men. *Tr. 429-34.*

As the investigation progressed, Inv. Williams obtained known blood standards from both of Derrick's parents, a search warrant for Toney's Facebook account, search warrants for Jackson's and Dixon's residences, a search warrant for one of Jackson's two Facebook accounts, and search warrants for Jackson's and Dixon's cell phones. Officers arrested Jackson when they executed the search warrant at his residence. Hidden under the bed in his bedroom, officers found a bag (State's Ex. 67). In the bag, officers found Derrick's short barrel 9 mm. assault rifle (State's Ex. 106), a magazine, and the loaded 9 mm. Glock (State's Ex. 107) that Toney had seen

him with on April 30th. *Tr. 429; 434-48.*

As part of the investigation, Toney gave a second statement and provided more information. That was when she identified Barnwell and Bacon from photographic lineups, (State's Ex. 4 and 5, respectively). Inv. Williams was able to eliminate other individuals as suspects and she confirmed that Jackson and Dixon were not friends with Derrick. In fact, she found evidence of a months-long dispute between Jackson and Curry on their Facebook accounts. *Tr. 448-50; 457-60.* Upon learning of Barnwell's involvement, Inv. Williams obtained consent to search the mobile home and the property where he lived. Officers discovered "a small fire pit" in front of the residence. *Tr. 452-53; 520.*

In the residence, officers found a book bag (State's Ex. 90) containing a work time sheet from Bacon's employer (State's Ex. 91) and Dixon's debit card (State's Ex. 92). *Tr. 454-57.* The Sheriff's Office learned of Bacon's involvement through another witness. Officers obtained a search warrant for Bacon's car, a 1995 Honda Prelude, as well as Dixon's Facebook account. A photograph on his Facebook page, posted on May 2, 2019, and taken on the Barnwell property (State's Ex. 93), depicted Dixon sitting on the trunk of Bacon's car *Tr. 460-62; 469-70.*

Inv. Williams obtained the cell phone records for Derrick (State's Ex. 108), Jackson (State's Ex. 109), Dixon (State's Ex. 110), and Bacon. Unfortunately, these were only call records and did not have any content. Dixon's and Bacon's phone records showed "constant communication" between them. The last call or text from Derrick's phone was "around one or two o'clock" on April 30th. There were plenty of incoming calls and texts. Also, calls after 2:00 pm., which looked like outgoing calls, were actually calls forwarded to voice mail. *Tr. 473-80.*

Among Inv. Williams' various efforts to locate Derrick, she subpoenaed or obtained search warrants various credit bureaus and discovered that he had not used any credit cards or

debit cards since April 30, 2019. *Tr. 470-71.*¹² Further, based on the cell phone records she had obtained, law enforcement searched “Williston Road near SRS1. We also went out to Houston Loop in Jackson as well as certain areas near Savannah River.” The Office even used cadaver dogs to try and locate Derrick’s body and another agency searched a nearby pond. However, all of these efforts were unsuccessful. *Tr. 483-85.*

Additionally, members of the Aiken County Sheriff’s Office processed Toney’s bedroom (the crime scene), as well as Toney’s and Bacon’s automobiles. Inv. Chris Johnson, Inv. Williams, and Lt. Bill Flurry processed Toney’s residence. *Tr. 331-32.* They were looking for blood stains, shell casings, projectiles, and any evidence indicating that a shooting had occurred there. *Tr. 336.*

In Toney’s bedroom, officers noticed a hole in the wall behind the bed that had toilet paper stuffed in it. Once the tissue was removed, “you could see you could see that it was like a bullet tumbling as it's traveling and made a hole in the wall.” Inv. Johnson retrieved a projectile (State’s Ex. 22) with drywall debris on it from this hole. *Tr. 336-38; 360-62.* Using a trajectory rod,¹³ he was able to determine that “a bullet traveled in the direction that the rod is pointing, so on the doorway side of the bed, and traveled across the bed to the wall.” *Tr. 357.*

Also, there was a visible stain or discoloration of an area of carpet on the side of the bed away from the wall. The carpet texture in this area was likewise different. Inv. Johnson tested with “Bluestar,” which presumptively tests for the presence of blood. Because the carpet tested positive, Inv. Johnson removed this area of the carpet (State’s Ex. 23), and officers saw a visible stain that reacted positively to a phenolphthalein test. The stain was visible on the underside of

