

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari - PCR - Common Pleas - Other
APPEAL FROM HORRY COUNTY
Common Pleas Court
Honorable H. Steven DeBerry, IV

S.C. SUPREME COURT

Appellate Case No. 2023-000747
Trial Court Case No. 2020-CP-26-4711

Marquis McDonald , Petitioner,

v.

The State of South Carolina , Respondent.

APPENDIX
VOLUME II

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JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 he said cool. He said come to Coastal, meet me at my
2 old spot. I said, okay. I got there. Him and Black
3 got out, came to my car, Tuesday. Black got in the
4 front and Ant got in the back. Me and Ant was
5 laughing, we was joking around talking about how he
6 sucked in football.

7 And I put the weed -- I put the weed on the scale.
8 We started talking about the weed. I looked at Black
9 and he pull out a black gun. I grabbed it. We were
10 struggling. Then Ant grabbed the gun. We trying to
11 take it from him and it went off. But Ant wasn't shot
12 then because I seen him with full power trying to get
13 it after the first gunshot. I dropped my hand off the
14 gun, I got out and was about to run.

15 But I seen Ant trying to get the gun. He told me,
16 help, help me. So I turned back and got into the car
17 and punch Black in the face. He fell out the car, and
18 Ant was already out the car. I put it in reverse and
19 mashed the gas. I heard another gunshot and I was
20 pulling off. I drove to Highway 90, set in the car and
21 cry.

22 Then I went to Doug house, picked -- parked it in
23 the front yard. Then I walk or went to my
24 grandmother's house. I seen one of my homeboys, he
25 pick me up. He took me to my grandmother's house.

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1 Dinner was there. He took me riding, be he said, you
2 look stressed out. And I went by Dollar Tree because I
3 realized I lost my phone. I got another one. He took
4 me to TT house. She thought I was with a girl and was
5 fussing me out, so I left Ant and go to Lynette's -- I
6 believe -- house, stayed there. Then I went to Lane's
7 house and stayed there.

8 The next day I called my uncle. He say people
9 looking for me, and I was on the news. And I told him
10 what happened. He said, go tell them. But I was
11 scared, but I came in any way to free my friend.

12 Q Free his friend?

13 A Free his friend.

14 Q Okay. In the defendant's statement, he says he
15 arrives at Coastal Carolina University, and Black and
16 Anthony got into his car?

17 A Yes, sir.

18 Q Who, if anyone, did he indicate other than those
19 two were in his vehicle?

20 A No one else.

21 Q From reading his statement and talking with him,
22 what was your understanding with regard to the
23 positioning of the defendant's car in that parking lot?

24 A He had drove head in to the space where the front
25 of his car was tracing the tree line, so to speak.

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1 Q Okay. Any reason for that?

2 A Because he said it backed out.

3 Q Backed out and mashed the gas?

4 A Yes, sir.

5 Q And the Defendant, what did he say with regard to
6 where he had been over the previous three days after
7 the shooting?

8 A He said he went by a friend's house, Roland
9 Crooms. He said he went there on the night of the
10 26th, and he stayed about 30 minutes, and then he left.

11 Q Okay. And what does he say -- now, y'all had this
12 case since the 26th. The Defendant in his statement
13 says Ant, Anthony is his best friend; correct?

14 A Yes, sir.

15 Q How many calls did you have from the Defendant
16 about the murder of his best friend?

17 A We received none.

18 Q What if anything did the Defendant say about how
19 Anthony exited that Acura?

20 A Well, he didn't say how he got out of the car. He
21 just said that after punching Black, Ant was already
22 out of the car by that time.

23 Q And the Acura, did he ever identify whose Acura it
24 was?

25 A He said it was his Uncle Doug's car.

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 Q His Uncle Doug's car.

2 A Um-hum.

3 Q Is that when y'all took that Acura into custody at
4 Doug's house?

5 A Yes, sir.

6 Q What if anything did he say about where Anthony's
7 cell phone was?

8 A He didn't say.

9 Q How about the gun that was used?

10 A He didn't say.

11 MR. McCOLLUM: Your Honor?

12 THE COURT: Yes.

13 MR. McCOLLUM: I object to the things that he
14 didn't say.

15 THE COURT: Overruled. Thank you.

16 MR. McCOLLUM: All right.

17 Q Do you recall anything he said with regard to the
18 murder that's not written down in his statement?

19 A Well, he told us that he had stopped by the
20 Sunhouse on his way to Coastal.

21 Q Okay. And we'll come back to the Sunhouse. Did
22 the Defendant ever mention anything about his own cell
23 phone?

24 A Only that he lost his phone.

25 Q So he said he lost his phone. Did he say he made

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 any -- what if anything did he say about his efforts to
2 get another phone?

3 A He went by the Dollar Tree and he purchased
4 another phone.

5 Q Okay. So after the murder he's lost his phone.
6 Then he just goes to Dollar Tree to get another one?

7 A Yes, sir.

8 Q Now, during the course of the reenactment, you
9 said that you put everybody's fears at rest, this gun
10 simulator, orange piece of rubber gun?

11 A It was a rubber gun, yes, sir.

12 Q I mean, it's shaped like one?

13 A Shaped like one.

14 Q It was you and the Defendant and Lieutenant
15 Bethea?

16 A Yes, sir.

17 Q Okay. And when he reenacted and showed where
18 everybody's hands were, what if anything did you say to
19 him?

20 A If I recall correct, I probably asked him how in
21 the world could the gun go off when both -- all three
22 of y'all had your hands on it and the slide couldn't go
23 back. But he said it did.

24 Q It's just how he responded, it did?

25 A Yes, sir.

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 Q Now, allow me to show you State's-34 and 35. Do
2 you recognize these items?

3 A Yes, sir, I do.

4 Q And what do you recognize 34 and 35 to be?

5 A 34 is supposed to be the inside of the car, and
6 their seated position inside of that car.

7 Q And --

8 A And it shows that Marquis McDonald is on the front
9 driver's seat, Black is in the front passenger seat and
10 Marquis -- I'm sorry, Anthony Liddell is in the back
11 passenger seat.

12 Q That's on 34?

13 A On 34.

14 Q Okay. And who drew that?

15 A This is a drawing that I did under Anthony's --
16 I'm sorry, under Marquis' direction.

17 Q So he's telling you what to draw, and you draw it?

18 A Yes, sir.

19 Q And you haven't worked for evidence, you don't do
20 crime scene sketches?

21 A That's correct.

22 Q Okay. Let's see it. On 34, these half circles
23 that you have on, what do those depict?

24 A They represent, I believe, the door.

25 Q And if I'm reading this correctly -- I'm sorry,

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 this sketch you did, you presented it to him?

2 A Yes, sir. He signed it, yeah, indicating --

3 Q I think I published it before I entered it.

4 MR. RICHARDSON: Your Honor, at this time the
5 State would seek to introduce State's-34 into evidence.

6 THE COURT: Objection?

7 MR. McCOLLUM: May I see it again.

8 THE COURT: Sure.

9 MR. McCOLLUM: No objection.

10 THE COURT: Without objection, State's-34 is
11 admitted.

12 (WHEREUPON, State's Exhibit No. 34 was admitted in
13 evidence.)

14 Q Whose signature appears at the --

15 MR. RICHARDSON: And permission to publish, of
16 course, Your Honor.

17 THE COURT: Yes.

18 THE WITNESS: Marquis McDonald, and it's dated
19 3/1/13.

20 Q Okay. And by his signature, what's he -- what was
21 your understanding as to what this was saying?

22 A That this was correct, what I have here.

23 Q Now, once again, what are these half circles?

24 A Those are the doors.

25 Q And you have a couple arrows on there with bullet

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1 holes; what's that about?

2 A He was saying that this is where bullet holes that
3 were made after the gun was fired.

4 Q Okay. He's indicating there are two bullet holes?

5 A That's what he indicated, yes, sir.

6 Q What he told y'all originally there was one shot
7 in the car?

8 A That's what he said, one shot was fired.

9 Q Okay. And the next diagram, 35.

10 A 35 is the same as that, only that he showed the
11 doors open and where they were after they got out of
12 the car. It has Black to the right side of the car on
13 the ground. Marquis is out on the left side, the side
14 of -- driver's side door, and Anthony is on the left
15 side, back rear passenger door.

16 Q Okay. So he's saying that afterwards Anthony is
17 getting out of the back passenger side?

18 A Yes, sir.

19 Q And is there a signature on there?

20 A Yes, sir. Marquis McDonald.

21 Q And this is -- you drew it and he signed off?

22 A Yes, sir, dated 3/1/13 at 6:25 p.m.

23 MR. RICHARDSON: The State would seek to introduce
24 No. 35 in.

25 THE COURT: Objection?

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 MR. McCOLLUM: No objection.

2 THE COURT: Without objection, State's-35 is
3 admitted.

4 (WHEREUPON, State's Exhibit No. 35 was admitted in
5 evidence.).

6 MR. RICHARDSON: Your Honor, these are a little
7 smaller, so I just seek to publish them to the jury.

8 THE COURT: Very well.

9 Q Now, the Defendant says Black?

10 A Yes, sir.

11 Q He ever give you another name for Black?

12 A No, sir, he didn't.

13 Q So he didn't identify him?

14 A No, sir.

15 Q What if anything did he tell you about his
16 familiarity with Black?

17 A He said he didn't know him. He didn't know Black.

18 Q He said he did not know him. But he knew him as
19 Black?

20 A Yes, sir. The only thing he knew him as Black.

21 Q Now, the Defendant's given you an explanation at
22 this point as to what happened?

23 A Yes, sir.

24 Q And he's told you he was the hero here. What did
25 you do after he gave a statement?

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 A After he gave us the statement, he insisted that
2 he do a composite of the person that he identified as
3 Black. So we had an artist come down from Columbia and
4 did that composite for him.

5 Q Okay. That took some time?

6 A It did, because he had to come from Columbia, I
7 believe.

8 Q And the actual interview with the Defendant, how
9 long did that take?

10 A Probably not more than an hour, an hour and a
11 half.

12 Q Hour, hour and a half?

13 A Yes, sir, I believe.

14 Q And while you were waiting on the sketch artist to
15 come down, what if anything were y'all doing with the
16 Defendant?

17 A He was in the conference room, setting in the
18 conference room.

19 Q Was he handcuffed at this point?

20 A No, sir.

21 Q Okay. After he got done with the sketch artist,
22 what happened to him?

23 A Then we served him with the arrest warrant, and he
24 was transported to J. Reuben Long Detention Center.

25 Q Okay. So he's told you that he's innocent, but

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1 you still served an arrest warrant on him?

2 A Yes, sir.

3 Q Now, the clothing that he had on that day when you
4 were talking to him was taken from him at J. Reuben
5 Long, what if anything did he say about his clothing?

6 A He told us that he had on the same clothing the
7 day of the incident, he said he didn't wash, he didn't
8 change clothes. Actually said he didn't eat anything
9 as well.

10 Q Okay. So he said he was upset during this whole
11 time?

12 A Yes, sir.

13 Q Now, he told you about the Sunhouse. Did you stop
14 your investigation at that point?

15 A No, sir, we did not.

16 Q Why not?

17 A Well, we still -- he told us about the Sunhouse,
18 he stopped there. So we wanted to see for ourselves
19 whether or not that was true, so we called the
20 Sunhouse. And I went by the Sunhouse, and I talked
21 with the owner and asked him did he have any videos
22 surveillance of that store. And he said he did. So I
23 asked, could I see the video for my particular time
24 period.

25 We went into the back of the store, and there he

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1 produced the video camera that feeds from the videos.
2 And we started looking at the videos from the time
3 period that I requested. And while we were doing that,
4 it showed Marquis MacDonald car driving up to the
5 Sunhouse, and he was getting out of the front driver's
6 side seat. The door on the right front passenger seat,
7 an individual got out of the car and came in the store
8 behind him.

9 Q Okay. So let's back up. Now, we don't see
10 anything about the Sunhouse in his written statement?

11 A No, sir.

12 Q How did it occur that he said the Sunhouse?

13 A That was -- that, I believe it was after he gave
14 his statement, and he was asked did he stop anywhere.
15 And he indicated that he did.

16 Q So kind of a throwaway line?

17 A Yes, sir.

18 Q Okay. Now, so you're going to Sunhouse. Did
19 you -- in addition to going to the Sunhouse, did you
20 ask for any items during the course of the
21 investigation from the Fusion Center?

22 A Yes, sir. What we did, we sent some telephone
23 numbers up there to run a clear report on those
24 telephone numbers. And one of the numbers we sent up
25 there was a number that they -- the clear report came

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 back as belonging to Stephon McLain.

2 Q Okay, all right. Now, we've heard some testimony
3 about crime scene reconstruction.

4 A Yes.

5 Q Y'all got the statement from the Defendant, and
6 then on the 1st, I believe it is, y'all had that Acura.
7 Did y'all make any efforts to conduct a crime scene
8 reconstruction or request one?

9 A No, sir.

10 Q Why not?

11 A We didn't have the car. The car was in his
12 possession for what, possibly four days before we took
13 possession of it. So, I mean, that gave him an
14 opportunity, if he wanted to, to clean the car up and
15 do anything he wanted to to the car.

16 Q Okay. So you typically wouldn't -- if property's
17 been missing for some time, you typically wouldn't do a
18 crime scene reenactment?

19 A That's correct.

20 Q Because it's not -- you don't know if it's in the
21 same condition?

22 A That's right.

23 Q Okay. Now, at some point did y'all request some
24 GPS mapping from the Fusion Center?

25 A Yes, sir.

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 Q Okay. Now, the Sunhouse store you went to to
2 collect the video, where is that located?

3 A Oak Street at the intersection of Cultra Road and
4 Oak Street.

5 Q And that's Cochran Town?

6 A Cochran Town.

7 Q Okay. Is there another area around there, another
8 name?

9 A For that area?

10 Q Yes.

11 A Not that I'm aware of.

12 Q Okay. So that's the Cochran Town area. And you
13 watched the video with Mr. Chalasani?

14 A Yes, sir, I did.

15 Q And at some point did he provide anything to you?

16 A Yes, sir. He provided me with a copy of what we
17 had looked at.

18 Q Okay. He provided on this disc?

19 A No, sir. He provided on the thumb drive.

20 Q Okay. The video that he provided to you on the
21 thumb drive, what did you do with it?

22 A I took it back and turned it over to Agent Randy
23 Truss.

24 Q Okay. I'm going to show you what's been marked as
25 State's No. 31 and been introduced as State's No. 31.

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 Do you recognize that item?

2 A Yes, sir. It's the -- it's the video DVD of the
3 activity at the Sunhouse.

4 Q And how do you recognize that particular --

5 THE COURT: Since it's already been identified and
6 submitted, let's go ahead and play it.

7 MR. RICHARDSON: Yes, sir, yes, sir.

8 THE COURT: We don't need to go through that
9 again. Thank you, sir.

10 Q And you viewed this before?

11 A Yes, I have.

12 Q Okay. And that is the video you saw?

13 A Yes, sir..

14 MR. RICHARDSON: Your Honor, permission to publish
15 now, please?

16 THE COURT: Yes, sir.

17 Q While that's loading up, now, after the Defendant
18 has told you that he punches, does he indicate which
19 hand he punches with?

20 A When he demonstrated, it was his right hand.

21 Q Okay. Did you get a good look at his right hand?

22 A Yes, sir.

23 Q Okay. And he told you that he knocked a man clear
24 out of the passenger seat, through a door?

25 A Yes, sir.

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 Q What did his hand look like?

2 A Fine to me. There were no bruises or anything on
3 his hand.

4 Q No bruising. Any cast?

5 A No, sir.

6 Q He said he had his hands on the gun when it went
7 off?

8 A Yes, sir.

9 Q Did you look at his palms?

10 A Yes, sir. They looked fine, his hands did.

11 Q All right.

12 MR. RICHARDSON: All right. For the record, Your
13 Honor, I'm going to start from this disc. It includes
14 one -- I believe, eight total videos. I'm going to
15 start with the one identified as cam 15.

16 THE COURT: Okay.

17 (WHEREUPON, a video was played at 2:53 p.m.)

18 Q The video place timestamp appears in the top
19 corner, top left corner?

20 A I can't see from here.

21 Q Who is that we just saw?

22 A Marquis McDonald.

23 Q And that gentleman we just saw?

24 A That is the person that got out of the car with
25 McDonald when he pulled up to the store. We believe

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 that person was -- is Black. We didn't have a positive
2 ID on the name at the time, but we believe him to be
3 Black.

4 Q Okay. What type of hairstyle is that that the
5 gentleman in the hoodie sweatshirt has?

6 A He has dreads.

7 Q Long dreads?

8 A Yes, sir.

9 Q From your recollection, do you remember about what
10 time this video was?

11 A Around about, it was sometime after six, I
12 believe.

13 Q About 6:30?

14 A Around about that timeframe.

15 Q And when you watched it before, did it have a
16 timestamp on it?

17 A Yes, sir.

18 Q It's hard to read up in the top left?

19 A Yes, sir. I couldn't see.

20 Q One again, who's that?

21 A That's Marquis McDonald.

22 Q And that fellow?

23 A That's Black, the person we identified as Black.

24 Q One more clip. Now, what are we looking at here?

25 A That's the outside of the store from the video

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 camera is taking a picture.

2 (WHEREUPON, the video concluded at 3:01 p.m.)

3 Q Senior Agent Johnson, do you see where it says
4 18:35 up there on the clock?

5 A Yes.

6 Q So that would have been about 6:35 p.m.?

7 A Thereabout, yes, sir.

8 Q Okay. Now, have you taken any efforts to travel
9 the distance between that Sunhouse store and the murder
10 scene?

11 A Yes, sir.

12 Q In a vehicle, how many times have you done that?

13 A We did it twice.

14 Q And what time of day was that?

15 A It was -- it was afternoon.

16 Q And not during February 2013?

17 A No, sir.

18 Q Okay. Which direction did you go?

19 A We went to the Sunhouse, and from there Agent
20 Randy Truss was driving, and his car has a timer and a
21 mileage indicator that would give you the exact mileage
22 and the time to take to travel from the Sunhouse to
23 where we was going.

24 And we left the Sunhouse, and we went by way of
25 highway -- Cultra Road to Highway 701. We traveled 701

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 down to Highway 544, crossing 501 at the bridge at
2 five -- 701 and 544, which turns into 544.

3 Q Okay.

4 A We went that way, and we turned on campus, went on
5 campus, to the crime scene; and we got there at
6 approximately -- it took approximately 14 minutes, I
7 believe, and 48 seconds. We traveled the distance, I
8 believe, of 7.9 miles.

9 Q Okay, all right. So about 15 minutes?

10 A Yes, sir.

11 Q And that's with y'all not making any other stops?

12 A No stops.

13 Q Go straight there. Now, we just saw who you
14 identified as Marquis McDonald, you saw the other
15 fellow in the black hoodie --

16 A Yes, sir.

17 Q -- and black jeans?

18 A Yes, sir.

19 Q Dreads. Did you make any efforts to try and
20 identify that person?

21 A Yes, sir.

22 Q Okay. And why were you trying to identify him?

23 A We wanted to know who he was, and he was a
24 possible suspect in the investigation.

25 Q Okay. Talk to us about the efforts you made to

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 identify him, what you did.

2 A We did a follow-up interview with Roland Crooms.
3 We brought him to CCU and we showed him that video.
4 When he looked at the video, you might say his face
5 just dropped. He said, my boy Blizzard tied up in
6 this.

7 Q Okay.

8 A Then through our Fusion Center, we were able to
9 identify Stephon McLain by his telephone number. We
10 had already knew his name, but we wanted Blizzard --
11 I'm sorry, we wanted Roland to identify him, so we
12 showed him the DMV picture that we had. We blacked out
13 the name. He only saw the face of Stephon McLain. He
14 said, Stephon McLain --

15 MR. McCOLLUM: Objection, Your Honor.

16 THE COURT: Okay. The objection?

17 MR. McCOLLUM: Just to hearsay.

18 THE COURT: Sustained.

19 Q Without telling us what he said, you presented
20 that to him?

21 A We presented that to him.

22 Q Okay. Now, after -- at some point, do you have an
23 identity?

24 A Yes, sir.

25 Q The fellow in the black sweatshirt being Stephon

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 McLain?

2 A Yes, sir.

3 Q Blizzard. Did you learn any other street names
4 for him?

5 A Just that Black and Blizzard were the same person.

6 Q Okay, Black and Blizzard were the same person.

7 Now, after you have that name Stephon McLain, what did
8 you do with regard to warrants?

9 A What we did, we listed him in NCIC, National
10 Criminal Information Center. And we sent out a release
11 on that person of -- person of interest that we're
12 looking for. We also obtained an arrest warrant for
13 Stephon McLain as the second person involved in that
14 incident.

15 Q Were you able to locate him?

16 A Yes, sir, we did.

17 Q Where was that?

18 A The NCIC bulletin that we put out, he was arrested
19 in Mansfield, Ohio. I believe the city officer --
20 there was an incident in Mansfield Ohio, what they told
21 us, and Stephon was walking down the street. And the
22 officer stopped him, I guess you might call it a Terry
23 stop, just to check him out. And he ran his name in
24 the system, and it came back that he was wanted out of
25 South Carolina.

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

1 Q Okay. And did you ever travel up to Ohio?

2 A Yes, sir. Agent Randy Black -- Randy Truss -- we
3 was called by Lieutenant Roxanne Bethea. She told us
4 that he had been apprehended in Mansfield, Ohio and
5 that we would have to travel out to Mansfield, Ohio to
6 interview him. We flew out that morning, and when we
7 got there, we interviewed Stephon McLain.

8 Q Okay. And prior to interviewing him, did you read
9 him his Miranda rights?

10 A Yes, sir.

11 Q And certainly we can't get into what he said.

12 A No, sir.

13 Q But after his interview, what did you do with the
14 arrest warrant you had?

15 A We -- well, he signed an extradition order, so we
16 transported him back to South Carolina where he was
17 served with the arrest warrant and put into J. Reuben
18 Long Detention Center.

19 Q Okay. So he waived extradition?

20 A Yes, sir, he did.

21 Q And he was brought back to South Carolina?

22 A Yes, sir.

23 Q Now, so you sat down, how long did you interview
24 him?

25 A Probably about an hour, give or take.

JAMES L. JOHNSON-DIRECT BY MR. RICHARDSON

- 1 Q What injuries did you see on him?
- 2 A None.
- 3 Q None?
- 4 A No, sir.
- 5 Q What were the condition of his teeth?
- 6 A Fine.
- 7 Q Any marks or anything on his face?
- 8 A None whatsoever.
- 9 Q Now, you've had this investigation a year and a
- 10 half now; correct?
- 11 A Yes, sir.
- 12 Q Roughly. Tell us what weapons were recovered
- 13 again.
- 14 A None were recovered.
- 15 Q You been working for SLED for what, 21 years, I
- 16 think?
- 17 A Yes, sir.
- 18 Q Without a weapon can you do anything with the
- 19 projectiles?
- 20 A No, sir. We have nothing to compare them to.
- 21 Q You can't match them up?
- 22 A That's correct.
- 23 Q In speaking with this defendant, did he ever
- 24 indicate anything with regard to Anthony being armed?
- 25 A No, sir.

JAMES L. JOHNSON-CROSS BY MR. McCOLLUM

1 MR. RICHARDSON: Thank you, Your Honor, no further
2 questions.

3 THE COURT: Cross-examine.

4 MR. McCOLLUM: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. McCOLLUM:

7 Q Agent Johnson?

8 A Yes, sir.

9 Q How you doing, I'm Greg McCollum. When you first
10 started testifying, I think you were talking about the
11 black Honda?

12 A The Honda that he had mentioned.

13 Q That you went through a black Honda, there was
14 nothing of any evidentiary value for this case?

15 A Well, I didn't -- I didn't go through it. It was
16 one that was searched, I believe.

17 Q It was a black Honda that was seized by the police
18 and --

19 A The vehicle, it wasn't seized, so to speak, we had
20 control of it. But I don't know what happened to it
21 because I wasn't involved in that. I was only told
22 about that.

23 Q But the reason that you went and took control of a
24 black Honda is because at least one witness had said a
25 black Honda had fled the scene of the incident; right?

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 P-R-O-C-T-O-R.

2 DIRECT EXAMINATION

3 BY MR. HYMAN:

4 Q Good afternoon, Dr. Proctor.

5 A Hi.

6 Q Tell the jury a little bit about yourself; where
7 are you from, where are you employed?

8 A Okay. I am a physician, I'm self-employed. I am
9 from -- originally from Conway, live in Myrtle Beach
10 and practice the specialty of pathology to include
11 anatomic, clinical and forensic pathology.

12 Q Okay. How long you been a pathologist?

13 A I was board certified in anatomic and clinical
14 pathology in 1982 and in forensic pathology in 1980 --
15 1994.

16 Q Briefly just take us through your education and
17 training in the field of pathology.

18 A I received my MD degree at Medical University of
19 Charleston. I did a combined anatomic and clinical
20 pathology residency at Walter Reed Army Medical Center
21 in Washington, DC. I served --

22 MR. McCOLLUM: I'll stipulate to his
23 qualifications.

24 THE COURT: Very well. In the field of forensic
25 pathology?

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 MR. McCOLLUM: Yes, sir.

2 THE COURT: All right. You may proceed with
3 qualifications for the jury's benefit, but he will be
4 permitted to render opinions in the field of forensic
5 pathology.

6 MR. HYMAN: As long as he's qualified as an expert
7 in forensic pathology, I'll move on.

8 THE COURT: I'll allow him to render opinions in
9 that area.

10 MR. HYMAN: Thank you very much.

11 Q Dr. Proctor, in the course of your work as a
12 forensic pathologist, did you have an opportunity to
13 perform a forensic autopsy on one Anthony Liddell, Jr.?

14 A I did.

15 Q And before we get into that specifically, explain
16 to the jury what a subset of pathology, specifically
17 forensic pathology, explain to them what that is.

18 A Forensic pathology is a subspecialty of pathology
19 which is a boarded subspecialty for which you'd have to
20 be trained. And forensic pathology specifically deals
21 with the medical legal cause and manner of death. And
22 we work with law enforcement and to include the police
23 and the coroners to formulate a cause and manner of
24 death in situations in which we are requested. It
25 includes a complete autopsy, toxicology and a

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 microscopic examination. Then we render an opinion.

2 Q And have you ever testified as an expert before?

3 A I have.

4 Q And about how many times would you estimate?

5 A Several hundred.

6 Q Fair enough. Now, back to this specific autopsy
7 that you conducted; when and where did that take place?

8 A Okay. This autopsy was performed on the 27th of
9 February, 2013. It was done in the morgue at Grand
10 Strand Regional Medical Center in Myrtle Beach.

11 Q At whose request did you perform this autopsy?

12 A I was requested by Mr. Darris Fowler, one of the
13 Horry County deputy coroners.

14 Q Okay. And who all was present with you?

15 A I was present, my assistant Mr. Leroy Rush who's
16 been helping me for, gosh knows, 20, 30 years. There
17 were representatives of State Law Enforcement Division
18 there, and I think there was Horry County Police. I
19 don't have a written record of all that were there.

20 Q Prior to you receiving the body for autopsy, do
21 you know if he was treated medically in any way?

22 A When I received the body, there was evidence of
23 surgical intervention to include a large suture
24 incision transversely across the anterior chest, I
25 assume, to open the chest to try to do cardiac massage

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 or see what damage was inside.

2 Q Do you know what time the time of death was?

3 A I was given the time of death stated by Coroner
4 Fowler as 8:30 p.m. on the 26th of February.

5 Q Do you remember, and if you don't remember it may
6 be in your notes, the height and weight of Anthony
7 Liddell, Jr.?

8 A Okay. He measured 68 inches in length, and we
9 estimated his weight at around 175 pounds, plus or
10 minus.

11 Q How many inches, 68?

12 A 68.

13 Q Is that five feet, eight inches?

14 A That's five feet, eight inches, yes, sir.

15 Q Okay. What was the purpose in conducting this
16 autopsy?

17 A The purpose of this autopsy was a request by the
18 coroner. I was told this man had been involved in a
19 shooting incident and was killed, and my job was to
20 determine cause and manner of death.

21 Q Explain, take us through the procedure that you
22 utilized while performing this autopsy.

23 A First and foremost, given the history by the
24 coroner, and it may be brief, may be extensive, but
25 what's stated in my autopsy is basically all that. I

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1 have. I take that information, do an external
2 examination of the body, do an internal examination of
3 the body taking what organs and tissues I think are
4 necessary to examine.

5 I take blood samples for toxicologic evaluation.
6 And then once I get all of the results, I put together
7 the toxicology, my findings, the history that I have
8 and issue an autopsy report with cause and manner of
9 death.

10 Q Very well. When you were conducting your
11 examination, tell us about any injuries you observed on
12 his body.

13 A All right. The most significant things that I
14 found on Mr. Liddell, there were three specific gunshot
15 wounds. There was a wound to the left chest at the
16 base of the sternum, the right chest at the base of the
17 sternum, and the anterior aspect of the hip on the bony
18 prominence of the hip. There were exit wounds in the
19 right mid back, the right lateral back along the base
20 of the ribs and one in the buttock area from the wound
21 that entered the hip.

22 Q Were you able to form an expert opinion as to what
23 caused these injuries?

24 A Well, these were obviously gunshot wounds.

25 Q And you pointed out generally where the wounds

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 were located. Were you able to determine which ones
2 were the entrance wounds and the exit wounds?

3 A Yes, sir.

4 Q Could you tell us which ones those were.

5 A The entrance wounds were those in the anterior
6 chest, right and left, and the hip, anterior hip.

7 Q Could you take us through each one again, if you
8 don't mind.

9 A Okay, all right.

10 Q With medical terms, lay people like me have a hard
11 time following it, so let's go through each one.

12 A All right. Starting with the left chest, this
13 wound penetrated the chest at the base of the sternum,
14 just left of the midline. It traveled through the body
15 in a anterior posterior, usually it's by left to right
16 direction. It penetrated tissues of the right middle,
17 right lower lung, the lung hilum which is where the
18 lung comes into the pulmonary artery. And this
19 projectile exited the body along the axillary line on
20 the right side.

21 The second wound penetrated the body in the right
22 chest just right of the midline. It passed anterior to
23 posterior to exit the back in the right mid back
24 lateral to the midline, and that wound penetrated again
25 through portions of the right middle and right lower

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1 lung lobes and the lung hilum. The third wound entered
2 the left iliac crest, which if you feel your hip --

3 Q You may stand.

4 A -- it's the bony prominence of your hip right here
5 (indicating). And in that area, passed anterior to
6 posterior and inferior and came out of the left buttock
7 area.

8 Q While conducting your examination, were you able
9 to determine the trajectory of the bullets?

10 A The bullet penetrated the left chest, was anterior
11 to posterior, left to right, coming out of the
12 right lateral --

13 Q Upward or downward?

14 A Pretty much straight through.

15 Q So maybe --

16 A Maybe, no actually pretty much straight through.
17 The right chest wound was pretty much anterior to
18 posterior, pretty much straight through, through the
19 lung hilum and out of the back area between the ribs.
20 The only one that I can definitively say went up and
21 down was that in the left hip.

22 It hit the iliac crest and in a -- passed in a
23 anterior posterior and inferior direction to come out
24 of the buttock area. And that may -- that may be as a
25 consequence of hitting bone and going through.

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 Q Okay. How were you able to term the trajectory of
2 the bullets?

3 A Basically by dissecting the body and opening the
4 body and looking.

5 Q Okay.

6 A We also at times take rods which we use to put
7 through the wounds after the body has been opened and
8 the wounds exposed just to confirm those trajectories.

9 Q Okay. So just to make sure that I fully
10 understand, I believe you said that the wound to the
11 left hip was at a slightly downward angle?

12 A That's correct.

13 Q The wound that entered the left chest and came
14 out --

15 A On the right side.

16 Q -- by the right rib cage --

17 A Um-hum.

18 Q -- was that --

19 A Pretty much --

20 Q -- horizontal basically?

21 A Pretty much horizontal, that's correct.

22 Q And the wound to the right chest that exited out
23 of Anthony's back?

24 A Was pretty much straight through.

25 Q It was pretty much straight through?

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

- 1 A Correct.
- 2 Q Do you recall if it was slightly upward or
3 slightly downward?
- 4 A At this point I do not recall.
- 5 Q Okay.
- 6 A It...
- 7 Q If you need a minute to look at your report?
- 8 A No, sir. I don't recall.
- 9 Q Okay. What is a collar abrasion?
- 10 A A collar abrasion is usually seen on an entrance
11 wound. And it's an abrasion on the side -- the bullet
12 passes through and the abrasion collar is on -- say if
13 the bullet passes a left to right direction, you'll see
14 the abrasion collar on -- sort of on the left aspect of
15 the bullet because it abrades the skin as it goes
16 through at sort of an angle.
- 17 Q Did you locate any collar abrasions on Anthony's
18 body?
- 19 A There was a slight abrasion collar on the left
20 chest wound. And, let's see, I want to make sure. I
21 see --- the wound, it had a lateral abrasion collar, so
22 that would be on the lateral aspect of it. It did not
23 state anything about an abrasion collar on the right
24 chest wound. And the iliac crest wound had a medial
25 abrasion collar, so it would probably passes slightly

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 medial to lateral and down.

2 Q Okay. So the two to the chest, did they or did
3 they not have --

4 A The left chest wound had a left-sided abrasion
5 collar.

6 Q Okay. Could you describe that a little bit for
7 the jury.

8 A It's just -- it's just a very small abrasion in
9 the skin which indicates just a slight angle. It's --
10 it can be a very minimal angle, be a lot of angle, but
11 you see -- you just see an abrasion of the skin. The
12 wound is -- wound site's usually straight and it's
13 usually perfectly circular. But if there's an abrasion
14 collar, that means the wound -- the bullet was -- you
15 know, the gun was at a slightly different angle.

16 Q The bullet came in at an angle?

17 A Very, very slight, yes.

18 Q Okay. What color were the abrasion collars?

19 A Abrasion collars are just abrasions, just a bloody
20 abrasion.

21 Q Okay.

22 A Just where it's like a skin mark.

23 Q Does that indicate anything to you in your
24 profession?

25 A The -- it indicates to me that the left chest

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1 wound, the gun was pointed at the victim from the
2 victim's left side pointed -- angled -- pointed
3 slightly towards the midline in this direction
4 (indicating). The right-sided wound was pretty much
5 straight through, and the left hip wound was
6 slightly -- slightly down and maybe slightly angled
7 out.

8 Q Now, when you conducted the autopsy, do you recall
9 if you were able to recover anything of evidentiary
10 value from Anthony's body?

11 A I did not recover any projectiles. These were all
12 through and through projectiles.

13 Q They were all through and through?

14 A That's correct.

15 Q And tell us when stippling is.

16 A Stippling is what is usually seen around a wound
17 site when a weapon is fired at close range. We see
18 powder and stippling. Stippling is actually the powder
19 that's on fire that hits the skin and burns the skin.
20 You can wipe the soot off, but you can't wipe stippling
21 off, that's actually where it's burned the skin.

22 Q So what's the purpose in looking for it?

23 A When stippling is noted on skin, you can with
24 reasonable degree state that the weapon was fired in a
25 distance probably less than two to two and a half feet

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 away.

2 Q Did you look for any on Anthony's body?

3 A I did.

4 Q Did you find any?

5 A I did not.

6 Q And what if anything does the absence of stippling
7 indicate to you?

8 A All right, it can indicate two things. Number
9 one, it can indicate that the distance of the weapon
10 that was fired was greater than that distance, or it
11 can mean that there was something intervening between
12 the weapon and the skin, i.e., clothes, items of
13 clothing, that kind of stuff.

14 Q So factors can affect the presence or absence of
15 stippling?

16 A That's correct.

17 Q And you say clothes can be one of those things?

18 A Yes, sir.

19 Q And what about if somebody's operated on?

20 A Well, if the man had been operated on, the
21 stippling itself would not be removed because that's
22 actual the hot powder coming out of the end of the
23 weapon and burning the skin. That would stay there.
24 Any smoke or whatnot that came out of the gun that was
25 there can be cleaned off. But the stippling itself is

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 actually where the skin is burned, and it will not be
2 removed.

3 Q Okay. But the presence of clothing, sometimes
4 could that affect --

5 A Absolutely.

6 Q -- the burning on the skin?

7 A Yes, it can.

8 Q So really does the presence or absence of
9 stippling indicate to you, could you form any
10 conclusions as to the distance of the gun being fired?

11 A I did not have the clothes present to look at.
12 Sometimes we can see powder burns on the clothes, that
13 kind of stuff. I was not given any clothing to examine
14 at the time of autopsy, so can I make a stippling
15 statement, no, sir, I cannot.

16 Q Could you tell us a little bit about what
17 offensive and defensive wounds are.

18 A Usual -- well, I know what defensive wounds are.
19 Defensive wounds are wounds about -- usually about the
20 extremities, anywhere on the body that someone has used
21 to put their arms up or turn their body and put a
22 portion of their body up to fend off an attack or
23 something like that.

24 Q Did -- while examining Anthony did you find
25 anything of interest on his hands?

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 A I did not notice anything on his hands. He had a
2 small laceration, I think, in his midline forehead and
3 maybe one along the bridge of his nose. I think there
4 may have been one somewhere else, I don't have it noted
5 in my notes here. But specifically what I would call
6 defense wounds I did not see.

7 Q As a matter of fact, I believe I went out to your
8 place of business last week sometime and we talked.
9 And I showed you some pictures, I believe.

10 A Yes, sir.

11 Q And we noticed, if you remember, that there was
12 nothing in your report indicating any wounds on his
13 hands?

14 A That's correct.

15 Q But do you recall me showing you any pictures of
16 his hands?

17 A You show me some pictures, and I would love to
18 refresh my memory if you want me to make a comment
19 about it.

20 Q Okay. Are you saying you need the pictures again?

21 A I would like to see it, yes, sir.

22 Q Okay.

23 A I'd be happy to talk about it if I saw it.

24 Q And you say you noticed an injury on Anthony's
25 face, I believe?

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 A He had -- let's see, stated in my -- he had a
2 laceration in his mid forehead between the eyebrows
3 measuring about a centimeter. That's about a half an
4 inch, just right in here (indicating). And he had a
5 small laceration on the lateral aspect of the right
6 nose, right here (indicating), small laceration.

7 Q Are you able to determine what caused those?

8 A Those could have been caused by falling against
9 something, something falling against his face. Could
10 it be an injury from being hit or struck, yes, they
11 could.

12 Q Were they recent wounds?

13 A They were -- they appeared to me to be of fairly
14 recent origin, yes, sir.

15 Q Okay. Again, I believe you said that the -- you
16 were not able to recover any projectiles from his body?

17 A That's correct.

18 Q So the wounds were through and through?

19 A That's correct.

20 Q And based on your autopsy within the bounds of
21 reasonable medical certainty, were you able to form an
22 expert opinion based on as to what the cause of death
23 was?

24 A Yes, sir. This man died as a result of these
25 multiple gunshot wounds with associated visceral

EDWARD PROCTOR, JR.-DIRECT BY MR. HYMAN

1 damage, which means all the damage he received to the
2 right, middle and lower lung lobes, and the hilar area
3 with all the blood vessels with resulting massive
4 hemorrhage.

5 Q Were you able to form an expert opinion regarding
6 the manner of death?

7 A Manner of death in this case is homicide.

8 Q And explain to us what that means.

9 A Homicide in forensic terms means death at the
10 hands of another. Whether that be self-defense, attack
11 from someone else, it's just death at the hands of
12 another.

13 Q Thank you.

14 A Yes, sir.

15 MR. HYMAN: And Mr. Richardson has gone to
16 retrieve those photographs of the hands. That's all
17 the questions I have for him at this time, Your Honor,
18 on direct. I would just like to reserve the right to
19 refresh his recollection and talk to him about the
20 hands as soon as Mr. Richardson gets back.

21 I don't know if we could take a short break or how
22 you want to address that.

23 THE COURT: Do you have any questions?

24 MR. McCOLLUM: Yes, sir, Your Honor.

25 THE COURT: You may proceed. Yes, sir.

EDWARD PROCTOR, JR.-CROSS BY MR. McCOLLUM

CROSS-EXAMINATION

1
2 BY MR. McCOLLUM:

3 Q Dr. Proctor, how you doing?

4 A I'm good.

5 Q Greg McCollum, good to see you.

6 A Good to see you.

7 Q When you got the victim's body for the autopsy, it
8 had come from the hospital?

9 A Yes, sir. It had come -- the body had been -- I
10 was told that the man had been transported to Grand
11 Strand Regional Medical Center and actually died in the
12 operating room.

13 Q And you may not be able to answer this, but when
14 you get -- when you got his body for the autopsy, when
15 you examined it, you did not recover any projectiles?

16 A That is correct.

17 Q Okay. And sometimes projectiles which they, if
18 they pass through the body, sometimes they get trapped
19 in the clothing?

20 A That's correct.

21 Q Sometimes they could fall out of the clothing?

22 A Yes, sir.

23 Q Okay. And in your experience, with someone being
24 in the ER where there are doctors who are trying to
25 save that person's life, are there occasions where

EDWARD PROCTOR, JR. - CROSS BY MR. McCOLLUM

1 they've brought you evidence and said that they

2 discovered this?

3 A To me directly, no. Now, I don't know what

4 they've given to law enforcement authorities, but I

5 have never been delivered anything while I've been at

6 Grand Strand Regional Medical Center from someone in

7 the ER that the law enforcement didn't have before I

8 had it.

9 Q And in terms of the hospital, if they are trying

10 to save someone's life, they are not concerned about

11 collecting evidence; right?

12 A I -- to answer your question, I would hope that

13 they are, but I can't give you an honest answer because

14 I'm not there and have not been there, so I don't know.

15 But I know their primary concern would be to save the

16 man's life.

17 Q And so -- and if somebody is taken from the scene

18 by ambulance, then if there is another projectile in

19 the clothing or something, then it could come out and

20 fall out in the ambulance?

21 A It could, yes, sir.

22 Q It could fall out while the person is being

23 stretchered into the ER; right?

24 A Yes, sir.

25 Q And then it could -- it could go missing sometime

EDWARD PROCTOR, JR.-CROSS BY MR. McCOLLUM

1 prior to you getting the opportunity to do the autopsy?

2 A It certainly can, yes, sir.

3 Q And all you know is what you're given to examine;
4 right?

5 A That is correct.

6 Q And that's all you can control and know about?

7 A That's correct.

8 Q Okay. And there were only three gunshot wounds;
9 right?

10 A That's correct.

11 Q When a gunshot wound -- and if you know this, I
12 don't know -- if a gunshot wound passes through a human
13 body and is recovered as a, I guess, as an entrance and
14 an exit --

15 A That's correct.

16 Q -- do you find blood or tissue on the projectile,
17 or do you know?

18 A Blood and tissue can be found on the projectile.
19 The projectile can be greatly deformed depending on
20 what it hits as it passes through the body, yes, sir.

21 If it's a -- what we call a jacketed projectile,
22 we can get the lead portion of the projectile coming
23 through, maybe portions of the jacket remaining in, or
24 we can get the intact jacketed projectile. It's a wide
25 variation of what we can see.

EDWARD PROCTOR, JR.-CROSS BY MR. McCOLLUM

1 Q And so do you know of instances where somebody,
2 for example, dug a bullet projectile out of a surface,
3 and then it was determined that it had blood tissue on
4 it?

5 A Yes, sir.

6 Q Or should I say blood tissue, I don't know --

7 A You got blood and tissue, yes, sir.

8 Q Blood or tissue?

9 A Um-hum.

10 Q So that's possible?

11 A That is possible.

12 Q That somebody could check that?

13 A Could be, yes, sir.

14 Q And since you're doing the examination of the
15 body, clearly you don't know how many times a gun was fired;
16 right?

17 A I do not.

18 Q And you don't know the position of the body at the
19 time the wounds are inflicted; right?

20 A I could only give you the angles that I have, and
21 any amount of what you can suggest that those angles
22 would occur can certainly be a possibility, yes, sir.

23 Q And sometimes when bullets enter into a body, a
24 human body, they change direction?

25 A That's correct.

EDWARD PROCTOR, JR.-CROSS BY MR. McCOLLUM

1 Q Depending on what factors?

2 A The most common factor would be what it hits as it
3 passes through.

4 Q Like bones or --

5 A Bones.

6 Q -- organs?

7 A Yes, sir.

8 Q Okay.

9 A Bone would be the most common thing to hit that
10 would -- that could change the trajectory of a bullet.

11 Q And you were talking about the, I think the term
12 is the stippling?

13 A Yes, sir.

14 Q And did you -- and I'm sorry, I got distracted --
15 did you find stippling?

16 A No, sir, I did not.

17 Q And I think you explained that stippling would
18 occur if a gun barrel is close to the subject who's
19 being shot; right?

20 A That's correct.

21 Q And is there a -- is there a set distance where it
22 doesn't occur anymore?

23 A The common distances are in handguns about 18 to
24 24 inches. Larger caliber weapons such as shotguns may
25 be seen up to -- you could see the powder for sure up

EDWARD PROCTOR, JR.-CROSS BY MR. McCOLLUM

1 to around 30 inches plus and maybe slight stippling.

2 But usually the stippling, around two feet is the
3 pretty much standard.

4 Q Okay. And so two feet, I think that you may have
5 said 18 inches; right?

6 A 18 inches to two feet, yes, sir.

7 Q I may have imagined that. So 18 inches to 24
8 inches?

9 A That's correct.

10 Q So if you have a higher caliber handgun and it's
11 within that 24 inches or within that 18 inches --
12 that's not exact; right?

13 A No, sir. That's -- that's -- based upon my
14 training and the cases I've seen and those I've
15 observed with other people, that's -- that's sort of
16 the general attitude.

