IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court of General Sessions

Appellate Case No. 2023-000408

The Honorable William H. Seals, Circuit Court Judge

The State of South Carolina……Respondent,

v.

Isaac Kareem Hemingway……Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities 2

Standard of Review 5

Statement of the Case 6

Relevant Facts 7

Arguments 12

I. The trial court erred by denying trial counsel's motion to suppress the search warrant issued to obtain access to Hemingway's cell phone records in violation of South Carolina Code 17-13-140, *State v. Smith*, *State v. Baccus*, and the Fourth Amendment to the United States Constitution. 12

II. The trial court erred in denying trial counsel's motion to suppress Hemingway's statement to law enforcement on December 1, 2020 because it was in violation of South Carolina Code §17-13-50 and the arrest warrant used to arrest Hemingway was not supported by probable cause. 15

III. The trial court erred in denying trial counsel's motion arguing against the admissibility of the DNA evidence pursuant to *State v. Phillips*. 19

IV. The trial court erred in denying trial counsel's pretrial motion to prevent the State from mentioning Hemingway's family court bench warrant as it was not relevant, unfairly prejudicial, and inappropriate character evidence in violation of South Carolina Rules of Evidence 401, 403, and 404(b) 23

V. The trial court erred in overruling trial counsel's objection to improper burden shifting during the State's closing argument. 26

Conclusion 30

TABLE OF AUTHORITIES

Cases:

Burke v. United States, 1 Cir., 328 F.2d 399 16

Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) 28

Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) 27, 29

Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 17

Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978) 13

Greer v. Miller, 483 U.S. 756, 762, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) 28

McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) 27

Nueslein v. District of Columbia, 73 App.D.C. 85, 115 F.2d 690 17

People v. Freeland, 218 Cal.App.2d 199, 32 Cal.Rptr. 132 16

Prescoe v. State, 231 Md. 486, 191 A.2d 226 16

Rea v. United States, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233 17

State v. Baccus, 367 S.C. 41, 54–55, 625 S.E.2d 216, 223 (2006) 8, 12-15

State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) 27

State v. Boswell, 391 S.C. 592, 606, 707 S.E.2d 265, 272 (2011) 16

State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) 27

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) 19, 20

State v. Cross, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019) 5

State v. Funchess, 255 S.C. 385, 391, 179 S.E.2d 25, 28 (1971) 16

State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958) 5

State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) 27

State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) 13

State v. Moore, 275 N.C. 141, 166 S.E.2d 53 16

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) 27

State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020) 9, 10, 19-22

State v. Prather, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020) 5

State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990) 8, 12-14

State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997) 14

United States v. Close, 4 Cir., 349 F.2d 841 16

United States v. Espinosa, No. 16-4295, 2017 WL 544589 (4th Cir. Feb. 10, 2017) 28

United States v. Higgs, 353 F.3d 281, 330 (4th Cir. 2003) 28

Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) 27

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) 17

U.S. Constitution:

U.S. Const. amend. IV 12, 13, 15

S.C. Constitution:

S.C. Const. art. I, § 10 12

S.C. Statutes:

S.C. Code Ann. § 16-03-0010 18

S.C. Code Ann. § 16-23-0490 18

S.C. Code Ann. § 17-13-50 15

S.C. Code Ann. § 17-13-140 ..... 8, 12, 13, 15

S.C. Rules of Evidence:

S.C. Rule of Evidence 401 23

S.C. Rule of Evidence 403 .....10, 19-21, 23-25

S.C. Rule of Evidence 404(b) 10, 23-26

S.C. Rule of Evidence 702 .....10, 19, 21

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only." *State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019). "[T]he conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had." *State v. Heath*, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958). An abuse of that discretion occurs where the trial court's conclusions are based on unsupported factual conclusions or controlled by an error of law. *State v. Prather*, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020).

STATEMENT OF THE CASE

Isaac Hemingway was indicted by the Marion County grand jury for two counts of murder and one count of possession of a weapon during the commission of a violent crime. *See* indictments. He was tried before the Honorable William H. Seals, and a jury between February 21- February 23 and February 27-March 2, 2023. He was convicted and sentenced to two life sentences on the murder charges and five years' imprisonment on the weapons charge, to be served concurrently. *See* Sentencing sheets. Hemingway was represented by Thurmond Brooker. The State was represented by Todd Tucker and Ryan White.

This appeal timely follows.