¹² He did not have a bank account before the murder. *Tr. 510.*

¹³ See photographs introduced as State’s Exs. 40-41.

the carpet, as well as on the padding. The concrete under the padding was also stained. Inv. Johnson took cuttings from the carpet and padding, as well as swabs from the concrete for subsequent testing. Officers observed a similar area of discoloration on the mattress that also reacted positively when tested with Bluestar. According to Inv. Johnson, it took “a good bit of blood to soak through the carpet[,] ... down to the padding and then down to the concrete.” *Tr. 337; 339-41; 346-57; 416.*

Inv. Johnson thereafter assisted in the searches of Toney’s white Toyota Avalon (by consent) and Bacon’s Honda Prelude (pursuant to a search warrant). Officers found and swabbed suspected blood stains on the plastic molding around the driver’s side taillight of Toney’s car. They also took two swabs of a stain on “the trunk weather stripping that the trunk lid touches” and a swab from “inside the trunk near the driver's side brake lights.” *Tr. 364-74; 461.*

Officers processed Bacon’s gray Honda Prelude on August 9, 2019. On the front floorboard, officers found a receipt for the purchase of Lysol. Officers were told that Derrick had been transported in the vehicle’s trunk. Although there were no visible stains, they did find a “Clorox wipe container” in the trunk. Also, they swabbed several areas that had reacted positively for the presence of blood when tested with Bluestar: a piece of carpet from the passenger side rear trunk wall, an area of plastic molding in the trunk, the passenger side trunk weather strip, and two swabs from the ledge of the trunk’s bumper slightly to the right of the trunk latch. *Tr. 377-87.*

Agent Adrienne Hefney is a forensic DNA analyst at SLED. Agent Hefney was provided buccal swabs from Jackson, Dixon, Bacon, and Barnwell. She was also able to develop an alternate known DNA profile for Derrick Curry based on the DNA of his parents. She was able to develop a DNA profile suitable for testing from the cuttings from the carpet and padding in

Toney's bedroom, and "[l]ikelihood ratios" were calculated for this profile using STRmix.¹⁴ The DNA profile developed was a mixture of two individuals. "If the DNA profile developed ... is from Derrick Curry, then the DNA profile is approximately 14-octillion times more likely if Derrick Curry and an unidentified, unrelated individual contributed to the mixture than if two unidentified unrelated individuals contributed to the mixture."¹⁵ She further opined that Jackson, Dixon, Bacon, and Barnwell were excluded as contributors to this mixture. *Tr. 575; 578; 581-92.*

Agent Hefney further testified that although the swabs from the concrete floor in Toney's bedroom tested positive on the presumptive test for the presence of blood and a partial DNA profile was developed, it was insufficient to make a comparison. She further opined that a swab (State's Ex. 18) from State's Ex. 107, the weapon found under Jackson's bed, was "a mixture

¹⁴ She explained that:

STRmix is [a] program ... that helps us ... to interpret mixtures that were before unable to interpret because of whether they're low level or certain characteristics they have or criteria they had to meet before. And if it didn't meet all [those] criteria, we would not be able to give it a statistical weight and, in turn, we would be throwing out valuable information.

The advancements in DNA brought this program online and now we ... [can] enter mixture profiles or single source profiles into this program and develop what we call a likelihood ratio, and I'm also gonna explain each likelihood ratio compares two things.

One is known as HP. HP stands for prosecutor's hypothesis and it compares it against HD, which stands for defense hypothesis. This, by any means, doesn't mean this is this prosecutor's hypothesis or this defense team hypothesis. It's just in general that in any Court television shows you'll see whoever on trial, the prosecutor will say this person is the one who committed the crime whereas the defense will say anyone other than this person is the one who committed the crime.

Tr. 586-87.