17 Q So if the person who received the wound, for
18 example, did not have on clothing, like was
19 bare-chested or something --

20 A Yes, sir.

21 Q -- you would expect to always find stippling from
22 a handgun at 18 inches?

23 A Yes, sir.

24 Q And why is that?

25 A The actual projectile, when the firing pin hits

EDWARD PROCTOR, JR.-CROSS BY MR. McCOLLUM

1 the bullet it causes an explosion in the weapon, the
2 powder ignites, and that's what throws the projectile
3 out of the weapon. But as the projectile comes out of
4 the weapon, the powder that is actually burning, powder
5 that's not burning and the smoke, soot and whatnot
6 generated by the powder -- a lot of newer weapons or
7 new ammunition is smokeless -- but it still sends out
8 burning portions of powder with that projectile as it
9 comes out the end of the weapon.

10 Q And is that what we see when we see a gun fired at
11 night and see a muzzle flash?

12 A You see -- you see a flash. And if you can see it
13 in slow motion just out of the end of a gun, you can
14 just see it looks almost like flame particularly out of
15 very high powered weapons. But even the handguns and
16 whatnot you'll see -- you could see if they do it in
17 very slow motion, you could see the powder coming out
18 the end of the gun, the burning powder.

19 Q So clearly if someone were within, you said, two
20 feet, and we're not talking about the clothing, I know
21 that clothing is an exception, I believe, but clearly
22 within two feet, if there's not some other factor, you
23 would expect to see stippling?

24 A Within -- within approximately two feet, yes, sir,
25 I would.

EDWARD PROCTOR, JR.-CROSS BY MR. McCOLLUM

1 Q And you testified that clothing could keep you
2 from seeing stippling on the body that you examined?

3 A That's correct.

4 Q And you said if that you had an opportunity,
5 though, to examine the clothing, then you would be able
6 to detect stippling on the clothing?

7 A Usually what we detect on the clothing would be
8 the hole produced by the projectile, and within that
9 distance usually around the edges of where the
10 projectile passes through, we'll see some burning of
11 the cloth or discoloration of the cloth, yes, sir.

12 Q Would that always be present?

13 A In all likelihood, yes, sir.

14 Q So you could say to a reasonable degree of medical
15 certainty that if the gun was fired within that
16 range -- and 24 inches is not an exact; correct?

17 A It's not exact, that's correct.

18 Q But within that two feet, say 18 inches, even with
19 clothing if you got to examine the clothing, there
20 would always be stippling?

21 A I would -- I would -- there would -- I would say
22 that there would be some evidence of the proximity of
23 the gun on the clothing, whether it be the smoke from
24 the end of the gun that penetrates the cloth or the
25 burning powder that causes little burns around the

EDWARD PROCTOR, JR.-CROSS BY MR. McCOLLUM

1 actual entrance on the cloth, yes, sir.

2 Q In this case you were not given the opportunity to
3 examine the clothing and make that determination?

4 A I did not have the clothing for examination.

5 Q If you had been given the clothing for
6 examination, then you could have made that
7 determination?

8 A If I had had the clothing, I would have tried to
9 have made a statement in my report or would have
10 referred it to the investigative authorities that could
11 have examined the clothing for the presence of powder
12 and that kind of stuff, yes, sir.

13 Q All right. And just one minor point. You do a
14 toxicology screen as a routine part --

15 A Yes, sir.

16 Q -- of the autopsy?

17 A I do.

18 Q And in this case the decedent, the person who
19 died, that you examined was negative for alcohol and
20 then positive for marijuana; right?

21 A That's correct.

22 Q Okay.

23 MR. McCOLLUM: Thank you, sir.

24 THE COURT: Redirect, Mr. Hyman?

25 MR. HYMAN: Just very briefly, Your Honor.

EDWARD PROCTOR, JR.-REDIRECT BY MR. HYMAN

1 THE COURT: Sure.

2 REDIRECT EXAMINATION

3 BY MR. HYMAN:

4 Q I believe Mr. McCollum asked you about a bullet
5 passing through a body, and you said -- I think you
6 said it's possible for there to be blood and tissue on
7 a bullet that travels through someone's body?

8 A Yes, sir.

9 Q If a bullet or three bullets passed through
10 someone's body and then lodge into a motor vehicle and
11 are then removed, is it possible there is no blood and
12 no tissue on those projectiles?

13 A I -- I'm sure that that's possible.

14 Q Okay.

15 A I would -- I would -- I can't say with absolute
16 certainty, but I would say that it's certainly
17 possible, yes, sir.

18 Q And when talking about a stippling, you said the
19 clothing can be a factor --

20 A Yes, sir.

21 Q -- in there not being stippling on someone's body,
22 I believe?

23 A That's correct.

24 Q Okay. This took place in February, so a big
25 sweatshirt, would that reasonably be why there's no

EDWARD PROCTOR, JR.-REDIRECT BY MR. HYMAN

1 stippling on the body, if it's fired within two feet?

2 A Certainly.

3 Q Okay. And if the gun is fired from farther than,
4 is it 18 inches or two feet?

5 A 18 inches to two feet.

6 Q Okay, something like that.

7 MR. HYMAN: Your Honor, I would just ask if I
8 could show him a photo to refresh his memory from
9 earlier.

10 THE COURT: Do you want to have them marked so he
11 could look at them. I assume you're not introducing
12 the photos?

13 MR. HYMAN: No, sir.

14 THE COURT: Okay.

15 (WHEREUPON, State's Exhibit No. 36 was marked for
16 identification only.)

17 Q Dr. Proctor, I'm just going to hand you what's
18 marked for identification only as State's-36. Just
19 take a look at that and see if it refreshes your
20 memory.

21 A Yes, sir.

22 Q Okay. Now that you've looked at that, do you
23 recall there being any injuries on Anthony's hands?

24 A Okay. This looks to be his right hand.

25 There's -- at the base of the wrist there is a little

1 blood spatter. There appears to be a spot at the base
2 of his hand, part of it is blood spatter. There may be
3 an abrasion underlying that and slight abrasion
4 adjacent to it. Yes, sir, there is.

5 Q And the wound that you see there on his hand, are
6 you able to determine what caused that?

7 A I am not, no, sir.

8 Q Was there actually a -- when you said an abrasion,
9 was there actually -- was it deep enough to draw blood?

10 A There appears to be some blood splatter and a
11 little bit of change right around the dark spot of
12 this. So I would say it probably was some sort of
13 superficial abrasion that may have oozed at some point,
14 yes, sir.

15 Q Is it possible that that's what you refer to as a
16 defensive wound?

17 A It could be, it's possible, yes, sir.

18 Q Okay.

19 MR. HYMAN: That's all the questions that I have
20 for the witness.

21 THE COURT: Recross?

22 MR. McCOLLUM: No, Your Honor.

23 THE COURT: Thank you. Do you wish him to be
24 excused?

25 MR. HYMAN: Yes, sir, please.

CHARLES R. SESSIONS-DIRECT BY MR. RICHARDSON

1 THE COURT: Any objection?

2 MR. McCOLLUM: No objection, Your Honor.

3 THE COURT: Dr. Proctor, you may step down, and
4 you are free to leave.

5 THE WITNESS: Thank you.

6 (Witness excused.)

7 THE COURT: Call your next witness.

8 MR. RICHARDSON: The State would call Rodney
9 Sessions, I'm sorry.

10 CHARLES RODNEY SESSIONS, after being duly sworn,
11 testified as follows:

12 CLERK OF COURT: Please state your full name and
13 spell your last name.

14 THE WITNESS: Charles Rodney sessions,
15 S-E-S-S-I-O-N-S.

16 DIRECT EXAMINATION

17 BY MR. RICHARDSON:

18 Q Captain Sessions, could you tell us where you're
19 employed and how long and in what capacity.

20 A I am currently employed at Coastal Carolina
21 University, I'm the captain over their investigation
22 division. I've been there since October of 2009.

23 Q And back in February of 2013, what was your
24 position there?

25 A Then I was a lieutenant over the investigation

CHARLES R. SESSIONS-DIRECT BY MR. RICHARDSON

1 division.

2 Q Still working investigation. So you were involved
3 in this investigation?

4 A Yes, sir.

5 Q And you were on the scene that night?

6 A Yes, sir.

7 Q Prior to going to work in 2009 with Coastal
8 Carolina University public safety office, where were
9 you employed?

10 A I was employed as a captain at Conway Police
11 Department here in South Carolina.

12 Q I was going to save this for a little later, but
13 I'm getting into it now. But I'm going to get this
14 marked.

15 (WHEREUPON, State's Exhibit No. 37 was marked for
16 identification only.)

17 Q I want to ask you, Captain Sessions, do you
18 recognize State's No. 37?

19 A It looks like a map of the city of Conway.

20 Q Okay. And you were with Conway how long?

21 A Approximately 16 years.

22 Q 16 years. So you're familiar with Conway?

23 A Yes. I was born and raised in Conway.

24 Q Born and raised in Conway. You know all the
25 little towns and whatnot or --

CHARLES R. SESSIONS-DIRECT BY MR. RICHARDSON

1 A Yes, sir.

2 Q -- subdivisions?

3 A Yes, sir.

4 Q Are you familiar with -- the State would -- is
5 this a fair and accurate depiction of the map of
6 Conway?

7 A It appears to be, yes, sir.

8 MR. RICHARDSON: The State would seek to introduce
9 No. 37, Your Honor.

10 THE COURT: Any objection?

11 MR. McCOLLUM: No, Your Honor.

12 THE COURT: Without objection, it's admitted.

13 (WHEREUPON, State's Exhibit No. 37 was admitted in
14 evidence.)

15 MR. RICHARDSON: And Your Honor, if I could have
16 Captain Sessions come down off the stand.

17 THE COURT: Sure. You may step down, Captain
18 Sessions.

19 Q Captain Sessions, I believe you went to the exact
20 right spot. If I can get this up. Now, you're
21 familiar with -- I assume you're familiar with Coastal
22 Carolina now as well?

23 A Yes, sir.

24 Q And we got one juror over here, so I'm going to
25 angle this just a little bit, not to block it from

CHARLES R. SESSIONS-DIRECT BY MR. RICHARDSON

1 Mr. McCollum. Can you point out on the map where
2 University Place Apartments is.

3 A Okay. This area right here, this will be
4 University Place Apartments (indicating).

5 Q Showing at the bottom right corner. And it's just
6 a blow-up of this area over here (indicating); correct?

7 A Yes, sir. This will be a blow-up of this area
8 (indicating).

9 Q Okay. And are you familiar with the area of
10 Conway called Homewood?

11 A I am.

12 Q Where is that located?

13 A That would be up on the 701 North area. I'll need
14 to find that on the map. Up in this area (indicating).

15 Q Okay. And this is a blow-up of that area?

16 A That's a blow-up of that area, correct.

17 Q Okay. So that's the general area called Homewood?

18 A Correct.

19 Q And one more, Jamestown.

20 A Jamestown would be on the west side of town.

21 Q Okay.

22 A It would be in this area right here (indicating),
23 which is also known as Fourth Avenue or 701 South.

24 Q Okay.

25 A That would be this blown up area (indicating).

CHARLES R. SESSIONS-DIRECT BY MR. RICHARDSON

1 Q Okay. There's a blown up area of Jamestown. So
2 what main thoroughfare is Jamestown off of?

3 A Jamestown is off of Fourth Avenue or Highway 701
4 South. And it also is a part of Ninth Avenue which
5 goes down into -- turns into Cates Bay Road.

6 Q Okay. So it's that whole area out there off of
7 Highway 701 heading towards Georgetown?

8 A Correct.

9 Q And it's a wide area. Are you familiar with most
10 of the streets and whatnot back in Jamestown?

11 A I am.

12 Q Are you familiar with Temple Street?

13 A I am.

14 Q Can you find that on the map, or do you see it on
15 the map?

16 A Temple Street is located off of -- let me find
17 Ninth Avenue. Ninth Avenue would be right here
18 (indicating). This would be Highway 378 (indicating).
19 Where my finger is is Ninth Avenue, and Ninth Avenue
20 runs down this way (indicating). So Temple Street
21 would be -- there is Janette, I went too far. Temple
22 Street is where my finger is.

23 Q Okay. Temple Street is right there in that box?

24 A Yeah.

25 Q And are you familiar with any cell towers in that

CHARLES R. SESSIONS-DIRECT BY MR. RICHARDSON

1 area?

2 A Yes. I believe there is a cell tower if you go
3 onto Ninth Avenue where I was, let me find my finger
4 again, Ninth Avenue that turns into Cates Bay Highway
5 as soon as you -- it turns into Cates Bay, there's one
6 right in that area. Ninth Avenue is Cates Bay, so the
7 road where it intersects is Janette Street and Ninth
8 Avenue. As soon as you go across there's a cell tower
9 located in that area, probably, I'd say, not even three
10 tenths of a mile from Temple Street.

11 Q Okay. And between Temple Street and Coastal
12 Carolina, have you ridden that road before?

13 A I have.

14 Q Have you seen any other cell towers in that area?

15 A I have not.

16 Q Okay. How about around Coastal, are there any
17 other cell towers?

18 A Actually, I'm trying to remember the closest one
19 that I've seen the last time. Yes, I believe it's one
20 right over in the -- over in this area off of Highway
21 544 (indicating).

22 Q The cell phone expert would be a better person to
23 talk about that?

24 A Right, right.

25 Q Okay. And so Homewood is on the north end of

CHARLES R. SESSIONS-DIRECT BY MR. RICHARDSON

- 1 Conway?
- 2 A North end of Conway.
- 3 Q And just to the west of Conway is Jamestown?
- 4 A Jamestown is the west side of Conway, correct.
- 5 Q And then south of Conway is where Coastal Carolina
- 6 University is?
- 7 A Correct.
- 8 Q Okay. And how far away is Jamestown from
- 9 University of South -- or Coastal Carolina University?
- 10 A Jamestown is approximately, I'd say, no more than
- 11 10 to 12 minutes.
- 12 Q Ten to twelve minutes?
- 13 A Um-hum.
- 14 Q All right.
- 15 MR. RICHARDSON: No further questions.
- 16 THE COURT: Cross examine?
- 17 MR. McCOLLUM: No questions, Your Honor.
- 18 THE COURT: Thank you.
- 19 THE WITNESS: Thank you.
- 20 THE COURT: Thank you, sir.
- 21 (Witness excused.)
- 22 MR. RICHARDSON: Your Honor, as I stated earlier,
- 23 I have only one agent from SLED that will be here in
- 24 the morning.
- 25 THE COURT: Okay. All right, ladies and

1 gentlemen, at this point we'll take a recess for the
2 evening. Again, please remember not to -- we're in the
3 evidentiary portion, it would still be inappropriate
4 for you to begin your deliberations. I'll ask you to
5 be in your jury room by 9:30 in the morning. Again,
6 I'm going to ask you not to read any newspaper accounts
7 or watch any news programs about it. Have a good
8 evening, see you tomorrow at 9:30.

9 (WHEREUPON, the jury exited the courtroom at
10 4:51 p.m.)

11 THE COURT: All right. Anything from the State
12 before we recess, solicitor?

13 MR. RICHARDSON: No, sir, Your Honor.

14 THE COURT: Same for defendant?

15 MR. McCOLLUM: No, judge.

16 THE COURT: We'll be at ease until 9:30 in the
17 morning, please.

18 MR. RICHARDSON: Thank you, Your Honor.

19 THE COURT: Thank you.

20 (WHEREUPON, the hearing adjourned at approximately
21 4:52 p.m.)

22 (WHEREUPON, the hearing resumed on Thursday,
23 October 9, 2014, at approximately 9:29 a.m.)

24 THE COURT: Thank you. Please be seated, good
25 morning.

1 (Discussion off the record.)
2 THE COURT: Is the State ready to proceed?
3 MR. RICHARDSON: We are, Your Honor..
4 THE COURT: Okay. Is the Defendant ready to
5 proceed?
6 MR. McCOLLUM: Yes, Your Honor.
7 THE COURT: Let the record reflect Mr. McDonald is
8 present, okay.
9 MR. RICHARDSON: Your Honor, if we could have just
10 one minute.
11 THE COURT: Okay..
12 MR. RICHARDSON: We have a witness, I believe,
13 coming right up.
14 THE COURT: All right..
15 MR. RICHARDSON: Did you want to discuss the
16 charges now, Your Honor?
17 THE COURT: No.
18 MR. RICHARDSON: Okay.
19 THE COURT: Thank you. Unless y'all resting and
20 everybody's resting.
21 MR. RICHARDSON: No, sir. No, sir, no, sir.
22 THE COURT: I'll give you an opportunity before
23 then.
24 MR. RICHARDSON: Yes, sir.
25 THE COURT: What's your issue with the charge?

1 MR. RICHARDSON: The only issue, that I would
2 request a felony murder charge, Your Honor.

3 THE COURT: Well, it depends, doesn't it?

4 MR. RICHARDSON: Yes, sir.

5 THE COURT: It depends on whether or not there is
6 another felony that the jury has to consider.

7 MR. RICHARDSON: Yes, sir.

8 THE COURT: Because, frankly, I think it's covered
9 with the if you're doing something illegal, when you're
10 doing something that's likely to cause harm to
11 somebody, that's the presumption. I think it's a
12 double -- we don't have felony murder in the State; do
13 you agree with me?

14 MR. RICHARDSON: Yes, sir. I just don't know if
15 there's a charge on that.

16 THE COURT: Well, there's a charge that says in
17 the commission of a felony that's a presumption of
18 malice which gives the same presumption the pistol has.
19 You already have a pistol being used, so it really
20 doesn't add anything to it, it's already covered in my
21 opinion. But I'll look at it and certainly respond.

22 MR. RICHARDSON: And the only other request I'd
23 have, ask is that the case law is out there, and I
24 understand if you don't wish to put it in there, but
25 the illegal drugs may be the subject of an armed

1 robbery.

2 THE COURT: I guess it could be a subject if it's
3 property. But at this point all you -- where is the
4 proof other than a statement if somebody says there
5 were drugs that may or may not have been there. There
6 were about -- there was about at least a couple of
7 minutes more than that. A lot of people were there.
8 The fact that you didn't find it, where is the proof
9 that they took any drugs.

10 MR. RICHARDSON: Your Honor, I think that the
11 evidence is there. Of course I'll argue that --

12 THE COURT: What's the evidence that you have or
13 the substantial circumstantial evidence?

14 MR. RICHARDSON: Your Honor, Defendant in his
15 statement states that the drugs are laid out on the
16 console when the gun is pulled out. He indicates that
17 nothing else happens with the drugs, we have --

18 THE COURT: Well, we don't know what happens,
19 solicitor, that's what I'm saying.

20 MR. RICHARDSON: And they drive away, and it's
21 immediate.

22 THE COURT: We don't know what happened, that's
23 the problem. That's not substantial circumstantial
24 evidence, in my opinion, sir.

25 MR. RICHARDSON: Yes, sir.

1 THE COURT: But I haven't heard any motions yet.
2 So, I mean, they may choose to say that it is, and
3 therefore that's fine. So I don't know.

4 MR. RICHARDSON: Yes, Your Honor.

5 THE COURT: Okay.

6 MR. RICHARDSON: Court's indulgence.

7 THE COURT: Yes, sir.

8 (Discussion off the record.)

9 MR. McCOLLUM: Your Honor?

10 THE COURT: Um-hum.

11 MR. McCOLLUM: On the hand of one is the hand of
12 all, if a crime is committed by two or more people who
13 are acting together and committing a crime, the act of
14 one is the hand -- is the act of all. A person who
15 joins with another to accomplish an illegal purpose is
16 responsible for everything done by the other person
17 which occurs as a natural consequent of the act.

18 Now, could that apply to the marijuana? In other
19 words, could the jury infer from that -- and I know
20 there's some other language later on intent.

21 THE COURT: There is.

22 MR. McCOLLUM: But that's a small concern of mine.

23 THE COURT: Thank you, sir. Your concern will be
24 noted. I haven't given that charge but probably eight
25 years and probably 20 times, and I'm confident I'm not

1 correct all the time. But it hasn't been reversed and
2 it hasn't been changed, and those issues have been
3 appealed. So I'm not concerned because I say consider
4 the charge as a whole. The marijuana, what's the -- I
5 don't understand your -- maybe I'm missing something
6 there.

7 MR. McCOLLUM: Well, let's say that Marquis
8 McDonald and Black or Stephon McLain clearly joined
9 together to go and do a marijuana deal.

10 THE COURT: Well, that's not what's being proven
11 here. What's being proven -- because there's no charge
12 of marijuana, we're not convicting him of that. We're
13 convicting him of doing an illegal act. And there's no
14 question that if that be the case, then you have,
15 according to the -- according to your client's
16 testimony, you have the victim and the shooter engaged
17 in a deal, and him going to buy and him going to get
18 some marijuana.

19 What's the crime? The crime is not him buying it,
20 the crime is them selling it. So he's not engaged in
21 selling it. I appreciate your note, but I'm -- again,
22 the intent part, I think, protects that and covers it.
23 So it is the law, and I don't have a problem with it.

24 MR. McCOLLUM: Thank you.

25 THE COURT: I think it's a problem -- frankly, I

1 think it's a problem, there are some conflicts in that
2 law that I think there are aspects of it that are
3 contradictory. But it's the law as I read it.

4 MR. McCOLLUM: Okay.

5 THE COURT: Okay? Thank you, sir. But I'll look
6 at it closely, sir, be happy to.

7 MR. McCOLLUM: Thank you.

8 THE COURT: With that in mind about the marijuana
9 issue. Thank you, sir.

10 MR. RICHARDSON: Your Honor, we can proceed on.

11 THE COURT: You ready?

12 MR. RICHARDSON: Yes, sir, Your Honor.

13 THE COURT: Okay, good. But, solicitor, in all
14 fairness, I have that part highlighted on your
15 requested charge, and I'll -- at the end of it, it may
16 be added. I don't have any problem with the law.

17 MR. RICHARDSON: The felony murder or the illegal
18 drugs?

19 THE COURT: The felony murder situation.

20 MR. RICHARDSON: Certainly, Your Honor. Thank
21 you.

22 THE COURT: I don't think there's -- it's
23 property, whether it's legal or not, it's still
24 property.

25 MR. RICHARDSON: Yes, sir.

1 THE COURT: So that's the point, is it personal
2 property of somebody else, it was.

3 MR. RICHARDSON: Yes, sir, Your Honor.

4 THE COURT: The problem I have is that the
5 movement, the transportation, the seizing, possession
6 of it, there's nothing in there for that. Could be any
7 number of things why that happened. Could be one, but
8 there are lots of other things that could have happened
9 too.

10 MR. RICHARDSON: Yes, sir, Your Honor.

11 THE COURT: So that's the problem.

12 (WHEREUPON, the jury came into open court at
13 approximately 9:37 a.m.)

14 THE COURT: And I guess we get into the word
15 what's substantial.

16 MR. RICHARDSON: Yes, sir, Your Honor.

17 THE COURT: And we'll talk about that later.

18 MR. RICHARDSON: Certainly.

19 THE COURT: Good morning, how are you all. I hope
20 you had a good evening, and we are ready to continue in
21 the matter. First, let me again ask if each of you
22 have do solemnly swear that you have honored the
23 Court's instruction by not talking about this case with
24 anyone outside of the court, including any of your
25 fellow jurors, you've not read any newspaper accounts

1 or watched any television programs about it. If you
2 have honored it in every respect, please raise your
3 right hand.

4 (WHEREUPON, all jurors' right hands were raised.)

5 THE COURT: Thank you. Put them down, and thank
6 you again for that, ladies and gentlemen. And again,
7 by doing that, I'm not -- please don't take that as a
8 suggestion that I think you are. As I told you when we
9 qualified you, it's so important that these cases be
10 decided on what occurs here. And the significance of
11 it, I think, is worth on occasions when there is
12 coverage and people are interested, as a community is
13 from time to time.

14 It's important that we honor that in every
15 respect. So thank you for your patience with me in
16 asking that question every morning. And thank you; let
17 thank you now, because just from talking with everyone,
18 and of course this is subject to change, of course, but
19 I would anticipate that we will have -- you will have
20 an opportunity to begin your deliberations in this case
21 today. So this will be the last time I have to ask you
22 that question.

23 So but I want to thank you now for just the fact
24 of your attentiveness, that you have been punctual.
25 You have been patient in working a little longer on one

MEGAN LUKACS-DIRECT BY MR. RICHARDSON

1 day. But thank you very much for that, again, that's
2 why I believe so strongly in the system, and you each
3 are shining examples of this process. So thank you for
4 that. Solicitor, good morning, you may call your next
5 witness, sir.

6 MR. RICHARDSON: Good morning, Your Honor. Thank
7 you. The State would call special analyst Megan Lukacs
8 of the State Law Enforcement Division to the stand.

9 MEGAN LUKACS, after being duly sworn, testified as
10 follows:

11 CLERK OF COURT: Please be seated. State your
12 full name, spell your last name for the Court, please.

13 THE WITNESS: My name is Megan Lukacs. My last
14 name is L-U-K-A-C-S.

15 DIRECT EXAMINATION

16 BY MR. RICHARDSON:

17 Q Ms. Lukacs, would you tell us a little bit about
18 yourself, where are you employed how long and in what
19 capacity?

20 A Yes, sir. I am a analyst with the South Carolina
21 Law Enforcement Division, SLED. I have been employed
22 as an analyst with SLED for three years now, I work out
23 of the Fusion Center.

24 Q And could you educate us a little bit about what
25 the Fusion Center is.

MEGAN LUKACS-DIRECT BY MR. RICHARDSON

1 A The Fusion Center actually has multi-faceted
2 items, but where I work is the criminal analytical
3 team. We assist law enforcement agencies with research
4 that aids in criminal investigations.

5 Q Okay. And you've been doing this work three
6 years?

7 A Yes, sir.

8 Q Now, so the Fusion Center is basically the
9 intelligence or the computer control for SLED?

10 A Yes, sir.

11 Q Okay. And what type of training do you have in
12 this field?

13 A For mapping call records, I have -- I've completed
14 the call analysis training, Pen-Link advanced training
15 and the cell site intelligence training.

16 Q Okay. And your educational background other than
17 that?

18 A Yes, sir. I received a BA in criminal justice at
19 the -- at USC.

20 Q Okay. And in the course of your work at SLED at
21 the Fusion Center, are you familiar with a program
22 called Clear?

23 A Yes, sir.

24 Q What is Clear?

25 A Clear is a database that we use to assist local

MEGAN LUKACS-DIRECT BY MR. RICHARDSON

1 law enforcement with criminal investigations. It is an
2 item we can find, if we have a phone number or an
3 address, we can put the information in and it will give
4 us possible subscribers or owners of the cell phone
5 carrier or the cell company, people who might live at a
6 certain address.

7 Q Okay. And what you did in this case, you were
8 telling me about or telling us about your training in
9 mapping?

10 A Yes, sir.

11 Q Okay. Tell us a little bit about that training.

12 A Yes, sir. With mapping I am requested to map call
13 records for a specific date and timeframe. Basically I
14 use a program called Pen-Link, it's an analytical tool
15 we use to analyze call records, and also Microsoft
16 MapPoint which actually communicates with Pen-Link to
17 map the call records.

18 I would receive the call records from the
19 requesting officer with -- along with the cell towers
20 and information such on the call records. And I would
21 import them into Pen-Link, which then after importing
22 them is successful, I would tag the specific timeframe,
23 date and timeframe, that they are looking for. And
24 then Pen-Link would communicate with MapPoint to plot
25 the GPS coordinates that are on the call records onto a

MEGAN LUKACS-DIRECT BY MR. RICHARDSON

1 map.

2 Q Okay. And so you take data received from cell
3 phone companies, tower locations and whatnot, and you
4 just plot it on a map using Pen-Link and then Map?

5 A MapPoint.

6 Q MapPoint, okay. And after you receive the cell
7 phone data from the cell phone provider, AT&T,
8 Cingular, whoever --

9 A Yes, sir.

10 Q -- what's the first step you take?

11 A As soon as I receive it, I go ahead and open up
12 Pen-Link and import the cell records into Pen-Link.

13 Q And upon entering this data into Pen-Link, what
14 happens next?

15 A After it is imported successfully, then I tag --
16 go in and I highlight or tag the date and time
17 specified by the requesting officer.

18 Q So that goes into Pen-Link. And then how does
19 Pen-Link communicate with MapPoint?

20 A Pen-Link, well, because we already have both,
21 actually two different programs, but it basically hooks
22 up with each other. And when I go and I click map
23 specified times and dates, it will communicate with
24 MapPoint, and MapPoint opens up and it will plot the
25 GPS coordinates.

MEGAN LUKACS-DIRECT BY MR. RICHARDSON

1 Q Okay. So Pen-Link communicates with MapPoint, and
2 then diagrams -- MapPoint diagrams the map showing
3 locations of GPS coordinates?

4 A Of the cell towers, yes, sir.

5 Q Okay. The maps that are contained in MapPoint,
6 what types of maps are in there?

7 A It's nationwide, South Carolina, it's up-to-date
8 maps.

9 Q Okay. Upon completion of the mapping, using these
10 software systems and utilizing the data provided by
11 cell companies, what happens to this map?

12 A After it is mapped, I go back in and put in the
13 dates and times in little bubbles so for the cell
14 towers. And then it is checked for accuracy, and after
15 it is passed for accuracy, then it is sent to the
16 requesting officer.

17 Q Okay. So you print the maps out?

18 A Yes, sir. If that's what the officer requests.

19 Q Okay. And after they've been double checked,
20 that's when you give it to the officers?

21 A Yes, sir.

22 Q All right. In the present case, the murder of
23 Anthony Liddell, Jr., did you have the opportunity to
24 become involved in this investigation?

25 A Yes, sir.

MEGAN LUKACS-DIRECT BY MR. RICHARDSON

1 Q And how was that?

2 A I was requested to create a map of --

3 MR. McCOLLUM: Your Honor, I have a, I don't know
4 if it's a objection, but it's a clarification. I'm not
5 quite sure how this works, I don't know if she's
6 testifying as an expert, or is this something that any
7 of us can do?

8 THE COURT: Well, I don't know if it -- she hasn't
9 been asked or been qualified yet, so I'll allow the
10 question. Until that point, we assume that she's
11 testifying -- until it is offered, that any of her
12 testimony would have to be a 701 opinion, and she
13 certainly can't render a 701 opinion.

14 MR. McCOLLUM: Okay.

15 THE COURT: All right. Proceed.

16 MR. RICHARDSON: Thank you, Your Honor.

17 THE COURT: Continue.

18 Q Once again, you were saying you were requested to
19 assist in this investigation?

20 A Yes, sir. I was requested to create a map of
21 three cell phone records.

22 Q Okay. And when did that occur?

23 A That was April of 2013.

24 Q Okay. And the information you needed to do this
25 mapping, from whom did you receive it?

MEGAN LUKACS-DIRECT BY MR. RICHARDSON

1 A Agent Truss with the South Carolina Law
2 Enforcement Division.

3 Q And let me show you what's been previously entered
4 into evidence as State's No. 8. Do you recognize that
5 document?

6 A Yes, sir.

7 Q And what is State's No. 8?

8 A These are call records for cell phone number
9 (843) 862-1424.

10 Q Okay. And are these records provided to you by
11 Agent Truss?

12 A Yes, sir.

13 Q Now, after you were provided this, these records,
14 what if anything -- allow me to show you the next
15 report, also State's-9.

16 A Yes, sir.

17 Q And how do you recognize those?

18 A These are call records from AT&T for the phone
19 number (843) 283-5423.

20 Q Okay. And those are records provided by Agent
21 Truss?

22 A Yes, sir.

23 Q And finally, State's No. 25 and 26.

24 A Yes, sir, I recognize these.

25 Q Okay. And how do you recognize those?

MEGAN LUKACS-DIRECT BY MR. RICHARDSON

1 A These are the cell phone records for cell phone
2 (843) 331-9585.

3 Q Okay. And all these are the records provided to
4 you by Agent Truss with regard to this case?

5 A Yes, sir.

6 Q Now, upon receipt, and you received these in
7 April 2013?

8 A Yes, sir.

9 Q Upon receipt of these records, what if anything
10 did you do?

11 A Yes, sir. Since there's three cell phone records,
12 I took them one at a time and I imported them into
13 Pen-Link. I started with the first cell phone number,
14 I entered it into Pen-Link. And when it was
15 successfully uploaded, I took that, tagged the
16 requested date and timeframes and then proceeded to map
17 them.

18 Q Okay. And whenever you map them, you type the
19 date in there, and then it communicates as you said
20 before?

21 A Yes, sir.

22 Q Okay. And were you able to produce maps using
23 those records?

24 A Yes, sir.

25 Q And how was that accomplished?

MEGAN LUKACS-DIRECT BY MR. RICHARDSON

1 A It was accomplished by previously uploading these
2 cell phone records into Pen-Link and then tagging the
3 date and timeframes requested and producing a map.

4 Q Okay. After these maps were produced, what if
5 anything did you do?

6 A I checked them against the call records for
7 accuracy. I added in the date and times specified and
8 checked it again for accuracy, compared it to the call
9 records, and then sent it to the requesting officer.

10 Q Okay. Now, the maps you produced, did you include
11 all the calls that appear in those cell records?

12 A Not all the calls, just the specified date and
13 time.

14 Q Specified date and time, okay. And what time
15 range were you looking at?

16 A He requested February 26th, 2013, timeframe
17 between 6:30 p.m. and 8:30 p.m.

18 Q And you produced maps at that point. The original
19 maps you did. Did there come a time when you
20 reformatted those maps?

21 A Yes, sir.

22 Q And why was that?

23 A I -- when I was called upon to testify, I wanted
24 to produce a cleaner version for court.

25 Q Okay. So you wanted to produce a cleaner copy for

MEGAN LUKACS-DIRECT BY MR. RICHARDSON

1 court. What information did you use when you made
2 the --

3 A The same call records.

4 Q The same call records?

5 A Yes.

6 Q And when did you do these newer maps?

7 A These were in the last week or so.

8 Q Okay. So at the time when you did the original
9 maps, how many -- how long had you been on the job
10 doing this type of work?

11 A Since the last?

12 Q Whenever you did the first one.

13 A Okay. Well, I've been on the job for three years,
14 so probably two years, I guess, 2013.

15 Q Year and a half more experience?

16 A Yes. Yes, sir.

17 Q Okay. And then after you produced these cleaner
18 maps, what did you do?

19 A I actually sent them for peer review and we --
20 again, we compared, made sure that everything was
21 accurate, and then I sent it to the solicitor.

22 Q Okay. So you sent it to peer review first before
23 sending it to the solicitor?

24 A Yes, sir.

25 Q Okay.

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1 (WHEREUPON, State's Exhibit No. 38 was marked for
2 identification only.)

3 Q Okay. I show you State's No. 38. Do you
4 recognize State's No. 38?

5 A Yes, sir.

6 Q And what do you recognize that to be?

7 A This is the map for the call records for phone
8 number (843) 283-5423.

9 Q And is this a fair and accurate depiction of the
10 GPS coordinates and the times of those GPS coordinate
11 hits produced on a map?

12 A Yes, sir.

13 MR. RICHARDSON: Your Honor, at this time the
14 State would seek to --

15 Q That you got utilizing those records that you were
16 talking about?

17 A Yes, sir.

18 MR. RICHARDSON: Your Honor, at this time the
19 State would seek to introduce 38.

20 THE COURT: Any objection?

21 MR. McCOLLUM: I'm just for clarification, is this
22 coming in as expert testimony?

23 THE COURT: It's coming in, she prepared a
24 document based on some data. There's nothing more than
25 a spreadsheet really. Somebody puts data on a sheet.

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1 MR. McCOLLUM: Okay.

2 THE COURT: I mean, she doesn't have to be an
3 expert, you and I could do that.

4 MR. McCOLLUM: That's my thing, I've tried to do
5 it.

6 THE COURT: I'm just saying, if we know what the
7 towers are and these records, from what I understand
8 all of these records to be, is simply taking the data
9 and putting it on a -- putting it on a map. I mean,
10 I'm not trying to belittle what she does, but it
11 doesn't require an expert. This is simply something
12 she requires some training and experience, she's
13 testified to that.

14 So if it is an expert, it's similar to bloodhound
15 expert, it's not required to peer review. Somebody
16 checked her work, that wasn't peer review, they just
17 checked her work. But the objection is noted and
18 overruled.

19 MR. McCOLLUM: I was not necessarily objecting.

20 THE COURT: Well, then, gentlemen, one of the
21 things -- and ladies and gentlemen, we're having a
22 discussion that's typically is out of your presence,
23 and normally I just say give me the basis of your
24 objection and then we'll discuss it elsewhere. All of
25 the comments that you've heard between us you are to

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1 ignore. This is not for you, it's for our purposes.

2 Please understand that.

3 No objection. State's-38 is admitted without
4 objection.

5 (WHEREUPON, State's Exhibit No. 38 was admitted in
6 evidence.)

7 THE COURT: We can discuss it further if need be
8 on the break.

9 MR. McCOLLUM: Thank you.

10 THE COURT: Thank you.

11 (WHEREUPON, State's Exhibit Nos. 39 and 40 were
12 marked for identification only.)

13 Q Before we start discussing State's-38, if I can
14 get you to look at State's-39 and, I'm guessing, 40.
15 Take a look at those, please.

16 A Yes, sir, I recognize these.

17 Q And what do you recognize those to be?

18 A Exhibit 39 is the call records for cell phone
19 (843) 331-9585. And 40 is the call records map for
20 cell phone (843) 862-1424.

21 Q Okay.

22 MR. RICHARDSON: Your Honor, likewise the State
23 would seek to introduce State's-39 and 40 into
24 evidence.

25 THE COURT: All right. 39 and 40 are admitted

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1 without objection?

2 MR. McCOLLUM: Yes, sir, Your Honor.

3 THE COURT: Very well, okay.

4 (WHEREUPON, State's Exhibit Nos. 39 and 40 were
5 admitted in evidence.)

6 MR. RICHARDSON: Your Honor, if I could have
7 agent -- or Analyst Lukacs come down from the stand.

8 THE COURT: Sure.

9 Q And Agent Lukacs, if you'll step down on that end
10 actually. Now, Agent Lukacs, you took those phone
11 records, and this pertains to 283-5423, this is State's
12 No. 38.

13 A Yes, sir.

14 Q Now, from this map can we tell where that phone
15 was located at around 6:30 or 18:30 hours?

16 A Yes, sir. Around 6:30 according to the records,
17 the cell phone was hitting off the these two towers
18 (indicating), which is close to Homewood.

19 Q Homewood area of Horry County, okay. How about
20 6:45, around there?

21 A Around 6:45. According to the records, around
22 6:44 -- or 6:49 the cell phone was hitting off of this
23 tower over here (indicating), which would be Conway.

24 Q In the Conway section?

25 A Yes, sir.

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1 Q Now, as we move on down, downtown Conway, let's go
2 down to around 7:12, 7:20, whatnot.

3 A Around 7:12, 7:20, the cell phone, according to
4 the records, it was hitting off of this tower down here
5 close to the incident location (indicating).

6 Q Okay. And 7:12, 7 o'clock, it's all down around
7 the incident location?

8 A Yeah, yes, sir. It's the one for that tower.

9 Q And is the incident location located on the map?

10 A Yes, sir.

11 Q Where is that?

12 A It's right here (indicating).

13 Q Okay. Right where it says, incident location?

14 A Yes, sir.

15 Q All right. Now, right around the time of the
16 incident that cell phone is bouncing out around CCU.
17 How about at 7:20, 7:30, 7:35?

18 A It's still hitting off the same tower, around that
19 area.

20 Q Okay. So after the hour of 7:05 p.m., does that
21 cell phone ever bounce off any other towers towards
22 Conway?

23 A According to the record, anytime after 7:05 it
24 stays down here (indicating), it does not come back up.

25 Q Okay. Let's move on to State's-39. Got that one

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1 right side up. Likewise, around the 6:30 hour, and
2 this is State's-39 pertaining to 331-9585, where is
3 that -- where is that song -- or where is that phone
4 bouncing off of around 6:30 hour?

5 A Around six -- around 6:32, according to the
6 records, the cell phone is hitting off of this tower up
7 here, which is close to Homewood again.

8 Q Near the Homewood section. How about as we move
9 towards 6:45?

10 A It moves down. The cell phone is hitting off of
11 this tower around Conway around 6:44, according to the
12 records.

13 Q Okay. So it's traveling or it's hitting off these
14 towers?

15 A Yes, sir.

16 Q In Conway. And about 7 o'clock or 19:00 hours?

17 A Around 7 o'clock. According to the records,
18 around 7:03 it actually comes down here and hits off of
19 this tower, which is in, appears to be, close proximity
20 to the incident location.

21 Q Okay. So close to the -- and that's Jackson Bluff
22 Road where the red dot is?

23 A Yes, sir.

24 Q Now, after -- after that, after -- when is the
25 next hit we have on that phone?

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1 A That one was 7:03. The next one would be around
2 7:28, 7:29, which it comes back up and hits off of this
3 tower up here (indicating).

4 Q Okay, so back away, okay. And after -- how about
5 7:30?

6 A Around 7:30, according to the records, it actually
7 is hitting off of multiple towers, which is in this
8 area up here (indicating), around 7:31, 7:33.

9 Q Okay. And that's back up around Conway?

10 A Yes, sir.

11 Q And how about as we move a little bit later, let's
12 go around 7:45, 8 o'clock and after.

13 A Yes, sir. Around 7:45, according to the records,
14 that cell phone comes down here at near Jamestown and
15 hits off of this (indicating).

16 Q Okay. And those are where the phone's hitting
17 after 7:30?

18 A Yes, sir.

19 Q Okay. Finally, State's No. 40. And looking at
20 State's No. 40, that pertains to (843) 862-1424;
21 correct?

22 A Yes, sir.

23 Q Now, can you tell us where that phone was located
24 around 6:30 or so?

25 A Yes, sir, according to the records, around 6:33

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1 the cell phone is actually hitting off of this tower.
2 right here (indicating), which is close to the incident
3 location.

4 Q How about as we go towards 6:45?

5 A 6:45, it actually -- it comes over here around
6 6:49 and hits off of this tower which is still close to
7 the incident location (indicating).

8 Q Okay. And as we move towards 7 o'clock?

9 A It stays right in this area with these three cell
10 towers (indicating).

11 Q At 7:12 where is it?

12 A Around 7:12 it is hitting off of this cell tower
13 (indicating).

14 Q And that would be 19:12; correct?

15 A Yes, sir.

16 Q How about 7:16?

17 A 7:16 it comes over here and hits off of this tower
18 (indicating), which is in close proximity to the
19 incident location.

20 Q Now, after that, after 7:16, this 862-1424, 7:16
21 is bouncing off near the incident location. Where do
22 we start seeing hits after that, where is the next
23 place we start seeing hits off of this phone?

24 A The next hit doesn't come till 7:51 when it
25 comes -- the cell phone records indicate that the cell

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1 phone is hitting off this tower, it's hitting near
2 Jamestown.

3 Q So it's hitting off the Jamestown tower?

4 A Yes, sir.

5 Q And is that the last tower it's hitting off of?

6 A Yes, sir. From 7:51 to 8:29.

7 Q So 8:29 to 8:30?

8 A Yes, sir.

9 Q Okay. Now, from your view, the 862 number is
10 bouncing off those Jamestown towers. Where is that 331
11 number bouncing off of?

12 A It is actually bouncing off of the -- based on the
13 GPS coordinates that I researched, it seems to be on
14 the same tower.

15 Q Seems to be on the same tower. And the 333 or 331
16 number as we look at State's-39 and State's-38, around
17 the 6:30 hour, where are those phones bouncing off of?

18 A Both of the cell phone -- cell phones are bouncing
19 off of cell phone towers that are both close to
20 Homeland.

21 Q Close to Homeland, okay. You can take your seat
22 again. Thank you. Now, Analyst Lukacs, can you tell
23 us who had the phones in their possession when they
24 were bouncing off of those towers?

25 A No, sir.

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1 Q And can you say that those phones were right at
2 those towers?

3 A No, sir.

4 Q All you can say is that that's the towers they
5 were hitting on?

6 A Yes, sir.

7 Q Can you tell us specifically where the phones were
8 located when the calls hit off those towers?

9 A No, sir.

10 Q And all we can say based on the information you
11 have is these towers are being used by these phones at
12 a particular time?

13 A Yes, sir.

14 MR. RICHARDSON: Thank you, Analyst Lukacs, if
15 you'll answer any questions Mr. McCollum may have.

16 THE COURT: You may cross-examine.

17 MR. MCCOLLUM: No questions.

18 THE COURT: Thank you, sir. You may come down.

19 Do you wish this witness to be excused?

20 MR. RICHARDSON: I do, Your Honor.

21 THE COURT: Any objection?

22 MR. MCCOLLUM: No objection.

23 THE COURT: Very well. You are free to leave,
24 thank you.

25 (Witness excused.)

1 THE COURT: Call your next witness, please.

2 MR. RICHARDSON: Your Honor, the State rests.

3 THE COURT: Okay. There are some matters of law
4 now that I must take up out of your presence, ladies
5 and gentlemen. I'm going to need for you to go to your
6 jury room, but do not begin your deliberations, don't
7 discuss the case. We'll be with you as quickly as we
8 can, thank you.

9 (WHEREUPON, the jury exited the courtroom at
10 10:04 a.m.)

11 THE COURT: All right. Any matters from the State
12 at this point, solicitor?

13 MR. RICHARDSON: No, sir, Your Honor.

14 THE COURT: Any matters from the Defendant?

15 MR. McCOLLUM: Your Honor, at this time on behalf
16 of the Defendant, I would renew any objections
17 previously made --

18 THE COURT: Okay.

19 MR. McCOLLUM: -- any motions made before the
20 Court. Also at this time the Defendant stands accused
21 of the charge of murder and armed robbery, and there
22 are two indictments. And I would move, ask Your Honor
23 to direct a verdict of not guilty as to the murder
24 charge and also direct a verdict of not guilty as to
25 armed robbery.

1 THE COURT: Okay. Well, obviously there's
2 certainly, I think, substantial circumstantial evidence
3 concerning, when you consider the statement of the
4 accused as it relates to indictment -- so that it's
5 clear because obviously the statement of the accused
6 can't create the corpus of the crime. There are tons
7 of cases on that issue. But if it's corroborated, then
8 certainly it becomes germane.