Relevant Facts

Isaac Hemingway was arrested and charged with the murders of Maisha Burch, the mother of his five children, and Andrew Legette. The State's theory of the case was that Isaac Hemingway and Maisha Burch were engaged in a contentious family court battle over child support and this was motivation for Isaac Hemingway to kill Maisha Burch and Andrew Legette. Transcript p. 141. On Saturday, January 12, 2020, Hemingway picked his children up from Maisha Burch and took them to his home in Horry County for the night. Transcript p. 143. Later that night, Hemingway and his girlfriend went over to a friend's home to play cards. Maisha Burch called Hemingway multiple times that night to check on the kids. Hemingway and his girlfriend returned home and went to sleep. On Sunday evening, Hemingway took the children back to Maisha Burch's home and while he was driving, he called Maisha Burch to let her know that he was on the way. Transcript p. 149. No one answered and it seemed no one was home so he left the children with Maisha Burch's adult daughter and he returned to Horry County where he lived. After not being able to reach her mother, eventually Ms. Burch's home was entered and Ms. Burch and Mr. Legette were found deceased in the home due to gunshot wounds.

The investigation began in January 2020 and Hemingway was not arrested until he was picked up on a family court bench warrant for child support in December of 2020, almost one year later. After being arrested on the family court bench warrant, he was subjected to a custodial interview regarding the murders of Burch and Legette. Immediately after the interview was over, he was served with the warrants in this case for the murders of Maisha Burch and Andrew Legette. The State's evidence against Hemingway was the alleged motive of child support, cell phone records showing he and Maisha Burch called each other multiple times that night, cell location

data, DNA on the backdoor of Maisha Burch's home, in her hallway, and DNA found under Maisha Burch's fingernails. No weapon was ever located. Hemingway's DNA was tested but the investigators never tested any of Hemingway's children's DNA, who all lived in the home with Maisha Burch and share DNA with Hemingway.

Prior to the start of trial, trial counsel for Hemingway made several motions. One motion was to suppress the search warrant used to obtain Hemingway's phone records pursuant to South Carolina Code 17-13-140, as well as South Carolina case law *State v. Baccus* and *State v. Smith*. Transcript p. 92-109. Trial counsel further argued the search warrant should be suppressed because it was not executed within 10 days pursuant to the statute 17-13-140. Transcript p. 109. Further, trial counsel argued that under federal law, magistrates are not able to issue subpoenas outside of its boundaries. Transcript p. 112. The trial court denied this motion to suppress and allowed the State to enter the phone records in evidence during the trial. The court ruled the affidavit submitted by law enforcement to obtain the search warrant contained "enough [] to search his phone to see if what he's saying is it true or not." Transcript p. 108. The court further denied the motion ruling that Justice Few addressed the magistrate issue so "I'm not even going to go there," and the 10-day window is a ministerial requirement to prevent someone from sitting on a search warrant for extended periods of time. Transcript p. 114. Trial counsel preserved his objection for appeal during the trial as well, citing his previous arguments as the basis for his objection. Tr. 278-279.

Also prior to trial, trial counsel moved to suppress the statement given by Hemingway after his arrest on a family court bench warrant. Trial counsel argued the arrest warrant was not supported by probable cause because the State could not produce the bench warrant showing the

legal authority that law enforcement had for that arrest. Further, the arrest warrant was not supported by probable cause because the arrest warrant for the murders of Burch and Legette lacked the sufficient factual information to rise to the level of probable cause. Therefore, the arrest of Hemingway was unlawful and everything which resulted from the arrest was unlawful as fruit of the poisonous tree, including Hemingway's statement made to law enforcement. Transcript p. 116-122. The Court denied the motion, ruling that Hemingway was properly Mirandized and freely and voluntarily provided his statement. Transcript p. 123.

Prior to trial, trial counsel objected to the admission of the DNA evidence pursuant to *State v. Phillips*, 430 S.C. 319, 844 S.E.2d 651 (2020). Transcript p. 444. The evidence the State was allowed to admit were partial profiles of touch DNA from the back door of Burch's home which was a mixture of at least three individuals, a swab from the wall of the hallway of the home, which was a mixture of at least two individuals, and fingernail scrapings under Burch's fingernails. Transcript p. 411-412, 419, 428. Trial counsel argued the admission of this DNA evidence would be in violation of *State v. Phillips* because the State sought to introduce DNA from the back door of the home, the hallway, and under the fingernails of Burch. Transcript p. 444-446. The samples collected were not of blood or semen which is stronger evidence of DNA but rather of skin cells which can only produce a partial profile and can only be used to discuss the DNA in terms of percentages of possibilities that it would include or exclude a particular suspect. Transcript p. 445. The fact which further exacerbated the issue of admitting this DNA evidence, as argued by trial counsel, is that Hemingway and Burch's five children also lived in the home with Burch, shared DNA with their father, and their DNA samples were not taken and tested as well. Transcript p.