¹⁵ "Anything over a million likelihood ratio is ... considered very strong support." An octillion is "one followed by 27 zeros." *Tr. 590, lines 9-14.* There are roughly 7.8 billion people on Earth. *Tr. 598, lines 5-7.*

originating from three individuals.” Derrick, Dixon and Bacon were excluded as contributing to this mixture. *Tr. 592-96.*

On the other hand, Jackson was a contributor:

Proposition Set 1, ... the prosecutor's hypothesis [is] that Denzell Jackson and two unidentified, unrelated individuals contributed to the mixture, and the defense hypothesis would be three unidentified, unrelated individuals contributed to the mixture. The DNA profile is approximately 5-quadrillion times more likely if Denzell Jackson and two unidentified, unrelated individuals contributed to the mixture than if three unidentified, unrelated individuals contributed to the mixture.

Tr. 594, line 22 – 595, line 7. Also, there was only “moderate support” for including Barnwell as a contributor to the mixture. *Tr. 595-96.*

Additionally, Agent Hefney tested the “swab from the top trunk weather seal to the right of the third brake light of Toney’s vehicle (State’s Ex. 65). This swab presumptively tested positive for blood, and she thereafter developed a “single source [DNA] profile” from it. She opined that “[i]f the DNA profile developed from ... [the swab] is from Derrick Curry, then the DNA profile is approximately 28-octillion times more likely if Derrick Curry contributed the profile than any identified, unrelated individual.” *Tr. 604-05.*

Similarly, Agent Hefney testified that “swabs from the inside trunk near the driver's side brake light” of Toney’s vehicle (State’s Ex. 66) presumptively tested positive for blood, and that she developed a DNA profile from it. She opined that “[i]f the DNA profile developed from the alternate known standard is from Derrick Curry, then the DNA profile’s approximately 28-octillion times more likely if Derrick Curry contributed the profile than if an unidentified, unrelated individual contributed the profile.” *Tr. 606-07.*

A DNA profile of a mixture of two individuals was developed from the swabs of the trunk bumper of Bacon’s Honda (State’s Ex. 86). The hypotheses were “Derrick Curry and an

unidentified, unrelated individual contributed to the mixture versus ... two unidentified, unrelated individuals contributed to the mixture.” Agent Hefney opined that “[i]f the DNA profile developed from the alternate known standard is from Derrick Curry, then the DNA profile is almost 3.4-sextillion [3,400,000,000,000,000,000] times more likely if Derrick Curry and an unidentified, unrelated individual contributed to the mixture than if two unidentified, unrelated individuals contributed to the mixture.” *Tr. 608-09.*

Finally, Agent Hefney was able to develop a DNA profile from “the trunk passenger side weatherstrip” (State’s Ex. 84) of Bacon’s Honda. This profile was “a mixture originating from three individuals.” The two hypotheses were “Derrick Curry and two unidentified, unrelated individuals versus three unidentified, unrelated individuals. Agent Hefney opined that “[i]f the DNA profile developed from the alternate known standard is from Derrick Curry, then the DNA’s profile [is] approximately 8.7-octillion times more likely if Derrick Curry and two unidentified, unrelated individuals contributed to the mixture than if three unidentified unrelated individuals contributed to the mixture.” *Tr. 609-10.*

Thus, the DNA developed in this case circumstantially corroborated Toney’s testimony. Cell phone records from Derrick Curry, Jackson, and Dixon likewise tended to corroborate her testimony.

Regina Sailer is “an intelligence research specialist” employed by the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). She has worked for ATF for over seventeen years. Agent Sailer “utilize[s] law enforcement and open source databases and [she] research[es] targets of criminal investigations.” Her duties also include conducting “phone analysis.”¹⁶ Inv. Williams asked for assistance in this case. Agent Sailer tried to locate any

¹⁶ Specifically, she utilizes call detail records of cell phones, which she obtains from the carrier

records for Derrick by running his identifying information through several databases. However, she did not find any activity for him after April 30th. *Tr. 627-30.*

Agent Sailer also received cell phone records for Derrick (State's Ex. 108) from AT&T. She took these records and used a software program entitled Pen-Link, or PLX, to make the records easier to follow. Derrick's AT&T records contained both records showing when a phone connects with a cell phone tower to make or receive calls or text messages, and "NELOS records." These are "location records of the phone that aren't related to any given phone call, text, or data. They're just random times when AT&T ... pings the phone and tell us a latitude and longitude in a meter radius of where that phone is at that given time." Agent Sailer then used a PowerPoint presentation (State's Ex. 112) to present this information to the jury. *Tr. 630-31.*