9 And in this case we have testimony which puts him
10 at the -- we don't know precisely, but clearly puts him
11 at the scene of the crime. His statement obviously
12 confirms that, but so do the -- so does the evidence
13 with respect to the cell phones, with respect to the
14 video putting him with the person which he says came up
15 with the victim, which is a direct contradiction. And
16 the jury certainly can consider that. So when you
17 consider all of that evidence as to the crime of murder
18 and the hand of one is the hand of all, I most
19 respectfully deny that.

20 Solicitor, where do you get the property without
21 the statement?

22 MR. RICHARDSON: Yes, sir, Your Honor.

23 THE COURT: And that's the problem we have,
24 because you can't use his statement to create the
25 corpus.

1 MR. RICHARDSON: Certainly, Your Honor.

2 THE COURT: You don't have a crime without the
3 statement.

4 MR. RICHARDSON: I understand that, Your Honor.
5 The statement combined with the cell phone text
6 messages before that they had set this meeting up for
7 the purpose of a drug transaction, that that was what
8 they were -- they intended to do, beyond just the
9 statement that he gave to the police. It was text
10 messages, not just the defendant's statement, but the
11 statements that the victim made concerning the drug
12 transaction and the cell records.

13 THE COURT: But the statements talk about, I want
14 to do a drug deal.

15 MR. RICHARDSON: Yes, sir.

16 THE COURT: We don't have any evidence of a drug
17 deal without the statement. That's the problem.

18 MR. RICHARDSON: Yes, sir.

19 THE COURT: And if we don't have the drugs without
20 the statement, we can't have a robbery.

21 MR. RICHARDSON: I understand with respect to the
22 drugs, Your Honor. We do have the defendant's cell
23 phone -- or defendant's, the victim's cell phone being
24 taken away, I believe that there is substantial
25 circumstantial evidence suggesting --

1 THE COURT: Cell phone taken away?

2 MR. RICHARDSON: Sir?

3 THE COURT: Where is the evidence that it was
4 taken away?

5 MR. RICHARDSON: The towers that it's hitting off
6 of, that was the information we just had, Your Honor,
7 that it does leave the scene. It's found at the scene,
8 is it not the same towers as the codefendant's?

9 THE COURT: Yes.

10 MR. RICHARDSON: And it travels there pretty
11 quickly.

12 THE COURT: What's your response to that as to
13 whether or not that's the property of the deceased and
14 it's being transported by the movement. And that would
15 at least be corroborated by the fact that he's
16 technically in the vehicle. And we've still got the
17 plan, the plan, there's no question about that. And
18 he's got to prove hand of one is the hand of all, but
19 in the light most favorable to the State. The cell
20 phone probably does create the property, so I
21 respectfully deny that.

22 Not with the drugs, I mean, I think you're right
23 on the drug issue. But we've got other property other
24 than the drugs, so my focus primarily had been on the
25 drugs. But clearly the cell phone is moving, and

1 there's testimony of it moving. And there's testimony
2 obviously that he had the cell phone because he's using
3 it. So there's substantial testimony to show that the
4 cell phone was present and it belonged to the victim.
5 And that's been established by the evidence.

6 So clearly that would be transporting personal
7 property with intent to deprive him of it permanently.
8 So I think armed robbery. And obviously if the jury
9 believes that the pistol was presented, disbelieves his
10 testimony that the shooter from his vantage point came
11 with the victim, then there's substantial
12 circumstantial evidence of an armed robbery. So thank
13 you, I respectfully deny it.

14 MR. McCOLLUM: All right.

15 THE COURT: Now, we talked yesterday. Do you plan
16 to call any additional witnesses?

17 MR. McCOLLUM: Your Honor, at this time I plan to
18 call the Defendant but probably no other witnesses.

19 THE COURT: All right.

20 MR. McCOLLUM: I thought I was going to call one,
21 but we've had a change in circumstances.

22 THE COURT: That's perfectly all right. So you
23 have -- but you've talked with the Defendant at length
24 about his right to testify and not to testify?

25 MR. McCOLLUM: Yes. And I've explained to him --

1 he's heavily relying on me -- but I've explained to him
2 that ultimately whatever I advise him, it has to be his
3 decision.

4 THE COURT: Sure.

5 MR. McCOLLUM: And we've talked about his
6 testimony and talked about him testifying.

7 THE COURT: All right. Insofar as that's
8 concerned, you've also talked to him about his
9 conviction?

10 MR. McCOLLUM: Yes, sir.

11 THE COURT: And that it is possibly subject to
12 cross-examination?

13 MR. McCOLLUM: Yes, sir. It's my understanding --
14 and he's got a couple charges on there -- it's my
15 understanding that the only conviction is for assault
16 and battery.

17 THE COURT: High and aggravated nature.

18 MR. McCOLLUM: Yeah. Which, I think, was in 2010.

19 THE COURT: Yeah.

20 MR. McCOLLUM: I think he was 16, or he says he
21 was 16 at the time. I haven't yet confirmed that. You
22 know, the question and obviously is whether or not
23 that's admissible to impeach him. The concern I have
24 is it seems like that what is admissible to impeach
25 seems to be moving away from the way it was originally

1 told to me and that clearly it carries more than a
2 year.

3 THE COURT: Right.

4 MR. McCOLLUM: Clearly it's a felony. But it
5 does -- there is some concern that it's so closely
6 related to this charge that I think that the
7 prejudicial value -- or effect, excuse me, could
8 outweigh it. Because it's clearly the reason you bring
9 it in is to show a dishonesty or deceit. If it didn't
10 carry more than a year, I don't think that it would fit
11 into that.

12 THE COURT: No question, no question.

13 MR. McCOLLUM: Crime of moral turpitude.

14 THE COURT: Well, if it's a crime of honesty, it
15 doesn't matter what it carried.

16 MR. McCOLLUM: Exactly, yes, sir.

17 THE COURT: But there's no question that it comes
18 under the really the first one, the (a)(1) and not
19 (a)(2) of 609, which requires obviously under (a)(1)
20 requires me to conduct a 403 analysis as well as to
21 does the probative value -- does the probative value
22 outweigh the prejudice. And there's certainly -- I
23 assume, solicitor, you intend to ask him about that if
24 you cross-examine?

25 MR. RICHARDSON: Yes, Your Honor.

1 THE COURT: Or excuse me, if he takes the stand.

2 MR. RICHARDSON: Yes, sir, Your Honor. And going
3 by memory, I thought he was 18 at the time of the
4 conviction.

5 THE COURT: Well, I don't -- 16, 18, 22, it
6 doesn't make any difference to me.

7 MR. RICHARDSON: Yes, sir. I would inquire on
8 that.

9 THE COURT: All right, that's fine. There's
10 certainly, and we have a number of cases that have
11 dealt with this part of it, and I concur and agree with
12 you in full. First of all, it's 403 analysis,
13 obviously his credibility is a critical aspect of this.
14 So there's no question it has probative value as to
15 that aspect.

16 So from the standpoint of it, and the rule
17 recognizes the right to bring it out for the purposes
18 of impeachment, solely for that purpose. As I would
19 instruct, it really almost negates it, it said -- I
20 said, it's a factor to be considered with all other
21 factors. It doesn't mean that you can't believe it,
22 it's just one of those factors that you may consider.

23 And in that regard, I would agree with you,
24 assault and battery of a high and aggravated nature is
25 very closely connected with the crime of murder. So I

1 would allow the solicitor to ask him a question, have
2 you been convicted of a felony, and were you convicted
3 of a felony in whatever the year is. And that's really
4 the extent that he can ask it. He can't go into
5 details, he can't do anything else.

6 I think that balances the concern with respect to
7 inferences to be drawn from the crime itself, and I
8 think it protects him from undue prejudice on that
9 respect. But I think the State's entitled to ask him
10 about it for purposes of challenging his credibility.
11 So I will allow it with that restriction.

12 MR. RICHARDSON: Yes, sir, Your Honor.

13 THE COURT: And certainly no inquiry as to what it
14 was or what, anything about it so that we can't
15 interject that aspect of it. So having made that
16 ruling, do you need to talk with your client any
17 further if you discuss that with him as well?

18 MR. McCOLLUM: Yes, I do. I would like a few
19 moments here. And also, Your Honor, of course --

20 THE COURT: Well, let me do this before you do
21 that, so I can have my discussion, then we can come
22 back together and I can just simply close it.

23 Mr. McDonald, you may remain seated if you choose
24 to, that's fine. You have -- you have heard me already
25 tell this jury that they needn't look to you to prove

1 or disprove anything, because that's not the law of
2 this country. And in fact, the only party that has a
3 burden of proof is the State of South Carolina in this
4 action. You don't have to prove anything, you don't
5 have to disprove anything, you don't have to present
6 any evidence, you don't have to do anything at all.

7 But every person accused has the right to testify
8 if they choose to. And obviously if you do, then you
9 are subject to cross-examination. And you talked with
10 your lawyer about this?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: He's explained these rights to you,
13 sir?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And you have had sufficient time to
16 reflect on your decision?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: If you do testify, obviously the same
19 thing will happen that you've observed happen
20 throughout this trial. Your lawyer will ask you
21 questions, and then the State will have a chance to
22 also ask you some questions.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And one of those, of course, is what
25 we've just talked about, your prior conviction. The

1 right that you also have is not to testify, and I would
2 again instruct the jury that they can't even consider
3 that. They can't even talk about that; you understand
4 that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Having given some thought to it, at
7 this point your lawyer has indicated you have chosen to
8 testify; is that correct?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And that's your choice?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And no one's threatened you in any way
13 or promised you anything to get you to make this
14 decision?

15 THE DEFENDANT: No, sir.

16 THE COURT: And you've had a chance to talk with
17 anyone you wanted to about this decision?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Are you under the influence of any
20 alcohol or any medication here today?

21 THE DEFENDANT: No, sir.

22 THE COURT: Do you know of anything that's
23 affecting your ability to think and reason?

24 THE DEFENDANT: No, sir.

25 THE COURT: And you've had sufficient time for

1 yourself to reflect on the decision?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Okay. I'm going to let you talk with
4 your lawyer further, having heard my ruling. And then
5 we'll revisit this in just a few minutes. Thank you
6 very much. If you want to talk with him, you can talk
7 with him in the courtroom or out of the courtroom.

8 MR. McCOLLUM: I would like to talk to him in
9 lock-up.

10 THE COURT: That's fine, okay.

11 MR. McCOLLUM: Your Honor, I just want to -- given
12 your earlier ruling that -- and I would ask him, is it,
13 you know, Marquis, is it true you've been convicted of
14 a felony.

15 THE COURT: That's fine.

16 MR. McCOLLUM: And then he says yes. And then
17 clearly I want say a couple other things like, well,
18 did you receive probation and you successfully complete
19 probation.

20 THE COURT: Can't do that. That's not relevant.

21 MR. McCOLLUM: I know. It's just I can't be
22 satisfied on this, Your Honor.

23 THE COURT: Well, I understand that. I'll be
24 happy to -- let me just say this, I'm all for creating
25 law, and it sounds fundamentally fair. But it seems to

1 me to be fundamentally unfair if I allow you to talk
2 about probation and how old you were and not allow the
3 State to talk about the nature of the crime.

4 MR. McCOLLUM: I know. That's why I brought that
5 up.

6 THE COURT: Because you're throwing on one hand,
7 I'm a good person and I abide by the law, but you're
8 negating for the jury to consider that, yeah, but at
9 one time I had a lack of control and I impulsively
10 reacted. And that -- that's very germane to what we're
11 talking about here.

12 So I think that would be -- we talked about doing
13 a 403 analysis, I think that would be grossly unfair.
14 So I'm going to rule that that would not be proper,
15 because I don't think it's proper for him to do that
16 and then the State -- now, if you want to, that's fine.
17 Because it becomes fair game because now he's injected
18 into the -- and that, I think, is set up in our
19 character rule.

20 They can't bring it in unless he puts it in to say
21 I didn't do it. And then that opens the door for the
22 State to say, but you've done this and this and this.
23 So you might be able to do it, but I think it opens
24 Pandora's box for you. But that's up to you.

25 MR. McCOLLUM: I guess I knew the answer, Your

1 Honor.

2 THE COURT: I figured you might know the answer.

3 MR. McCOLLUM: Thank you.

4 THE COURT: You bet, sure, no problem. All right.
5 Okay. We'll be at ease, then, for a few moments.

6 MR. RICHARDSON: Thank you, Your Honor.

7 THE COURT: Thank you.

8 (WHEREUPON, a brief recess was taken at
9 10:39 a.m.)

10 THE COURT: All right. Is the State ready to
11 proceed?

12 MR. RICHARDSON: The State's ready, Your Honor.

13 THE COURT: Defendant's ready to proceed?

14 MR. McCOLLUM: Yes, Your Honor.

15 THE COURT: All right, Mr. McDonald, we took a
16 break. You and I have had a conversation about your
17 right to testify, and thank you for standing, but you
18 don't have to stand, but I appreciate that very, very
19 much. Just for your information and the reason I say
20 that, I learned it from one of the judges that I sat
21 with one of my first weeks as a judge, and he's now a
22 Supreme Court justice. And it finally made sense to
23 me.

24 I was reading a transcript that he was trying a
25 case, it was a criminal case. And just as you are

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**STATE OF SOUTH CAROLINA
COURT OF APPEALS**

**Appeal from Horry County
Markley Dennis, Circuit Court Judge**

THE STATE,

RESPONDENT,

V.

MARQUIS MCDONALD,

APPELLANT

APPELLATE CASE NO. 2014-002181

RECORD ON APPEAL

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1 doing, the person stood and the lawyer asked him to
2 stand. And his response was, sir, you don't have to
3 stand for me, I appreciate you doing it, but you don't
4 have. Your lawyer has to because he's an officer of
5 the Court, and that's the reason we have to stand.
6 It's part of the formality that we have as a part of
7 this process. But thank you, sir, for standing, I
8 appreciate it. But if you want to be seated, you may
9 be seated.

10 THE WITNESS: Thank you.

11 THE COURT: You have talked with your lawyer about
12 your right to testify further after our discussion and
13 my discussion with him about his objection concern
14 about the conviction; is that correct?

15 THE WITNESS: Yes, sir.

16 THE COURT: He has advised me that it is still
17 your desire to testify.

18 THE WITNESS: Yes, sir.

19 THE COURT: And I will assume that when in just a
20 moment when we bring the jury out, I'm going to
21 reiterate to them, remember, ladies and gentlemen, what
22 I told you when we started. We now are at the point
23 where the Defendant, while he doesn't have to prove or
24 disapprove anything, they don't even have to present
25 any evidence, but they still have the right to present

1 additional testimony if they choose.

2 . . Then I'm going to turn to your lawyer and I'm
3 going to ask him, Mr. McCollum, does the Defendant wish
4 to present any additional testimony for the jury's
5 consideration. At that point he's going to call you.
6 At that point it's final, okay. Well, it's final once
7 you take -- raise your hand and you start testifying.

8 THE WITNESS: Yes, sir.

9 THE COURT: At any point between that when you
10 raise your hand and you start testifying you change
11 your mind, you just let your attorney know. I'll
12 excuse the jury, and we'll return and have further
13 discussion.

14 THE WITNESS: Okay.

15 THE COURT: If I don't hear anything from you,
16 though, I'm going to assume that you stand by your
17 decision and you're comfortable with that decision.

18 THE WITNESS: Yes, sir.

19 THE COURT: Is that fair?

20 THE WITNESS: Yes, sir.

21 THE COURT: Thank you so much. All right, let's
22 bring in our jury, please.

23 (WHEREUPON, the jury came into open court at
24 approximately 10:43 a.m.).

25 THE COURT: Thank you very much, ladies and

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 gentlemen. When we took our recess the State had
2 concluded its evidentiary portion. As you recall,
3 while the Defendant in this case has nothing to prove
4 or disprove, as I told you, the only burden of proof,
5 the only party with a burden of proof is the State, the
6 Defendant still has a right to present any additional
7 testimony for your consideration that he chooses to.

8 So, now, any additional testimony that the
9 Defendant wishes to present at this point?

10 MR. McCOLLUM: Yes, Your Honor.

11 THE COURT: Very well. You may call your first
12 witness.

13 MR. McCOLLUM: All right. Your Honor, at this
14 time the defense calls Marquis McDonald.

15 THE COURT: Thank you, sir.

16 MARQUIS McDONALD, after being duly sworn,
17 testified as follows:

18 CLERK OF COURT: Please be seated. State your
19 full name, spell your last name for the Court, please.

20 THE WITNESS: Marquis McDonald, M-C-D-O-N-A-L-D.

21 DIRECT EXAMINATION

22 BY MR. McCOLLUM:

23 Q All right. Can you move that microphone just a
24 little bit closer.

25 A (Complied.)

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

- 1 Q All right. I don't want you to have to lean
2 forward when you talk, but I want us to be able to hear
3 you.
- 4 A Okay.
- 5 Q You kind of have a soft voice, so all right. Just
6 state your name again.
- 7 A Marquis McDonald.
- 8 Q Okay, that's better. How are you doing today,
9 Mr. McDonald?
- 10 A Fine.
- 11 Q All right. Are you nervous?
- 12 A Yes.
- 13 Q Now, where are you from originally, where did you
14 grow up?
- 15 A Conway, South Carolina.
- 16 Q All right. Did you go to Conway High School?
- 17 A Yes, sir.
- 18 Q Okay. Did you finish?
- 19 A Yes, sir.
- 20 Q And does your family live here?
- 21 A Yes, sir.
- 22 Q And I think they were, your mother and your
23 grandmother, some people here with us this week; right?
- 24 A Yes, sir.
- 25 Q All right. Now, in this particular case,

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 obviously you've been charged with murder and armed
2 robbery; right?

3 A Yes, sir.

4 Q And do you know somebody who has been referred to
5 as Black?

6 A Yes, sir.

7 Q And how do you know Black; in other words, is he a
8 distant cousin or something of yours?

9 A Yes, sir.

10 Q And explain how he's related to you.

11 A Well, his mother and my mother is first cousins.

12 Q Okay. On this particular evening, February the
13 26th -- well, before I go any further, let me just ask
14 you this. Do you have one prior felony conviction?

15 A Yes, sir.

16 Q You do?

17 A Yes, sir.

18 Q Okay. Now, on this particular evening, did you go
19 to the Sunmart, I can't remember the exact name, the
20 Sun Store or something like that?

21 A Yes, sir.

22 Q And did you go there with Black?

23 A Yes, sir.

24 Q Okay. At the time that you gave your statement,
25 did you deny doing that?

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

- 1 A Yes, sir.
- 2 Q And why was that?
- 3 A Because I was scared.
- 4 Q Okay. And at the time you gave your statement to
- 5 the police, you said that during the incident that you
- 6 had physically punched Black out of the passenger seat
- 7 of the car; right?
- 8 A Yes, sir.
- 9 Q Is that true?
- 10 A No, sir.
- 11 Q You said that it wasn't true; right?
- 12 A Yes, sir.
- 13 Q Okay. And do you know why you did that?
- 14 A Just scared, didn't know what to do.
- 15 Q All right. You also stated in your statement that
- 16 when you arrived at Coastal Carolina University, that
- 17 you arrived there without Black?
- 18 A Yes, sir.
- 19 Q Okay. Is that true?
- 20 A No, sir.
- 21 Q So did Black arrive there with you?
- 22 A Yes, sir.
- 23 Q Okay. Now, did you know Anthony Liddell?
- 24 A Yes, sir.
- 25 Q And what name did you know him by, or what did you

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 call him?

2 A Ant.

3 Q Ant?

4 A Um-hum.

5 Q Is that like A-N-T short for Anthony?

6 A Yes, sir.

7 Q And how long did you know Ant?

8 A Two years.

9 Q Two years?

10 A Yes, sir.

11 Q Okay. And had you bought marijuana from him on
12 previous occasions?

13 A Yes, sir.

14 Q And were you going there on February 26th to buy
15 marijuana from him?

16 A Yes, sir.

17 Q And tell me about why you met him, where you met
18 him.

19 A Because that's the -- that's the location we
20 usually meet.

21 Q And you've been sitting here in the trial, and
22 obviously you were there. When you arrived there, were
23 you driving the Acura?

24 A Yes, sir.

25 Q And who's -- who was that car registered to?

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

- 1 A My Uncle Doug.
- 2 Q Your Uncle Doug?
- 3 A Um-hum.
- 4 Q Is that a car that he let you use?
- 5 A Yes, sir.
- 6 Q When you drove into the apartment complex or the
7 student housing complex, what route did you drive --
8 did you use to come in there?
- 9 A I came off of 544 and turned by the store and went
10 straight and made a right into the complex, and I
11 parked.
- 12 Q When you parked, did you back the car in?
- 13 A No, sir.
- 14 Q Did you pull it into the parking space?
- 15 A Yes, sir.
- 16 Q And which direction was your car pointed, was it
17 pointed toward the residential building, or was it
18 pointed toward the tree line?
- 19 A The tree line.
- 20 Q And when you pulled in there, was Black in the car
21 with you?
- 22 A Yes, sir.
- 23 Q Was anybody else in the car when you drove up?
- 24 A No, sir.
- 25 Q At some point -- and do you remember if you left

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 the car running or not?

2 A No, sir.

3 Q No, you didn't leave it running, or no, you don't
4 remember?

5 A No, I didn't leave it running.

6 Q Okay. And did you have your phone with you?

7 A Yes, sir.

8 Q And as you were sitting in the car, were you
9 sitting in the driver's seat?

10 A Yes, sir.

11 Q And where was Black sitting?

12 A In the passenger.

13 Q And as you were sitting there, at some point did
14 Ant or Mr. Liddell, did he get into your car?

15 A Yes, sir.

16 Q And which part of the car did he get into?

17 A The back seat.

18 Q And once he got in the back seat, what did -- what
19 was the purpose for him being there?

20 A To sell me the weed, the marijuana.

21 Q All right. And was the -- was there some
22 discussion about the quality of the marijuana?

23 A Yes, sir.

24 Q And from that discussion did you think that Black
25 was somehow dissatisfied with the quality of the

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 marijuana?

2 MR. RICHARDSON: Your Honor, I am going to object
3 to the leading questions.

4 THE COURT: Sustained.

5 MR. McCOLLUM: All right.

6 Q In terms of you're there -- let me just say it
7 this way. Just briefly tell me what happened starting
8 with when Ant got in the car.

9 A Well, he got in the car, we shook hands and we
10 started talking. He handed me the weed and I asked
11 Black for his -- to use his scale, and he said, okay.
12 So I put the scale on the middle console, and I put the
13 weed, was weighing the weed. He was like, well, yeah,
14 this is some good stuff.

15 So I said, okay, well, you know, it looked kind of
16 strange, usually the good weed will be in balls. So he
17 said, no, it smoke real good, I sell it to my friends
18 up here for like \$30 a gram. So I said, okay. And
19 then Black was like, well, you selling it 35 -- \$30 a
20 gram, that's kind of high. He was like, no, that's how
21 good it is.

22 MR. RICHARDSON: Your Honor, I'm going to object
23 to any hearsay that he's testifying to, about what
24 Black said or what Anthony said.

25 THE COURT: I'll sustain the objection if that's

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

- 1 what you want to do. Sustain the objection.
- 2 Q At some point, did any kind of argument occur?
- 3 A Yes, sir.
- 4 Q And who was arguing?
- 5 A Black and Ant.
- 6 Q Black and what was the other?
- 7 A Anthony.
- 8 Q And were you arguing?
- 9 A No, sir.
- 10 Q Okay. And as you sat there, what were they
- 11 arguing about?
- 12 A It was from -- it was like he was arguing about
- 13 the weed, about how he was coming off and how Anthony
- 14 was coming off to Black about the weed.
- 15 Q Did Black appear to think that he was being ripped
- 16 off or cheated or something?
- 17 A No.
- 18 Q Okay. How far did the argument go between Ant, or
- 19 Anthony, and Black?
- 20 A It went very far. It escalated out of hand for no
- 21 reason.
- 22 Q All right. Did Black become mad or angry?
- 23 A Yes.
- 24 Q And without saying what the parties said, what was
- 25 Black mad about?

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 A Because he felt like he was -- he felt like
2 Anthony was trying to act hard or act like something he
3 wasn't, because he was selling the weed at a high
4 price.

5 Q Now, when you say that Anthony was trying to act
6 like he was hard, what does that mean?

7 A It just -- he's very confident in his weed, which
8 everyone should be, well, if you going to purchase or
9 sell marijuana.

10 Q And did Black -- was Black in any way challenged
11 by Anthony's attitude or appearing hard or confident or
12 whatever he was appearing?

13 A Yes.

14 Q And how did Black take that, did he -- how did he
15 react, how did he take being offended?

16 A He got mad, and he was just trying to prove his
17 ego. So as he tried to prove his ego, he was -- he
18 just thinking that he's a small schoolboy, and he
19 trying to act tough, like a tough guy. So he pulled a
20 gun out just to show him like I can just take your weed
21 and you not do nothing about it.

22 So when he pulled his gun out to try to just be
23 like, well, you need to get up out the car, I'm taking
24 this, I can take this. And Ant was like, you ain't
25 taking nothing, so --

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 Q All right. And did you know that Black was going
2 to do that?

3 A No.

4 Q Did you go there with the intention of robbing Ant
5 of the marijuana?

6 A No, not at all.

7 Q Now, what happened next?

8 A When he pulled out the gun and said, you know, I
9 can take your weed because, you know, you ain't built
10 like that, Ant was like, no, you can't take nothing.
11 So when he pulled out the gun, he just grabbed the gun.
12 And when they start tussling over the gun, the gun went
13 off and it hit my seat and shook my seat. And my cell
14 phone, my cigarettes, everything was in my lap, and I
15 dove out the car.

16 When I dove out the car, I got up. And then when
17 I got up I seen Ant still struggling with the gun with
18 his feet outside the car. When he's trying to pull the
19 gun away from him, I hear two more gunshots, boom,
20 boom. So when the gunshots occurred, Ant let the gun
21 go and just walked off from the car. And I got back in
22 the car and I left.

23 Q To your knowledge, did the bullets pass through
24 the seat that you had been sitting in, the driver's
25 seat?

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

- 1 A It hit my headrest and shook it.
- 2 Q Did that scare you?
- 3 A Yeah.
- 4 Q Did that startle you?
- 5 A Yes.
- 6 Q Okay. And tell us again, where were your
7 cigarettes?
- 8 A They was in my lap.
- 9 Q And where was your phone?
- 10 A In my lap.
- 11 Q So you were just sitting there with stuff in your
12 lap?
- 13 A Yes, sir.
- 14 Q And you jumped out of the car?
- 15 A Dived out the car.
- 16 Q All right. And when you got out of the car, this
17 is kind of an obvious question, but did you open the
18 door?
- 19 A Yes.
- 20 Q So your car door was opened?
- 21 A Yes.
- 22 Q On the front driver's side of the Acura?
- 23 A Yes.
- 24 Q All right. And this is kind of, some of these
25 questions are going to just kind of seem stupid, but

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 this is the way we have to do it sometimes. When
2 Anthony got out of the car, he opened his own car door?

3 A Yes.

4 Q And so when the shooting occurred or when you
5 heard shots fired, was the back car door on the
6 driver's side open?

7 A Yes.

8 Q Okay. And was Anthony, was he inside the car or
9 outside the car or was he both, if you remember? If
10 you don't remember, you don't remember.

11 A You said after the first shot?

12 Q To the best of your knowledge, did you -- to the
13 best of your knowledge, if you know, where was Anthony
14 when the shots were fired?

15 A When the first shot was fired, he was in the car.

16 Q Okay.

17 A But when the second shots were fired when I got up
18 off the ground, he was -- he was still reaching in from
19 the car, but his feet was on the ground... He was moving
20 from in the car, but he was still trying to grab the
21 gun.

22 Q All right. And so Anthony's hands were inside the
23 car?

24 A Yes.

25 Q And how was he positioned; in other words, in

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 terms of the struggle with Black, was Anthony's --

2 which side of Anthony's body was facing toward Black?

3 A Well, his middle chest was like -- his left foot
4 front was in his right foot backwards trying to pull
5 the gun.

6 Q And did you have any idea that Black was going to
7 pull a gun?

8 A No.

9 Q Did you have any idea that he was going to shoot
10 anybody?

11 A None.

12 Q After this occurred, what did you do?

13 A I got in the car and I left, I fled the scene.

14 Q And during this struggle, did you actually grab
15 the gun and try to pull it away from either Ant or from
16 Black?

17 A No.

18 Q Did you tell the police that you did that?

19 A Yes.

20 Q And why would you tell them that?

21 A Because just trying to -- just trying to put more
22 to it, like I didn't -- to show them that I didn't have
23 nothing to do with it.

24 Q After -- well, when you -- you're the one that
25 drove off; right?

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

- 1 A Yes, sir.
- 2 Q And your phone, your cigarettes were laying on the
3 ground next to the car; right?
- 4 A Yes, sir.
- 5 Q And when you drove off, did you know at that time,
6 you knew there had been gunfire, did you know that Ant
7 or Anthony Liddell had been hit by the bullets?
- 8 A No, sir. He walked away from the car.
- 9 Q Okay. So you saw him walking?
- 10 A Yes, sir.
- 11 Q Correct?
- 12 A Yes, sir.
- 13 Q And so you thought since he was walking that he
14 wasn't shot?
- 15 A Yes, sir.
- 16 Q So if you know somebody was shooting at him, why
17 would you think he wasn't shot?
- 18 A Because I'm thinking if someone gets shot, the
19 first thing they do is drop.
- 20 Q Like in the movies?
- 21 A Yes, sir.
- 22 Q And so you backed the car out?
- 23 A Yes, sir.
- 24 Q And turned and drove off?
- 25 A Yes, sir.

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

- 1 Q And was Black in the car?
- 2 A Yes, sir.
- 3 Q And where did you and Black go?
- 4 A Back to Roland's house.
- 5 Q To Roland's house. Roland Crooms; right?
- 6 A Yes, sir.
- 7 Q And when you got to Roland's house, what did you
- 8 do?
- 9 A When I pulled up, I got out the car and walked in
- 10 Roland's apartment.
- 11 Q And you just got out of the car and went in?
- 12 A Yes, sir.
- 13 Q And what did Black do?
- 14 A I left him in -- well, I left him when he was
- 15 getting out the car, I just left him, I got out the car
- 16 first and walked in there.
- 17 Q Were you upset?
- 18 A Yes, very.
- 19 Q And what were you upset about?
- 20 A Because that was very unnecessary.
- 21 Q And at that point did you tell Roland what had
- 22 happened?
- 23 A No.
- 24 Q Did you say anything to Black afterward or when
- 25 you got to Roland's house or when you were getting out

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 of the car?

2 A When I got out the car and when he finally came
3 into the house, he's like, yo, don't say nothing, don't
4 say nothing to nobody now. I was like, man, you
5 tripping man, I'm not -- I walked back out the house,
6 got back in my car and left.

7 Q All right. And you left Black there?

8 A Yes.

9 Q Okay. Now, at this time, did you know that Ant
10 had been struck and shot by the bullets?

11 A No.

12 Q At some point later did you find out that he had
13 in fact been shot?

14 A Yes.

15 Q And did you in fact find out not only had he been
16 shot, but that he had died as a result of it?

17 A Yes.

18 Q And how did you find that out?

19 A When I called up my girlfriend and she told me it
20 had been on the news and stuff like that.

21 Q And then also you learned that the police were
22 looking for you?

23 A Yes.

24 Q Right? And so at some point did you speak to any
25 of your relatives?

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 A Yes.

2 Q And I think you -- did you call an uncle or
3 somebody that you consider an uncle?

4 A Yes.

5 Q And what's his name?

6 A Tyrone Williams.

7 Q All right. And what did you do as a result of
8 talking to him?

9 A I turned myself in.

10 Q And you turned yourself in in Conway?

11 A Yes.

12 Q Okay. Do you know how many times that you and Ant
13 had met to either just meet and talk or to buy and/or
14 sell marijuana?

15 A No, sir. A lot.

16 Q Did you have any kind of hatred or ill will for
17 Ant?

18 A None.

19 Q Did you like him?

20 A Yeah.

21 Q At some point, I mean, you knew somebody had been
22 shot at; right?

23 A Yes.

24 Q And you didn't have your phone, but when you got
25 to Roland's house, you could have called the police;

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 right?

2 A Yes.

3 Q And you didn't do that; right?

4 A No, sir.

5 Q As far as you know, after the incident what
6 happened to the gun, in terms of did Black have the
7 gun?

8 A Yes, he had the gun.

9 Q And what did he do with it?

10 A I don't have no clue.

11 Q What happened to Ant's cell phone?

12 A I don't know.

13 Q All right. When you went into Roland's house, do
14 you know how long Black stayed in your car?

15 A No, sir. I was just pacing and mad and upset.

16 Q And then when you got in your car and left Black
17 there, at some point did you take the car back to your
18 uncle?

19 A Yes.

20 Q Okay. Did you leave it at his house?

21 A Yes.

22 Q Is there any -- now, when you went to meet with
23 Anthony Liddell; clearly that was for some type of
24 marijuana transaction; right?

25 A Yes, sir.

MARQUIS McDONALD-DIRECT BY MR. McCOLLUM

1 Q And did Black know that there was going to be a
2 marijuana transaction?

3 A Yes, sir.

4 Q Okay. And so is it safe to say that you and Black
5 had arranged to go do that together; right?

6 A To go buy the weed?

7 Q Yeah.

8 A Yes, sir.

9 Q Okay. Because you knew you were going to buy the
10 weed; right?

11 A Yes, sir.

12 Q And he knew you and he were going to buy the weed;
13 right?

14 A Yes, sir.

15 Q Okay. Was there ever any indication to your
16 knowledge prior to the shooting that you and Black were
17 going to rob Anthony Liddell?

18 A No, sir, none.

19 Q Did you go there with any intention whatsoever to
20 rob him?

21 A None.

22 Q Did you go there with any intention to try to kill
23 him and murder him?

24 A None.

25 MR. McCOLLUM: Thank you, Your Honor. Those are

MARQUIS McDONALD-CROSS BY MR. RICHARDSON

1 all the questions I have.

2 THE COURT: You may cross-examine, solicitor.

3 MR. RICHARDSON: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. RICHARDSON:

6 Q What day was it that you learned that Anthony had
7 been murdered?

8 A Probably two days later.

9 Q Two days later. So you didn't see the stories on
10 CNN?

11 A No. The trailer I was at ain't had no
12 electricity, no cable, no nothing.

13 Q Where was that?

14 A On Highway 90.

15 Q On Highway 90. When did you go to Highway 90?

16 A The two days afterwards.

17 Q You went and stayed there for two days afterwards?

18 A No. I went there two days afterwards.

19 Q Okay. That's the trailer that didn't have no
20 electricity or anything?

21 A Yes, sir.

22 Q So where you were at two days before you had
23 electricity?

24 A I went from there, I went from my girlfriend
25 house, she was arguing so I went to Lynette house and

MARQUIS McDONALD-CROSS BY MR. RICHARDSON

1 stayed. And then after I left Lynette house, I went to
2 Highway 90.

3 Q You didn't hear any word on the street about a
4 murder?

5 A I didn't have my cell phone.

6 Q Speaking of cell phone, you went and just got a
7 new cell phone at what was it, Dollar Tree?

8 A Yes, sir.

9 Q The next day?

10 A Yes, sir.

11 Q Okay. And Mr. McCollum asked you about, you could
12 have borrowed Roland's phone to make a call; right?

13 A Yes, sir.

14 Q Actually, you did borrow Roland's phone that
15 Wednesday, didn't you, made a couple calls when you
16 went and saw Roland?

17 A Yes, sir.

18 Q And then on that Thursday you borrowed his phone
19 because you hadn't got your phone at the Dollar Tree
20 yet; correct?

21 A No, sir.

22 Q You didn't borrow his phone that day?

23 A No, sir.

24 Q But you did go to Roland's on that Thursday?

25 A No, sir.

MARQUIS McDONALD-CROSS BY MR. RICHARDSON

1 Q You didn't, okay. When you went to Doug's house,
2 that's over in Jamestown; right?

3 A On Temple Street.

4 Q Temple Street, Jamestown. No doubt about it,
5 that's his car?

6 A Yes, sir.

7 Q You were driving?

8 A Yes, sir.

9 Q You drove from the Sunhouse to Coastal Carolina
10 University that night?

11 A Yes, sir.

12 Q And you were the one that was texting with Anthony
13 Liddell?

14 A Yes, sir.

15 Q State's No. 12, no doubt about it, that's your
16 cell phone?

17 A Yes, sir.

18 Q And any records on that cell phone are yours?

19 A Yes, sir.

20 Q Any texts out from it are yours?

21 A Yes, sir.

22 Q Where were you working at the time of this crime?

23 A Well, I was on and off working with my uncle, he
24 owned a landscaping company, cutting grass and stuff
25 like that.

MARQUIS McDONALD-CROSS BY MR. RICHARDSON

- 1 Q So you didn't have a solid job at the time?
- 2 A No, sir.
- 3 Q Okay. When you went to go speak with the police,
- 4 that's three and a half days after the murder; right?
- 5 A Yes, sir.
- 6 Q So you didn't call him Wednesday, Thursday, Friday
- 7 morning?
- 8 A Yes, sir.
- 9 Q It wasn't until Friday afternoon?
- 10 A Friday sometime. I'm not accurate.
- 11 Q During that whole time, you had possession of that
- 12 Acura; didn't you?
- 13 A No, sir.
- 14 Q You had access to the Acura?
- 15 A No, sir.
- 16 Q Was that a car you frequently drove?
- 17 A No, sir.
- 18 Q It's not. You just happened to drive it that one
- 19 night?
- 20 A No. I be driving it on like -- if I call him and
- 21 ask him if he not working and if he not busy, he might
- 22 let me get it, he might not.
- 23 Q But no doubt about it, the police didn't have that
- 24 car for three days?
- 25 A I don't know.

MARQUIS McDONALD-CROSS BY MR. RICHARDSON

1 Q You told the police where to find the car; didn't
2 you?

3 A Yes, sir.

4 Q Okay. So you knew where it was?

5 A The last location to where I had it, where I left
6 it.

7 Q When you went and talked with State Law
8 Enforcement Division --

9 A Um-hum.

10 Q -- you didn't know what evidence they had; did
11 you?

12 A No, sir.

13 Q You knew you dropped your cell phone there; right?

14 A I know I lost my cell phone.

15 Q Okay. You knew you lost your cell phone. Did you
16 remember the last time you had it?

17 A Not accurately because I was -- my mind wasn't
18 thinking right.

19 Q So you didn't know what the police had?

20 A Yes, sir.

21 Q You didn't know about any witness statements they
22 had?

23 A No, sir.

24 Q Didn't know about the video they were going to get
25 from the Sunhouse; did you?

MARQUIS McDONALD-CROSS BY MR. RICHARDSON

1 A No, sir.

2 Q And you told a completely different story when you
3 spoke with them?

4 A Yes, sir.

5 Q But since that time you know what the police have,
6 what evidence they have?

7 A Yes, sir.

8 Q And you've heard the testimony here in court
9 during the week; haven't you?

10 A Yes, sir.

11 Q And now you tell a completely different story?

12 A The truth.

13 Q Let's look at that Miranda form and your
14 statement. I'm sorry, I actually think we had one that
15 we've entered into evidence, I'll have him read from
16 that one. Here we go.

17 THE COURT: 32.

18 MR. RICHARDSON: Thank you, Your Honor. 33 is
19 what I have.

20 THE COURT: 33, right.

21 Q State's-33, can you read that typed portion down
22 right here?

23 A I have read -- I have read each page of the
24 statement consist of two pages. Each page of these
25 bears my signature, and corrections, if any, bears my

MARQUIS McDONALD-CROSS BY MR. RICHARDSON

1 initials. And I certify that the facts contained
2 herein are true and correct.

3 Q Okay. So you certified then that that was true
4 and correct?

5 A Yes, sir.

6 Q And now you're telling us you lied to the police?

7 A Yes, sir.

8 Q You didn't tell the police the identity of Black?

9 A Yes, sir.

10 Q You told them you didn't even know him?

11 A Yes, sir.

12 Q Black's your cousin, he's shorter than you are;
13 right?

14 A No. We like the same height.

15 Q How tall are you?

16 A Six foot.

17 Q You're six foot. Black's five-ten; isn't he?

18 A I don't know, sir. We like the same height.

19 Q Five-ten would be shorter than you. Black is
20 Stephon McLain, no doubt about it?

21 A Yes, sir.

22 Q And at no point did you call 911?

23 A No, sir.

24 Q At no point did you call police prior to the
25 afternoon of Friday, March 1st, 2013?

MARQUIS McDONALD-CROSS BY MR. RICHARDSON

1 A No, sir.

2 Q And you said that -- you said today that Anthony
3 was leaned into the car, hand on the gun when he was
4 shot?

5 A He had his hands around the gun.

6 Q He had his hands around the gun.

7 MR. RICHARDSON: Mr. Hyman, can you come up here.

8 Q I just want to make sure we have it right for the
9 jury.

10 A All right.

11 Q So you said his feet were on the ground outside
12 the door.

13 MR. RICHARDSON: Could you stand right there,
14 Mr. Hyman, and face me.

15 Q You said his feet are on the ground outside the
16 car; correct?

17 A Yes, sir.

18 Q And so where is Black at this point?

19 A In the passenger seat.

20 Q In the passenger seat. And he's seated?

21 A Yes, sir.

22 Q Okay. So Anthony is leaned over grabbing the gun
23 that Black has?

24 A Shift that way.

25 Q Which way?

MARQUIS McDONALD-CROSS BY MR. RICHARDSON

1 A This way (indicating).

2 Q This way?

3 A No. Both of y'all shift.

4 Q Okay. Like this?

5 A No, not in front of each other, shift like you in
6 the back seat of that car.

7 Q Okay.

8 A No, man, shift. Put your body on this side, y'all
9 just do the opposite. Yeah, right here. No, no. Go
10 back this way. Pretend like this the car, you're in
11 the passenger seat. Okay.

12 Q We'll make it a lot easier.

13 MR. RICHARDSON: Sorry about that, Your Honor. I
14 thought it would slide. Let's do this, there's a
15 console in the middle. Mr. Hyman, could you take a
16 seat right there.

17 Q This is the back seat; right?

18 A Yes, sir.

19 Q And you just testified that when -- not when the
20 first shot was fired but the next shots that are fired
21 that Anthony's got his feet on the ground outside the
22 car; right?

23 A When I got up off the ground, yes, sir.

24 Q Okay. He's got his feet on the ground and he's
25 reached in grabbing the gun.

MARQUIS McDONALD-CROSS BY MR. RICHARDSON

- 1 MR. RICHARDSON: Mr. Hyman, can you turn around
2 right here.
- 3 Q So he's got the gun like this (indicating)?
- 4 A Yes, sir.
- 5 Q Okay. And so he shot this way (indicating)?
- 6 A No. Put your head up, put both hands on the gun.
- 7 Q I can't do that right now. But we can imagine my
8 other hand's on the gun. So he's got both hands on the
9 gun in this position?
- 10 A Yes, sir. And you pulling back.-- and you moving
11 back trying to get out the car.
- 12 Q Okay. So he was moved back, he was leaned over
13 holding the gun?
- 14 A Pulling for the gun.
- 15 Q Pulling for the gun. And he's moving backwards,
16 leaned over. Okay. When you got to Roland's house,
17 was he there?
- 18 A Yes, sir.
- 19 Q He wasn't working at Waffle House on his 9 o'clock
20 shift that night?
- 21 A No, sir.
- 22 Q Okay. Did you ride away with the weed?
- 23 A Yes, sir.
- 24 Q And those windows didn't get blown out or
25 anything; right?

MARQUIS McDONALD-CROSS BY MR. RICHARDSON

1 A No, sir.

2 Q Those windows are tinted; correct?

3 A Yes, sir.

4 Q Dark tint, okay.

5 MR. RICHARDSON: No further questions; Your Honor.

6 THE COURT: Very well. Redirect?

7 MR. McCOLLUM: I don't have any other questions,

8 Your Honor.

9 THE COURT: Thank you, sir. You may step down,
10 Mr. McDonald:

11 (Witness excused.)

12 THE COURT: Do you have any additional witnesses,
13 Mr. McCollum?

14 MR. McCOLLUM: Your Honor, the defense rests.

15 THE COURT: Very well. Is there any reply
16 testimony, solicitor?

17 MR. RICHARDSON: No, sir, Your Honor.

18 THE COURT: Thank you. Ladies and gentlemen, that
19 would conclude the evidentiary portion of this process.
20 There are still some matters of law now that I have to
21 take up out of your presence. I'm going to ask you to
22 go to your jury room. Don't begin your deliberations
23 because it still would be inappropriate for you to
24 discuss this case among yourselves.

25 When we return we will then complete the final two

1 portions. As you recall, the attorneys have a second
2 opportunity to speak to you, and then I will give you
3 the law. But, please, until you are given an
4 instruction to begin your deliberations, do not
5 individually or collectively discuss the case and
6 decide any of the issues. We'll be with you as quickly
7 as we can, thank you.

8 (WHEREUPON, the jury exited the courtroom at
9 11:18 a.m.)

10 THE COURT: Any matters from the State at this
11 point?

12 MR. RICHARDSON: No, sir, Your Honor.

13 THE COURT: Mr. McCollum?

14 MR. MCCOLLUM: Your Honor, at this time on behalf
15 of the Defendant, Marquis McDonald, the defense would
16 renew all objections previously made, renew all motions
17 before the Court. At this time, Your Honor, I'd also
18 renew the motion for a directed verdict of not guilty
19 regarding the charge of armed robbery and the charge of
20 murder.

21 THE COURT: Thank you, sir. Certainly, and we
22 dealt with it the last time I articulated the reasons
23 for the murder and the armed robbery. Now that the
24 Defendant has testified, obviously we now have his
25 testimony, and we also have further testimony that the

1 marijuana was taken away from the scene, which clearly
2 now establishes another item of property in addition to
3 the cell phone.

4 And, again, I'll have to -- that's a -- the jury
5 could conclude that based on the testimony of believing
6 some parts of a witness' testimony and not all of a
7 witness' testimony. And I have to consider it in the
8 light most favorable to the State, so I would
9 respectfully deny your motions. And also the rulings
10 previously made, I would stand by those rulings.