436-437, 445-446. There also would have been many reasons why the children's DNA would have been on the back door of their home and under their mother's fingernails.

The State's witness testified when she completed these samples that she had no idea there were children living in the home. Transcript p. 436-437. She also testified that children share fifty percent of their DNA from their mother and fifty percent from their father. Trial counsel argued that under *State v. Phillips*, the admission of this evidence was unlawful. The court denied the defense's objection to the admission of this evidence reasoning that under the Rule 702 analysis the witness satisfied those requirements. The Court went on to rule that *State v. Phillips* did not preclude the introduction of the evidence in this case because in *State v. Phillips* the state failed to present the testimony of an expert witness at the hearing, presented an incomplete factual and scientific basis for the admission of the expert's opinion, and did not explain to the jury the complicated DNA concepts involved. The Court ruled those things did not exist in this case and therefore the testimony was admissible and the testimony was not more prejudicial than probative under Rule 403. Transcript p. 447-449.

Prior to trial, trial counsel moved that evidence of the Petitioner's family court bench warrant not be admitted in evidence. The trial court denied that motion reasoning that the evidence was relevant to prove motive, its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under Rule 403, and it fit within the motive exception to Rule 404(b). Transcript p. 449-450. Trial counsel argued that this bench warrant was served eleven months after the murder of Burch and Legette and because of that, could not be used as evidence to commit murder when the warrant was not served until eleven months after the murders. Transcript p. 452. Furthermore, the bench warrant had been extinguished by

the time he was arrested and the State could not prove the bench warrant was even active at the time he was arrested. Transcript p. 452.

Finally, trial counsel objected to improper burden shifting during closing arguments. During the State's closing argument, the Solicitor argued:

> He also touched on, ladies and gentlemen, the cell phone evidence and the time line. He's right I don't know why he keeps bringing it up. I don't dispute everything – we don't dispute everything that happened up to midnight. What they can't account for – and he glossed right over it. It's what happened from midnight to 7a.m.
>
> Transcript p. 869.

Trial counsel argued this statement of what the defense could not account for was improper burden shifting because the defendant in a criminal trial is not required to account for anything or prove anything. *Id*. The trial court overruled the objection stating the Solicitor was "just replying to what you brought up" referring to trial counsel. *Id*. The trial court then stated "I'm going to charge them."

ARGUMENTS

I. The trial court erred by denying trial counsel's motion to suppress the search warrant issued to obtain access to Hemingway's cell phone records in violation of South Carolina Code 17-13-140, *State v. Smith*, *State v. Baccus*, and the Fourth Amendment to the United States Constitution.

South Carolina Code §17-13-140 states:

> Any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize (1) stolen or embezzled property; (2) property, the possession of which is unlawful; **(3) property which is being used or has been used in the commission of a criminal offense or is possessed with the intent to be used as the means for committing a criminal offense or is concealed to prevent a criminal offense from being discovered; (4) property constituting evidence of crime or tending to show that a particular person committed a criminal offense;** (5) any narcotic drugs, barbiturates, amphetamines or other drugs restricted to sale, possession, or use on prescription only, which are manufactured, possessed, controlled, sold, prescribed, administered, dispensed or compounded in violation of any of the laws of this State or of the United States. Narcotics, barbiturates or other drugs seized hereunder shall be disposed of as provided by § 44-53-520.
>
> S.C. Code Ann. § 17-13-140 (emphasis added).

In *State v. Baccus*, the Supreme Court of South Carolina was presented with a search warrant issue where the defense challenged the affidavit which was submitted in order to issue the search warrant as lacking the requisite probable cause to issue the search warrant under section (3) of S. C. Code Ann. § 17-13-140 as cited above. The Court reasoned:

> Under both the United States and South Carolina constitutions, search warrants may not be issued except "upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV; S.C. Const. art. I, § 10. Following these constitutional requirements, § 17–13–140 requires a sworn affidavit for a search warrant to be issued. A court order issued pursuant to § 17–13–140, which stands in place of a search warrant, should only be issued upon a finding of probable cause, which is supported by oath or affirmation.
>
> *State v. Baccus*, 367 S.C. 41, 54–55, 625 S.E.2d 216, 223 (2006).

Therefore, in South Carolina, search warrants may be issued "only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant." S.C. Code Ann. § 17–13–140 (2003); *see also State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987). "The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter." *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978). Failure to do so is not only a violation of South Carolina law, it is also a violation of the Fourth Amendment to the United States Constitution as the Supreme Court ruled in *Baccus*.

