

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

ROBERT L. MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000562

APPENDIX

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Petitioner claims he retained his privacy interest in the digital content of the cell phone, and the United States Supreme Court case of Riley v. California, 134 S.Ct. 2473 (2014), should be read to hold his privacy right to the digital content cannot be abandoned because of its significant difference from other physical items, such as purses or suitcases. Petitioner ignores the key distinction between this case and Riley, which is the expectation of privacy and its continued assertion in a phone seized subject to an arrest, versus a phone which was entirely abandoned with actions demonstrating no intent of reclaiming the physical phone or any digital content contained on it.

In Riley, the United States Supreme Court discussed the significant privacy interests associated with today's cell phones. The Court explained cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." Riley, 134 S. Ct. at 2484. The Court explained the difference between a physical object and what it can carry versus a cell phone and the vast digital data it contains: "many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." Id. at 2489.

However, Riley does not establish special rules or exceptions to the exceptions for cell phones. Instead it recognized that the privacy concerns of cell phones were analyzed under the already existing framework for Fourth Amendment analysis and no need for special consideration was present. Riley analyzed a search of a cell phone incident to an arrest under the same balancing test used to originally establish the exception. It considered the two prong basis for the exception: law enforcement's need for officer safety and the preservation of evidence.

The Court found neither factor justified the invasion of privacy present in a search incident to arrest. The Court specifically stated: “Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape.” Id. at 2485. The Court concluded other possible exceptions could still apply to better serve officer safety under a specific set of circumstances:

Accordingly, the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board. To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances.

Id. at 2486.

The Court then went on to examine the second prong, the need to preserve evidence. The Court recognized the need to seize the phones in order to prevent the arrestee from being able to destroy any evidence on the phone. However, the Court found: “once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.” Id. Again, the Court indicated other exceptions may be considered in preventing data loss under certain circumstances:

If “the police are truly confronted with a ‘now or never’ situation,”—for example, circumstances suggesting that a defendant’s phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately. Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone’s automatic-lock feature in order to prevent the phone from locking and encrypting data. Such a preventive measure could be analyzed under the principles set forth in our decision in McArthur, 531 U.S. 326, 121 S.Ct. 946, which approved officers’ reasonable steps to secure a scene to preserve evidence while they awaited a warrant.

Id. at 2487-2488.

Notwithstanding the extensive discussion of the search incident to arrest and the privacy concerns implicated in the search of the data of a cell phone, the Court specifically recognized: “Our holding, of course, is **not** that the information on a cell phone is immune from search; it is instead that a warrant is **generally** required before such a search” *Id.* at 2493 (emphasis added). The Court articulated: “Moreover, even though the search incident to arrest exception does not apply to cell phones, **other case-specific exceptions may still justify a warrantless search** of a particular phone.” *Id.* at 2494 (emphasis added).

One such exception should be the abandonment exception. Unlike in the case of a cell phone in a person’s pocket in which the person still maintains a clear expectation of privacy, even upon arrest, abandonment of a cell phone evidences no expectation of privacy. As discussed above, the person discarding a cell phone—whether by throwing it away or by failing to make any attempt to find and recover it—has expressed a lack of an expectation of privacy which clearly distinguishes the analysis from that of the search incident to arrest. As the Supreme Court of Washington explained in a case very similar to the one at hand and decided after *Riley*:

Neither *Riley* nor *Hinton* [a case involving Washington’s invasion of private affairs provision of the state’s constitution] can be read for the proposition that the abandonment doctrine should not apply to cell phones or should be limited in its application to cell phones. The *Riley* holding that cell phones may not be searched incident to arrest without a warrant was based on the fact that such cell phone searches do not fall into the particular justifications for the search incident to arrest exception. . . . But in this case and for the abandonment doctrine, there has been no advancement in technology to cause one to abandon property in stolen vehicles while attempting to flee from police [or in this case abandon a cell phone in an apartment the person just burglarized]. Moreover, the rationale driving the abandonment doctrine fits cell phone searches. When an individual voluntarily abandons an item, not as a facet of modern communication but to elude the police, that individual voluntarily exposes that item—and all information that it may contain—to anyone who may come across it. Cell phones

are no different in this respect than for any other item; the abandonment doctrine applies to all personal property equally.

State v. Samalia, 375 P.3d 1082, 1089 (2016).

The case of People v. Schutter, 249 P.3d 1123 (Colo. 2011), is also instructive. The facts of Schutter demonstrate the extensive difference between a case in which someone has clearly not abandoned their expectation of privacy in a phone and this case where all of Petitioner's actions demonstrate a clear lack of assertion of his rights. In Schutter, the defendant left their phone in a restroom of a store. The defendant, upon realizing it was left, made an immediate demand for its return, which was denied by the clerk because he was too busy to unlock the restroom. Schutter, 249 P.3d at 1126. The defendant was told he would have to come back later to retrieve the phone. Prior to the defendant's return, an officer entered the store and was given the phone. As the Court explained:

Whether or not he knew the defendant's name, Officer Burg was aware from the moment the iPhone came into his possession that the defendant inadvertently left it in the store's locked restroom and knew precisely where it was; that his immediate demand for its return had been refused by the store clerk, who controlled access to the restroom; and that he left the area only when he was told by the clerk that he would have to come back later to retrieve his phone.

According to Officer Burg's own undisputed testimony, the store clerk told him all of this when he handed over the phone. Officer Burg also testified that it was 4:20 in the morning, and at that time, the defendant had been gone from the store for at most an hour. Under these circumstances, the officer had no grounds to believe the property's safe return required the discovery of any further information.

Id. These facts are certainly distinguishable from the underlying facts in the case *sub judice* when Petitioner left his phone in the victim's vehicle at the scene of a shooting, fled the scene to evade capture and prosecution for the crime, never made an attempt to retrieve the phone, and did not secure the phone's privacy by turning off the phone with the carrier.

Schutter demonstrates that under a case by case analysis a person can leave a phone and still maintain their expectation of privacy by demonstrating a desire to reclaim the phone and protect the data on it. Petitioner on the other hand demonstrated no desire to maintain his expectation of privacy and should be found under Dupree to have voluntarily abandoned his expectation of privacy such that he cannot now have standing to seek to have the evidence found in the search of the phone suppressed. See e.g., Dupree, 319 S.C. at 457, 462 S.E.2d at 281 (“Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment.”); Stevenson, 396 F.3d at 546 (“When a person voluntarily abandons his privacy interest in property, his subjective expectation of privacy becomes unreasonable, and he is precluded from seeking to suppress evidence seized from it.”).

This case is much more similar to the case of United States v. Quashie, 162 F. Supp. 3d 135 (E.D.N.Y. 2016). The District Court explained the facts as follows:

During the course of the robbery that occurred on July 10, 2009, one of the robbers dropped a cellphone in the apartment where the robbery occurred. A robber attempted to recover the cellphone but was unable to reenter the apartment. A few hours later, the victim found a cellphone in his apartment and called the NYPD, which came and recovered it. The Government has stipulated that an employee of the NYPD went into the telephone and obtained the number without obtaining a warrant. Using this phone number, the police were able to determine that the phone belonged to defendant.

Id. at 140. The Court found: “If defendant’s phone was simply abandoned by him at the apartment where the robbery occurred, he has clearly relinquished his expectation of privacy in the property.” Id. at 141. The Court further concluded:

By leaving the phone behind in the apartment, the robbers did not protect the property and did not evince an intent to maintain an expectation of privacy in it. Even if the robbers did not intentionally abandon the phone when they first left the apartment, they returned to the scene of the crime to retrieve it, and found the

door locked. At that point, the robbers voluntarily abandoned the phone and left the crime scene, rather than risk getting caught.

Id. The behavior of the robber in Quashie evidenced an even greater desire to protect his privacy interest than Petitioner because he went back for the phone one time. Petitioner never made an attempt to recover the phone after leaving it in the victim's vehicle. The District Court also analyzed the impact of Riley on the determination of whether the phone was abandoned. The Court issued a well-reasoned conclusion:

[Riley] outlines the standard to be applied to a search of a cellphone incident to arrest. It has nothing to do with an abandoned cellphone or even a stolen cellphone. Although Riley includes language about the vast amount of information contained on cellphones and how the expectations of privacy in the contents of a phone have shifted, any objective expectation of privacy in a cellphone must go hand-in-hand with an individual's demonstration of a subjective expectation of privacy. Whether it was defendant or the robbers who left the phone in the victim's apartment, they gave up that subjective expectation of privacy.

Id. at 141-42. Just as the District Court found, this Court should conclude that by abandoning his expectation of privacy, any analysis under Riley is inapplicable to Petitioner's case.

This Court should find Petitioner voluntarily abandoned his cell phone and all of its contents when he left it inside the vehicle of the victim he shot, failed to make any attempt to reclaim the phone, and failed to take any steps to prevent access to the phone or its data. As a result, this Court should find he lacked the requisite expectation of privacy to be able to assert a claim for suppression of the evidence obtained through the warrantless search of the phone.

Independent Source/Inevitable Discovery

Even if this Court finds obtaining the phone number of the phone off the SIM card violated the Fourth Amendment, the Court of Appeals correctly determined the information

would have inevitably been found. Any evidence seized as the result of an unreasonable search and seizure typically must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the United States Supreme Court held the exclusionary rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence. “The holding of Silverthorne was carefully limited, however, for the Court emphasized that such information does not automatically become ‘sacred and inaccessible.’” Nix v. Williams, 467 U.S. 431, 441 (1984) (citations omitted). The Court explained: “If knowledge of [such facts] is gained from an independent source, they may be proved like any others” Silverthorne, 251 U.S. at 392. The Court in Nix further explained: “The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation.” Nix, 467 U.S. at 443; see also, State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) (finding “challenged evidence is admissible if it was obtained from a lawful source independent of the illegal conduct”).

The only evidence admitted from the search of Appellant’s phone was to establish Appellant’s ownership and the phone’s connection to the victim through the phone calls made directly before the shooting occurred. The officers had the victim’s phone in their possession. They had every right to search the victim’s phone as part of the investigation, and even if they did not, Appellant could not assert any violation of the right because he did not have a possessory interest in the victim’s phones. See State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) (stating defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate his “own rights” have been violated by showing he has a legitimate expectation of privacy in connection with the searched premises in order to challenge the search). As a result of

the search of the victim's phone, the officers would have found the number that called five times immediately before the shooting. It would have taken nothing more than running the number through the same database that they ran the number from the SIM card through to determine it belonged to Appellant. A simple call to the number would have verified it was the phone in their possession and would have placed Appellant at the scene of the crime. As a result, any evidence obtained from the search of Appellant's phone would have inevitably been discovered through an independent source, the victim's phone. See Nix v. Williams, 467 U.S. 431, 443-444 (1984) (finding the inevitable discovery doctrine has been adopted as an exception to the exclusionary rule and "[t]he independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.").

In Nix, officers violated the defendant's Sixth Amendment right to counsel by speaking with him after agreeing with his lawyer not to communicate with the defendant. As a result of the communications, the defendant led the officers to the location of a missing child's body. The United States Supreme Court acknowledged the violation of the Sixth Amendment, but found because individuals were already canvassing the area, the body would have been inevitably discovered. The Court explained its reasons for not excluding the evidence based on the constitutional violation saying:

Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. . . . Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.

Nix, 467 U.S. at 446. The Court continued that exclusion was not necessary to cure an ill or to insure fairness, finding:

Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct. Williams' argument that inevitable discovery constitutes impermissible balancing of values is without merit.

Id. at 447. The Fourth Circuit, in United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir. 1970), recognized the inevitable discovery doctrine in a case similar to the one at hand. Officers stopped a vehicle driven by the defendant. After obtaining his wallet and realizing he presented an expired license, the officer continued to search through the wallet for further proof of identification. He found papers with the defendant's real name listed. The trial court suppressed the papers from the wallet, but allowed testimony and evidence that resulted after the individuals were detained. The Fourth Circuit found that the defendant's identity would have been discovered from his co-defendant because they were both wanted as fugitives and the co-defendant had given his actual name. The Fourth Circuit explained:

[T]he district judge found that the police would have learned of the Baltimore warrants through Rutkowski and that they would have arrested Seohnlein even if they had not discovered the papers in his wallet. Although the knowledge gained from examining the wallet may have accelerated a lawful arrest on the Baltimore warrant, it did not taint the evidence that was subsequently obtained.

Seohnlein, 423 F.2d at 1053.

Similar to Nix and Seohnlein, the information of Appellant's identity would have been discovered by the officers even if they had never pulled the SIM card from his phone. The officers would have matched his name to the phone number that called the victim using the same database they used once they had the phone number off the SIM card. There is no reason to suppress the evidence that otherwise would have been admissibly because it did not taint the investigation.

In addition, this Court can analyze the warrant subsequently obtained and determine that, even when removing any information obtained through an illegal search, probably cause existed to search the phone and obtain the necessary information regarding ownership. The original search warrant affidavit read:

On 2/25/2Q13 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriffs Office responded to 7680 Warren H. Abernathy Hwy, in reference to a shooting. Upon arrival, they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle an AT&T ZTE model Z331 cell phone serial number #22213371843 was found inside the victim's vehicle. Through further investigation it was found the phone number assigned to the phone is [phone number]. Through further investigation it was found this phone did not belong to the Victim. Through further investigation it was found this phone belonged to Robert Lee Moore. This search warrant is needed for the furtherance of this investigation to obtain information from the phone that can either implicate, or clear Robert Lee Moore from any involvement in this incident.

(R.324). Once this Court removes the references to Robert Lee Moore which were only obtained through the search of the SIM card, the warrant reads as follows:

On 2/25/2Q13 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriffs Office responded to 7680 Warren H. Abernathy Hwy, in reference to a shooting. Upon arrival, they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle an AT&T ZTE model Z331 cell phone serial number

#22213371843 was found inside the victim's vehicle. . . . Through further investigation it was found this phone did not belong to the Victim. . . . This search warrant is needed for the furtherance of this investigation to obtain information from the phone that can either implicate, or clear an individual from any involvement in this incident.³

The search warrant indicates the phone was found inside the vehicle belonging to the victim of a shooting. The warrant indicates the phone was not the victim's. It provides a fair probability the phone would contain evidence of the crime. If the phone is not the victim's, then it is a fair probability it was left by the shooter. Even if the phone were the victim's phone, it likely still contained evidence of the crime because it may have had the last person contacted by the victim or contacting the victim—at minimum a witness to be interviewed or possibly the shooter. As a result, the officers would have obtained the ownership of the phone through execution of the search warrant which means the trial court properly refused to suppress the evidence obtained from the SIM card.

³ The officers had two cell phones in their possession belonging to the victim, so through investigation they could have determined the third was not Hall's. Petitioner's counsel acknowledged once the officers had two phones belonging to the victim, it was likely the third phone belonged to someone else. (T.50; R.42).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals. In the alternative, this Court should grant the Petition for Writ of Certiorari and find the initial search of the SIM card did not violate the Fourth Amendment.⁴

Respectfully submitted,

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January 19, 2018

⁴ Again, it should be noted that the outcome of this case is likely to be significantly impacted or determined by this Court's decision in State v. Lamar Sequan Brown, which is scheduled for oral argument on January 31, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. R. Keith Kelly, Circuit Court Judge
Appellate Case Tracking No. 2017-002479

The State,

Respondent,

v.

Robert Lee Moore,

Petitioner.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 19th day of January, 2018.


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The Supreme Court of South Carolina

The State, Respondent,

v.

Robert Lee Moore, Petitioner.

Appellate Case No. 2017-002479

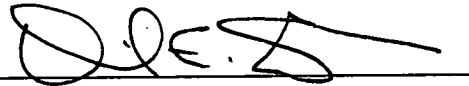
Trial Court Case No. 2013-GS-42-02965

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

March 28, 2018

cc:

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Alan McCrory Wilson, Esquire

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The Honorable M. Hope Blackley

The Honorable Jenny Abbott Kitchings

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Supreme Court County

Honorable R. Keith Kelly, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

ROBERT LEE MOORE,

PETITIONER

APPELLATE CASE NO. 2017-002479

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred by affirming petitioner's conviction based on an inconsistent "inevitable discovery" analysis where the majority agreed petitioner's constitutional rights were violated where the police searched his cell phone without a warrant, yet found on erroneous and inconsistent basis that the fruits of the warrantless search would have been inevitably discovered since the majority opinions circumvent the integrity of the warrant requirement in violation of Riley v. California, 134 S.Ct. 2473 (2014)?

STATEMENT

Petitioner was indicted by the Spartanburg County Grand Jury for the offense of attempted murder. R. 327. His case came on for trial on July 21, 2014, before the Honorable R. Keith Kelly, and a jury. Andrew Johnston represented petitioner. Derrick Bulsa was the deputy solicitor. R. 1.

On July 23, 2014, the jury found petitioner guilty. R. 320, l. 25 – 321, l. 6. Judge Kelly sentenced petitioner to thirty years' imprisonment. R. 322, ll. 5-6.

The majority of the Court of Appeals affirmed in State v. Moore, 421 S.C. 167, 805 S.E.2d 585 (2017). Chief Judge Lockemy and Judge Konduros both held that petitioner's constitutional rights were violated by the warrantless search by the police of his cell phone. However, Judge Lockemy, based on a different analysis, agreed with Judge McDonald that the information from the cell phone search would have been inevitably discovered. Therefore, petitioner's attempted murder conviction was affirmed. App. 1-15.

Petitioner and the state sought rehearing. App. 16-30. Rehearing was denied. App. 2. Petitioner now seeks certiorari from this Court.

ARGUMENT

The Court of Appeals erred by affirming petitioner's conviction based on an inconsistent "inevitable discovery" analysis where the majority agreed petitioner's constitutional rights were violated where the police searched his cell phone without a warrant, yet found on erroneous and inconsistent basis that the fruits of the warrantless search would have been inevitably discovered since the majority opinions circumvent the integrity of the warrant requirement in violation of *Riley v. California*, 134 S.Ct. 2473 (2014)

Relevant facts

Defense counsel Johnston moved to suppress all of the information derived from the search of petitioner's cell phone, "an AT&T flip phone, which is attributed to the ownership of the defendant." Defense counsel told the judge the court would need to hear the testimony from the investigators who recovered it, and the other law enforcement personnel who were involved "in the forensic evaluation of the phone" before ruling. R. 2, ll. 7-19.

Assistant solicitor Balsa told the judge this case involved the shooting of the victim, thirty-four-year-old Travis Hall, on February 25, 2013 at a Taco Bell in Spartanburg. Three cell phones were found surrounding the injured victim in his car. Since money and drugs were also found in the vehicle, the police suspected a drug deal gone bad, or a drug deal that was actually the result of a planned robbery that went awry. R. 3, l. 8 – 6, l. 11. Defense counsel cited *Riley v. California*, 134 S.Ct. 2473 (2014) in support of his motion to suppress the cell phone evidence. R. 6, l. 13 – 7, l. 15.

Balsa argued that the police discovered the cell phones, and thought they had a potential suspect. The police later got a search warrant after making "preliminary productive discoveries" from the warrantless search of the phone. However, Balsa maintained a search warrant for the

contents of the cell phone was never required because it had been “abandoned by the defendant.” R. 7, l. 16 – 9, l. 6.

Defense counsel Johnston confirmed that petitioner was claiming a privacy interest and an expectation of privacy in his cell phone. Johnston strongly disagreed with the assertion that petitioner had “abandoned” his cell phone. Johnston argued there was a major difference between forgetting one’s phone or negligently leaving it behind, and abandoning it, even though the state had the burden of proof, as will be seen *infra*, the state was unable to state whether the cell phone had a secure password on it that law enforcement was able to get beyond, or whether the forensically “pulled” information was obtained in a less onerous manner. R. 8, l. 2 – 9, l. 14.

Suppression hearing

Investigator Lindsey McGraw testified that three cell phones were collected from the scene of the February 25, 2013 shooting at the Taco Bell in Spartanburg. “I was asked to perform a forensic examination of three cellular telephones that were found at the scene primarily to determine who owned the cell, the cell phones to determine ownership.” McGraw identified the phones as an Apple I-phone 3, an Apple I-phone 4, and a ZTE331 flip phone. R. 10, ll. 8-25.

The flip phone was the one at issue here. McGraw did a forensic examination of **“the installed SIM card.”** The card contained the call logs stored contacts “things of that nature.” R. 10, l. 22 – 11, l. 12. (emphasis added). McGraw was able to recover the cell phone number assigned to the phone from his forensic investigation. He then asked other investigators to find out whom the person was that had that phone number. R. 12, l. 2 – 13, l. 3.

McGraw testified he was able to determine the cell phone number did not belong to the victim. Before he obtained a search warrant, McGraw said he found out the telephone number was

864-494-2573. He also recovered thirty-four contact entries, and he discovered three text messages on the cell phone. R. 12, l. 2 – 13, l. 3.

McGraw testified the stored contract information allowed him to associate a name – petitioner -- with a phone number. McGraw said after he obtained this information, the police got a search warrant and “I did a full forensic examination of the phone, processed it.” McGraw maintained he was unable to further recover contacts and images and pictures from the phone. R. 12, l. 2 – 15, l. 9.

On cross-examination, McGraw confirmed he got the phone number for the cell phone *before* the police obtained a search warrant. He said the cell phone could send and receive text messages, and that typically the phone would have a contact name, phone number and “possibly their physical address and email address.” McGraw testified that the cell phone had a camera for photographs, and a record of all telephone calls made and received. R. 16, l. 1 – 17, l. 21.

McGraw said that the search warrant was obtained the day after he initially searched the phone without a warrant. R. 17, l. 4 – 18, l. 20. The search warrant affidavit stated:

On 2/25/2013 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sherriff's Office responded to 760 Warren H. Abernathy Hwy. in reference to a shooting. Upon arrival, they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle an AT&T ZTE model Z331 cell phone serial number #22213371843 was found inside the victim's vehicle. **Through further investigation it was found the phone number assigned to the phone is (864) 494-2573. Through further investigation it was found this phone did not belong to the Victim. Through further investigation it was found this phone belonged to Robert Lee Moore. This search warrant is needed for the furtherance of this investigation to obtain information from the phone that can either implicate, or clear Robert Lee Moore from any involvement in this incident.**

R. 324; State v. Moore, 421 S.C. 167, 179, 805 S.E.2d 585, 592 (2017). (emphasis added).

This was the search warrant affidavit that the police used to obtain the warrant. The Court of Appeals found it was a sufficiently detailed affidavit, that it was not conclusory, and that it established probable cause for a complete search of petitioner's cell phone. Petitioner maintains, however, *infra*, that it was improper for one of the affirming Judge's to reason that if the highlighted objectionable language was deleted (based on the initial search of the cell phone) that the evidence would have been inevitably discovered because the search warrant affidavit would have passed "probable cause" muster for a search warrant to be issued anyway.

Detective Tom Clark was the state's next witness at the suppression hearing. Clark testified he was originally contacted by Investigator Williams because multiple (three) cell phones had been found in the vehicle, and Clark said the police determined that the victim himself had multiple cell phones. R. 19, l. 6 – 20, l. 16.

Clark confirmed that he was not the person who conducted the forensic examination on the telephone before a search warrant was obtained. He correctly said he assumed investigator Williams was the person who did the warrantless forensic examination. R. 20, l. 24 – 21, l. 18. Clark then read into the record his affidavit to obtain the search warrant.

Q. Tell me what you told Judge Willingham.

A. Told Judge Willingham that on February the 25th at approximately 14:30 hours deputy responded to the Spartanburg County – well, excuse me. With the Spartanburg County Sheriff's Office responded to 7680 Warren H. Abernathy Highway in reference to a shooting. Upon arrival they found the victim, Travis Hall, had been shot. Travis Hall was transported to Spartanburg Regional Medical Center.

Through further investigation and processing of the, processing of the vehicle, the victims AT&T ZTE model 7331 cell phone with serial number 322213371843 was found inside the vehicle. Through further investigation it was found that this phone number **assigned to this phone was**

864-494-2573. Through further investigation it was found that this phone *did not belong to the victim. Through further investigation it was found that this phone belonged to Robert Lee Moore*, that a search warrant is needed for the furtherance of this investigation to obtain information from the phone that can either implicate or clear Robert Lee Moore from any involvement in this incident.

R. 21, l. 19 – 22, l. 13. (emphasis added).

Judge Willingham did not have any other information to base his decision about the search warrant on other than that above. R. 22, ll. 14-19. Clark also confirmed that the police used the information from the warrantless search of the cell phone to obtain the search warrant. R. 23, ll. 3-19.

Clark agreed there was **not anything** in the search warrant affidavit which stated why the police thought petitioner may or may not “have shot the victim.” R. 23, l. 20 – 24, l. 4. Clark also said he was only told that the cell phone was found “in the vehicle under or near the victim and **that was all the information that I was given** other than the victim, according to the investigation, had several cell phones.” R. 24, ll. 10-17. (emphasis added).

On re-cross examination, Clark said he did not recall what he told the judge about **how the police knew** that cell phone was owned by petitioner. He confirmed that the affidavit also did not provide even that most basic information to the magistrate. R. 25, l. 12 – 26, l. 3.

Investigator Lorine Williams was the lead investigator on this case. R. 26, ll. 6-19. Williams confirmed that several cell phones were found in the victim’s automobile. The wounded victim had been removed from the scene by the time he arrived at the Taco Bell and observed the two cell phones in the car. Williams said the third cell phone seized was not in plain view. Two of the cell phones “are in the driver compartment floorboard closer to the door.” R. 27, l. 3 – 28, l. 1.

Williams testified -- and apparently found significance in the fact -- that no one at the scene was claiming ownership of any of the cell phones. Williams said that although he did not have any documentation, he seemed to remember that McGraw had told them that "he had gotten a phone number from the flip phone I believe it was. That number was run through our data system at the sheriff's office. It was associated to Mr. Moore through that system as a "known phone number that he had used or given either in a previous incident or when he was booked in at the jail or something of that nature. It was associated to him. At that point we realized the phone did not belong to the victim. Therefore, the exam was stopped in order to obtain a search warrant before any further forensic testing was done on the phone." R. 28, l. 23 – 29, l. 14.

Williams said he could not testify whether or not the cell phone was "password protected," and he added that Investigator McGraw's report was no help on the password protected subject either. R. 29, l. 21 – 30, l. 1.

As for "abandonment", Williams confirmed he had never seen petitioner in possession of the cell phone nor had he seen petitioner relinquish possession of the phone. Williams said he had chased suspects in the past who had discarded items during the chase. R. 30, ll. 2-17. Williams said he had never seen petitioner throw the phone down or throw it away. "I never saw Mr. Moore at the scene." Williams said he did not know why petitioner left his cell phone but he opined it was apparent there had been a struggle at the Taco Bell scene, and he said **he was sure the cell phone was left behind by mistake.** R. 30, l. 1 – 32, l. 15.

Another law enforcement officer, Forensic agent Robert Talanges, would take issue with the statement that it was apparent there had been a struggle inside the car. "I can't say there was a struggle." R. 101, ll. 9-17. Williams confirmed that he was aware of other situations where a person may have forgotten or misplaced their cell phone. R. 32, l. 18 – 33, l. 3.

Argument of counsel

Defense counsel Johnston again argued pursuant to Riley v. California that the fruits of the search of the cell phone had to be suppressed. Johnston distinguished State v. DuPree, 319 S.C. 454, 462 S.E.2d 279 (1995) where the defendant had abandoned his property for Fourth Amendment purposes by throwing the crack cocaine to the floor during the search of his mouth. Johnston reminded the judge that “Detective Williams summed it up very nicely when he said I have no doubt that he [petitioner] *forgot it* and left it behind.” Johnston argued unintentionally forgetting or leaving behind a cell phone did not mean that it was abandoned. R. 33, l. 24 – 35, l. 9.

Johnston added there was a large amount of money and drugs were found in the victim’s car, and this was not a situation where a person would have voluntarily abandoned his cell phone. Johnston argued there was nothing in the search warrant or affidavit to indicate petitioner had anything to do with the shooting, the warrant was conclusory, and it did not provide probable cause for the issuance of a search warrant. Johnston noted the search warrant went so far as to state the search of the cell phone may actually “clear” petitioner. R. 37, l. 4 – 38, l. 11. (Petitioner argued this issue in the Court of Appeals. It is presently subsumed in the argument before this Court that a majority of the Court of Appeal’s opinion constituted an incorrect and inconsistent “inevitable discovery” holding.)

Johnston argued Riley v. California was on point about the extraordinarily large amount of private information that was stored on an individual’s cell phone. The cell phones provided “potentially all of the person’s associates, their addresses, their telephone numbers, email addresses, anything else a person might decide to include with their contact information.” The cell phones also contained photographs and other personal data. R. 37, l. 4 – 38, l. 11.

Defense counsel repeated that the cell phone had not been abandoned, and that there was no evidence of a clear intention to abandon the phone. Counsel argued that all the information obtained from the cell phone before and after the search warrant had to be suppressed. R. 38, ll. 12-25.

