STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,.....RESPONDENT

v.

JEREMY SAVOY CORNISH.....APPELLANT

INITIAL BRIEF OF RESPONDENT

Appellant Case No. 2022-001536

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney

TOMMY EVANS, JR.
Assistant Attorney General
P.O. Box 111549
Columbia, South Carolina 29211
(803) 734-6305

S.R. Hubbard, III
Solicitor, Eleventh Judicial Circuit
205 E. Main St. 3rd Fl.
Lexington, SC 29072

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court reversibly erred by admitting DNA results when it ruled that the State obtained Appellant's first sample in violation of his constitutional rights, yet held the violation was cured under the independent source doctrine when the State obtained a new sample from Appellant through a search warrant shortly before trial?

2. Whether the trial court reversibly erred by failing to charge the jury with the defense of alibi where Appellant's statement to police indicated he remained inside his uncle's truck in the parking lot of the Woodland Apartment Complex and never entered the apartment where the homicides occurred?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in admitting DNA evidence obtained from a sample given by the Appellant after being served a lawful search warrant curing an earlier voluntary sample thereby falling under the independent source doctrine? Would law enforcement have eventually discovered this DNA since they were collecting samples from all individuals involved?

2. Did the trial court err in not instructing the jury on alibi when the Appellant admitted that he drove the co-defendant to the incident location, thereby, possibly being an accessory, and the story given by the Appellant to law enforcement revealed his mere presence the law which was instructed by the jury by the trial judge? Since the State proved Appellant's guilt beyond a reasonable doubt, an alibi instruction would not have changed the outcome, so can any error that have occurred be considered harmless?

STATEMENT OF THE CASE

On December 17, 2009, during the early morning hours, Duwan Williams, Sheldon Livingston, Branton Booker and Donnovin Haynes were in their apartment in Lexington County, South Carolina. (T. 575 l. 23 - p. 576 l. 17). There was a knock on the door and when Mr. Booker answered he was immediately shot in the chest and right shoulder by either the Appellant or his co-defendant Justin Hopkins. As they gained entry, they found Mr. Williams laying on the couch and shot him four times. Either the Appellant or his co-defendant proceeded to the bedroom of Mr. Livingston where he was shot twelve times. After the shootings, both defendants ransacked the apartment in search of money, guns, and drugs. Mr. Haynes was in the master bedroom. He woke up due to the gunfire. (T. p. 581 l. 18-22). Mr. Haynes went into the bathroom and hid inside a closet. (T. p. 582 l. 12-13).

While hiding the co-defendant kicked in the bedroom door and began looking for items. (T. p. 584 l. 19-22). The co-defendant kicked in the door of the bathroom and attempted to forcibly open the door of the closet where Mr. Haynes hid. (T. p. 585 l. 6-11). Mr. Haynes leaned up against the door fighting Appellant's attempts to gain entry. Appellant then yelled, "Here it is, I found it." (T. p. 265 l. 17-20). That is when both defendants left the apartment. Mr. Haynes waited a minute before exiting the closet. He saw Mr. Booker lying in the hallway under a mound of clothes. Mr. Haynes then crawled out of the bedroom window, and ran upstairs to call 911. (T. p. 588 l. 18; p. 595 l. 16-19).

The first person to respond was Deputy Scott Purdy of the Lexington County Sheriff's Department. When Deputy Purdy arrived, he saw Mr. Haynes standing outside the apartment in pajama pants, no shoes, and no shirt in the December cold. (T. p. 455 l. 17 – p. 456 l. 1). Arriving next was Deputy Barber. When they got to the apartment the door was locked on the inside by the

deadbolt lock. To gain entry law enforcement officer had to kick the door in. As they walked inside they noticed there was blood all over the entryway. (T. p. 461 l. 11-13). They walked into the living room and saw Mr. Williams wrapped in blankets struggling to breathe after losing a large amount of blood. (T. p. 462 l. 12-15). The officers walked through the apartment and saw all of the clothes from the closets dumped on the floor. They walked into a bedroom and saw a body near the bathroom, they then realized there was also a body under the clothes. (T. p. 463 l. 1-11).