11 MR. McCOLLUM: Very well, Your Honor.

12 THE COURT: Thank you. And I think you've
13 addressed and I think the hand of one part that you
14 raised really does deal with that. And you brought out
15 that, that it was -- if the jury concludes the only
16 deal was to buy marijuana, then obviously he's no
17 longer involved in a murder or an armed robbery or
18 both.

19 But likewise, the State from the reasonable
20 inferences to be drawn from it and credibility being a
21 major issue can conclude that, yes, he was very much
22 involved in it. And by his actions then, because we
23 have testimony of someone striking the victim who was
24 positioned where the driver would have been.

25 And so clearly if a jury concludes that, they

1 could believe that he was very much involved because he
2 indicated he had no animosity or ill will, so there's
3 no reason for him to strike the Defendant other than to
4 perform -- to take the marijuana which led to then the
5 other. And I think that's where we get into that gray
6 area about hand of one and hand of all.

7 But there are a number of cases that cite if a
8 murder is committed in the performance of an armed
9 robbery, that would -- the hand of one and hand of all
10 would support a conviction for murder notwithstanding
11 the person did not actually fire the weapon.

12 So thank you very much. Okay. And I will charge
13 the felony, I've incorporated that as an additional
14 basis. I'm going to charge the weapon since there's no
15 evidence of any self-defense here, charge that the use
16 of a weapon is inference of malice as well as a
17 commission of a felony likewise raises the inference of
18 malice.

19 MR. RICHARDSON: Yes, sir, Your Honor.

20 THE COURT: But also add the part that says that's
21 an inference they would consider, they weigh it and
22 they can just -- they don't have to follow it if they
23 don't want to.

24 Now, I could remove the statement, I don't think I
25 need to go into any charge on the statement and the

1 voluntariness of the statement. Because he's testified
2 and I think that negates that from having to be charged
3 to the jury. Any objection from the State?

4 MR. RICHARDSON: Just I would request the charge
5 on the inconsistent statements, Your Honor.

6 THE COURT: Well, I'm going to charge that, that
7 in the credibility of a witness, was the testimony of
8 the witness consistent or inconsistent. That's what I
9 say about that. And you can elaborate all you want on
10 that in your argument.

11 MR. RICHARDSON: Yes, sir.

12 THE COURT: Okay. Anything else?

13 MR. McCOLLUM: No, Your Honor.

14 THE COURT: All right. How long you need before
15 we --

16 MR. RICHARDSON: Your Honor, if we could have
17 about 15 minutes just to kind of get our feet up under.

18 THE COURT: You got it, no problem.

19 MR. RICHARDSON: Thank you, Your Honor.

20 THE COURT: I'll be back at about 25 to 12.

21 MR. McCOLLUM: Your Honor, I would just inquire,
22 are they going to open on the law or just --

23 THE COURT: That's a good inquiry. You going to
24 open on the law, or you just going to waive it --

25 MR. RICHARDSON: Your Honor, I'll just call

1 them -- I'll do it in one big bite.

2 THE COURT: All right, that's fine. Thank you
3 very much. We'll be at ease.

4 (WHEREUPON, a brief recess was taken at
5 11:23 a.m.)

6 THE COURT: Let the record reflect Mr. McDonald is
7 present.

8 Solicitor, I will also probably charge if I
9 understand, that just as I charge that a firearm is a
10 weapon, I will charge as well illegal drugs may be the
11 subject of an armed robbery.

12 MR. RICHARDSON: Thank you, Your Honor.

13 THE COURT: So there's no question about it being
14 proper.

15 MR. RICHARDSON: Yes, sir, Your Honor.

16 THE COURT: Okay.

17 MR. McCOLLUM: Your Honor, obviously I plan to
18 talk about Your Honor's instruction.

19 THE COURT: Sure.

20 MR. McCOLLUM: The solicitor does too. And he's
21 got a couple of visual aids that he's going to put up,
22 so is that --

23 THE COURT: I don't have a problem with it.

24 MR. McCOLLUM: Okay.

25 THE COURT: In fact, I'm not there yet, we could

1 talk about this. I think the day is coming when we're
2 going to give the charge visually, so that the charge
3 to the jury -- in fact, I know that Judge Newman does
4 it as a matter of course now. I will give the charge
5 to the jury when they ask for a recharge so they can
6 see it and read it.

7 Because the problem that we have, and that's why
8 we as lawyers spend money and energy to get visual
9 obviously exhibits, because we know that if a person
10 was visual, not auditory but visual, we can talk all
11 day long, but they're not -- it's not going to sink in
12 until they can actually see it. So I don't have any
13 problem. It obviously will not go back to the jury.
14 Again, I'm going to iterate, reiterate that your
15 remarks, his remarks are not evidence.

16 And I will also, part of my charge, anything that
17 either of you state is the law, and it's kind of
18 preposterous to say that I'm -- my knowledge is
19 superior to yours, it's not. And I know that and you
20 know that. It's just my position, I'm the person who
21 gets the final say right now. And I've even added this
22 to my charge because we know that I'm not the sole
23 judge of the law in this case. Columbia is. That's
24 where the -- so I say for purposes of the proceeding
25 today, I'm the sole judge of the law. And I think

1 that's a more accurate statement because it changes
2 dramatically once it leaves this courtroom.

3 But anyway, having said that, I think it covers
4 and protects you and protects your client. But if you
5 want to object to it, feel free to. But I will
6 overrule the objection more than likely.

7 MR. McCOLLUM: Okay, good. I don't want to
8 object.

9 THE COURT: I know. I just wanted to give you an
10 indication of that so you can make a strategic call as
11 to whether you want to do it or not.

12 MR. McCOLLUM: Thank you.

13 THE COURT: Thank you.

14 MR. RICHARDSON: Thank you, Your Honor.

15 THE COURT: Okay. All right, let's bring in our
16 jury, please.

17 (WHEREUPON, the jury came into open court at
18 approximately 11:41 a.m.)

19 THE COURT: Thank you very much, ladies and
20 gentlemen. We're now moving into the third phase of
21 this process where you will hear from the attorneys
22 now. And unlike the opening statement, you have heard
23 the evidence. And of course it's that evidence that
24 you ultimately will analyze very shortly when you begin
25 your -- are instructed to begin your deliberations.

1 But it's very proper for the attorneys as officers
2 of this court to discuss the evidence with you and
3 suggest reasonable inferences that you may draw from
4 that evidence. Please remember, though, that their
5 remarks, while extremely beneficial and very important,
6 they should not be considered evidence in any fashion.

7 Following the closing arguments, I will then
8 instruct you on the law. And, again, you will not hear
9 any evidence during that process either.

10 I also would inform you that we are ordering lunch
11 for you, that should be here by the time we complete
12 these two processes, so you can go ahead and have your
13 lunch and deliberate -- and begin your deliberation as
14 well. So thank you very much for your attention. I
15 know it's almost 12 o'clock and we'll probably take an
16 hour, an hour and a half to complete it. So we'll have
17 it for you when you finish. So thank you very much.

18 As I understand, the State waives its opening; is
19 that correct, on the law?

20 MR. RICHARDSON: Waive the opening on the law.

21 THE COURT: Very well. Mr. McCollum.

22 MR. MCCOLLUM: May it please the Court?

23 THE COURT: Yes, sir.

24 MR. MCCOLLUM: Thank you, Your Honor. Ladies and
25 gentlemen of the jury, I want to thank you for your

1 service in this case. And I want you to think back
2 when the case started. I stood right here just a few
3 days ago and said that Marquis McDonald is not guilty
4 of murder and armed robbery, okay. I said that the
5 State did not elect to charge him with buying or
6 selling or attempting to possess marijuana with intent
7 to distribute it.

8 The State also did not elect to charge him with
9 what's called accessory, in other words, accessory
10 after the fact or accessory to a crime or doing
11 something wrong after a crime has occurred. In
12 addition, I said that the State initially would say
13 that Marquis McDonald shot and killed Anthony Liddell.
14 But then they would change that to if he didn't shoot
15 him or he didn't shoot him, then he's still guilty
16 because of hand of one is the hand of all.

17 And I told you that for the hand of one to be the
18 hand of all, for someone to be guilty under that
19 theory, then there had to be a prior arrangement, a
20 prior plan, to do the robbery. It cannot be a prior
21 plan to buy marijuana or do a marijuana deal. It can't
22 even be a prior plan that if something terrible happens
23 that I don't know what's going to happen, I'm going to
24 do some improper steps, okay. It's got to be a plan to
25 rob somebody, as one of the officers described it, a

1 rip or something like that, okay. So that's not there.

2 The State has the burden of proof. His Honor will
3 tell you that in any criminal case the State has the
4 burden of proof. In other words, they have to prove
5 that Marquis McDonald committed a murder or committed
6 an armed robbery.

7 The judge also tells you that standing here today
8 seated in this courtroom, Marquis McDonald is presumed
9 innocent, that he comes in here with a presumption of
10 innocence that we all carry with us, and that the State
11 must prove armed robbery and murder beyond a reasonable
12 doubt.

13 Now, beyond a reasonable doubt is something that
14 His Honor will define, okay. And beyond a reasonable
15 doubt means that -- and the courts have tried to define
16 this for a long time. Currently I think His Honor will
17 tell you that it would cause a person to hesitate or
18 hesitate to act.

19 And I would say that in order to understand that,
20 if we were -- if we were going to make an important
21 decision about a relative in order, let's say, to have
22 some surgery or something that was extremely important.
23 And we met with the doctor, and then we just didn't
24 feel quite right about it, so we wanted to get a second
25 opinion or something of that nature. Then we would

1 have a reasonable doubt, because we'd be hesitant:

2 You know, if you're talking to a grandmother or
3 sometimes like, you know, grandmom, I'm just hesitant,
4 I'm not sure this is the right thing to do, let's get a
5 second opinion. That's a reasonable doubt.

6 Another way to look at it is this, in order to
7 arrest somebody and charge a somebody with a crime, the
8 State has to have probable cause. And that just means
9 that it's a little bit more than suspicious. There's
10 some fact or combination of facts which you think, make
11 you think that somebody may have done something. They
12 are suspect, they are -- it's suspicious, they're
13 suspected.

14 To go from there, which is what it takes to get in
15 here, okay, the probable cause that a crime was
16 committed, to get in here, that's what it takes to be
17 on trial, to be charged. To be arrested and charged
18 with murder, to be arrested and charged with armed
19 robbery, that's what it takes. It's a very, very low
20 standard.

21 If you signed a contract with somebody and you
22 thought they'd breached it because they owed you some
23 money or something like that and you went to civil
24 court, and this is not civil court clearly, then you'd
25 have to prove by a preponderance of the evidence, okay.

1 And that's often described as just pictures of scales,
2 and whoever puts more weight on the scales wins.

3 So if the scales are even and I'm trying to prove
4 my case that this person owes me money, or I had a car
5 wreck, it's my fault, I'm trying to prove that, then I
6 got to put some weight on the scales, but I just have
7 to move them. And that's a preponderance of the
8 evidence.

9 And sometimes people say, well, it's got to be
10 more than 50 percent or it's got to be 51 percent. Or
11 it really doesn't even have to be 51 percent, it just
12 has to be something, okay. Then you get into other
13 serious issues like child custody and things like that
14 which clearly we're not dealing with, but in family
15 court figure out; you know, how are you going to
16 determine something that important, and it's got to be
17 clear and convincing, clear and convincing evidence.
18 It's over here somewhere (indicating).

19 Reasonable doubt means as far as you can go as a
20 human being. We don't have perfection, okay, so it's
21 got to be as far as you can go, okay. And you can't
22 just make up some doubt, or you can't just make up a
23 reason. It has to be something that's real and
24 present.

25 So if you look at this case, let's talk about

1 that, let's talk about reasonable doubt, okay. The
2 State says that Marquis McDonald is what's called the
3 shooter, it's the person who fired the weapon, who's
4 the person who shot somebody, okay. The witnesses
5 testified, and I submit that everybody doesn't see
6 everything the same way, just like my example of the
7 instant replay, okay. It's not always perfect, and
8 there are going to be inconsistencies, so you want to
9 look at the big picture.

10 Clearly, the witnesses said or one witness, she
11 said she saw in the rearview mirror that a person
12 believed to be Marquis McDonald was outside the car,
13 outside the Acura, on the driver's side. The
14 individual who was injured, Anthony Liddell, she didn't
15 know him at the time, was outside the car.

16 Now, we know, His Honor told you earlier and you
17 know, that we with just normal reasoning, common sense,
18 we know that to get out of the car, and this seems so
19 basic, you have to open the door. So the rear door is
20 open, the front door is open. She sees what she
21 thinks, but she doesn't know what's happening, it
22 startled her. It startled her so much, she said she
23 blacked out, okay.

24 So this is something that happened in the dark,
25 and a couple of things that are important. One, she

1 said that the individual they believe was Marquis
2 McDonald. Marquis McDonald, who said he was in the
3 car, is facing back toward her, facing the person
4 Anthony Liddell. Anthony Liddell is facing him. She
5 thinks they are fighting.

6 They're not fighting, okay. They are standing
7 next to each other while Anthony Liddell is being shot,
8 okay. We know the bullet came from inside the car just
9 because we know -- just because we know how the car
10 door opens, just because we know where the bullet hit,
11 that it hit in the back of the door. We also know that
12 if Marquis McDonald were standing outside the car door
13 shooting at this person, a couple of things would have
14 happened.

15 One, we have to try to figure out how he could
16 shoot over the car door, because we know he didn't
17 shoot through it. Then we have to try to determine,
18 had that happened, how did the bullets go into the car
19 next door, how did it go into the SUV. And nobody's
20 established where the cars were parked in terms of how
21 far up or how far back.

22 The other thing is we said bullet holes in the car
23 seat. Marquis McDonald, even if he didn't even testify
24 and tell you that it shook his seat, where does that
25 come from? It shook the seat, it startled me, I had my

1 phone in my lap, I had my cigarettes in my lap. Why is
2 that? Because he wasn't going to rob anybody. He met
3 with the man over and over and over. He wasn't there
4 to rob him, he was startled, okay. The bullets are
5 coming from that side of the car.

6 Now, if I'm seated in the driver's side of the
7 car, it is impossible for me to have shot him, just as
8 it's impossible for me to have shot him if I'm standing
9 outside the car. If you look at the evidence, I'm
10 inside the car, there's no way I can do that, it won't
11 work, okay. What works, what works is what happened.

12 Now, the other thing we know from Dr. Proctor, the
13 medical examiner, the pathologist, the forensic
14 pathologist, said, look, if you're shot at close range,
15 18 to 24 inches, there will always be stippling on the
16 body, which is burning. And it isn't there, it's not
17 there. So not only would Marquis McDonald have to
18 somehow shoot through a car door to get the bullet to
19 turn into the SUV, it would also cause stippling.

20 And then the doctor said, in some instances
21 stippling could conceivably be prevented by the
22 clothing. And when asked, well, if somebody had showed
23 you the clothing, could you determine if the stippling
24 would be there. He said, absolutely. And the term is
25 to a reasonable degree of medical certainty, which

1 means science. Science is something that two plus two
2 equals four. It's not some crazy theory that I thought
3 up. It's that if you do this every time, time after
4 time after time it will be the same. You could do it
5 in America, you could do it in China, you can do it in
6 the Bahamas, it doesn't matter where you do it. If you
7 do it on earth, it is the same because it's science.

8 So who has the burden of proof? The State has the
9 burden of proof. We don't have the clothes, we don't
10 have the bullets. We don't have the crime lab, we
11 don't have the experts. So the doctor when asked said,
12 well, since clothing can sometimes keep stippling from
13 being on the body, is it always in the clothes. Yes,
14 it's always in the clothes, always, it's science.

15 Did you look at the clothes? No. I didn't have
16 the clothes. No one asked me to look at the clothes.
17 The burden of proof, the burden of proof. He said, if
18 you showed me the clothes, if I'd examined the clothes,
19 I could tell you if it's there. It's not there. We
20 don't know, to this day I don't know, you don't know.
21 The burden of proof.

22 Now, when you just look at that, the case is over,
23 it's just over, okay. Because Marquis McDonald not
24 only didn't do it, he could not have done it unless you
25 repeal the natural laws of physics.

1 I have never in my life seen a case where law
2 enforcement officials took a crime scene car and put
3 those trajectory rods through it and pointed where
4 those things were going and came into court and said,
5 it might have been a screwdriver, somebody might have
6 put a screwdriver through there. Wow. Wow. Wow.

7 Now, okay, couldn't have happened that way. So
8 let's just say whatever happened, it's the hand of one
9 is the hand of all. Let's just say that if we're the
10 State, if everything we said isn't true, and we say
11 there's blood in the console but we didn't test it,
12 okay, and we say we swabbed for touch DNA, but we
13 didn't test it, that there might have been stippling,
14 but we didn't test it; if we could have reenacted the
15 crime scene but we didn't do it, if we didn't do
16 anything that we're supposed to do, then it's okay,
17 jury, it's all right, because you could find him guilty
18 anyway.

19 Because it doesn't matter if he shot him, it
20 doesn't matter anything, he's there, the hand of one is
21 the hand of all, and he's just as guilty as Black or
22 O'Blake or McLain. No, it's not true. And it won't
23 work.

24 "And the things that I said have come true, the
25 things I've told you about the case are in the case.

1 The physics of the case screams not guilty, it shouts
2 not guilty. The hand of one is the hand of all. There
3 is absolutely no evidence, it is inconsistent, it's not
4 believable, period, that Marquis went to rob Anthony.
5 It doesn't even make sense, okay.

6 So now what? Well, Marquis lied about it, Marquis
7 did not act honorably. Marquis drove off and shouldn't
8 have driven off. Clearly, clearly, he lied in his
9 statement, okay, clearly. Lying in your statement
10 because the police suspect of you murder, suspect you
11 of robbery or whatever else causes people to lie
12 sometimes.

13 There are instances in our life which sometimes
14 aren't even important, like I backed into a pole or my
15 wife drove the car into the washer and dryer, okay, in
16 the garage and tore it all up, or I did something
17 stupid or I did somebody I'm ashamed of, I did
18 something I regret, I did something I don't want to
19 even tell anybody about. We all do that. We
20 shouldn't, I don't believe we should. But people do
21 it.

22 But doing that doesn't change the physical aspect
23 of the case. Doing that looks bad, doing that is
24 regrettable, doing that is not advisable, fleeing and
25 leaving is not advisable. But it doesn't change

1 everything that happened, it does not repeal the laws
2 of physics.

3 Now, and as you look at me, I promise, I'm not
4 going to talk all day, okay, I just want to get through
5 this, and then you'll get this case. It's very
6 important. I have a great deal of feeling and concern
7 for Anthony Liddell's family. Because I defend Marquis
8 McDonald and try to reach the truth in this case, I
9 didn't know that young man, I feel for his family, I'm
10 very sorry for them. I have children, we all have
11 children. It's terrible what happened, that they would
12 send him to college and this would happen.

13 And I don't -- I'm not blaming him, because he was
14 doing stuff he shouldn't have been doing. And I'm --
15 I'm not judging him because he was buying and/or
16 selling marijuana while he went to college. It's an
17 allegation, it's the facts of the case. It's only
18 significant to me in the fact that it surrounds what
19 happened. I don't approve of that, I don't -- because
20 it's illegal, okay. I don't approve of Marquis
21 McDonald and Black going and doing that.

22 I would tell anybody, look, I don't care what you
23 think about it, it's illegal. If you want to do that,
24 go to a state that it's not illegal, go there, if
25 that's what you believe in and that's what you want to

1 do. But I'm not judging him for that, and in no way,
2 shape or fashion am I saying that Anthony Liddel
3 caused any of this. He was at the wrong place at the
4 wrong time doing the wrong thing, okay. Marquis
5 McDonald was at the wrong place at the wrong time doing
6 the wrong thing.

7 If Marquis McDonald had been outside that car with
8 a firearm and fired it, not only would it have broken
9 the door or the window, there would have been some
10 muzzle flash, just like with the stick. The reason it
11 wasn't seen is because it came from inside the car.
12 The State said, I think, in the very beginning of this
13 case they had a footprint they were going to show you.

14 The State has made promises they haven't
15 delivered. And the reason they haven't delivered is
16 because they cannot deliver, they cannot deliver
17 something that's not true. And what's not true is that
18 this was not a common plan or scheme, okay. This was
19 not the hand of one is the hand of all.

20 And briefly, what I would like to do with you is
21 just talk about couple things in terms of the judge is
22 going to tell you the law, and then that's -- I'm
23 finished. In order for there to be murder, there must
24 be malice aforethought. Aforethought means prior to,
25 malice aforethought. Malice, malice is hatred, ill

1 will or hostility toward another person. There's no
2 evidence whatsoever that Marquis McDonald had any
3 hatred or ill will toward Anthony Liddell.

4 Hand of one is hand of all, prior knowledge alone
5 is not sufficient. There must be a finding of a
6 pre-arranged plan, a finding of a pre-arranged plan to
7 commit armed robbery or murder is necessary. It's not
8 there. Intent, His Honor will tell you about intent.
9 Intent must be a common design or intent to commit the
10 crime, with the intent to commit the crime. Not intent
11 to sell marijuana, not intent to do something with
12 so-called weed, okay, intent to commit armed robbery,
13 intent to commit murder.

14 His Honor will also tell you in addition to your
15 duties as jurors, that when you see something that
16 raises a reasonable doubt you must, according to your
17 oath, give the Defendant, Marquis McDonald, the benefit
18 of that doubt. As doubts arise, you must give him the
19 benefit of those doubts. And the language, I believe,
20 is, and resolve those doubts in his favor. And if they
21 are there, find him not guilty.

22 When you have done that, you will have served.
23 When you have done that, you will have fulfilled your
24 duty and your oath. When you have done that, you have
25 not rewarded any friends or given consequences to any

1 enemies. Your focus is on this case, and the only
2 thing that you can do is decide this case on evidence
3 and lack of evidence. That's all you can do. That's
4 all you're asked to do, and that's all your oath
5 requires. It's not a time for you to think what if,
6 what if the State had done more. You must look at it
7 the case is the case. They've done all they can do and
8 it clearly doesn't prove guilt.

9 At the conclusion of the case when you go back and
10 deliberate, look at the evidence, discuss it with each
11 other, and after you have reasoned it through, I'm
12 confident that when you look at the circumstances and
13 the case presented and the things that were not proved
14 to you though they were promised, that you won't have
15 any other choice but to reach two verdicts, one verdict
16 of not guilty of murder, and another verdict of not
17 guilty of armed robbery. And when you do that will you
18 have discharged your duty, you will have done justice
19 in this case, in this courtroom that was presented to
20 you.

21 Again, thank you, thank you for your patience,
22 thank you for your attention, thank you for your
23 service.

24 THE COURT: Thank you, Mr. McCollum. Solicitor.

25 MR. RICHARDSON: Thank you, Your Honor. It's the

1 Defendant's choices that bring us here in this
2 courtroom today, his deadly decisions, his cold,
3 calculated determination that he was going to get that
4 weed.

5 When he chose Anthony Liddell, Jr. as a soft
6 target, old college boy, he lives on campus, he ain't
7 going to have no gun, he's soft, college boy. I'm
8 going to go rip him off of his marijuana. He's the one
9 that told me he's got it, look at my cell phone. He's
10 got some good bud, I'm going to steel it. Who's he
11 going to tell, he can't run to the police and say, hey,
12 they stole my marijuana.

13 When he chose him as a soft target, when he chose
14 to arm himself not just with a handgun but with his
15 accomplice, his codefendant, his cousin, Black, Stephon
16 McLain, driving there, a little more force and
17 intimidation. You know what's better than one thug in
18 the car, two. Especially when Marquis has a gun.

19 And whenever the plan went awry, when the plan
20 went awry and Anthony didn't give it up, maybe he got
21 scared, maybe he tried to run and take the dope with
22 him, when it went awry, the Defendant used that handgun
23 for its intended purpose. Maybe they shot him one time
24 in the hip, show him they meant business. And when it
25 scared him enough to where he ran, jumping out of that

1 car, slammed the door as you would do trying to get
2 away from gunfire, you don't sit there with it open and
3 say, hey, hit me.

4 But when he chose to get out with that handgun on
5 the driver's side and pin Anthony Liddell up and, boom,
6 boom, silence the only witness he knew about, thinking
7 he created the perfect crime as he chose to speed away
8 in the night to leave Anthony Liddell lying, broken,
9 bloody, dying on the cold, wet pavement of that parking
10 lot. He made his choices.

11 Anthony Liddell lay dying, two hours away from his
12 mom. And Sheila Gillespie will never see Anthony cross
13 that stage at Coastal Carolina University, get his
14 diploma, look out in that audience and (indicating),
15 love you mama. This isn't the day she dreamed of when
16 she sent him off in that -- in the fall of 2011, not
17 coming here praying for justice.

18 She prayed, she hoped, Lord, please, let Anthony
19 make good decisions. Please, help him make the right
20 path. And Anthony probably did make some good ones, we
21 heard from one of his friends yesterday, we seen his
22 support. He's a good fellow, he was working at the
23 college, was making decent grades.

24 But he made a couple poor decisions. He chose to
25 get mixed up with marijuana, there's a lot of college

1 kids that do. But Anthony chose to smoke it, buy it
2 obviously if he was going to smoke it, maybe sell a
3 little bit. He wasn't a big time drug dealer, he was
4 work delivering stuff for the school around campus.
5 Look at his car, not some souped up Mercedes or SUV.
6 Listen to what his friends said.

7 But what it did make him is it made him a target.
8 And that's where his final fatal decision, the worst
9 decision he could make, comes into play. Because he
10 chose to trust this man, this defendant, a man who saw
11 Anthony Liddell not as a friend, not as a business
12 associate, but as a lamb ready for slaughter, an easy
13 mark. And because he saw Anthony that way, because he
14 saw Anthony as an easy mark, a soft target, easy to
15 rip, he planned that armed robbery that night.

16 And he made his choice when he armed himself with
17 a handgun and took his cousin along with him. All the
18 shooting took place on his side. When the armed
19 robbery went bad, he did exactly what that gun was
20 meant for. He silenced that only witness, and he chose
21 murder. And so I'm going to ask you to make the same
22 choices. He chose armed robbery, he chose murder. I'm
23 asking you to choose guilty, find him guilty for his
24 choices, armed robbery and murder. It's what he
25 planned, that's what he did.

1 Now, in just a moment, His Honor is going to talk
2 to you again. He's going to remind you that from the
3 time you swore your oath that you became the sole and
4 only judges of the facts, testimony and evidence in
5 this case. You get to weigh it out to reach a true and
6 just verdict, that's your job.

7 But he's also going to tell you he's the judge of
8 the law. And so he's going to give you the law to
9 apply to the case, to the facts, the evidence, how do
10 you weigh stuff out, the ground rules. He's going to
11 talk to you about credibility and believability. And,
12 quite frankly, that's something you do everyday, you
13 use your good common sense. That's why you were
14 picked, folks, because you got good common sense.

15 But in judging credibility you look up here at the
16 witness stand, the witness testifying. What's their
17 demeanor like? Does what they say have logic to it,
18 does it make sense, is it corroborated by evidence.
19 Have they made prior statements, is it consistent with
20 that? Are they asking you to believe that one plus one
21 is two, or say, no, no, no, one plus one must be seven.
22 Do they have friends to reward or enemies to punish,
23 why are they testifying?

24 And in doing that, the judge will tell you, you
25 can take all of what a witness says, some of it or none

1 of it. It's your job, your duty, you get to weigh it
2 out and give it what weight you determine.

3 The judge will talk to you about direct and
4 circumstantial evidence. He'll tell you that direct
5 evidence is the testimony of someone who claims to have
6 actual knowledge of an event. Actual knowledge, I
7 heard something, saw something, smelled something.
8 When I was pulling into the parking lot I was looking
9 ahead and I heard, boom, and it startled me. Didn't
10 know somebody had hit something or I had hit something.

11 I look up in the rearview mirror, and I see two
12 men fighting, not stuck in between doors but two men
13 fighting, grappling, hugging, and then fists being
14 thrown. Not leaned over in a car but standing up.
15 That's direct testimony. We saw the Defendant back
16 out, windows blacked out, tinted up, and strike the
17 victim. That's direct testimony.

18 But circumstantial evidence is a little different.
19 Circumstantial evidence is the proof of a chain of
20 facts or circumstances to indicate the existence of yet
21 another fact. It's evidence that immediately
22 establishes collateral facts from which a main fact may
23 be inferred, it's built off inferences.

24 It's like pieces of a puzzle. Any piece of that
25 puzzle individually tells us nothing. May have a

1 thousand pieces, and if you look at one piece it tells
2 us nothing. But as those pieces begin to snap
3 together, the picture becomes clearer, and even before
4 you finish the puzzle the picture is clear. And the
5 picture in this case is the Defendant planned that
6 armed robbery, and when it went bad he murdered Anthony
7 Liddell, Jr., with his cousin sitting right beside him.

8 The judge will talk to you about the hand of one
9 is the hand of all. And he'll tell you that if a crime
10 is committed by two or more people who are acting
11 together committing a crime, the act of one is the act
12 of all. A person who joins with another to commit a
13 criminal act or unlawful act is criminally responsible
14 for everything done by the other person which happens
15 as a probable, natural consequence of the acts that are
16 in furtherance of or carrying out that initial crime.

17 And, folks, when you take that gun for an armed
18 robbery, you could assume that somebody might fight
19 back. Because that's why you take the gun to put them
20 down if they do. And Mr. McCollum said that the State
21 was going to change its theory. No. I'm not here to
22 change theories, I'm not here to tell you that the
23 Defendant didn't pull that trigger. I'm telling you
24 he's guilty because he did pull the trigger. He's also
25 guilty under the hand of one, hand of all. Because

1 Mr. Hyman said, as is Stephon McLain because he was
2 there as the muscle. But we know the Defendant pulled
3 the trigger because all the action happened on the
4 driver's side where Amanda McTaggart saw them.

5 The judge will talk to you about armed robbery.
6 He'll tell you it's the taking of another's property
7 unlawfully by use of a deadly weapon with threats. And
8 that's what happened here. The judge will tell you
9 that illegal narcotics can be the subject of armed
10 robbery as property. We may not like it, but that is
11 the law. And also the cell phone was taken away.

12 The judge will talk to you about murder, that it's
13 the unlawful killing of another with malice
14 aforethought. Malice, as Mr. McCollum said, is hatred
15 or ill will. It can be express or implied. Express
16 malice, I hate you, I'm going to kill you. Implied
17 malice, prior planning, prearrangement, the planning of
18 a crime. Because that's felony murder, folks.
19 Whenever you plan to do one crime and you take a
20 weapon, and during the commission of that crime a
21 killing takes place, you can infer malice is there.
22 Because that gun did exactly what it was supposed to
23 do, it put a witness down.

24 But how does the State do this? The State proved
25 its case, because you're going to hear that term beyond

1 a reasonable doubt throughout the judge's charges.

2 What does it mean? We've all heard it, whether it's in
3 movies, TV's, books, but what does it mean? The judge
4 told you a little bit at the beginning, but the judge
5 will tell you in his charge that to give you evidence
6 beyond a reasonable doubt, the State must give you
7 evidence that leaves you firmly convinced of the
8 Defendant's guilt.

9 That's all. It's not some magic precipice that
10 the State couldn't meet. The State's got to give you
11 evidence that leaves you firmly convinced of the
12 Defendant's guilt. And we do that by the presentation
13 of the competent evidence, the admissible evidence, the
14 relevant evidence. It's our only job, to give you the
15 evidence that will assist you, the trier of fact, in
16 rendering a true and just verdict.

17 Our job is not to talk about the irrelevant. DNA
18 tests that might tell us who was there, but we have
19 witness statements to tell us who were there. They
20 talked about the absence of crime scene reconstruction.
21 It's irrelevant. We didn't have the car for three or
22 four days, the Defendant did. We can't do it.

23 We have testimony, folks, that's what we have.
24 And that's what the State gave you, the competent, the
25 admissible, the relevant evidence to assist you. So

1 let's take a look at that evidence. And I'm going to
2 ask you not to start on the night of the murder, the
3 26th.

4 Go back in those cell records, the Cellebrite
5 records, and look at the texts back and forth. That's
6 when the plan begins. That's whenever Anthony contacts
7 the Defendant, and I don't know what call, if they ran
8 into each other before, but says, hey, man, I got some
9 weed. Rainy day perp on deck, or something to that
10 effect. Good weed is what our drug agent said.
11 Expensive.

12 And that's when the plan begins to formulate. And
13 you can tell that as you look down those records
14 because after the initial conversation with Anthony, he
15 starts to -- the Defendant starts calling O'Blake, his
16 cousin, Black, Stephon. They don't go and buy the dope
17 that night. Why? Maybe O'Blake's busy, maybe they
18 can't get the gun that night.

19 But the next day they are ready to go. And so we
20 move forward, you see some more texts and conversations
21 back and forth. But we know that around 7:15 Amanda
22 McTaggart's driving over to University Place
23 Apartments, Grand Strand E, 114. She's driving up,
24 she's going over, maybe listening to the radio. It's
25 dark. She lives about a half mile away, but it's dark

1 so she's driving. She's concentrating on what she's
2 doing, she's going to watch Pretty Little Liars. And
3 when she's in there, she's concentrating on parking her
4 car and not hitting the curb.

5 And she hears that boom (indicating). And when
6 she hears that boom, it startles her.. Like what, I
7 assume some of you may have been in a fender bender,
8 run up on the curb before, thought you hit something,
9 and it startles you. You don't know where to look at
10 first, and she's looking around.

11 And finally she looks up, and in the rearview
12 mirror, she doesn't see car doors open. She sees two
13 guys outside of the car. She doesn't see the dome
14 light on inside the car, as you would if the door was
15 open. She sees two guys fighting, wrestling.

16 And the defendant's told you already that he was
17 outside the car on that side. Anthony was outside the
18 car on that side, he's had to change his story a little
19 bit from his initial one. But she sees them, she
20 thinks they are hugging at first, they're tight, no
21 doors in between them, and she sees punches being
22 thrown. She's heard that initial pop. And then as she
23 watches she hears, boom, boom.

24 And she freezes. She doesn't see the Defendant
25 get back in the car to drive away, she doesn't see

1 Anthony fall, and she doesn't see muzzle flash. She is
2 frozen. And she told you she didn't see muzzle flash
3 outside. She didn't see that car light up like the 4th
4 of July either with muzzle flash. If you seen movies
5 you've seen that. People shoot in a car, it looks
6 likes a flash bulb went off. Looks likes Christmas or
7 4th of July. She didn't see that because the gun is
8 pressed.

9 Mr. McCollum wants to talk about the lack of
10 stippling on the victim. Dr. Procter looked at it.
11 And Dr. Procter said, well, I could have looked at the
12 clothing. Well, I'm sorry we didn't go collect
13 everything at the crime scene and take it over to Dr.
14 Proctor. Dr. Procter is a forensic pathologist, his
15 job is the body, not the clothes. It was night, it was
16 a big sweatshirt and a tank top in between those
17 bullets and the victim's body.

18 We got pictures, we can put them back up for you.
19 And stippling is not going to be big. It's darkened
20 with blood. But those shots were close, folks, that's
21 why she doesn't see the muzzle flash. And Dr. Proctor
22 is not an expert on stippling on clothes, he's an
23 expert on stippling on the body and what happens.
24 We'll come back to Dr. Proctor.

25 But Amanda was frozen. And so we turn our

1 attention to Janie and we turn our attention to
2 Infiniti, and they both see basically the same thing.
3 Janie who got a good view as does Infiniti, and they
4 see the same thing. And the Defendant had to change
5 his story. He said he did not black out before, but
6 now he knows. Didn't know when he talked to us the
7 first time, but he knows now.

8 Janie would have seen somebody getting out, they
9 would have seen somebody on the floor. They didn't.
10 They have independent witnesses with no friends to
11 reward and no enemies to punish, so he's got to change
12 his story. Infiniti likewise didn't see anything but
13 the Defendant back his car up striking the victim, take
14 off into the night.

15 The chaos erupts. You heard from Sergeant
16 Farrell, you heard the 911 call. Crime scene is
17 called, they start processing the scene. Now, when
18 they process the scene, they pay particular attention
19 over to that white Hyundai, because that's where Amanda
20 said she saw them fighting. She saw them fighting over
21 by the Hyundai. And they go up to the door of that
22 Hyundai and they see those two bullet marks, two, not
23 that far apart, not far apart at all.

24 And they look at them. And they know they're
25 bullet marks. And they are not at a severe angle from

1 the side as if somebody was wrestling with a gun and it
2 went through them. It's through and through, as if
3 somebody had been pressed up against the car and
4 they're shot in the chest with one exit up the ribs and
5 turns, and the other shot goes into his chest popping
6 through that car. And they tumble around in that door,
7 and they look down and they find them. Three shots, we
8 found two shells -- or two projectiles so far. And
9 they looked down and they found that .40 caliber
10 projectile, that empty cigarette pack and that cell
11 phone.

12 I think that's what Mr. Hyman was talking about
13 when he said the Defendant left his footprint, that
14 cell phone is his footprint. We thought it was the
15 victim's at first and we took it in. Well, let's see
16 who the victim talked to last, maybe they know
17 something. But when they took it to the drug agents,
18 no, no, no, no, it's not the victim's. This phone
19 called the victim, this is the last one that contacted
20 the victim, who is it. It's Marquis McDonald, he's one
21 of our confidential informants.

22 And he informed SLED, or Lynch does. They give
23 him the CI packet, here's the addresses you can go to,
24 and they start beating the bushes. This is Wednesday
25 night now on into Thursday. They are beating the

1 bushes knocking on doors. Does the Defendant turn
2 himself in that day? Nope. Wednesday, Thursday, no.
3 Friday, morning, no. It's about 3 o'clock in the
4 afternoon when he's had time to stage that car up
5 right, when he's had time to come up with a story, that
6 he turns himself in. When his Uncle Doug calls, not
7 him but Uncle Doug. Maybe Uncle Doug's tired of people
8 knocking on his door and said, boy, you better get in
9 there and tell them something. Don't put the heat on
10 me.

11 But he turns himself in. He's had that car for
12 three days. And what does he do immediately upon him
13 getting in, he goes and he starts talking. Before they
14 can even read Miranda rights to him he wants to talk.
15 There's a reason for that, folks. My pop always told
16 me, lies are real hard to remember, truth's a lot
17 easier because it's constant. You can remember the
18 truth. Those lies you got to get out kind of quick,
19 and you got to remember what your lies are. So he
20 wanted to talk then, get that story out, what did I set
21 up in this -- in the Acura I was driving.

22 And we'll come back to the Acura, but he goes and
23 he gives that statement. You've heard the statement,
24 you heard what he said here in court today. He gave
25 that statement to law enforcement not knowing what

1 evidence they had at the time, not knowing what
2 witnesses had seen him do, not knowing the physical
3 evidence or trajectories or anything else.

4 And so he lied, didn't know we'd find him on video
5 with Black, didn't know we'd discovered who Black was.
6 Sunhouse was a throwaway line. So he told them what he
7 thought was going to get him out of trouble again. And
8 the police did not buy it. They didn't buy that he was
9 Anthony's best friend because what are you doing when
10 your best friend's shot, you get some help for him.

11 They didn't buy it that he didn't know Black that
12 he -- like he told them. They didn't buy his
13 reenactment of what happened in the car because it
14 couldn't be. And when confronted this couldn't have
15 happened this way, he just argued, well, it did because
16 nothing else fits his lie. But he's had a year and a
17 half to think about it now. And he told the police,
18 hey, man, I'm wearing the exact same clothes I was
19 wearing the night of the murder. Y'all can test it.
20 These are the clothes I had on whenever I was over at
21 CCU. Y'all can have them.

22 Look at the video from the Sunhouse. Why is he
23 lying about his clothes? Because he's scared. Was he
24 scared that night, no. He was eager to talk. And he
25 pointed out the damage done on the Acura. He hits him.

1 You got to look at these bullet holes, but there's no
2 stippling around those holes, no scorch marks. He's
3 not deaf, he's not damaged. If gunfire goes off in a
4 car, he's going to be deaf as a post. But he's not.

5 Those weren't bullet holes, folks, they found one
6 projectile. How did it happen? Maybe Anthony did see
7 the gun, maybe Anthony did try to escape, open that
8 door and that's when he's shot in the hip. Not down.
9 And he slams the door. Marquis can't let him out,
10 can't let him go, can't let him tell police at that
11 point.

12 So he gets out the car, closes it behind him, and
13 then he tackles him, pins him up against that white
14 SUV. And they're wrestling, that's what Amanda
15 McTaggart sees. She's frozen watching them, something
16 she doesn't watch normally. Not a doubt in her mind
17 that they were fighting. And boom, boom, shots go off
18 and she blacks out. That's how it happened.

19 Mr. McCollum wants you to believe that if the --
20 Anthony is leaning in the car, as Marquis said today,
21 his new story, Marquis leaned in the car grabbing that
22 gun, and he's shot, that those bullets were going to
23 hit him in the chest, take a big angle, go out his side
24 straight through. Remember Dr. Procter told you those
25 shots were pretty much straight through.

1 But that had to be believed that they came out,
2 went through his body out his side, and then made some
3 kind of U-turn or right turn or left turn and end up in
4 the Hyundai, and the other one did the same thing.
5 Folks, if he's shot as he's leaned over, those shots
6 are going to have a different angle, different collar
7 mark and they are going to come out somewhere around
8 his posterior, not out his back, not out his side. The
9 man lied to you. The police didn't believe his lies
10 that night on March 1st, 2013, don't you believe them
11 today. Don't believe him.

12 And we put up the GPS and everything. And you're
13 wondering why, but folks, you heard the initial story
14 said. We had to put him and Black together, and he
15 knows we put them together. And he knows nobody saw
16 Black outside the car, so he's got to come up with a
17 new story. And he's seen the GPS. We know they where
18 together, we know where the phone went to, we know
19 where the dope went to, we know it all. We know it was
20 planned it because he planned it, look at the cell
21 phone records.

22 He doesn't come out and say we're going do a
23 robbery, he tricks Anthony. But we know from what
24 happens he's the only man that could have done the
25 shooting. By Amanda McTaggart, a girl who doesn't know

1 Anthony from Adam's house cat, doesn't know Marquis,
2 doesn't know Black. She tells you what she saw. They
3 were hugged up together. When she first saw them,
4 Anthony's back's turned, but they were hugged up
5 together when those shots go off (indicating). The
6 Defendant and Anthony are hugged up together when those
7 shots go off.

8 And the only way for those wounds to happen to
9 Anthony without Marquis being damaged whatsoever is for
10 him to be the shooter; him shooting as he grapples with
11 him, cutting him from left to right, and when he turns
12 shooting him through the chest, putting him down. And
13 then he speeds away into the night, and but for that
14 cell phone we would have never found him.

15 On February 26th, 2013 the Defendant made his
16 choice. He chose armed robbery. And when it went bad,
17 he made a decision. Anthony Liddell's life is worth
18 less to me than \$350 worth of weed, and so I got to put
19 him down. Got to put the only witness I know about
20 down. And he did that. And when he did that, he
21 committed murder. He made his choices. You've got the
22 evidence to make your award. Find him guilty because
23 that's what he is.

24 JURY CHARGE

25 THE COURT: Thank you, solicitor. Now, ladies and

1 gentlemen, if I could have your attention, it becomes
2 my responsibility to give you the law which you of
3 course have promised that you will accept and apply
4 fairly and impartially to those facts that you will
5 determine very shortly when you begin your
6 deliberations in this case. Both the State and
7 Mr. McDonald expect that you will when you're
8 instructed analyze the evidence and decide what you
9 find to be credible and believable and once deciding
10 those facts take the law and apply it fairly and
11 impartially.

12 And to that end I would submit that you will have
13 honored the oath that you made when we started, and the
14 State and Mr. McDonald will have received a fair and
15 impartial determination in this process.

16 During this charge you may hear me use the word
17 Defendant from time to time. That's a term that we use
18 to designate the party against whom a claim is made.
19 That's the sole significance of that term, it means
20 nothing else. It's just another way of identifying
21 Mr. McDonald, so when I do use the term, please
22 understand I'm referring to him.

23 Mr. McDonald was accused in these two documents
24 which I discussed with you when we started. They are
25 what they appear to be, pieces of paper. They will not

1 accompany you to your jury room, they are not evidence.
2 And he's accused of committing the offense of murder
3 and armed robbery. To these indictments Mr. McDonald
4 has entered a plea of not guilty which places then upon
5 the State the burden of proving beyond a reasonable doubt
6 beyond a reasonable doubt.

7 As I stated to you, in this state, in this
8 country, persons accused of criminal offenses, such as
9 Mr. McDonald here today, are never required to come in
10 and prove or disprove anything at all. They don't have
11 to explain anything, they don't even have to present
12 any evidence. Because the law says when a state
13 accuses one of an offense, they have to prove that.

14 And in fact, it goes further to say that everyone,
15 and that would be you, must presume in this process,
16 must actively presume that he is innocent. And I would
17 tell you that that's a real presumption, that's not
18 just -- those aren't just words. You have to have
19 actively and must still actively presume that he is
20 innocent of these charges. And that presumption may be
21 only be set aside when through your deliberations you
22 become firmly convinced that the State has established
23 one or more of the crimes, and then and only then may
24 that presumption be set aside.

25 And the State of course has to prove these

1 elements of the crime beyond a reasonable doubt. What
2 is a reasonable doubt? A reasonable doubt is a doubt
3 which would make an honest, sincere, conscientious
4 juror in the search of a case to hesitate to act or
5 take some action. Proof beyond a reasonable doubt is
6 proof that leaves you firmly convinced of the
7 Defendant's guilt.

8 I would tell you that there are very few things in
9 this life and in this world that we know with absolute
10 certainty. And in criminal disputes such as this our
11 law does now require proof that overcomes every
12 possible doubt. If based upon your consideration of
13 the evidence you're firmly convinced that the Defendant
14 is guilty of one or more of these crimes, then you must
15 find him guilty.

16 If on the other hand, you think there's a real
17 possibility that he's not guilty, then you must give
18 him the benefit of that doubt and return a verdict of
19 not guilty as to that particular offense.