The records reflect that Derrick's last out-going call was made at 1:01 pm. on April 30th. The NELOS records reflect that at 1:51 pm., his phone was in the vicinity of McDonalds, and by 3:07 pm. he is in the vicinity of Toney's home, the crime scene. At 4:09 pm., his phone is the vicinity of Jackson's residence. By 5:04 pm., his phone is in the vicinity of Blackwell's home, and it is in the vicinity of the crime scene five minutes later. *Tr. 635-40.* By 5:14 pm., his phone is in the "Aiken Mall area, which is near the IHOP where Toney worked, and it was back in the vicinity of the crime scene by 5:17 pm. *Tr. 639-40. See also Tr. 424.*

At 6:51 pm., Derrick's phone is in the area of Jackson's residence. The last NELOS ping was at 9:03 pm. on April 30th. At that time, the phone was in the area of Jackson's residence, as well as "the tip of Savannah River site." If the phone company unsuccessfully attempted to ping his phone after that time, this means that "the phone has been turned off, the phone has been destroyed, [or] the phone is no longer functioning." *Tr. 641-42.*

for the phone(s). She then puts them on a map to make it "easier to understand and illustrate where a particular phone is at a given time." *Tr. 628.*

Further, Agent Sailer received cell phone records for both Jackson (State's Ex 109, from Verizon) and Dixon (State's Ex 110, from AT&T). (However, she did not receive NELOS records for Jackson's phone because Verizon does not generate these records). Using these records and the records for Derrick's phone, she created a PowerPoint presentation (State's Ex. 133) that further tended to prove both defendants guilty of Derrick's murder. A NELOS ping revealed that Derrick's phone was in the area of McDonald's at 1:51 pm. At 1:57 pm., Dixon is either making or receiving a call in the area of Toney's residence. At 2:23 pm., Dixon's phone was still in the vicinity of her residence, while Derrick's phone was in the area of McDonald's. *Tr. 644-51.*

By 2:44 pm., however, Derrick's phone was being used in the area of Toney's residence. Two minutes later, both his phone and Dixon's phone are in the vicinity of her residence, and both phones were in this area at 3:50 through 3:56 pm. Both phones are thereafter in the vicinity of Barnwell's residence: Derrick's at 4:03 pm. and Dixon's at 4:04 pm. Nine minutes later (at 4:12 and 4:13 pm., respectively), both phones are overlapping in between Barnwell's residence and Jackson's residence. Jackson's phone is being used at 4:39 pm. in the area of Toney's residence. Dixon's phone is in the same area at 4:39 pm., and there is a NELOS ping on Derrick's phone at 4:41 pm. Derrick's phone is still there at 5:17 pm., and Dixon's phone is there at 5:20 pm. *Tr. 651-59.*

Dixon's and Jackson's phones are then in the area of Jackson's residence at 5:31 and 5:34 pm., respectively. Their phones are thereafter "west of the Savannah River site and [Jackson's residence]" at 6:24 and 6:25 pm., respectively. They are each in this same area five minutes later. By 6:38 pm., however, Dixon's phone is in the vicinity of Jackson's residence, and Jackson's phone is in the same area at 6:42 pm. All three phones are in the same area several minutes later.

Both Dixon's and Derrick's phones are between the Jackson and Barnwell residences at 7:30 pm. *Tr. 659-62.*

At 8:44 pm., Jackson's and Dixon's phones are west of Jackson's residence and "just north of the Savannah River site." At 8:57 pm., Dixon's phone is "[j]ust north of the Savannah River site and west of [Jackson's residence]." Derrick's phone is in the same area at 9:02 pm. By 11:33 pm., Dixon's phone is in the vicinity of Tony's residence. However, his phone is in the area covering Barnwell's residence at 11:34 pm., and Jackson's phone is in this area one minute later. *Tr. 662-63.*

Agent Chad Smith is a firearms and tool mark examiner in the firearms department of SLED's forensic services laboratory. In connection with this case, he received the fired bullet recovered from Toney's bedroom (State's Ex. 22) and the "Generation 5 Model 19" Glock 9 mm. Luger pistol and magazine (State's Ex. 107) found under Jackson's bed. The fired bullet "was dented and kind of misshapen but it was mostly [intact]," and based on its weight, the diameter at its base and other characteristics, Agent Smith opined that was "most consistent with being loaded into ... a 9-millimeter Luger cartridge." Based on its lands and grooves, Agent Smith further opined that it was consistent with having been fired by a newer model Glock, such as State's Ex. 107, or a similar newer model Glock. *Tr. 556; 558-60; 565-70.*