The solicitor said he had not anticipated the argument that the phone was mistakenly left behind rather than abandoned. The solicitor insisted the search was reasonable, and that the phone had been abandoned regardless. The solicitor also argued that the Riley v. California did not prevent the judge from ruling the telephone had simply been abandoned, and that petitioner had no expectation of privacy in the cell phone once it “was left behind.” R. 39, l. 2 – 41, l. 3.

Defense counsel in his colloquy with the court said that the victim was apparently known to carry two cell phones but that three phones were found. Johnston also argued that even if the police thought the phone belonged to the victim they would still have needed to obtain a search warrant to obtain the victim’s information since it was known these cell phones contain private communications, and information that is inculpatory. For that reason, a search warrant was required for the personal information on the cell phone. R. 43, l. 4 – 44, l. 23. The judge deferred ruling. R. 44, ll. 22 -23.

Ruling

Following jury selection, the judge denied petitioner’s motion to suppress any and all of the information seized from petitioner’s cell phone. R. 51, ll. 9-14. The judge ruled that petitioner’s cell phone was “abandoned property.” The judge said he had read cases that property can “be abandoned even momentarily.” The judge reasoned the “property” had been abandoned. The judge ruled he would not suppress any information derived from the search of the cell phone, and

accepted, that an alleged “benign” reason to search a cell phone was permissible. R. 51, l. 9 – 52, l. 24.

Defense counsel quickly tried to correct the judge about the prejudice of the information that law enforcement intended to use from the search of petitioner’s cell phone. Counsel correctly predicted the state was going to show a record of phone calls between petitioner and the victim’s phone that were in close proximity to the crime. He requested that the judge reconsider his ruling. The judge said he was not changing his ruling: “I have wrestled with that a little bit, Mr. Johnston.” The judge and Johnston had a further discussion of Riley v. California, and Johnston argued that the holding in Riley v. California did not “hang on whether or not the person had been arrested.” R. 53, l. – 54, l. 11. The judge refused to alter his ruling denying suppression.

Trial evidence

The state’s first witness was the victim’s mother, Deborah Hall. Her son, Travis Hall, was thirty-four years old when he was shot on February 25, 2013 at the Taco Bell. R. 58, l. 18 – 59, l. 23.

Ms. Hall testified her son came by her house for twenty to twenty-five minutes prior to the incident, and “he kept receiving several phone calls *from the same person*.” (emphasis added). Ms. Hall said she overheard her son talking about picking up his daughter near Highway 29. Highway 29 was near the Taco Bell. Ms. Hall said the next thing she heard from her son was when “I got a phone call that he had got shot in the head from the sheriff’s department.” R. 59, l. 15 – 61, l. 24.

Ms. Hall testified her son spent a couple of months in the hospital after the shooting. R. 61, l. 7 – 63, l. 20. Ms. Hall then identified photographs showing the damage to her son’s Impala. R. 64, l. 1 – 65, l. 21.

Deputy John Hudson to the crime scene off Highway 29 at the Taco Bell. He remembered several people standing around the victim's automobile. R. 68, l. 2 – 70, l. 16.

Hudson recalled the victim had been shot, and he was leaning out of the vehicle "and the seatbelt was supporting his weight." Hudson opined the victim was attempting to get out of the front driver's seat, but the seatbelt was holding him inside. R. 73, l. 5 – 75, l. 16.

Tim Tullock worked for an air conditioning and refrigeration company. He was at the Taco Bell on the day of the shooting, February 25, 2013. R. 80, l. 22 – 82, l. 4.

Tullock was doing paperwork in his van when he heard "some popping sounds." He saw a man "hanging out of the car," and proceeded to walk across the parking lot "to see if he could help him out." Tullock remembered that a "white Chrysler 300 with some rather large rims tore out" of the parking lot "squealing its tires at the same time." R. 82, l. 23 – 84, l. 21.

Marilyn Arthur was a fingerprint identification expert. She testified that Tevin Thomas, a future state's witness, left behind ten fingerprints on the victim's automobile. R. 117, l. 17 – 119, l. 18. None of petitioner's fingerprints were found on the victim's automobile. R. 127, ll. 9-14.

Tevin Thomas' fingerprints were also located on the white Chrysler that Tullock apparently identified as the car quickly leaving the Taco Bell parking lot. Petitioner's fingerprints were found on the Chrysler as well. R. 129, l. 12 – 130, l. 11.

Thomas later testified as a state's witness that Reginald Sanders, Thomas, and petitioner planned to rob the victim during a drug deal. Thomas claimed when Sanders did not show up that he went with petitioner to meet the victim at the Taco Bell without Sanders. Thomas said petitioner parked his car "side by side" with the victim's car. Thomas maintained it was petitioner who got out of his car, and got into the victim's car. Thomas claimed he saw petitioner and the victim get into a struggle with the victim. Thomas said petitioner and the victim were "on top of each other"

when he heard a shot. R. 196, l. 4 – 207, l. 20. Thomas claimed petitioner admitted he shot the victim as he fought with him inside the victim's car.¹ R. 207, l. 16 – 208, l. 11.

Eyewitness Barnes

The defense called eyewitness Chris Barnes during petitioner's trial. Barnes was going through the drive through at the time of the Taco Bell shooting. R. 242, l. 19 – 245, l. 22. Barnes testified he saw the victim's car "rocking back and forth. I was thinking like, what's going on in that car because it was swinging around, and then I heard a pop, and then I saw somebody slumped over and blood like squirting." Barnes saw a man get out of the passenger side of the victim's car, and jump into "another car." R. 245, l. 19 – 246, l. 8.

The description Barnes gave of the man getting out of the victim's car after the shooting matched Thomas, and not petitioner. That is true because Barnes described the black male quickly leaving the car as wearing a dark colored sweatshirt and a dark colored toboggan, and not red clothing. This was significant because Thomas was captured on a Hot Spot convenience store videotape shortly after the shooting wearing dark colored clothing, and a toboggan. Petitioner, on that same videotape, was wearing red clothing. R. 172, l. 1 – 174, l. 17.

The solicitor was left to argue in closing that he did not think Barnes had a good view of the victim's car. The solicitor essentially argued that Barnes misidentified Thomas as the man in getting out of victim's car at the time of the shooting, and maintained Barnes saw Thomas get out of the other car consistent with what state's witness Thomas said. R. 301, ll. 6-19.

¹ This Court can take judicial notice from the Department of Corrections Inmate Locator Information Service Website of the fact that Thomas was also serving sentences for burglary in the second degree, and he apparently received a ten year sentence for attempted armed robbery in this case. He is scheduled to be released in a little over three years on August 26, 2021.

Cell phones

Robert Talanges was with the forensic department of the Spartanburg County Sheriff's Department. He opined, from the broken glass, that the shots were fired from inside the victim's car "out" that day. There was also a powder burn on the seat. The victim had "a fully loaded gun" inside his car -- with a full magazine with sixteen rounds in it. Talanges opined the victim did not shoot his gun. R. 94, l. 21 – 96, l. 10.

Talanges found three cell phones inside the victim's car. He acknowledged he could not tell from looking at them who owned these cell phones. R. 100, l. 11 – 103, l. 20. Finally, according to Talanges, the gun which fired the shot that hit the victim in the head, and injured him, was never found. R. 106, ll. 11-13.

Forensic cell phone evidence

Forensic analyst Lindsey McGraw testified three cell phones were recovered from the victim's car, and he tried to identify the owners of the cell phones. R. 136, l. 11 – 137, l. 5. McGraw testified that his examination of the SIM card on the AT&T flip phone revealed the phone number was 864-494-2573. He identified the phone numbers from the other two cell phones as well. R. 137, l. 1 – 138, l. 13.

During his investigation, McGraw said he was able to "pull phone calls off of the cell phone log" and he "took pictures of them" with his digital camera. He testified *five calls were made from petitioner's phone to the victim's phone on the day of the shooting*. R. 138, l. 24 – 142, l. 7. (emphasis added).

Closing arguments

In closing, defense counsel Johnston reminded the jury how many times Tevin Thomas had lied to the police to gain an advantage for himself. He told the jury as a strategic matter the

prosecution decided to charge petitioner as a participant in the shooting rather than as an accessory after the fact which petitioner actually was. R. 273, l. 8 – 277, l. 22. Johnston reminded the jury that Barnes was a neutral witness, with nothing to gain or lose, and that he observed a man dressed exactly like Tevin Thomas and not like petitioner get out of the victim’s automobile immediately after the shooting. R. 280, l. 16 – 283, l. 16.

The solicitor argued to the jury that the forensic evidence traced the cell phone found in the victim’s car to petitioner. The forensic cell phone evidence showed petitioner called the victim five times on the day of the incident. R. 288, l. 21 – 289, l. 14.

When the police went looking for petitioner after removing the information from his cell phone, the solicitor told the jury petitioner could not be found for eleven days before he “conveniently turned himself in.” R. 287, l. 18 – 288, l. 20. The solicitor said Tevin Thomas conversely was found the day after the shooting. R. 288, ll. 15-20.

Court of Appeals

There were three distinct opinions in the Court of Appeals.

Judge McDonald authored the “lead” opinion. She found the initial search of petitioner’s phone did not violate the Fourth Amendment. In doing so she acknowledged “the police removed the phone’s SIM card and processed it . . .” App. 6. Judge McDonald stated she agreed obtaining a warrant before the search was the “best policy” but found a warrant was not required for the first search of petitioner’s phone. She finally found, for a different reason than Judge Lockemy, that “inevitable discovery” was applicable as an additional sustaining ground. Judge McDonald ruled that a search of the victim’s phone would have led to the discovery of the five phone calls between petitioner and the decedent before their alleged meeting at the Taco Bell. She reasoned that petitioner had no expectation of privacy in the victim’s phone. App. 8 – 9.

It was during the first warrantless search, however, that the police discovered that this was petitioner's phone which allowed it to link his phone to the victim's phone.

Chief Judge Lockemy found the first search without a warrant violated petitioner's constitutional rights. App. 11. **Judge Konduros** agreed the first warrantless search violated petitioner's Fourth Amendment rights, *and* that she would reverse and remand for a new trial. App. 13. However, **Judge Lockemy**, for a different reason than **Judge McDonald**, found the evidence would be "inevitably found pursuant to a valid search warrant, regardless of the initially unlawful search." App. 12 – 13.,

Judge Lockemy reasoned:

I recognize police included information gleaned from the warrantless search in their warrant affidavit. In State v. Spears, this court faced a similar issue regarding illegally obtained information used in a warrant. 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). The court excised the offending information from the warrant affidavit, and analyzed the remaining portions of the affidavit to determine if probable cause still existed to support the magistrate's decision to issue the warrant. Id. at 483, 713 S.E.2d at 333.

Here, I would find any information about the owner of the phone should be removed from the warrant affidavit and the remaining language should be considered under our test for probable cause. The affidavit would thus read:

On 2/25/2013 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriff's Office responded to 7680 Warren H. Abernathy Hwy. In reference to a shooting. Upon arrival they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle and AT&T ZTE Model Z331 cell phone serial number [Redacted] was found inside the Victim's vehicle. This search warrant is needed for the furtherance of this investigation to obtain information from the phone that can either implicate, or clear any individual from any involvement in this incident.

I agree with the lead opinion that this warrant affidavit would support a finding of probable cause. See State v. Dunbar, 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004) ("The task of

the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.”). Accordingly, I would find the evidence would have been inevitably found pursuant to the valid search warrant, regardless of the initially unlawful search. App 12 – 13.

Discussion

It was undisputed in this case that the forensics personnel searched petitioner’s cell phone without a warrant. It is also undisputed that the information they obtained from this warrantless search allowed them to trace the telephone to petitioner. The state used this information from the illegal warrantless search to obtain a search warrant that led to the discovery of inculpatory evidence linking petitioner to the decedent. Removing the offending information obtained during the warrantless search from the search warrant affidavit, and then finding the “mythical affidavit” sufficient is an improper application of the “inevitable discovery” doctrine, and for that reason alone this Court should reverse.

Further, Judge McDonald respectfully erred in her application of the “inevitable discovery” doctrine as well. She determined that the police would have found out the link to petitioner’s phone (the phone exchanges around the time of the robbery) by searching the victim’s phone and that petitioner had no right to complain about information she assumed would be found by search of the victim’s phone. This is speculative, and not a proper application of the “inevitable discovery” doctrine.

Moreover, State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct.App. 2011) relied upon in Judge Lockemy’s inevitable discovery analysis was a case littered with procedural appellate briefing problems wherein the Court of Appeals found that “the evidence recovered from 140

Charlotte Circle was admissible under the inevitable discovery doctrine as the evidence would have been found subject to the valid search warrant, regardless of whether Bantan was coerced to give consent during the initial search.” State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct.App. 2011). The reliance on the information found in the warrantless search of petitioner’s cell phone here was too great to rely on the “redaction” principle discussed in Spears. Here, the information used from the warrantless search to obtain the search warrant was inextricably entwined with obtaining the search warrant, and the application of the inevitable discovery doctrine here being grounded in Spears was respectfully improper.

The Court of Appeals did correctly assume that petitioner did not abandon his phone. Law enforcement had no way of knowing when petitioner’s cell phone was unintentionally left in the victim’s vehicle. For all the police knew, petitioner may have ridden with the victim on other occasions, and there was an innocent explanation for the cell phone being forgotten and left behind. Common sense dictated that petitioner did not intentionally relinquish control of his cell phone in this case.

The state used the evidence procured from the search warrant to trace calls from the petitioner’s cell phone to the victim’s cell phone. The phone calls allegedly showed petitioner and the victim were communicating at a critically inculpatory time on the day of the shooting. The solicitor argued that five calls were made to the victim by petitioner that day, and Tevin Thomas was found the day after the shooting, and that petitioner was not located for eleven days until “he conveniently turned himself in.”

Searches without a warrant are *pre se* unreasonable under the Fourth Amendment unless some exception applies. Katz v. United States, 389 U.S. 347, 357 (1967). It should be apparent that

the abandonment exception does not apply here given the testimony of the state's own witness in this case. The judge erred by finding the cell phone was abandoned. See State v. Dupree, supra.

In Riley v. California, 134 S.Ct. 2473 (2014), the United States Supreme Court eloquently explained how a citizen's cell phone is a storage facility for nearly every aspect of his or her life – from the mundane to the intimate. Riley v. California, 134 S.Ct at 2490. The “historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a specific building.” Id. at 2490 (*citing* United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 955 (2012) (Sotomayer, J., concurring)).

Defense counsel correctly argued that the fact the cell phone in Riley was seized incident to arrest was not a distinguishing factor from this case. In fact, it seems intuitive from the case law that a person has a much less expectation of privacy in what is removed from his person incident to arrest than he or she does in a mistakenly left behind cell phone.

Law enforcement knows very well that a search of cell phone may lead to suspicion or probable cause that the owner of the cell phone is, or has been, engaged in criminal activity, or other wrongdoing. Further, intimate information, details, and photographs contained on a citizen's cell phone also raise considerable privacy considerations.

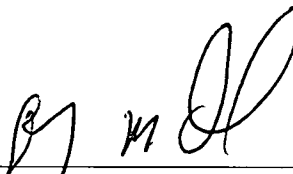
Law enforcement in this case should have obtained a search warrant before it forensically searched petitioner's cell phone. Defense counsel correctly argued petitioner had an expectation of privacy in his cell phone. Although the state had the burden of justifying the search of petitioner's cell phone, they *incredibly* maintained they did not even know if the cell phone was “password protected.”

Because illegally procured information from the warrantless search was used to obtain the search warrant the fruits of the search warrant also had to be suppressed. See, Wong Sun v. United States, 371 U.S. 471 (1963). It was simply unreasonable for the police here not to obtain a search warrant for the contents of the cell phone once it was safely in their possession. See United States v. Chadwick, 433 U.S. 1 (1977)² See, also, State v. Brown, 400 S.C. 82, 91, 736 S.E.2d 263, 267 (2012). All of the evidence procured from the warrantless illegal search, and then from the search warrant in this case, should have been suppressed as the fruit of the poisonous tree. See, Wong Sun v. United States, 371 U.S. 471 (1963). Because of the improper application of the inevitable discovery doctrine by one or two Judges on the Court of Appeals petitioner's conviction should be reversed and this case remanded for a new trial as urged by the dissenting Judge Konduros.

² Overruled on other grounds. California v. Acevedo, 500 U.S. 565 (1991).

CONCLUSION

By reason of the foregoing argument, petitioner's conviction should be reversed, and this case remanded to the Spartanburg County Court of General Sessions for a new trial.

A handwritten signature in black ink, appearing to read 'R M Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

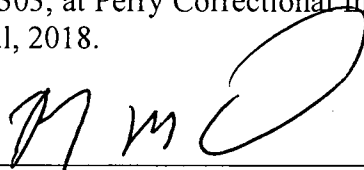
V.

ROBERT LEE MOORE,

PETITIONER

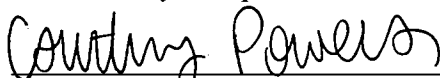
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Robert Lee Moore, #320303, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 25th day of April, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 25th day of April, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. R. Keith Kelly, Circuit Court Judge
Appellate Case Tracking No. 2017-002479

RECEIVED

MAY 16 2018

S.C. SUPREME COURT

The State,

Respondent,

v.

Robert Lee Moore,

Petitioner.

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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STATEMENT OF ISSUES ON CERTIORARI

- I. The trial court properly refused to suppress evidence found during the search of a cell phone Appellant abandoned at the scene of the crime. The search was not an unreasonable search in violation of the Fourth Amendment. Additionally, Appellant relinquished any expectation of privacy in the phone by abandoning it inside the victim's vehicle and failing to make any effort to retrieve the phone. Even if the search was in violation of the Fourth Amendment, the evidence should not have been suppressed because it would have inevitably been discovered either through the victim's cell phone records or through the subsequently obtained search warrant.

STATEMENT OF THE CASE

Procedural History

The State agrees with Petitioner's procedural statement of the case.

Factual Background

On February 25, Deputy Hudson responded to a call that shots had been fired at a Taco Bell in Spartanburg. When he arrived, he saw the victim, shot in the left side of the head, hanging out of the victim's vehicle, and hung up in the seatbelt. (T.115; R.73). The victim was barely breathing. EMS arrived to render aid and transport the victim. (T.116-117; R.74-75).

During the suppression hearing and at trial, officers explained three cell phones were located in the victim's vehicle. No one came forward to claim any of the cell phones. (T.36; R. 28). Investigator McGraw was asked to examine the phones to determine ownership. He did not initially examine the contents of the phone such as text messages and call logs. Instead, he examined the SIM card, which provided him merely a phone number for the phone. (T.19-20; R. 11-12).¹ The phone number was then run through the Sheriff's Department's database and was connected to Appellant. (T.20; 37; R. 12; 29). Appellant presented no evidence he intended to come forward and claim the cell phone as his prior to the suppression hearing. Further, the only evidence presented at trial was the phone number and the phone's connection to Appellant. None of the contents, such as text messages or images, were presented at trial.

¹ The cell phone ultimately connected to Appellant was not password protected. (T.37-38; R. 29-30).

STANDARD OF REVIEW

“On review of a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling and will reverse only when there is clear error.” State v. Bruce, 412 S.C. 504, 509, 772 S.E.2d 753, 755 (2015) (citing State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011)); see also, State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004) (same). ““On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error.”” State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (quoting State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010)). “The ‘clear error’ standard means that an appellate court will not reverse a trial court’s finding of fact simply because it would have decided the case differently.” State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (quoting State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)). “[A]ppellate courts must affirm if there is any evidence to support the trial court’s ruling.” Id. “On appeals from a motion to suppress based on Fourth Amendment grounds, this Court reviews questions of law *de novo*.” State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017) (quoting Adams, 409 S.C. at 647, 763 S.E.2d at 344).

ARGUMENT

- I. The trial court properly refused to suppress evidence found during the search of a cell phone Appellant abandoned at the scene of the crime. The search was not an unreasonable search in violation of the Fourth Amendment. Additionally, Appellant relinquished any expectation of privacy in the phone by abandoning it inside the victim's vehicle and failing to make any effort to retrieve the phone. Even if the search was in violation of the Fourth Amendment, the evidence should not have been suppressed because it would have inevitably been discovered either through the victim's cell phone records or through the subsequently obtained search warrant.

The trial court correctly denied the motion to suppress because there was no violation of the Fourth Amendment. First, the search was entirely reasonable because the officers were merely attempting to locate the owner of property found at a crime scene. Second, the property was abandoned and Appellant no longer retained an expectation of privacy in the property so the officers did not need a warrant to examine the cell phone for its phone number. Third, the only information obtained through the search and presented at trial was the ownership of the phone and this information would have been easily obtained through the independent source of the victim's phone as well as inevitably discovered pursuant to a valid search warrant. Accordingly, this Court should affirm the decision of the circuit court denying the motion to suppress and affirm Appellant's conviction and sentence.²

"The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV (emphasis added). This guarantee protects against unreasonable searches and seizures. "The touchstone of

² Initially, it is important to note this Court held oral argument in State v. Lamar Brown on March 28, 2018. Appellate Case Number 2015-002360. The issue in Brown is remarkably similar to the issue in the instant case and this Court's holding in Brown is likely to significantly impact the holding in this case even if it is not determinative of the outcome of this case.

the Fourth Amendment is **reasonableness.**” Florida v. Jimeno, 500 U.S. 248, 250 (1991) (emphasis added).

When moving to suppress evidence on the basis of an alleged unreasonable search, the defendant has the burden of showing a legitimate expectation of privacy in the area searched. See United States v. Risher, 966 F.2d 868 (4th Cir. 1992); see also Rawlings v. Kentucky, 448 U.S. 98 (1980) (declaring a legitimate expectation of privacy is necessary to trigger Fourth Amendment protections); State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) (stating defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate his “own rights” have been violated by showing he has a legitimate expectation of privacy in connection with the searched premises in order to challenge the search). “Since Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the touchstone of [Fourth] Amendment analysis has been the question whether a person has a ‘constitutionally protected reasonable expectation of privacy.’” Oliver v. United States, 466 U.S. 170, 177 (1984) (quoting Katz, 389 U.S. at 360 (Harlan, J., concurring)).

Thus,

in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has “a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”

Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Rakas v. Illinois, 439 U.S. 128, 143–44 n. 12 (1978)).

Reasonable Search

Initially, the search of the phone's SIM card to determine ownership of the phone was entirely reasonable and not a violation of the Fourth Amendment. In Riley v. California, the United States Supreme Court reiterated: "As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " Riley v. California, 134 S. Ct. 2473, 2482 (2014) (citing Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006)). The Court explained: "Our cases have determined that '[w]here a search is undertaken by law enforcement officials to **discover evidence of criminal wrongdoing**, . . . reasonableness **generally** requires the obtaining of a judicial warrant.'" Id. (emphasis added) (citing Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)). As the Court in Acton explained: "But a **warrant is not required to establish the reasonableness of all government searches**; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either." Acton, 515 U.S. at 653 (emphasis added).

"When containers have been turned over to the police, an officer 'may validly search lost property to the extent necessary for identification purposes.'" United States v. Wilson, 984 F. Supp. 2d 676, 683 (E.D. Ky. 2013) (quoting State v. Ching, 678 P.2d 1088, 1093 (Haw. 1984). In Wilson, officers searched a suitcase containing the personal effects and electronics of the defendant in order to identify ownership. Id. at 681. The district court found officers acted reasonably in searching a suitcase for identification of the owner when the suitcase was found in the woods and turned over to them. Id. at 683.

Very recently, the Ohio Supreme Court considered the reasonableness of searching unattended book bags on a school bus. The Court found even if someone retained an expectation

of privacy in a lost item, that expectation was “diminished to the extent that the finder may examine the contents of that item as necessary to determine the rightful owner.” State v. Polk, 78 N.E.3d 834, 843 (Ohio 2017) (citing State v. Hamilton, 2003 MT 71, 314 Mont. 507, 67 P.3d 871; accord Ching at 110, 678 P.2d 1088; State v. Kealey, 80 Wash. App. 162, 173, 907 P.2d 319 (1995)); see also, U.S. v. Sumlin, 909 F.2d 1218, 1220 (8th Cir.1990) (holding officer’s search of defendant’s stolen property for the purpose of identifying ownership was a “legitimate governmental interest” that outweighed defendant’s reasonable expectation of privacy in that property); Chrispen v. Sec’y, Florida Dep’t of Corr., 246 F. App’x 599, 602 (11th Cir. 2007) (finding either briefcase left on trunk of third-party’s automobile was abandoned or the search by officers of the briefcase “constituted a reasonable inventory-like administrative search conducted for the purpose of identifying the seemingly abandoned briefcase’s owner”); Wayne R. LaFave, 3 Search & Seizure § 5.5(d) (5th ed.) (2016 Supp.) (“Similarly, there is authority that police may inventory effects which they find apparently abandoned or which are turned over to them by persons who found them or who by mistake took or received possession of them. Even if such full inventory authority is not granted, courts recognize a police obligation to undertake to find the owner of property they find or which a finder turns over to them, and on this basis an examination of contents is permissible but only to the extent needed to discover the owner’s identification.”) (footnotes omitted).

As the California Court of Appeals, First District, explained in an analogous situation in which the Court found no Fourth Amendment violation in searching a jacket for identification:

An individual who places a jacket at an empty table in a restaurant must reasonably expect that the coat will be touched or handled by either an employee or by a member of the public who wishes to clean up or sit at the table. Indeed, an individual who leaves behind an article of clothing at a public place most likely hopes that some

Good Samaritan will pick up the garment and search for identification in order to return it to the rightful owner.

People v. Juan, 175 Cal. App. 3d 1064, 1069, 221 Cal. Rptr. 338 (Ct. App. 1985). The same consideration would apply to a cell phone left behind in someone's vehicle.

Investigator McGraw did not initially examine the contents of the phone such as text messages and call logs. Instead, he examined the SIM card and obtained merely a phone number for the phone to determine ownership. (T.19-20; R. 11-12). The phone number was then run through an internal Sheriff's Department database to determine if it belonged to the victim or someone else—a process which was entirely reasonable given the phone was found in the victim's car. (T.20; 37; R. 12; 29). This process would have been required in order to even verify whether the phone belonged to the victim, who was known to have multiple phones. (T.27; R.19). The fact the phone number connected to Appellant and not the victim does not alter the reasonableness of the initial intrusion into the phone. The mere obtaining of the cell phone number from the SIM card in order to verify whether the phone belonged to the owner of the vehicle in which it was found did not implicate the Fourth Amendment because it was not an unreasonable search, nor one requiring a warrant.

Investigator McGraw indicated his sole intention was to determine ownership of the phone and set about in the least intrusive means of establishing ownership by trying to find contacts which would lead him to the owner's information. (T.10; R.18). It is difficult to imagine how police would obtain owner information from an unidentified cell phone in a less intrusive way than what occurred here. Most phones do not have their numbers emblazoned across the front of the phone; therefore, some investigation was necessary to determine the identity of the owner. Finding the identity of the owner of a lost item, whether a wallet, a briefcase, or a cell phone should be a reasonable endeavor by law enforcement. Anyone that has lost an item would

hope that a Good Samaritan or law enforcement would undertake to find its rightful owner so that it can be returned. The determination of whether the search is reasonable should not be different because the person who lost the item is a criminal hoping not to be found instead of an average citizen hoping for the return of the lost item. The investigation undertaken by Investigator McGraw was entirely reasonable and not in violation of the Fourth Amendment.

Abandonment

Additionally, the phone in the instant case was abandoned and so Appellant did not retain any expectation of privacy in the phone. Consistent with Katz, the United States Supreme Court has uniformly held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a reasonable expectation of privacy that has been invaded by government action. U.S. v. Knotts, 460 U.S. 276 (1983), citing Smith v. Maryland, 442 U.S. 735 (1979). The reasonable expectation of privacy inquiry involves two discrete questions: First, whether the individual, by his conduct, has “exhibited an actual (subjective) expectation of privacy.” Knotts at 281 (citations omitted). Second, whether the individual’s expectation, viewed objectively, is one society is prepared to recognize as reasonable under the circumstances. Id.

It is the “basic rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’” Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting Katz, 389 U.S. at 357). As this Court has explained:

The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. “Exclusion is ‘not a personal constitutional

right,’ nor is it designed to ‘redress the injury’ occasioned by an unconstitutional search.’ ” “The rule’s sole purpose, [the Supreme Court] has repeatedly held, is to deter future Fourth Amendment violations.” Because “[e]xclusion exacts a heavy toll on both the judicial system and society at large,” the Court has stated “the deterrence benefits of suppression must outweigh its heavy costs” for the exclusion to be deemed appropriate.

State v. Brown, 401 S.C. 82, 88–89, 736 S.E.2d 263, 266 (2012) (citing and quoting Davis v. United States, 564 U.S. 229 (2011)).

However, because the ultimate touchstone of the Fourth Amendment is “reasonableness,” the warrant requirement is subject to certain exceptions. State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009). This Court has “recognized the doctrine of abandonment as an exception to the Fourth Amendment warrant requirement.” State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing Fernandez v. State, 306 S.C. 264, 411 S.E.2d 426 (1991)).

“Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment.” State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing California v. Greenwood, 486 U.S. 35 (1988)). “When a person voluntarily abandons his privacy interest in property, his subjective expectation of privacy becomes unreasonable, and he is precluded from seeking to suppress evidence seized from it.” United States v. Stevenson, 396 F.3d 538, 546 (4th Cir. 2005) (citing United States v. Leshuk, 65 F.3d 1105, 1111 (4th Cir.1995)); see also Abel v. United States, 362 U.S. 217, 241 (1960) (“There can be nothing unlawful in the Government’s appropriation of ... abandoned property”). “Abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent.” Friedman v. United States, 347 F.2d 697, 704 (8th Cir.1965). “Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered.” United States v. Hoey, 983 F.2d 890, 892 (8th Cir. 1993).

“Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. All relevant circumstances existing at the time of the alleged abandonment should be considered.” United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973).

“[T]he proper test for abandonment is not whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the [property] alleged to be abandoned.” United States v. Haynie, 637 F.2d 227, 237 (4th Cir.1980) (internal quotation marks and citation omitted). This Court thoroughly explained the determination of abandoned property, indicating a very clear distinction between abandoned property in a property-law sense and abandoned property in a Fourth Amendment sense:

The distinction between abandonment in the property-law sense and abandonment in the constitutional sense is critical to a proper analysis of the issue. In the law of property, the question . . . is whether owner has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest.... In the law of search and seizure, however, the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein.

Where the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for the purpose of search and seizure.

Dupree, 319 S.C. at 457, 462 S.E.2d at 281 (quoting City of St. Paul v. Vaughn, 237 N.W.2d 365, 370–71 (1975)). This Court also made it clear: “Even though Dupree abandoned the drugs in response to police action, when the actions of the police are lawful the abandoned property is not protected by the Fourth Amendment.” Dupree, 319 S.C. at 460, 462 S.E.2d at 283.

The distinction set forth in Dupree between property rights and expectation of privacy rights is critical in this case where Appellant's sole argument regarding whether he abandoned the cell phone is that he "forgot it" or "inadvertently" left it behind—as he fled a crime scene. His argument, if believed in full, could be fruitful in the "property-law sense" because he did not voluntarily abandon his interest in the property, such that the police who found it could claim a greater possessory interest. Appellant did abandon his expectation of privacy interest in the cell phone by leaving it at a crime scene and not seeking to reclaim the phone. He did nothing to further protect his expectation of privacy by claiming the phone at the scene, or calling the phone to determine if it had been discovered.

During the suppression hearing and at trial, officers explained three cell phones were located in the victim's vehicle. No one came forward to claim any of the cell phones. (T.36; R. 28). The cell phone ultimately connected to Appellant was not password protected. (T.37-38; R. 29-30). Appellant presented no evidence he intended to come forward and claim the cell phone as his prior to the suppression hearing. As a result, the officers reasonably and objectively believed the cell phone to be abandoned, and the Fourth Amendment did not require a warrant to conduct a search of the phone.

Appellant's actions clearly exemplify an intent to abandon his expectation of privacy in the phone. His actions are those of someone who does not care who finds the phone, or what they do with the phone; otherwise he would have taken some action to retrieve the cell phone. As far as Petitioner was concerned, especially as expressed by his actions, the cell phone was "*bona vacantia*." See Abel, 362 U.S. at 241. As the trial court found, this case squarely fits within the definition of abandonment of a reasonable expectation of privacy as provided by Dupree and Petitioner cannot now claim any protection under the Fourth Amendment. [R. 89.]. See also,

United States v. Sanders, 130 F.3d 1316, 1318 (8th Cir. 1997) (“The Fourth Amendment only protects privacy. It does not immunize people who, finding themselves in a compromising situation, voluntarily trade their interest in privacy for a chance to escape incrimination, no matter how unwise the decision may seem in retrospect.”).

It is entirely unreasonable for someone to discard a cell phone and not expect the person who finds it to go through the content of the phone, whether that person is an individual just looking to see who owns the phone, someone looking to see if there are pictures or other information on the phone which can be exploited for nefarious gain, or the police looking to determine the owner who left it in a shooting victim’s vehicle.

It is entirely unreasonable to believe the content of that phone will not be examined when you do nothing to turn off service to the phone or prevent the accessibility of the content. See e.g., United States v. Powell, 732 F.3d 361, 374 (5th Cir. 2013) (“As a consequence of her statements abandoning the cell phone, she lacks standing to challenge the admissibility of the phone and the records contained therein.”) (emphasis added).

Petitioner claims he retained his privacy interest in the digital content of the cell phone, and the United States Supreme Court case of Riley v. California, 134 S.Ct. 2473 (2014), should be read to hold his privacy right to the digital content cannot be abandoned because of its significant difference from other physical items, such as purses or suitcases. Petitioner ignores the key distinction between this case and Riley, which is the expectation of privacy and its continued assertion in a phone seized subject to an arrest, versus a phone which was entirely abandoned with actions demonstrating no intent of reclaiming the physical phone or any digital content contained on it.

In Riley, the United States Supreme Court discussed the significant privacy interests associated with today's cell phones. The Court explained cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." Riley, 134 S. Ct. at 2484. The Court explained the difference between a physical object and what it can carry versus a cell phone and the vast digital data it contains: "many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." Id. at 2489.

However, Riley does not establish special rules or exceptions to the exceptions for cell phones. Instead it recognized that the privacy concerns of cell phones were analyzed under the already existing framework for Fourth Amendment analysis and no need for special consideration was present. Riley analyzed a search of a cell phone incident to an arrest under the same balancing test used to originally establish the exception. It considered the two prong basis for the exception: law enforcement's need for officer safety and the preservation of evidence. The Court found neither factor justified the invasion of privacy present in a search incident to arrest. The Court specifically stated: "Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." Id. at 2485. The Court concluded other possible exceptions could still apply to better serve officer safety under a specific set of circumstances:

Accordingly, the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board. To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances.

Id. at 2486.

The Court then went on to examine the second prong, the need to preserve evidence. The Court recognized the need to seize the phones in order to prevent the arrestee from being able to destroy any evidence on the phone. However, the Court found: “once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.” Id. Again, the Court indicated other exceptions may be considered in preventing data loss under certain circumstances:

If “the police are truly confronted with a ‘now or never’ situation,”—for example, circumstances suggesting that a defendant’s phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately. Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone’s automatic-lock feature in order to prevent the phone from locking and encrypting data. Such a preventive measure could be analyzed under the principles set forth in our decision in McArthur, 531 U.S. 326, 121 S.Ct. 946, which approved officers’ reasonable steps to secure a scene to preserve evidence while they awaited a warrant.

Id. at 2487-2488.

Notwithstanding the extensive discussion of the search incident to arrest and the privacy concerns implicated in the search of the data of a cell phone, the Court specifically recognized: “Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is **generally** required before such a search” Id. at 2493 (emphasis added). The Court articulated: “Moreover, even though the search incident to arrest exception does not apply to cell phones, **other case-specific exceptions may still justify a warrantless search of a particular phone.**” Id. at 2494 (emphasis added).

One such exception should be the abandonment exception. Unlike in the case of a cell phone in a person’s pocket in which the person still maintains a clear expectation of privacy,

even upon arrest, abandonment of a cell phone evidences no expectation of privacy. As discussed above, the person discarding a cell phone—whether by throwing it away or by failing to make any attempt to find and recover it—has expressed a lack of an expectation of privacy which clearly distinguishes the analysis from that of the search incident to arrest. As the Supreme Court of Washington explained in a case very similar to the one at hand and decided after Riley:

Neither Riley nor Hinton [a case involving Washington’s invasion of private affairs provision of the state’s constitution] can be read for the proposition that the abandonment doctrine should not apply to cell phones or should be limited in its application to cell phones. The Riley holding that cell phones may not be searched incident to arrest without a warrant was based on the fact that such cell phone searches do not fall into the particular justifications for the search incident to arrest exception. . . . But in this case and for the abandonment doctrine, there has been no advancement in technology to cause one to abandon property in stolen vehicles while attempting to flee from police [or in this case abandon a cell phone in an apartment the person just burglarized]. Moreover, the rationale driving the abandonment doctrine fits cell phone searches. When an individual voluntarily abandons an item, not as a facet of modern communication but to elude the police, that individual voluntarily exposes that item—and all information that it may contain—to anyone who may come across it. Cell phones are no different in this respect than for any other item; the abandonment doctrine applies to all personal property equally.

State v. Samalia, 375 P.3d 1082, 1089 (2016).

The case of People v. Schutter, 249 P.3d 1123 (Colo. 2011), is also instructive. The facts of Schutter demonstrate the extensive difference between a case in which someone has clearly not abandoned their expectation of privacy in a phone and this case where all of Petitioner’s actions demonstrate a clear lack of assertion of his rights. In Schutter, the defendant left their phone in a restroom of a store. The defendant, upon realizing it was left, made an immediate demand for its return, which was denied by the clerk because he was too busy to unlock the restroom. Schutter, 249 P.3d at 1126. The defendant was told he would have to come back later

to retrieve the phone. Prior to the defendant's return, and officer entered the store and was given the phone. As the Court explained:

Whether or not he knew the defendant's name, Officer Burg was aware from the moment the iPhone came into his possession that the defendant inadvertently left it in the store's locked restroom and knew precisely where it was; that his immediate demand for its return had been refused by the store clerk, who controlled access to the restroom; and that he left the area only when he was told by the clerk that he would have to come back later to retrieve his phone.

According to Officer Burg's own undisputed testimony, the store clerk told him all of this when he handed over the phone. Officer Burg also testified that it was 4:20 in the morning, and at that time, the defendant had been gone from the store for at most an hour. Under these circumstances, the officer had no grounds to believe the property's safe return required the discovery of any further information.

Id. These facts are certainly distinguishable from the underlying facts in the case sub judice when Petitioner left his phone in the victim's vehicle at the scene of a shooting, fled the scene to evade capture and prosecution for the crime, never made an attempt to retrieve the phone, and did not secure the phone's privacy by turning off the phone with the carrier.

Schutter demonstrates that under a case by case analysis a person can leave a phone and still maintain their expectation of privacy by demonstrating a desire to reclaim the phone and protect the data on it. Petitioner on the other hand demonstrated no desire to maintain his expectation of privacy and should be found under Dupree to have voluntarily abandoned his expectation of privacy such that he cannot now have standing to seek to have the evidence found in the search of the phone suppressed. See e.g., Dupree, 319 S.C. at 457, 462 S.E.2d at 281 ("Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment."); Stevenson, 396 F.3d at 546 ("When a person voluntarily abandons his

privacy interest in property, his subjective expectation of privacy becomes unreasonable, and he is precluded from seeking to suppress evidence seized from it.”).

This case is much more similar to the case of United States v. Quashie, 162 F. Supp. 3d 135 (E.D.N.Y. 2016). The District Court explained the facts as follows:

During the course of the robbery that occurred on July 10, 2009, one of the robbers dropped a cellphone in the apartment where the robbery occurred. A robber attempted to recover the cellphone but was unable to reenter the apartment. A few hours later, the victim found a cellphone in his apartment and called the NYPD, which came and recovered it. The Government has stipulated that an employee of the NYPD went into the telephone and obtained the number without obtaining a warrant. Using this phone number, the police were able to determine that the phone belonged to defendant.

Id. at 140. The Court found: “If defendant’s phone was simply abandoned by him at the apartment where the robbery occurred, he has clearly relinquished his expectation of privacy in the property.” Id. at 141. The Court further concluded:

By leaving the phone behind in the apartment, the robbers did not protect the property and did not evince an intent to maintain an expectation of privacy in it. Even if the robbers did not intentionally abandon the phone when they first left the apartment, they returned to the scene of the crime to retrieve it, and found the door locked. At that point, the robbers voluntarily abandoned the phone and left the crime scene, rather than risk getting caught.

Id. The behavior of the robber in Quashie evidenced an even greater desire to protect his privacy interest than Petitioner because he went back for the phone one time. Petitioner never made an attempt to recover the phone after leaving it in the victim’s vehicle. The District Court also analyzed the impact of Riley on the determination of whether the phone was abandoned. The Court issued a well-reasoned conclusion:

[Riley] outlines the standard to be applied to a search of a cellphone incident to arrest. It has nothing to do with an abandoned cellphone or even a stolen cellphone. Although Riley includes

language about the vast amount of information contained on cellphones and how the expectations of privacy in the contents of a phone have shifted, any objective expectation of privacy in a cellphone must go hand-in-hand with an individual's demonstration of a subjective expectation of privacy. Whether it was defendant or the robbers who left the phone in the victim's apartment, they gave up that subjective expectation of privacy.

Id. at 141-42. Just as the District Court found, this Court should conclude that by abandoning his expectation of privacy, any analysis under Riley is inapplicable to Petitioner's case.

Another remarkably similar case recently was considered by the Eighth Circuit Court of Appeals. See United States v. Crumble, 878 F.3d 656 (8th Cir. 2018). Just a couple months ago, the Court considered the application of Riley to an abandoned cell phone. First, they determined whether the facts supported the conclusion the phone had been abandoned:

It is well-established that a defendant does not have a reasonable expectation of privacy in abandoned property. Thus, if Crumble abandoned the cell phone, he forfeited his expectation of privacy and cannot raise a Fourth Amendment challenge to the subsequent search.

....

After the crash, Crumble fled the scene, leaving the Buick wrecked on a stranger's lawn. The Buick's key was in the ignition and its back window was shot out—allowing for easy access to the vehicle and its contents—which included a gun on the floorboard and the cell phone on the driver's seat. Crumble claims he was not fleeing from police, but rather attempting to get away from the shooter in the other vehicle. Abandonment, however, does not turn on Crumble's subjective intent, but rather “the objective facts available to the investigating officers.”

Id. at 659–60 (Internal citations omitted). After finding the phone abandoned, the Court turned its attention to whether Riley required a warrant for an abandoned phone. The Court explained:

Crumble urges this Court to categorically deny application of the abandonment doctrine to cell phones. We decline to do so. Crumble points to Riley v. California, where the Supreme Court held that the search incident to arrest exception does not apply to

cell phone searches, in part because cell phones hold “the privacies of life.” However, Riley’s holding is limited to cell phones seized incident to arrest. Riley was explicit that “other case-specific exceptions may still justify a warrantless search of a particular phone.” Other courts have found abandonment to be one such exception.

Id. As a result, the Court found the phone abandoned and, therefore, it did not need to consider the validity of the warrant because no warrant was required.

This Court should find Petitioner voluntarily abandoned his cell phone and all of its contents when he left it inside the vehicle of the victim he shot, failed to make any attempt to reclaim the phone, and failed to take any steps to prevent access to the phone or its data. As a result, this Court should find he lacked the requisite expectation of privacy to be able to assert a claim for suppression of the evidence obtained through the warrantless search of the phone.

Independent Source/Inevitable Discovery

Even if this Court finds obtaining the phone number of the phone off the SIM card violated the Fourth Amendment, the Court of Appeals correctly determined the information would have inevitably been found. Any evidence seized as the result of an unreasonable search and seizure typically must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the United States Supreme Court held the exclusionary rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence. “The holding of Silverthorne was carefully limited, however, for the Court emphasized that such information does not automatically become ‘sacred and inaccessible.’” Nix v. Williams, 467 U.S. 431, 441 (1984) (citations omitted). The Court explained: “If knowledge of [such facts] is gained from an independent source, they may be proved like any others” Silverthorne, 251 U.S. at 392. The Court in Nix further explained: “The independent source doctrine allows

admission of evidence that has been discovered by means wholly independent of any constitutional violation.” Nix, 467 U.S. at 443; see also, State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) (finding “challenged evidence is admissible if it was obtained from a lawful source independent of the illegal conduct”).

The only evidence admitted from the search of Appellant’s phone was to establish Appellant’s ownership and the phone’s connection to the victim through the phone calls made directly before the shooting occurred. The officers had the victim’s phone in their possession. They had every right to search the victim’s phone as part of the investigation, and even if they did not, Appellant could not assert any violation of the right because he did not have a possessory interest in the victim’s phones. See State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) (stating defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate his “own rights” have been violated by showing he has a legitimate expectation of privacy in connection with the searched premises in order to challenge the search). As a result of the search of the victim’s phone, the officers would have found the number that called five times immediately before the shooting. It would have taken nothing more than running the number through the same database that they ran the number from the SIM card through to determine it belonged to Appellant. A simple call to the number would have verified it was the phone in their possession and would have placed Appellant at the scene of the crime. As a result, any evidence obtained from the search of Appellant’s phone would have inevitably been discovered through an independent source, the victim’s phone. See Nix v. Williams, 467 U.S. 431, 443-444 (1984) (finding the inevitable discovery doctrine has been adopted as an exception to the exclusionary rule and “[t]he independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of

a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.”).

In Nix, officers violated the defendant’s Sixth Amendment right to counsel by speaking with him after agreeing with his lawyer not to communicate with the defendant. As a result of the communications, the defendant led the officers to the location of a missing child’s body. The United States Supreme Court acknowledged the violation of the Sixth Amendment, but found because individuals were already canvassing the area, the body would have been inevitably discovered. The Court explained its reasons for not excluding the evidence based on the constitutional violation saying:

Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. . . . Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.

Nix, 467 U.S. at 446. The Court continued that exclusion was not necessary to cure an ill or to insure fairness, finding:

Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct. Williams’ argument that inevitable discovery constitutes impermissible balancing of values is without merit.

Id. at 447.

The Fourth Circuit, in United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir. 1970), recognized the inevitable discovery doctrine in a case similar to the one at hand. Officers stopped a vehicle driven by the defendant. After obtaining his wallet and realizing he presented an expired license, the officer continued to search through the wallet for further proof of identification. He found papers with the defendant's real name listed. The trial court suppressed the papers from the wallet, but allowed testimony and evidence that resulted after the individuals were detained. The Fourth Circuit found that the defendant's identity would have been discovered from his co-defendant because they were both wanted as fugitives and the co-defendant had given his actual name. The Fourth Circuit explained:

[T]he district judge found that the police would have learned of the Baltimore warrants through Rutkowski and that they would have arrested Seohnlein even if they had not discovered the papers in his wallet. Although the knowledge gained from examining the wallet may have accelerated a lawful arrest on the Baltimore warrant, it did not taint the evidence that was subsequently obtained.

Seohnlein, 423 F.2d at 1053.

Similar to Nix and Seohnlein, the information of Appellant's identity would have been discovered by the officers even if they had never pulled the SIM card from his phone. The officers would have matched his name to the phone number that called the victim using the same database they used once they had the phone number off the SIM card. There is no reason to suppress the evidence that otherwise would have been admissibly because it did not taint the investigation.

In addition, this Court can analyze the warrant subsequently obtained and determine that, even when removing any information obtained through an illegal search, probable cause existed to search the phone and obtain the necessary information regarding ownership. The original search warrant affidavit read:

On 2/25/2Q13 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriffs Office responded to 7680 Warren H. Abernathy Hwy, in reference to a shooting. Upon arrival, they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle an AT&T ZTE model Z331 cell phone serial number #22213371843 was found inside the victim's vehicle. Through further investigation it was found the phone number assigned to the phone is [phone number]. Through further investigation it was found this phone did not belong to the Victim. Through further investigation it was found this phone belonged to Robert Lee Moore. This search warrant is needed for the furtherance of this investigation to obtain information from the phone that can either implicate, or clear Robert Lee Moore from any involvement in this incident.

(R.324). Once this Court removes the references to Robert Lee Moore which were only obtained through the search of the SIM card, the warrant reads as follows:

On 2/25/2Q13 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriffs Office responded to 7680 Warren H. Abernathy Hwy, in reference to a shooting. Upon arrival, they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle an AT&T ZTE model Z331 cell phone serial number #22213371843 was found inside the victim's vehicle. . . . Through further investigation it was found this phone did not belong to the Victim. . . . This search warrant is needed for the furtherance of this investigation to obtain information from the phone that can either implicate, or clear an individual from any involvement in this incident.

The search warrant indicates the phone was found inside the vehicle belonging to the victim of a shooting. The warrant indicates the phone was not the victim's. It provides a fair probability the phone would contain evidence of the crime. If the phone is not the victim's, then it is a fair probability it was left by the shooter. Even if the phone were the victim's phone, it likely still contained evidence of the crime because it may have had the last person contacted by the victim or contacting the victim—at minimum a witness to be interviewed or possibly the shooter. As a result, the officers would have obtained the ownership of the phone through

execution of the search warrant which means the trial court properly refused to suppress the evidence obtained from the SIM card.

Accordingly, this Court should conclude the initial intrusion into the phone was entirely reasonable because it was performed with the intention of determining the owner of the phone. Further, even if not reasonable, the search did not require a warrant because Petitioner abandoned the phone and any reasonable expectation of privacy in the phone when he left it in the automobile of the victim and failed to take any measures to recover the phone or prevent access to the phone. Finally, even if a warrant was required, the information obtained would have been inevitably discovered through the warrant obtained or through the information provided on the victim's cell phones in the possession of the same officers. Therefore, this Court should affirm the trial court's decision and affirm Petitioner's conviction and sentence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed.

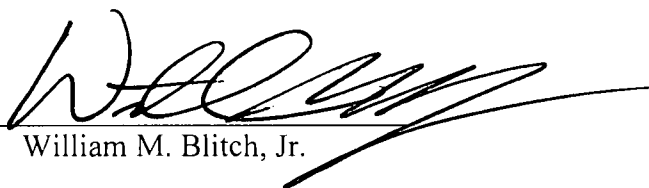
Respectfully submitted,

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BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

BY:

A handwritten signature in black ink, appearing to read 'W. Blitch, Jr.', written over a horizontal line.

William M. Blitch, Jr.

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ATTORNEYS FOR RESPONDENT

May 16, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. R. Keith Kelly, Circuit Court Judge
Appellate Case Tracking No. 2017-002479

RECEIVED

MAY 16 2018

S.C. SUPREME COURT

The State,

Respondent,

v.

Robert Lee Moore,

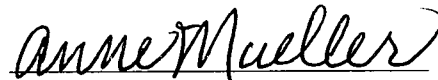
Petitioner.

PROOF OF SERVICE

I, ANNE A. MUELLER, certify that I have served the within Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 16th day of May, 2018.



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**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Robert Lee Moore, Petitioner.

Appellate Case No. 2017-002479

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
R. Keith Kelly, Circuit Court Judge

Opinion No. 27948
Heard June 11, 2019 – Filed February 19, 2020

AFFIRMED AS MODIFIED

Chief Appellate Defender Robert M. Dudek, of
Columbia, for Petitioner.

Attorney General Alan Wilson and Assistant Attorney
General William M. Blich Jr., both of Columbia, and
Seventh Judicial Circuit Solicitor Barry J. Barnette, of
Spartanburg, all for Respondent.

JUSTICE KITTREDGE: Following a jury trial, Petitioner Robert Moore was sentenced to thirty years' imprisonment for the attempted murder of Travis Hall. Hall was shot in the head and left for dead in a vehicle in a Taco Bell parking lot

following a drug deal gone wrong. In the immediate aftermath of the shooting, law enforcement officers found three cell phones, including one later identified as Petitioner's "flip phone,"¹ in the area of the driver's floorboard after emergency medical personnel removed Hall from the vehicle.² Without obtaining a warrant, the officers removed the cell phones' subscriber identity module (SIM) cards to determine ownership. The officers then obtained a warrant to search the contents of Petitioner's flip phone. Petitioner's subsequent motion to suppress all evidence acquired from the flip phone was denied, as the trial court found Petitioner had abandoned his phone. A divided court of appeals' panel affirmed Petitioner's conviction on the basis of inevitable discovery. *State v. Moore*, 421 S.C. 167, 805 S.E.2d 585 (Ct. App. 2017). We granted a writ of certiorari to review the decision of the court of appeals and now affirm as modified.

I.

On February 25, 2013, Spartanburg County Sheriff's Office deputies were dispatched to a "shots fired" call at a Taco Bell. The first officer to arrive on the scene found Hall shot in the head, hanging out of his vehicle while partially restrained by the seatbelt. Despite the severity of his injuries, Hall survived. Witnesses told law enforcement that a white Chrysler 300 with "some rather large [and distinctive] rims" fled the scene immediately after the shooting.

Deputies at the crime scene recovered three cell phones from Hall's vehicle. The phones were immediately given to an investigator, who removed the SIM cards to obtain the phone number associated with each phone. A Spartanburg County Sheriff's Office database identified one phone number as belonging to Petitioner, who had given law enforcement that number three months prior in connection with obtaining a surety bond. An investigator with the Sheriff's Office then listed (1) the flip phone's phone number obtained from the SIM card; (2) Petitioner's name; and (3) the circumstances under which the phone was found, ultimately securing a

¹ While a "smart phone" is "a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity," a flip phone is "a kind of phone that is flipped open for use and that generally has a smaller range of features than a smart phone." *Riley v. California*, 573 U.S. 373, 379, 380 (2014).

² The other two cell phones were later identified as Hall's.

search warrant to examine the contents of the flip phone. The search revealed that five calls were made from Petitioner's phone to the victim's phone in the hour prior to the shooting.

Meanwhile, in a separate portion of the investigation unrelated to the flip phone or search warrant, law enforcement officers identified the getaway vehicle and its two occupants—Petitioner and his co-defendant Tevin Thomas—via eyewitness testimony and video recording. Thomas was subsequently apprehended, initially denying he was present at the scene of the crime. However, after an officer confronted him with the video recording of Thomas and Petitioner at a nearby gas station—driving, within minutes of the shooting, the distinctive getaway car described by witnesses at the crime scene—Thomas made a second statement naming and implicating Petitioner in the shooting. Petitioner was arrested and charged with attempted murder.

Pursuant to the Fourth Amendment to the United States Constitution and *Riley v. California*,³ Petitioner made a pre-trial motion to suppress any evidence seized from the warrantless examination of his phone's SIM card. Finding Petitioner had abandoned his cell phone, the trial court denied the motion. On appeal, a majority of the court of appeals' panel affirmed on the ground of inevitable discovery. A dissenting member of the panel voted to reverse the trial court, relying on *Riley* and contending that the warrantless examination of the SIM card constituted a Fourth Amendment violation. We granted a writ of certiorari to review the divided court of appeals' decision.

II.

On appeals involving a motion to suppress based on Fourth Amendment grounds, appellate courts apply a deferential standard of review and will reverse only in cases of clear error. *State v. Cardwell*, 425 S.C. 595, 599–600, 824 S.E.2d 451, 453 (2019). The "clear error" standard means appellate courts may not reverse the trial court's findings of fact merely because they would have decided the case differently. *State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (citation omitted). Rather, in reviewing Fourth Amendment cases, appellate courts must affirm the trial court's ruling if there is any evidence to support it. *Robinson v. State*, 407 S.C. 169, 181, 754 S.E.2d 862, 868 (2014).

³ 573 U.S. 373 (2014).

III.

The State primarily contends that the limited warrantless search of Petitioner's cell phone was entirely reasonable under the circumstances. We agree. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated" U.S. Const. amend. IV (emphasis added). It has long been recognized that the touchstone of the Fourth Amendment is reasonableness. *Riley*, 573 U.S. at 381–82 (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)).

The trial court denied the motion to suppress on the basis of abandonment. Arguably, some evidence supports the trial court's finding that Petitioner abandoned his flip phone. *Cf. State v. Brown*, 423 S.C. 519, 525, 815 S.E.2d 761, 764–65 (2018) (finding a defendant abandoned his cell phone at the scene of the crime and explaining the defendant made no attempt to call or send text messages to the phone to see if someone would answer; the defendant did not attempt to contact the service provider for information on the whereabouts of the phone; and the defendant did not go back to the scene of the crime to look for the phone or call the police to see if they had it); *Robinson*, 407 S.C. at 181, 754 S.E.2d at 868 (setting forth the deferential "any evidence" standard of review). Yet we acknowledge a close question is presented on the issue of abandonment. We elect to resolve this appeal on other grounds.⁴

⁴ We note the dissent focuses much of its analysis on abandonment, on which we have expressly declined to rule. As a result, we view much of the dissent's analysis as non-responsive. We additionally note it does not appear as simple as the dissent's contention that "*Riley* created a categorical rule that, *absent exigent circumstances*, law enforcement must procure a search warrant before searching the data contents of a cell phone." (second emphasis added) (quoting *Brown*, 423 S.C. at 531, 815 S.E.2d at 767 (Beatty, C.J., dissenting)). Rather, other courts have found the abandonment exception, as well as other exceptions, may continue to justify a warrantless search of a cell phone, even post-*Riley*. *See, e.g., Commonwealth v. Kane*, 210 A.3d 324, 329–32 (Pa. Super. Ct. 2019) (affirming the trial court's finding that a cell phone was abandoned and that law enforcement therefore permissibly executed a warrantless search), *cert. denied*, 218 A.3d 856 (Pa. 2019) (per curiam).

The Fourth Amendment, as interpreted, requires that the actions of law enforcement be viewed through a lens of reasonableness. The reasonableness inquiry is fact specific and context dependent. Here, law enforcement limited the warrantless portion of their search of the three phones to the SIM cards alone in an effort to establish ownership, which—as will be explained in more detail below—is a search wholly distinct from examining the contents of the phones. Moreover, at the time of the warrantless portion of the search to discover the identities of the cell phones' owners, law enforcement officers were responding to an active crime scene, not knowing the identity and whereabouts of the shooter. The public safety concerns are self-evident. Under the circumstances presented, we hold the limited search of the SIM cards to identify the phone numbers was reasonable and in no manner constituted an unreasonable search or seizure.