When Detective John Donnelly also of the Lexington Sheriff's Department, arrived he saw Mr. Williams was still alive, so he attempted to get a statement. Detective Donnelly asked Mr. Williams if he saw who did this, Mr. Williams could only answer that he was asleep. (T. p. 546 l. 17-19). Both Mr. Livingston and Mr. Booker were determined to be dead at the scene, Mr. Williams was later pronounced dead at the hospital.

After the incident law enforcement was informed by Dale Galloway that he saw a person fitting the co-defendant's description fleeing the incident location. Two other people, Christy and Hansen Meneses, informed law enforcement they saw someone fitting the co-defendant's description riding a bicycle in the area, and that person then got into a white dually pickup and drove off. Dr. Sabah Kahdim a nearby resident, informed police that his bicycle was stolen. He later identified the bicycle being ridden by the Appellant as his stolen bicycle (T. p. 786 l. 19-20).

With information gathered in the course of their investigation Sheriff deputies went to a magistrate to secure a search warrant of the co-defendant's residence. While attempting to secure this warrant, Detective James Pratt was asked to do surveillance of Apartment 27-A at the Landmark Apartments, where the Appellant resided. He sat in his unmarked car in the Apartment complex parking lot making sure the apartment was not disturbed and to observe who, if anyone, entered or left that apartment. (T. p. 812 l. 9-11). While Detective Pratt was observing the

apartment, he saw the identical white dually pickup that was seen leaving the crime scene drive up to apartment 27-A. Detective Pratt then saw someone matching the description of the co-defendant get out of the truck and walk into apartment 27-A. (T. p. 817 l. 9-13). Detective Pratt notified his supervisor and, (T. p. 820 l. 21-25) he was told to follow that truck. He did, and observed that the license plate lights were out. (T. p. 823 l. 18-20). Detective Pratt waited until they were far enough down the road not to tip off the Appellant, and he pulled over the white pickup. (T. p. 821 l. 5-10).

After pulling over the truck, the Appellant was found driving. Captain Jessie Laintz arrived, and asked Appellant if he was willing to speak with him. (T. p. 826 l. 24-24). Captain Liantz also asked the Appellant if he was willing to consent to a search of his vehicle. (T. p. 831 l. 25 – p. 832 l. 3). Appellant gave consent to a search of his vehicle. (T. p. 831 l. 19-20). Captain Liantz asked the Appellant his whereabouts on December 17, 2009, the incident date. The Appellant told him that he picked up the co-defendant from a Food Lion to take him to a construction site at McIntire Air Force Base. Because it rained, that job was cancelled so he returned the co-defendant back to the Food Lion and left him there. (T. p. 835 l. 8-19). Appellant never acknowledged that he saw him again that day. (T. p. 835 l. 20-23). Appellant told him that after leaving, he went to the Department of Motor Vehicles (DMV), then to BB&T bank, and then back to the DMV. (T. p. 836 l. 3-6). Deputy Pratt found paperwork from the DMV dated December 17, 2019, with the co-defendant's name on it. Appellant told him he did not know how that got in his car. (T. p. 840 l. 18-21).

On December 23, 2017, the Appellant voluntarily came into the Lexington County Sheriff's Department for an interview. He was not under arrest so he was not read his *Miranda* rights. Appellant spoke to Sergeant Anthony Creech and Detective Hendrix. Halfway through the interview Sergeant Creech asked Appellant for a DNA swab. Sergeant Creech told the Appellant

"Are you cool with that?" the Appellant responded, "Why would you need DNA from me?" (court order pg. 4). Sergeant Creech told Appellant that they were checking DNA found at the crime scene and the lack of his DNA would go to clearing his name. Appellant then told him, "I'd rather be getting a lawyer involved in this because I don't know, need nothing fishy going on." (Court order pg. 4). During the interview they went back and forth further, then Appellant voluntarily gave a DNA sample to Sergeant Creech through a buccal swab.