20 A reasonable doubt, ladies and gentlemen, may
21 arise from the evidence which is in the case or the
22 lack or absence of evidence in the case. And I charge
23 you that he is entitled to every reasonable doubt
24 arising in the whole case. What do I mean by that?

25 If upon any issue of fact which is essential to a

1 conviction, that is a verdict of guilty, you should
2 have a reasonable doubt as to how that issue should be
3 resolved, it would be your duty to resolve that in
4 Mr. McDonald's favor. The evidence, of course, which
5 you must consider consists of the testimony of the
6 witnesses and exhibits that have been offered and
7 introduced during the trial. Please remember that you
8 saw several occasions during this process an item may
9 be, and I mentioned this to you when we started, that
10 may be marked for identification, but it wasn't
11 formally introduced. If that as to that item you
12 certainly are to analyze the testimony concerning that
13 document.

14 Many times it's used to refresh a witness'
15 recollection so that they can testify to specific
16 things. And you certainly will analyze that and
17 analyze the fact that the witness had to refer to a
18 document. But as for the document itself, you won't
19 have that. Only those documents that were introduced
20 into evidence will accompany you to your jury room.

21 Also, during the trial there were times when you
22 heard attorneys say objection and you heard my ruling.
23 I either overruled the objection or I sustained the
24 objection.

25 If I overruled the objection, I meant -- it meant

1 that you were going to hear the question and answer.
2 But if I sustained the objection then you did not hear
3 the question -- the answer to the question. The fact
4 that an attorney makes an objection and the fact that
5 my ruling, neither of those should be considered. It's
6 very proper for the attorneys as officers of this court
7 to make those objections, and they have that
8 responsibility to raise those matters of law which I
9 must consider.

10 And my ruling, again, is not evidence, it's part
11 of my responsibility as a judge of the law to make
12 rulings on matters of law that do arise from time to
13 time. Most of the time those are dealt with...
14 evidentiary matters or rules of evidence which govern
15 the presentation of evidence in these proceedings.

16 Now, if I sustained the objection, please --
17 excuse me, if I overruled the objection, please don't
18 say, well, the judge allowed it, therefore I must
19 accept it. Because if you do that, then you've let me
20 step over into your area of responsibility. Just as
21 you're not to consider if I excluded it. Because if
22 you do start thinking about that, then you've invaded
23 my province and you've stepped into my responsibility.

24 No, if I overruled it, it really demonstrates how
25 we work together. I've said as a matter of law and our

1 rules, I was going to permit the testimony for your
2 consideration. But then it shifts to you, you decide
3 whether you believe it or not and if so how strongly
4 you believe it. And that's how we work. You analyze
5 the evidence and you decide what you find to be
6 credible and believable.

7 Please remember that the remarks of the attorneys,
8 while extremely helpful, never should be considered
9 evidence. I would instruct you that if their remarks
10 and their arguments about what a witness said or didn't
11 say differs from your collective recollection of what
12 that witness said, you're instructed to disregard their
13 remarks and take your recollection. And the reason for
14 that is you and you alone are the sole judges of the
15 facts in this case.

16 Likewise, if any statement of law that they've
17 raised or made during either the opening statements or
18 closing arguments differs from the law as I give it to
19 you, then you are instructed to disregard those remarks
20 because for the purposes of this proceeding today, I'm
21 the sole judge of the law.

22 Ladies and gentlemen, in these cases and really
23 applies to whether it's a criminal dispute or civil
24 dispute; when presenting a case is there are two types
25 of evidence, direct evidence and circumstantial

1 evidence. Direct evidence, as the name would imply, is
2 when a person generally testifies to a sensory
3 perception, I saw something, I heard something, I felt
4 something or the like. And if you are firmly convinced
5 of the credibility of that testimony or that it's
6 credible testimony, then it would establish that
7 particular fact or circumstance.

8 Circumstantial evidence is proof of a chain of
9 facts and circumstances indicating the existence of a
10 fact. It is evidence which immediately establishes
11 collateral facts from which the main fact may be
12 inferred, either by deductive or inductive reasoning.
13 And basically it says that as to each of those
14 circumstances, if you are firmly convinced as to the
15 credibility of each of those circumstances and you link
16 them, they lead you to a logical conclusion, then that
17 also is a proper way of establishing a particular fact
18 of circumstance, if you are firmly convinced as to the
19 logical conclusion.

20 I would tell you that in that regard the law makes
21 absolutely no distinction between the weight or the
22 value to be given to either direct or circumstantial
23 evidence, nor is there any greater degree of certainty
24 required of circumstantial evidence than direct
25 evidence. You're instructed to weigh all of the

1 evidence in this case and decide what you find to be
2 credible and believable.

3 However, to the extent that the State relies on
4 circumstantial evidence, all of the circumstances must
5 be consistent with each other, and when taken together
6 point conclusively to the guilt of the accused, or the
7 Defendant, beyond a reasonable doubt. If these
8 circumstances merely portray the defendant's behavior
9 as suspicious, then the proof has failed.

10 Because the mere fact that the circumstances
11 brought out in a case are strongly suspicious of guilt
12 or that the circumstances assert the Defendant's guilt
13 is even probable, that that would not be enough to
14 sustain a verdict or a conviction. Why, because the
15 proof offered by the State has to be more than mere
16 suspicion, it has to be more than somebody being
17 probably guilty, it has to be proof that convinces you
18 beyond a reasonable doubt.

19 How do you decide what you find to be credible and
20 believable, how do you decide the true facts of the
21 case? As we discussed when we qualified you and we
22 discussed when I made my opening remarks, this is not
23 foreign to you, you've done this and do this every day
24 of your life. You read something or you hear something
25 and you make a decision as to whether or not you

1 believe it.

2 And there are many, many factors that we use to
3 assist us in making this type of decision. I'm going
4 to discuss some of them now. But if I don't mention a
5 method or a factor that you've considered and used in
6 your life and you find -- have found it to be reliable,
7 please employ it when you begin the process of
8 analyzing the evidence:

9 But some of the factors that you may want to
10 consider would be the appearance of the witness, how
11 did they appear to you, straightforward or hesitant in
12 answering a question. Was the testimony of a witness
13 consistent or was it inconsistent. How did the witness
14 come to know the facts that he or she testified to, and
15 what was the ability of that witness to know those
16 particular facts. Is there a reason for a witness to
17 give testimony which may be helpful or hurt -- or
18 detrimental to one side or the other; in other words,
19 was the witness biassed or prejudice.

20 Also you've heard testimony in this case of a
21 prior conviction of a witness. That is testimony that
22 may be considered by you in evaluating the credibility
23 of that witness. You would consider it the same as any
24 other factors that you would use to evaluate the
25 witness and may only consider it for the purpose of

1 evaluating credibility. And the fact that a person has
2 a prior conviction does not make his testimony not
3 credible or does it make it credible. It's just
4 another factor that you must decide in determining the
5 credibility of that particular witness.

6 In determining and evaluating the credibility and
7 believability of witnesses, our law gives you very
8 broad discretion. And please remember, we're not
9 talking about counting witnesses, we're not talking
10 about numbers. But you may consider many witnesses
11 against one, you may consider one witness against
12 several. You may consider all of a witness' testimony,
13 you may -- as being credible, you may believe parts of
14 a witness' testimony, or you may find that the witness'
15 testimony is not credible in any fashion and you
16 therefore don't believe it in its entirety.

17 Now, these are decisions you don't make
18 arbitrarily, but if there's a reason in the record of
19 this case that is evidence in this case for taking that
20 position, you have that prerogative. Because your
21 objective has been since you -- since we started to
22 determine the truth regardless of the source of the
23 evidence.

24 Now, while you enjoy a very wide latitude and
25 broad discretions when it comes to determining the true

1 facts in this case, please remember that you don't
2 enjoy the same with the law. Because as we discussed,
3 you may hear a principle of law with which you differ.
4 And I respect your right to feel that way. You may
5 even feel that the law should be changed, and that's
6 your right and your prerogative. But that's for
7 another day.

8 For the purposes of today, you must accept the law
9 as I give it to you, setting aside your personal belief
10 as to what you think the law is or should be, and apply
11 that law fairly and impartially to the facts. You are
12 also instructed to consider the charge as a whole, and
13 don't put any greater weight on any one aspect of the
14 charge but apply the entire charge to the facts that
15 you will determine when you begin your deliberations.

16 The fact that I give you an instruction on a
17 particular aspect of this case is not to be considered
18 by you as a suggestion of how you are to decide a
19 factual issue because, as I've stated, nothing that I
20 say or have said during this process or do should be
21 considered by you as an indication of how you must
22 resolve a factual issue. Also, the fact that I have it
23 in some order means nothing, again, consider the charge
24 as a whole.

25 Let's look at the two charges. First, I want to

1 talk about the offense of murder. He's accused in this
2 indictment of committing the offense of murder, which
3 is provided at Section 16-3-10 of our code of laws,
4 defines murder as the killing of another person -- any
5 person with malice aforethought, either expressed or
6 implied. The State in order to obtain a conviction
7 must prove that Defendant killed another person with
8 malice aforethought.

9 Malice is hatred, ill will or hostility towards
10 another person. It is the intentional doing of a
11 wrongful act without just cause or excuse and with the
12 intent to inflict an injury or under circumstances that
13 the law will infer an evil intent. Malice indicates a
14 formed purpose and is a design to do a wrongful act
15 under circumstances that exclude any legal right to do
16 it.

17 Further, there must be malice aforethought, which
18 means that the malice must have been conceived in the
19 mind of the Defendant prior to the act producing the
20 fatal result. The word aforethought is usually
21 understood to refer to the time when the evil is
22 conceived. But the law does not require that the
23 malice must exist for any appreciable length of time
24 before the commission of the act. It may be -- it may
25 be conceived at the very moment that the action is

1 taken, which results in the death of another.
2 Therefore, there must be a combination of a previous
3 evil intent and the act. Malice aforethought may be
4 expressed or inferred.

5 These terms expressed, inferred do not mean
6 different kinds of malice but merely the manner in
7 which the malice may be shown to exist, that is, either
8 by direct evidence or inference from facts and
9 circumstances which are proven. Express malice is
10 shown when a person speaks words which express hatred
11 or ill will for another, or when a person prepared
12 beforehand to do the act which was later accomplished.

13 Malice may be inferred from conduct showing a
14 total disregard for human life. Inferred malice may
15 also arise when the deed is done with a deadly weapon.
16 A deadly weapon is any article, instrument or substance
17 which is likely to cause death or great bodily harm.
18 Whether an instrument has been used as a deadly weapon
19 depends on the facts and circumstances of each case. I
20 would instruct you that a pistol under our law is a
21 deadly weapon.

22 Also, if the facts proved beyond a reasonable
23 doubt establish that one intentionally kills another
24 during the commission of a felony, the inference of
25 malice may also arise. Now, if facts are proved in a

1 case beyond a reasonable doubt sufficient to raise this
2 inference of malice, then -- and it's you considering
3 that, you are to consider that inference as simply an
4 evidentiary fact which is to be taken into
5 consideration together with all other facts and
6 evidence in the case. And you may give it such weight
7 as you find it should receive.

8 You as jurors are free to accept or reject the
9 permissive inference depending on your view of the
10 facts of the case. Now, if malice is present in the
11 mind of one doing the killing any length of time before
12 the act, then its presence would be sufficient to
13 render the killing murder.

14 Let's look at the offense of armed robbery. The
15 Defendant is also charged with this offense, and in
16 order to prove this offense, the State must prove
17 beyond a reasonable doubt that the Defendant took
18 personal property from the person or presence of
19 another person. Property is in the presence of a
20 person if it is within the person's reach, inspection,
21 observation or control, so that the person could, if
22 not overcome with violence or prevented by fear, keep
23 possession of the property.

24 The State must also prove beyond a reasonable
25 doubt that the Defendant carried the property away

1 intending to permanently deprive the owner of the
2 property and to keep the property for Defendant's own
3 use.

4 The slightest removal of the property or the
5 complete possession of the property even for an instant
6 by the Defendant is sufficient to show a taking and
7 carrying away of the property. In that regard, I would
8 instruct you that illegal drugs are considered by our
9 law to be property. The taking and carrying away of
10 the property must have been done with violence or by
11 putting the owner of the property in fear of violence.

12 Finally, the State must prove beyond a reasonable
13 doubt that the Defendant was armed with a deadly weapon
14 during the robbery. A deadly weapon is any, as I've
15 just -- as I've earlier defined, is any article,
16 instrument or substance which is likely to caught death
17 or bodily harm. And in that regard, I would tell you a
18 pistol may be a deadly weapon.

19 I would also instruct you, ladies and gentlemen,
20 that if a crime is committed by two or more people who
21 are acting together and committing a crime, the act of
22 one is the act of all. A person who joins with another
23 to accomplish an illegal purpose is criminally
24 responsible for everything done by the other person
25 which occurs as a natural consequence of the acts done

1 in carrying out the common plan and purpose.

2 If two or more people are together acting
3 together, assisting each other in committing the
4 offense, the act of one is the act of all. This is
5 sometimes called the hand of one is the hand of all.

6 Prior knowledge that a crime is going to be
7 committed without more is not sufficient to make a
8 person guilty of the crime. Mere knowledge that
9 another person is going to commit a crime, even if the
10 Defendant is present when the crime is committed is not
11 sufficient to convict the Defendant as a principal, nor
12 does mere presence at the scene of a crime or mere
13 association with a person who commits a crime make a
14 defendant an accomplice or an aider or abettor, and
15 abettor of person committing the crime.

16 Guilt as a principle is shown by actual or
17 constructive presence at the crime as a result of a
18 prior arrangement. Therefore, a finding of a prior
19 arranged plan or common scheme is necessary for finding
20 of guilt as a principal.

21 The State must prove beyond a reasonable doubt by
22 competent evidence the theory of the hand of one is the
23 hand of all. A principal in a crime who is one who
24 either actually commits a crime or who is present
25 aiding, abetting or assisting in committing the crime.

1 When a person does an act in the presence of and
2 with the assistance of another, the act is done by
3 both. Where two or more acting with a common plan or
4 intent are present at the commission of a crime, it
5 does not matter who actually commits the crime.
6 Present at the commission of a crime means to be
7 sufficiently near to aid and abet and assist in the
8 commission of that crime.

9 The burden upon the State is to prove every
10 element of the crime charged. If you find after
11 reviewing all of the evidence that the State has proved
12 the Defendant was only present at the scene and that --
13 and they had not proved beyond a reasonable doubt any
14 other participation in the crime, then you must find
15 the Defendant not guilty. The law is that -- law is
16 that the proof at the scene of the crime is not
17 sufficient alone to establish guilt.

18 I would also instruct you that intent is a
19 necessary element that the State must prove beyond a
20 reasonable doubt. For there must have been a common
21 design or intent to commit the crime, and the crime
22 must have been committed pursuant thereto with the
23 person aiding and abetting by some overt act.

24 Intent means intending the result which actually
25 occurs, not accidentally or involuntarily. Intent may

1 be by acts and conduct of the Defendant and other
2 circumstances from which you may naturally and
3 reasonably infer intent. The State must prove these
4 elements beyond a reasonable doubt.

5 Intent may be -- may be -- intent operates jointly
6 with the commission of the act and may include those
7 consequences which represent the very purpose for which
8 the act is done or are known to be substantially
9 certain to result regardless of one's desire.

10 Criminal intent is a mental state, a conscious --
11 of a conscious wrongdoing. And it's up to you, ladies
12 and gentlemen, in analyzing the evidence to decide
13 whether or not the State has convinced you beyond a
14 reasonable doubt that the Defendant was the person at
15 the scene and the intent was carried out, and that was
16 established beyond a reasonable doubt.

17 Throughout this entire process, ladies and
18 gentlemen, you and I were selected as judges. We're
19 not partisans or advocates for either the State or
20 Mr. McDonald. We don't have any friends to reward, nor
21 do we have enemies to punish. In fact, ladies and
22 gentlemen, we have to do something and it's -- we have
23 to be conscious of this, because as human beings it's
24 not always easy to not be influenced by human emotion,
25 which we all have.

1 But you have to -- you have promised that you will
2 set aside all human emotions. You can't be motivated
3 by any human emotion. And you must methodically apply
4 your common sense, your sense of logic and reason in
5 analyzing the facts; decide what you find to be the
6 true facts, and then once deciding those facts apply
7 the law and report your decision.

8 I would come down normally, but I'm not going to
9 take the time to walk around again, forgive me for not
10 doing that, ladies and gentlemen. As the presiding
11 juror, I will be sending back two verdict forms. And
12 you will note when you see them, I probably couldn't
13 even see the paper from where you are, but there are
14 two choices. The order in which they appear means
15 absolutely nothing, I had to put them in some order.
16 You'll note there's a caption on each one, one of them
17 deals with the offense of murder, the other with armed
18 robbery, two separate crimes.

19 And the caption is just to facilitate the filing
20 of the document. That's the purpose of that. The body
21 reads thusly, and this one happens to deal with armed
22 robbery. We, the jury, in the above entitled action by
23 unanimous consent -- what does that mean, all 12 of you
24 have to agree. 11 to 1 is not sufficient, ten to two.
25 12 to 0 -- find the Defendant, Marquis Spencer

1 McDonald, on the charge of armed robbery -- and again,
2 the order means nothing -- first charge says guilty,
3 second charge not guilty.

4 Then it will say presiding juror and a line and a
5 blank for the date. I ask you to, whichever your
6 choice, that you place a check in the line that
7 precedes the choice and circle it. That way we know
8 that's your choice. Once you've done that, sign it and
9 you will have completed that form.

10 What will you be saying if it's guilty? You'll be
11 saying that you and other jurors analyzed the evidence
12 and are firmly convinced that the State established
13 each element of the crime of armed robbery. And
14 therefore your verdict is guilty. Not guilty says,
15 we've analyzed the evidence, and collectively the State
16 has failed on one or more elements and therefore,
17 pursuant to my instruction, you are instructed to
18 return a verdict of not guilty.

19 The same -- you'll go through the same process for
20 the offense of murder, and again, the elements that
21 I've discussed. Guilt means the State is -- you are
22 firmly convinced that the State has established beyond
23 a reasonable doubt, each of the elements of the crime of
24 murder. So whichever it is, if you'll check it, circle
25 it, sign it, date it, knock on the door once you've

1 finished both of them, we'll be happy to return you to
2 the courtroom to receive your verdict.

3 I know you're anxious to get started, and you're
4 almost there. First, I need to ask if any member of
5 the jury panel, the first 12, we have Ms. Lightweis as
6 well now, but the 12 jurors now on the jury, any one of
7 you feel that you will be unable to continue? If so,
8 please raise your right hand. Thank you very much.

9 Ms. Post, at this point it appears that the first
10 12 jurors will be able to continue. I'm going to ask
11 when the jury is excused that you not rejoin them in
12 your jury room. They will take you to another room,
13 and I'll be in very shortly to discuss with you how
14 much longer you need to stay.

15 I have to excuse you to discuss my charge with the
16 attorneys. It may be necessary that I return you to
17 the courtroom to give you some additional instruction
18 or clarification. If so, we will return all of you to
19 the courtroom, including Ms. Post, to give that
20 instruction.

21 But if there aren't any additions or corrections
22 that need to be given, then we will gather the exhibits
23 and the verdict forms and deliver them to you. When
24 you receive those exhibits, then you may commence your
25 deliberations but not before.

1 Now, once the deliberations commence, the only
2 restriction that I place on the deliberations is this.
3 If any juror has to leave the table for any reason, you
4 must stop deliberating until all 12 of you are
5 together. Other than that, you proceed as you deem fit
6 and proper. I also would remind you that if during
7 your deliberations you should have a difference of
8 opinion about what a witness said or didn't say, if you
9 will let me know that or if you need further
10 clarification on any instruction, they will give you a
11 pad. If you'll just write that, use an entire sheet
12 because that will become an exhibit.

13 If you need further witnesses' testimony or
14 rehearing witnesses' testimony, if you'll just indicate
15 the witness, and we'll make arrangements to bring you
16 in. Because as I told you, please remember, my court
17 reporter is the sole -- is solely responsible for the
18 record. And it's -- so if you do have a difference, we
19 can resolve that very simply. Thank you very much for
20 your attention. Please now retire to your jury room
21 and await the exhibits before commencing your
22 deliberations.

23 (WHEREUPON, the jury exited the courtroom at
24 1:02 p.m.)

25 THE COURT: Exceptions, additions from the State?

1 MR. RICHARDSON: No, Your Honor.

2 THE COURT: Exceptions, additions from the
3 Defendant?

4 MR. McCOLLUM: No, judge.

5 THE COURT: Thank you all very much, I appreciate
6 it. It's been an honor and privilege to work with you,
7 the professionals that you are. Good luck to all
8 parties.

9 MR. McCOLLUM: Thank you, judge.

10 MR. RICHARDSON: Thank you, Your Honor.

11 THE COURT: And those of you that have been
12 attending that are here for either side, thank you as
13 well. I know this is a tough time for each one of you.
14 My heart goes out to both sides in this situation. And
15 I just thank you for the courtesies that you've
16 extended and your professionalism in observing the
17 proper decorum during this process. Thank you so much.
18 We'll be at ease.

19 MR. RICHARDSON: Yes, sir, Your Honor.

20 (WHEREUPON, the jury begins to deliberate at 1:03
21 p.m.)

22 (WHEREUPON, Court's Exhibit No. 1 was marked for
23 identification.)

24 THE COURT: Thank you, let's bring in our jury
25 panel. Let the record reflect that Mr. McDonald is

1 present.

2 (WHEREUPON, the jury came into open court at
3 approximately 1:59 p.m.)

4 THE COURT: Thank you very much, ladies and
5 gentlemen. What's now Court's Exhibit 1, we want all
6 the photos of the cars, etcetera. You have them. The
7 problem, and I told them I forgot to mention it to you,
8 you have the disc. But there are no -- were not
9 physically entered, they are on the Power Point. And
10 we checked to see if we have a computer that can be
11 taken by you and played in the jury room. We do not.

12 So we need to -- for you to let us know if you
13 want to see the disc again or disc, any part of it.
14 Let us know and we'll need you to bring the disc with
15 you and we'll play it, and you can retire.

16 So with that, if you need to talk with them, go
17 back to your jury room. If not, I just need you --
18 somebody to get the disc for us. We need the disc.
19 All right. Could we get the -- could you --

20 THE FOREPERSON: You want me to get it?

21 THE COURT: Yes, sir, that would be fine.
22 Everybody else could just remain seated. We're ready
23 to go forward, are we not, solicitor, with that?

24 MR. RICHARDSON: If I could just have some
25 direction.

1 THE COURT: We're going to play it.

2 MR. RICHARDSON: There are three, I just...

3 THE COURT: Yeah. I would say we'll play all of
4 them until they tell us otherwise.

5 MR. RICHARDSON: Your Honor, if it will work, I
6 can hand them the remote, once it's plugged in they can
7 flip forward and back. Or they can tell me to flip
8 forward and back, and I can do the remote.

9 THE COURT: Okay. Well, when the presiding juror
10 gets back, I'll find out what they want to do.

11 MR. RICHARDSON: Yes, sir, Your Honor.

12 THE COURT: Thank you. Thank you, sir. And what
13 we'll do -- thank you very much -- is with a mark, you
14 want all of them played, you want certain ones played,
15 without disclosing what it is you're looking for?

16 THE FOREPERSON: I would like to see the bullet
17 holes in the white SUV.

18 THE COURT: Okay, all right. And we'll be happy
19 to -- you can fast forward.

20 MR. RICHARDSON: I know where those are, Your
21 Honor.

22 THE COURT: That and any other parts, if you'll
23 just let us know, then we'll be happy to play it for
24 you.

25 MR. RICHARDSON: Thank you.

1 THE COURT: Let me do this, okay. If y'all need
2 to go back and talk about that and then let us get a
3 list of the ones, we can do that as well. But we'll
4 just do it this way if that works for everybody.

5 MR. RICHARDSON: Your Honor, for the record, this
6 is State's No. 10.

7 THE COURT: Very well, thank you.

8 (Discussion off the record.)

9 MR. RICHARDSON: For the record, Your Honor, I'll
10 be starting at slide 59.

11 THE COURT: Okay.

12 MR. RICHARDSON: Your Honor, if the jury will tell
13 me when they want me to stop.

14 THE COURT: Just show right now the request that
15 this vehicle of the bullet holes, I think, so whatever
16 you have, whatever photographs you have of that. Just
17 go through those photographs for me.

18 MR. RICHARDSON: That was slide 58 through 65,
19 Your Honor.

20 THE COURT: Okay, all right.

21 MR. RICHARDSON: That's with the tape around.

22 THE COURT: Any other photographs without the tape
23 around?

24 MR. RICHARDSON: I believe there was one
25 previously, Your Honor. I'm just reversing back, Your

1 Honor.

2 THE COURT: All right.

3 MR. RICHARDSON: There's one without the tape.
4 That is slide 48.

5 THE COURT: Okay.

6 MR. RICHARDSON: I believe that would be just
7 about all of them.

8 THE COURT: All right. Any other photographs of
9 the --

10 THE FOREPERSON: I mean, can you go forward from
11 there, and I'll tell you when to stop.

12 MR. RICHARDSON: Sure, sure. Going up, okay.

13 THE FOREPERSON: Slowly just go. Right there.
14 Okay. Keep going forward. Right there. So we're
15 clear, Defendant's car would have been parked right in
16 this --

17 THE COURT: Wait just one second. This, what's
18 happening right now, would be a wonderful maybe
19 addition one day. But right now, any discussion that
20 we have, y'all cannot talk, y'all should only wait and
21 talk in the jury room. We don't need to know what it
22 is y'all are looking for.

23 THE FOREPERSON: Okay.

24 THE COURT: And unfortunately, we can't -- we
25 can't comment on what we -- where we are now under the

1 rules. So thank you, sir.

2 THE FOREPERSON: I apologize.

3 THE COURT: Nothing wrong with what you did, I
4 understand it, but we're not permitted to do that.

5 Y'all want to go back and talk, discuss it, then --

6 THE FOREPERSON: Can you go two more pictures.

7 MR. RICHARDSON: Sure.

8 THE FOREPERSON: All right, right there.

9 MR. RICHARDSON: Right there?

10 THE FOREPERSON: Okay. Everybody good?

11 THE COURT: All right. If you need to view more,
12 just let us let us know..

13 THE FOREPERSON: All right..

14 THE COURT: Thank you very much, appreciate it.
15 Resume and continue your deliberations.

16 (WHEREUPON, the jury exited the courtroom at
17 2:09 p.m.)

18 (WHEREUPON, the jury resumed deliberations at
19 approximately 2:10 p.m.)

20 THE COURT: Any exceptions, additions from the
21 State regarding comments of the Court to the jury?

22 MR. RICHARDSON: No, sir, Your Honor.

23 MR. McCOLLUM: None from the defense, Your Honor.

24 THE COURT: Thank you very much, and we're off the
25 record.

1 (WHEREUPON, a brief recess was taken at 2:10 p.m.)

2 THE COURT: Thank you; please be seated. All
3 right, let the record reflect Mr. McDonald is present.
4 I'm advised the jury has reached a verdict. Is the
5 State ready to receive the verdict?

6 MR. RICHARDSON: The State is prepared to go for
7 it, Your Honor.

8 THE COURT: Very well. Is the defense ready to
9 receive the verdict?

10 MR. McCOLLUM: The defense is ready, Your Honor.

11 THE COURT: Very well. Ladies and gentlemen,
12 again, I thank you for the -- your professionalism in
13 observing the proper courtroom decorum throughout this
14 trial. I understand emotions. I've been doing this
15 for 20 years and it's an emotional time, it still is.
16 And I hope and pray if I'm fortunate enough to do it 20
17 more years, it will always be because we're dealing
18 with something that -- we're dealing with human life,
19 and I understand that. And I respect anybody that
20 would have deep feelings right now.

21 But if you remain, I'm going to expect you to
22 continue to maintain this proper decorum. There will
23 be no reaction to the verdict. And if you feel that
24 you are unable to do that, then I would appreciate you
25 just exiting the courtroom right now. Because if you

1 remain and there is any outburst, then I will have to
2 deal with that because that would constitute direct
3 contempt of court. So thank you very much again for
4 your courtesy and acknowledgement of this process.

5 And, frankly, those 12 persons from this county
6 have made a sacrifice to make this process work, and we
7 need to keep the dignity of the process. So thanks
8 again. Let's bring in our jury, please.

9 (WHEREUPON, the jury came into open court at
10 approximately 4:01 p.m.)

11 THE COURT: Thank you very much, ladies and
12 gentlemen. Mr. Hill, I've been advised the jury has
13 reached a verdict; is that correct, sir?

14 THE FOREPERSON: (Nodding affirmatively.)

15 THE COURT: If you would pass the verdict form,
16 please, to the bailiff, the verdict forms. Verdict
17 forms have been properly completed. I would ask the
18 Defendant to please rise. You may publish the verdict.

19 CLERK OF COURT: In the Court of General Sessions,
20 Case 2014-GS-26-3820, the State of South Carolina,
21 County of Horry, State of South Carolina versus Marquis
22 Spencer McDonald, we, the jury, in the above entitled
23 action by unanimous consent find the Defendant, Marquis
24 Spencer McDonald, on the charge of armed robbery,
25 guilty. Signed by foreperson John Hill, Horry County,

1 South Carolina, October 9, 2014.

2 In the Court of General Sessions, case number
3 2013-GS-26-1478, the State of South Carolina, County of
4 Horry, State of South Carolina versus Marquis Spencer
5 McDonald, we, the jury, in the above-entitled action by
6 unanimous consent find the Defendant, Marquis Spencer
7 McDonald, on the charge of murder, guilty. Signed by
8 foreperson John Hill, Horry County, South Carolina,
9 October 9, 2014.

10 Ladies and gentlemen of the jury, if this is your
11 verdict, so signify by raising your right hand.

12 (WHEREUPON, all jurors' right hands were raised.)

13 THE COURT: Thank you... You may put them down.

14 Let the record reflect that each juror raised his or
15 her right hand in response to the clerk's request. You
16 may be seated. Anything further for the jury panel
17 from the Defendant?

18 MR. McCOLLUM: No, Your Honor.

19 THE COURT: Very well. Ladies and gentlemen,
20 thank you very much for your participation. I
21 appreciate the service that you've rendered to your
22 county and state. I ask you to return to your jury
23 room for just a moment, and I'll be in in just a short
24 while to discuss it with you. Thank you.

25 (WHEREUPON, the jury exited the courtroom at

1 4:03 p.m.)

2 THE COURT: Any matters from the State?

3 MR. RICHARDSON: No, sir, Your Honor.

4 THE COURT: Any motions or matters from the
5 Defendant?

6 MR. McCOLLUM: Thank you, Your Honor.

7 THE COURT: Yes, sir.

8 MR. McCOLLUM: Your Honor, at this time on behalf
9 of the Defendant, I would make a motion for a new
10 trial. In addition, I would renew all motions
11 previously made, renew all objections and renew the
12 motion for a directed verdict.

13 THE COURT: Thank you so much, I appreciate that.
14 And certainly the record reflects my positions with
15 regarding the objections and the motions for directed
16 verdict. With respect to the motion for new trial, it
17 was clearly a matter for the jury to decide two
18 positions presented from both sides and argued very,
19 very clearly.

20 And the jury made a decision, and I think the
21 verdict -- I think the evidence supports the verdict,
22 and I therefore deny your motion. Thank you, sir. All
23 right. We're prepared for sentencing?

24 MR. RICHARDSON: Yes, sir.

25 THE COURT: Prepare the sentencing sheets?

1 MR. RICHARDSON: Yes, sir.

2 THE COURT: We'll take a few minutes, and I'm
3 going to go speak to the jury and dismiss them, and
4 then I'll return and impose a sentence.

5 MR. RICHARDSON: I'll hand these up to you.

6 THE COURT: Thank you so much. We'll be at ease
7 for a few moments.

8 (WHEREUPON, a brief recess was taken at 4:05 p.m.)

9 THE COURT: All right. Sorry to keep y'all
10 waiting. All right. Anything from the State further?

11 MR. RICHARDSON: Your Honor, I've spoken to both
12 Anthony Liddell, Sr., and Sheila Gillespie, Anthony
13 Jr.'s mother and father. They are heartbroken, they
14 don't wish to address the Court at this time. They
15 don't -- they just -- they are emotionally overwhelmed
16 this morning, Your Honor.

17 THE COURT: And I understand that perfectly well.

18 MR. RICHARDSON: Yes, sir, Your Honor.

19 THE COURT: And I appreciate that.

20 MR. RICHARDSON: And with regard to sentencing,
21 the State just -- well, you've heard the case, Your
22 Honor. He does have a prior record for assault and
23 battery, high and aggravated nature. And murder, just
24 to silence a witness over \$350 worth of marijuana.

25 THE COURT: Okay.

1 MR. RICHARDSON: I just ask for justice, Your
2 Honor.

3 THE COURT: Thank you, sir.

4 MR. RICHARDSON: Yes, sir.

5 THE COURT: Mr. McCollum?

6 MR. MCCOLLUM: May it please the Court, Your
7 Honor.

8 THE COURT: Yes, sir.

9 MR. MCCOLLUM: Obviously we've been in court on
10 this case since Monday. So Your Honor is
11 well-acquainted with most aspects of the case. I would
12 just add that Marquis is a native of Conway, his family
13 lives in Conway, they were -- many of them were in
14 court, his grandmother, his mother, his girlfriend.
15 His uncle was here at one point and his father was here
16 part of the time as well.

17 He's got -- he has two children under the age of
18 six that live with their mother in the State of North
19 Carolina. As I said, he is a graduate of Conway High
20 School. He has a one prior conviction of assault for
21 which he received probation, I think, in the year 2010.
22 And I've explained to him sentences and that there's
23 certain mandatory minimums that must be imposed, but
24 beyond that we would ask for whatever mercy is
25 appropriate considering the length of the mandatory

1 minimums.

2 THE COURT: All right, sir. Is there anything you
3 wish to say, Mr. McDonald?

4 THE DEFENDANT: Yes. I'm sorry for the family
5 what they went through, and I hope they -- I hope
6 they -- I hope they reach mercy on me somehow and
7 forgive me. I know the truth that I didn't do it, but
8 that's about it.

9 SENTENCE

10 THE COURT: Okay. I can't think of a more
11 senseless act in what I've watched and witnessed,
12 tragedy in every sense of the word. A young man that
13 who knows what they could have provided to society now
14 won't. And I don't know when we're going to learn.

15 I'm going to take into consideration all the
16 aspects of it. One of the things that I've been
17 stating all along, for some reason young people don't
18 seem to understand two things, what can happen when you
19 shoot somebody, but they don't understand the hand of
20 one is the hand of all. And if there's ever a
21 principle that needs to be taught to high schools
22 across this state and this country, that is a principle
23 of law that should be expressed.

24 The sentence of the Court on indictment 2014-3820
25 as to armed robbery is 30 years. The sentence of the

1 Court on indictment 2013-1478, while I could impose a
2 life sentence, I will not. Sentence of the Court is
3 you be committed to the Department of Corrections for a
4 term of 45 years. Good luck to you, sir.

5 MR. RICHARDSON: Thank you, Your Honor.

6 THE COURT: They are concurrent.

7 MR. RICHARDSON: Your Honor, may I approach?

8 THE COURT: Sure.

9 (Discussion off the record.)

10 THE COURT: That concludes this matter. Anything
11 else.

12 MR. McCOLLUM: Nothing else on behalf of
13 Defendant.

14 THE COURT: Thank you very much. Good luck to
15 you, the attorneys as well, working with you.

16 MR. RICHARDSON: Yes, sir, Your Honor.

17 (WHEREUPON, the hearing concluded at approximately
18 4:14 p.m.)

19 (End of Transcript of Record)
20
21
22
23
24
25

WITNESSES

Randall Truss S C Law Enforcement Division

ARREST WARRANT NUMBER

2014GS2603820

CDR: 0139 16-11-0330(A)

DOA: 3/8/2013

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: SEP 11 2014

VERDICT

Foreperson of Petit Jury
Date:

BUCKET NO. 2014-GS-20-03820

610

The State of South Carolina

County of Horry

Bradley C. Richardson
13H01046

COURT OF GENERAL SESSIONS

September, 2014 TERM

THE STATE

vs.

Marquis Spencer McDonald
B/ M
Effingham, SC 29541
DOB: [REDACTED]
SSN: [REDACTED]

ATTORNEY: M. Gregory McCollum

**Indictment for
ARMED ROBBERY**

Jimmy A. Richardson, II, Solicitor

ORIGINAL

FILED
HORRY COUN.
2014 SEP 17 PM 4:06
MELANIE HUBBARD
CLERK OF COURT
DATE RECEIVED FROM
GRAND JURY
COURT DATE
PLED GUILTY/TRIAL

2014 OCT -9 PM 5:20

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

INDICTMENT
 ARMED ROBBERY

At a Court of General Sessions, convened on September 11, 2014, the Grand Jurors of Horry County present upon their oath:

ARMED ROBBERY

CDR: 0139 16-11-0330(A)

That Marquis Spencer McDonald and/ or his co-defendant did in Horry County on or about February 26, 2013, while armed with a deadly weapon, to wit: a handgun and/or firearm, take and carry away personal property of Anthony Liddell, Jr. from or in the immediate presence of Anthony Liddell, Jr. with intent to deprive Anthony Liddell, Jr. of possession by use of force, threats or intimidation, in violation of Section 16-11-0330(A), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Jimmy A. Richardson, II
 JIMMY A. RICHARDSON, II
 FIFTEENTH CIRCUIT SOLICITOR

CLERK OF COURT
 Horry County
 South Carolina

WITNESSES

Randall Truss S C Law Enforcement Division

DOCKET NO. 2013-GS-26-01498

612

The State of South Carolina

County of Horry

Bradley C. Richardson
13H01048

COURT OF GENERAL SESSIONS

April, 2013 TERM

COURT DATE
PLED GUILTY/TRIAL

ARREST WARRANT NUMBER

H269693

CDR: 0116 16-03-0010, 0020

DOA: 3/5/2013

THE STATE

VS.

Marquis Spencer McDonald
~~410 Greenwood Rd~~
Conway, SC 29527-3504
DOB: ~~01/01/1988~~
SSN: ~~2-40004700~~

B/ M

2014 OCT -9 PM 5:20

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: *[Signature]*

MAR 28 2013

VERDICT

ATTORNEY:

Indictment for

MURDER

Jimmy A. Richardson, II, Solicitor

ORIGINAL

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT
MURDER

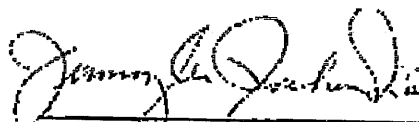
At a Court of General Sessions, convened on March 28, 2013, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116 16-03-0010,0020

That Marquis Spencer McDonald and/or his Co-Defendant did in Horry County, on or about February 26, 2013, willfully, feloniously, and intentionally kill the victim, Anthony Darnell Liddell, with malice aforethought, either express or implied, by means of a shooting, and Anthony Darnell Liddell did die as a proximate result thereof on or about February 26, 2013, in Horry County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Horry

VS.

Marquis Spencer McDonald

AKA:

Race: BLACK Sex: M Age: 22

DOB: ~~01/15/1991~~ SS#: ~~123456789~~Address: ~~1234 Main St~~ Road

City, State, Zip: Effingham, SC 29541

DL#: ~~123456789~~ SID#: ~~123456789~~*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Armed Robbery

IN THE COURT OF GENERAL SESSIONS

614

INDICTMENT/CASE#: 2014GS2603820

A/W#: 2014GS2603820

Date of Offense: 2/26/2013

S.C. Code §: 16-11-0330(A)

CDR Code #: 0139

SENTENCE SHEET

☐ CONVICTED OF or ☐ PLEADS

in violation of § 16-11-0330(A)

of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

SCB68305

Richardson, Bradley C.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Del. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(I) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ 25.00 beginning 10/9/14

\$ _____ paid to Public Defender Fund

Other: _____

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

Clerk of Court/Deputy Clerk

Melanie Higgins Ward
Teresa Bautz

Presiding Judge

Judge Code: 2060

10/9/14

STATE OF SOUTH CAROLINA

COUNTY OR
STATE

Horry

VS.

Marquis Spencer McDonald

AKA:

Race: BLACK Sex: M Age: 22

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Effingham, SC 29541

DL#: [REDACTED] SID#: [REDACTED]

*CDE Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Murder / Murder

IN THE COURT OF GENERAL SESSIONS

615

INDICTMENT/CASE#: 2013GS2601478

A/W#: H269693

Date of Offense: 2/26/2013

S.C. Code §: 16-03-0010, 0020

CDR Code #: 0116

SENTENCE SHEET

☐ CONVICTED OF or ☐ PLEADS

In violation of §: 16-03-0010, 0020

of the S.C. Code of Laws, bearing CDR Code# 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC

w/minor 1st or Lowd Act)

☐ §17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Prosecution to Grand Jury, (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.JURY: ☒ YES ☐ NO SCB68305

Richardson, Bradley C.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 45 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence,) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Del. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDEPPS

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ 25.00 beginning 10/9/2013

\$ _____ paid to Public Defender Fund

Other: _____

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

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 56-21-114 (DUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

Clerk of Court/ Deputy Clerk:

Teresa Bautz

Melanie Huggins Ward

Presiding Judge

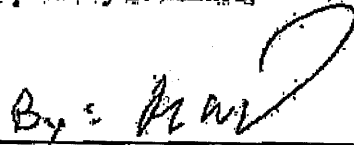
Judge Code: 2060

10/9/14

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

By: 

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Robert M. Dudek
Chief Appellate Defender

This 10th day of October, 2016.

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Appeal from Horry County
Honorable Markley Dennis, Circuit Court Judge

OCT 31 2016
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MARQUIS SPENCER MCDONALD

APPELLANT

APPELLATE CASE NO. 2014-002181

FINAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- 1) DID THE TRIAL COURT ERR IN PERMITTING AT&T'S RECORDS CUSTODIAN, JAMES DOBBINS, TO TESTIFY TO THE LOCATION OF CELLULAR PHONES WITHOUT QUALIFYING HIM AS AN EXPERT UNDER RULE 702?
- 2) DID THE TRIAL COURT ERR IN PERMITTING SLED AGENT, MEGAN LUKACS, TO TESTIFY AS TO THE LOCATION OF CELLULAR PHONES WITHOUT PROPERLY QUALIFYING HER AS AN EXPERT UNDER RULE 702?
- 3) DID THE TRIAL COURT ERR IN ITS RULING REGARDING EVIDENCE OF APPELLANT'S PRIOR FELONY CONVICTION UNDER RULE 609 AND RULE 403?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for the offenses of murder and armed robbery. His case came on for trial on October 6, 2014 before the Honorable Markley Dennis, and a jury. Gregory McCollum, Esq. represented the appellant and Bradley Richardson, Esq. and Travis Hyman, Esq. represented the state. (R. p. 1).

On October 9, 2014 the jury found appellant guilty of both offenses. Judge Dennis sentenced the Appellant to 45 year for murder, and 30 years for armed robbery, to run concurrently.

This appeal follows.

STATEMENT OF FACTS

This unfortunate case arises from a drug deal gone bad. On February 26, 2013, appellant, Marquis McDonald, had planned to purchase marijuana from the victim, Anthony Liddell, a student at Coastal Carolina. It is undisputed that Mr. McDonald drove his uncle's car to the Coastal Carolina campus to meet with Mr. Liddell. Also present at the scene was Stephon "Black" McClain, who was separately charged and did not testify at appellant's trial. Appellant, McClain and Liddell all met in appellant's car, apparently to finalize a drug purchase. The record evidence reveals that Mr. McDonald was in the driver's seat, Mr. McClain was in the front passenger seat, and Mr. Liddell was in the back seat of the vehicle. (R. p. 312, line 10 – p. 313, line 7). An eyewitness testified that at some point a fight broke out, shots were fired, and Mr. Liddell was killed. (R. p. 74, line 7 – R. p. 78, line 18). Ballistics taken from inside the car tended to show that the shots were fired from the passenger seat of the vehicle. (R. p. 259, line 10 – p. 261, line 24).

Mr. McDonald testified in his own defense and stated that he had purchased marijuana from Mr. Liddell before, and that he intended to purchase marijuana again on the night in question. He had no intention of committing a robbery. (R. p. 513, lines 1-6). Mr. McDonald testified that he had no idea Mr. McClain would pull a gun, or shoot anyone. (R. p. 516, lines 6-17). After the shooting occurred, Mr. McDonald fled the scene, alone, in his uncle's vehicle.

After the incident, Mr. McDonald's car was recovered. A search of the car revealed no shell casings, no live rounds, no hand guns, no cell phones, no marijuana, and no cash. (R. p. 225, lines 8-28; R. p. 252, lines 6-14). The murder weapon was never recovered, no marijuana was ever recovered, and the victim's cell phone was never recovered. (R. p. 402, lines 6-10). The state's only eyewitness did not identify Mr. McDonald as the shooter, and her testimony of seeing two gunshots at close proximity during a fight was contradicted by physical evidence including the absence of stippling on the victim and defects (i.e., bullet holes) inside of Mr. McDonald's vehicle. (R. p. 259, line 10 – p. 261, line 24; R. p. 434 lines 2-5). The record is devoid of any evidence of gunshot residue, blood spatter, or other physical evidence tending to show that Mr. McDonald shot the weapon. It is likewise devoid of any communication between Mr. McDonald and Mr. McClain relating to a robbery – rather, the state only presented evidence of the intention to purchase marijuana. (R. p. 489, lines 4-17).

Throughout the case, the state introduced lay testimony tending regarding the locations of the cellular phones of the victim, the appellant and Mr. McClain. This evidence included “phone maps” and “GPS tracking,” which the Court relied upon in denying the

Appellant's Motion for Directed Verdict. (R. p. 477, lines 1-22; R. p. 489, line 2 p. 490, line 9.)

ARGUMENT

- 1) THE TRIAL COURT ERRED IN PERMITTING AT&T'S RECORDS CUSTODIAN, JAMES DOBBINS, TO TESTIFY TO THE LOCATION OF CELLULAR PHONES WITHOUT QUALIFYING HIM AS AN EXPERT UNDER RULE 702.