The Court in *Baccus* ruled the affidavit lacked specificity and contained conclusory statements which were not sufficient to establish probable cause and the trial court erred in admitting the evidence seized pursuant to the search warrant. *Baccus,* 367 S.C. at 52.

In *State v. Smith,* 301 S.C. 371, 392 S.E.2d 182 (1990), Smith moved to suppress a knife, allegedly used in a robbery, which was seized from his motel room pursuant to a search warrant. In determining whether the issuing magistrate had a substantial basis to conclude probable cause existed, this Court considered the following affidavit accompanying a search warrant:

> That on May 12th at approximately 11:45 p.m. Reginald Jerome Smith went into the Master Inn located at 1468 Savannah Hwy., Charleston, S.C. and he then robbed the manager at knife point. Smith has been staying at the Host of America Room 216 since Jan. 1, 1988 and there is every reason to believe the weapon and clothes used in the robbery will be located in the room. This information was confirmed in person by Sgt. Sherman on 05/13/88.
>
> *Id.* at 372, 392 S.E.2d at 183.

The Supreme Court of South Carolina held that the affidavit was defective because it "set[ ] forth no facts as to why police believed Smith robbed the Master Host Inn." *Id.* at 373, 392 S.E.2d

at 183. The Court ruled that, "[m]ere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient." *Id. See also State v. Weston,* 329 S.C. 287, 494 S.E.2d 801 (1997) (court ruled the affidavit did not provide a substantial basis for probable cause because it failed to set forth any facts as to why police believed Weston committed the crime and the first three sentences of the affidavit contained conclusory statements).

In Hemingway's case, the affidavit was presented to the magistrate judge to obtain a search warrant for Hemingway's cell phone records from Verizon Wireless. *See* affidavit. The affidavit made similar conclusory statements as the insufficient affidavits in *Baccus* and *Smith*. Special Agent Barkdoll, who presented the affidavit, failed to set forth in the affidavit any facts as to why law enforcement believed Hemingway committed the crime, which was the same error as the affidavits in *Baccus* and *Smith*. Attached to the affidavit and search warrant as Exhibit B was a form Agent Barkdoll sent indicating an "urgent request for examination." *See* Exhibit B. The reason which Agent Barkdoll wrote for his urgent request for an examination of these phone records stated, "[t]his is a double murder with zero leads. The phones possibly have information that could lead to a suspect." *See* Exhibit B. This form further indicated that law enforcement had no suspects and they could not articulate why Hemingway committed the crime in the affidavit because he was not even a suspect- the case had zero leads at the time and law enforcement was hoping the cellphone records would lead to a suspect. This is in clear violation of *Smith*, *Baccus*, S.C. Code Ann. § 17-13-140, and the Fourth Amendment to the United States Constitution. The trial court erred in ruling otherwise.

Respectfully, Hemingway asks this Court to grant him a new trial.

II. The trial court erred in denying trial counsel's motion to suppress Hemingway's statement to law enforcement on December 1, 2020 because it was in violation of South

Carolina Code §17-13-50 and the arrest warrant used to arrest Hemingway was not supported by probable cause.

Hemingway was arrested on December 1, 2020 and law enforcement told him that he was being arrested on a family court bench warrant for child support. Transcript p. 61-63. Once arrested, he was interviewed at the Horry County Police Department and once the interview was over, he was served with the murder warrants in this case. Transcript p. 63, 67. This family court bench warrant was actually terminated by a family court order on February 27, 2020. *See* Defendant's Exhibit 2. There was no active bench warrant to arrest Hemingway and his arrest and interview were made under false pretenses.

South Carolina Code Section §17-13-50 states:

> (A) A person arrested by virtue of process or taken into custody by an officer in this State has a right to know from the officer who arrests or claims to detain him the true ground on which the arrest is made. It is unlawful for an officer to:
> (1) refuse to answer a question relative to the reason for the arrest;
> (2) answer the question untruly;
> (3) assign to the person arrested an untrue reason for the arrest; or
> (4) neglect on request to exhibit to the person arrested or any other person acting in his behalf the precept by virtue of which the arrest is made.
> (B) An officer who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.

S.C. Code Ann. § 17-13-50.

Here, there was no active family court bench warrant and law enforcement lied to Hemingway and told him that was the reason for his arrest. After his arrest, he was interviewed at the Horry County Police Department. Transcript p. 63. Only after the interview ended he was he served with the murder warrants in this case. Transcript p. 67. Law enforcement violated this South Carolina statute when they arrested Hemingway under false pretenses.