Appellant was arrested later and charged with the offenses of three counts of murder and three counts of burglary in the first degree (Burglary 1st). After his arrest Appellant's attorney requested an interview with law enforcement. Appellant was read his *Miranda* rights even though his attorney was present. (T. p. 1250 l. 20-24). During this interview Appellant provided the passcode to his cell phone. (T. p. 1253 l. 3-4). Appellant also gave law enforcement officers permission to go through his phone. (T. p. 1253 l. 11-13). Law enforcement officers already had possession of the cell phone of Appellant's co-defendant. (T. p. 1254 l. 6-8). During this interview Appellant told officers that he took his co-defendant to an apartment to buy marijuana. He said his co-defendant went inside and that he parked in a parking lot near the apartment entrance. Appellant told them that he sat in the truck checking his e-mail until he got a call from a friend. (T. p. 1265 l. 1-5).

The day after his interview law enforcement did an extraction of the Appellant's phone using a program called Cellebrite (T. p. 1254 l. 6-8). During this extraction law enforcement discovered that on the incident date Appellant's cell phone received a call at 10:35 am that no one answered and there was no activity on his phone until 11:10 am. The 911 call was made at 10:59am. This extraction revealed that there was no activity on Appellant's phone on the incident date between 9:51am and 11:16am. (T. p. 1290 l. 2-7). During the interview Appellant told them that

he was reading a group e-mail from his bosses at Caddell Construction. (T. p. 1291 l. 8-10). Law enforcement checked all of the Appellant's emails and there was one from Caddell Construction dated December 18, 2019, the day after the incident. The only other one dated December 15, 2009, before the incident occurred. This e-mail pertained to building work for December 5, 6, and 7, 2019. Law enforcement also retrieved phone messages made between the Appellant and his co-defendant from December 17, 2019. (T. p. 1329 l. 14-16) One message from Appellant to his co-defendant was sent on December 17, 2019, at 1:03pm which stated, "make sure you clean the tools off." (T. p. 1341 l. 17-18). Another message sent one minute later at 1:04pm stated "erase these messages." (T. p. 1350 l. 5-8). Law enforcement believed that the statement "clean the tools off," referred to the guns used in the murder.

Law enforcement also found Facebook pictures of his co-defendant attempting to sell Glock 9mm, and a Taurus .38 caliber revolver. (T. p. 1355 l. 18-23; T. p. 1356 l. 5-10). Law enforcement retrieved 9mm casings as well as .38 caliber bullets from the crime scene. (T. p. 659 l. 15-16; p. 666 l. 1-10; p. 679 l. 24-25). The weapons used in this murder were never recovered by law enforcement. There was also no evidence that either of these guns were ever sold. (T. p. 1355 l. 24 – p. 1356 l. 2; p. 1356 l. 5-10; 1356 l. 11-15).

On October 11, 2022, this case was called for trial before the Honorable Debra R. McCaslin. Present before the trial judge was the Appellant along with his three attorneys Jack Swerling, Alissa Wilson, and Leigh Leventis. Present representing the State of South Carolina was Eleventh Circuit Solicitor Samuel Rick Hubbard, Deputy Solicitor Suzanne Mayes, and Assistant Solicitor Bruce Norton of the Eleventh Circuit Solicitor's Office.

Prior to the beginning of trial, Appellant made a motion to exclude the DNA evidence. Appellant also requested that the trial court exclude statements made during the interview with

law enforcement on December 23, 2019. A hearing was held in which Sergeant Creech testified. Sergeant Creech stated that he was instructed by the Solicitor's office two weeks prior to trial to request a search warrant for a DNA swab from Appellant. The Appellant argued that both DNA samples taken, both the voluntary and the search warrant were collected in violation of the Appellant's Fourth and Fifth Amendment rights. The Appellant argued that the initial collection made during his interview was unlawful because he requested counsel and none was provided prior to the taking of the DNA sample. Appellant also argued that the second DNA sample that was obtained through a search warrant was the "fruit of the poisonous tree." Appellant argued that this sample was only obtained due to the State knowing that the first sample was obtained though unlawful means.

At the conclusion of this hearing the trial court issued a twelve-page written order. Within this order the trial court decided that the first DNA sample was taken in violation of the Appellant's Fourth and Fifth Amendment rights. However, the trial court determined that the second DNA collection was lawful pursuant to independent source doctrine. So, the second DNA collection and its results were allowed into evidence.