During its case in chief, the state called James Dobbins, a private contractor for AT&T, and presented him as a "records custodian" for AT&T. (R. p. 125, lines 6-15). While Mr. Dobbins initially testified as to types of records AT&T keeps in the regular course of business, Mr. Dobbins went on to testify that AT&T's records include "the location of your phone where the call originated." (R. p. 125, lines 5-16). Mr. Dobbins then specifically began to explain how AT&T's cell phone towers interact with users' cellphones in order to find their location:

Q. Okay. And so whenever you're talking about the location of a cell phone, you're talking about with regard to a tower?

A. A tower or an area covered by a tower, yes.

Q Okay, okay. And I'm sorry for mish-moshing the terminology a little bit. Now, it's a radio signal. I'm sure we've all seen cell towers and passed down the road. How does a certain phone call determine which tower to bounce off of? You may have already answered that.

A Yeah, it will typically go to the tower that's nearest.

Q Okay.

A. But if it's congested, it could go to a secondary tower or -- and pass along the towers as you move from one location to another.

Q Okay. Now, that information regarding tower location --

(R. p. 130, line 1 – p. 131 line 6).

Counsel for the Appellant then objected and advised the Court that the state was using the witness to introduce expert testimony. The Court asked the state whether they were “offering [Mr. Dobbins] as an expert witness,” to which the state replied in the negative. (R. p. 131, lines 7-22). The Court then permitted testimony to continue, without conducting the required analysis relating to qualifications or reliability as required by rule 702, or otherwise instructing the jury on the testimony it had just received. The witness went on to reiterate that AT&T stores “latitude and longitude,” “tower location,” and “the location that the call started and stopped on.” (R. p. 131, line 32 – p. 132, line 13). The State reiterated these statements during continued questioning, specifically asking the witness to explain how “call location” corresponds with the particular date and time of a call from a specific number. (R. p. 135, line 10 – p. 138, line 21). The state used the specific phone numbers elicited through Mr. Dobbin’s testimony to identify the phone of the victim, and subsequently argued that *the location data of the victim’s phone* was evidence of the robbery. (R. p. 320, lines 8 – 25; R. p. 489, line 20 – p. 490, line 11). This phone location evidence was, in fact *the only evidence of robbery presented by the state in opposition to Appellant’s motion for directed verdict.*

SCRE 620 provides:

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.

Further, SCRE 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Finally, SCORE 702 provides:

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

“[A] lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 446 (2010). Mr. Dobbins was not present when any of these calls were made, and does not have personal knowledge of where they were actually made from. Rather, Mr. Dobbins’ testimony regarding the manner in which cellular phone towers interact with cell phones and radio signals in order to record a phone’s location clearly requires “special knowledge, skill, experience or training,” such that before Mr. Dobbins could provide such testimony, he would need to be qualified as an expert pursuant to rule 702. *See e.g., US v. EADY*, 2013 WL 4680527 (D.SC 2013) (conducting *Daubert*/702 analysis for cell phone location testimony); *United States v. Yeley–Davis*, 632 F.3d 673, 684 (10th Cir.2011) (same); *U.S. v. Reynolds*, --- Fed.Appx. ----, (6th Cir. 2015) (same); *U.S. v. Machado-Erazo*, 950 F. Supp 2d 49 (DDC 2013) (same); *Collins v. State*, 172 So. 3d 724 (Miss. 2015) (same); *State v. Patton*, 419 S.W.3d 125, 132 (Mo. Ct.App.2013) (same); *Wilder v. State*, 191 Md.App. 319, 991 A.2d 172, 180 (Mo. Ct. App. 2010) (same).

“[T]he trial courts of this state have a gatekeeping rule with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping rule, a trial court **must assess the threshold foundational requirements of qualifications and reliability** and further find that the proposed evidence will assist the trier of fact.” *State v. White*, 382 S.C. 265, 274 (2009) (emphasis added); *see also State v. Council*, 335 S.C. 1 (1999).

Mr. Dobbins’ testimony was not limited to authenticating business records that would otherwise be hearsay (i.e., the traditional role of a records custodian). Rather, Mr. Dobbins’ testimony included a detailed explanation of a highly technical and specialized part of the cellular phone industry. The “location” information, which was based on this specialized testimony, was then presented as irrefutable evidence of the physical location of the phones of the appellant, his alleged co-conspirator, and the victim. The Court never conducted any inquiry regarding Mr. Dobbins’ qualifications to provide this critical testimony, and moreover, did not make any inquiry regarding the reliability of Mr. Dobbins’ opinions.

Mr. Dobbins’ testimony, which was clearly admitted in error, and without the mandated rule 702 analysis, permeated the remaining portion of the state’s case.¹ Cell phone location evidence was referenced throughout the trial on a number of occasions, including:

- The State, in its opening, argued that phone evidence and “GPS Tracking” would prove the Appellant’s guilt. (R. p. 28, lines 14-25; R. p. 32, lines 5 – 12).
- “Phone Maps” tracking the movements of the Appellant’s phone, the alleged co-conspirator’s phone, and the victim’s phone, were presented by SLED Agent Megan Lukacs to the jury. (R. p. 477, line 1 – p. 486 line 13; Trial Exhibits on File).

¹ SLED Agent Megan Lukacs supplied similar lay testimony over counsel’s objection, addressed *infra*.

- Because the victim's cell phone was never recovered, his phone location was the evidence that the Court relied upon in finding that the State had satisfied the *corpus delicti* requirement of the armed robbery charge, denying Appellant's Motion for Directed Verdict. (R. p. 489, line 2 – p. 490, line 3).
- The State, in its closing, argued that the "victim's cell phone was taken away" to establish guilt for armed robbery. (R. p. 562, lines 1-11).
- The State, in its closing, further referred to phone locations as evidence of guilt. (R. p. 572, lines 12-21).

These numerous, specific references do not adequately account for what a large role the cell phone location information played in the State's case. The mapping data formed the backbone of the State's theory of the case, and their narrative as to how each event occurred during the date in question.

Given the absence of any eyewitnesses identifying Mr. McDonald as the shooter, the absence of any murder weapon, the absence of any shell casings in Mr. McDonald's vehicle, the ballistic evidence tending to show that Mr. McDonald's passenger *and not Mr. McDonald* fired a weapon, and the absence of any physical evidence which would satisfy the *corpus delicti* requirement of the armed robbery charge, there can be no doubt that the improper admission of this cellphone data was not a mere harmless error. It was deeply prejudicial to the Appellant, and likely tipped the scales, resulting in his conviction. Moreover, the Appellant was prejudiced because he was not put on notice that the State planned to introduce the aforementioned expert testimony, which prevented Appellant from securing his own expert who could contest the underlying credibility of this evidence. *Wilder*, 991 A. 2d 127 at 196-197 ("By channeling testimony that is actually expert testimony to Rule 702, the [2000] amendment [to Federal Rule 701] also

ensures that a party will not evade the expert witness disclosure requirements... simply by calling an expert witness in the guise of a layperson.")

The reliability of cell phone tower data has been repeatedly called into question², and even *expert testimony* on cell phone location information has been found *unreliable and inadmissible* by at least one federal court.³ The trial court's decision to admit this testimony without determining the qualifications of the witness and the reliability of the underlying opinion was contrary to law and deprived the Appellant of a fair trial.

2) THE TRIAL COURT ERRED IN PERMITTING SLED AGENT, MEGAN LUKACS, TO TESTIFY AS TO THE LOCATION OF CELLULAR PHONES WITHOUT PROPERLY QUALIFYING HER AS AN EXPERT UNDER RULE 702.

The State went on to call SLED analyst Megan Lukacs during its case in chief. Agent Lukacs initially testified about "mapping the call records" using information from cellular towers. (R. p. 468, lines 1-15). Prior to her providing any of the "maps" she had plotted based upon cell phone location data, Defense counsel raised the 702 issue with the court. The Court specifically permitted the witness to continue this line of testimony, stating "she certainly can render a 701 opinion." (R. p. 472, lines 3-15). Defense counsel again raised the matter during the course of Agent Lukacs' testimony, after the state attempted to admit the "map" she had generated as evidence. (R. p. 475, line 6 – p 476, line 18). The Court then appeared to conduct an incomplete analysis pursuant to rule 702, making no attempt to determine the reliability of Agent Lukacs' testimony, and allowed her testimony to continue.

² "PROSECUTORS' USE OF MOBILE PHONE TRACKING IS 'JUNK SCIENCE,' CRITICS SAY," ABA JOURNAL, June 1, 2013; "EXPERTS SAY LAW ENFORCEMENT'S USE OF CELLPHONE RECORDS CAN BE INACCURATE," WASHINGTON POST, June 27, 2014.

³ *United States v. Evans*, 892 F.Supp.2d 949, 954 (N.D.Ill.2012).

The State went on to admit three exhibits (38, 39 and 40) which were “call records maps” for the Appellant’s cellphone, the alleged co-conspirator’s cellphone, and the victim’s cellphone (R. p. 479, lines 2-19). Agent Lukacs testified, referring to the maps, as to the location of specific phones at specific times on the date of the crime. (R. p. 480, line 9 – p. 486, line 13).

By her own admission, Agent Lukacs was not present at the scene of the crime, and did not personally retrieve any cell phones. Rather, she was merely tasked with analyzing data, with the assistance of specialized software, to formulate an opinion as to the locations of the Appellant, the victim, and the alleged Co-Conspirator on the date of the incident. Using this specialized software, Agent Lukacs produced three “maps” showing movements throughout the day, which were then introduced into evidence.

Given the highly technical and specialized nature of this analysis, Agent Lukacs’ testimony regarding locations of specific phones and specific times is not properly admitted as lay testimony.⁴ Rather, her qualifications and the reliability of her opinions should have been subjected to the appropriate Rule 702 analysis. While the South Carolina Supreme Court has not answered the specific question of whether cell phone location testimony (of the kind offered by Agent Lukacs) must always be considered “expert” testimony, other courts have considered the issue in depth.

In *State v. Collins*, the Mississippi Supreme Court, citing a Maryland appeals court, recently considered the specific question of whether cell phone “mapping” testimony must be treated as expert testimony, and concluded that it should:

⁴ For the sake of brevity, appellant has not re-stated each case cited in its first argument, but incorporates them herein by reference.

The Maryland court recognized that "cellular telephone technology has become generally understood." [...] It also acknowledged that certain information regarding cell phone bills may be readily discerned by a juror familiar with his own cell phone bill. *Id.* However, it noted that the detective's testimony "implicated much more than mere telephone bills." *Id.* He had "elaborated on the information provided by the cell phone records — the bills and records of calls — by his use of a Microsoft software program to plot location data on a map and to convert information from the cellular phone records in order to plot the locations from which [the appellant] used his cell phone[,]" which the court found "required some specialized knowledge or skill not in the possession of the jurors." *Id.* at 199-200. The court ultimately held that "the better approach is to require the prosecution to offer expert testimony to explain the functions of cell phone towers, derivative tracking, and the techniques of locating and/or plotting the origins of cell phone calls using cell phone records." [...] This is because the detective's "description of the procedures he employed to plot the map of [the appellant's] cell phone hits was not commonplace. Because his explanation of the method he employed to translate the cell phone records into locations is demonstrably based on his training and experience[;]" thus, the court concluded that the detective should have been qualified as an expert and the State should have been obliged to fulfill the discovery obligations attendant with calling an expert witness. *Collins*, 172 So. 3d at 741-742 (Miss. 2015).

During the course of Agent Lukacs' testimony, after Defense counsel's second objection, the Court acknowledged that the opinions being offered constituted expert testimony. (R. p. 477, line 20 – p. 478, line 18). However, the Court incorrectly treated Agent Lukacs' *scientific* testimony (which is based upon physics, and the manner in which cell phone signals are transmitted and recorded) as *experience testimony*, explicitly declining to conduct a "peer review" analysis under *Jones* and instead stating that "it's similar to bloodhound expert." (R. p. 478, lines 6-18).

The most recent South Carolina Court of Appeals case regarding expert testimony standards and bloodhound experts, *State v. White*, specifically notes that testimony based upon "practical experience" such as bloodhound testimony, is treated differently than testimony that is based on "scientific evidence." *White*, 382 S.C. at 377. With respect to the

admission of scientific evidence, the Court must consider “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.” *Id.* at 376 (citations omitted). Conducting this analysis prior to the admission of scientific testimony is critical in order to “**prevent the fact finders from being misled by the aura of infallibility surrounding unproven scientific methods.**”⁵ *Id.* (emphasis added). In short, the Court erroneously found that Agent Lukacs’ expert testimony was properly admissible because it applied the wrong standard.

Further, while the Court did qualify Agent Lukacs as an expert during the trial, she does not appear to have disclosed as an expert beforehand, such that the Appellant was deprived of the right to secure his own expert to contest the reliability of Agent Lukacs’ opinions. This allowed the State to present these findings as indisputable fact to the jury, which profoundly prejudiced the defense of the case.

3) THE TRIAL COURT ERRED IN ITS RULING REGARDING EVIDENCE OF APPELLANT’S PRIOR FELONY CONVICTION UNDER RULE 609 AND RULE 403.

A. THE COURT APPLIED THE INCORRECT LEGAL STANDARD IN ITS RULE 609 ANALYSIS

SCRE 404 (B)(1) provides that evidence of a prior crime may not be admitted “to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Moreover, before such evidence is admitted to

⁵ A review of the record reveals that both the State and the Court treated the cell phone location data without any doubt or skepticism – falling into the very trap that *White* warned against.

impeach a Defendant, the Court must weigh the evidence and find that “probative value of the evidence outweighs its prejudicial effect to that defendant.” SCRE 609(B).

In the instant case, the Appellant elected to testify on his own behalf. Prior to taking this testimony, Defense counsel moved to exclude reference to the Appellant’s 2010 conviction for Assault and Battery of a High and Aggravated Nature, asserting that this past crime was highly prejudicial due to its similarity to the charge of murder, and was not probative as to the Appellant’s character for truthfulness. (R. p. 492, line 7 – p. 493, line 16). The Court stated that there was “no question” that this prior conviction would be admitted into evidence. (R. p. 493, lines 17 – 24). The Court went on to perform a Rule 403⁶ balancing test as provided for in subsection (a)(1), and conclude that the evidence should be admitted.

SCRE 609 provides, in relevant part:

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused;

By improperly applying the Rule 403 standard (which is reserved for witnesses “other than the accused”) the Court set an erroneously high bar for exclusion of Appellant’s prior convictions. In order to exclude evidence pursuant to Rule 403, the party seeking exclusion must establish that the “probative value is **substantially outweighed** by the

⁶ Note that the Court specifically stated that the applicable rule “requires me to conduct a 403 analysis.” (R. p. 493, lines 17-24).

danger of unfair prejudice.” (emphasis added). In contrast, an accused under rule 609(a)(1) must only establish that “the probative value of admitting this evidence outweighs its prejudicial effect.” *See e.g., US v. Tse*, 375 F. 3d 148, 163 (1st Cir. 2004) (noting that “the [403] standard of prejudice differs from the standard of prejudice applicable to the court's consideration of requests by the government to impeach a defendant with prior convictions” and holding that “**the failure to apply the different standards for exclusion was an error of law.**”)(emphasis added).

B. ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE IS NOT A CRIME OF DISHONESTY, AND AS SUCH, THE COURT’S ADMISSION OF THIS EVIDENCE WAS PLAIN ERROR

When seeking to introduce evidence of prior crimes, SCRE 609 limits the state to introducing conviction evidence which impeaches the Defendant’s “character for truthfulness.” South Carolina Courts have expressly rejected the notion that crimes of violence are probative as to truthfulness. In *State v. Al-Amin*, the South Carolina court of appeals considered whether armed robbery constituted a crime of dishonesty, and concluded that it is “the **larcenous element**” of armed robbery, rather than the violent element of armed robbery, which makes a crime dishonest. *State v. Al-Amin*, 353 S.C. 405 (Ct. App. 2003). *Al-Amin* recognizes that crimes of violence have little to no true probative value as to the Defendant’s character for truthfulness, which the Court failed to consider in its (erroneously applied) 403 analysis.

C. THE COURT’S LIMITATION ON THE STATE’S ABILITY TO CROSS EXAMINE THE WITNESS ON HIS PRIOR FELONY WAS MORE PREJUCIAL THAN PROBATIVE

After erroneously applying Rule 403 analysis to the Appellant’s prior conviction, the Court ruled that the State would be permitted to ask the Appellant whether he had

been convicted of a felony, but would not be permitted to ask him about the details of this felony.⁷ (R. p. 494, line 9 – p. 495, line 17). Admission of this evidence greatly prejudiced the Appellant’s case, as the jury was left to speculate as to what that prior felony might be.

D. THE COURT ERRED IN EXCLUDING EVIDENCE OF THE APPELLANT’S SENTENCE, HAVING RULED THAT THE STATE COULD INTRODUCE EVIDENCE OF A PRIOR FELONY

Having received the Court’s ruling that the state would be permitted to introduce an unspecified prior felony as evidence against the Appellant, counsel requested that the Court permit him to ask the Appellant about the sentence for this prior felony: specifically, whether the Appellant received probation and successfully completed probation. (R. p. 498, line 11 – p. 499, line 4). This would have allowed the jury to have some sense of the severity of the prior crime, taking some of the sting out of the amorphous claim that a felony had been committed. The Court denied this request and ruled that if this evidence were admitted, the State would be permitted to introduce the specific nature of the prior crime.

Evidence of the Appellant’s sentence of probation, and the fact that he had completed probation, was relevant to give the jury a sense of the severity of his prior felony. The probative value of this evidence was not substantially outweighed by its prejudice on the state, and as such, the Court erred in excluding this evidence under Rule 403.

E. THE CUMULATIVE EFFECT OF THE AFOREMENTIONED EVIDENTIARY ERRORS RESULTED IN SUBSTANTIAL PREJUDICE TO THE APPELLANT

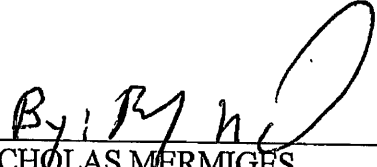
⁷ While *Green v. State*, 338 S.C. 428 (2000) has suggested that this may be an appropriate balancing tactic in some instances, the underlying reasoning in *Green* (where the Plaintiff was charged with drug conspiracy, no direct evidence of drug sale existed, and the Defendant had multiple prior drug convictions) does not support the Court’s conclusion in this case. Moreover, it does not appear that the Court in this case applied the five factors regarding admission of prior crimes as articulated in *State v. Colf*, 337 S.C. 622 (2000).

The cumulative effect of the aforementioned rulings, arising from an error of law with respect to the appropriate evidentiary standard, resulted in substantial prejudice to the appellant, and given the very questionable evidence of guilt in this case, these errors were clearly not harmless. Rather, they had the effect of depriving the Appellant of the right to a fair trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed in this case and remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



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This 31st day of October, 2016.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
Markley Dennis, Circuit Court Judge

THE STATE,

Respondent,

v.

MARQUIS SPENCER MCDONALD,

Appellant.

Appellate Case No. 2014-002181

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in permitting AT&T's records custodian, James Dobbins, to testify to the location of cellular phones without qualifying him as an expert under Rule 702?
- II. Did the trial court err in permitting SLED agent, Megan Lukacs, to testify as to the location of cellular phones without properly qualifying her as an expert under Rule 702?
- III. Did the trial court err in its ruling regarding evidence of appellant's prior felony conviction under Rule 609 and Rule 403?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court erred in allowing AT&T's records custodian to testify as a lay witness regarding the information AT&T keeps on every customer where the testimony was within the witness's personal knowledge and experience and was not an expert opinion.
- II. Whether the trial court erred in allowing a SLED agent to testify as a lay witness where defense counsel did not object to her testimony at trial and where the agent testified to information that did not require highly specialized knowledge or training.
- III. Whether the trial court erred in admitting appellant's prior conviction after considering multiple factors to reach a ruling that was not unfairly prejudicial to appellant and the jury received a limiting instruction.

STATEMENT OF THE CASE

An Horry County Grand Jury indicted appellant, Marquis Spencer McDonald, for murder and armed robbery. (R.pp.610-15). Appellant proceeded to a jury trial on October 6, 2014 and was represented by Gregory McCollum, Esquire. (R.p.1). Bradley C. Richardson, Esquire, and Travis W. Hyman, Esquire, of the Fifteenth Circuit Solicitor's Office represented the State. (R.p.1).

The jury found appellant guilty of both charges on October 9, 2014. (R.p.603, line 19-p.604, line 9). The Honorable Markley Dennis sentenced appellant to concurrent terms of forty-five (45) years' imprisonment for murder and thirty (30) years' imprisonment for armed robbery. (R.p.608, line 24-p.609, line 6).

This appeal follows.

STATEMENT OF FACTS

A chaotic scene at an apartment complex near Coastal Carolina University after someone shot a student three times in the parking lot on February 26, 2013. (R.p.43, lines 1-8; p.55, lines 13-21). And a cell phone left behind that led investigators to the person who killed Anthony Liddell (Liddell). (R.p.289, line 10-p.290, line 4).

At trial, the State presented evidence that appellant killed Liddell after arranging to buy marijuana from him. Other students rushed to try and save Liddell's life, but he later died from his injuries. (R.p.52, lines 2-5; p.424, lines 11-14). Amanda McTaggart (McTaggart) was a freshman at Coastal Carolina at the time of the shooting, but transferred to a university in New Jersey after witnessing the murder. (R.p.67, lines 9-14; p.68, lines 11-16). McTaggart had just parked her car in front of a friend's apartment when she heard a bang. (R.p.71, lines 15-18; p.72, lines 6-20). At first, McTaggart thought two cars had been involved in a crash. (R.p.73, line 11-p.74, line 11). However, when she looked in the rearview mirror she saw two people struggling between a small, white SUV and a black car. (R.p.74, lines 17-20). McTaggart testified it looked like appellant was winning the fight and stated, "It was very aggressive." (R.p.77, line 22-p.78, line 9). McTaggart heard two more gunshots and testified she "froze up" in fear, worried "that the kid was going to come and shoot [her] too "because her car was still on and the shooter might see her taillights. (R.p.78, line 13-p.79, line 9). While McTaggart did not see the driver leave the scene, she heard the car speed away. (R.p.80, lines 9-11).

McTaggart testified she got out of her car and was going to call 911, but the victim stumbled toward her, asked for help, and then fell to the ground. (R.p.80, line 24-p.81, line 6). McTaggart ran over to the victim, put his head in her lap, and tried to comfort him, "telling him to stay with me." (R.p.81, lines 8-9; p.82, lines 19-25). McTaggart yelled up at some people

standing on a nearby balcony to call 911. (R.p.95, line 21-p.96, line 1). McTaggart testified people ran out of their apartments and one of her friends, who was a volunteer firefighter, tried to stop the victim's bleeding while they waited for an ambulance to arrive. (R.p.81, line 21-p.82, line 15).

Other students gave similar testimony. Infiniti Henderson (Henderson) was sitting near the balcony door inside her apartment when she heard a gunshot. (R.p.100, line 12-p.101, line 3; p.101, lines 19-25). After hearing two more shots, Henderson went out onto the balcony to see what was happening. (R.p.102, line 14-p.103, line 4; p.103, lines 16-20). She testified she saw a dark-colored car back out of a parking space, almost hit the victim, and take off. (R.p.104, lines 9-22). Henderson stated the victim stumbled back and she saw a woman get out of a car, ask if he was ok, and the victim collapsed and did not move. (R.p.105, line 24-p.106, line 2; p.109, lines 20-25; p.110, lines 1-7). Henderson called 911. (R.p.111, lines 3-9).

Janie Plyler (Plyler) was studying for an exam when she heard the gunshots and ran to her window to see what was going on. (R.p.115, line 23-p.116, line 6). Plyler testified she saw the victim standing at the rear of a dark-colored car parked near a white SUV and, as the driver backed up to leave, the victim jumped toward the car, but was thrown off as the driver pulled out. (R.p.117, lines 1-8; p.118, lines 6-15). Plyler stated during direct-examination, and confirmed on cross-examination, that the tires squealed as the car left and the driver "was trying to leave as fast as they could." (R.p.120, lines 15-18; p.122, line 23-p.123, line 11).

One of the first officers to respond to the scene testified "it was chaos" when he arrived at the apartment complex, and students were crying. (R.p.55, line 9; p.56, lines 9-14). The victim was face down on the ground and moaning, and a student was holding his head while another person tried to stop the bleeding. (R.p.52, lines 2-5). Sergeant Bradford Ferrell (Ferrell) testified

he walked to the area where witnesses told him the shooting happened, and he saw a cell phone on the ground with a cracked screen that looked like it had been dropped, and a bullet casing lying nearby. (R.p.42, line 22-p.43, line 6; p.50, lines 10-19). Witnesses told Ferrell that the person who shot Liddell got in a car and left. (R.p.51, lines 7-10). Agents with South Carolina Law Enforcement Division's (SLED) crime scene unit collected evidence from the parking lot. (R.p.140, lines 3-4; p.140, lines 12-15; p.142, lines 3-11; p.144, lines 3-11). The unit collected the cell phone, bullet casing, and a pack of cigarettes found on the ground. (R.p.162, line 15-p.163, line 23; p.167, lines 4-18). Moreover, agents found two bullets in the white SUV that had been parked near the shooter's dark-colored car at the time of the murder. (R.p.173, line 24-p.175, line 12).

At first, investigators thought the cell phone dropped at the scene belonged to the victim because of where it was found. (R.p.289, line 11-p.290, line 4; p.290, lines 17-23). However, once they got into the phone and obtained preliminary information, an agent recognized the man in some selfies as a confidential informant who worked with a drug enforcement unit that operated in Horry and Georgetown counties.¹ (R.p.294, line 24-p.295, line 14; p.329, lines 13-16). Once investigators realized the phone belonged to a likely suspect rather than the victim, they stopped looking at it and got a search warrant. (R.p.295, lines 15-24; p.336, line 25-p.337, line 15). After receiving the warrant, investigators got detailed information from the phone, including a list of contacts, text messages, additional pictures, and a call history. (R.p.337, lines 22-25; p.338, lines 11-19). The number attached to the cell phone belonged to appellant.

¹ SLED sent the phone to Will Lynch (Lynch) who was part of the Fifteenth Circuit Drug Enforcement Unit. (R.p.329, lines 6-12; p.333, lines 11-17). Lynch testified appellant's "cell phone was in pretty bad shape" when he got it; however, once he charged the phone, he saw some selfies of a man he recognized as appellant, who had signed up to work as a confidential informant. (R.p.334, line 17-p.335, line 7; p.360, lines 1-8).

(R.p.341, line 25-p.342, line 1).

Investigators subpoenaed subscriber information for various other numbers found in appellant's cell phone. (R.p.300, line 13-p.301, line 4). One of the phone numbers belonged to the victim and one of them belonged to Stephon McLain (McLain).² (R.p.297, lines 1-7; p.301, lines 5-17). Investigators put into chronological order the text messages and calls from appellant's phone to create a minute-by-minute timeline of the hours leading up to the deadly shooting. (R.p.339, lines 1-9; p.344, lines 2-11). Lynch testified there were text messages exchanged between appellant and McLain, and between appellant and the victim. (R.p.347, line 5-p.348, line 9; p.348, line 18-p.349, line 2; p.349, line 14-p.350, line 4). Lynch testified appellant and the victim set up the marijuana deal on February 25, 2013, the day before the murder, via text messages. (R.p.351, line 5-p.352, line 20). In a lengthy series of messages that Lynch read to the jury, the victim agreed to give appellant a discount because they were friends and they set a time to meet. (R.p.351, lines 14-21; p.352, lines 11-14). There were also phone calls made from appellant to the victim and from appellant to McLain and, at some point, the decision was made to wait until the following day to meet. (R.p.353, line 10-p.354, line 14).

On February 26, 2013, the day of the murder, appellant called the victim and McLain several times. (R.p.355, line 10-p.356, line 7). One of the last calls the victim received was from appellant. (R.p.356, lines 6-7). Based on the information from the cell phone, interviews with witnesses, and evidence found at the crime scene, investigators got an arrest warrant for appellant, charging him with murder, and began looking for him. (R.p.297, lines 17-23; p.298, lines 1-16; p. 299, line 23-p.300, line 3)

On March 1, 2013, appellant's uncle called investigators and said appellant wanted to turn

² McLain was also charged with murder in this case and later arrested in Ohio. (R.p.302, lines 15-17; p.303, line 14-p.304, line 13; p.419, line 7-p. 420, line 22).

himself in. (R.p.299, lines 4-15). SLED Lieutenant Roxanne Bethea (Bethea) and another officer took appellant into custody and drove him to Coastal Carolina's police department. (R.p.369, lines 22-24; p.370, lines 3-14; p.372, line 11-p.373, line 18). Bethea testified appellant "was very excited and wanted to talk and tell his story." (R.p.374, lines 15-16). Bethea "constantly had to tell [appellant], slow him up and tell him, you know, we didn't want him to discuss anything at this point because we need to read him his rights. And we were headed to [Coastal Carolina] where we could do that." (R.p.374, lines 16-20).

SLED Senior Special Agent James Johnson (Johnson) helped interview appellant, who was "very talkative and excited, kind of excited about telling the story." (R.p.378, lines 6-12; p.379, lines 16-23; p.386, lines 5-7; p.396 lines 3-7). Appellant waived his rights and told investigators he was willing to talk.³ (R.p.388, lines 14-19; p.390, lines 1-6; p.391, lines 1-11; p.392, lines 1-16). During the interview, appellant admitted he set up the marijuana deal with Liddell, the victim. (R.p.393, lines 10-18). Appellant further admitted to being at the scene of the deadly shooting; however, contrary to the information gathered from the cell phone, appellant said McLain arrived with the victim. (R.p.311, line 22-p.312, line 9; p.393, lines 19-21). Appellant said McLain got into the front passenger seat, the victim got into the back seat, and the three were talking when McLain suddenly pulled out a gun. (R.p.393, line 21-p.394, line 9). Appellant claimed he and McLain were struggling over the gun when Liddell grabbed it and it fired.⁴ (R.p.394, lines 9-13). Appellant told investigators he got out of the car to run, but Liddell asked for help so appellant got back into the vehicle and punched McLain so hard that

³ Following the interview, appellant wrote his statement which Johnson read to the jury at trial. (R.p.396, line 20-p.397, line 7; p.398, line 2-p.400, line 11).

⁴ Johnson asked appellant to show him where everyone's hands were on the gun because "how in the world could the gun go off when both—all three of [them] had [their] hands on it and the slide couldn't go back. But he said it did." (R.p.403, lines 17-25).

McLain fell out and onto the ground.⁵ (R.p.394, lines 13-22). Appellant said he heard another gunshot as he was driving away, but he did not look back. (R.p.394, lines 22-25). Appellant also admitted he bought a new cell phone after realizing he lost his on the night of the incident. (R.p.400, lines 2-3; p.402, line 25-p.403, line 7).

Johnson testified appellant claimed he never met McLain before that night, and "insisted that he do a composite sketch of the person." (R.p.407, lines 15-20; p.408, lines 1-4). However, investigators determined appellant was lying. (R.p.312, lines 10-12). During the interview, appellant said he stopped at a convenience store prior to meeting the victim for the marijuana deal. (R.p.312, lines 14-17; p.409, lines 17-24). Surveillance video from the store showed appellant pull up in a vehicle, McLain get out of the passenger side, and both men walk into the store and later get back into the same car together. (R.p.312, line 18-p.313, line 19; p.409, line 25-p.410, line 8).

Appellant also admitted in his statement that he was driving his uncle's car on the night of the murder. (R.p.401, line 23-p.402, line 5). SLED agents who processed that car found blood inside it, near the center console. (R.p.199, lines 17-20; p.214, line 24-p.215, line 2; p.226, line 14-p.227, line 1). Agents also found a fired bullet inside, near a rear door, and found the victim's fingerprint on one of the car's windows. (R.p.216, lines 1-2; p.232, line 13-p.233, line 5; p.248, line 23-p.249, line 13; p.250, lines 3-13; p.251, lines 4-11). While SLED agent Randall Truss testified he could not "definitively" say whether appellant or McLain shot the victim, Truss testified all of the evidence recovered from the scene came from the driver's side of the car that

⁵ Appellant did not have any bruises on his hand, despite his claim that he hit McLain hard enough to knock him out of the car, while the door was closed. (R.p.395, lines 11-22; p.413, line 17-p.414, line 10).

appellant admitted he was driving, including the cell phone and bullet casing.⁶ (R.p.285, lines 11-17; p.309, lines 15-19; p.309, line 25-p.311, line 15).

Appellant placed himself at the scene of the murder when he testified at trial, conceding he was there and driving his uncle's car. (R.p.507, line 21-p.508, line 5). Appellant admitted McLain was his cousin, the two were together on the night of the shooting, and that he initially lied to investigators about knowing McLain. (R.p.505, lines 4-11; p.505, line 18-p.506, line 3; p.506, lines 15-22). Appellant also admitted he lied to investigators about punching McLain. (R.p.506, lines 4-14). Appellant testified he had known Liddell for two years prior to the murder and bought marijuana from him multiple times. (R.p.506, line 23-p.507, line 20). However, appellant testified, this time, McLain and Liddell began arguing and McLain got angry. (R.p.511, lines 2-23). Appellant stated McLain pulled out a gun to show Liddell he could "just take [his] weed and [he could] not do nothing about it." (R.p.512, lines 16-21). Appellant testified McLain and Liddell fought over control of the gun, which fired and appellant "dove out of the car" and heard two more shots. (R.p.513, lines 8-20). Appellant stated Liddell finally let go of the gun and walked away, so appellant got back in the vehicle and left. (R.p.513, lines 20-22). Appellant admitted he lied to investigators about trying to grab the gun during the struggle, testifying he was "just trying to—just trying to put more to it, like I didn't—to show them that I didn't have nothing to do with it." (R.p.516, lines 14-23).

On cross-examination, the State showed appellant the cell phone found on the ground at the scene and appellant admitted the phone was his:

Q: And you were the one that was texting with Anthony Liddell?

⁶ The trial court instructed the jury extensively on accomplice liability, stating the jury could find appellant guilty under the theory "the act of one is the act of all." (R.p.588, line 19-p.591, line 16).

A: Yes, sir.

Q: State's No. 12, no doubt about it, that's your cell phone?

A: Yes, sir.

Q: And any records on that cell phone are yours?

A: Yes, sir.

Q: Any texts out from it are yours?

A: Yes, sir.

(R.p.525, lines 12-21; p.527, lines 13-18). Moreover, appellant later admitted he drove away from the apartment complex with the marijuana in his car, corroborating the State's theory that the victim was shot and killed during an armed robbery. (R.p.532, lines 22-23).

ARGUMENTS

I.

The trial court did not abuse its discretion in allowing AT&T's records custodian to testify as a lay witness about the location of cell towers.

Introduction

The trial court did not err in allowing AT&T's records custodian to testify as a lay witness because he testified to matters within his personal knowledge and experience and the subject matter was not beyond the ordinary knowledge of the jury. The custodian relayed to the jury general information about the data collected by AT&T, including the location of cell towers, which did not require the special knowledge of an expert. Any error by the court was harmless because appellant admitted at trial that he was at the murder scene.

How the Issue Was Raised

At trial, the State presented evidence, testimony, and appellant's statement to connect him to the deadly incident, including appellant's cell phone, found at the scene. (R.pp.289-90; pp.295-96). Appellant placed himself at the apartment complex when he testified about the incident at trial. (R.pp.506-08; p.513). Appellant admitted during his testimony that the phone was his, and that he had called and sent text messages to both Liddell and Stephon McLain (McLain). (R.pp.507-08; p.513; p.525; p.527). Moreover, appellant admitted his cell phone was lying on the ground when he left the apartment complex, and told investigators he bought a new phone to replace the one he lost. (R.p.400; pp.402-03; p.517).

To corroborate the details of appellant's statement, the State called James Dobbins (Dobbins) to testify as the business records custodian for AT&T. (R.p.125, lines 8-25). Dobbins explained AT&T's records for every customer indicate data usage, the general location of a

customer's phone when a call or text message originated, the number a customer contacted, the type of communication in which a customer engaged, as well as the date and time of the communication. (R.p. 126, line 24-p.127, line 13; p.132, lines 7-13). The records, maintained in the ordinary course of business, were "very accurate," stored electronically, and could be accessed when needed. (R.p.129, lines 20-25; p.133, lines 3-9).

Dobbins explained that when a customer used a cell phone, a signal from the phone communicated with nearby towers, which then transmitted the signal. (R.p.130, lines 1-13). Dobbins testified the signal went to the closest tower, which determined a customer's general location at the time a cell phone was used and, "if it's congested, it could go to a secondary tower or—and pass along the towers as you move from one location to another." (R.p.130, lines 14-25; p.131, lines 2-4). Defense counsel interrupted the testimony and the following exchange occurred:

[Defense Counsel]: Your Honor, I think the witness was presented as a, I think, a records custodian, I'm not sure. But it seems like if we're getting or trying to get some kind of expert testimony—

The Court: At this point, he's just a lay witness. Solicitor, just move on to what it is, and we don't need to go into that much detail—

[The State]: Yes, sir.

The Court: —on how it works at this point. Thank you.

[The State]: Yes, sir, Your Honor.

The Court: Thank you. I sustain the objection insofar as we're not—he's not been presented, and I assume you're not offering him as an expert witness?

[The State]: No, sir, Your Honor, no, sir.

The Court: All right.

(R.p.131, lines 7-22). Counsel did not raise any further objections during Dobbins's remaining testimony. Dobbins testified that every cell tower was identified by a number, and that AT&T's records showed the identification number associated with each tower and the corresponding "latitude and longitude" which indicated the center of the general area covered by each tower. (R.p.131, line 23-p.132, line 4).

Specific to this case, Dobbins testified he reviewed the cell phone records requested for two numbers—later determined to belong to appellant and the victim. (R.p.134, lines 19-25; p.138, lines 6-9; p.341, line 25-p.342, line 1; p.342, lines 8-11). The records were introduced into evidence, without objection, and Dobbins pointed out to the jury each column on the records and explained what each represented, including the column(s) with the: (1) cell tower identification number; (2) latitude and longitude of the tower associated with the identification number; (3) date of the call or text message and the phone number contacted; and, (4) time of the communication. (R.p.134, line 2-p.138, line 17).

Defense counsel did not cross-examine Dobbins. (R.p.139, lines 3-4).

Standard of Review for Arguments I, II, and III

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); see also *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (holding appellate courts

review errors of law only and are bound by the trial court's factual determinations unless they are clearly erroneous).

To warrant reversal based on the admission or exclusion of evidence, an appellant must prove both the error and that there is a reasonable probability the wrongly admitted or excluded evidence influenced jury's verdict. *See State v. Livingston*, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984) ("[W]here guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result."). An error is harmless beyond a reasonable doubt where a review of the entire record shows the error did not contribute to the verdict. *See State v. Mizzell*, 349 S.C. 326, 333-34, 563 S.E.2d 315, 318-19 (2002) (listing the factors of a harmless error analysis, including the importance of the witness's testimony in the State's case, whether the testimony was cumulative, the presence or absence of evidence corroborating the testimony of the witness on material points, the extent of cross-examination, and the overall strength of the State's case) (citations omitted).

Analysis

The trial court did not abuse its discretion in allowing Dobbins to testify as a lay witness without first qualifying him as an expert. Dobbins's testimony about cell phone signals communicating with nearby towers and the possibility of a signal moving from one tower to another based on the user's location was not opinion testimony. *See, e.g.*, Rule 602, SCRE (providing that a witness may testify to a matter if there is evidence to support a finding that he has personal knowledge of the matter). The statements were not conclusions Dobbins drew based on any specialized reasoning or assessment, and were not presented in the form of an opinion or inference. They were facts based on Dobbins's personal experience as an employee at

AT&T and proper lay witness testimony under Rule 701. *See* Rule 701, SCRE (providing that a lay witness may testify about matters rationally related to the witness's perception). Because the testimony was based on Dobbins's personal observations and knowledge, he did not need to be qualified as an expert. *See, e.g., State v. Douglas*, 380 S.C. 499, 502-03, 671 S.E.2d 606, 608-09 (2009) (finding that a witness need not be qualified as an expert in the field of forensic interviewing when the witness testified only as to her personal observations and as to her interview with the victim); *see also Divine v. Robbins*, 385 S.C. 23, 39, 683 S.E.2d 286, 294-95 (Ct. App. 2009) (finding a guardian ad litem's testimony in a child custody case, regarding the mother's behavior, was based on her personal interactions with the mother and did not require special knowledge or skill) (citing *Douglas*, 380 S.C. at 502-03, 671 S.E.2d at 608-09).

Appellant makes much of Dobbins's statement regarding a cell tower's "latitude and longitude." However, a careful reading of the record shows Dobbins was not testifying to the actual location of a user, but that individual towers have an actual, physical location. Further, Dobbins stated AT&T stored that location information electronically which Respondent submits is far from the technical testimony which would require a qualified expert. Such information was easily accessible to anyone who looked at AT&T's customer records and required minimal technical knowledge. *See* Rule 701 (providing that a lay witness can testify to matters that do not require special knowledge, skill, or training, but that may assist the jury's understanding of the witness's testimony); *cf. Watson v. Ford Motor Co.*, 389 S.C. 434, 445-46, 699 S.E.2d 169, 175 (2010) (explaining that expert testimony differs from that of a lay witness because an expert can give an opinion based on facts outside the witness's personal knowledge, and based on technical or specialized knowledge). Other jurisdictions have consistently found testimony that simply describes the information in a cell phone record, such as that given by Dobbins, is proper

lay testimony. *See Collins v. State*, 172 So. 3d 724, 743 (Miss. 2015) (holding that testimony that merely informs the jury as to the location of cell phone towers is proper lay testimony when it is based upon the personal observations of the witness); *Fleming v. State*, 179 So. 3d 1115, 1119 (Miss. 2015) (holding a witness crosses the line into expert testimony when he exceeds the information contained in phone records and provides specialized knowledge on how cell technology works); *Perez v. State*, 980 So. 2d 1126, 1131-32 (Fla. 3d Dist. Ct. App. 2008) (finding a cellular company's records custodian was not required to be qualified as an expert to testify regarding geographic coverage of a typical cell tower and factually explain the contents of phone records).

Dobbins provided only a brief and generic description of the role of cell phone towers consistent with information available to the general public. That cell phones send signals to towers, indicating a user's general location, does not qualify as testimony beyond the realm of common experience that would require the special knowledge of an expert witness. *See, e.g., Watson*, 389 S.C. at 446, 699 S.E.2d at 175 (stating that expert testimony is appropriate where the subject matter is beyond the ordinary knowledge of the jury). Dobbins merely pointed out to the jury what information AT&T collected, which included phone numbers called or texted, times and dates of communications, and the tower associated with the communication. The record shows Dobbins did not engage in any analysis, such as comparing factors which may affect a phone's ability to connect to a particular cell tower, which would require scientific, technical, or specialized knowledge. *See, e.g., Rule 702, SCORE* (providing that a witness may be qualified and testify as an expert if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence"). Dobbins's testimony was limited to the information found in AT&T's records, which were kept for every customer. Accordingly, the

trial court did not err in admitting Dobbins testimony.

Harmless Error

Even if the Court were to find the trial court abused its discretion, any error in admitting Dobbins's testimony regarding cell tower locations was harmless because the jury considered substantial corroborating evidence properly admitted at trial. *See Livingston*, 282 S.C. at 6, 317 S.E.2d at 132 (holding an error admitting evidence is harmless beyond a reasonable doubt where guilt is proven by other competent evidence, such that the error could not have reasonably affected the verdict). Dobbins's testimony could not be used to improperly place appellant at the scene of the murder where appellant himself testified he was there, he acknowledged at trial that the cell phone belonged to him, and admitted he left the scene with the marijuana in his car. Further, investigators saw the phone in the parking lot and a drug enforcement agent who analyzed the phone recognized appellant in some selfies as a confidential informant. The jury also heard a lengthy series of text message in which appellant and the victim set up the marijuana deal, as well as evidence of phone calls between appellant and the victim, and appellant and McLain. *See Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318 (holding factors of a harmless error analysis include whether the testimony is cumulative, the presence of evidence corroborating the testimony, and the importance of the testimony to the State's case); *see also State v. Ford*, 454 S.W.3d 407, 415 (Mo. 2015) (analyzing the admission of cell phone location data through lay testimony and holding, despite trial court error, there was no "miscarriage of justice" because of the substantial evidence of guilt presented by the State). Accordingly, Dobbins's testimony detailing the information contained in AT&T's records did not substantially affect the verdict and any error in admitting it was harmless.

II.

Appellant's argument that the trial court erred in allowing SLED agent Megan Lukacs to testify as a lay witness is not preserved.

Introduction

Defense counsel specifically told the trial court he was not objecting to Lukacs's testimony, and this issue is not preserved. Additionally, the maps created by the agent did not require specialized skill, training, or analysis to complete as Lukacs testified she took factual information readily available in cell phone records, including cell tower locations and the times of texts and calls, and input the data into a computer program which mapped the communications. Any error by the court was harmless because appellant admitted at trial that he was at the murder scene and Lukacs's testimony was cumulative to other competent evidence presented at trial.

How the Issue Was Raised

To corroborate appellant's statements that he was at the scene and that the phone was his, as well as agent Will Lynch's (Lynch) testimony that he put into chronological order communications from appellant's phone, the State called SLED agent Megan Lukacs (Lukacs) to testify about how she utilized cell phone data. (R.p.467, lines 20-23; p.468, lines 1-4). Lukacs first testified about her general duties. She stated investigators would send call records to her, which included cell tower coordinates, she imported the information from the records into a computer program, and the program then "mapped" the calls. (R.p.469, line 12-p.470, line 1). As Lukacs began her testimony specific to this case, defense counsel asked the court:

[Defense Counsel]: Your Honor, I have a, I don't know if it's an objection, but it's a clarification. I'm not quite sure how this works, I don't know if she's testifying as an expert, or is this something that any of us can do?

The Court: Well, I don't know if it—she hasn't been asked or qualified yet, so I'll allow the question. Until that point, we assume that she's testifying—until it is offered, that any of her testimony would have to be a 701 opinion, and she certainly can render a 701 opinion.