South Carolina jurisprudence is clear that when an unlawful arrest is made, everything that flows from it must be suppressed as fruit of the poisonous tree. *See State v. Boswell* (finding law enforcement did not have legal authority to arrest Boswell and the "trial judge erred in refusing to suppress Boswell's confessions as the product of the unlawful arrest") *State v. Boswell*, 391 S.C. 592, 606, 707 S.E.2d 265, 272 (2011). In a case where the evidence is a statement, however, the test is still voluntariness of the statement. "We conclude and hold that every statement or confession made by a person in custody as the result of an illegal arrest, is not involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible" *State v. Funchess*, 255 S.C. 385, 391, 179 S.E.2d 25, 28 (1971) (relying on *Prescoe v. State*, 231 Md. 486, 191 A.2d 226, *People v. Freeland*, 218 Cal.App.2d 199, 32 Cal.Rptr. 132, *Burke v. United States*, 1 Cir., 328 F.2d 399, *United States v. Close*, 4 Cir., 349 F.2d 841, and *State v. Moore*, 275 N.C. 141, 166 S.E.2d 53).

Here, the arrest of Hemingway was unlawful as there was no active family court bench warrant. The State was never able to present evidence that this bench warrant existed at trial and no witness for the State could testify to having seen the bench warrant. This was an unlawful arrest. Law enforcement violated the South Carolina statute mentioned above by conducting this unlawful arrest and everything which flows from the arrest must be suppressed according to South Carolina case law. As it relates to the statement Hemingway provided, the facts and circumstances which surrounded the arrest and the in-custody statement must be considered to determine whether the statement was voluntarily given.

Here, Hemingway was arrested for an inactive bench warrant and subjected to a custodial interview. He was arrested on a family court bench warrant for failure to pay child support for his five children, months after the last hearing in his child support case where no one appeared at the hearing because Ms. Burch, who initiated the proceeding, was deceased. He was not voluntarily present and speaking to law enforcement of his own free will. Transcript p. 61. He was there under false pretenses for an inactive bench warrant.

His statement was not voluntarily given and should be suppressed as fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (ruling the statement of the defendant during an unlawful arrest must be suppressed as fruit of the poisonous tree). The court in *Wong Sun* opined "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." *See Nueslein v. District of Columbia*, 73 App.D.C. 85, 115 F.2d 690. "Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction." *Wong Sun v. United States*, 371 U.S. 471, 485–86, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441 (1963)(*citing Rea v. United States*, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233, *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669). The trial court's failure to suppress his statement given to law enforcement at that time was erroneous.

Additionally, trial counsel argued that the affidavits for the arrest warrants in this case similarly were not supported by probable cause. The affidavits used to secure the arrest warrants in this case also contained conclusory statements. Transcript p. 120-122. Trial counsel argued that information contained in the affidavits "contained no information upon which the issuing magistrate could make an independent determination as to whether there was probable cause to believe that Hemingway had committed the offenses in which the warrants were sought for." *See* Defendant's 2. The trial court denied this motion.

The language at issue read as follows:

> That on January 12, 2022 at approximately 2:00 AM, at 5305 Taft Watson Boulevard, Centenary South Carolina, in the county of Marion, one Isaac Kareem Hemingway, did, with malice aforethought, cause the death of Victim (Maisha Burch) by shooting her multiple times in the head. Therefore, Isaac Hemingway is charged with Murder. This being in violation of South Carolina Code of Laws 16-03-0010. (Warrant No. 2020A3310100434).
>
> That on January 12, 2022 at approximately 2:00 AM, at 5305 Taft Watson Boulevard, Centenary South Carolina, in the county of Marion, one Isaac Kareem Hemingway, did, with malice aforethought, cause the death of Victim (Andrew Legette) by shooting him in the head. Therefore, Isaac Hemingway is charged with Murder. This being in violation of South Carolina Code of Laws 16-03-0010. (Warrant No. 2020A3310100435).
>
> That on January 12, 2022 at approximately 2:00 AM, at 5305 Taft Watson Boulevard, Centenary South Carolina, in the county of Marion, one Isaac Kareem Hemingway was in possession of a firearm during the commission of a violent crime, Murder. Therefore, Isaac Kareem Hemingway is charged with Poss. Weapon during violent crime, if not also sentenced to life without parole or death. This being in violation of South Carolina Code of Laws 16-23-0490. (Warrant No. 2022A3310100436).

See Warrants, Defendant's 2.

These affidavits in the arrest warrants contain mere conclusory statements and the trial court erred in ruling otherwise.

Respectfully, this Court should grant Hemingway a new trial.

III. The trial court erred in denying trial counsel's motion arguing against the admissibility of the DNA evidence pursuant to *State v. Phillips*.