During trial the Lexington County Sheriff's Department crime scene investigator Patrick Ward testified. Investigator Ward stated that he found 9mm cartridge cases in the living room and bedroom. (T. p. 651 l. 10-12; p. 659 l. 15-16; 684 l. 15-17). Investigator Ward also testified that nineteen fired shell casings were found at the scene. (T. p. 685 l. 9-11). However, there were no shell casings consistent with a .38 caliber. (T. p. 685 l. 9-11). This led Investigator Ward to believe that a revolver was also used to commit these murders. (T. p. 685 l. 14-15) Investigator Ward also processed the scene for fingerprints and touch DNA, which were sent to South Carolina Law Enforcement Division (SLED) for testing.

Agent James Green of SLED also testified. Agent Green was accepted as an expert in the field of firearms identification. (T. p. 1075 l. 6-10). Agent Green testified that the twelve or thirteen 9mm shell casings found at the scene were fired by the same gun. (T. p. 1078 l. 15-18; 1083 l. 5-7). Agent Green also testified that victim Williams had .9mm and .38 caliber bullets removed from his body, so he was definitely shot with two different guns. (T. p. 1094 l. 20 – p. 1095 l. 3). Agent Green stated that the .38 caliber bullets found at the crime scene had the same characteristics as the ones found inside Mr. Williams. (T. p. 1097 l. 1-6).

SLED Agent Samuel Allen Stewart also testified. Agent Stewart was accepted as an expert in DNA analysis. (T. p. 1159 l. 13-15). He testified that he received a known DNA sample from the Appellant on September 26, 2022. (T. p. 1162 l. 19-23; p. 1163 l. 8). There was blood on the inside of the front door that was determined to belong to victim Branton Booker. It was approximately 12 octillion times more likely that Mr. Booker contributed to this profile that an unknown individual. (T. p. 1182 l. 9-17). There was also a swab taken from the interior deadbolt lock. (T. p. 1183 l. 14-16). Agent Stewart compared this known standard to both defendants. (T. p. 1185 l. 15-18). He also compared them to the known standards of each victim. (T. p. 1185 l. 19-22). Agent Stewart determined that it appeared to be a mixture of DNA. (T. p. 1185 l. 25). Agent Stewart testified that after testing the DNA from the deadbolt lock it was 510 million times more likely that victim Booker and the Appellant and two unidentified unrelated individuals were the contributors than Mr. Booker and three unidentified unrelated individuals.

Dr. Nicholas Ike Batalis also testified. Dr. Batalis was accepted as an expert in the field of forensic pathology. (T. p. 492 l. 4-10). Dr. Batalis was the individual that performed the autopsy on all three victims on December 19, 2019. (T. p. 492 l. 14-16). He testified about the fatal injuries that were sustained by each victim.

For victim Brandon Booker, he had two gunshot wounds, one to his right shoulder and the other to the right side of his chest. (T. p. 494 l. 4-6). The one shot that went into the right side of his chest went through the right lung and continued to the spine and buried itself into skin of his back. (T. p. 495 l. 16-22). As a result of going through his lung there was a significant amount of blood loss. (T. p. 495 l. 17-19). The second shot went into the top of the right shoulder traveled a few inches deeper into the shoulder where the bullet was recovered. (T. p. 497 l. 14-21). Dr. Batalis determined Mr. Booker's cause of death was due to the compromise of the lung with massive bleeding due to the gunshot wound. (T. p. 500 l. 14-18). The manner of death was homicide as the death was due to the actions of another individual. (T. p. 500 l. 21-22).