[Defense Counsel]: Okay.

The Court: All right. Proceed.

(R.p.472, lines 3-15). Lukacs continued to testify that she was asked to assist with this case and given the cell phone records for appellant, the victim, and Stephon McLain (McLain). (R.p.472, line 18-p.474, line 5). Investigators requested Lukacs map the calls from the phones for a narrow time frame—from 6:30 p.m. to 8:30 p.m. on February 26, 2013, the evening of the murder. (R.p.475, lines 14-17). Lukacs imported the records into the computer program, input the specific time frame, and mapped the calls to plot the progression of the phones belonging to appellant, McLain, and the victim. (R.p.474, line 9-p.475, line 3). Lukacs then compared the cell phone records provided by investigators to the maps the program generated to ensure the maps accurately reflected the call logs and tower locations, and one of her colleagues subsequently reviewed the maps. (R.p.475, lines 4-9; p.476, lines 17-24).

As the State prepared to introduce the maps, defense counsel again asked for clarification and specifically stated he was not objecting to the evidence:

[Defense Counsel]: I'm just for clarification, is this coming in as expert testimony?

The Court: It's coming in, she prepared a document based on some data. There's nothing more than a spreadsheet really. Somebody puts data on a sheet.

[Defense Counsel]: Okay.

The Court: I mean, she doesn't have to be an expert, you and I could do that.

[Defense Counsel]: That's my thing, I've tried to do it.

The Court: I'm just saying, if we know where the towers are and these records, from what I understand all of these records to be, is simply taking the data and putting it on a—putting it on a map. I mean, I'm not trying to belittle what she does, but it doesn't require an expert. This is simply something she requires some training and experience, she's testified to that.

So if it is an expert, it's similar to bloodhound expert, it's not required to peer review. Somebody checked her work, that wasn't peer review, they just checked her work. But the objection is noted and overruled.

[Defense Counsel]: I was not necessarily objecting.

(R.p.477, line 21-p.478, line 19). After a brief comment to the jury regarding the discussion, the court stated, "No objection. State's 38 is admitted without objection." (R.p.478, line 20-p.479, line 4). The other two map exhibits, State's 39 and 40, were also admitted without objection. (R.p.479, line 22-p.480, line 5).

Without further requests for clarification from defense counsel, Lukacs testified the maps indicated appellant's cell phone moved between towers near the incident location around the time of the shooting. (R.p.480, line 9-p.481, line 24). Records from McLain's cell phone indicated its signal moved toward the murder scene and then away on the evening of February 26, 2013. (R.p.481, line 25-p.483, line 18). In addition, the map showed the victim's cell phone was sending a signal to a tower near the apartment complex for most of the night, and then switched to the same tower as McLain's phone after the murder, which was not near the shooting scene. (R.p.483, line 19-p.485, line 14). Lukacs testified the maps only indicated the general area in which the cell phones were used, and she could not give the exact location for the users or determine who actually used the phones. (R.p.485, line 22-p.486, line 13).

Defense counsel did not cross-examine Lukacs. (R.p.486, lines 16-17).

Analysis

Issue Preservation

Respondent submits appellant's argument that the trial court erred in admitting Lukacs's testimony without qualifying her as an expert is procedurally barred as the record shows defense counsel told the court he was not objecting to her statements. Counsel twice asked for clarification as to the nature of Lukacs's testimony; however, counsel did not specifically object on the ground that Lukacs must be qualified as an expert prior to testifying about her utilization of the cell phone data. *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)) (holding an objection must be made with sufficient specificity to allow the trial court to understand the nature of the argument being advocated by the party making the objection). As Lukacs began her testimony about the data she imported when assisting with this case, counsel stated, "I have a, I don't know if it's an objection, but it's a clarification" and never specifically objected following the trial court's statement that Lukacs could render a Rule 701 opinion. (R.p.472). A few minutes later, counsel again asked for clarification as to the nature of Lukacs's testimony, the court stated the witness was not testifying to a matter in which she was required to be an expert but that "the objection is noted and overruled," to which counsel replied, "I was not necessarily objecting." (R.pp.477-478). The court then admitted the map evidence "without objection" and counsel did not inform the court he had, in fact, objected, nor did he raise any further concerns regarding Lukacs's continuing testimony. (R.pp.478-479).

Respondent submits defense counsel's statement that he "was not necessarily objecting" waived appellant's right to now raise the argument that the trial court erred in admitting Lukacs's testimony without first qualifying her as an expert. *See Byers*, 392 S.C. at 444, 710 S.E.2d at 58

(citing *State v. Simpson*, 325, S.C. 37, 42, 479 S.E.2d 57, 60 (1996)) (holding an objection to the admission of evidence must be made at the time the evidence is presented in order to be preserved for appellate review). The State was entitled to present a counterargument to the court had counsel demonstrated an intent to object on the ground that Lukacs must be qualified as an expert before continuing to testify. *State v. Torrence*, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (stating the rationale behind the contemporaneous objection rule is to enable the trial court to make a reasoned decision by developing issues by way of argument, both for or against a legal proposition). The record shows the State was not given such an opportunity as counsel's statement effectively ended the discussion of the matter, counsel never specifically objected on this ground, and counsel failed to subsequently challenge Lukacs's continuing testimony. Accordingly, this issue is not preserved for appellant review and not properly before the Court.

Merits Analysis

Notwithstanding the above discussion, respondent submits the trial court did not abuse its discretion in allowing Lukacs to testify as a lay witness. The threshold question to any Rule 702 analysis is whether the witness is testifying to a subject matter beyond the ordinary knowledge of the jury which would require an expert to explain the matter to the trier of fact. *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. Lukacs's testimony did not amount to an expert opinion and was not so specialized or technical to subject it to a Rule 702 analysis. To create the maps, Lukacs utilized software that was marketed to law enforcement agencies across the country and required little more than identification of the various locations she intended to plot. *See* Rule 701 (providing that lay witnesses may testify to inferences rationally based on the perception of the witness). Lukacs input the cell tower sites by latitude and longitude, as disclosed by AT&T and T-Mobile pursuant to subpoenas for the information. (R.pp.472-474). She further imported the

time of each text or phone call during a narrow timeframe to plot the progression of the cell phones belonging to appellant, McLain, and the victim on the night of the murder, also disclosed by the cell phone companies in their records. (R.pp.474-75). The minimal technical knowledge or skill required to complete the task was not so "specialized" as to constitute a matter of expertise within the meaning of Rule 702. *See* Rule 702 (providing that a witness may be qualified and testify as an expert if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence").

Once the maps were created, Lukacs simply reviewed the cell phone records and compared them to the maps to make sure the maps accurately reflected the tower and time information contained in the subpoenaed records. (R.pp.475-76). Lukacs's knowledge that she testified to at trial was readily accessible to any ordinary person. *Cf. Watson*, 389 S.C. at 446, 699 S.E.2d at 175 (stating that expert testimony is appropriate where the subject matter is beyond the ordinary knowledge of the jury). Notably, federal courts that have considered this issue have found witnesses need not be an expert to take information provided by a cell phone company, such as tower coordinates, and transfer it onto a map as the witness is simply creating a visual aid to help the jury understand the information. *See United States v. Baker*, 496 Fed. App'x 201, 204 (3d Cir. 2012) (finding a federal agent's testimony as to his use of computer mapping software to create map of defendant's general location from cell phone records did not involve expert testimony); *United States v. Evans*, 892 F. Supp. 2d 949, 953 (N.D.Ill. 2012) (finding creation of a map plotting cell towers utilized by a defendant's phone does not require specialized knowledge and is admissible through lay opinion testimony); *see also Burnside v. State*, 352 P.3d 627, 636 (Nev. 2015) (holding the State was not required to notice as an expert witness a detective who made a map of cell phone sites that handled calls from cell phones registered to

the defendant). To the extent appellant argues the trial court erred in failing to determine the reliability of cell phone location mapping technology, respondent notes multiple courts have rejected that argument.⁷ See *Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1204 n. 5 (8th Cir. 2015) (rejecting a challenge to the reliability of cell phone mapping technology); *United State v. Jones*, 918 F. Supp. 2d 1, 6-7 (D.C. 2013) (finding the reliability of cell phone mapping is so well-established that a *Daubert*⁸ hearing was not necessary).

Importantly, Lukacs acknowledged that she could not give a precise location of an individual user as the records only indicated a general area of use based on the location of the cell towers, and the State did not attempt to use Lukacs's testimony to pinpoint appellant's exact location around the time of the murder. (R.pp.485-86). This is another indication that Lukacs simply input already available data into software to create the maps, she did not engage in any specialized analysis of the data,⁹ and the conclusions she drew were not based on any specialized reasoning. See Rule 701 (providing that a lay witness can testify to matters that do not require special knowledge, skill, or training, but that may assist the jury's understanding of the witness's

⁷ In addition, the record demonstrates the trial court did not acknowledge Lukacs's statements constituted expert testimony nor did the court engage in an incomplete Rule 702 analysis as appellant asserts. The court specifically stated "it doesn't require an expert" to create the maps Lukacs was using. (R.p.478). The court further stated, even assuming it was expert testimony, it was not scientific, but similar to bloodhound, experience-based evidence. (R.p.478); see also *State v. White*, 382 S.C. 265, 269-71, 676 S.E.2d 684, 686-87 (2009) (holding a trial court retains its gatekeeping role for admission of nonscientific, or evidence based, expert testimony). Regardless, as argued above, the court was not required to conduct a Rule 702 analysis to assess the reliability of the testimony as defense counsel told the court he was not objecting to her statements, leaving the issue unpreserved.

⁸ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

⁹ As noted by the Missouri Supreme Court, such analysis requires broad inferences be made of a cell phone's ability to connect to towers, which depends on a multitude of factors such as weather and geography, and would require an expert who had specialized experience in the field of cellular communications. *State v. Blurton*, 484 S.W.3d 758, 771 (Mo. 2016). Lukacs did not have such experience and testified her job only required her to input already available data.

testimony); *cf. Watson*, 389 S.C. at 445-46, 699 S.E.2d at 175 (explaining that expert testimony differs from that of a lay witness because an expert can give an opinion based on facts outside the witness's personal knowledge, and based on technical or specialized knowledge). Lukacs's testimony was proper lay witness testimony under Rules 602 and 701, and her testimony regarding the maps she developed aided the jury in its understanding of her testimony and did not overstep the bounds of Rule 701. *See, e.g., Douglas*, 380 S.C. at 502, 671 S.E.2d at 608 (determining that a forensic interviewer could testify as a lay witness to her utilization of an established method to build rapport with the child victim, and that she established the opinion the victim needed to undergo a medical exam); *see also Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 81 (3d Cir. 2009) ("When a lay witness has particularized knowledge by virtue of her experience, she may testify—even if the subject matter is specialized or technical—because the testimony is based upon a layperson's personal knowledge rather than on specialized knowledge within the scope of Rule 702."). Our case law does not support the contention that lay witness testimony oversteps the bounds of Rule 701 where the witness delves into the reason for her determination. Accordingly, the trial court did not abuse its discretion in admitting Lukacs's testimony.

Harmless Error

Even if the Court were to find the trial court abused its broad scope of discretion, any error in admitting Lukacs's testimony was harmless because appellant's guilt was established by other competent evidence at trial. *See Livingston*, 282 S.C. at 6, 317 S.E.2d at 132 (holding an error admitting evidence is harmless beyond a reasonable doubt where guilt is proven by other competent evidence, such that the error could not have reasonably affected the result at trial). While Lukacs used maps to aid the jury in understanding her testimony, much of it was

cumulative to Lynch's testimony. Lynch put into chronological order the communications from appellant's phone to create a timeline of the hours leading up to the murder. Lynch read to the jury a lengthy series of text messages between appellant and the victim setting up the drug deal, and detailed for the jury the dates and times of other texts and phone calls between appellant and the victim, and appellant and McLain. (R.p.339; p.344; pp.347-54). Additionally, Lukacs's testimony corroborated appellant's admission on the stand that the phone found at the scene was his, any records from it were his, and that he was at the murder scene. (R.pp.507-508; p.525; p.527).

Appellant's conviction stemmed from the testimony of multiple witnesses and investigators, his own statement to police and those made at trial, and the corroboration of those details through evidence and the cell phone records of appellant, McLain, and the victim. *See Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318 (holding factors of a harmless error analysis include whether the testimony is cumulative, the presence of evidence corroborating the testimony, and the importance of the testimony to the State's case). Accordingly, Lukacs's testimony regarding her review of cell phone records and maps of cell tower locations did not substantially affect the verdict and any error in admitting it was harmless.

III.

The trial court did not abuse its discretion in admitting appellant's prior conviction.

Introduction

The trial court did not err in admitting appellant's prior conviction where the court limited the introduction to simply "a prior felony conviction" and did not allow either party to name the specific charge. The court balanced multiple factors to limit the prejudice to appellant, and gave the jury a limiting instruction that the conviction was to be used for impeachment only. Any error admitting the evidence was harmless because appellant himself damaged his credibility by admitting he lied multiple times to investigators.

How the Issue Was Raised

Prior to appellant's testimony, defense counsel informed the trial court he spoke to appellant about the possibility of a previous conviction being used to impeach him. (R.p.491, line 22-p.492, line 13). Counsel stated appellant had a 2010 conviction for assault and battery of a high and aggravated nature (ABHAN). (R.p.492, lines 13-19). While acknowledging the conviction was for a charge punishable by imprisonment of more than one year, counsel argued ABHAN was "so closely related to [a murder] charge" that the prejudicial effect outweighed the probative value. (R.p.492, line 20-p.493, line 8). Counsel further asserted ABHAN was not a crime of dishonesty, to which the court replied, "No question, no question." (R.p.493, lines 8-16). Thereafter, the court stated, "there's no question" that the prior ABHAN conviction falls under Rule 609(a)(1), SCRE,¹⁰ which required that he conduct a Rule 403, SCRE¹¹ analysis to

¹⁰ The rule provides, for purposes of attacking the credibility of a witness:

[E]vidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was

determine if "the probative value outweigh[ed] the prejudice." (R.p.493, lines 17-22).

The trial court weighed the probative value of admitting the prior conviction and ruled it was too prejudicial to name the specific charge, but that it was admissible to simply state that appellant had a prior conviction:

First of all, it's 403 analysis, obviously [appellant's] credibility is a critical aspect of this. So there's no question it has probative value as to that aspect.

So from the standpoint of it, and the rule recognizes the right to bring it out for the purposes of impeachment, solely for that purpose.

...

And in that regard, I would agree with you, assault and battery of a high and aggravated nature is very closely connected with the crime of murder. So I would allow the solicitor to ask him a question, have you been convicted of a felony, and were you convicted of a felony in whatever the year is. And that's really the extent that he can ask it. He can't go into details, he can't do anything else.

I think that balances the concern with respect to inferences to be drawn from the crime itself, and I think it protects him from undue prejudice on that respect. But I think the State's entitled to ask him about it for purposes of challenging his credibility. So I will allow it with that restriction.

(R.p.493, line 22-p.494, line 1; p.494, line 12-p.495, line 11). The court also cautioned defense

punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

Rule 609(a)(1).

¹¹ The rule requires a trial court to exclude otherwise relevant evidence 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." Rule 403.

counsel that discussing the sentence that appellant received would open the door for the State to cross-examine appellant on the specifics of the prior crime because it would "be fundamentally unfair if I allow you to talk about probation and how old [appellant was] and not allow the State to talk about the nature of the crime." (R.p.498, line 16-p.499, line 24).

As appellant's testimony began, defense counsel asked him, "Do you have one prior felony conviction?" to which appellant replied, "Yes, sir." (R.p.505, lines 13-15). Appellant then testified in detail about the instant crime and advanced his assertion that, while he was at the scene and participated in the marijuana deal, he did not plan to rob the victim and did not shoot him. (R.pp.503-533). Appellant's past conviction was not raised again and the State did not cross-examine him on it.

Importantly, and as the trial court noted it would do, the court gave a limiting instruction to the jury explaining that the prior conviction could only be considered for impeachment purposes:

Also you've heard testimony in this case of a prior conviction of a witness. That is testimony that may be considered by you in evaluating the credibility of that witness. You would consider it the same as any other factors that you would use to evaluate the witness and may only consider it for the purpose of evaluating credibility. And the fact that a person has a prior conviction does not make his testimony not credible nor does it make it credible. It's just another factor that you must decide in determining the credibility of that particular witness.

(R.p.582, line 20-p.583, line 5).

Analysis

No Prejudice

Generally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show he acted "in conformity therewith." Rule 404(b), SCRE. Evidence

of other crimes may be admissible to impeach a defendant's credibility. For prior convictions less than ten years old,¹² Rule 609(a)(1) provides a two-part test determine whether a defendant's prior convictions can be used to impeach him: (1) the conviction must have been punishable by death or imprisonment in excess of one year, and (2) the trial court must determine that the probative value of admitting the evidence outweighs its prejudicial effect to the accused. Rule 609(a)(1). Prior convictions for the same or similar crimes, in particular, can be highly prejudicial; therefore, the court must determine, in its discretion, whether to admit the evidence after weighing the probative value against the prior convictions' prejudicial effect. *Green v. State*, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000). To make that determination, our Supreme Court has noted the trial court should consider the following factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and, (5) the centrality of the credibility issue. *State v. Colf*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000).¹³

Here, respondent acknowledges the trial court stated it must do a Rule 403 analysis, which requires exclusion of evidence if the probative value is substantially outweighed by the danger of unfair prejudice, when the proper determination was if the probative value of admitting

¹² Rule 609(b), SCRE, establishes a presumption against the admissibility of remote convictions, i.e., those more than ten years old, for impeachment unless the trial court expressly finds the probative value of the conviction "substantially outweighs" its prejudicial effect. *State v. Johnson*, 363 S.C. 53, 57, 609 S.E.2d 520, 522 (2005). Here, appellant's prior conviction occurred in 2010 and he was tried in 2014. Accordingly, the admission of the conviction is governed by Rule 609(a)(1).

¹³ While *Colf* involved the admission of prior convictions more than ten years old under Rule 609(b), our courts have implicitly recognized the value of the factors in making a similar determination under Rule 609(a)(1). See, e.g., *Green*, 338 S.C. at 433-34, 527 S.E.2d at 101 (discussing the issue in a PCR case and approving the use of the *Colf* factors in the context of a Rule 609(a)(1) analysis).

the evidence outweighed its prejudicial effect. *See* Rule 609(a)(1), *supra*. However, the record does not indicate the court's analysis was unduly prejudicial to appellant. First, the record shows the court properly considered the *Colf* factors. The court specifically balanced the conviction with the centrality of appellant's credibility, the importance of appellant's testimony to the theory of his defense, as well as the nature of the underlying offense of ABHAN and its similarity to murder. (R.pp.494-95); *see also Colf*, 337 S.C. at 627, 525 S.E.2d at 248 (listing the factors a trial court should consider to determine whether to admit the fact of a prior conviction). The court's analysis was partly in appellant's favor because it ultimately ruled the nature of the underlying offense was inadmissible because it was too prejudicial, while allowing the fact of appellant's single felony conviction to be admitted. *See Green*, 338 S.C. at 433, 527 S.E.2d at 101 (holding that prior convictions for similar crimes are particularly prejudicial and a trial court must determine whether to admit the evidence after conducting the required balancing test). Second, the court's ruling that counsel could not discuss the sentence appellant received further demonstrated its concern about the potential for prejudice to appellant as the court stated, if counsel referenced the sentence, it opened the door for the State to bring up the nature of the past offense. Third, the conviction was mentioned only once by defense counsel, likely in an effort to lessen its impact on appellant's credibility, and was not raised again by counsel or by the State during its cross-examination of appellant. Fourth, the court properly gave a limiting instruction to the jury explaining appellant's past conviction could only be considered for impeachment purposes. Finally, counsel failed to bring the court's alleged erroneous analysis to its attention before proceeding with appellant's testimony which prevented the court from correcting any error before the trial continued.¹⁴ Accordingly, the trial court did not abuse its discretion in admitting

¹⁴ Appellant argues the trial court's admission of the evidence was plain error. However, our

appellant's prior conviction.

Harmless Error

Regardless, even if the Court were to find the trial court abused its discretion, any error in admitting the prior conviction was harmless because appellant's guilt was established by other evidence at trial which was more damaging to appellant's credibility than the introduction of the prior conviction. *See Livingston*, 282 S.C. at 6, 317 S.E.2d at 132 (holding an error admitting evidence is harmless beyond a reasonable doubt where guilt is proven by other competent evidence, such that the error could not have reasonably affected the result at trial). Investigators proved appellant lied to them about his relationship with Stephon McLain through surveillance video which showed the two of them together prior to the murder and the video was introduced to the jury. (R.pp.312-13; pp.407-10). Appellant himself admitted to the jury that he lied multiple times to investigators, including when he told them he tried to grab the gun during the struggle to make it look like he "didn't have nothing to do with it." (R.pp.505-06; p.516). Additionally, the other evidence implicating appellant in the crime was extensive. The evidence included testimony from multiple witnesses and investigators, appellant's statement to police, and the corroboration of those details through evidence such as bullets and bullet casings, cell phone records, a selfie from the phone found at the scene which indicated it belonged to appellant, and text messages read to the jury. *See Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318 (holding factors of a harmless error analysis include whether the testimony is cumulative, the presence of evidence corroborating the testimony, and the importance of the testimony to the

appellate courts have routinely held the plain error rule does not apply in South Carolina state courts. *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (citations omitted). Instead, a party must make a specific and contemporaneous objection to preserve an issue for appellate review. *Johnson*, 363 S.C. at 58, 609 S.E.2d at 523. Accordingly, respondent submits this argument fails because our courts do not recognize the rule and because defense counsel's failure to object to the court's analysis regarding the prior conviction waived the issue.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

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BY: 

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ATTORNEYS FOR RESPONDENT

October 28, 2016.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
Markley Dennis, Circuit Court Judge

THE STATE,

Respondent,

v.

MARQUIS SPENCER MCDONALD,

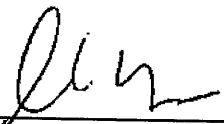
Appellant.

Appellate Case No. 2014-002181

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 28th day of October, 2016.



SHERRIE BUTTERBAUGH
Assistant Attorney General

ATTORNEY FOR RESPONDENT

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Marquis Spencer McDonald, Appellant.

Appellate Case No. 2014-002181

Appeal From Horry County
R. Markley Dennis, Jr., Circuit Court Judge

Unpublished Opinion No. 2017-UP-285
Heard May 2, 2017 – Filed July 12, 2017

AFFIRMED

Nicholas Daniel Mermiges, of Law Offices of Nick
Mermiges, LLC, and Chief Appellate Defender Robert
Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Deputy Attorney
General Donald J. Zelenka, and Assistant Attorney
General Sherrie Butterbaugh, all of Columbia, and
Solicitor Jimmy A. Richardson, II, of Conway, for
Respondent.

PER CURIAM: In this criminal action, Marquis Spencer McDonald appeals his convictions for murder and armed robbery, for which McDonald was sentenced to 45 years and 30 years respectively, to run concurrent. McDonald argues the trial court erred in permitting two witnesses to testify regarding cell phone location data without qualifying them as experts and allowing evidence of his felony conviction to be introduced to the jury. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the cell phone location testimony: *State v. Hewins*, 409 S.C. 93, 102, 760 S.E.2d 814, 819 (2014) ("In criminal cases, the appellate court sits to review errors of law only." (quoting *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001))); *id.* at 103, 760 S.E.2d at 819 ("The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the decision of the trial court is based upon an error of law or upon factual findings that are without evidentiary support."); Rule 701, SCRE (stating a lay witness's testimony in the form of opinions or inferences is "limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."); Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009) ("The trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702[, SCRE] whether the evidence is scientific or nonscientific."); *id.* ("In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact."); *State v. Berry*, 418 S.C. 500, 504, 795 S.E.2d 26, 28 (2016) (finding an issue not preserved for appellate review when the trial court sustains the defendant's objections, and trial counsel does not take any further measures to have the testimony stricken from the record, curative instructions given, or a mistrial granted); *State v. Holliday*, 333 S.C. 332, 338, 509 S.E.2d 280, 283 (Ct. App. 1998) ("In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground.").

2. As to the previous felony conviction testimony: Rule 609(a)(1), SCRE (stating evidence that a defendant has been convicted of a crime shall be admitted

if the crime was punishable by death or imprisonment in excess of one year under the law under which the defendant was convicted, if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.); *State v. Scriven*, 339 S.C. 333, 344, 529 S.E.2d 71, 76 (Ct. App. 2000) (noting the burden is on the State to establish the probative value of admitting the prior conviction evidence outweighs its prejudicial impact); *id.* ("A decision to admit this evidence without these safeguards would be an error of law, amounting to an abuse of discretion."); *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial [court] to be preserved for appellate review." (quoting *State v. Nichols*, 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997))).

AFFIRMED.

LOCKEMY, C.J., and HUFF and THOMAS, JJ., concur.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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July 28, 2017

The Honorable Renee Elvis
PO Box 677
Conway SC 29528-0677

REMITTITUR

Re: The State v. Marquis Spencer McDonald
Lower Court Case No. 2014GS2603820, 2013GS2601478
Appellate Case No. 2014-002181

Dear Clerk of Court:

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

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Jimmy A. Richardson, II, Esquire
Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire
Nicholas Daniel Mermiges, Esquire
Sherrie Butterbaugh, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

MARQUIS S. MCDONALD

Plaintiff(s)

vs.

THE STATE OF SOUTH CAROLINA

Defendant(s)

Submitted By: STEPHEN D. GEOLY
Address: 222 PHOENIX STREET
GREENWOOD, SC 29646

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2020-CP-26-4711

SC Bar #: 9674
Telephone #: 864-223-3352
Fax #:
Other:
E-mail: geolylawfirm@yahoo.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/ Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -NI- ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399)	Real Property ☐ Eminent Domain (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Incapacitated Adult Settlement (790) ☐ Other (799)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOJ (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680) ☐ Interpleader (690)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)		

Submitting Party Signature:

Date: 8/11/2020

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 et. seq.

SCCA / 234 (02/2018)

Page 1 of 2

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

MARQUIS S. MCDONALD #361662,
Applicant,

vs.

THE STATE OF SOUTH CAROLINA,
Respondent.

) IN THE COURT OF COMMON PLEAS
) THE FIFTEENTH JUDICIAL CIRCUIT
)

) Case No.:

) APPLICATION FOR POST-CONVICTION
) RELIEF
)

20 20 CP26 4711

FILED
HORRY COUNTY
RENEE N. ELYS
CLERK OF COURT
HORRY COUNTY, SC
2020 AUG 11 PM 12:21

1. Place of detention: Broad River Correctional Institution
2. Name and location of Court which imposed sentence: Horry County Court of General Sessions, the Honorable Markley Dennis presiding.
3. Name(s) of co-defendant(s) (if any): Stephon McLain.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: 2013-GS-26-1478 Murder 45 year sentence. 2014-GS-26-3820 Armed Robbery 30 years.
5. The date upon which sentence was imposed and the terms of the sentence: October 9, 2014.
6. A finding of guilty was made: after a plea of not guilty.
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed: South Carolina Court of Appeal.
 - (b) the result in each such Court to which you appealed: Affirmed by the Court of Appeals.

(c) the date of each such result: Court of Appeals May 25, 2016; Supreme Court July 12, 2017.¹

(d) if known, citations of any written opinion or orders entered pursuant to such results: Court of Appeals - 2017-UP-285.

9. If you answered "no" to (7), state your reasons for not so appealing: Not Applicable.

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- a. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Appellate Counsel failed to timely inform him that the remittitur had been sent in his case.²
- b. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to call a crime scene reconstruction expert to testify at his trial.
- c. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly investigate his case.
- d. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly meet with and prepare Applicant for trial.

¹ Applicant was only notified that the remittitur had been sent in his direct appeal.

² Applicant asserts that his statute of limitations should be tolled until he learned that his direct appeal was complete. Although there is generally a one year statute of limitation on Post-Conviction Relief actions, the PCR statute of limitations have not been applied when it denies an applicant his "right to one fair bite at the apple." See *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002) (holding an applicant who was denied his right to a direct appeal due to ineffective assistance of counsel should not be denied his right to a PCR application because of the one-year statute of limitations). Additionally, under rare circumstances the doctrine of equitable tolling can extend a statute of limitations. See *Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008).

- e. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to historical cell phone data which was seized in violation of the Fourth Amendment.
- f. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to cell company data which was seized in violation of his right to due process and S.C. Code §17-13-14.
- g. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to information obtained through and as a result of the search his cellphone. 336
- h. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the cell tower map that was confusing and likely to mislead the jurors.
- i. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the cell phone location data admitted through the AT&T records custodian.
- j. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the cell phone location opinions given by Megan Lukas.³
- k. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to opinion testimony from Agent Hezel about trajectory of bullets. (264).

³ Applicant asserts that the State should be estopped from asserting that this was properly preserved based on the fact that they asserted on direct appeal that this issue was not preserved.

- l. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to opinion testimony from Agent Hezel about whether there was blood spatter present. (240).
- m. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Appellate Counsel failed to raise the issue concerning the objection to the accomplice liability jury instruction. 462-463
- n. Alternatively to the immediately preceding allegation, Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the accomplice liability jury instruction. 588-590.
- o. Alternatively to the allegations raised in the prior two allegations, Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly request a jury instruction that the purchase of marijuana was not a felony or an illegal act whose nature and probable consequence was death.
- p. Alternatively to the allegations raised in the prior three allegations, Applicant was denied his Sixth Amendment right to effective assistance of counsel when Appellate Counsel failed to brief the issue concerning a jury instruction on marijuana raised by Trial Counsel.
- q. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to request a jury instruction on involuntary manslaughter.
- r. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the jury charge stating that inferred malice may also arise from the use of a deadly weapon when

evidence had been presented that would reduce, mitigate, excuse or justify a homicide caused by the use of a deadly weapon⁴. 586.

- s. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to and/or move to strike statements made by Roland Crooms which were admitted in violation of the Confrontation Clause and Rule 802, SCRE. 418-419
- t. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Dr. Proctor giving opinion testimony concerning stippling on clothing and in eliciting testimony concerning stippling on clothing. (446-447).
- u. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Dr. Proctor giving opinion testimony concerning whether wounds were defensive or not. (435, 436, 450).
- v. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to have the swabs tested for DNA.
- w. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to have the swabs tested for serology.
- x. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to investigate what type of markings a bullet hole would make on the seat of the Acura.

⁴ Applicant asserts this jury instruction contradicts the Supreme Court of South Carolina's decision in *State v. Belcher*. "Today we . . . hold that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." *See State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

- y. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the passion and prejudice arguments which were raised in the State's opening.
 - z. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel predicted that the State's theory of the case would change during the course of the trial. (36).
 - aa. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to statements of how the shooting impacted witness Amanda McTaggart. (84).
 - bb. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to testimony that Stephon McClain consented to extradition despite the fact that such testimony violated Confrontation Clause and Rule 802, SCRE. (316 420).
 - cc. Applicant was denied his right to effective assistance of counsel due to cumulative error of all previous allegations.⁵
 - dd. Applicant was denied his right to due process based Appellate Counsel's failure to notify him that his direct appeal was resolved.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- a. Applicant was not properly informed about the status of his direct appeal or that the remittitur had been sent.

⁵ Applicant asserts that each of the prior grounds of ineffective assistance of counsel individually justifies a new trial. However, Applicant would also assert that the cumulative effect of any combination of the above reference errors would have the cumulative effect of denying him a fair trial.

- b. Trial Counsel failed to call a crime scene reconstruction expert to testify despite the fact that he presented a case centered around the fact that the physical evidence was inconsistent with the State's theory of how the deceased was shot.
- c. Trial Counsel failed to adequately investigate his own theory of the case or to consider other possible evidence or theories of defense.
- d. Trial Counsel failed to adequately meet and prepare Applicant for the trial and the defense.
- e. Trial Counsel failed to properly object to historical cell phone data which was seized in violation of the Fourth Amendment.
- f. Trial Counsel failed to properly object to cell company data which was seized in violation of his right to due process and S.C. Code §17-13-14.
- g. Trial Counsel failed to object to information obtained through and as a result of the search Applicant's cellphone. Law enforcement search the phone without a warrant and later got a warrant for the second search. Applicant asserts that all evidence obtained from the cell phone or as a result of the cell phone should have been suppressed.
- h. Trial Counsel failed to object to the cell tower map that was confusing and likely to mislead the jurors.
- i. Trial Counsel failed to properly object to the cell phone location data admitted through the AT&T records custodian. The records custodian was allowed to testify concerning location information without first being qualified as an expert. Additionally, the call location information in the AT&T records was likely to confuse the jury and/or unreliable.

- j. Trial Counsel failed to properly object to the cell phone location opinions given by Megan Lukas.
- k. Trial Counsel failed to properly object to various opinions from Agent Hezel concerning the trajectory of bullets fired. However, Agent Hezel admits on App. 267 that she is not qualified to do crime scene reconstruction.
- l. Trial Counsel failed to properly object to opinion testimony from Agent Hezel about whether there was blood spatter present at App. 240 despite the fact that she admits on App. 239 she would not be able to do any blood spatter testing.
- m. Appellate Counsel failed to raise the issue concerning the objection to the accomplice liability jury instruction that was present at App. 462-463.
- n. Alternatively to the immediately preceding allegation, Trial Counsel failed to properly object to the accomplice liability jury instruction located at App. 588-590.
- o. Alternatively to the allegations raised in the prior two allegations, Trial Counsel failed to properly request a jury instruction that the purchase of marijuana was not a felony or an illegal act whose nature an probable consequence was death.
- p. Alternatively to the allegations raised in the prior three allegations, Appellate Counsel failed to brief the issue concerning a jury instruction on marijuana raised by Trial Counsel at App. 462-463.
- q. Trial Counsel failed to request a jury instruction on involuntary manslaughter despite the fact that Applicant's statement involved a fight over the gun.

- r. Trial Counsel failed to properly object to a jury instruction on inferred malice from the use of a deadly weapon even though evidence was presented that mitigate, reduce, excuse or justify the homicide.
- s. At App 418-419, Statements made by Roland Crooms which were admitted in violation of the Confrontation Clause and Rule 802, SCRE.
- t. Dr. Proctor was allowed to give opinion testimony concerning stippling on clothing and Trial Counsel eliciting testimony concerning stippling on clothing from Dr. Proctor. This was outside the scope of his expertise.
- u. At App. 435-436 and 450, Dr. Proctor was allowed to characterized wounds as being defensive in nature or not. Applicant asserts that he lacked personal knowledge to characterize the wounds this way. Additionally, there is no reliable way to determine whether such wounds were offensive or defensive. *See* Rules 701, 702, 703, and 704, SCRE. Additionally, this characterization should have been suppressed pursuant to Rule 403, SCRE.
- v. Trial Counsel failed to have the swabs tested for DNA.
- w. Trial Counsel failed to have the swabs tested for serology.
- x. type of markings a bullet hole would make on the seat of the Acura.
- y. The State's opening statement is replete with arguments that go to passion and prejudice arguments. Trial Counsel did not object.
- z. App. 36, Trial Counsel predicted that the State's theory of the case would change during the course of the trial. This prediction did not pan due to the failure of Trial Counsel to properly understand the State's evidence. Trial Counsel would have lost credibility in the jury's eyes when this prediction did not work.

- aa. At App. 84, Trial Counsel failed to object to statements of how the shooting impacted witness Amanda McTaggart.
 - bb. At App. 316 and 420, Trial Counsel failed to properly object to testimony that Stephon McClain consented to extradition despite the fact that such testimony violated Confrontation Clause and Rule 802, SCRE.
 - cc. Applicant was denied his right to effective assistance of counsel due to cumulative error of all previous allegations.⁶
 - dd. Applicant was denied his right to due process based Appellate Counsel's failure to notify him that his direct appeal was resolved.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No.
 - (b) any petition in State or Federal Courts for habeas corpus or post-conviction relief? No.
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any already specified in (8)? No.
 - (d) any other petitions or applications in this or any other Court? No.
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or Application: Not Applicable.
14. Has any ground set forth in (10) been previously presented to this or any other State or Federal Court, in any petition, motion or application which you have filed? No.
15. If you answered "yes" to (14) identify: Not Applicable.

⁶ Applicant asserts that each of the prior grounds of ineffective assistance of counsel individually justifies a new trial. However, Applicant would also assert that the cumulative effect of any combination of the above reference errors would have the cumulative effect of denying him a fair trial.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: First collateral review.
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes.
 - (b) your trial, if any? Yes.
 - (c) your sentencing? Yes.
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Greg McCollum- 1012 38th Ave. North, Suite 202, Myrtle Beach, SC 29577.
 - ii. Robert Dudek- P.O. Box 11589, Columbia, SC 29211
 - iii. Nicholas Mermiges- 1720 Main Street, Suite 202, Columbia, SC 29201
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Appeal to the Court of Appeals
 - iii. Appeal to the Court of Appeals.
19. State clearly the relief you seek in filing this application: a new trial or any other relief this court finds fair and just.
20. Are you now under sentence from any other court that you have not challenged? No.

RESPECTFULLY SUBMITTED,

Date: 8/6/2020



Stephen Drew Geoly (SC Bar 9674)
Geoly Law Firm
222 Phoenix St.
Greenwood, SC 29646
geolylawfirm@yahoo.com
(864) 223-3352
Attorney for Applicant

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Marquis McDonald, SCDC No. 361662

Applicant,

v.

State of South Carolina

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
)

) Case No. 2020-CP-26-4711
)

) **RETURN AND MOTION TO DISMISS**
)

FILED
HORRY COUNTY
2021 MAR -4 P 1:29
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

NOW COMES Respondent, the State of South Carolina, in response to Applicant Marquis McDonald's August 11, 2020 application for post-conviction relief, to respectfully show this Court:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted for Murder by the Horry County Grand Jury during its April, 2013 term. (2013-GS-26-01478). Applicant was later indicted for an additional Armed Robbery charge by the Horry County Grand Jury during its September, 2014 term. Applicant proceeded to trial before the Honorable Markley Dennis on October 6, 2014. Applicant was represented by Gregory McCollum, Esquire, and the case was prosecuted by Senior Solicitor Bradley C. Richardson and Assistant Solicitor Travis W. Wyman, of the Fifteenth Circuit Solicitor's Office. The jury convicted Applicant on both charges on October 9, 2014, and he was sentenced to 45 years for murder, and 30 years for armed robbery, to be served concurrently.

Applicant filed a timely notice of appeal and the appeal was perfected by Nicholas Mermiges, Esquire. On appeal, Applicant argued that the trial court erred in permitting AT&T's records custodian to testify to the location of cellular phones without qualifying him as an expert,

that the trial court erred in allowing a SLED agent to testify to the location of cell phones without qualifying her as an expert, and the trial court erred in its ruling on admissibility of evidence of Applicant's prior felony convictions. The court rejected these arguments and affirmed Applicant's conviction. The remittitur was sent on July 28, 2017.

II. FACTUAL HISTORY

On the night of February 26, 2013, Applicant and another individual, Stephon McLain, drove to the campus of Coastal Carolina University to purchase marijuana from the victim, Anthony Liddell. (App. 689, 15 – App. 690, 20). When they arrived, Liddell met them in the parking lot of a dormitory and got in the back seat of the vehicle to complete the sale. (App. 692, 13-20). A dispute over the quality of the marijuana arose and Applicant and McLain told Liddell they were going to take the marijuana without paying. (App. 693, 9 – App. 695, 25). When Liddell protested, one of the men presented a .40 caliber handgun and pointed it at Liddell. (App. 696, 8-15). A fight broke out and Liddell was shot three times, fatally wounding him. (App. 188, 14 – App. 190, 17; App. 696, 17-22). Applicant and McLain then quickly left the scene with the marijuana in the car. (App. 195, 20-21; App. 220, 9-15; Applicant ultimately turned himself in to police three days later.

III. CURRENT APPLICATION

In his current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

- (1) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Appellate Counsel failed to timely inform him that the remittitur had been sent in his case.
 - (a) Applicant was not properly informed about the status of his direct appeal or that the remittitur had been sent.
- (2) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to call a crime scene reconstruction expert to testify at his trial.

- (a) Trial Counsel failed to call a crime scene reconstruction expert to testify despite the fact that he presented a case centered around the fact that the physical evidence was inconsistent with the State's theory of how the deceased was shot.
- (3) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly investigate his case.
 - (a) Trial Counsel failed to adequately investigate his own theory of the case or to consider other possible evidence or theories of defense.
- (4) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly meet with and prepare Applicant for trial.
 - (a) Trial Counsel failed to adequately meet and prepare Applicant for the trial and the defense.
- (5) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to historical cell phone data which was seized in violation of the Fourth Amendment.
 - (a) Trial Counsel failed to properly object to historical cell phone data which was seized in violation of the Fourth Amendment.
- (6) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to cell company data which was seized in violation of his right to due process and S.C. Code §17-13-14.
 - (a) Trial Counsel failed to properly object to cell company data which was seized in violation of his right to due process and S.C. Code §17-13-14.
- (7) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to information obtained through and as a result of the search his cellphone. 336
 - (a) Trial Counsel failed to object to information obtained through and as a result of the search of Applicant's cellphone. Law enforcement search the phone without a warrant and later got a warrant for the second search. Applicant asserts that all evidence obtained from the cell phone or as a result of the cell phone should have been suppressed.
- (8) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the cell tower map that was confusing and likely to mislead the jurors.
 - (a) Trial Counsel failed to object to the cell tower map that was confusing and likely to mislead the jurors.
- (9) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the cell phone location data admitted through the AT&T records custodian.
 - (a) Trial Counsel failed to properly object to the cell phone location data admitted through the AT&T records custodian. The records custodian was allowed to testify concerning location information without first being qualified as an expert. Additionally, the call

location information in the AT&T records was likely to confuse the jury and/or unreliable.

- (10) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the cell phone location opinions given by Megan Lukas.
 - (a) Trial Counsel failed to properly object to the cell phone location opinions given by Megan Lukas.
- (11) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to opinion testimony from Agent Hezel about trajectory of bullets. (264).
 - (a) Trial Counsel failed to properly object to various opinions from Agent Hezel concerning the trajectory of bullets fired. However, Agent Hezel admits on App. 267 that she is not qualified to do crime scene reconstruction.
- (12) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to opinion testimony from Agent Hezel about whether there was blood spatter present. (240).
 - (a) Trial Counsel failed to properly object to opinion testimony from Agent Hezel about whether there was blood spatter present at App. 240 despite the fact that she admits on App. 239 she would not be able to do any blood spatter testing.
- (13) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Appellate Counsel failed to raise the issue concerning the objection to the accomplice liability jury instruction. 462-463.
 - (a) Appellate Counsel failed to raise the issue concerning the objection to accomplice liability jury instruction that was present at App. 462-463.
- (14) Alternatively to the immediately preceding allegation, Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the accomplice liability jury instruction. 588-590.
 - (a) Alternatively to the immediately preceding allegation, Trial Counsel failed to properly object to the accomplice liability jury instruction located at App. 588-590.
- (15) Alternatively to the allegations raised in the prior two allegations, Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly request a jury instruction that the purchase of marijuana was not a felony or an illegal act whose nature an probable consequence was death.
 - (a) Alternatively to the allegations raised in the prior two allegations, Trial Counsel failed to properly request a jury instruction that the purchase of marijuana was not a felony or an illegal act whose nature an probable consequence was death.
- (16) Alternatively to the allegations raised in the prior three allegations, Applicant was denied his Sixth Amendment right to effective assistance of

counsel when Appellate Counsel failed to brief the issue concerning a jury instruction on marijuana raised by Trial Counsel.

- (a) Alternatively to the allegations raised in the prior three allegations, Appellate Counsel failed to brief the issue concerning a jury instruction on marijuana raised by Trial Counsel at App. 462-463.
- (17) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to request a jury instruction on involuntary manslaughter.
 - (a) Trial Counsel failed to request a jury instruction on involuntary manslaughter despite the fact that Applicant's statement involved a fight over the gun.
- (18) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the jury charge stating that inferred malice may also arise from the use of a deadly weapon when evidence had been presented that would reduce, mitigate, excuse or justify a homicide caused by the use of a deadly weapon. 586.
 - (a) Trial Counsel failed to properly object to a jury instruction on inferred malice from the use of a deadly weapon even though evidence was presented that mitigate, reduce, excuse or justify the homicide.
- (19) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to and/or move to strike statements made by Roland Crooms which were admitted in violation of the Confrontation Clause and Rule 802, SCRE. 418-19.
 - (a) At App 418-419, Statements made by Roland Crooms which were admitted in violation of the Confrontation Clause and Rule 802, SCRE.
- (20) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Dr. Proctor giving opinion testimony concerning stippling on clothing and eliciting testimony concerning stippling on clothing. (446-447).
 - (a) Dr. Proctor was allowed to give opinion testimony concerning stippling on clothing and Trial Counsel eliciting testimony concerning stippling on clothing from Dr. Proctor. This was outside the scope of his expertise.
- (21) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Dr. Proctor giving opinion testimony concerning whether wounds were defensive or not. (435, 436, 450).
 - (a) At App. 435-436 and 450, Dr. Proctor was allowed to characterized wounds as being defensive in nature or not. Applicant asserts that he lacked personal knowledge to characterize the wounds in this way. Additionally, there is no reliable way to determine whether such wounds were offensive or defensive. *See* Rules 701, 702, 703, and 704, SCRE. Additionally, this characterization should have been suppressed pursuant to Rule 403, SCRE.