Special Agent Alexandra Schelble is the "missing persons coordinator and the statewide alerts coordinator" at SLED. She "assist[s] local, federal, and state law enforcement with missing person investigations." Her job allows her to access information from all 46 counties in South Carolina, information from other states, and information from the federal government. She assisted Aiken County in attempting to locate Derrick Curry, by looking for records reflecting activity beginning on April 30, 2019. In searching for Derrick, she accessed utility, licensing,

credit, DMV, insurance claims, and NCIC databases, as well as police reports, border patrol, and flight records. However, she did not find any activity suggesting that he was still alive. *Tr. 532-40.*

Agent Schelble also conducted an “offline query” from the FBI, which reflected that the only American law enforcement agencies that had run Derrick’s name and other identifying information were doing so for investigative purposes and not for any other reason. A check of the NCIC database, which includes a link to an individual’s fingerprints and aliases, did not reflect any activity relating to him. The same was true of her offline query of the database. So, she was unable to locate any trace of Derrick. *Tr. 540-44.*

STANDARD OF REVIEW

Ordinarily, the conduct of a trial, including the admission of proffered evidence, is largely within the sound discretion of the trial judge. His exercise of discretion will not be disturbed on appeal unless it can be shown he committed legal error in the exercise of discretion and the rights of the appellant were thereby prejudiced. *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941).

State v. Nathari, 303 S.C. 188, 193, 399 S.E.2d 597, 601 (Ct. App. 1990) (1996).

ARGUMENT

The trial judge properly excluded testimony from the victim’s mother, Kenya Bush, that his father “was not worried about” the victim’s disappearance because this testimony was irrelevant to any issue in the case, Ms. Bush lacked personal knowledge of how his father felt about his disappearance, and any information she had about how the father felt was hearsay. Further, many of Jackson’s arguments raised on appeal are procedurally defaulted because they were not presented to the trial judge.

Notwithstanding Jackson’s attacks upon the trial judge’s ruling, Respondent submits that the trial judge properly excluded testimony from the victim’s mother, Kenya Bush, that his father “was not worried about” the victim’s disappearance because this testimony was irrelevant to any issue in the case, Ms. Bush lacked personal knowledge of how his father felt about his disappearance, and any information she had about how the father felt was hearsay. Further, many

of his arguments raised on appeal are procedurally defaulted because they were not presented to the trial judge.

A. How the issue arose, and the trial judge's ruling.

On Jackson's cross-examination of Ms. Bush, he asked if she had mentioned Derrick's father when she spoke to police. She replied that she did not think so. Jackson then established that Derrick's father had asked her if she had insurance when she was filing a missing person report. She replied, "I told him yes and he said ... could he get insurance and I told him no." She did not find this conversation odd because they "already knew he was deceased" when she went to the police, and Derrick's father simply "wanted to make sure we had insurance to bury him." *Tr. 117, line 22 – 118, line 16.*

The State objected when Jackson asked, "Didn't you tell police that [Derrick's father] wasn't worried?" Outside of the jury's presence, Jackson argued that "this is a statement that she perceived based on her own senses and her own observations and that she actually stated during her interview with the police. And so it's a fact of their investigation that was supplied to defense counsel. In contrast, the State maintained that the question was "irrelevant," outside of the witness' "personal knowledge," and "hearsay." After Jackson restated the question, the trial judge sustained the objection. *Tr. 118, line 17 – 119, line 18.*

B. Discussion.

"As a threshold matter, the trial judge must initially determine whether the proffered evidence is relevant as required under Rule 401 of the South Carolina Rules of Evidence." *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009) This determination is "within the trial judge's discretion." *State v. Gillian*, 373 S.C. 601, 612, 646 S.E.2d 872, 878 (2007). Evidence is only "relevant" if it has a "tendency to make the existence of any fact that is of consequence to

the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. Stated differently, evidence “is relevant” if it “assists the jury in arriving at the truth.” *State v. Sweat*, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct.App. 2004). “Evidence which is not relevant is not admissible.” Rule 402, SCRE. Also, lay witnesses generally may not testify about things outside their personal knowledge. See Rule 602, SCRE (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter”).