Mr. Sheldon Livingston was shot a total of twelve times. (T. p. 501 l. 6-7). The first entered the left arm and exited the front. (T. p. 502 l. 1-5). Shots two and three went through his right arm one above the elbow, the other directly through his elbow. (T. p. 502 l. 12-18; p.; 503 l. 3-8). Both shots went through his arm breaking the bone in his arm. (T. p. 502 l. 20). The fourth shot went through the front part of the right thigh at the top of the leg and exited out the other side. (T. p. 503 l. 15-21). Shot five went through the left shin, it did not fracture the bone exiting the back part of the left leg. (T. p. 503 l. 42 – p. 504 l. 4). Shot six went in at the posterior part of the left thigh just above the knee and exited the anterior part of the left thigh. (T. p. 504 l. 7-13). Shot seven entered between the back and abdomen. The bullet crossed his body thorough the lower part of the left lung, though the intestines into the abdomen where it was recovered. (T. p. 504 l. 24 – p. 505 l. 9). Shot eight went into at the left side of his abdomen, then traveled through his body, and exited his upper right chest were it passed through his heart. (T. p. 505 l. 20 – p. 506 l. 8). Shots nine and ten both entered the right side of his abdomen; they both exited the right side of his back. (T. p. 507 l. 3-16). Shot eleven entered the upper left side of his chest near the left armpit, going through his

ribs and the bullet was recovered at the shoulder. (T. p. 507 l. 22 – p. 508 l. 4) Shot twelve entered the left side of victim's chest, struck the left lung and the bullet was recovered in the back part of the chest wall. (T. p. 508 l. 9-15). The cause of death was a gunshot wounds to the trunk. There was also cumulative effect of several wounds that passed through his heart, lungs, and liver. (T. p. 510 l. 1-4) The manner of death was homicide. (T. p. 510 l. 5-6).

Victim Duwan Willimas had four gunshot wounds. (T. p. 510 l. 13-14). The first shot entered his mid-back going through the lung and larynx before being embedded into the tissue beneath his chest. (T. p. 511 l. 11-16). Shot two went in at the left side of the neck and became imbedded a couple of inches into the musculature of the neck. (T. p. 512 l. 17-23). Shot number three went in the back of the left arm, exited out the inner portion of the arm, not hitting the bone. (T. p. 513 l. 18-24). Shot four entered the back of the left shoulder, went across the body fracturing a rib exited the body and reentered into the right arm. (T. p. 514 l. 5-18). Dr. Batalis testified that Mr. Williams was shot with two separate types of ammunition. (T. p. 439 l. 17-18). Dr. Batalis determined that the cause of death was gunshot wounds of the neck and trunk, with the one to his back that perforating his lung. (T. p. 517 l. 5-8).

After nine days of testimony a jury of his peers found the Appellant guilty of three counts of murder and three counts of burglary in the first degree. (T. p. 1570 l. 7-17). After the announcement of the verdict the Appellant appeared before the trial judge for sentencing. The trial judge proceeded to sentence Appellant to a term of imprisonment for the remainder of his natural life for each count of murder, and eighteen years for each burglary in the first degree. (T. p. 1595 l 1-5).

ARGUMENTS

1. **The trial court did not err in admitting DNA evidence obtained from a sample given by the Appellant after being served a valid search warrant since this cured an earlier voluntary sample given by the Appellant. Even if the warrant was unlawful the DNA would have been inevitably discovered due to the DNA found at the residence and law enforcement obtaining samples from all individuals that were possibly involved.**

Relevant Facts

When law enforcement arrived at the scene the door was locked from the inside. Officers had to kick in the door to get inside. (T. p. 460 l. 10-12; p. 461 l. 6) Officer Ward dusted the entry door for fingerprints and swabbed the deadbolt door lock for touch DNA. (T. p. 725 l. 5-6). At that time law enforcement needed DNA samples from the Appellant in order to include or exclude him as the person who touched the door lock.

The Appellant came into the sheriff's department for an interview voluntarily. Although at the time he was not a suspect, he was asked if he was willing to provide a DNA sample. At that time, he asked law enforcement if he needed a lawyer. He was informed that it was up to him if he thought he needed a lawyer. He voluntarily provided the sample. Closer to trial, as a precaution, the Solicitor's officer instructed Sergeant Anthony Creech to request a search warrant to obtain DNA samples from the Appellant.