In *State v. Phillips*, 430 S.C. 319, 844 S.E.2d 651, (2020), and *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), the Supreme Court of South Carolina set forth what has become the standard South Carolina formulation of the elements of the foundation for scientific evidence under Rule 702. "When admitting scientific evidence under Rule 702, []the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." 335 S.C. at 20, 515 S.E.2d at 518. If the evidence is admissible under Rule 702, then the trial court must determine whether the probative value is substantially outweighed by the dangers listed in Rule 403. *Id*. at 20.

In *State v. Phillips*, the primary challenge against the admissibility of the evidence was under Rule 403. *Phillips* at 327. The Supreme Court of South Carolina started its analysis by determining the probative value of having Phillips' DNA on the murder weapon. *Id*. at 327. The Court acknowledged that in a typical murder case where the central issue is who killed the victim, which it was in Phillips' case, DNA on the murder weapon is extremely probative. *Id*. However, Phillips admitted that he was at the victim's home and touched the victim's gun that day while imitating law enforcement officers. *Id*. Therefore, the Supreme Court of South Carolina ruled under those facts that the "probative value of Gallman's testimony connecting Phillips to the DNA on the gun is minimal." *Id*.

The Supreme Court of South Carolina found the DNA evidence that Phillips' hand had been in the victim's pocket was much more probative because the State's theory of the case was Phillips robbed the victim and presumably the victim kept his cash in his pocket. *Id*. at 328. Because

there was no other reason for Phillips' DNA to have been in the victim's pocket, unlike the other reason provided as to why his DNA was on the gun, the DNA evidence in the pocket had greater probative value than the gun. *Id*. However, the DNA analyst's testimony was that one in every two people could have been the person to leave the DNA in the victim's pocket, which basically meant half the population could have provided that DNA. *Id*. That probability made the probative value of the testimony connecting Phillips to the DNA in the victim's pocket minimal. *Id*.

After determining the probative value, the Court then weighed the minimal probative value of this DNA evidence of the gun and the pocket against risk of unfair prejudice, confusion of the issues, and misleading the jury under Rule 403. The Court found that unlike other DNA cases, the DNA involved in *Phillips* did not involve "straightforward DNA evidence from hair or bodily fluids like in *Council*." *Id*. at 330. The Court stated those types of "straightforward DNA" are much stronger, more reliable evidence and such evidence was not used in *Phillips*. Because of the type of DNA used, certain concepts needed to be explained to the jury, such as touch DNA. The Court found the DNA concepts were not adequately explained to the jury in *Phillips* which caused confusion of the issues and misled the jury. *Id*. at 334. However, the Court also stated, "even when the concepts of touch DNA, non-exclusion DNA, and random match probability are completely and accurately presented to a jury, there is significant potential the testimony will be confusing and misleading." *Id*. Thus, this minimally probative evidence was significantly outweighed by danger of confusion of the issues and misleading the jury under Rule 403. *Id*.

The Court rejected the State's argument in *Phillips* that even if the trial court erred in admitting the evidence, the error was harmless. *Id*. at 342. The Court found the State provided significant circumstantial evidence against Phillips but it did not present any evidence which

conclusively proved his guilt. *Id*. The Court found the error was not harmless and reversed and remanded for new trial. *Id*. at 342-343.

The trial court in Hemingway's trial did not follow the thoughtful approach of the Supreme Court of South Carolina in analyzing this issue. The trial court simply ruled the 702 factors were met and distinguished Hemingway's case from *Phillips* by stating there was an analyst present to testify who could explain these concepts to the jury and that was not present in *Phillips*. The trial court did not discuss the probative value of the evidence, did not address the fact that the children live in the home and their DNA was not tested and would provide an alternative explanation for the DNA to be found in those locations which reduces the probative value of the offered evidence, and did not engage in a thoughtful balance of the probative value against the risk of confusion of the issues and misleading the jury as the Supreme Court did in *Phillips*.

The facts at hand are similar to *State v. Phillips* in several ways. First, this case also involves a murder where the central question is the identity of the shooter. Second, the probative value of the DNA evidence which was admitted is extremely low. The DNA evidence involved touch DNA of Hemingway on the back door and in the hallway of Maisha Burch's home, where Burch and Legette were murdered, and DNA under Burch's fingernails. However, just as in *Phillips*, there was an alternative explanation as to why the DNA was present, which lowered the probative value of the evidence. Burch and Hemingway share five biological children, all of whom live with Burch and share DNA with Hemingway. The children's DNA was not tested and, in fact, the DNA analyst testified that she was not aware that there were any children living in the home when she tested the DNA samples. When asked whether the DNA analyst would be able to differentiate the DNA

of Hemingway's biological son, who lived in the home with Maisha Burch, from his father's DNA, the analyst responded by saying,

> So for male DNA markers, it is pass[ed] along for males from generation to generation. So any male in the line, the blood line is going to have the same Y-STR profile or the male identifying markers that I test with Globalfiler. So those would be the same from father to son or to dad all in the same biological line. **So there is no way to tell which male it came from**.
>
> Tr. 437 emphasis added.