Respondent submits that the posited question was irrelevant and called for hearsay because Ms. Bush obviously lacked personal knowledge of whether the victim’s father was not worried about Derrick’s disappearance. See Rule 602, SCRE. Also, the father did not testify at trial, and the record is devoid of any evidence, whatsoever, that he interacted with Derrick on the days leading up to the murder or on April 30, 2019. Similarly, there is no evidence the father was involved in his “disappearance,” directly or indirectly participated in any effort to locate Derrick on April 30-May 1, had any knowledge he was allegedly alive, or even suggested that he was allegedly alive. Rather, the trial transcript reflects that the father’s only involvement was providing a sample of his DNA to law enforcement, so that DNA testing could be performed on evidence collected. *See Tr. 437-38; 581-82; State’s Ex. 89. See also* “Statement of Facts,” *supra*.

Jackson asserts that the proffered question was relevant because law enforcement has not found the victim’s body and the excluded “evidence had a tendency to make it less probable that Derrick was dead.” Yet, his argument in this regard is not properly before the Court on appeal because it was not presented to the trial judge. As discussed, he argued at trial that: Ms. Bush’s statement was based on “her own senses and her own observations,” she had given the statement when interviewed by police, and it was part of law enforcement’s “investigation that was

supplied to defense counsel.”

It is well settled that an argument or objection is not preserved for appellate review unless it is first presented to the trial judge. See, e.g., *State v. Dial*, 429 S.C. 128, 132, 838 S.E.2d 501, 503 (2020); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 72 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (“There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity”) (internal quotation marks omitted); *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal”); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (“In order to preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge”); *State v. Torrence*, 305 S.C. 45, 60-71, 406 S.E.2d 315, 324-29 (1991) (Toal, J., concurring in result) (abolishing the doctrine of *in favorem vitae* review in capital cases and requiring contemporaneous objection or motion to preserve issue for appellate review); *State v. Vanderbilt*, 287 S.C. 597, 598, 340 S.E.2d 543, 544 (1986) (“Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled”).

The rationale behind the requirement of a contemporaneous objection is to “enable[] trial judges to make reasoned decisions by appropriately developing issues by way of argument, both

for or against any particular legal proposition.” *Torrence*, 305 S.C. at 66, 406 S.E.2d at 327 (Toal, J., concurring in result). Thus, his argument in this regard is not properly before the Court on appeal.

Further, none of the reasons proffered at trial for admitting this evidence provide a basis for admitting it. His assertion that this evidence was relevant also ignores that he would be asking jurors to infer - without a scintilla of proof and contrary to eyewitness testimony that was thoroughly corroborated by circumstantial evidence – that the reason his father was not worried was because the victim was alive. However, there are many reasons why his father may have not been worried: he may have had a falling out with the victim, he may have been ashamed that the victim had a pending armed robbery charge, he may not have appreciated the gravity of the victim’s disappearance, he might not be on good terms with Ms. Bush, or he may have simply wanted to irritate Ms. Bush. The jury would thus be called upon to speculate that the reason suggested by Jackson was correct. Likewise, her statement that he appeared uninterested may have been motivated by her displeasure with the father for not doing everything that she felt he should have done, or some previous falling out between the two of them. Thus, the posited question was irrelevant to any issue properly before the jury.¹⁷

Jackson’s claims the evidence was not hearsay or, alternatively, that it was admissible

¹⁷ These same reasons support the conclusion that the proffered evidence cannot survive a Rule 403, SCRE, analysis because even if there was some *de minimis* relevancy, the danger of unfair prejudice substantially outweighed that relevance. Indeed, admitting this evidence would do nothing more than needlessly inject confusion and send the jury down a rabbit hole of whether and why the victim’s father was, or potentially appeared, indifferent to his son’s disappearance, even though the father did not have any involvement or knowledge of the disappearance until after April 30th, and he had an extremely limited role in the case. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” *Id. See also State v. Collins*, 409 S.C. 524, 536, 763 S.E.2d 22, 28 (2014). Of course, this Court “may affirm any ruling, order, decision[,] or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR. So, it may affirm on this basis if it desires to do so.