A.

A SIM card is a small device which contains a customer's basic information, along with encryption data to allow a device to access a particular carrier's mobile network. Thus, in many ways, a SIM card is simply a key to a specific mobile network. However, a SIM card is not part of a phone. This is evidenced by the facts that (1) not all phones have SIM cards; (2) SIM cards may be transferred from one phone to another; and (3) a single phone can utilize a series of SIM cards to easily change the phone's number and subscriber information. *See, e.g., United States v. Flores-Lopez*, 670 F.3d 803, 810 (7th Cir. 2012) (explaining people may purchase multiple prepaid SIM cards, "each of which assigns a different phone number to the cell phone in which the card is inserted," making it easy for a single phone to be associated with multiple phone numbers), *abrogated on other grounds by Riley*, 573 U.S. at 400; *In re Apple iPhone Antitr. Litig.*, 874 F. Supp. 2d 889, 892 n.5 (N.D. Cal. 2012) ("A SIM card is a removable card that allows phones to be activated, interchanged, swapped out and upgraded. The SIM card is tied to the phone's network, rather than to the physical phone device itself." (internal citations omitted)).

Given its purpose of identifying a phone to a particular mobile network, a SIM card contains limited storage capacity. It therefore never contains the vast majority of the information available on an unlocked cell phone. *See Sigram Schindler Beteiligungsgesellschaft mbH v. Cisco Systems, Inc.*, 726 F. Supp. 2d 396, 413 n.27 (D. Del. 2010) ("Generally, a SIM card is a smart card that encrypts voice and data transmissions and stores data about a user *for identification purposes*." (emphasis added)); *see also United States v. Wicks*, 73 M.J. 93, 97 (C.A.A.F. 2014) (explaining that a witness initially attempted to turn over only the SIM card of a suspect's cell phone, but "the SIM card did not contain any [useful] information,"

so the witness eventually turned over the suspect's entire cell phone, which did contain the incriminating information for which law enforcement was looking).⁵ According to one witness at trial, the SIM card on this particular type of older model flip phone "primarily contains the assigned cell phone number," but can also contain incomplete records of the contacts stored on the phone as well as partial call and text logs. A SIM card does not store call or text logs in reverse chronological order but, rather, randomly if at all. We conclude searching a SIM card is fundamentally distinct from searching the full contents of an unlocked cell phone, making much of the language in *Riley* concerning the privacy implications for searching a cell phone inapplicable or, at best, greatly diminished here.⁶

B.

As explained previously, "the ultimate measure of the constitutionality of a government search is reasonableness." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (internal quotation marks omitted). However, "a warrant is not required to establish the reasonableness of *all* government searches." *Id.* at 653. For example, law enforcement officers may search lost property to safeguard the property, protect the police department from false claims, and protect the police

⁵ The dissent disagrees with our recitation of the functionality of a SIM card, resorting to an internet search well outside the record on appeal and citing to a website from www.wisegeek.com titled "What is a SIM card?" We could similarly surf the internet to find information counter to the dissent, but decline to do so given the functionality of a SIM card is adequately set forth in the case law cited above.

⁶ Due to the fact that a SIM card's storage is both incomplete and random, we strongly disagree with the dissent's argument that we should view SIM cards as functionally equivalent to flash drives, whose contents are generally protected by the Fourth Amendment. In the case of a flash drive, the user deliberately chooses which information to place on the drive, and destroying the drive destroys access to the information placed on it. In contrast, a cell phone owner does not choose which information is (or is not) stored on his SIM card, and destroying the SIM card does not destroy access to the (incomplete) information stored therein because the full data is duplicated on the phone itself or, at worst, on the provider's servers. Thus, searching the contents of a SIM card is fundamentally distinct from searching *either* a flash drive *or* the full contents of an unlocked cell phone. The privacy implications of searching the digital data contained on SIM cards, flash drives, and unlocked cell phones are likewise distinct.

from danger. *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976). Likewise, "[w]hen containers have been turned over to the police, an officer 'may validly search lost property to the extent necessary for identification purposes.'" *United States v. Wilson*, 984 F. Supp. 2d 676, 683–86 (E.D. Ky. 2013) (quoting *State v. Ching*, 678 P.2d 1088, 1093 (Haw. 1984)) (holding officers acted reasonably in searching a suitcase and the laptop found inside in order to identify the owner); *State v. Polk*, 78 N.E.3d 834, 843 (Ohio 2017) ("[A] person retains a reasonable expectation of privacy in a lost item, 'diminished to the extent that the finder may examine the contents of that item as necessary to determine the rightful owner.'" (quoting *State v. Hamilton*, 67 P.3d 871, 875 (Mont. 2003))); *see also People v. Juan*, 221 Cal. Rptr. 338, 341 (Ct. App. 1985) (finding law enforcement's search through the pockets of a jacket left hanging on the back of a restaurant chair at an empty table was reasonable because the defendant had no reasonable expectation of privacy under those circumstances, and explaining in part, "Indeed, an individual who leaves behind an article of clothing at a public place most likely *hopes* that some Good Samaritan will pick up the garment and search for identification in order to return it to the rightful owner.").

Here, the Spartanburg County Sheriff's Office investigator conducted a limited search of the cell phones found at the crime scene for the targeted purpose of determining the owner. Importantly, he did so by searching only the phones' SIM cards, *not the contents of the phones*—despite the fact that the flip phone was not password protected—and the search lasted a single minute.⁷ Once the investigator identified the owners of the cell phones, a warrant was obtained to search Petitioner's flip phone. Under these circumstances, the limited search of the SIM cards for purposes of identification was reasonable and did not contravene the Fourth Amendment. *Cf. State v. Green*, 164 So. 3d 331, 344 (La. Ct. App. 2015) (holding an officer's removal of a cell phone's battery to acquire the identifying subscriber number (analogous to a serial number) did not implicate the Fourth Amendment because the subscriber had no "reasonable expectation of privacy in the serial number of his cell phone or other identifying information"). The determination of whether a search is permissible should not be the result of varying

⁷ Aside from Petitioner's phone number (which was used to obtain his name), the warrantless portion of the search of the flip phone's SIM card revealed thirty-four contacts and three text messages that had been sent in the year prior to the shooting. Petitioner does not argue the contact entries or text messages were relevant to the shooting or otherwise led law enforcement officers to discover his identity or suspect his involvement.

frameworks depending on whether the person who lost the item is a criminal hoping to avoid detection or a law-abiding citizen hoping for the return of the lost item. To the extent Petitioner retained an expectation of privacy in his cell phone left next to the victim's body, that expectation of privacy was diminished to the point that the finder could properly examine the item in a manner limited to determining the owner. *Cf. State v. Hill*, 789 S.E.2d 317, 319 (Ga. Ct. App. 2016) (holding the police properly obtained the defendant's cell phone number and name in a case in which the defendant left his cell phone at the scene of a crime, and the police used the phone to call 911 in order to get the phone number from the 911 dispatcher; and explaining, "While the application of Fourth Amendment law to this precise set of facts appears to be an issue of first impression in Georgia, there are many cases in Georgia and in other jurisdictions supporting the conclusion that a person lacks a legitimate expectation of privacy in identifying information such as name, address, or telephone number that is used to facilitate the routing of communications by methods such as physical mail, e-mail, landline telephone, or cellular telephone." (collecting cases)); *id.* at 321 ("[W]e do not construe *Riley* to recognize a legitimate expectation of privacy in identifying noncontent information such as the person's own phone number, address, or birthdate, simply because that information was associated with a cellular phone account rather than a landline phone account or a piece of physical mail.").

IV.

Of course, we recognize the adage "get a warrant" will always be at play in these Fourth Amendment challenges. We join that chorus as well, as it is always preferable to "get a warrant." However, the question before us is not whether obtaining a warrant would have been preferable; rather, the question here is whether obtaining the phone numbers assigned to the SIM cards without a warrant under these circumstances contravened the Fourth Amendment. As explained previously, we hold law enforcement's identification of the number assigned to the flip phone by examining the SIM card was reasonable and did not violate the Fourth Amendment.

Were we, however, to accept the premise of Petitioner's argument regarding a Fourth Amendment violation, his conviction would nevertheless be upheld because the absence of a warrant does not require the categorical suppression of evidence as advocated by Petitioner. *See Herring v. United States*, 555 U.S. 135, 140 (2009) ("The fact that a Fourth Amendment violation occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies."). "Indeed, exclusion has always been our last resort, not our first impulse." *Id.* (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)) (internal quotation marks

omitted); *see also Davis v United States*, 564 U.S. 229, 237 (2011) (explaining suppression can be a harsh sanction, for it "exact[s] a heavy toll on both the judicial system and society at large").

The purpose of the exclusionary rule is to deter law enforcement officers from committing Fourth Amendment violations. *Davis*, 564 U.S. at 236–37. As a result, when suppression will fail to yield "appreciable deterrence," exclusion is clearly unwarranted. *Id.* at 237 (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)). "To that end, courts have recognized several exceptions to the exclusionary rule," including, among others, the independent source doctrine, inevitable discovery, and good-faith reliance. *See State v. Adams*, 409 S.C. 641, 647 & n.3, 763 S.E.2d 341, 345 & n.3 (2014) (collecting cases). We find that—even if law enforcement committed a Fourth Amendment violation by searching the SIM cards for identification purposes—each of these three exceptions applies, rendering the exclusionary rule inappropriate in this instance.

A.

Previously, this Court explained the independent source exception as follows:

The "fruit of the poisonous tree" doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality. However, the challenged evidence is admissible if it was obtained from a lawful source independent of the illegal conduct.

State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) (internal citation omitted).

Here, in a portion of the investigation wholly unrelated to or affected by the cell phones, law enforcement obtained incriminating video from a nearby gas station located approximately one-and-a-half miles from the Taco Bell where the victim was shot. The video—taken around three to five minutes after the shooting—showed Petitioner and Thomas driving the distinctive getaway vehicle into the parking lot and loitering around the car for several minutes while police cars drove past the gas station with their blue lights flashing and sirens blaring. Petitioner and Thomas then grabbed a bag from the car and threw it in the trash before entering the gas station. Inside, Petitioner bought a package of cigarettes, which caused him to have to give his (real) date of birth, and the sales clerk dutifully noted the birthdate on a receipt that was later introduced at trial. Other video recordings

introduced at trial showed Petitioner and Thomas in the getaway vehicle driving it towards the location where it was subsequently found by law enforcement that same night—the house of a relative of Petitioner.

The Sheriff's Office investigators could not recall exactly when they identified Thomas as the second man in the video recordings; however, they located and arrested him on February 26, one day after the shooting.⁸ Thomas initially denied being at the Taco Bell at all on February 25. However, an investigator confronted Thomas with a picture of Thomas at the gas station after the shooting, and Thomas recanted his non-involvement, giving a second written statement. In this second statement, Thomas named Petitioner as the second man involved.

At trial, Thomas testified Petitioner had called Hall, the victim, multiple times directly before the shooting in order to set up a meeting (a drug deal).⁹ However, Thomas and Petitioner had prearranged to rob Hall at the meeting and armed themselves accordingly. Thomas stated that as soon as Petitioner climbed into Hall's car for the drug deal, Petitioner pulled out a gun, and the two men started "tussling real heavy." Eventually, Petitioner shot Hall, jumped back into the getaway vehicle, and drove off against traffic and over the median, nearly hitting a pedestrian on the way out of the parking lot.

We conclude that none of this evidence "has been come at by exploitation of [any possible] violation of [Petitioner's] Fourth Amendment rights." *See United States v. Crews*, 445 U.S. 463, 471 (1980) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)) (internal quotation marks omitted). We find Petitioner's identity and the possible presence of incriminating call logs on Hall's and Petitioner's cell phones came from an independent source in the investigation untainted by any alleged Fourth Amendment violation. *Cf. id.* at 474 ("Insofar as respondent challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by [a Fourth Amendment violation]. [A Fourth Amendment violation], without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. The

⁸ This is the same day the magistrate signed the warrant allowing the investigators to examine the contents of Petitioner's flip phone.

⁹ At least one other witness confirmed Hall had received a series of phone calls attempting to set up a meeting with him before the shooting. That witness was of the impression that Hall knew the person calling him. While Petitioner and Hall were longstanding friends, Hall was not acquainted with Thomas.

exclusionary principle of *Wong Sun* and *Silverthorne Lumber Co.*^[10] delimits what proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness. Respondent is not himself a suppressible 'fruit,' and the illegality of his detention [due to a Fourth Amendment violation] cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct." (footnote omitted) (internal citations omitted)); *id.* at 478–79 & n.* (White, J., concurring) (rejecting, in a portion of his concurrence that received a majority vote of the Justices on the United States Supreme Court, the notion that a defendant's face or identity can be considered evidence suppressible for no other reason than the defendant's presence in the courtroom is the fruit of a Fourth Amendment violation (citing *Frisbie v. Collins*, 342 U.S. 519, 522 (1952))).¹¹

B.

"[T]he inevitable discovery doctrine provides that illegally obtained information may nevertheless be admissible if the prosecution can establish by a preponderance of the evidence that the information would have ultimately been discovered by lawful means." *Cardwell*, 425 S.C. at 601, 824 S.E.2d at 454 (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984)). Here, after receiving a "shots fired" call, law enforcement officers found Hall shot in the head and three cell phones on the floorboard at his feet. Correctly suspecting that it would have been highly unusual for all three phones to belong to Hall, investigators took action to identify the cell phones' owners and determine if there was a connection between the phones, first by searching the SIM cards and then by obtaining a warrant to examine the contents of the phones. While the officers obtained the call logs between the two phones by executing the warrant on Petitioner's flip phone, they could have also obtained the same information by searching Hall's phones, which they had in their lawful possession. Particularly given the fact that other portions of the investigation revealed that, prior to driving to the Taco Bell, Hall had been phoned

¹⁰ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

¹¹ In focusing on the abandonment issue, the dissent does not address all of the bases we discuss in reaching our decision, namely, the independent source doctrine. In fact, the gas station video and Thomas's confession were the key pieces of evidence against Petitioner, not the flip phone or its call logs. While the testimony about the phone helped confirm various aspects of some witnesses' testimony, the phone's call logs and its role in revealing Petitioner's involvement in the crime were purely cumulative.

multiple times in the presence of witnesses and seemed to be setting up a meeting in the hour prior to his shooting, we find the State established that law enforcement was keyed into and actively investigating Hall's phone records and would have obtained the call logs regardless of the search of Petitioner's phone. Obtaining the call logs—including Petitioner's five calls to Hall in the hour prior to the shooting—would have allowed the investigators to obtain Petitioner's phone number and run it through their internal database (as actually occurred), thus giving them Petitioner's name. As a result, we find the evidence Petitioner seeks to have suppressed would have been inevitably discovered, and we therefore find the exclusionary rule inapplicable here because it would not sufficiently deter police conduct in the future. *See Nix*, 467 U.S. at 444 ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." (footnote omitted)).

C.

Finally, it is beyond dispute that law enforcement in this case acted in good faith. Even accepting the premise of Petitioner's Fourth Amendment challenge, none of the purposes served by the exclusionary rule would be achieved by suppressing any of the evidence obtained from searching his cell phone. *See United States v. Leon*, 468 U.S. 897, 907–08 (1984) ("The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. *Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.*" (emphasis added) (footnote omitted) (internal citations omitted) (internal quotation marks omitted)).

Petitioner, as did the dissenting opinion in the court of appeals, relies principally on the United States Supreme Court's *Riley v. California* decision from 2014, which emphasized the degree of governmental intrusion resulting from warrantless searches of cell phones incident to an arrest due to the wealth of private information contained within modern cell phones. Notably, when law enforcement responded to the Taco Bell in Spartanburg County on February 25, 2013, *Riley* had

not yet been decided. At the time, the law was far from settled in terms of the necessity of obtaining a warrant to search *a cell phone*, much less *a SIM card alone*.¹² *See id.* at 919 ("If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed *only* if it can be said that the law enforcement officer had knowledge, *or may properly be charged with knowledge*, that the search was unconstitutional under the Fourth Amendment." (emphasis added) (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975))). Finally, it must be remembered that law enforcement did obtain a warrant to search Petitioner's phone once his identity as owner was determined.

IV.

For the foregoing reasons, the judgment of the court of appeals is affirmed as modified.

AFFIRMED AS MODIFIED.

FEW and JAMES, JJ., concur. HEARN, J., concurring in part and dissenting in part in a separate opinion. BEATTY, C.J., dissenting in a separate opinion.

¹² In fact, the law is still far from settled regarding the propriety of searching a SIM card alone, rather than the full contents of a cell phone. We have found little case law on the constitutionality of such searches, as much of the relevant case law either (1) appears to have been decided post-*Riley*; (2) is distinguishable because it involves searches of cell phone contents and not SIM card contents; or (3) more commonly, reflects both of these problems.

JUSTICE HEARN: I concur with the majority to affirm Moore's conviction based upon the inevitable discovery and independent source doctrines. Thus, regardless of whether there was a Fourth Amendment search—which I believe there was—the exclusionary rule would not apply. However, even though Moore cannot avail himself of this remedy, I part company with the majority's discussion of the good-faith exception as a basis for declining to apply the exclusionary rule.

The good-faith exception ensures that evidence will not be suppressed when law enforcement acts in an objectively reasonable manner. The purpose of the exclusionary rule is deterrence, and this consideration must be weighed against the social costs of excluding relevant, incriminating evidence. *Hudson v. Michigan*, 547 U.S. 586, 599 (2006) (noting the "substantial social costs" of the exclusionary rule). We have previously addressed this exception in analyzing whether binding precedent supported law enforcement's warrantless search. *State v. Adams*, 409 S.C. 641, 652, 763 S.E.2d 341, 347 (2014). In *Adams*, police attached a GPS device to the defendant's vehicle and monitored his movements, suspecting he was transporting drugs. Police tracked Adam's vehicle and conducted a stop on the interstate, where an officer discovered cocaine. Adams filed a motion to suppress the evidence, which the trial court denied. We reversed, and in doing so, rejected the contention that law enforcement acted in good faith based on purported precedent supporting the warrantless search. The State relied on two cases—*United States v. Knotts*, 460 U.S. 276, 281 (1983) (holding law enforcement's placement of a beeper in a container of chloroform with the seller's consent and their subsequent monitoring did not constitute a search under the Fourth Amendment because individuals do not possess a reasonable expectation of privacy in traveling on public highways), and *United States v. Karo*, 468 U.S. 705, 713 (1984) (holding the placement of an electronic beeper in a container with the owner's consent before being sold did not constitute a search because the buyer's privacy interests were not infringed when he received possession of the container). We also noted a statute required police to procure a warrant before installing and monitoring a GPS device. S.C. Code Ann. § 17-30-140 (2014). In addressing the good-faith exception, we rejected the State's argument that *Knotts* and *Karo* constituted binding precedent that permitted law enforcement to install and monitor GPS devices without a warrant.

Our focus in *Adams* concerned whether binding precedent supported the warrantless search. That made sense because the default is that a search without a warrant is unreasonable. *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007) ("Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures.").

While we will not penalize law enforcement by suppressing evidence obtained when police follow precedent, that is not the case here. Indeed, even the majority characterizes the state of the law as "far from settled," which obviously is short of controlling precedent. In light of the unsettled nature of our case law, I believe our Fourth Amendment jurisprudence requires this fact to militate in favor of requiring a warrant. Nevertheless, because I agree that the inevitable discovery and independent source doctrines apply, the exclusionary rule has no bearing in this case.

CHIEF JUSTICE BEATTY: I respectfully dissent. I would reverse the decision of the court of appeals and remand Moore's case for a new trial. In my view, the warrantless removal of the SIM card and forensic examination of its digital contents constituted a search in violation of the Fourth Amendment. Accordingly, I would find the trial court erred in denying Moore's motion to suppress.

I.

The Fourth Amendment to the United States Constitution protects a person's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (citation omitted). The State bears the burden of establishing "the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures." *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013).

"The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). "*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *Id.*

In determining whether the expectation of privacy is reasonable, "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity,' but instead 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'" *Ciraolo*, 476 U.S. at 212 (quoting *Oliver v. United States*, 466 U.S. 170, 182–83 (1984)).

Here, the object of the challenged search is the SIM card in Moore's cell phone found at the crime scene.¹³ The majority holds "the limited search of the

¹³ A SIM card is defined as follows:

A Subscriber Identity Module (SIM) card is a portable memory chip used mostly in cell phones that operate on the Global System for Mobile Communications ([GSM](#)) network. *These cards hold the personal information of the account holder, including his or her*

SIM cards to identify the phone numbers was reasonable and in no manner constituted an unreasonable search or seizure." In so holding, the majority explains that "searching a SIM card is fundamentally distinct from searching the full contents of an unlocked cell phone, making much of the language in *Riley* concerning the privacy implications for searching a cell phone inapplicable or, at best, greatly diminished here."

For several reasons, I disagree with the majority's conclusion. Initially, I disagree with the majority's apparent dismissal of the import of *Riley v. California*, 134 S. Ct. 2473 (2014). As I stated in my dissent in *Brown*, "*Riley* creates a categorical rule that, absent exigent circumstances, law enforcement must procure a search warrant before searching the data contents of a cell phone." *State v. Brown*, 423 S.C. 519, 531, 815 S.E.2d 761, 767 (2018) (Beatty, C.J., dissenting). I believe the circumstances of the instant case fall within this rule.

Moore had a reasonable expectation of privacy in the digital contents of the SIM card.¹⁴ See *Riley*, 134 S. Ct. at 2473 (concluding society is willing to recognize an expectation of privacy in the digital information on a cell phone). In my view, there is no distinction between the digital contents of a SIM card and the full contents of a cell phone. At issue is the digital data, not the type of device or the amount of storage capacity. While the SIM card has limited storage capacity, it contains significant personal information about the cell phone account holder, including the phone number, call logs, address books, text messages, and other data.¹⁵ Thus, even if law enforcement claims to confine their search to identify the

phone number, address book, text messages, and other data. When a user wants to change phones, he or she can usually easily remove the card from one handset and insert it into another. SIM cards are convenient and popular with many users, and are a key part of developing cell phone technology.

<https://www.wisegeek.com/what-is-a-sim-card.htm> (last visited Dec. 10, 2019) (emphasis added).

¹⁴ Given the trial court ruled that Moore abandoned his cell phone, the court implicitly found Moore had an expectation of privacy in the cell phone, which included the SIM card.

¹⁵ The majority minimizes the privacy implication of the digital data because the SIM card is "simply a key to a specific mobile network" and "not part of a phone." If this analysis is taken to its logical extreme, one would have no expectation of

phone number, the search nevertheless provides law enforcement access to all of the information stored on the SIM card. I do not believe one can dissect digital data to determine what information is afforded Fourth Amendment protection. Once law enforcement removes a SIM card in order to conduct a forensic examination, it has unrestricted access to personal information that is protected by the Fourth Amendment. *See Riley*, 134 S. Ct. at 2492 (rejecting proposed rule that would restrict the scope of a cell phone search to those areas of the phone where an officer reasonably believes there would be information relevant to a crime such as the arrestee's identity and stating, "[t]his approach would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where").

Further, law enforcement recognized the amount of information that was accessible as Detective McGraw explained the SIM card "primarily contains the assigned cell phone number[,]. . . continuing call logs, stored contacts, things of that nature." During the warrantless search, Detective McGraw recovered the cell phone number, thirty-four contact entries, and three text messages. Therefore, despite the claim that the scope of the search was limited, the search provided access to and ultimately yielded much more than a phone number. Contrary to the majority's characterization, such a search cannot be deemed reasonable.

Because Moore had a reasonable expectation of privacy in the digital contents of the SIM card, I would hold the warrantless search violated the Fourth Amendment's prohibition against unreasonable searches and seizures. *See Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) ("When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." (internal quotation marks omitted)).

II.

Even if Moore had a reasonable expectation of privacy in the digital contents of the SIM card, the State argued and the trial court found Moore divested himself of the Fourth Amendment protection by abandoning the cell phone.

In my view, the State failed to establish the abandonment exception to the

privacy in the digital contents of a flash drive given (1) not all computers have USB ports; (2) flash drives may be transferred from one computer to another; and (3) a single computer can utilize a series of flash drives.

Fourth Amendment warrant requirement. *See State v. Dupree*, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (recognizing the doctrine of abandonment as an exception to the Fourth Amendment warrant requirement).

When determining whether a defendant abandoned property for Fourth Amendment purposes, "the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment." *Id.* at 457, 462 S.E.2d at 281 (quoting *City of St. Paul v. Vaughn*, 237 N.W.2d 365, 370–71 (Minn. 1975)). "[A]bandonment is a question of intent and exists only if property has been voluntarily discarded under circumstances indicating no future expectation of privacy with regard to it." 68 Am. Jur. 2d *Searches and Seizures* § 23, at 135 (2010). In the context of abandonment, intent is "inferred from words, acts, and other objective facts." 79 C.J.S. *Searches* § 43, at 70 (2017).

In this case, the objective facts known to law enforcement at the time of the search were as follows. The phone was found on the floorboard of the victim's vehicle. Although the vehicle was clearly a crime scene, law enforcement did not see Moore in possession of the phone, did not see him throw the phone in an effort to evade police, and did not know when the phone was left. Additionally, the record shows no denial of ownership by Moore, nor was there any evidence showing Moore had intentionally discarded the cell phone. In fact, Investigator Clark testified: "I'm sure [the flip phone] was left by mistake."

At trial, Detective McGraw testified he received the flip phone within two hours of the shooting. The two-hour period was in the afternoon (approximately 2:00 p.m. to 4:00 p.m.),¹⁶ and there was no report that the phone was lost or stolen

¹⁶ Unlike the situation where an officer needs to make an instant decision to determine whether a suspect is reaching for identification or a weapon, no such exigencies existed. *See Riley*, 134 S. Ct. at 2485 ("Once an officer has secured a phone and eliminated any potential physical threats, however, data on a phone can endanger no one."). At trial, Investigator Lorin Williams testified: "[T]he quicker we can get our hands on those phones . . . the quicker it helps us with the investigation." However, there is no testimony in the record that the officers believed Moore posed an imminent threat to law enforcement. *See Harris v. O'Hare*, 770 F.3d 224, 235 (2d Cir. 2014) (stating "general knowledge, without more, cannot support a finding of exigency"); *cf. Barton v. State*, 237 So. 3d 378, 381 (Fla. Dist. Ct. App. 2018) (holding that defense counsel was not ineffective for failing to file a motion to suppress evidence discovered from the warrantless search of Barton's abandoned cell phone where the following exigent circumstances

prior to the first search. Notably, the record is unclear as to whether the screen was locked.¹⁷

Next, I note, by law enforcement's own admission, the phone was left by mistake. The record does not reveal a single instance in which officers referred to the phone as "abandoned." Furthermore, law enforcement's actions and testimony clearly indicate an intent to identify the owner. Had the flip phone not contained calls to the victim, law enforcement likely would have interviewed Moore and returned the phone.

In my view, considered as a whole, the objective facts known to the officer at the time of the initial search do not satisfy the State's burden to show Moore abandoned his phone. My conclusion, however, in no way limits law enforcement's ability to investigate an active crime scene.

When law enforcement finds a phone, they have several less intrusive options at their disposal to identify the owner of the phone. These options include examining the exterior of the phone, using the emergency dialer to call 911 so that the dispatcher may identify the number associated with the phone, or contacting the phone's wireless service provider to determine the owner. *See* Mikah Sargent, *How to Find the Owner of a Lost or Stolen iPhone, iMore* (Dec. 28, 2016), <https://www.imore.com/how-find-owner-lost-or-stolen-iphone>. Ultimately, the protection of privacy must keep up with technological advances.

existed: "police knew the gunman fired several bullets towards fifteen to twenty-five students at a bus stop near an elementary school; a student was seriously injured; the gunman had not been detained; and the gun had not been located").

¹⁷ From the record, it is not clear if the flip phone was password protected. The State claims it was not password protected; however, from my reading, it appears the officer did not know, and the report makes no comment on whether or not a password was required.

[Defense Counsel:] This phone was password protected, wasn't it?

[Investigator Williams:] I could not answer that.

[Defense Counsel:] [I]n [Detective McGraw's] report, does he say it was password [protected]?

[Investigator Williams:] I don't see that it was.

III.

Finally, I do not believe the warrantless search can be cured through the inevitable discovery doctrine. "[T]he inevitable discovery doctrine provides that illegally obtained information may nevertheless be admissible if the prosecution can establish by a preponderance of the evidence that the information would have ultimately been discovered by lawful means." *State v. Cardwell*, 425 S.C. 595, 601, 824 S.E.2d 451, 454 (2019) (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984)).

Here, Detective McGraw testified he performed a limited forensic examination of all three phones found at the scene of the shooting prior to the issuance of a warrant. From this search, law enforcement retrieved cell phone numbers associated with each of the phones and, through their database, determined that one of the phones did not belong to the victim but, instead, belonged to Moore. After obtaining the search warrant, Detective McGraw determined the flip phone was used to make five phone calls to one of the victim's phones shortly before the shooting occurred.