- (22) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to have the swabs tested for DNA.
 - (a) Trial Counsel failed to have the swabs tested for DNA.
- (23) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to have the swabs tested for serology.
 - (a) Trial Counsel failed to have the swabs tested for serology.
- (24) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to investigate what type of markings a bullet hole would make on the seat of the Acura.
 - (a) type of markings a bullet hole would make on the seat of the Acura.
- (25) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the passion and prejudice arguments which were raised in the State's opening.
 - (a) The State's opening statement is replete with arguments that go to passion and prejudice arguments. Trial Counsel did not object.
- (26) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel predicted that the State's theory of the case would change during the course of the trial. (36)
 - (a) App. 36, Trial Counsel predicted that the State's theory of the case would change during the course of the trial. This prediction did not pan due to the failure of Trial Counsel to properly understand the State's evidence. Trial Counsel would have lost credibility in the jury's eyes when this prediction did not work.
- (27) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to statements of how the shooting impacted witness Amanda McTaggart. (84).
 - (a) At App. 84, Trial Counsel failed to object to statements of how the shooting impacted witness Amanda McTaggart.
- (28) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to testimony that Stephon McClain consented to extradition despite the fact that such testimony violated the Confrontation Clause and 802, SCRE. (316, 420).
 - (a) At App. 316 and 420, Trial Counsel failed to properly object to testimony that Stephon McClain consented to extradition despite the fact that such testimony violated the Confrontation Clause and Rule 802, SCRE.
- (29) Applicant was denied his right to effective assistance of counsel due to cumulative error or all previous allegations.
 - (a) Applicant was denied his right to effective assistance of counsel due to cumulative error of all previous allegations.
- (30) Applicant was denied his right to due process based Appellate Counsel's failure to notify him that his direct appeal was resolved.
 - (a) Applicant was denied his right to due process based on Appellate Counsel's failure to notify him that his direct appeal was resolved.

In his prayer for relief Applicant requests the following:

- A new trial or any other relief this court finds fair and just.

Attached and incorporated herein are the Clerk of Courts records regarding the subject convictions, the trial transcript, and Applicant's present PCR application. Respondent reserves the right to alter or amend this Return upon receipt of any relevant materials.

IV. MOTION FOR SUMMARY DISMISSAL

Pursuant to S.C. Code Ann. §17-27-70(c), the Court may summarily dispose of an application if there is no genuine issue of material fact in the "pleadings, depositions and admissions and agreements of fact" and the movant is entitled to judgment as a matter of law.¹ The summary dismissal of an application for post-conviction relief without a hearing is appropriate only when it is apparent on the face of the application that a hearing is not needed for the development of a factual record and the applicant is not entitled to relief. *Mose v. State*, 420 S.C. 500, 505, 803 S.E.2d 718, 720 (2017) (citing *Leamon v. State*, 363 S.C. 432, 611 S.E.2d 494 (2005)). The Court, in considering the motion for summary dismissal without the holding of an evidentiary hearing, must assume the facts presented by the applicant as true and view them in the light most favorable to the applicant. *Robertson v. State*, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (citing *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013)).

The present application for post-conviction relief should be dismissed summarily for its non-compliance with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. A motion for summary judgment may

¹ In addition to filing this return and motion to dismiss, Respondent will also simultaneously submit a proposed conditional order of dismissal.

properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994).

South Carolina law requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of offense or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. §17-27-45(A). The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996) (per curiam). One who was convicted and sentenced prior to the effective date of the statute of limitations must file the application within one year of the effective date of the statute, which was July 1, 1995. *Id.* at 470, 469 S.E.2d at 607.

Applicant argues that the statute of limitations should be tolled until he learned that his direct appeal was complete. Applicant's reasons that his case is one of the "rare circumstances" justifying equitable tolling of the statute of limitations to safeguard his "right to one fair bite at the apple." See *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002); See also *Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008).

The Supreme Court of South Carolina has held that the statute of limitations shall be equitably tolled where "circumstances preventing a petitioner from making a timely filing [are] both beyond the petitioner's control and unavoidable despite due diligence." *Mose*, 420 S.C. at 508, 803 S.E.2d at 722 (quoting *Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009)). Respondent asserts that Applicant's case is not the type of rare circumstance justifying equitable tolling of the statute of limitations. Applicant was convicted on October 9, 2014. Applicant appealed, his conviction was affirmed, and the remittitur was sent on July 28, 2017. He therefore had until July 30, 2018 to file his post-conviction relief action. Even assuming that applicant was

not personally delivered a copy of the remittitur by his appellate counsel, had he exercised the due diligence required by law, he would have discovered that his appeal had come to a conclusion well before his application was filed. Instead, he waited more than three years since the remittitur was sent, and two years since the period for filing a timely application for post-conviction relief had closed. He may not supplant the rules of clearly drafted statutes on these grounds. Therefore, Respondent respectfully requests that the Court summarily dismiss Applicant's current PCR application as untimely.

V. ALL OTHER ALLEGATIONS DENIED

Each and every allegation contained in Applicant's application for post-conviction relief not otherwise expressly admitted, qualified, or explained in this return is hereby denied.

VI. CONCLUSION

WHEREFORE, Respondent moves to dismiss the application as barred by the statute of limitations.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

WILLIAM H. RAY
Assistant Attorney General

By: /s/ William H. Ray
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

March 3, 2021

Respondent.

CONDITIONAL ORDER OF DISMISSAL

FILED
Horry County
2021 MAR 15 10 46
RENEE NELSON
CLERK OF COURT
Horry County, SC
McDonald's August 14th
ed to summarily dismiss

records custodian to testify to the location of cellular phones without qualifying him as an expert, that the trial court erred in allowing a SLED agent to testify to the location of cell phones without qualifying her as an expert, and the trial court erred in its ruling on admissibility of evidence of Applicant's prior felony convictions. The court rejected these arguments and affirmed Applicant's conviction. The remittitur was sent on July 28, 2017.

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 - (a) Applicant was not properly informed about the status of his direct appeal or that the remittitur had been sent.
- (2) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to call a crime scene reconstruction expert to testify at his trial.
 - (a) Trial Counsel failed to call a crime scene reconstruction expert to testify despite the fact that he presented a case centered around the fact that the physical evidence was inconsistent with the State's theory of how the deceased was shot.
- (3) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly investigate his case.
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- (a) Appellate Counsel failed to raise the issue concerning the objection to accomplice liability jury instruction that was present at App. 462-463.
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- (19) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to and/or move to

- strike statements made by Roland Crooms which were admitted in violation of the Confrontation Clause and Rule 802, SCRE. 418-19.
- (a) At App 418-419, Statements made by Roland Crooms which were admitted in violation of the Confrontation Clause and Rule 802, SCRE.
- (20) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Dr. Proctor giving opinion testimony concerning stippling on clothing and eliciting testimony concerning stippling on clothing. (446-447).
- (a) Dr. Proctor was allowed to give opinion testimony concerning stippling on clothing and Trial Counsel eliciting testimony concerning stippling on clothing from Dr. Proctor. This was outside the scope of his expertise.
- (21) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Dr. Proctor giving opinion testimony concerning whether wounds were defensive or not. (435, 436, 450).
- (a) At App. 435-436 and 450, Dr. Proctor was allowed to characterized wounds as being defensive in nature or not. Applicant asserts that he lacked personal knowledge to characterize the wounds in this way. Additionally, there is no reliable way to determine whether such wounds were offensive or defensive. *See* Rules 701, 702, 703, and 704, SCRE. Additionally, this characterization should have been suppressed pursuant to Rule 403, SCRE.
- (22) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to have the swabs tested for DNA.
- (a) Trial Counsel failed to have the swabs tested for DNA.
- (23) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to have the swabs tested for serology.
- (a) Trial Counsel failed to have the swabs tested for serology.
- (24) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to investigate what type of markings a bullet hole would make on the seat of the Acura.
- (a) type of markings a bullet hole would make on the seat of the Acura.
- (25) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the passion and prejudice arguments which were raised in the State's opening.
- (a) The State's opening statement is replete with arguments that go to passion and prejudice arguments. Trial Counsel did not object.
- (26) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel predicted that the State's theory of the case would change during the course of the trial. (36)
- (a) App. 36, Trial Counsel predicted that the State's theory of the case would change during the course of the trial. This prediction did not pan due to the failure of Trial Counsel to properly understand the

State's evidence. Trial Counsel would have lost credibility in the jury's eyes when this prediction did not work.

- (27) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to statements of how the shooting impacted witness Amanda McTaggart. (84).
 - (a) At App. 84, Trial Counsel failed to object to statements of how the shooting impacted witness Amanda McTaggart.
- (28) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to testimony that Stephon McClain consented to extradition despite the fact that such testimony violated the Confrontation Clause and 802, SCRE. (316, 420).
 - (a) At App. 316 and 420, Trial Counsel failed to properly object to testimony that Stephon McClain consented to extradition despite the fact that such testimony violated the Confrontation Clause and Rule 802, SCRE.
- (29) Applicant was denied his right to effective assistance of counsel due to cumulative error or all previous allegations.
 - (a) Applicant was denied his right to effective assistance of counsel due to cumulative error of all previous allegations.
- (30) Applicant was denied his right to due process based Appellate Counsel's failure to notify him that his direct appeal was resolved.
 - (a) Applicant was denied his right to due process based on Appellate Counsel's failure to notify him that his direct appeal was resolved.

In his prayer for relief Applicant requests the following:

- A new trial or any other relief this court finds fair and just.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleading and the record in this case and finds there is no genuine issue of material fact. Therefore, summary dismissal is appropriate.

The State moved for summary dismissal pursuant to S.C. Code Ann. §17-27-70 of the South Carolina Code on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, the State requested the Court issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for doing so. *See* S.C. Code Ann. §17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C.

432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); *Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court*, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). This Court finds the State is entitled to summary judgment for the following reasons:

Statute of Limitations

This action shall be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (2014). Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. §17-27-45(A).

Our Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). The Supreme Court of South Carolina has held that the statute of limitations shall be equitably tolled where "circumstances preventing a petitioner from making a timely filing [are] both beyond the petitioner's control and unavoidable despite due diligence." *Mose*, 420 S.C. at 508, 803 S.E.2d at 722 (quoting *Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009)). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, §17-27070(c) authorizes this Court to "grant a motion by either party for summary disposition of [an]

application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Here, Applicant was convicted on October 9, 2014. Applicant appealed, his conviction was affirmed, and the remittitur was sent on July 28, 2017. Therefore, a PCR application should have been filed on or before July 30, 2018. This application was filed on August 11, 2020, well beyond the statutory filing period. Applicant’s assertion that he did not learn that his appeal had been denied because he was not provided the remittitur is insufficient to toll the statute of limitations. Applicant’s failure to make a timely filing was not unavoidable despite due diligence, nor was it out of his control. As such, Applicant’s request that the statute of limitations be tolled shall be denied, and Respondent’s motion for summary dismissal shall be granted.

[Conclusion and signature page follows]

Page 8 of 9 / *mgc*

IV. CONCLUSION

Pursuant to §17-27-70(b), the Court intends to dismiss this action with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Horry County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – 15th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 11th day of March, 2021.



Benjamin H. Culbertson
Chief Administrative Judge
Fifteenth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Marquis McDonald, SCDC
No. 361662,

Applicant,

-vs-

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

RETURN TO CONDITIONAL ORDER
OF DISMISSAL

2020-CP-26-4711

This matter is before the Court pursuant to Applicant Marquis McDonald's August 11, 2020 action for post-conviction relief. The State made its return and moved to summarily dismiss the action for being untimely. The Court issued a Conditional Order of Dismissal signed by The Honorable Benjamin H. Culbertson on March 11, 2021, recorded at the Horry County Clerk of Court's Office on March 15, 2021 and delivered to counsel for the Plaintiff via email on March 22, 2021. For the reasons discussed below, the Plaintiff responds to the Conditional Order of Dismissal and wishes to proceed with their request for post-conviction relief.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted for Murder by the Horry County Grand Jury during its April, 2013 term. (2013-GS-26-01478). Applicant was later indicated for an additional Armed Robbery charge by Horry County Grand Jury during its September, 2014 term. Applicant was represented by Gregory McCollum, Esquire, and the case was prosecuted by Senior Solicitor Bradley C. Richardson and Assistant Solicitor Travis W. Wyman, of the Fifteenth Circuit Solicitor's Office. The jury convicted Applicant on both charges on October 9, 2014, and he was sentenced to 45 years for murder, and 30 years for armed robbery, to be served concurrently.

Applicant filed a timely notice of appeal and the appeal was perfected by Nicholas Merminges, Esquire. On appeal, Applicant argued that the trial court erred in permitting AT&T's records custodian to testify to the location of cellular phones without qualifying him as an expert, that the trial court erred in allowing a SLED agent to testify to the location of cell phones without qualifying her as an expert, and the trial court erred in its ruling on admissibility of evidence of Applicant's prior felony convictions. The court rejected these arguments and affirmed Applicant's conviction. The remittitur was sent on July 28, 2017, however, Applicant never received notice of the remittitur nor did appellant counsel inform him as to the completeness of his direct appeal.

II. CURRENT APPLICATION

In his current application for post-conviction relief and the subject matter of the conditional order of dismissal, Applicant alleges he was denied his Sixth Amendment right to effective assistance of counsel when, among other claims, Appellate Counsel failed to timely inform him that the remittitur had been issued in his case. Applicant was not properly informed about the status of his direct appeal or that the remittitur had been issued. Applicant will show that he had no knowledge of the remittitur being sent and the appeal compete until hiring independent counsel.

III. LAW

"Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the fact of the application that there is no need for hearing to develop any facts and (2) the applicant is not entitled to relief." *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005); S.C. Code Ann § 17-27-70(b), (c) (2014). When considering the State's motion for summary dismissal of an application, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. *Leamon*, 363 S.C. at 434, 611 S.E.2d at 495.

The State moves to summarily dismiss Applicant's petition because the application was filed outside the one-year statute of limitations provided by the PCR Act. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later. S.C. Code Ann. §17-2745(a) (2014).

IV. ARGUMENT

Applicant asserts that his statute of limitations should be tolled until he received notice that his direct appeal was complete through the issuance of the remittitur. Although there is generally a one-year statute of limitation on Post-Conviction Relief actions, the PCR statute of limitations have not been applied when it denies an applicant his "right to one fair bite at the apple" *See Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002) (holding an applicant who was denied his right to a direct appeal due to ineffective assistance of counsel should not be denied his right to a PCR application because of the one-year statute of limitations). Notice is an elementary and fundamental requirement of due process. *Mullane vs. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). In addition, notice must be sufficient to enable recipient to determine what is being proposed and, ordinarily, service of the notice must reasonably structured to assure that the person to whom it is directed receives it. *Armstrong vs. Manzo*, 380 U.S. 550 (1965); *Robison v. Hanrahan*, 409 U.S. 38 (1974); *Greene vs. Lindsey*, 456 U.S. 444 (1982).

Here, Applicant did not receive notice of the remittitur issued by the appellate court and had no knowledge of the completion of his direct appeal. Once Applicant learned that his appeal had been denied, he timely filed this PCR application with this Court. Applicant contends that granting the State's motion for summary dismissal because he filed his petition outside the time required under the Act deprives him of a statutory right without being afforded proper due process of law.

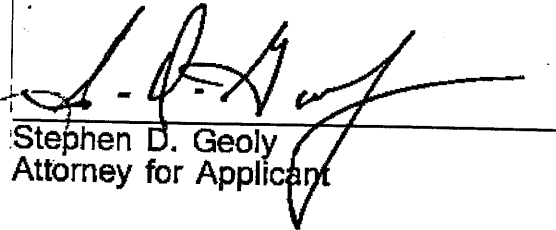
Alternatively, under rare circumstances the doctrine of equitable tolling can extend a statute of limitations. See *Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008). Notably, the S.C. Supreme Court has determined that statute of limitations shall be equitably tolled where "circumstances preventing a petitioner from making a timely filing [are] both beyond the petitioner's control and unavoidable despite due diligence," *Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009). Additionally, the Court has concluded that "the unique conditions of incarceration require a holding that the statute of limitations should be tolled if the circumstances warrant." *Mose v. State*, 420 S.C. 500, 803 S.E.2d 718 (S.C. 2017).

Here Applicant contends that because he was not notified of the issuance of the remittitur he did not have knowledge of the commencement of the statute of limitations. In fact, Applicant did not learn of the completion of his direct appeal until after the statute of limitations passed. These events were beyond Applicant's control, unavoidable and warrant a finding by this Court that the statute of limitations should be tolled under the doctrine of equitable tolling.

V. CONCLUSION

Applicant has provided specific reasons, factual and legal, why the application should not be dismissed in its entirety. The Applicant has shown why the Conditional Order to Dismiss should not become final within the twenty (20) days granted and filed these with the Horry County Clerk of Court and served opposing counsel.

Wherefore, for the reasons noted herein the Applicant respectfully requests that the conditional order be vacated and this matter set for a hearing on the issues raised in the petition.


Stephen D. Geoly
Attorney for Applicant

Greenwood, SC

March 1, 2021

Apr. 7

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2020-CP-26-4711

Marquis McDonald, SCDC No. 361662
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Administrative Judge

Attorney for : ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant's Motion to Dismiss is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$ N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Benjamin H. Culbertson

Benjamin H. Culbertson, Circuit Court Judge

2148

Judge Code

Sept. 8, 2021

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Stephen Drew Geoly

William Ray

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

Marquis McDonald, SCDC No 361662)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Evans Correctional Institution, Bennetsville, SC
2. Name and location of Court which imposed sentence Court of General Sessions, Horry County, Conway, SC
3. Name(s) of co-defendant(s) (if any) Stephon McLain

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
- (a) 2013-GS-26-1478 (murder)
 - (b) 2014-GS-26-3820 (armed robbery)
 - (c)
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) Ocotber 9, 2014
 - (b)
 - (c)
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii.
 - iii.
 - (b) the result in each such Court to which you appealed:
 - i. Convictions affirmed
 - ii.
 - iii.
 - (c) the date of each such result:
 - i. July 12, 2017
 - ii.
 - iii.
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. 2017-UP-285

- ii. —
- iii. —

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) —
- (b) —
- (c) —

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Appellate counsel deprived Applicant of effective assistance of counsel when he failed to notify Applicant he had lost his appeal and that the reremittur had been sent to the clerk of court's office.

(b) Trial counsel was ineffective when he failed to properly investigate the facts of the case and secure the services of a crime scene expert.

(c) Trial counsel was ineffective in failing to meet with the Applicant in order to prepare Applicant for trial

(d) Trial counsel was ineffective in failing to present evidence that the shell casing and bullet found at the scene of this crime matched the shell casing and a bullet found at the scene of another murder which the Applicant could not have committed.

(e) Trial counsel was ineffective when when he failed to object to the judge's charge to the jury may infer malice from the use of a deadly weapon.

(f) Trial counsel was ineffective when he failed to object to the jury charge that malice can be inferred from the killing of someone during the commission of a crime that is a felony

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Appellate counsel failed to notify that Applicant that the appeal had been lost. Applicant did not know he had lost the appeal until another lawyer he contacted informed him the appeal had been lost. At the time of learning that the appeal had been lost, the time for filing a Post Conviction Relief application had run. The Applicant filed the original application within one year of learning the appeal had been lost.

(b) Trial counsel should have retained the services of a crime scene expert to

establish the fact that the Applicant could not have been the shooter. A crime scene expert would have been able to show the jury the shots were fired from the front passenger side of the automobile and therefore the Applicant could not have been the shooter as the facts show he was the driver.

(c) Trial counsel met with the Applicant at the county detention center very seldom. As a result, the Applicant did not discuss with his trial counsel the theory of the case being used by the defense counsel nor was he adequately prepared to testify in the case.

(d) In the discovery reviewed by the Applicant, a report exists that shows the marking on the the shell casing and the bullet matched the shell casing and the bullet found at another murder in Horry County. At the time of the other murder, the Applicant was not at the scene. Applicant is further informed and believes that the co-defendant in this case was charged with the murder in that case.

(e) Trial counsel failed to object to the charge to the jury that malice can be inferred from the use of a deadly weaspon. In 2009, more than 5 years before the trial of this case, the South Carolina Supreme Court had held that a jury should not be instructed that malice should can be inferred from the use of a deadly weapon. A reasonably competent lawyer who tries criminal case should have been aware of the change in the law. Rec. on App. at 586, ll 13-21.

(f) The trial judge further charged the jury they may infer malice from the intentional killing of someone during the commission of the felony. This charge was also improper. A reasonable criminal defense lawyer should have known that the South Carolina Surpeme Court was questioning all such inferences. A resaonably competent criminal defense lawyer would have known to object to the this inference charge.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or

Revised 3/2003

application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:
 - i. _____
 - ii. _____
 - iii. _____
 - (b) the proceedings in which each ground was raised:
 - i. _____
 - ii. _____
 - iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) _____
 - (b) _____
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Gregory McCollum, 1012 38Th Avenue N., Ste. 202
Myrtle Beach, SC 29577 (843) 626-5480
 - ii. Nick Mermiges, 1720 Main St., Suite 202, Columbia, SC 29201 (803) 587-0472
 - iii. Stephen D. Geoly, 227 Hampton Ave, Greenwood, SC 29649 (864) 223-3352 and
C. Rauch Wise, 305 Main Street, Greenwood, SC 29646 864 229-5010
 - (b) the proceedings at which each such attorney represented you:

Revised 3/2003

- i. Arraignment, plea, trial and sentencing
 - ii. The appeal
 - iii. Preparation of this application and original Post Conviction Relief application.
19. State clearly the relief you seek in filing this application:
A new trial
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA

)
)

VERIFICATION

County of Marlboro

)

I, Marquis S. McDonald, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

SWORN to and subscribed before me this _____
day of _____, 2_____.

Notary Public (L.S.)

My Commission Expires: _____.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Margie Marmid

Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2_____.

Notary Public

My Commission Expires: _____

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
Marquis McDonald, № 361662,	)	
	)	
Applicant,	)	Rule 59e Motion to Alter or Amend Judgment
	)	
-vs-	)	Case № 2020-CP-26-4711
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED
 HORRY COUNTY
 2023 APR -3 1:11
 RENEE N. LAVIS
 CLERK OF COURT
 HORRY COUNTY, SC

Pursuant to Rule 59e of the South Carolina Rules of Civil Procedure, Marquis McDonald, the Applicant above named, hereby moves this Court to alter or amend the judgment entered in this matter on March 17, 2023 and received by counsel on March 21, 2023 in the following particulars:

1. The Court erroneously concluded on page 2 of the order that "A dispute over the quality of the marijuana arose and Applicant and McLain told Liddell they were going to take the marijuana without paying." A reading of the transcript on page 695, l 19-21, the testimony by Mr. McDonald stated, "So he [McLain] pulled a gun out just to show him like I [McLain] can just take your weed and you not do nothing about it." McDonald never stated he and Mr. McLain were going to take the marijuana without paying for it. On Page 693, ll 15-21, the argument between Mr. McLain and Mr. Liddell was about the price of the marijuana and not the quality of the marijuana.

2. The Court erroneously concluded that "one of the men presented a .40 caliber handgun and pointed it at Liddell." Order at 2. The testimony on the page referenced by the Court shows that only McLain pulled out a gun and pointed it at Mr. Liddell. The testimony shows, "When he

[Mr. McLain] pulled out the gun and said, you know I can take your weed because, you know, you ain't nothing." App. at 696, ll 8-10.

3. The Court erred in finding that while the expert testimony would have been helpful, "[I]t was not unreasonable for Counsel to fail to call [an] expert to present duplicative evidence aligning with what he reasonable thought the evidence clearly reflected." Order at 14. The Court erred in failing to recognize that what defense counsel thought the evidence showed is not evidence before the jury. The purpose of the expert, as testified at the Post Conviction Relief hearing, is to put facts before the jury to support the theory of defense counsel. Trial counsel at the trial attempted to elicit his theory from the state experts but failed. PCR hearing at 38, l 12 to 40, l 10. Defense counsel testified, "But, I mean, the crime scene seemed so obvious that hindsight I wish I had an expert." PCR hearing at 39, ll 22-24. After watching at least part of the testimony of Dr. Brent Turvey, trial counsel admitted the testimony would have been helpful. He stated, [C]learly, an expert to contradict or clarify that issue where the state did not admit it, that would have been very helpful." PCR Hearing at 46, ll 12-14.

In *Ard v. Catoe*, 372 S.C. 318, 333, 642 S.E.2d 590, 597 (2007) the court said, "[W]e agree with the PCR court that it was unreasonable for counsel to choose Avery as their only expert on the critical gunshot residue analysis." Mr. Avery was found not to be completely impartial. If the court found a failure to hire an independent expert to be ineffective, the failure to retain the services of an expert that this court and trial counsel have acknowledged would have been helpful is ineffective assistance of counsel.

4. The Court erred in a finding the failure to meet and discuss the case a sufficient number of times was not prejudicial to Mr. McDonald. Order at 15. This finding is not

supported by the record. As discussed in this order, Mr. McDonald and his trial counsel did not discuss the need for a crime scene expert. They did not discuss the use of the other shooting to prove the pistol used in this case belonged to Mr. McLain. Trial counsel had only a very vague recall of what he discussed with Mr. McDonald. PCR hearing at 52, ll 11-22. The decision not to use an expert should only be made after consulting with the client. The decision not to use proof that the pistol belonged to Mr. McLain should also only be made after discussing the matter with the client. The record in this case does not show it was done.

5. The Court erred in finding the failure to introduce evidence of the firearm used by Mr. McLain had been used in another murder. The investigation showed Mr. McDonald could not have been the shooter in that case and Mr. McLain had been charged with murder in that case. In holding that the failure to present this evidence was not ineffective assistance of counsel, this court said, "Conversely, there was evidence in the record that Applicant was a part of this scheme or plan and evidence that the co-defendant was implicated in another murder with the same gun could have been used as evidence of Applicant's guilt in this case." Order at 16. This finding is incorrect for two reasons. First, there is no evidence that this crime was planned other than the fact that both co-defendants were present at the time of the shooting. Secondly, the theory used by the court in the order was not established at the Post Conviction Relief hearing. Trial counsel for Mr. McDonald testified the information as to the co-defendant being charged in a murder involving the same weapon would have been beneficial to his defense. PCR hearing, 43, l 18 to 44, l 1. No testimony exists in the record to support the conclusion by the court as to the evidence of the other shooting being prejudicial to Mr. McDonald.

5. As to the issue of prejudice from failing to object to the implied malice charge, this

court said, "Whether failure to object constitutes deficient performance hinges on whether a valid trial strategy was used." Order at 16. The decision by trial counsel in this case not to object to the inference charge was not part of any trial strategy as trial counsel was not aware the *Belcher* decision even existed at the time of the trial. In fact, trial counsel was not even aware of the decision until he testified at the Post Conviction relief hearing. PCR hearing at 54, 125 to 55, 120. No trial strategy was involved in not objecting. Defense counsel had failed to keep himself abreast of the current law. This is ineffective assistance of counsel. Had trial counsel objected to the charge of implied malice, this conviction would have been reversed. Thus, Mr. McDonald was in fact prejudiced.

For the foregoing reasons, this Court should alter and amend the order in this matter to correct the factual and legal errors stated above and issue an order granting Marquis McDonald a new trial.

March 30, 2023

/s/ C. Rauch Wise

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IN THE COURT OF COMMON PLEAS

Plaintiff,

vs.

Defendants.

ORDER
Case No.: 2020-CP-26-4711

The Applicant, Marquis McDonald, requests the Court to reconsider the Order dated March 17, 2023, and filed in the Horry County Clerk of Court's office.

Having duly considered the motion of the Plaintiff, this Court has determined that the original March 17, 2023, ruling is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion is therefore **DENIED**.

AND IT IS SO ORDERED.

Dated: 7-7-2023

H. Steven DeBerry, IV
Judge, Twelfth Judicial Circuit

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Marquis McDonald, #361662,

Applicant,

v.

State of South Carolina

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
)

) Case No. 2020-CP-26-4711
)

) **ORDER OF DISMISSAL**
)
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HORRY COUNTY, SC

This matter comes before this Court by way of Applicant's post-conviction relief application filed August 11, 2020. Respondent made its return and motion to dismiss on March 3, 2021. The motion was denied on September 8, 2021. An evidentiary hearing was held on November 29, 2022, at the Horry County Courthouse. C. Rauch Wise, Seth Rose, and Stephen Geoly, Esquires, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Dr. Brent Turvey and trial counsel, Greg McCollum, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his burden of proof establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice.

Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During its April 2013 term, Applicant was indicted by the Horry County Grand Jury for murder (2013-GS-26-01478). During its September 2014 term, Applicant was indicted by the Horry County Grand Jury for armed robbery (2014-GS-26-03820). Applicant proceeded to trial before the

Honorable Markley Dennis on October 6, 2014. Applicant was represented by Gregory McCollum, Esquire, and the case was prosecuted by Senior Solicitor Bradley C. Richardson and Assistant Solicitor Travis W. Hyman, of the Fifteenth Circuit Solicitor's Office. The jury convicted Applicant on both charges on October 9, 2014, and he was sentenced to forty-five years' imprisonment for murder, and thirty years' imprisonment for armed robbery, sentences running concurrently.

Applicant filed a timely notice of appeal, and the appeal was perfected by Nicholas Mermiges, Esquire. On appeal, Applicant argued that the trial court erred in permitting AT&T's records custodian to testify to the location of cellular phones without qualifying him as an expert, that the trial court erred in allowing a SLED agent to testify to the location of cell phones without qualifying her as an expert, and the trial court erred in its ruling on admissibility of evidence of Applicant's prior felony convictions. The court rejected these arguments and affirmed Applicant's conviction. The remittitur was sent on July 28, 2017.

Summary of Relevant Facts

On the night of February 26, 2013, Applicant and another individual, Stephon McLain, drove to the campus of Coastal Carolina University to purchase marijuana from the victim, Anthony Liddell. (App. 689-90). When they arrived, Liddell met them in the parking lot of a dormitory and got in the back seat of the vehicle to complete the sale. (App. 692). A dispute over the quality of the marijuana arose and Applicant and McLain told Liddell they were going to take the marijuana without paying. (App. 693-95). When Liddell protested, one of the men presented a .40 caliber handgun and pointed it at Liddell. (App. 696). A fight broke out and Liddell was shot three times, fatally wounding him. (App. 188-90, 696). Applicant and McLain then quickly

left the scene with the marijuana in the car. (App. 195, 220). Applicant ultimately turned himself in to police three days later.

Current Action Before This Court

In his current application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that;

- (1) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Appellate Counsel failed to timely inform him that the remittitur had been sent in his case.
 - (a) Applicant was not properly informed about the status of his direct appeal or that the remittitur had been sent.
- (2) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to call a crime scene reconstruction expert to testify at his trial.
 - (a) Trial Counsel failed to call a crime scene reconstruction expert to testify despite the fact that he presented a case centered around the fact that the physical evidence was inconsistent with the State's theory of how the deceased was shot.
- (3) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly investigate his case.
 - (a) Trial Counsel failed to adequately investigate his own theory of the case or to consider other possible evidence or theories of defense.
- (4) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly meet with and prepare Applicant for trial.
 - (a) Trial Counsel failed to adequately meet and prepare Applicant for the trial and the defense.
- (5) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to historical cell phone data which was seized in violation of the Fourth Amendment.
 - (a) Trial Counsel failed to properly object to historical cell phone data which was seized in violation of the Fourth Amendment.
- (6) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to cell company data which was seized in violation of his right to due process and S.C. Code §17-13-14.
 - (a) Trial Counsel failed to properly object to cell company data which was seized in violation of his right to due process and S.C. Code §17-13-14.
- (7) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to information obtained through and as a result of the search his cellphone. 336

- (a) Trial Counsel failed to object to information obtained through a search of Applicant's cellphone. Law enforcement searched the phone without a warrant and later got a warrant for the second search. Applicant asserts that all evidence obtained from the cell phone or as a result of the cell phone should have been suppressed.
- (8) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the cell tower map that was confusing and likely to mislead the jurors.
 - (a) Trial Counsel failed to object to the cell tower map that was confusing and likely to mislead the jurors.
- (9) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the cell phone location data admitted through the AT&T records custodian.
 - (a) Trial Counsel failed to properly object to the cell phone location data admitted through the AT&T records custodian. The records custodian was allowed to testify concerning location information without first being qualified as an expert. Additionally, the call location information in the AT&T records was likely to confuse the jury and/or unreliable.
- (10) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the cell phone location opinions given by Megan Lukas.
 - (a) Trial Counsel failed to properly object to the cell phone location opinions given by Megan Lukas.
- (11) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to opinion testimony from Agent Hezel about trajectory of bullets. (264).
 - (a) Trial Counsel failed to properly object to various opinions from Agent Hezel concerning the trajectory of bullets fired. However, Agent Hezel admits on App. 267 that she is not qualified to do crime scene reconstruction.
- (12) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to opinion testimony from Agent Hezel about whether there was blood spatter present. (240).
 - (a) Trial Counsel failed to properly object to opinion testimony from Agent Hezel about whether there was blood spatter present at App. 240 despite the fact that she admits on App. 239 she would not be able to do any blood spatter testing.
- (13) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Appellate Counsel failed to raise the issue concerning the objection to the accomplice liability jury instruction. 462-463.
 - (a) Appellate Counsel failed to raise the issue concerning the objection to accomplice liability jury instruction that was present at App. 462-463.

- (14) Alternatively to the immediately preceding allegation, Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the accomplice liability jury instruction. 588-590.
- (a) Alternatively to the immediately preceding allegation, Trial Counsel failed to properly object to the accomplice liability jury instruction located at App. 588-590.
- (15) Alternatively to the allegations raised in the prior two allegations, Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly request a jury instruction that the purchase of marijuana was not a felony or an illegal act whose nature and probable consequence was death.
- (a) Alternatively to the allegations raised in the prior two allegations, Trial Counsel failed to properly request a jury instruction that the purchase of marijuana was not a felony or an illegal act whose nature and probable consequence was death.
- (16) Alternatively to the allegations raised in the prior three allegations, Applicant was denied his Sixth Amendment right to effective assistance of counsel when Appellate Counsel failed to brief the issue concerning a jury instruction on marijuana raised by Trial Counsel.
- (a) Alternatively to the allegations raised in the prior three allegations, Appellate Counsel failed to brief the issue concerning a jury instruction on marijuana raised by Trial Counsel at App. 462-463.
- (17) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to request a jury instruction on involuntary manslaughter.
- (a) Trial Counsel failed to request a jury instruction on involuntary manslaughter despite the fact that Applicant's statement involved a fight over the gun.
- (18) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the jury charge stating that inferred malice may also arise from the use of a deadly weapon when evidence had been presented that would reduce, mitigate, excuse or justify a homicide caused by the use of a deadly weapon. 586.
- (a) Trial Counsel failed to properly object to a jury instruction on inferred malice from the use of a deadly weapon even though evidence was presented that mitigate, reduce, excuse or justify the homicide.
- (19) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to and/or move to strike statements made by Roland Crooms which were admitted in violation of the Confrontation Clause and Rule 802, SCRE. 418-19.
- (a) At App 418-419, Statements made by Roland Crooms which were admitted in violation of the Confrontation Clause and Rule 802, SCRE.

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- (20) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Dr. Proctor giving opinion testimony concerning stippling on clothing and eliciting testimony concerning stippling on clothing. (446-447).
- (a) Dr. Proctor was allowed to give opinion testimony concerning stippling on clothing and Trial Counsel eliciting testimony concerning stippling on clothing from Dr. Proctor. This was outside the scope of his expertise.
- (21) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Dr. Proctor giving opinion testimony concerning whether wounds were defensive or not. (435, 436, 450).
- (a) At App. 435-436 and 450, Dr. Proctor was allowed to characterized wounds as being defensive in nature or not. Applicant asserts that he lacked personal knowledge to characterize the wounds in this way. Additionally, there is no reliable way to determine whether such wounds were offensive or defensive. *See* Rules 701, 702, 703, and 704, SCRE. Additionally, this characterization should have been suppressed pursuant to Rule 403, SCRE.
- (22) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to have the swabs tested for DNA.
- (a) Trial Counsel failed to have the swabs tested for DNA.
- (23) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to have the swabs tested for serology.
- (a) Trial Counsel failed to have the swabs tested for serology.
- (24) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to investigate what type of markings a bullet hole would make on the seat of the Acura.
- (a) type of markings a bullet hole would make on the seat of the Acura.
- (25) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the passion and prejudice arguments which were raised in the State's opening.
- (a) The State's opening statement is replete with arguments that go to passion and prejudice arguments. Trial Counsel did not object.
- (26) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel predicted that the State's theory of the case would change during the course of the trial. (36)
- (a) App. 36, Trial Counsel predicted that the State's theory of the case would change during the course of the trial. This prediction did not pan due to the failure of Trial Counsel to properly understand the State's evidence. Trial Counsel would have lost credibility in the jury's eyes when this prediction did not work.
- (27) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to statements of how the shooting impacted witness Amanda McTaggart. (84).

- (a) At App. 84, Trial Counsel failed to object to statements of how the shooting impacted witness Amanda McTaggart.
- (28) Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to testimony that Stephon McClain consented to extradition despite the fact that such testimony violated the Confrontation Clause and 802, SCRE. (316, 420).
- (a) At App. 316 and 420, Trial Counsel failed to properly object to testimony that Stephon McClain consented to extradition despite the fact that such testimony violated the Confrontation Clause and Rule 802, SCRE.
- (29) Applicant was denied his right to effective assistance of counsel due to cumulative error or all previous allegations.
- (a) Applicant was denied his right to effective assistance of counsel due to cumulative error of all previous allegations.
- (30) Applicant was denied his right to due process based on Appellate Counsel's failure to notify him that his direct appeal was resolved.
- (a) Applicant was denied his right to due process based on Appellate Counsel's failure to notify him that his direct appeal was resolved.

At the PCR hearing, Applicant proceeded forward on the following allegations, as raised in his amended application:¹

- (1) Ineffective Assistance of Counsel
 - (a) failure to properly investigate the facts of the case and secure the services of a crime scene expert.
 - (b) failure to meet with the Applicant in order to prepare Applicant for trial.
 - (c) failure to present evidence that the shell casing and bullet found at the scene of the crime matched the shell casing and a bullet found at the scene of another murder which the Applicant could not have committed.
 - (d) failure to object to the judge's charge to the jury may infer malice from the use of a deadly weapon.
 - (e) failure to object to the jury charge that malice can be inferred from the killing of someone during the commission of a crime that is a felony.

All other allegations raised in his initial application and amendments are deemed waived

¹ Applicant also raised an ineffective assistance of appellate counsel claim for failure to timely notify Applicant about the issuance of the remittitur. This issue was dropped after the State agreed not to renew their motion to dismiss for untimeliness.

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and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Turvey Testimony

Dr. Turvey was deemed an expert witness in crime scene investigation and reconstruction. He stated that he did not think there were a lot of photographs in this case. He stated that, based upon his review of the case, it is possible that Applicant was the shooter, but highly unlikely. He stated that the shooting was short range. He stated that the shot was most likely fired from the passenger seat. He stated that a bullet was lodged in the passenger door and saw exterior damage on the outside of the car. He stated that a cell phone was found on the ground near the car on the driver's side. He stated that dropping the phone is consistent with someone trying to escape quickly. He stated that the victim had at least three bullet holes. He stated that the shooting took place inside the vehicle. He stated that there was only one shell casing found outside the car.

On cross-examination, he testified that he did not dispute the fact that Applicant was in the car. He stated that the actual shooter had no bearing on whether a plan between multiple people existed. He stated that he was unaware of a third party being implicated in the crime that was not brought up at trial. He stated that sometimes the number of casings and number of bullet holes do not match. He stated that he never spoke to Applicant directly. He stated that it is not impossible for the shot to be fired from the driver's side, but it was not likely. He stated that he knew Applicant dropped his phone.

Counsel Testimony

Counsel testified he was appointed to counsel soon after the incident took place. He stated that his defense was that based upon the placement of the parties in the car, Applicant was

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not the shooter. He stated that he thought this argument was obvious and that he did not think the State would argue Applicant was the shooter. He stated he tried to question the witnesses at trial about where the bullet was fired from, but they were evasive. He stated he wished he used an expert in retrospect but thought that the trajectory was obvious. He stated that he had a vague recollection about the same bullets being used in a different murder. He stated that Applicant was excluded from being a suspect in the other murder. He stated that the co-defendant was charged in another murder. He stated he did not think he needed an expert. He stated he typically does not hire experts on appointed cases and that nothing jumped out to him that warranted retaining an expert. He stated that he typically does not discuss the theory of the case with the State to avoid highlighting their potential errors before trial. He stated that he did not know that it is no longer good law for the court to instruct the jury that they can infer malice from use of a deadly weapon. He stated he did not object to this charge but would have if he knew it was improper. He stated that he thought the jury was charged on hand of one hand of all.

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Applicant Testimony

Applicant testified that he met with his attorney on numerous occasions and reviewed all the evidence. He stated that he saw the ballistics report regarding the other murder. He stated that he thought the expert witness would have been helpful at trial. He stated that the State argued that he was the shooter. He stated he initially told the police he was not there. He stated that he testified at trial that Applicant was the shooter. He stated that he did not think that the evidence showed that he was the shooter. He stated that he recalled hand of one hand of all being charged at trial.

NSD

Findings of Fact and Conclusions of Law

The Court had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are Clerk of Court records, his SCDC records, the trial transcript, the direct appeal records, and Applicant's present PCR action records. Respondent reserves the right to alter or amend this return upon receipt of any relevant materials. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely decide upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law required by the South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v.*

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Washington, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814, ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); see *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "'strong presumption' of reasonableness that the defendant must overcome"); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to Properly Investigate Facts and Secure Crime Scene Expert

Applicant claims that Counsel was ineffective for failure to investigate and call a crime scene expert. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

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"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 442 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. See e.g. *Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State*, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. See e.g. *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531

(1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

Though this Court finds that the expert would have been helpful, it was not unreasonable for Counsel to fail to call an expert to present duplicative evidence aligning with what he reasonably thought the evidence clearly reflected. Counsel is not deficient. Additionally, this Court declines to find that calling an expert would have changed the outcome at trial. This Court finds that the eyewitness testimony and ability of the jury to infer their findings from all evidence presented at trial. This Court also finds that prejudice is not established because the evidence and testimony legitimize the jury charges and the jury's ability to draw inferences from the evidence presented, including the charge of hand of one hand of all. Accordingly, Applicant has not met his burden of proof and relief is denied.

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HARRIS COUNTY, SC

Failure to Meet to Prepare for Trial

Applicant alleges that Counsel was ineffective for failure to meet and communicate with Applicant enough. "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." *Id. See Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Applicant has failed to establish how additional communication would have resulted in a different outcome at trial. Applicant has failed to meet his burden of proof and relief is denied accordingly.

FILED
HOREY COUNTY
2023 MAR 17 P 3:33
REFEE KELVIS
CLERK OF COURT
HOREY COUNTY, SC

Ballistics Report

Applicant claims Counsel was ineffective for failing to present evidence that the shell casing and bullet found at the scene of the crime matched the shell casing and bullet found at the scene of another murder which Applicant did not commit. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. *Strickland*, 466 U.S. at 680. If there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. *Id.* "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Regarding failure to alert the Applicant of a defense specifically, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. *See McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State*, 306 S.C. 556, 413

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S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

This Court finds that evidence of the gun being used in an unrelated murder, connected to the co-defendant and not Applicant, could have had a negative or positive effect on Applicant's guilt in the minds of the jurors. It could be argued that because the co-defendant was implicated in connection to that gun in an unrelated murder that Applicant was not implicated in, therefore, it must be the co-defendant who committed this crime acting alone and without the knowledge of this defendant. Conversely, there was evidence in the record that Applicant was a part of this scheme or plan and evidence that the co-defendant was implicated in another murder with the same gun could have been used as evidence of Applicant's guilt in this case. Given these findings, this Court cannot determine that the revelation of this evidence to the jury would have changed the outcome of the verdict. Counsel is not deficient for failure to argue a potentially harmful defense and no prejudice is established because this is not necessarily exculpatory evidence. Accordingly, relief is denied on this ground.

Infer Malice Jury Instruction

Applicant claims Counsel was ineffective for failure to object to the jury instructions stating that the jury could infer malice from use of a deadly weapon and by killing someone during the commission of a violent crime. Whether failure to object constitutes deficient performance generally hinges on whether a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the

failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Counsel has never been required "to be clairvoyant or anticipate changes in the law which were not existent at the time of trial." *Gilmore v. State*, 314 S.C. 453, 456, 445 S.E.2d 454, 457 (1994), overruled on other grounds by *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). See generally e.g. *Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (citations omitted); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992); *Arnett v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992); *Kirkpatrick v. State*, 306 S.C. 359, 412 S.E.2d 389 (1991).

In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in a way that violates the Constitution. *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 740 (2009). The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

Here, Counsel was not deficient because *State v. Burdette*² was not decided until after this trial was held. Accordingly, the controlling law was *State v. Belcher*,³ which permitted an implied malice instruction so long as there was no evidence of mitigating circumstances presented. This Court finds that the jury charge did not violate *Belcher* at the time this case was heard or on direct appeal, as there was no evidence that could reduce, excuse, justify, or mitigate

² 427 S.C. 490, 502-03, 832 S.E.2d 575, 582-83 (2019).

³ 385 S.C. 597, 685 S.E.2d 892 (2009).

the homicide. Although, it would violate *Burdette* today, the Supreme Court stated clearly that the new precedent would not apply to PCR actions like this. Counsel is not deficient for failure to object to correct law and because there is no deficiency there can be no prejudice. Accordingly, relief is denied on this ground.

Conclusion

Based on the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgement entry's written notice to secure appropriate appellate review. See Rule 203, SCAR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of denial of PCR. Rule 71.1 (g). SCRCR provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to custody of Respondent.

AND IT IS SO ORDERED this 14th day of MARCH, 2023.


H. STEVEN DEBERRY, IV.
Presiding Judge
Fifteenth Judicial Circuit

Fluence, South Carolina.

FILED
HOLLY COUNTY
MAR 17 P 3:33
REBECCAH ELVIS
CLERK OF COURT
HOLLY COUNTY, SC

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Common Pleas Court
Honorable H. Steven DeBerry, IV

Trial Court Case No. 2020-CP-26-4711

FILED
HORRY COUNTY
2023 MAY 12 P 1:47
RENEE M. ELVIS
CLERK OF COURT
HORRY COUNTY, S.C.

The State , Respondent,

v.

Marquis McDonald , Appellant

NOTICE OF INTENT TO APPEAL

Marquis McDonald appeals the Order of Dismissal of the Honorable H. Steven DeBerry, IV dated March 14, 2023 and filed March 17, 2023 and the Order dated April 4, 2023 and filed April 10, 2023.

May 8th, 2023


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