On September 23, 2022, an affidavit for a search warrant was presented to Lexington County Magistrate Brian Buck. The following statement was presented to Judge Buck within the affidavit:

> "On 12/17/2019, deputies responded to 113 Butternut Ln, located in the Columbia area of Lexington County, South Carolina, in reference to a possible home invasion. Upon arrival deputies found 3 individuals with apparent gunshot wounds. Two victims (Branton Booker and Sheldon Livingston) were pronounced deceased at the incident location and another victim (Duwan Williams) was pronounced deceased at the hospital. A fourth individual (Donnovin Haynes) was able to escape the location after hearing gunfire.

Based on multiple caliber projectiles located during the investigation, and statements from Donnovin it was believed that at least two suspects were present inside the victims' residence during crime. During the subsequent investigation, a person with information, Taquiem Ketter, came forward with information that helped lead investigators to the identification of Justin Hopkins as a possible suspect in this case; Hopkins was alleged to have committed the offense with someone referred to as his "uncle" based upon information received by Taquiem Ketter from another person familiar with Hopkins, Jamel Patrick (a former roommate of Hopkins). Jamel Patrick reported that another mutual acquaintance heard information directly from Hopkins that he (Hopkins) committed the triple homicide.

Justin Hopkins was identified by a witness, Dale Galloway, via photo lineup, as appearing to be the same man seen fleeing 113 Butternut Ln after the shooting. Two witnesses Christy and Hansen Meneses described seeing a heavy-set black male with a bandage on his face, believed by law enforcement to be Justin Hopkins, leaving the area of the crime scene, after getting into the passenger side of a white Dually pickup truck, immediately following the timeframe of the crime.

On 12/21/19, Justin Hopkins was detained during a traffic stop leaving his apartment at Landmark Apartments, after being dropped off at his apartment by a white work truck, similar to the one also described by witnesses who observed a vehicle at the scene following the shooting. The white work truck was stopped, and the driver was identified as Jeremy Cornish. Deputies spoke with Jeremy, who was originally believed to be a potential witness, regarding the events of 12/17/19. Based on conflicting statements from Jeremy Cornish and Justin Hopkins regarding their alleged mutual whereabouts on the morning of 12/17/19, and findings at Justin Hopkins' apartment Justin was placed under arrest for the incident on 12/17/19.

During the initial contact with law enforcement, Jeremy told law enforcement he went alone to the SCDMV in Columbia, SC. Jeremy told law enforcement that this was after he dropped Justin off that morning in Columbia, after their job site got rained out, after which time he stayed in the Two Notch Rd area, and did not see Justin again that day. SCDMV video was later obtained, which showed Jeremy and Justin at the same SCDMV together that morning, a short time before the incident on 12/17/19, as well as together that afternoon at the same SCDMV, after the incident. Phone records were also obtained for Jeremy and Justin. Location data associated with Jeremy's phone number placed him in the area of 113 Butternut Ln during the time frame of the incident, and text messages obtained from Verizon Wireless for Justin's phone number, documented an exchange between the two individuals, on 12/17/19. In this exchange, following the crime, Jeremy sends Justin an SMS text message stating, "Make sure u clean those tools off," followed by, "Erase these messages," all believed by law enforcement to be statements directly attributable to the crime. Surveillance video obtained from KJ's Supermarket, located near the incident location, also depicted a person believed by law enforcement to be Jeremy (a heavy-set black male in a white t-shirt) dropping off Justin, who matches the description provided the Menses', off at that location, in a white Dually pickup truck, approximately 15 minutes after the incident. The black male driving the white Dually pickup truck appears consistent in clothing and

appearance to Jeremy's depiction on SCDMV video just prior to the incident. This truck also appeared to be consistent with the vehicle driven by Jeremy on 12/21/19, when stopped by law enforcement, which contained SCDMV paperwork for Justin from 12/17/19. The individual dropped off at KJ's (a heavy-set black male with a bandage on his face) is believed to be Justin, who matches the description of the subject described by the Menses' getting into the white Dually pickup truck. Jeremy was determined to be a potential suspect, as opposed to a potential witness, and he was arrested as a codefendant this case on 12/31/19.

Facebook records obtained for Justin also depicted him in possession of two handguns, consistent with the two suspected calibers identified at the crime scene. When arrested on 12/21/19, Justin was also in possession of ammunition matching both of these calibers.