under an exception to the rule barring hearsay are likewise not properly before the Court because he did not raise these arguments at trial. See *Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584 (a party cannot argue one theory at trial and a different theory on appeal). The same is true of his suggestion that the testimony was admissible as the opinion of a lay witness under Rule 701, SCRE. Moreover, it is impossible to glean from this record whether her statement to police was based on her observations of the victim's father, or something he said to her: *i.e.*, hearsay that is inadmissible under Rule 802, SCRE. See *TNS Mills, Inc. v. S.C. Dep't of Rev.*, 331 S.C. 611, 628, 503 S.E.2d 471, 480 (1998) (a failure to make a proffer of what an excluded witness' testimony would have been precludes appellate review). His suggestion that the testimony was admissible under the state of mind exception in Rule 803(3), SCRE, and *State v. Weston*, 367 S.C. 279, 625 S.E.2d 641 (2006), ignores that the father's state of mind was irrelevant for the previously stated reasons.

Similarly, his argument that the testimony was admissible as the opinion of a lay witness under Rule 701, SCRE, fails. Indeed, he acknowledges on p. 12 of his brief that this Court has held that “[m]ost witnesses may not testify about things outside their first-hand knowledge.” *State v. Gibbs*, 431 S.C. 313, 320, 847 S.E.2d 495, 499 (Ct. App. 2020). And, again, Ms. Bush did not have and could not have personal knowledge of whether the victim's father was not worried about Derrick's disappearance. Also, any opinion she may have was irrelevant to any issue properly before the jury.

Finally, Respondent submits that any error in excluding the proffered testimony was harmless beyond a reasonable doubt. “Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result.” *State Pagan*, 369 S.C. 201, 212, 631 S.E.2d 266, 267 (2006). Here, there was an eyewitness to the murder, whose account was

circumstantially corroborated by telephone records and, more importantly, by the presence of the victim's blood (shown by DNA testing) in her bedroom and on or inside of the two vehicles the eyewitness claimed had been used to transport the victim's body. Therefore, any error is harmless, since it could not have affected the result of the trial. *Id. See also State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011) (“Where ‘guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,’ an insubstantial error that does not affect the result of the trial is considered harmless”) (quoting *Pagan*, 369 S.C. at 212, 631 S.E.2d at 267); *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018) (stating evidence of a defendant's guilt is “overwhelming” when it includes “something conclusive, such as ... DNA evidence demonstrating guilt”); *Hutto v. State*, 387 S.C. 244, 247, 249, 692 S.E.2d 196, 197-98 (2010) (finding the victim's identification of the defendant and evidence of the defendant's DNA at the crime scene constituted overwhelming evidence the defendant was guilty of first-degree criminal sexual conduct, first-degree burglary, and armed robbery).

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,


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Columbia, South Carolina
November 4, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2021-000942

THE STATE,RESPONDENT

v.

DENZELL DESHAWN JACKSON,.....APPELLANT.

PROOF OF SERVICE

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent, Designation of Matter, and Certificate of Service has been forwarded to Appellant's counsel, Susan B. Hackett, Esquire, via email today, November 4, 2022 to shackett@sccid.sc.gov and to her assistant Chris Stock at Cstock@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 4th day of November, 2022.

s/ Donna D'Alessio

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Donna D'Alessio

From: Donna D'Alessio
Sent: Friday, November 4, 2022 11:55 AM
To: 'shackett@sccid.sc.gov'
Cc: Stock, Chris (cstock@sccid.sc.gov)
Subject: Jackson, Denzell D. - Appellate Case No. 2021-000942 - Initial Brief of Respondent and Designation of Matter
Attachments: Jackson, Denzell D. - Appellate Case No. 2021-000942 - Initial Brief of Respondent and DOM 11-4-22 (03146869xD2C78).pdf

Dear Ms. Hackett:

Attached is a scanned copy of the Respondent's Initial Brief and Designation of Matter regarding the above matter. The Initial Brief of Respondent, Designation of Matter and Proof of Service are being submitted to the South Carolina Court of Appeals through e-filing, along with a copy of this email.

Hope you are well and thank you.

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