The State maintains this evidence would have been inevitably discovered because law enforcement "had the victim's phone in their possession[.]" and they "had every right to search the victim's phone." However, nowhere in the record does the State claim law enforcement pulled call logs from any of the victim's phones, or even if law enforcement's forensic examination equipment was capable of accessing the victim's iPhones' call logs.¹⁸ "The independent source doctrine allows admission of evidence that has been discovered by means *wholly independent* of any constitutional violation." *Nix*, 467 U.S. at 443 (emphasis added). Without the illegal search, the officers had no evidence connecting the phone to Moore. It was only through the unlawful action of the officers—accessing Moore's cell phone without a warrant—that the officers were able to connect Moore to the flip phone and the flip phone to the victim.

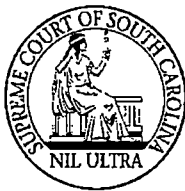
¹⁸ Detective McGraw recalled that he pulled the SIM card from the iPhone 4 to identify the number and, also, identified the number associated with the iPhone 3. However, he testified the extraction of call logs and text messages from the flip phone was not supported by the equipment and, thus, he had to take pictures of the call log on the flip phone. Detective McGraw also noted the victim's iPhone 4 "was damaged." Based on the flip phone's call log, he was ultimately able to determine the flip phone communicated with the iPhone 3 prior to the shooting.

While the State claims the information was available from the victim's cell phone, it cannot point to any place in the record to substantiate that claim. Therefore, without assuming, this Court cannot conclude Moore's phone number, and the call log implicating Moore, would have been inevitably discovered. As a result, I would find the information was inadmissible. *See id.* at 449–50 (holding the inevitable discovery doctrine applied when searchers were approaching the location of a victim's body and would have discovered it without information obtained from the defendant's unlawful interrogation).¹⁹

IV.

Based on the foregoing, I would find the warrantless search violated Moore's rights under the Fourth Amendment. In reaching this conclusion, I adhere to my dissent in *Brown* as I believe *Riley* gave a clear directive that law enforcement, absent exigent circumstances, must obtain a warrant prior to searching the digital contents of a cell phone. Accordingly, I would reverse the decision of the court of appeals and remand for a new trial.

¹⁹ Additionally, the State—without citing support—asks the Court to redact the information obtained through the illegal search and find the warrant valid. However, the redaction principle applies when the defendant seeks to challenge false statements in a search warrant affidavit. *See Franks v. Delaware*, 438 U.S. 154 (1978) (holding a defendant has the right to challenge misstatements in a search warrant affidavit); *State v. Robinson*, 415 S.C. 600, 606–08, 785 S.E.2d 355, 358–59 (2016) (finding probable cause no longer existed after redacting misstatements in the search warrant affidavit and considering the remaining content). Most importantly, I believe the purpose of the exclusionary rule is defeated if a court applies the redaction principle to a search that violates the Fourth Amendment. If law enforcement obtains evidence by means of an illegal search and then belatedly obtains a search warrant based, in part, on the evidence, it is self-evident that applying the redaction principle to the search warrant on judicial review should not serve to cure the constitutional defect.



The Supreme Court of South Carolina

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CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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March 6, 2020

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: The State v. Robert L. Moore
Lower Court Case No. 2013GS4202965
Appellate Case No. 2017-002479

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 along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

A handwritten signature in black ink, appearing to be "D. Shearouse", written over a horizontal line.

CLERK

cc:

Robert Michael Dudek, Esquire

Alan McCrory Wilson, Esquire

William M. Blicht, Jr., Esquire

Barry Joe Barnette, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

County of Spartanburg)Robert Lee Moore)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2020CP4201279

APPLICATION FOR
POST-CONVICTION RELIEFCLERK OF COURT
SPARTANBURG COUNTY
AMY D. COX

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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 Perry Correctional Institution
430 Oaklawn Rd, Pelzer S.C. 29669
2. Name and location of Court which imposed sentence Spartanburg Co.
General Sessions
3. Name(s) of co-defendant(s) (if any) Tevin Thomas
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Attempted Murder-2013-GS-42-2965
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) July 23, 2014-30 years
- (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. S.C. Court of Appeals Direct Appeal
- ii. S.C. Court of Appeals Rehearing
- iii. S.C. Supreme Court Writ of Cert.
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. Affirmed
- iii. _____
- (c) the date of each such result:
- i. Aug. 30, 2017
- ii. Nov. 2, 2017
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2014-001669
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A

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SPARTANBURG COUNTY
AMY W. COX

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- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See attached pages-Reserve the right to amend
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See attached pages-Reserve the right to amend
- (b) _____
- (c) _____
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, 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 application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. _____
- iv. _____

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SPARTANBURG COUNTY
AMY W. COX

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(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

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?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

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) N/A
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____
 (b) your trial, if any? x
 (c) your sentencing? x
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? x
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

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. Andrew Johnston
Spartanburg C. Bar
 ii. Robert Dudek
Appellate Defense
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. Jury Trial
Direct Appeal
 ii. Writ of Cert.
 iii. _____

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 SPARTANBURG COUNTY
 AMY W. COX

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19. State clearly the relief you seek in filing this application:

Vacate conviction and sentence and remand for

new trial

20. Are you now under sentence from any other court that you have not challenged?

no

STATE OF SOUTH CAROLINA)

County of Spartanburg)

VERIFICATION

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SPARTANBURG COUNTY
AMY W. COX

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I, Robert Lee Moore, 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.

Robert Moore

SWORN to and subscribed before me this 2nd
day of April 2020.
Jamarcus Conwell (L.S.)
Notary Public

My Commission Expires: My Commission Expires
September 25, 2023

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APR 02 2020

PC.I. MAILROOM

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Robert Lee Moore, 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.

Robert Lee Moore
Applicant

SWORN or affirmed to and subscribed before me this

2nd day of April, 2020
Lamara Conwell
Notary Public

My Commission Expires. My Commission Expires
September 25, 2023

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SPARTANBURG COUNTY
AMY W. COX

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APR 02 2020

P.C.I. MAILROOM

(ANSWER TO QUESTION #10 on PCR Application)

- 1) Trial counsel failed to request a mental competency hearing / evaluation pursuant to the Due Process clause.
- 2) Trial counsel failed to challenge a pre-arranged plea agreement with my alleged codefendant
- 3) Trial counsel ineffective for failure to request a erroneous included offense instruction.
- 4) Trial counsel was ineffective for giving applicant erroneous advice on which he based his decision not to testify.
- 5) Trial counsel was ineffective for denying applicant's right to an impartial jury as guaranteed by the South Carolina Constitution and by the 6th and 14th amendment of the United States Constitution.
- 6) Trial counsel was ineffective for conceding guilt on applicant behalf.
- 7) Trial counsel violated applicant's due process rights by not objecting to the trial court's erroneous jury charge on 'hand of one, hand of all' theory.
- 8) Trial counsel ineffective for failure to object to the burden-shifting instruction which shifted the burden of proof.
- 9) Trial counsel denied applicant's confrontation rights and compulsory process of 6th amendment, and hearsay assertions.
- 10) Trial counsel was ineffective for failure to argue in suppression hearing that he had a reasonable expectation of privacy in the data contained on his cell phone.
- 11) Trial counsel was ineffective for failure to request a directed verdict.
- 12) Trial counsel failed to object to reference of surety bond prior bad act evidence, and failed to request curative instruction in reference of surety bond. (Prior bad act evidence)
- 13) Trial counsel failed to investigate and interview the victim and the State's witnesses prior to trial.
- 14) Trial counsel was ineffective for failing to object to solicitor's improper comment during closing arguments.
- 15) T/C ineffective for failure to request mistrial/improper burden shifting

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 JIMMY W. COX

The applicant allege and can prove that he was denied effective assistance of counsel . The applicant submits that the extensive record speaks for itself as to the competency of counsel. Trial counsel for the applicant was not diligent in his representation of the applicant and did not perform well within the range of competence demanded of attorneys in criminal matters and did not perform within the wide range of reasonable professional assistance.

In Strickland v. Washington, 466 U.S. 668, the United States Supreme Court held that counsel's assistance was defective as to require a reversal of a conviction requiring that the defendant show, first, that counsel's performance was deficient and, second that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. 104 S.CT. 2064. The applicant submits that counsel's performance was deficient and prejudiced him to the point of being denied a fair trial.

The applicant can prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial could not have been relied upon as having a just result. Strickland v. Washington, supra, counsel's performance prejudiced the applicant to the point where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The applicant have presented questions of law and fact requiring a new trial ,

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Counsel did not investigate some critical evidence and defence when he was preparing for trial. STRICKLAND ALSO ASSIGNS ADDITIONAL DUTIES TO COUNSEL AS ASSISTANT TO THE DEFENDANT WHICH IS TO ADVOCATE THE DEFENDANT'S CAUSE and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution, which did not happen. Applicant is requesting a pre hearing and a new trial. Applicant contends and can show that his conviction and sentence was in violation of the U.S. Constitution, S.C. Constitution and the laws of this state. The applicant is asserting a 4th, 5th, 6th, and 14th amendment violation which sets forth a prima facie violation of his rights. The applicant's grounds are constitutional violations. The fundamental defects alleged are standards that require establishment of a complete miscarriage of justice and an omission inconsistent with the rudimentary demands of fair procedure. The following acts and omissions by counsel constituted ineffective assistance of counsel. (1) Trial counsel failed to request a mental competency hearing/evaluation which denied him due process of law. The applicant gave his trial counsel information about his early childhood and growing up. Mental competency became an issue because of the prior treatment and medication that he was taking. Trial counsel refused to request a mental evaluation which denied him due process and procedural due process of law, when a criminal defendant's mental capacity is questioned and the trial attorney has reason to believe that the applicant is not fit to stand trial because the person lacks the capacity to understand the proceeding against him and to assist in his own defense, upon request, the judge shall order examiners designated by the dept. of mental health.

(2) Order the person committed for examination and observation to an appropriate facility of mental health or dept of disabilities and special needs. In applicant case, defense counsel's representation alone should have invoked S.C. code 44-23-410. Counsel was in a unique position

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to evaluate applicants ability to assist him, since that entailed frequent conversation and interaction. Defense counsels concern about applicants mental capacity was additionally supported by the uncharacteristic nature of the charge. The prosecution would have suffered no harm from a mental examination if trial counsel would have requested an examination well before his trial. See transcript page #391 l. 10-24 IN MEDINA V. SINGLETARY, 116 s. ct. 2505, DUE PROCESS (also) requires that a hearing be held whenever evidence raises a sufficient doubt about the mental competency of an accuse to stand trial. This procedural competency operates as a safeguard to ensure that the substantive claim competent to stand trial, but the issue in a procedural competency claim is whether the trial court should have conducted a competency hearing. See STELEY V. SINGLETARY, 955 f. 2nd 1434, 1438, UNITED STATES V. DAY, 949 f2d 973, 982, Adenial of either of these rights as in the case at bar should provide the basis for relief. WEISBERG V. MINN, 29 f3d at 1276 Applicant, have made a substantive competency claim by contending he was tried and convicted while mentally incompetent. Due process prohibit the conviction of a person when is mentally incompetent. BISHOP V. U.S., 350 u.s. 961, 76 s. ct. 44, GODINES V. MORON, 509 u.s. 389 113 s. ct. 2680, PATE V. ROBERTSON, 383 u.s. 375 86 s. ct. 836, JETER V. STATE, 417 s. e. 2d 594. Trial counsel knew that sanity was an issue that should have been fully addressed. MENTAL ALERTNESS AND UNDERSTANDING DISPLAYED BY THE APPLICANT IN COLLOQUIES WITH THE TRIAL COURT DID NOT JUSTIFY IGNORING APPLICANTS HISTORY WITH HIS ATTORNEYS while the applicants demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to forego a hearing on that very issue. BISHOP, 350 u.s. 961, 76 s. ct. 440. Applicants constitutional rights were abridged by his failure to receive an adequate hearing on his competence to

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stand trial. SEE COOPER V. OKLAHOMA, 517 u.s. 348, 116 s.ct. 1373 and DROPE V. MISSOURI, 420 u.s. 162, 95 s.ct. 896. IN PETE V. ROBINSON, 383 u.s. 375 the court held the failure to observe procedures adequate to protect a defendants right not to be tried and convicted while incompetent to stand trial deprives him at his due process right to a fair trial (2) Trial counsel failed to challenge a pre-arranged plea agreement with my allege co-defendant. Applicants allege co-defendant made incriminating statements which induced a pre-arranged agreement by the state. Trial counsel failed to challenge the statement for the truth of the matter. There is a reasonable probability that had counsel challenged the pre-arranged plea agreement, the outcome of the proceeding would have been different. The deliberate deception of a court by the presentation of evidence known to be false violates the fourteenth amendment. The same result obtains when the government/solicitor, although not soliciting false evidence allows it to go uncorrected when it appears. GIGLIO V. UNITED STATES, 405 u.s. 150 (1972). In other words. The state/solicitor cannot create a materially false impression regarding the facts or the credibility of the witness. Relief is compelled when the false impressions are material which means when there is any reasonable likelihood that the false testimony could have affected the judgment of the court, as in the case at bar. UNITED STATES V. AGURS, 427 u.s. 103, NAPI V. ILL. 264. SEE MOONEY V. HOLOHAM, 394 u.s. 103, CAMPBELL V. REED, 594 (4th cir), BOONE V. PADERICK, 541 f.2d 441 (4th cir) Allege co-defendants statements were made involuntarily, STATE V. FRANKLIN, 299 s.ct 133, 382 s.e2d 911 (1989). A statement is made involuntarily when it is induced by a promise of leniency. STATE V. PEAKE, 291 s.c. 138, 352 s.e, 2d 487 (3) Trial counsel was ineffective for failure to request a lesser-included offense instruction. Trial counsels actions prejudiced the applicant and unduly subjected him to federal law vio-

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lations and the u.s:supreme-court precedents. In KEEBLE V. UNITED STATES, 412 u.s. 205, 93 s.ct. 1993, the supreme court stated although the lesser included offence doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged it is now beyond dispute that the applicant was entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. see SANSONE V. UNITED STATES, 380 u.s. 343, 85 s.ct. 1004 BERRA V. UNITED STATES, 351 u.s. 131, 76 s.ct. 685; STEVENSON V. UNITED STATES, 162 u.s. 313, 16 s.ct. 839. The U.S. SUPREME COURT ruled in SPAZIANO V. FLORIDA, 468 u.s. 447, 104 s.ct. 315 (1984), the absence of a lesser included instruction increases the risk that the jury will convict simply to avoid setting the defendant free... the goal of the BECK RULE, in other words is to eliminate the distortion of the fact finding process that is created when the jury is forced into an all-or-nothing choice between attempted murder and innocence. SEE BECK V. ALABAMA, 447 u.s. 625, 100 s.ct. 2382 (1980). KEEBLE V. UNITED STATES, supra Applicant assert that trial counsel's refusal to request a lesser included offense of attempted murder instruction or self defence instruction not only subjected him to due process rights violation under the 14th amendment but also clearly subjected him to equal protection rights violation. As the S.C. SUPREME COURT'S RULING and mandates in STATE V. HEYWARD, supra, STATE V. LAMBRIGHT, supra. The very same constitutional equal protection rights should have been afforded to the applicant. See TRAN, pages #258 1.13 pg#321 1.20-21 & pg#366 1.21 Applicant assert he was denied a substantial constitutional right of effective assistance of counsel in violation of the 6th amendment. (4). Trial counsel was ineffective for giving applicant erroneous advice on which he based

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his decision not to testify. Applicant maintains his decision not to testify was based on trial counsels advice that he would be subject to cross-examination on his prior criminal convictions. Applicant contend that trial counsels advise was in error since neither prior conviction was admissible for the purpose of impeachment. In order to meet the two-pronged test establishing ineffective assistance of counsel, a defendant must prove (1) that counsels representation fell below an objective standard of reasonableness, and 2) that but for counsels error, there is a reasonable probability the result would have been different. MARTINEZ V. STATE, 403 s.e.2d 113 BUTLER V. STATE, 334 s.e.2d 813. There is no showing in the record that trial counsel sought a ruling on admissibility from the trial judge obviously, counsels advise in this instance was premised upon an unsubstantial legal assumption and he was under a duty to move the court for a ruling either confirming or invalidating his assumption. see HORTON V. STATE, 411 s.e.2d 223. Trial counsel was ineffective for denying applicants right to an impartial jury as guaranteed by the s.c. constitution and by the sixth and fourteenth amendment of the u.s. constitution. Applicant contend that he was prejudiced in this effect, whereas, trial counsel failed to request for a alternate juror to replace the forelady or request for an individual voir dire on each of the juror, independantly. Applicant specifically requested that trial counsel fully investigate his assertion because the forelady intentionally concealed information, and the information concealed would have supported a challenge for cause or would have been a material factor in the use of applicants preemptory challenges. see STATE V. WOODS, 345 s.c. 583, 550 s.e.2d 282, see also MCCOY V. STATE, 401 s.c. 363 (2013) 737 s.e.2d 623. Trial counsel denied applicant a full and fair trial when he failed to request a independant indi-

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vidual voir dire on the forelady. Trial counsel agreed with the trial court and solicitor not to do a voir dire on the forelady which deprived him of information material to his intelligent use of peremptory challenges, which in turn deprived him of his constitutional right to trial by an impartial jury. If it were not for trial counsel's acts and omissions, his use of peremptory challenges would have been different, and there is a reasonable probability that the outcome of the trial would have been different. see pg#81.17-25, pg#155 1.16-pg#161 1.12.(6) Trial counsel was ineffective for conceding guilt on applicants behalf. Applicants trial attorney violated his sixth amendment right to the effective assistance of counsel when he conceded guilt during closing argument without applicants knowledge or approval and despite applicants taking a jury trial and clothing himself with the role of innocence. Not even a prosecutor can express such a personal opinion as to the defendants guilt. FRANCIS V. SPRAGGINS, 720 F.2d 1190, citing U.S.V. MORRIS, 588 F.2d 396, 401. What was presented to the jurors and the court as a confession of applicants guilt was in fact nothing more than defense counsels opinion of the case. see CANON 7(ec7-24) of code of professional responsibility of the American Bar Association which provides The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of loyalty when he expresses his opinion to the jury that the applicant was guilty of accessory after the fact. see transcript page#336 1.3 -11 pg#341 1.19-23, pg#342 1.18-22. When a lawyer concedes a client guilt during the guilt innocence phase of trial in spite of their clients plea of not guilty (jury trial) and without the defendants consent, counsel regardless of the weight of evidence against the

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defendant or the wisdom of counsels credibility approach strategy, SPRAGGINS, supra WILEY V. SANDERS, 647 f.2d 642, N.C. HARBISON, 315 N.C. 175 (1985). The gravity of the consequences of a decision to plead or to admit ones guilt demands that the decision remain in the defendants hands. An attorney cannot deprive his her client of the right to have the issue of guilt or innocence presented to the jury as an adversarial issue on which the state bears the burden of proof without committing ineffective assistance of counsel. see U.S.v. CRO- NIC, 466 u.s. 648. The due process clause does not permit the attorney to enter a guilty plea or admit plea without the clients consent. see BROOKHART V. JANIS, 384 u.s. 186 s.ct. 1245. Only a defendant can plead himself guilty, not his lawyer. Applicant contend that his trial attorney acted less like an adversary and more like an advocate for the state when he made unsolicited declaration of applicants guilt. Trial counsel caused a breakdown in the adversarial process and rendered the outcome of the trial unreliable and thereby violated applicants 6th amendment right to effective assistance of counsel. When a defendant enters a plea of not guilty he preserves two fundamental rights. (1) He preserves the right to a fair trial as provided by the sixth amendment. (2) He preserves the right to hold the government to proof beyond a reasonable doubt, Wiley, supra. An attorney may not stipulate to facts which amount to the functional equivalent of a guilty plea. Trial counsel denied the applicant a fair trial. (3) Trial counsel violated applicants due process rights by not objecting to the trial courts erroneous jury charge on hand of one hand of all theory. The state chose to indict applicant for attempted murder as a principle. The indictment 2013-65-42-2965 gives no indication of the states theory or any specific involved in the case other than that allege co-defendant was also indicted for attempted murder on or about february 25, 2013 as the principles. Neither

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indictment included the other defendants name in it to place each other on notice that they were codefendants, nor did the state charge the defendants with criminal conspiracy. On or about scenario does not place the defendants together at the same time. The prosecution failed to properly allege or prove a conspiracy or accessory theory under which both defendants could be found guilty of the attempted murder, had the state charged the defendants with conspiracy, it could have pursued convictions against both defendants under the hand of one hand of all theory. Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. *STATE V. WOOPER*, 276 S.C. 258, 277 S.E.2d 696 (1981). To admit evidence under this theory. The existence of the common design and the participation of the accused against whom the evidence is offered should first be shown. This approach state did not charge the defendants with conspiracy so this approach was unavailable. However, the state placed itself in the position where it would not meet its burden of proof against each defendant unless it showed participation in the attempted murder by both defendants at least to the point of overcoming mere presence. While a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially charges a complete offense, and the state presents evidence which convicts under a different theory than the allege. *THOMASON V. STATE*, 892 S.W.2d 11 (Tex. Crim. App. 1994) (392 S.C. 434). In South Carolina it is a rule of universal observance in administering the criminal law that a defendant must be convicted if convicted at all of the particular offense charged in the bill of indictment. *STATE V. LADY*, 186 S.E.2d 167. The court may not substantially amend the indictment through its instruction to the jury *STIRONE V. UNITED STATES*, 361 U.S. 212, 80 S.Ct. 270, *UNITED STATES V.*

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MILLER, 471 U.S. 130, 105 S.Ct. 1811. The fourth circuit has held that regardless of whether a defendant objects, STIROME demands reversal when a constructive amendment has occurred. see U.S. v. FLORESCA, 38 F.3d 706, 713 (4th Cir. 1994) (en banc) STATING THAT IT WOULD BE UNFAIR TO DEPRIVE A DEFENDANT OF THE GRAND JURYS PROTECTION. UNITED STATES V. RANDALL, 171 F.3d 195, 210 (4th Cir. 1999) applying floresca. The instant that the court amends the indictment the court loses jurisdiction. At that point in time, there is nothing that can cure that defect. It is a jurisdictional defect. Upon an indictment so charged the court can proceed no further. A trial on such an indictment is void. There nothing for which the applicant can be held to answer. If it lies within the province of the court to honor a change in the charging paper the purpose of the grand jury dissolves. see ex parte BAIN V. U.S., 30 L.Ed2d 849. Trial counsel was ineffective for failure to object to the erroneous jury charge. A material variance between charge and proof entitles the applicant to a directed verdict. (8). Trial counsel was ineffective for failure to object to the burden-shifting instruction which shifted the burden of proof. The applicant contend and will show that the burden-shifting instruction in the jury charge was unconstitutional under SAMSTROM V. MONTANNA, 99 S.Ct. 2450 and FRANCIS V. FRANKLIN, 105 S.Ct. 1965. see hand of one hand of all accomplice liability instruction. An instruction or charge that shifts the burden of proof an element of the offense as in the case at bar, substantially impairs the truth finding of the jury. The due process clause of the fourteenth amendment protects the accused against conviction except, upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. IN RE WINSHIP, 90 S.Ct. 1068, this bedrock elementary (constitutional) principle, Id at 363 (90 S.Ct. 1072) prohibits

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the state from using evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. SAMSTROM V. MONTANNA, 99 s.ct.at 2457-2459, PATTERSON V. NEW YORK, 97 s.ct.2319, 2329, MULLAREY V. WILLIAMS, 95 s.ct.1881, also MORISETTE V. U.S., 72 s.ct.240, 255. SANDSTROM V. MONTANA, supra made clear that the due process clause of the 14th amendment does not deny the accused a fair trial. A jury charge is defective if a reasonable juror could interpret it to allow a finding of guilt based on a degree of proof below that required by the due process clause. STATE V. KILPATRICK 462 s.e.2d 884, 889, (ct.app.1995) citing s.c. constitution article 21 the court states that judges shall not charge juries with respect to matters of fact, but shall, declare the law. A judge may not instruct the jury in a manner which assumes the truth of the facts needing to be proved. Although portions of the requested charge may be sound, the charge and give the jury the unobjectionable parts. BUTLER V. GAMMA, 445 s.e.2d 468. see indictment 2013-65-42-2965 and jury charge. Trial counsel violated applicants 6th amendment right to effective assistance.

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(9)

Trial counsel was ineffective for failure to object and preserve applicant's confrontational rights, compulsory process rights and hearsay assertions.

During the course of pre-trial motions, it was discovered that the victim would be available for trial, but would not be used by the prosecution. See Transcript page ~~581-825~~

Trial counsel failed to challenge, object and preserve his constitutional rights, compulsory process rights and hearsay assertions. Trial counsel's acts and omissions denied the applicant a fundamental fair trial in violation of the S.C. Constitution Article I section 3 and the U.S. Constitution 14th amendment. If it were not for trial counsel's errors, the outcome of the applicant's trial would have been different.

Rule against hearsay prohibits admission of testimony, or written evidence of a statement made out of court, offered in court to prove truth of the matter asserted. The admission of hearsay constituted reversible error because it prejudiced the applicant. Prejudice is presumed because the hearsay had some probative value on a material fact in the case.

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Like the testimony in the instant case, the police officer's testimony in *State v. Coin*, 215 S.C. 166, 54 S.E. 2d 559 (1949); *State v. Pollard*, 260 S.C. 457, 196 S.E.2d 839, their testimony had no purpose other than to prove the truth of the matters asserted.

The Confrontation clause provides: In all criminal prosecution the accused shall enjoy the right to be confronted with the witnesses against him, Article I Section 14 of the SC Const. an accused this same right. Any person charged with an offense

③ Trial counsel failed to investigate and interview the victim and the state's witnesses prior to trial

Prior to trial, applicant contend that his trial counsel did nothing than accept the version of the solicitor's file and reports. There was no investigation, no interviewing of witnesses no preparation of a defense, no discovery, no visiting of the crime scene and no trial preparation.

Trial counsel made little use if any of the evidence garnered from the state's (SLED) reports which tended to substantiate his innocence. Applicant contend that actual and substantial prejudic have occurred. Even less excusable is trial counsel's failure to interview the state's witnesses whom he knew would testify against the applicant. Although the names of the state's witnesses and victim had been provided, trial counsel did not attempt to contact them. See House v. Balkcom, 725 F 2d 608. Trial counsel failed to investigate the facts of the case.

Trial counsel's failure to investigate the facts below the level of performance by counsel required by the Sixth Amendment. When a lawyer fails to conduct a substantial investigation into any of his client's plausible lines of defense. The lawyer has failed to render effective assistance of counsel. pre-trial investigation, principally because it provide a basis upon which most of the defense must rest is the most critical stage of a lawyers preparation. See Von Moltk v. 332 U.S. 708, 68 S.CT. 316 Powell v. Alabama, 53 S.CT. at 59. The Sixth Amendment involve the independant duty to investigate and prepare. See also Chambers v. Armontrout, 907 F.2d 825

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shall enjoy the right to be confronted with the witnesses against him. Section 17-23-60 of the 1976 Code of Laws of South Carolina restates this right. State v Smith, 230 S.C. 164, 94 S.E.2d 886

(1956). The right to confrontation envisions:

a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Trial counsel failed to put the State's case through adversarial testing by denying applicant's personal constitutional 6th and 14th amendment rights.

These tests of truthfulness are so important that the absence of confrontation and compulsory process at trial call's into question the ultimate integrity of the fact-finding process. see Ohio v. Roberts, 448 U.S. at 63, 100 S.Ct. at 2538, quoting, Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038 and Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540 See State v. Williams, 331 S.E.2d 354.

Prejudice worked to applicant's actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. Ouska v Cohill-Masching, 246

F3d 1036, 1050 quoting 456 U.S. 152, 170 U.S. v Frady, 102 S.Ct 1584

14) improper comment - pg #367 L. 17-19

15) Failure to Request mistrial / Burden improper

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TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO INTRODUCE ESSENTIAL MEDICAL EVIDENCE AND TESTIMONY THAT WOULD HAVE EXONERATED APPLICANT

During pre-trial motions, Applicant's trial counsel told the trial court page #57L. 12-19 I'm told that the victim is going or his most recent statement is going to say that the codefendant is the one who shot him. Mr. Bulsa and I already had this conversation the other day, but I just want to put it on the record, and that is that Mr. Bulsa would have the victim in court and would not release him unless the court ordered he could be released in case that I need to call him.

On page #58L. 10-20 the solicitor stated that we brought the victim in to see exactly how far he has, has recovered and whether he could testify. When we asked him who shot him, he said he didn't know, but he did indicate it was not Robert Moore because he knows Robert Moore. That conflicting information, based on his condition, and the other pieces of evidence that we have, we decided not to call him as a witness. We would use codefendant's testimony to prove Mr. Moore was the shooter.

Although trial counsel was aware in advance of the trial of the importance of medical testimony in this case, he failed to adequately investigate whether he could have offered additional evidence in support of the victim not testifying.