The children's DNA could have been the DNA found on the door and under their mother's fingernails but the State never bothered to test the children's DNA. This alternative explanation for the presence of the DNA makes the probative value of the DNA minimal as the Supreme Court of South Carolina found with the DNA evidence in *Phillips*.

Next, the concepts involved were not sufficiently explained the jury in order to aid the jury in understanding these complex scientific concepts. Furthermore, even if the concepts were sufficiently explained to the jury, the Supreme Court of South Carolina explained in *Phillips* that there would still be "significant potential the testimony will be confusing and misleading." *Phillips*, 430 S.C. at 334. Weighing the limited probative value of the evidence in this case compared to the risk of confusion of the issue and risk of misleading the jury leads to the same result as in *Phillips*, the DNA evidence should have been excluded from the trial and the trial court erred in admitting it.

Finally, just as in *Phillips*, the error by the trial court was not harmless. The State merely presented circumstantial evidence that amounted to mere suspicion that Hemingway was guilty: the alleged child support motive, the phone calls between him and Burch, and the cell phone location data. There is no evidence which conclusively proves his guilt. The error here was reversible error.

Respectfully, this Court should grant Hemingway a new trial.

IV. The trial court erred in denying trial counsel's pretrial motion to prevent the State from mentioning Hemingway's family court bench warrant as it was not relevant, unfairly prejudicial, and inappropriate character evidence in violation of South Carolina Rules of Evidence 401, 403, and 404(b).

Prior to trial, Hemingway's trial counsel motioned the Court to prevent the State from mentioning Hemingway's family court bench warrant and the fact that he was arrested on this bench warrant prior to being served with warrants in this case. The trial court denied the motion and ruled that the evidence of the family court bench warrant in any other case, the trial court would not let it in. Transcript p. 450. The court stated that in most circumstances this evidence would be irrelevant and only used to prejudice the defendant or confuse the jury. *Id.* The court ruled that in this case, because the State's theory of the case was that Hemingway's motive to kill Burch and Legette was over child support, this evidence was relevant to prove motive. *Id.*

The trial court then ruled that the evidence's probative value was not substantially outweighed by any danger of unfair prejudice, confusion of the issues, or misleading of the jury under South Carolina Rules of Evidence 403. *Id.* Finally, the court ruled that under South Carolina Rules of Evidence 404(b) there is an exception for motive so "it passes 404(b) as well." *Id.*

Trial counsel objected to the court's ruling arguing that this bench warrant could not possibly be relevant to prove motive for one major reason: the warrant was served eleven months after Burch and Legette's murders. The warrant was not issued until after Burch and Legette's murders either.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

would be without the evidence." South Carolina Rules of Evidence 401. Due to the fact that this bench warrant was not issued or served until after Burch and Legette were murdered, it cannot be used to prove Hemingway's alleged motive to murder them. This evidence was simply not relevant because it was not in existence at the time of the murder. The State was not prevented from presenting its version of the facts and its theme of the case to the jury if the trial court prevented this evidence of the bench warrant from being admitted in evidence. Other witnesses could testify to the fact that Hemingway and Burch were engaged in child support hearings prior to Burch's murder. This evidence of the bench warrant was simply irrelevant.

Because the evidence is irrelevant, there is no need to address South Carolina Rules of Evidence 403 and 404. However, for argument's sake, should the court have found the evidence of the bench warrant was relevant, it still should have granted trial counsel's motion to exclude the evidence under 403 or 404(b).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." South Carolina Rules of Evidence 403. For argument's sake, if this evidence had any probative value, said probative value was substantially outweighed by the danger of unfair prejudice to Hemingway and needless presentation of cumulative evidence. Here, the State's theory of the case was Hemingway's motive to murder Burch and Legette was because Hemingway did not want to pay child support to Burch. The State argued this evidence of the bench warrant went to motive and was therefore relevant and needed to prove its case. However, because this bench warrant was not issued or served until after Burch and Legette were murdered, it cannot be used to prove

motive. The State's use of this evidence was to paint Hemingway in a negative light to the jury, thereby prejudicing him in the minds of the jurors. Further, because the State was able to present evidence of the child support hearings as Hemingway's alleged motive in other ways, this evidence of the bench warrant was needlessly cumulative. The evidence should have been ruled inadmissible under Rule 403.