Touch DNA swabs from areas in the apartment that suspects may have had contact with were among the trace evidence collected by Crime Scene investigators at the original scene of 113 Butternut Ln, and other physical evidence items obtained in this case. It is reasonably believed that DNA standards obtainable from the defendants are relevant to compare against these samples, as they could establish their presence at the incident location, or associations with other physical or trace evidence located outside of the initial scene. The method used to collect such standards is known to be medically safe and reliable, and not overly intrusive, pursuant to the 4th Amendment. The method involves orally collected cheek swabs, and may be collected without injury, or further invasion of the person. (search warrant dated 9/23/2022).

Standard of Review

The admission or exclusion of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Winkler,* 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010). A search warrant may be issued only upon a finding of probable cause, and it is the duty of the reviewing court to ensure the issuing official had a substantial basis upon which to conclude that probable cause existed. *State v. Chisholm,* 395 S.C. 259, 267, 717 S.E.2d 614, 618 (Ct. App. 2011). The Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified by the circumstances, or which are made in an improper manner. *Maryland v. King,* 569 U.S. 435, 447, 133 S.Ct. 1958, 1969 (2013). The inevitable discovery doctrine, one exception

to the exclusionary rule, states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact that it was illegally obtained. *State v. Spears,* 393 S.C. 466, 487, 713 S.E.2d 324, 332 (Ct. App. 2011).

Discussion

In order to obtain the bodily fluids from a person, it must come either by consent, search warrant, or an order of the court. An order issued pursuant to §17-13-140 that allows the government to procure evidence from a person's body constitutes a search and seizure under the Fourth Amendment, and must comply with constitutional and statutory guidelines. *State v. Baccus,* 367 S.C. 41, 53, 625 S.E.2d 216, 222 (2006).

The search warrant issued on September 23, 2022, provided sufficient probable cause..[1] This search warrant informed the magistrate sufficient probable cause that the Appellant committed this crime. The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. *Baccus,* 367 S.C. at 51, 625 S.E.2d at 221. The Appellant argues that this search warrant should be considered poisonous fruits due to the fact it was obtained after it was possible that an earlier sample given voluntarily by the Appellant could have been obtained illegally. This was an ongoing investigation so law enforcement has the right to make sure all bases are covered prior to taking this case to trial.

In *State v. Baccus,* the South Carolina Supreme Court set out elements that must be satisfied in order to obtain bodily fluids from a person accused of a crime. In *Baccus* it states that these

[1] Within the Appellant's initial brief, they state that "probable cause may have been present on the face of the search warrant." IBOA p. 11.

elements are: (1) probable cause to believe the suspect has committed the crime; (2) a clear indication that relevant material evidence will be found; and (3) the method used to secure it is safe and reliable. *Id.*, 367 S.C. at 54, 625 S.E.2d at 223. In this search warrant the *Baccus* elements were satisfied. First, sufficient probable cause was placed on these warrants revealing that the Appellant committed this crime. The affidavit included information regarding two individuals that knew the co-defendant who informed law enforcement that co-defendant told them he committed this crime; that a white pickup matching the description given by witnesses was and driven by Appellant found picking up the co-defendant near the crime scene right after the event took place; texts sent between the Appellant and his co-defendant relating to their involvement in the crime; Facebook photos revealing the co-defendant selling guns that were the same caliber used in the crime.

There was a high probability that evidence would be found from the touch DNA at the scene, and other physical evidence obtained in this case. A buccal swab is very safe because all that law enforcement needs to do is swab the inside cheek. This method has very little intrusion and is painless.

In *Baccus* the South Carolina the Supreme Court also added additional factors that should be considered by the magistrate during the issuance of a warrant for bodily fluids. In *Baccus* it states:

> Additional factors to be weighed are the seriousness of the crime and the importance of the evidence to the investigation. The judge is required to balance the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures.

Id.

A crime cannot get any more serious than the taking of a man's life, and this was not just the taking of one man's life but three. DNA evidence was important due to it being found at the scene on the deadbolt lock that was locked on the inside by the assailants. The State argues that the search warrants revealed sufficient probable cause to give the magistrate an indication that the Appellant committed this crime, evidence would be found, and was necessary in this ongoing investigation.