Trial counsel did nothing to investigate any medical reports. He did not contact or interview the doctor who treated the victim. He failed to present powerful exculpatory testimony which could have exonerated the applicant. Trial counsel could have raised serious doubts as to whether the victim's condition would keep him from testifying. The jury would likely have concluded that the applicant could not have committed the crime charged, based upon prior inconsistent statements.

Applicant was denied confrontation and compulsory process by trial counsel's acts and omissions. Counsel's failure to even contact the hospital where the victim was treated is incomprehensible.

Due to the incompetence of his trial counsel, applicant was precluded from presenting a coherent and compelling defense that he was innocent.

The codefendant's testimony could not be corroborated, which is error. The codefendant's testimony caused a structural error which infected the entire trial. See hearsay assertions, confrontation and compulsory process violation argument. See also Henry v Scully, 918 F. Supp. 693, 715 (finding no possible strategy that could have justified defense counsel in allowing co-defendant's testimony to be used against petitioner at trial. 78 F.3d 51, 52 such is the case here.

Trial counsel's ineffectiveness severely prejudiced the applicant which is supported by the record at trial, to include the nature of the evidence presented against applicant at trial and the evidence applicant's trial counsel failed to present at trial. Trial counsel failed to call the doctors who examined the victim or introduce medical reports into evidence. Expert testimony or documentation could have been used to determine whether or not the victim suffered major damage to his head which would keep him from testifying.

Trial counsel's failure to not introduce evidence of the victim's medical condition was not a matter of strategy and, in fact, severely prejudiced applicant, when one considers the prosecution's evidence against applicant at trial. Defense counsel has a responsibility to investigate or to make a reasonable decision not investigate law or facts relevant to plausible options. Strickland, 466 U.S. at 690-91, 104 S. Ct. 2052. In this case, trial counsel's efforts fell short of what the constitution requires.

If it were not for trial counsel's acts and omissions, the outcome of the trial would have been different. Applicant denied a fair trial.

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Robert L. Moore, #320303,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-42-01279

RETURN AND MOTION FOR A
MORE DEFINITE STATEMENT

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NOW COMES Respondent, making its return to the post-conviction relief (hereafter "PCR") application filed on April 9, 2020 by Robert L. Moore (hereafter "Applicant"). Respondent respectfully offers the following in support of its return:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. During its June 2013 term, the Spartanburg County Grand Jury indicted Applicant for Attempted Murder (2013-GS-42-2965). Applicant was represented by Andrew Johnston, Esquire. Deputy Solicitor Derrick Balsa of the Seventh Circuit Solicitor's Office prosecuted the case. On July 21-23, 2014, Applicant proceeded to trial before the Honorable R. Keith Kelly, circuit court judge, and a jury. Judge Kelly sentenced Applicant to thirty years' imprisonment.

Applicant filed a timely Notice of Appeal that was perfected by Robert M. Dudek, Esquire, through filing a brief. The South Carolina Court of Appeals affirmed the conviction by written order. *State v. Moore*, Op. No. 5512 (S.C. Ct. App. filed Aug. 30, 2017). On September 14, 2017, the State made a petition for rehearing, asking the court to grant a petition for rehearing and find in accordance with the trial court judge that no violation of the Fourth Amendment

occurred, and affirm Applicant's conviction and sentence. Alternatively, the State requested the Court to publish the opinions because "three vastly different opinions are likely to cause confusion on the issues involved. On September 14, 2017, Applicant made a petition for rehearing, requesting the court reconsider its finding and conclude the warrantless search of the cell phone was unconstitutional. The South Carolina Court of Appeals denied both petitions for rehearing on November 2, 2017. This decision was appealed to the South Carolina Supreme Court. Our Supreme Court affirmed, with modifications. *State v. Moore*, Op. No. 27948 (S.C. S.C. filed Feb. 19, 2020). The remittitur was issued on March 6, 2020.

II. Statement of Facts

On February 25, 2013, several officers responded to a shooting at a Taco Bell in Spartanburg. (Tr. 110, 125). The victim was found, shot in the left side of the head, hanging out of the victim's vehicle, and hung up in the seatbelt. (Tr. 115). A bystander was frantically yelling how the victim had been shot. (Tr. 127). The victim was barely breathing, unresponsive, and had blood draining out of his mouth. (Tr. 116, 119). EMS arrived to render aid and transport the victim. (Tr. 116-17). The victim was in the ICU for over a month and spent about two or three months in the hospital, but ultimately survived the incident. (Tr. 104-05). The victim suffered permanent injuries that require around the clock care. (Tr. 105).

III. Current Action before the Court

In his *pro se* PCR application, Applicant alleges he is detained unlawfully for the following reasons (excerpts verbatim):¹

1. "Trial Counsel failed to request a mental competency hearing / evaluation pursuant to the Due Process Clause."
2. "Trial Counsel failed to challenge a pre-arranged plea agreement with my alleged

¹ For brevity's sake, Applicant's detailed explanations on each of the points listed above as stated in the PCR application are not specifically quoted in this return.

- codefendant."
3. "Trial Counsel [was] ineffective for failure to request a lesser-included offense instruction."
 4. "Trial Counsel was ineffective for giving applicant erroneous advice on which he based his decision not to testify."
 5. "Trial counsel was ineffective for denying applicant's right to an impartial jury as guaranteed by the South Carolina Constitution and by the 6th and 14th amendment of the United States Constitution."
 6. "Trial Counsel was ineffective for conceding guilt on applicant[s] behalf."
 7. "Trial Counsel violated applicant's due process rights by not objecting to the trial court's erroneous jury charge on 'hand of one, hand of all' theory."
 8. "Trial Counsel ineffective for failure to object to the burden-shifting instruction which shifted the burden of proof."
 9. "Trial Counsel denied applicant's confrontation rights and compulsory process of 6th amendment and hearsay assertions."
 10. "Trial Counsel was ineffective for failure to argue in suppression hearing he had a reasonable expectation of privacy in the data contained on his cell phone."
 11. "Trial Counsel was ineffective for failure to request a directed verdict."
 12. "Trial Counsel failed to object to reference of surety bond prior bad act evidence, and failed to request curative instruction in reference of surety bond. (Prior bad act evidence)."
 13. "Trial Counsel failed to investigate and interview the victim and the State's witnesses prior to trial."
 14. "Trial counsel was ineffective for failing to object to solicitor's improper comment during closing arguments."
 15. "[Trial Counsel was] ineffective for failing to request mistrial/improper burden shifting."

Attached to and incorporated herein are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, and the current PCR application. Respondent reserves the right to amend this Return upon receipt of additional relevant information.

IV. Argument

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). 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

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upon as having produced a just result.” *Strickland v. 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), SCRCP (“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). 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.

Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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 Request Mental Competency Hearing

Applicant claims Counsel was ineffective for failing to request a competency hearing before trial was convened and that he was not competent to stand trial. A defendant must prove he was incompetent to stand trial by a preponderance of the evidence. *Hall v. Catoe*, 360 S.C. 353, 358, 601 S.E.2d 335, 338 (2004) (citing *State v. Reed*, 332 S.C. 35, 39, 503 S.E.2d 747, 749 (1998)). A defendant is competent to stand trial if they have “‘a rational, as well as factual, understanding of the proceedings against him’ and the ‘ability to consult with his lawyer with a reasonable degree of rational understanding.’” *Id.* at 359, 601 S.E.2d at 338 (quoting *State v. Bell*, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987)).

Applicant alleges that Counsel was ineffective because he failed to request a competency hearing that, if requested, would have shown that Applicant was not fit to stand at trial. However, Applicant did not indicate what his condition was, how it impacted him, or how it rendered him unfit to sit for trial. Thus, a more definite statement is needed for Respondent to ascertain

whether or not this allegation has merit.

Failure to Challenge Plea Deal with Co-Defendant

Applicant alleges that Counsel was ineffective for failing to challenge a pre-arranged plea agreement with Applicant's alleged co-defendant. Specifically, he alleges that Counsel was ineffective for failure to challenge statements made by the co-defendant against Applicant that were incriminating in nature and allegedly false, according to Applicant.

Counsel is not deficient when he articulates a valid reason for employing a certain trial strategy. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). Though Applicant states the State presented false testimony at trial, he does not state what testimony was false, how he thinks Counsel should have challenged the plea deal or elicited testimony, or how it would have impacted the trial proceedings. A more definite statement is needed to ascertain if this allegation has merit.

Failure to Investigate and Interview Witnesses

Applicant alleges ineffective assistance of counsel for "failure to investigate." Specifically, he claims Counsel did not investigate, interview the State's witnesses, prepare a defense, conduct discovery, visit the crime scene, prepare for trial, or make use of SLED reports. *Strickland* makes clear that counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness [under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* However, counsel is required to, at minimum, "interview potential witnesses and make an independent investigation of the facts and circumstances of the case". *Ard v. Catoe*, 372 S.C.

318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff'd*, 828 F.2d 670 (11th Cir.1987)), including aggressively re-examining all the government's forensic evidence and conducting analyses of all other available forensic evidence." *Id.* (quoting *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, reprinted in 31 Hofstra L.Rev. 913, 1015 (2003) (emphasis added)).

Counsel is not obligated to "investigate lines of defense that he has chosen not to employ at trial." *Strickland*, 466 U.S. at 682 (quoting *Washington v. Strickland*, 693 F.2d 1243, 1255 (5th Cir. 1982)). 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).

Here, outside of stating that he wished Counsel talked to the doctor that treated victim, called the victim to testify, and procured the victim's medical reports, Applicant does not show what impact, if any, interviewing State's witnesses would have had at trial, what defenses were not explored, what evidence he would have obtained through further investigation, or how else Counsel could have utilized the SLED report. Even so, regarding the complaints concerning the victim and his medical history, Applicant has not specifically stated what Counsel would have discovered that was unknown because of Counsel's alleged failure, how Counsel's alleged inaction was unreasonable, or how that discovery would have affected trial proceedings. A more definite statement is needed to ascertain whether or not the allegation has merit.

Failure to Argue for Suppression of Cell Phone Data

Applicant claims Counsel was ineffective for failing to argue in a suppression hearing that he had a reasonable expectation of privacy. Before trial, a motion to suppress hearing was

held, where Counsel argued that the contents of the cell phone should have been suppressed because they were seized through a warrantless search. (Tr. 10-60). This was also raised on direct appeal twice; once before the South Carolina Court of Appeals and once before the South Carolina Supreme Court. Counsel did his due diligence in raising this issue and was not ineffective simply because the court sided with the State.

Additionally, Applicant failed to state what exactly Counsel failed to do on this particular issue, how Counsel's action or inaction constituted a deficiency, or how Applicant was prejudiced by that action or inaction. A more definite statement is needed for Respondent to ascertain whether this allegation has merit.

Failure to Correctly Advise Applicant on Whether to Testify

Applicant claims Counsel was ineffective for giving him erroneous advice on whether to testify, alleging that the advice given was in error because previous crimes Counsel said would be used to impeach Applicant were inadmissible. "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). To show prejudice, Applicant has to show but for prejudice, the results of the proceeding would have been different. *Id.* at 595, 533 S.E.2d at 310-11.

Besides stating that his previous criminal history could not have been used to impeach him on cross-examination, Applicant has failed to state what the charges were, what Counsel's advice specifically consisted of, how it impacted his decision, and what impact his personal testimony would have had on the trial's outcome. Thus, a more definite statement is needed to ascertain whether or not the allegation has merit.

Failure to Guarantee an Impartial Jury

Applicant claims Counsel was ineffective for failing to ensure the jury was impartial.

Specifically, he states Counsel was ineffective for failing to request an alternate juror to replace the forelady or request a voir dire of each juror. Additionally, he states that if Counsel fully investigated the forelady he would have found out that she intentionally concealed information and that the information concealed would have supported a challenge for cause or would have been a factor in a peremptory challenge. He claims the results of the trial would have been different absent the deficiency.

"[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). Additionally, "[t]he fact that an accused does not personally select the jury is not a deprivation" of the right to a jury trial. *Id.* (quoting *Commonwealth v. Sanders*, 299 Pa.Super. 410, 445 A.2d 820 (1982)). To show prejudice, applicants must "provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense." *Id.*

Additionally, the trial transcript clearly shows that a discussion about the forelady's relationship with the Solicitor as a Sunday School student of his when she was in first grade. (Tr. 155). The Solicitor explained that they do not have a close relationship and, in fact, he did not think they forelady remembered who he was. (Tr. 155-57). After this, Counsel asked to use a peremptory challenge to strike the forelady with and replace her with an alternate. (Tr. 157-58). The judge ultimately concluded that the forelady could remain fair and impartial and, thus, did not allow Counsel to use a peremptory challenge, despite his request to do so. (Tr. 158-60). Counsel did his due diligence in moving to strike the forelady once he found out about the relationship with the Solicitor and, as such, he did not act deficiently. Further, Applicant fails to state what impact, if any, striking the forelady would have had on the proceedings, what information was concealed, how Counsel would have discovered it, how the information would

have impacted Counsel's decision to strike. A more definite statement is needed to ascertain whether or not this allegation has merit.

Ineffective for "Conceding Guilt"

Applicant states Counsel was ineffective for conceding Applicant's guilt during closing arguments without Applicant's knowledge or approval. Though Counsel stated that the State "at most" proved that Applicant was at the scene of the crime and drove the getaway car from the scene, Counsel never stated that Applicant was guilty of the crime. (Tr. 341). In fact, Counsel's main argument in closing was that Applicant was not guilty of the crime charged because Applicant's "mere presence" at the scene is not sufficient to charge someone under the "crime of one, crime of all" theory. (Tr. 341-42). Further, though Applicant stated he was upset that Counsel stated he was guilty as accessory after the fact of the crime, but, when viewed in context of the entire closing argument, it is clear that Counsel stated that, at most, the State could prove he was an accessory after the fact, but that the State decided wrongly when it decided not to pursue this charge at trial and, because they chose wrong, the jury should decide Applicant was not guilty of the greater offense. (Tr. 341). This strategy was reasonable and, because an accessory charge was not available for the jury to vote to convict on, Applicant was not injured by any alleged admittance of guilt on Applicant's part. Thus, Respondent contends this allegation is without merit.

Failure to Request Jury Instruction

Applicant claims Counsel was ineffective for failing request a lesser-included offense or a self-defense instruction. A jury does not have to be instructed on a lesser-included offense unless there is "any evidence from which it could be inferred [that] the lesser, rather than the greater, offense was committed." *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 242

(1996). Applicant failed to state what the lesser-included offense would have been, why it was more appropriate in this case, how it would have impacted the results of the proceedings, or why the lesser offense was more appropriate than the greater offense. A more definite statement is needed for Respondent to ascertain whether or not the allegation has merit.

Failure to Object

Applicant raises many different failure to object allegations in attempting to prove Counsel was ineffective. Whether failure to object constitutes deficient performance generally hinges on whether or not 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").

Regarding failure to object to the jury instruction under the "hand of one hand of all" theory, Applicant has failed to specifically show why this charge was improper or specifically why Counsel acted deficiently by failing to object. Applicant also asserted the indictment was improper because it did not specifically mention his co-defendants or that he was a co-conspirator or an accessory in the crime. He does not, however, provide any evidence showing why an attempted murder charge was inappropriate. Instead, given his conviction, the crime he was indicted under was seemingly proper. However, a more definite statement is needed on this ground for Respondent to ascertain whether or not the allegation has merit.

Concerning failure to object to the Solicitor's "improper comment during closing arguments", Applicant failed to state what the comment was, why Counsel was deficient for failing to object, or how an objection would have impacted trial proceedings. A more definite

statement is needed for Respondent to ascertain whether or not the allegation has merit.

Regarding failure to object to burden-shifting instructions, or request a mistrial because of the instructions, the judge told the jury that "[t]he State has the burden of proving the defendant guilty beyond a reasonable doubt." (Tr. 371). The judge expanded upon this, telling the jury they must be "firmly convinced of the defendant's guilt" and explained to the jury what a reasonable doubt is. (Tr. 371-72). The trial transcript does not substantiate Applicant's claim that the judge shifted the burden of proof to Applicant. Thus, Counsel was not ineffective for failure to object to instructions that were not, in fact, given. However, a more definite statement is needed concerning what exactly was said that Applicant alleges shifted the burden or how it impacted the trial proceedings.

Regarding failure to object to a surety bond, prior bad act evidence, and failure to request a curative instruction in regards to the surety bond, Counsel did request a jury instruction concerning the surety bond after the Judge denied his request for a mistrial on this point. (Tr. 202-04). Thus, Respondent contends Applicant's allegation is without merit. However, Respondent requests a more definite statement concerning why Counsel's alleged inaction was deficient or how Applicant was prejudiced as a result of the inaction.

Applicant also alleged that Counsel was ineffective for failure to object and preserve "applicant's confrontational rights, compulsory process rights and hearsay assertions. Specifically, Applicant took issue with the fact that the victim was not called to testify. As evidenced by the victim's father's testimony, the victim required around the clock care and could only speak a little at the time of trial. Thus, it was presumably a strategic move by Counsel not to call the victim to testify because, even if the victim was capable of doing so at the time, his testimony probably would have, if anything, hurt Applicant further given how damning his

testimony presumably would have been and how emotionally jarring it would be for jurors to see, firsthand, how negatively impacted the victim was from the incident.

Applicant's allegation that Counsel failed to object officer's testimony in its entirety because everything they said was allegedly hearsay is without merit, because the responding officers that testified had personal knowledge of the incident and could testify in concordance with the rules of evidence. *See generally* Rule 801(c), S.C.R.Evid. (Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.") (emphasis added). The officer's testimonies were not, by their very natures, completely hearsay. Thus, if Applicant is claiming this, his claim is without merit. Alternatively, if Applicant is taking issue with something specific that was said, he failed to state what that is and, thus, a more definite statement is needed.

Applicant claims Counsel was ineffective for failing to ensure Applicant was guaranteed his rights under the Confrontation Clause, but failed to state how it was violated, who he wanted to confront, how Counsel's inaction was a deficiency, and how it impacted the trial proceedings. A more definite statement is needed regarding this matter.

Failure to Request Directed Verdict

Applicant claims Counsel was ineffective for failing to move for a directed verdict. Applicants are not entitled to directed verdicts as a matter of law, and counsel will not be found ineffective for failure to move for a directed verdict if the motion would have been denied when viewed in the light most favorable to the State. Here, given that ample evidence existed suggesting Applicant's involvement and that the jury ultimately found Applicant guilty, a directed verdict likely would have been denied. *Teamer v. State*, 416 S.C. 171, 181, 786 S.E.2d 109, 114 (2016). Thus, Respondent contends this allegation is without merit.

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CLERK OF COURT
STANLEY COUNTY
SOUTH CAROLINA
JAN 14 2017
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However, the many allegations of ineffective assistance of counsel asserted in the PCR application probably raise questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 265; 305 S.E.2d 247, 248 (1983) ("Where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.").

V. Motion for a More Definite Statement

Respondent moves for a more definite statement regarding Applicant's allegations. Applicant alleges that plea counsel was constitutionally ineffective based upon the numerous allegations, addressed above. However, he does not explain exactly what Counsel did that constituted ineffective assistance of counsel, as it relates to the issues outlined above. Applicant fails to set forth with specificity any facts and circumstances upon the claim is based. The Uniform Post-Conviction Procedure Act requires that applicants must "specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In a PCR application, it is incumbent upon applicants to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). The Supreme Court of South Carolina has provided that:

[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of counsel is insufficient.

Coardes v. State, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974).

Furthermore, Rule 8(a), SCRPC, requires all civil pleadings include "a short and plain

statement of the facts showing that the pleader is entitled to relief.” Respondent moves pursuant to Rule 12(e), SCRCP, to require Applicant to provide a more definite statement of his claims. Respondent moves to require Applicant to file an additional amended application well in advance of any evidentiary hearing concerning this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the allegation.

VI. Other Allegations Denied

Each and every other allegation in Applicant’s PCR application not explicitly admitted, qualified, or explain in this Return is hereby denied by the Respondent.

VII. Assertion of Rights to Notice of Amendments, Experts

Applicant should raise any claims he intends to raise at the PCR evidentiary hearing well in advance of the hearing. Here, Applicant’s court-appointed attorney is the only individual authorized to file amendments to this application, given his representative capacity, Rule 11(a), SCRCP and *pro se* filings will not be considered at the PCR hearing. *State v. Devore*, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct. App. 2016) (*Pro se* filing is a nullity where person was represented by counsel); *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010) (“Since there is no right to ‘hybrid representation’ that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relief counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.”).

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent or, in the alternative, continue the matter to permit adequate time to investigate and address the claims. *See Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) (“In most PCR cases . . . we have refused to excuse the pleading

and issue-preservation requirements that apply in all civil cases.”); *Love v. State*, 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019) (“When analyzing the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record.”); *see also* Rules 15(a)-(b), SCRCP (explaining how to amend a pleading). Pursuant to Section 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless the Court grants leave upon good cause shown. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits withheld until the last minute resulting in undue prejudice to Respondent.

[conclusion and signature line on following page]

VIII. Conclusion

WHEREFORE, Respondent respectfully requests that the Court require Applicant to provide a more definite statement and hold an evidentiary hearing regarding Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHELSEY F. MARTO
Assistant Attorney General

By: /s Chelsey F. Marto
ATTORNEYS FOR RESPONDENT

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July 27, 2020

FILED
2021 AUG -11 AM 8:54
CLERK OF COURT
CHARLESTON COUNTY
ALAN W. COX

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS
) FOR THE SEVENTH JUDICIAL
) CIRCUIT

Robert L. Moore, #320303

Case No.: 2020-CP-42-01279

Applicant,

v.

Certificate of Service

State of South Carolina

Respondent,

1. Undersigned is counsel of record for the Respondent in the above-captioned action.
2. Pursuant to the South Carolina Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency" (Appellate Case No. 2020-000447), dated April 3, 2020, "a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS)."
3. Undersigned has served a copy of the **Return and Motion for a More Definite Statement** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

Rodney W. Richey, Esquire
richevandrichev@yahoo.com

DATED this 27th Day of July, 2020.

/s Chelsey F. Marto
Chelsey F. Marto
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ChelseyMarto@scag.gov

2021 AUG -4 AM 8:54
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
ROBERT MOORE,	)	AMENDED APPLICATION
APPLICANT.	)	
v.	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	
RESPONDENT.	)	CASE # 2020-CP-42-1279

This matter comes before the Court by way of application of post conviction relief filed April 9, 2020, making a number of allegations of ineffective assistance of trial counsel. A Return was made on August 4, 2021. This application is intended to supplement the Applicant's pro se Application to provide a more definite statement of Fifth, Sixth, Eighth and Fourteenth Amendment violations of the Constitution of the United States & Art. I Sec. 3, 10, & 14 of the South Carolina Constitution due to ineffective assistance of trial counsel. The Applicant alleges ineffective assistance of counsel for:

- 1) failing to request mistrial after State's burden shifting comment in closing; (p. 357-62)
- 2) failing to object to State's improper comment in closing asking to convict for the community; (p. 367, l. 17) See State v. Parker, 391 S.C. 606, 707 S.E.2d 799 (S.C. 2011), State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (S.C. App. 1999).
- 3) failing to object or take exception to the trial judge's jury instructions on attempted murder, implied malice, and accomplice liability which was especially prejudicial after the State argued it did not matter who pulled the trigger because the hand of one is the hand of all; (pp. 358, 377-381, 384) See State v. Geter, 434 S.C. 557, 864 S.E.2d 569 (S.C. App. 2021), State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), State v. King, 810 S.E.2d 18, 422 S.C. 47 (S.C. 2017), State v. Campbell, 435 S.C. 528, 868 S.E.2d 414 (S.C. App. 2021).

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2023 SEP -9 AM 8:50

4) failing to investigate and interview victim Travis Wayne Hall or argue Applicant's right of confrontation required the State to call victim unless the Court made a finding on the competency of the witness; (p. 57-8, l. 8-25)

5) failing to move for directed verdict; (p. 297-304)

6) failure to request curative instruction after reference to surety bond; (p. 203)

Respectfully submitted,

s/ Susannah Ross
Susannah Ross #11205
Attorney for the Applicant
330 E. Coffee St,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 8th day of February, 2023

FILED
2023 FEB -9 AM 8:50
CLERK OF COURT
JANET L. COLE
1200 W. BROAD ST.
GREENVILLE, SC 29601

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

ROBERT MOORE,

Applicant,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

CASE #2020-CP-42-1279

AFFIDAVIT OF SERVICE
BY ELECTRONIC MAIL.

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by electronic mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by electronic mail:

ChelseyMarto@scag.gov

s/ Susannah Ross
Attorney for Defendant

This 8th day of February, 2023

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SPARTANBURG COUNTY
SOUTH CAROLINA

1	STATE OF SOUTH CAROLINA	)	IN THE COURT OF
		)	COMMON PLEAS
2		)	OF THE SEVENTH
	COUNTY OF SPARTANBURG	)	JUDICIAL CIRCUIT
3		)	
		)	
4		)	
	ROBERT LEE MOORE,	)	
5		)	
	Applicant,	)	TRANSCRIPT OF RECORD
6		)	2020-CP-42-1279
	vs.	)	
7		)	
	THE STATE OF SOUTH CAROLINA,	)	
8		)	
		)	
9	Respondent.	)	
		)	

February 15, 2023
Spartanburg, South Carolina

B E F O R E:

HONORABLE BRIAN M. GIBBONS, Judge.

A P P E A R A N C E S

SUSANNAH CONYERS ROSS, ESQUIRE
For Applicant

CHELSEY F. MARTO, ASSISTANT ATTORNEY GENERAL
For Respondent

Julie A. Cendroski,
Circuit Court Reporter III
Seventh Judicial Circuit

I N D E X

WITNESSPAGE

ANNOUNCEMENT OF CASE

By Ms. Marto

4

STATEMENT OF ISSUES

By Ms. Ross

4

ANDY JOHNSTON

DIRECT EXAMINATION

By Ms. Ross

8

CROSS-EXAMINATION

By Ms. Marto

30

REDIRECT EXAMINATION

By Ms. Ross

39

CLOSING ARGUMENT

By Ms. Ross

41

CLOSING ARGUMENT

By Ms. Marto

43

COURT TAKES UNDER ADVISEMENT

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COURT REPORTER CERTIFICATE

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EXHIBITS

MARKED

ENTERED

NO EXHIBITS PROFFERED

1 ROBERT LEE MOORE VS. STATE OF SOUTH CAROLINA

2 THE COURT: All right. Are you all ready?

3 MS. ROSS: Yes.

4 THE COURT: All right. Madam Attorney General,
5 if you'll introduce the case.

6 MS. MARTO: Yes, Your Honor. May it please the
7 Court? We're here today in the case of Robert Moore
8 versus The State of South Carolina, 2020-CP-42-1279.
9 He's presently incarcerated. During June 2013, he was
10 indicted for attempted murder. Represented by Andy
11 Johnston, and Derrick Bulsa prosecuted the case. July
12 21st through the 23rd, 2014, proceeded to trial before
13 Judge Kelly. He was found guilty and sentenced to 30
14 years imprisonment.

15 He filed a timely Notice of Appeal. That was
16 perfected by Bob Dudek. South Carolina Court of Appeals
17 affirmed the conviction. The decision was appealed to
18 the State Supreme Court, and it was affirmed with
19 modifications.

20 The remittitur was issued March 6th, 2020, and
21 this application filed April 9th, 2020. And with that
22 I'll turn it over to Ms. Ross.

23 THE COURT: All right. Ms. Ross?

24 MS. ROSS: Thank you, Your Honor. May it please
25 the Court? That was a very close appellate opinion

1 about the phone issues and the State's use of the phone.
2 Basically, just a brief factual overview. The
3 co-defendant, Tevin Thompson, testified that he was
4 gonna rob the victim and that Moore shot him. And there
5 was a witness in this parking lot who testified he saw
6 one person in dark clothes, like the co-defendant, exit
7 the car.

8 So, there was an issue. There were
9 co-defendants, Mr. Moore and then another man, Tevin
10 Thomas. And the issue was who actually did the
11 shooting. And then this phone came in. The
12 co-defendant's prints were on the victim's car and was
13 where -- the co-defendant was wearing clothes. The
14 defendant was wearing orange, and the witness identified
15 the co-defendant in dark clothes coming from the car.
16 So there's some real issues there. And the victim was
17 shot in the head, but he did not testify, though I
18 understand he was present in court.

19 So, I did an amended allegation. Mr. Moore had
20 someone from the prison system file a very thorough
21 application. I've included that with my amended
22 application, but brought some issues, particularly to,
23 to your attention.

24 I'll say that Mr. Moore, I believe, is fairly
25 illiterate and doesn't understand a lot about, well,

1 reading and writing and stuff.. He says he did not
2 understand those issues necessarily, but had someone
3 write them for him.

4 But I've added the issues of failing to request a
5 mistrial on page 357. And that's in the amended
6 application.

7 Two, failing to objects to the State's comment in
8 closing as to asking for a conviction for the community.
9 And that's at page 367, line 17. And I've referenced
10 State v. Parker, 707 S.E. 2d 799, and that's a 2011
11 Supreme Court case. And State v. Liberte, and that's
12 521 S.E. 2d 744, and that's a 1999 case, for that
13 argument.