Once again, for argument's sake, if the trial court had found the evidence was relevant and the probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or presenting cumulative evidence under 403, the court still should have ruled the evidence was inadmissible under South Carolina Rules of Evidence, Rule 404. The rule states:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.
>
> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.
>
> South Carolina Rule of Evidence 404.

This evidence was improper character evidence. The State very generally sought to introduce evidence which suggested that because Hemingway violated the law by not paying child support and was arrested on a bench warrant for that, he was also guilty of violating the law by murdering Burch and Legette. The trial court ruled that the evidence was not improper character evidence because it fit within subsection (b) because the evidence was used to prove motive, not the character of Hemingway. However, as argued above, this evidence could not possibly have proven motive as the bench warrant was not issued nor served until after Burch and Legette were murdered. Therefore, the evidence does not fit within this exception to Rule 404.

The evidence of Hemingway's child support bench warrant was irrelevant, prejudicial, needlessly cumulative, and improper character evidence. The trial court erred in ruling otherwise.

Respectfully, Hemingway asks this Court to grant him a new trial.

V. The trial court erred in overruling trial counsel's objection to improper burden shifting during the State's closing argument.

"A closing argument must stay contained to the evidence within the record or any reasonable inferences that can be drawn therefrom." *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "A solicitor is allowed to argue his or her version of the evidence and to comment on how much weight to give such evidence." *Vasquez*, 388 S.C. at 458, 698 S.E.2d at 566. "However, a solicitor's duty is to see justice done, not to convict a defendant." *Id*. *See* also *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) ("Solicitors are bound to rules of fairness in their closing arguments ...."); *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) ("While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done.").

When counsel makes an improper argument, opposing counsel should "immediately object and ... have a record made of the statements or language complained of and ... ask the court for a distinct ruling thereon." *State v. Black*, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995). "The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996).

"The State may not comment on a defendant's exercise of a constitutional right." *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). "Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense." *Id.*

Prosecutorial comment on a defendant's invocation of rights pursuant to *Miranda* is forbidden. *See Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (opining that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial"). "Miranda assures a defendant that his silence or invocation of the right to counsel will not be used against him at trial; thus, the Supreme Court has explained, to allow the prosecution to comment at trial on the defendant's decision to exercise that right violates the implicit assurance [afforded by Miranda] 'that silence will carry no penalty.'" *United States v. Espinosa*, No. 16-4295, 2017 WL 544589 (4th Cir. Feb. 10, 2017) (quoting *Greer v. Miller*, 483 U.S. 756, 762, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987).

Such improper comments violate due process only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*,

416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). To obtain a new trial on this basis, the defendant must show both "(1) that the government's remarks were in fact improper and (2) that the remarks prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial." *United States v. Higgs*, 353 F.3d 281, 330 (4th Cir. 2003).

Trial counsel objected to improper burden shifting during closing arguments. During the State's closing argument, the Solicitor said

> He also touched on, ladies and gentlemen, the cell phone evidence and the time line. He's right I don't know why he keeps bringing it up. I don't dispute everything – we don't dispute everything that happened up to midnight. **What they can't account for – and he glossed right over it. It's what happened from midnight to 7a.m.**

Transcript p. 869 emphasis added.

Trial counsel objected to this improper argument of the State implying a shift in the burden of proof from the State's burden to prove the defendant is guilty beyond a reasonable doubt to the defendant not being able to account for certain things- implying he has something to prove and he failed to do so during the presentation, or lack thereof, of his defense. The burden of proof in a criminal trial is always on the State. A person accused of committing a crime is never under any duty to prove that he did not commit the crime. Suggesting to the jury that the defendant has some duty to prove that he is innocent is improper and greatly prejudices a defendant because it places a duty on him in the minds of the jurors that the law does not require. It tarnishes the assumption of innocence every person has until he or she is proven guilty beyond a reasonable doubt by the State. Here, during the State's closing argument, the Solicitor made a comment which suggested the defendant did not prove he was innocent.

Furthermore, this comment violated *Doyle v. Ohio* by improperly commenting on Hemingway's silence on this particular topic after receiving his *Miranda* warnings from law enforcement. During the State's closing argument, the Solicitor played Hemingway's statement for the jury before making this comment that Hemingway cannot account for what happened from midnight to 7am. The Solicitor cannot comment on a defendant's silence after receiving *Miranda* warnings to suggest the defendant is guilty. This improper comment prejudicially affected Hemingway's substantial rights so as to deprive Hemingway of a fair trial.

Respectfully, Hemingway asks this Court to grant him a new trial.

CONCLUSION

This Court should reverse Hemingway's conviction and remand for a new trial.

Respectfully submitted,

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