14 The third argument is failing to object or take
15 exception to the trial judge instruction on attempted
16 murder, accomplice liability, and implied malice. We
17 would argue it was especially prejudicial after the
18 State argued in their closing it didn't matter who
19 pulled the trigger because the hand of one is the hand
20 of all.

21 And specifically, Judge, my issue on that is if
22 under the attempted murder statute, if you have to have
23 a specific intent to kill, can you have accomplice
24 liability for a specific intent to kill prong. I would
25 argue that ---

1 THE COURT: But was that the law at the time this
2 trial would have been?

3 MS. ROSS: The statute had been amend -- you
4 know, the statute said with intent to kill. You know,
5 there are new -- the attempted murder statute was in
6 effect, essentially. King came a year later, so that
7 was the -- State v. King was that -- well, there's an
8 appellate court case in 2015, and then the Supreme Court
9 case in 2017. So, arguably it's later, but had the
10 objection been made, the statute that the law was based
11 on was the same statute with intent to kill.

12 Finally, failing to investigate, interview the
13 victim, Travis Wayne Hall, or argue applicant's right
14 to confront confrontation required the State to call
15 that victim, unless the Court makes a specific finding
16 on his competence to be a witness. And I've referenced
17 page 57, line 8 through 25.

18 The appellate to move for directive verdict. I
19 believe I have in there. Failing to request a curative
20 instruction after there was a reference to a surety
21 bond. And that's at page 203.

22 THE COURT: All right.

23 MS. ROSS: So, Judge, with those allegations, the
24 Applicant does not wish to testify, but I would call
25 Andy Johnston to the stand as the witness.

DIRECT EXAMINATION OF ANDY JOHNSTON BY MS. ROSS

1 THE COURT: All right. Thank you, sir.

2 (Witness comes forward.)

3 All right. Sir, do you swear or affirm the
4 testimony you give today will be the truth, the whole
5 truth, and nothing bus the truth so help you God?

6 THE WITNESS: Yes, sir, I do.

7 THE COURT: Thank you very much. Have a seat
8 there. All right.

9 MS. ROSS: Thank you, Judge.

10 ANDY JOHNSTON,
11 having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MS. ROSS:

14 Q. Now, just start off, Robert Moore is here today,
15 doesn't wish to testify. Did you have any questions of
16 his competency or have him evaluated?

17 A. No.

18 Q. Why not?

19 A. Why didn't I have any questions of his
20 competence?

21 Q. Oh, I'm sorry. So you didn't have him evaluated
22 because you had no questions of his competency?

23 A. I didn't have any questions of his competence to
24 stand trial or to assist me in the defense of his case.

25 Q. Did he, in fact, assist you --

1 A. Yes.

2 Q. -- in the defense of his case?

3 A. Yes.

4 Q. How so?

5 A. Well, we interviewed several times. He told me
6 his version of the events, and his discussions with me
7 were rational. As we proceeded through the trial, I
8 cannot tell you a specific moment during the trial, but
9 I'm confident that at any point I needed clarification
10 from him or if he wanted to comment on something that
11 occurred, that we were able to exchange that
12 information.

13 Q. Now, was there any plea offer in the case?

14 A. As I sit here now, I honestly can't remember.
15 This one stretches back quite a way. I -- if you can
16 refresh my memory with something, that might. My guess
17 would be that there was a plea offer of some kind and
18 that Mr. Moore declined it. But as to what specifically
19 it was, as I sit here now, I cannot tell you.

20 Q. Do you recall if the co-defendant received a plea
21 offer?

22 A. My recollection was that the co-defendant was
23 cooperating.

24 Q. Correct.

25 A. Now, exactly what deal they made with him, I do

1 not remember. Of course, there's always a concern that
2 there is an implied agreement whenever someone like that
3 is going to testify and cooperate that there's some sort
4 of implied agreement that the deal's better than what
5 you're being told. But, again, I cannot remember
6 specifically what offer it was.

7 Q. Now, did you question the co-defendant about any
8 plea offers or promises that were made to him?

9 A. I can consult the transcript, if you would like
10 me to. I don't have an independent recollection. That
11 would be my usual practice, but if co-defendant is
12 testifying and he's receiving some sort of benefit from
13 his testimony, that I would cross-examine him thoroughly
14 on that point.

15 Q. All right. And I would refer you to page 270.

16 A. All right. Let me take a look. Yes. I began by
17 questioning him about his prior record. And he also
18 seemed to have a good deal of knowledge about how the
19 South Carolina Department of Corrections classifications
20 and test -- and credits worked, and I commented about
21 that. And he admitted that he had been studying that
22 particular point.

23 Q. Would it surprise you that he ended up getting a
24 ten-year sentence for this?

25 A. No, it would not surprise me at all. As I said,

1 these sorts of situations are often based on a wink and
2 a nod, and they come up with some sort of a generic
3 statement of he'll get credit for testifying truthfully
4 and then they cut a deal with him later.

5 Q. All right. And were you aware of any lesser
6 included offenses that were offered to Mr. Moore or any
7 plea offers?

8 A. You asked me that a few minutes ago and I -- my
9 answer would be the same. I cannot remember as I sit
10 here what offers were made to Mr. Moore. My guess is
11 that an offer of some kind was made to him, and that if
12 it was I would certainly have told him about it,
13 explained the ramifications, pros and cons of accepting
14 or not accepting, and allowing him to make a choice.

15 Q. Okay.

16 A. But because they already had one cooperating
17 defendant, my thought would be that they weren't going
18 to be giving Mr. Moore anything too favorable.

19 Q. Now, I'm just gonna jump around now. Just...

20 A. Yes, ma'am.

21 Q. Just going down to the -- the victim was Travis
22 Wayne Hall.

23 A. That's correct.

24 Q. And it's addressed on page 57 and 58 of the
25 transcript.

1 A. All right. Let me take a look. I'm there.

2 Q. Now, did you interview -- something came up at
3 the beginning of trial about Travis Wayne Hall, correct?

4 A. Yes. I cannot remember exactly what that was.
5 It seems to me perhaps that the victim's physical
6 condition had deteriorated. That he had earlier given a
7 statement implicating Mr. Moore, but perhaps by the time
8 of trial, he was no longer able to testify or able to
9 recall. I'm not 100 percent sure about that, but he was
10 in a wheelchair and he had a bullet in his head. So,
11 certainly, I could conceive that bullet might move, or
12 something to that effect, and could further cloud his,
13 his memory.

14 Q. Now, would it surprise you, I believe, on page
15 57, Solicitor Bulsa states that he interviewed the
16 victim, you know, a year ago initially.

17 A. Yes, ma'am.

18 Q. But in preparation for the trial, just weeks
19 prior, the victim stated that Mr. Moore was not a
20 shooter.

21 A. I, I do recall that, yes.

22 Q. And Mr. Bulsa did point out that there was a
23 bullet in the victim's head, but did not necessarily
24 state that he was in a worse or different condition. He
25 just put forward that he did not intend to call him as a

1 witness.

2 A. Yes. One assumes that that was the reason he
3 wasn't calling him.

4 Q. All right. Now, at that point, did you ask for
5 the judge to have -- well first, did you object to say
6 that your client had a right to confront the witness
7 against him since the indictment was based partly on his
8 statement?

9 A. No. He certainly has a right to confront any
10 witness who's going testify against him in court, but
11 I'm not familiar with a principle of law that I could go
12 back and collaterally attack the grand jury indictment
13 on that basis. I'm not familiar with that, as a
14 principle of law.

15 Q. But at that point you didn't make any objection
16 to the State failing to call a witness who was there in
17 the courthouse who had given exculpatory information?

18 A. Well, you are correct. Though I did not make an
19 objection, what -- in reading the transcript, the
20 solicitor and I talked and that he agreed that he would
21 make him available to me if I wanted him -- if I wanted
22 to talk to him. I think that the way the -- what I
23 ultimately concluded was that if I were to call him to
24 the stand, he might revert to his earlier statement,
25 which was apparently a clear implication of Mr. Moore.

1 The other thing is that the solicitor might have
2 used his prior statement to somehow impeach him with his
3 -- or to -- in an attempt to refresh his prior memory,
4 or something to that effect. And that he would be able
5 to get out of him that Mr. Moore was the shooter. So, I
6 think I concluded that the best approach was they didn't
7 call him.

8 Another more subliminal factor is a gentleman was
9 in a wheelchair and was suffering from some degree of
10 mental disability from the bullet in his head. And I
11 thought that would also create a good bit of sympathy on
12 the part of the jury for him. So I think I thought that
13 it was overall a win for us if they didn't call him.

14 Q. But you did not actually interview him?

15 A. No, not that I recall. It does say here that he
16 was gonna be made available to me, but I do not recall
17 actually interviewing him, so I must have concluded that
18 even under the best of circumstances it would be a
19 mistake to call him.

20 Q. Now -- and you didn't ask the judge to make a
21 finding on the record to -- of the competence of the
22 victim as the witness?

23 A. No, I didn't. And I don't know that the question
24 was one of the victims competence. It seems to me more
25 it was a question of did the victim just no longer

1 remember.

2 Q. Well, I guess I'm asking you this because in the
3 trial setting, it has been an opportunity for you to,
4 outside of the presence of the jury, to feel out the --
5 what the victim was gonna say and whether he would be a
6 compelling witness for your client or not.

7 A. I could have, but that would have also given the
8 State the same opportunity. And since they had the
9 burden of proof and I didn't, I think that's how I came
10 to my ultimate conclusion.

11 Q. Okay. Now, I'm going back on Mr. Moore did not
12 testify. Did you advise him whether to testify or not?

13 A. My practice is this. I -- before -- at an
14 appropriate time, generally after the end of the State's
15 case, I have a conference with the client. Then I
16 explain to him what his Fifth Amendment rights are. I
17 explain to him that he is not required to testify, but
18 he has an absolute right to testify if he desires to do
19 so, but that if he testifies he'll have to answer not
20 only the more softball questions that I might pose to
21 him, but the more intense cross-examination questions
22 that would be posed to him by the State.

23 And as I sit here, I don't recall whether or not
24 Mr. Moore had a prior record, but I would also give him
25 my thoughts about whether or not his testimony would

1 allow the jury to hear his prior record. Although, I
2 would tell him, of course, that the jury would be
3 instructed not to use that for determination of whether
4 or not he committed this crime, but for credibility
5 alone. But still, as a general rule, that sort of thing
6 is not helpful to the defendant.

7 So, in any event, I advised him that he has a
8 right to testify and he has a right not to testify. And
9 that if he decides not to testify, that the judge would,
10 in fact, instruct the jury not to hold that against him.
11 So...

12 Q. All right. And I'd just refer you briefly to
13 page 390 --

14 A. Yes.

15 Q. -- on the record.

16 A. Yes, ma'am.

17 Q. At line 19.

18 A. Yes, ma'am.

19 Q. The judge does refer -- the solicitor, excuse me,
20 lays out the record and it looks like ---

21 A. Did you say page 319?

22 Q. 390.

23 A. 390, sorry.

24 Q. At line 19. I'm referring you. I don't think
25 there's much of a question there, as on there.

1 A. Oh, you're talking about his prior record?

2 Q. Yes. And then the questioning of the witness
3 about whether he is to testify is at page 300.

4 A. Right.

5 Q. And it does look like he had an ABHAN prior and
6 it was impeachable; is that correct?

7 A. I'll just quote from the transcript: The
8 defendant's criminal history dates to 2007. Pled guilty
9 to assault and battery high and aggravated. Burglary
10 second degree violent, common law robbery, malicious
11 injury. Must have been to the jail, and resisting
12 arrest. And then an A&B third. And then a criminal
13 domestic violence. And then another malicious injury to
14 property. Failure to stop for a blue light.

15 Now, of course, not all of those convictions
16 would necessarily have been allowed for impeachment.
17 And even if they were allowed for impeachment, there are
18 arguments that one can make about them being more
19 prejudicial than probative. So, had he decided that he
20 wanted to testify, we would have gone through that
21 analysis on each of those points that the solicitor --
22 on each of those convictions that the solicitor proposed
23 to impeach him with.

24 Q. All right. Then, so just based on your
25 discussions, you believe Mr. Moore, it's his, his

1 decision not to testify?

2 A. Yes, ma'am. And I don't know where in the
3 transcript it's contained, but as a general principle,
4 either the judge on his own, or I would suggest to the
5 Court that a colloquy be conducted between the judge and
6 the defendant. And the defendant, essentially, going
7 over all those same rights and issues that I discussed
8 earlier. So, I assume that's in the transcript, but...

9 Q. At page 300.

10 A. So that would be the final of -- he and I would
11 talk. He would preliminarily tell me what his plan was,
12 and then the judge would have a colloquy with him on it.

13 Q. Now, Mr. Moore, in the application what was
14 prepared on his behalf, pointed out that it was an
15 impartial jury pool. That the makeup was not even
16 between the races or didn't reflect Spartanburg County.
17 Was that your finding trying the case, or what was your
18 position?

19 A. Well, of course, we don't have a quota system for
20 racial, the racial composition of a jury. As I sit here
21 now, I cannot tell you what the racial composition of
22 this particular jury was.

23 Q. Now, did you request any charges, jury charges,
24 or object to the charge that the, the judge made or take
25 exception to?

1 A. I'd have to go back and consult the record on
2 that point. Can you tell me the page that we're talking
3 about?

4 Q. I'm referring to page -- tab 334 and 335.

5 A. Yes. On 333, the Court invites us to send
6 proposed jury charges, and that he would be there early
7 the next morning to discuss.

8 Q. Do you recall if he did that?

9 A. There does not seem to be anything on the record
10 about me having requested any special charge or the
11 State, for that matter, because basically he dismisses
12 us for the day at the end of page 344. And then we
13 begin with closing arguments the next day. So, I'm not
14 aware of any special jury charges that I made. Now,
15 I'll go to see if I made any objections to charges that
16 he actually did give.

17 Q. At 384. Line ---

18 A. Yes, ma'am. It begins at line 19. I asked the
19 judge. I said, I think I could have missed it. I don't
20 think it was in the written instruction, but I asked
21 specifically that the Court give a standard instruction
22 about the use of Rule 609, convictions for witnesses.
23 And I asked that he charge basically how a jury should
24 use a prior conviction in evaluating the credibility of
25 a witness.

DIRECT EXAMINATION OF ANDY JOHNSTON BY MS. ROSS

1 Q. Now, did you ---

2 A. And, apparently, the judge did agree to give
3 that.

4 Q. Now, did you -- you objected to the State's own
5 nine, that anything about attempted murder or implied
6 malice or the accomplice liability instruction?

7 A. I don't recall having done that, no.

8 Q. And refer you to page 377 over that instruction.

9 A. Yes, ma'am, I'm looking at it now.

10 Q. And those go on to 379. Now, I'm gonna hand you
11 -- there we. I wonder if I have the right one. This is
12 State v. King. I keep printing off the appellate
13 instead of the Supreme Court ruling.

14 A. Yeah. This ---

15 Q. If you're familiar with that case, then --

16 A. I am.

17 Q. -- I know it happened after this trial.

18 A. And this is the Court of Appeals opinion, in case
19 that matters to you.

20 Q. I apologize.

21 A. But I am familiar with it, yes, ma'am.

22 Q. Basically, what is the opinion of both the Court
23 of Appeals and the Supreme Court in State v. King, as
24 far as specific intent to kill under, at the time fairly
25 new, attempted murder?

1 A. My understanding is that the Court imposed a
2 requirement that was not specifically stated in the
3 statute. I believe in the current attempted murder
4 statute it is actually expressed, but at the time it
5 wasn't expressly stated in the statute. But they
6 indicated that one of the things the State would have to
7 prove before it could obtain a conviction for attempted
8 murder was proof beyond a reasonable doubt that the
9 defendant had a specific intent to kill when the act of
10 attempted murder occurred.

11 Q. And I ---

12 A. And so it was not in the statute at the time of
13 Mr. Moore's trial. The *King* case comes later. Then
14 there was a change in the statute later to actually put
15 that in specifically, if my memory serves me correctly.

16 Q. And I'd have to take a look at that. I believe
17 at the time that the judge even instructed in its
18 instruction, it says with intent to kill specifically,
19 but there's not an instruction, a separate instruction
20 that there must be a specific intent to kill.

21 A. I'll yield to your recollection. I do not...

22 MS. ROSS: I yield to yours, Judge, and just ask
23 that we can look that up at a later time.

24 BY MS. ROSS:

25 Q. Now, just given that with the instruction given

1 on page 377 at line 11, a person, who with intent to
2 kill attempts to kill another person, did you make any
3 objection to that theory, somebody could not be
4 convicted of attempted murder under the theory of
5 accomplice liability?

6 A. No, I did not. I think it presents -- I can't
7 tell you that I even considered the point at the time.
8 I believe you and I have discussed this, or I knew that
9 this was coming up in this hearing, and I thought it
10 presented an interesting question.

11 Q. And it wasn't preserved --

12 A. No.

13 Q. -- when there was no objection?

14 A. No.

15 Q. Okay.

16 A. My, what I think my analysis of it would be, is
17 that it could occur, that so long as the person who was
18 convicted under the theory of the hand of one is the
19 hand of all or accomplice liability, so long as the
20 accomplice was aiding or assisting another person who
21 had a specific intent to kill, that that would be an
22 appropriate conviction. Now, whether or not the charge
23 expressed that clearly, I can't say as I sit here.

24 Q. Now, on Page 357 through 362, the State
25 highlights the hand of one, hand of all argument.

1 A. Yes, ma'am.

2 Q. And just to follow that up, you had presented a
3 witness in your case in chief from the Taco Bell, just a
4 bystander, who may have identified the co-defendant as
5 the person who got out of the car and was the likely
6 shooter, versus Mr. Moore?

7 A. You're correct.

8 Q. And then in response to that, the State argues
9 that it doesn't matter under accomplice liability
10 theory, essentially.

11 A. I agree.

12 Q. And did you ever object to that as being burden
13 shifting?

14 A. No. I could be wrong, but I thought that was the
15 law. I still think that's the law. I could be wrong.

16 Q. Now, on page 367, line 17, the solicitor asked
17 you to convict him for Mr. Hall's sake, for Spartanburg
18 County's sake, for this community. Did you object to
19 that argument by the State?

20 A. No. I agree that that seems to be stretching the
21 point a bit of -- you know, it's been said that a jury
22 is the conscious of the community and acts on behalf of
23 the community in making decisions, but I think probably
24 that one merited an objection.

25 Q. Now ---

1 A. In retrospect.

2 Q. And then it's not your practice to move for a
3 directed verdict, is it?

4 A. It's not that it's not my practice to move for a
5 directed verdict, it's my practice is that I don't move
6 for one if I think there's plenty of evidence to support
7 the case. I don't do it, as some lawyers would say,
8 quote/unquote, just for the record. I do it if I think
9 there is a real question about whether or not one or
10 more of the elements of the crime have not been
11 established.

12 But, as you know, it's a very low standard. And
13 so, I don't generally just, when there's a lot of
14 evidence that's been presented, eye witness testimony,
15 et cetera, I don't just generally stand there and say,
16 Judge, I don't think there's enough evidence to go
17 forward, take it away from the jury. That's just how I
18 do it.

19 Q. And if you'll refer to page 297 through 304 of
20 this transcript, it wouldn't surprise you that you
21 didn't make a directed verdict, would it?

22 A. Would it surprise me that I did not?

23 Q. Yes.

24 A. No, it would not surprise me that I did not,
25 because while I certainly think the facts of the case

1 were arguable, there is certainly far more than a
2 scintilla of evidence to support the State's case.

3 Q. Now, on page 203, line 25.

4 A. Page 203, you say?

5 Q. Yes. I believe Ms. Moffitt testified to being
6 out on an appeal bond or something.

7 A. Yes. And I'm trying to remember now why that was
8 an issue.

9 Q. I believe it was signature because Mr. Moore had
10 bought some cigarettes later on and --

11 A. I see.

12 Q. -- signed a credit card.

13 A. Yes. And so, they used the surety bond for
14 comparison. Okay. All right. All right, and your
15 question?

16 Q. And you did not request a curative instruction
17 there, did you, on page 203?

18 A. Because she had called it, quote/unquote, a
19 surety bond?

20 Q. Yes.

21 A. No, I did not object to that. I ---

22 Q. I believe you objected, but you didn't request a
23 curative.

24 A. Yeah, you're correct. I made an objection, which
25 the judge did not grant, but he did offer a curative

1 instruction. Then I asked him to explain to the jury
2 something, that a surety bond can be a bond for
3 property. That it could be a bond in a criminal case.
4 It could also be a bond for a person that we're talking
5 about for another person. That is, that Mr. Moore could
6 have been the surety, rather than the subject of that
7 surety bond. And the solicitor didn't object, but the
8 judge still wouldn't give that instruction.

9 But he offered a curative instruction of just
10 disregarding the last comment and striking it from the
11 record. I studied it a moment and thought the best
12 thing was that if the Court wasn't gonna grant a
13 mistrial that we would not request a curative
14 instruction, as it would just bring the whole matter
15 back before the jury and re-emphasize it with them,
16 rather than really help.

17 Q. Now, again, you did ask for a curative
18 instruction at page 357. And at this point -- I'm
19 sorry, I believe it's more 359, 358.

20 A. Okay. I'm at those pages. What...

21 Q. And you didn't ask for a mistrial at that point,
22 did you?

23 A. I've got to look and see ---

24 Q. Go ahead and take your time.

25 A. What page was the issue on that was the

1 controversy?

2 Q. It really comes in more at 358, 359, and it goes
3 through 362. There was some statements.

4 A. Right.

5 Q. At the top of page 360, line 4.

6 A. I believe that we're in the solicitor's closing
7 argument at this juncture; is that correct?

8 Q. Right. The solicitor argued -- you mentioned
9 some statements and the solicitor says, where are those
10 statements? Mr. Moore, the defense has had total
11 freedom to introduce those statements.

12 A. That's burden shifting.

13 Q. And you objected and said, I'm just asking for a
14 curative instruction, not a mistrial.

15 A. Yes, that's what I did. And let's see what the
16 judge did. And I, in fact, asked him to give a curative
17 instruction. And I asked him to also give them a
18 specific curative instruction and also a more gentle one
19 too, and the judge agreed to do so.

20 Q. And you didn't ask for a mistrial --

21 A. No.

22 Q. -- before the ---

23 A. No.

24 Q. And that was a thing that the -- it wasn't in the
25 record to be argued on appeal.

1 A. The fact that I didn't ask for a mistrial, yes.

2 Q. Correct.

3 A. Because I didn't ask for it, it wasn't preserved.

4 At least that aspect of the argument was not preserved.

5 Q. And I believe this is the last question. The one
6 that I probably shouldn't ask that was on the list, but
7 you -- the issue that was preserved about the phone?

8 A. Yes, ma'am.

9 Q. I believe you made extensive argument about that,
10 but --

11 A. Yes, ma'am.

12 Q. -- he's saying that you failed to specifically
13 argue the expectation of privacy on the phone. Is that
14 -- does that make sense or is that possible?

15 A. I mean, I guess it is possible. I would have to
16 go back and review exactly what I said, but an
17 instructive United States Supreme Court case on the
18 issue of cellphones had come out, not too long before
19 the trial of this case, and the whole basis of that
20 United States Supreme Court case was that in modern
21 society a cellphone is everything that we carry all of
22 our innermost records and thoughts in these little, in
23 these little boxes. And that that's why the U.S.
24 Supreme Court found that a search of the phone in that
25 case without a warrant was illegal, so...

1 Q. So, do you just stand on the record of whatever
2 you said?

3 A. Oh, yeah. So I would stand on the record of
4 whatever I said. And I would think that I said
5 something along the lines of what I just mentioned to
6 you, is that it carries all of these private things and
7 that, therefore, we have a reasonable expectation in
8 being able to have these devices with all of this
9 confidential information and not have it subject to
10 being plundered through by the State, by agents of the
11 State without a warrant.

12 Q. And in South Carolina, under Article 10, Section
13 2 or Section 2 Article 10, we have an even higher
14 expectation of privacy than the ---

15 A. Yes. And that has most recently come very much
16 into play. I don't remember the name of the abortion
17 case, but the abortion case that's come out in the last
18 year, as I understand it, that was one of the basis for
19 the majority opinion.

20 Q. And do you recall specifically whether you made
21 that argument at Mr. Moore's trial?

22 A. No, I don't recall specifically, no.

23 Q. And I don't either, but I don't have any further
24 questions.

25 THE COURT: All right.

1 THE WITNESS: It would have been a good argument
2 to make.

3 CROSS-EXAMINATION

4 BY MS. MARTO:

5 Q. Good morning, sir.

6 A. Good morning.

7 Q. So, can you give us a brief rundown on the facts
8 and evidence that was in this case?

9 A. Wow, that's a hard one there. This was a
10 shooting that occurred at a Taco Bell here in
11 Spartanburg. It's on the west side, if you're familiar
12 with Spartanburg. It is a very high traffic location.
13 Tons of people coming.

14 I want to say this was during -- the time period
15 was around lunch time. I'm not 100 percent sure about
16 that, but correct me if I'm wrong, but it was around
17 lunch time, so there was a lot of people floating around
18 this Taco Bell.

19 And my client was driving a 300, white in color,
20 if I'm not mistaken. They had had some distinctive
21 wheels on it. I don't remember for sure, but anyway...
22 And my client and the co-defendant were in that vehicle.
23 The pull up to the Taco Bell, and the other gentleman,
24 who was shot, was also parked at the Taco Bell. And the
25 guy in the other car ends up getting shot. I think

1 probably the most likely explanations for the shooting
2 were either a drug deal gone bad or an attempted
3 robbery.

4 So, the guy gets shot in the head. The defendant
5 and co-defendant flee the scene. The defendant's cell
6 -- Mr. Moore's cellphone is left behind. I don't
7 remember now. I think it was found inside the victim's
8 car or on the ground around the victim's car, something
9 like that, so that it was associated with the people who
10 had done the shooting.

11 The police find that phone, as well as one or two
12 other phones, and they pulled something called the SIM
13 cards. They pull the SIM cards from the phone without a
14 warrant to get the information as to what was the number
15 of the phones, and I assume what carrier it was, and so
16 that they could then take that information and find out
17 whose phone it was. Later on, the co-defendant
18 cooperates, gives a statement implicating Mr. Moore as
19 the primary shooter.

20 Q. How many times did you meet with Mr. Moore?

21 A. I cannot tell you. Mr. Moore was incarcerated
22 pre-trial through the entire time. I'm sure I met with
23 him on several occasions. I'm sure I met with him a
24 sufficient number of times so that I clearly had his
25 version of the events and that we were preparing for

1 trial in the event that trial happened. So I'm
2 confident I met with him a sufficient number of times,
3 but I cannot tell you how many.

4 Q. During those conversations, were you given any
5 impression that Mr. Moore didn't understand those
6 conversations?

7 A. No. Now, admittedly, Mr. Moore was in special
8 schools and I was aware of that. By special schools, I
9 mean, he went to a school called the McCarthy Teszler
10 School, I believe is where he went. And that is a place
11 for -- many different types of people go there, but I
12 believe that he went there because of learning
13 disability of one type or another.

14 Q. Despite those issues, you weren't given any signs
15 of incompetence?

16 A. No. I found Mr. Moore easy to talk with. I
17 found that he understood the issues. He was able to
18 provide his version of the events and evaluate plea
19 offers and make a decision as to whether or not he
20 wanted to testify at trial. I don't recall having any
21 communication problems with him whatsoever.

22 Q. And, again, you don't recall any plea offers
23 being offered; is that correct?

24 A. I, I don't recall them, but please don't infer
25 from that, that there were none. I just can't tell you.

1 I have two large accordion files here with me today that
2 I have not had the chance to go through, so I don't want
3 to say that there was one when I don't know there was
4 one, but in general they make some -- the solicitor here
5 makes some kind of plea offer, but often it's, you know,
6 on the high side.

7 And so if there was one, I would have conveyed it
8 to him. I would have given him the pros -- my thoughts
9 and pros and cons and allowed him to make the decision
10 as to whether or not he wanted to accept it. If he
11 wanted to counter, I certainly would have done that.

12 If the client says -- I'm speaking hypothetically
13 now: I won't take 15, but I will take 8, then I would
14 try and negotiate that. But this was a very serious
15 crime. A man left permanently handicapped as a result.

16 It happened in broad daylight, again, in a very
17 heavily traveled area in this town, so I would not --
18 and they had substantial evidence, so I would not have
19 expected them to have offered anything particularly,
20 I'll use the term, sweet.

21 Q. How many criminal trials have you handled?

22 A. Dozens and dozens.

23 Q. As a defense lawyer, have you ever called a
24 victim to testify in the defense's case in chief?

25 A. In the defendant's case in chief? That would

1 mean that they -- that the State didn't call them?

2 Q. Yes, sir.

3 A. I cannot tell you specifically where I have done
4 that, but I certainly would do it if I thought it would
5 help.

6 Q. So, did you think it would be helpful in this
7 case?

8 A. No. For the reasons that we discussed earlier.

9 Q. Okay. Now, did you think -- you discussed with
10 Mr. Moore the option of testifying, correct?

11 A. Yes, as reflected in the colloquy.

12 Q. Did you think his testimony wouldn't have been
13 favorable to your case?

14 A. Well, you know, that's one of the things that the
15 defendant makes the call on. I will give him my advice.
16 My advice to him would have been don't testify. But had
17 he said, nope, I want to testify, then I would certainly
18 have facilitated that. Two reasons. One, he had some
19 priors. Again, there are arguments that, perhaps, some
20 of them could be kept out, but I had the feeling not all
21 of them would be kept out. The other thing is, I don't
22 think Mr. Moore would have told a good enough story that
23 it would have been helpful.

24 The other thing is, in my practice I've found
25 this. If you put the defendant on the stand, the jury's

1 focus will often change from has the State proven its
2 case beyond a reasonable doubt, to do they believe the
3 defendant?

4 Q. Now, have you ever brought up a Batson motion
5 during the course of one of your trials?

6 A. Oh, yes.

7 Q. And, typically, when do you do that?

8 A. Well, after a jury has been selected but not
9 sworn, and before the venire has been dismissed.
10 Typically, the judge, the presiding judge will say
11 something to the effect of, do either of the parties
12 have any issues before the jury is sworn or the venire
13 is released. So that would be the time to do it. And,
14 yes, I have done it a number of times.

15 Q. Typically, what are the circumstances that cause
16 you to bring that motion?

17 A. Well, if I think I can win it. I know what the
18 law is. I know that I have to make a prima facie
19 showing of discrimination. For example, let's say that
20 the State had five strikes and my client was an
21 African-American, and they had exercised four of their
22 five strikes against African-Americans, I think that
23 would be a strong prima facie showing. Of course, then
24 I ask the judge to rule upon that. And if he or she
25 agrees with me, then the prosecution has to go through

1 the list and explain and give a racially neutral reason
2 for each strike that they make.

3 Q. Did you think there was a reason to bring up a
4 Batson motion in this case?

5 A. If I did, I don't remember anything about how
6 many people -- what the racial composition was on this
7 particular jury, but I can tell you that if I did not
8 make a Batson motion, it's because I felt the facts
9 didn't support it. I would probably always make a
10 Batson motion if I thought the facts supported it. I'm
11 not going to make one if I don't think I can make a
12 prima facie showing. I'm not gonna waste everybody's
13 time. Because even if I can make a prima facie showing,
14 the prosecution may be able to give racially neutral
15 responses as to why they struck that -- struck those
16 jurors.

17 Q. To the best of your knowledge, was the law and
18 the jury instructions correct at the time?

19 A. Okay. Please answer that [sic]. I didn't quite
20 hear you.

21 Q. The question is, to the best of your knowledge,
22 was the law the jury was charged upon correct at the
23 time?

24 A. To the best of my knowledge, yes. As I said, I
25 did not consider the point about how accomplice

1 liability would work with a specific intent statute like
2 the attempted murder statute. I didn't consider that.
3 But as I sit here now, I still think that that would
4 probably be the law.

5 Q. And you testified that in retrospect you would
6 have objected to the State stating that the jury must
7 convict for the good of Spartanburg, South Carolina,
8 correct?

9 A. I, I think that in retrospect I think that I
10 should have objected to that point. As to the
11 egregiousness of the comment, I don't think it was that
12 egregious, but it probably merited an objection.

13 Q. Do you think it changed the outcome of the trial?

14 A. No.

15 Q. Do you think a directed verdict motion would have
16 been successful here?

17 A. Definitely not.

18 Q. How would you gage the strength of the State's
19 case?

20 A. Well, I'll use like when you go to the doctor
21 they say scale from one to ten, since you haven't
22 suggested any other, I found this, with ten being
23 overwhelming and one being hardly any evidence at all,
24 I'd put this at an eight.

25 Q. And, again, you did object to the surety bond

1 comment?

2 A. I did.

3 Q. And did you think a curative instruction would
4 have been helpful?

5 A. No, because if he wasn't willing to give the
6 supplementary information that the State even agreed was
7 proper, if he wasn't willing to do that, that a curative
8 instruction would just have made it worse and it would
9 have called that point to the jury's attention even
10 further.

11 Q. And, again, you raised the cellphone issue
12 pretrial, correct?

13 A. Yes. And I haven't gone back and reviewed it
14 again, but I assume that I renewed my objection at the
15 appropriate point, but gave a full-blown argument
16 pretrial. And then asked the Court to take note of that
17 objection again before that evidence was introduced.

18 Q. To the best of your knowledge, that was found to
19 be properly preserved by the appellate courts, correct?

20 A. They, they discussed the issue and made a ruling.
21 And they didn't say anything about it not being
22 preserved, so, yes.

23 MS. MARTO: No further questions.

24 THE COURT: Redirect?

25 MS. ROSS: Just one question, just on the ruling

1 here right before number two.

2 REDIRECT EXAMINATION

3 BY MS. ROSS:

4 Q. I just -- and this is sort of a last-minute
5 thing.

6 A. Okay.

7 Q. But what is the, what is the basis -- what was
8 preserved for the record, according to the Supreme Court
9 opinion?

10 A. Let me read it.

11 Q. Okay.

12 A. Okay. I made a motion to suppress. The trial
13 court said that my motions about them having to have a
14 warrant didn't apply because Mr. Moore had abandoned his
15 cellphone.

16 Q. Okay. But just where I put a star on that
17 opinion, just right above the number, Roman
18 Numeral II --

19 A. Yes, ma'am.

20 Q. -- it said the objection was based on the 14 ---

21 A. The Fourth Amendment.

22 Q. I'm sorry, the Fourth, and nothing about the
23 State constitution?

24 A. You, you are correct. I would have to look at
25 the transcript again, but I do not remember citing the

1 South Carolina provision of a right to privacy in the
2 argument, and it does not appear that they ruled on
3 that. But, apparently, they went off on -- their
4 decision was based on inevitable discovery. So, I
5 guess, if one agrees that inevitable discovery would
6 have applied here, it wouldn't have mattered whether it
7 was -- whether I'd argued the South Carolina right to
8 privacy or not.

9 Q. Right. But we don't know that because it wasn't
10 preserved.

11 A. No, we don't know that, no.

12 Q. Okay. Thank you. No further questions.

13 THE COURT: Anything?

14 MS. MARTO: No recross, Your Honor.

15 THE COURT: All right. Thank you, sir. You may
16 step down.

17 THE WITNESS: Yes, sir.

18 (Witness leaves witness stand.)

19 THE COURT: All right. Applicant can call the
20 next witness.

21 MS. ROSS: No further witnesses.

22 THE COURT: All right.

23 MS. MARTO: No witnesses, Your Honor.

24 THE COURT: All right, wonderful. Well, let's
25 proceed to argument then. Ms. Ross, let me hear from

1 you.

2 MS. ROSS: Well, Judge, just ---

3 THE COURT: Of course, I'm gonna take everything
4 under advisement, because I've gotta read all this
5 stuff, but give me your points.

6 MS. ROSS: Other than, you know, I move to
7 conform the pleadings to the evidence pursuant to
8 Love v. State, which is 834 S.E. 2d 196, a 2019 case, as
9 to the State issue of privacy. That just sort of came
10 up at the last minute and I didn't brief it. You know,
11 just looking at the opinion, I don't know if that would
12 have changed the outcome. I'm just pointing out that it
13 may have. This was a close call, split jurists on that,
14 as far as that phone issue that I threw in the last
15 minute.

16 Now, as to the -- most of them are sort of in the
17 amended application, but just specifically on this
18 attempted murder charge, Mr. Moore was not charged with
19 armed robbery. So this wasn't like a drug deal gone bad
20 case where you'd have an armed robbery charge and an
21 attempted murder charge, so the hand of one is the hand
22 of all, because it would be foreseeable. Here, it's a
23 little bit extinguishable because Mr. Moore and his
24 co-defendant were not charged with armed robbery, but
25 the main charge was attempted murder and that's it. So

1 that's a small thing, but I think important going to the
2 fact of would accomplice liability apply to attempted
3 murder? And I know that that is -- there's transferred
4 intent law. There's not really case law out there on
5 this specific subject, and I think that's probably --
6 because usually there's some other charge there.

7 As to not being able to predict the future
8 changing of laws, I will have to double check 2014, but
9 I'm fairly certain that attempted murder was changed to
10 the reading that it has now. That point about list
11 specific intent to kill.

12 State v. King was a product that came out of that
13 because someone did object and had the foresight to see
14 that. And that would be ineffective assistance. And we
15 could argue not doing that was problematic.

16 And I'll refer you to one of my trial cases,
17 Chappel v. State where I was the trial attorney who did
18 not object to predict the future change of case law and
19 then found ineffective assistance of counsel there. So
20 we just argued that based on that one.

21 As far as Travis Wayne Hall, I did not -- I
22 attempted to contact him. He is not here today, I
23 understand that, to present testimony. I would just
24 stand on the record, which I gave the page number
25 earlier, I think it was 57, of where the State said --

1 he initially said Mr. Moore was the shooter, but when I
2 interviewed him last week, he said Mr. Moore was not the
3 shooter. And he knew Mr. Moore. They were friends. So
4 I would stand on the fact that that was out there right
5 before trial, and the failure to go and just talk to
6 that victim and interview them, we would argue, is
7 ineffective, just to find that out, because there could
8 have been a pretrial hearing outside the presence of the
9 jury where we could have found out what that young man
10 had to say.

11 And, certainly, a trial where you have the victim
12 saying my friend, Mr. Moore, was not my shooter. And
13 then a witness in the parking lot saying it didn't look
14 like he was the one who got out of the car. That would
15 be some compelling evidence that would favor Mr. Moore.
16 So, we would stand on what's in the record there with
17 his testimony changing and that ABA standards would
18 require an effective attorney to interview all witnesses
19 prior to trial. And, otherwise, I think that's
20 presented most -- well, points there.

21 THE COURT: Okay. Thank you, Ms. Ross.

22 Madam Attorney General?

23 MS. MARTO: Yes, Your Honor. Concerning the
24 competency issue, I think Mr. Johnston probably
25 testified he saw no issues of competence when it came to

1 Mr. Moore. He didn't recollect any plea offers. He
2 stated that he did cross-examine the witness, the
3 co-defendant about the proper agreements and those
4 agreements with the State concerning jury instructions.
5 Those were proper at the time. The law was justified.
6 Mr. Johnston should not be found to be ineffective for
7 failure to be clairvoyant on that issue.

8 Concerning the surety bond, I think Mr. Johnston
9 was reasonable in making an objection and making a
10 motion outside the presence of the jury and failing to
11 request a curative instruction, because it would have
12 highlighted the issue more so than it was already.

13 I think Mr. Johnston was incredibly reasonable in
14 his determination that the victim likely wouldn't be
15 helpful to Mr. Moore's case, especially given the fact
16 that Mr. Moore had already been placed at the scene,
17 given the fact that his cellphone was found inside the
18 car.

19 And so, concerning these issues -- and then also,
20 Mr. Johnston was reasonable in determining that a
21 directed verdict wouldn't go anywhere because the
22 evidence against Mr. Moore was ample. And so, for these
23 reasons, we would just request you deny relief.

24 THE COURT: All right. Thank you both very much.
25 I'm gonna take the matter under advisement, read through

1 everything, deliberate my decision, sir. And then I'll
2 be in touch with the attorneys and let them know, let
3 them know what my decision is as soon as possible, okay?
4 Thank you very much, that concludes this hearing.

5 MS. ROSS: Thank you, Judge.

6 THE COURT: Thank you.

7 (Hearing concluded at 11:31 a.m.)

8

9 --- THIS ENDS REQUESTED TRANSCRIPT ---

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1 COURT REPORTER CERTIFICATE

2
3 I, the undersigned Julie A. Cendroski, Court
4 Reporter for the Seventh Judicial Circuit Court of the
5 State of South Carolina, do hereby certify that to the
6 best of my ability the foregoing is a true, accurate,
7 and complete transcript of record of all the proceedings
8 and evidence introduced in the hearing and/or trial of
9 the captioned case, relative to appeal, in the Court of
10 Common Pleas for Spartanburg County, South Carolina, on
11 the 15th day of February, 2023.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.
14
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17
18

19 s/Julie A. Cendroski
20 Julie A. Cendroski
21 Circuit Court Reporter III
22 Seventh Judicial Circuit
23
24
25

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT

Robert L. Moore, #320303,)
 Applicant,)

Case No.: 2020-CP-42-01279

v.)

ORDER OF DISMISSAL

State of South Carolina,)
 Respondent.)

This matter comes before this Court by way of Applicant's post-conviction relief application filed April 9, 2020. Respondent made its return on July 27, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on February 15, 2023, at the Spartanburg County Courthouse. Susannah C. Ross, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Counsel Andrew Johnston, Esquire, testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of 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 pursuant to orders of commitment from the Spartanburg County Clerk of Court. During its June 2013 term, the Spartanburg County Grand Jury indicted Applicant for Attempted Murder (2013-GS-42-2965). Applicant was represented by Andrew Johnston, Esquire. Deputy Solicitor Derrick Bulsa of the Seventh Circuit Solicitor's Office prosecuted the case. On July 21-23, 2014, Applicant proceeded to trial before the Honorable R. Keith Kelly, circuit court judge, and a jury. Judge Kelly sentenced Applicant to thirty years' imprisonment.



Applicant filed a timely Notice of Appeal that was perfected by Robert M. Dudek, Esquire, through filing a brief. The South Carolina Court of Appeals affirmed the conviction by written order. *State v. Moore*, Op. No. 5512 (S.C. Ct. App. filed Aug. 30, 2017). On September 14, 2017, the State made a petition for rehearing, asking the court to grant a petition for rehearing and find in accordance with the trial court judge that no violation of the Fourth Amendment occurred, and affirm Applicant's conviction and sentence. Alternatively, the State requested the Court-de-publish the opinions because "three vastly different opinions are likely to cause confusion on the issues involved. On September 14, 2017, Applicant made a petition for rehearing, requesting the court reconsider its finding and conclude the warrantless search of the cell phone was unconstitutional. The South Carolina Court of Appeals denied both petitions for rehearing on November 2, 2017. This decision was appealed to the South Carolina Supreme Court. Our Supreme Court affirmed, with modifications. *State v. Moore*, Op. No. 27948 (S.C. S.C. filed Feb. 19, 2020). The remittitur was issued on March 6, 2020.

Summary of Relevant Facts

On February 25, 2013, several officers responded to a shooting at a Taco Bell in Spartanburg. (Tr. 110, 125). The victim was found, shot in the left side of the head, hanging out of the victim's vehicle, and hung up in the seatbelt. (Tr. 115). A bystander was frantically yelling how the victim had been shot. (Tr. 127). The victim was barely breathing, unresponsive, and had blood draining out of his mouth. (Tr. 116, 119). EMS arrived to render aid and transport the victim. (Tr. 116-17). The victim was in the ICU for over a month and spent about two or three months in the hospital, but ultimately survived the incident. (Tr. 104-05). The victim suffered permanent injuries that require around the clock care. (Tr. 105).

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Q-112

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. "Trial Counsel failed to request a mental competency hearing / evaluation pursuant to the Due Process Clause."
2. "Trial Counsel failed to challenge a pre-arranged plea agreement with my alleged codefendant."
3. "Trial Counsel [was] ineffective for failure to request a lesser-included offense instruction."
4. "Trial Counsel was ineffective for giving applicant erroneous advice on which he based his decision not to testify."
5. "Trial counsel was ineffective for denying applicant's right to an impartial jury as guaranteed by the South Carolina Constitution and by the 6th and 14th amendment of the United States Constitution."
6. "Trial Counsel was ineffective for conceding guilt on applicant['s] behalf."
7. "Trial Counsel violated applicant's due process rights by not objecting to the trial court's erroneous jury charge on 'hand of one, hand of all' theory."
8. "Trial Counsel ineffective for failure to object to the burden-shifting instruction which shifted the burden of proof."
9. "Trial Counsel denied applicant's confrontation rights and compulsory process of 6th amendment and hearsay assertions."
10. "Trial Counsel was ineffective for failure to argue in suppression hearing he had a reasonable expectation of privacy in the data contained on his cell phone."
11. "Trial Counsel was ineffective for failure to request a directed verdict."
12. "Trial Counsel failed to object to reference of surety bond prior bad act evidence, and failed to request curative instruction in reference of surety bond. (Prior bad act evidence)."
13. "Trial Counsel failed to investigate and interview the victim and the State's witnesses prior to trial."
14. "Trial counsel was ineffective for failing to object to solicitor's improper comment during closing arguments."
15. "[Trial Counsel was] ineffective for failing to request mistrial/improper burden shifting."

Applicant, through PCR Counsel, filed an amendment on December 9, 2022, alleging:

1. Ineffective assistance of counsel:
 - a. Failure to request a mistrial after the State's burden-shifting comment in closing;
 - b. Failing to object to the State's improper comment in asking the jury to convict for the community;
 - c. Failing to object or take exception to the trial judge's jury instructions on attempted murder, implied malice, and accomplice liability which was especially prejudicial after the State argued it did not matter who pulled the

- trigger because of the hand of one hand of all;
- d. Failing to investigate and interview victim Travis Wayne Hall or argue Applicant's right to confrontation required the State to call victim unless the Court made a finding on the competency of a witness;
- e. Failing to move for a directed verdict;
- f. Failing to request a curative instruction after reference to a surety bond.

Applicant proceeded forward on the allegations raised in his amended application, as well as:

1. Ineffective assistance of Counsel for:
 - a. Failing to request a competency evaluation or hearing;
 - b. Failure to procure a plea offer;
 - c. Failure to raise a *Batson* issue;
 - d. Failure to argue the cell phone issue effectively;
 - e. For erroneously telling Applicant not to testify.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of Counsel's Testimony

Counsel testified that he saw no issues with Applicant's competence. He stated that Applicant was rational and assisted in his defense. He stated he had no recollection about a plea offer. He stated that the co-defendant cooperated to get a better deal. He stated the co-defendant got a ten-year sentence. He stated that he would have talked to Applicant about a plea offer if one was offered. He stated that the State did not give a favorable offer because one of the defendants was already cooperating.

He stated that he did not think the victim would be a favorable witness to the defense but that they were available to testify if he wanted. He stated that the victim was stuck in a wheelchair with a bullet in his head. He stated that he did not think he tried contacting the victim.

He stated that Applicant was worried about testifying because of his prior record. He stated that not everything on Applicant's record was impeachment material. He stated he raised

the issue of the cell phone search at trial.

He stated he was unsure what the racial composition of the jury was. He stated he did not pursue a *Batson* challenge because he did not think he would win one.

He stated he did not object to the Court charging that specific intent is not an element of attempted murder because it was not settled law at the time. He stated that he did not object to a hand of one hand of all charge being given because he thought it was proper. He stated he did not object to burden shifting because he did not think it was objectionable.

He stated that he did not object to the State telling the jury to convict Applicant for Spartanburg. He stated he should have objected in retrospect, but it would not have changed the outcome at trial. He stated that he did not pursue a directed verdict motion because he did not think there was a good basis for the motion.

He stated that mention of a surety bond was brought up at trial. He stated that he asked for the Court to explain to the jury what the surety bond means, and the Court only offered a curative instruction. Counsel declined the curative instruction because he did not want to bring more attention to the issue.

Findings of Fact and Conclusions of Law

This Court has 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 the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, direct appeal records, the trial transcript, and the current PCR application. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by 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). 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. 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), SCRCP ("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). 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. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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.

Mistrial

Applicant claims Counsel was ineffective for failure to move for a mistrial. This Court finds that even if Counsel moved for a mistrial, one would not be granted. Accordingly, Applicant has not met his burden of proving prejudice and relief is denied.

Object to State's Closing

Applicant claims Counsel was ineffective for failure to object to the State's closing.

82:5 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 testified that he thought that the comment was out there and would have objected in retrospect, but that he did not think it altered the results of the proceedings. Accordingly, Applicant has not proven prejudice and relief is denied.

Object to Jury Instruction – Accomplice Liability

Applicant claims Counsel was ineffective for failure to object to the jury instructions regarding accomplice liability. 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).

These instructions were not improper, and Counsel was not deficient for failure to launch a frivolous objection. Applicant has failed to establish both deficiency and prejudice and relief is denied accordingly.

Object to Jury Instruction – Specific Intent

Applicant claims Counsel was ineffective for failure to object to the jury instructions regarding specific intent and implied malice. 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); *Arnette 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).

Counsel credibly testified that the law charged at trial was correct at the time and changes to that law which rendered the charge erroneous did not arise until after the trial occurred. Counsel is not responsible for anticipating changes in the law, nor is he deficient for failing to do so. Accordingly, Applicant has failed to meet his burden of proof and relief is denied.

Failure to Investigate and Call Victim/Confrontation Clause

Applicant claims Counsel was ineffective for failure to call and investigate the victim and for failure to argue that his absence was a Confrontation Clause violation. 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).

"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, 440

(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 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).

This Court declines to find that the victims' absence violated the Confrontation Clause.

See Crawford v. Washington, 541 U.S. 36, 54 (2004) (finding that a Confrontation Clause

violation occurs if there is admission of testimonial hearsay statements admitted, the declarant is

unable to testify, and there was no prior opportunity for cross-examination). The victim's existence and absence from the trial does not, by itself, constitute a Confrontation Clause violation.

Counsel credibly testified that he did not think the victim would help Applicant's case. This Court agrees. Failure to call a witness because he would be harmful to the defense is reasonable and Counsel is not deficient as a result. Further, Applicant has failed to show what victim would have presented that would have changed the results of the proceedings. Accordingly, Applicant has failed to establish prejudice and deficiency and relief is denied.

Directed Verdict

Applicant claims Counsel was ineffective for failing to move for a directed verdict. Applicants are not entitled to directed verdicts as a matter of law, and counsel will not be found ineffective for failure to move for a directed verdict if the motion would have been denied when viewed in the light most favorable to the State. Here, given that ample evidence existed suggesting Applicant's involvement and that the jury ultimately found Applicant guilty, a directed verdict likely would have been denied. *See Teamer v. State*, 416 S.C. 171, 181, 786 S.E.2d 109, 114 (2016) (finding counsel was not ineffective for failing to request a directed verdict when, viewed in the light most favorable to the State, ample evidence of the defendant's guilt was clear). Counsel credibly testified to the same, stating that a motion for a directed verdict would be frivolous in this case. Accordingly, relief is denied.

Surety Bond

Applicant claims Counsel was ineffective for failing to request a curative instruction on the surety bond statement. Counsel raised a matter of law and requested the Court to describe what a surety bond is. (Tr. 201-02). He also moved for a mistrial. (Tr. 202). The Court offered to

give a curative statement, which was declined by Counsel. (Tr. 203). Counsel credibly testified that he did not want a curative instruction because it would draw more attention to the matter. This is reasonable. Applicant has also failed to establish he was prejudiced by the failure to seek a curative instruction. Applicant has failed to establish deficiency and prejudice and relief is denied accordingly.

Competency

Applicant claims Counsel was ineffective for failing to request a competency hearing or evaluation. "Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea." *Matthews v. State*, 358 S.C. 456, 458, 596 S.E.2d 49, 50 (2004) (citing *Jeter v. State*, 308 S.C. 230, 232, 417 S.E.2d 594, 595-96 (1992)). "In a PCR action, the petitioner must prove by a preponderance of the evidence that he was incompetent when he entered his guilty plea." *Id.* at 458-59, 596 S.E.2d at 50. "In order to find that petitioner's trial counsel was ineffective for refusing to request a *Blair* hearing on petitioner's competency to stand trial, petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings." *Id.* at 459, 596 S.E.2d 50-51. Prejudice is found when the petitioner shows a "reasonable probability" that he was either insane at the time [the crime was committed] or incompetent at the time of the plea." *Id.* (citing *Jeter v. State*, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)).

Counsel credibly testified that he saw no signs of Applicant having a competency issue warranting evaluation. Applicant has presented no evidence to dispute this conclusion.

Accordingly, relief is denied.

Batson Issue

Applicant claims Counsel was ineffective for failing to raise an issue under *Batson v.*

Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). “Under *Batson* ... and later decisions applying *Batson*, parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors based on race, ethnicity, or sex.” *Rivera v. Illinois*, 556 U.S. 148, 148, 129 S. Ct. 1446, 1447 (2009). See also *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203 (2008); *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989).

Counsel credibly testified that he did not see a legitimate *Batson* issue presented and stated that he does not raise *Batson* motions unless he thinks he can win. This is a reasonable strategy, and he is not deficient as a result. Additionally, Applicant has failed to show how he would have won the *Batson* issue. Accordingly, Applicant has failed to meet his burden of proof concerning both deficiency and prejudice and relief is denied.

Plea Offer

Applicant’s allegation that Counsel was ineffective for failure to obtain a plea deal is without merit. “[A] defendant has no constitutional right to plea bargain.” *Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400-01 (Ct. App. 1999). (citing *State v. Easter*, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), *aff’d as modified*, 327 S.C. 121, 489 S.E.2d 617 (1997)).

“Prosecutors have broad powers in the plea bargain process[.]” *Id.* Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety.” *Id.*, 333 S.C. at 684, 511 S.E.2d at 400-01. “The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor’s actions.” *Id.* Yet, plea offers must be analyzed within the bounds of judicial restraint. *Id.*

Applicant is not entitled to a plea offer. Counsel credibly testified that the State was unwilling to extend an offer. This claim is dismissed as without merit.

82:5 IN 62 87119703
09:11:29 AM
FBI

Cell Phone

Applicant claims Counsel was ineffective for failure to successfully argue the motion to suppress the cell phone search. Counsel made a reasonable argument and is not deficient solely based on his inability to reach the desired outcome. This Court declines to find an argument Applicant could have made that would have changed the outcome. Accordingly, relief is denied.

Applicant's Right to Testify

Applicant alleges Counsel was ineffective for telling Applicant not to testify. "The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. However, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." *Id.* "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." *Id.*

Applicant waived his right to testify after a thorough colloquy with the Court. (Tr. 300-04). This decision was seemingly made voluntarily and intelligently, regardless of Counsel's advice. Accordingly, relief is denied on this ground.

Conclusion

Based on all 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.

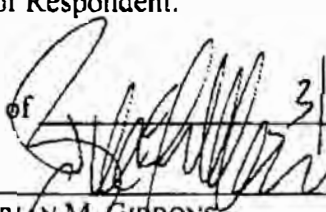
82.5 117 62 This Court notifies Applicant that he must file and serve a notice of appeal within thirty

days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. 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 the denial of PCR. Rule 71.1(g), SCRCP provides that if the 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 the custody of Respondent.

AND IT IS SO ORDERED this _____ day of March 3/21, 2023.


 BRIAN M. GIBBONS
 Presiding Judge
 Seventh Judicial Circuit

✓, South Carolina.

CLERK OF COURT
 SUPREME COURT
 2023 MAR 29 AM 9:28

FILED

WITNESSES

Spartanburg County Sheriff's Office

Kevin [Signature]

ARREST WARRANT NUMBER

2013A4210100762

ACTION OF GRAND JURY

*True Bill**Harold [Signature]*
Foreperson of Grand Jury

JUN 13 2013

Date:

VERDICT

*guilty**Nikue [Signature]*

Foreperson of Petit Jury

Date: JULY 23, 2014

DOCKET NO.

13-GS-42-2965

The State of South Carolina

County of Spartanburg

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

JUN 13 2013

TERM

THE STATE
vs.

Robert Lee Moore

Indictment for

ATTEMPTED MURDER

SC Code: 16-3-0029

CDR Code: 3410

Class FEL-A

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2013 JUN 20 PM 3:29

M. HOPE BLACKLEY

A CERTIFIED COPY

*M. Hope Blackley*CLERK OF COURT
SPARTANBURG COUNTY
BY *[Signature]* D.C.
DATED 7/31/14*ck*

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

JAN 13 2013

At a Court of General Sessions, convened on _____, the
Grand Jurors of Spartanburg County present upon their oath:

ATTEMPTED MURDER

That Robert Lee Moore did in Spartanburg County on or about February 25, 2013,
with malice aforethought attempt to kill Travis Hall, by shooting him in the head, in
violation of §16-03-0029, of *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976, as
amended).

Against the peace and dignity of the State, and contrary to the statute in such
case made and provided.


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG
STATE VS.

Robert Lee Moore

AKA:

Race: BLACK Sex: M Age: 26

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Spartanburg SC 29307

DL#: [REDACTED] ID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Murder / Attempted Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS4202965

A/W#: 2013A4210100762

Date of Offense: 2/25/2013

S.C. Code §: 16-03-0029

CDR Code #: 3410

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC §17-25-45 w/minor 1st or Lewd Act)The 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: B. Bulsa 15264 Robert Lee Moore Andrew G. Bulsa 3064
BULSA, DERRICK 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 ☐ Def. Waives Hearing ☐ Ordered PTUPTotal: \$ — 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(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

— days/hours Public Service EmploymentObtain 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 \$ — beginning —\$ — paid to Public Defender FundOther: —☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Maggie Woods

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2165Sentence Date: 23 July 2014