In the South Carolina Court of Appeals case of *State v. Simmons,* 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009) the trial court denied a palm print into evidence because there was not sufficient probable cause to obtain the palm print. After this denial the State moved to conduct a *Schmerber* hearing.[2] At the conclusion of this hearing the trial court ruled that sufficient probable cause existed for the taking of the defendant's palm print. The Court of Appeals ruled that:

> Regardless of the admissibility of the first palm print, the court's order requiring Simmons to submit to the second palm print was proper as the State established probable cause for the acquisition of the palm print evidence by satisfying the three-prong test for acquiring nontestimonial identification.

Simmons, 384 S.C. at 176, 682 S.E.2d at 35.

This case is almost identical to *Simmons.* There exists probable cause that was provided to an unbiased member of judiciary. The magistrate made a lawful decision to allow a search of the person of the Appellant for bodily fluids. This search was harmless and non-intrusive.

Within his brief the Appellant argues that *Simmons* does not apply due to the fact there was a *Schmerber* hearing before a Circuit Court Judge in *Simmons.* The State argues that acquiring nontestimonial evidence from a person with the use of a search warrant or a court order are identical. Section 17-13-140 of the South Carolina Code of Laws clearly state:

> Any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize (1)

[2] *See, Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826 (1966).

> stolen or embezzled property; (2) property, the possession of which is unlawful; (3) property which is being used or has been used in the commission of a criminal offense or is possessed with the intent to be used as the means for committing a criminal offense or is concealed to prevent a criminal offense from being discovered; (4) **property constituting evidence of a crime or tending to show that a particular person committed a criminal offense;** (5) any narcotic drug, barbiturates, amphetamines or other drugs restricted to sale, possession, or use on prescription only, which are manufactured, possessed, controlled, sold, prescribed, administered, dispensed or compounded in violation of any of the laws of this State or of the United States.

S.C. Code Ann. §17-13-140 (1976)(emphasis added).

There is nothing in the statue that gives a court order after the completion of a *Schmerber* hearing more weight than a search warrant signed by a magistrate. As long as probable cause is provided the warrant is valid and the search can commence.

The trial court was correct in establishing the independent source doctrine in order to allow the DNA into evidence. The independent source doctrine applies when a "search pursuant to [a] warrant was in fact a genuinely independent source of the information and tangible evidence." *U.S. v. Hill,* 776 F.3d 243, 251 (4th Cir. 2015), *quoting, Murray v. United States,* 487 U.S. 533, 542, 108 S.Ct. 2529 (1988). In order to find a search warrant "genuinely independent" the unlawful search must not have affected (1) the officer's "decision or seek the warrant" or (2) the magistrate judge's "decision to issue [it]." *Id.*

The Appellant argues that the warrant was not independent of the illegal search due to the fact the solicitor requested that Sergeant Creech, as a precaution, get a warrant for obtaining a DNA sample. However, the warrant was independent because all the probable cause that was mentioned within the search warrant was knowledge law enforcement obtained before the interview with the Appellant. The fact they had already obtained matching DNA that was found at the scene was never a part of the affidavit. Therefore, the prior search did not influence the decision to issue this warrant. The DNA collected from this search warrant was sent to the South Carolina

Law Enforcement Division and retested. These were DNA results that were introduced at trial, and not from the previous voluntary collection. This search warrant was totally independent of the prior collection and testing. Thereby it was allowed into evidence under the independent source doctrine.

The State also argues that since there was touch DNA found at the crime scene, a search warrant would have eventually been issued revealing probable cause that the Appellant committed this crime. This DNA would have been eventually sought and obtained by law enforcement. Under the doctrine of inevitable discovery, the search warrants are lawful. Even without an applicable exception to the search warrant requirement, evidence acquired as a result of a warrantless search or seizure may be admissible if the evidence would have inevitably been discovered by lawful means. *State v. Cardwell,* 425 S.C. 595, 600, 824 S.E.2d 451, 453 (2019).

During his pre-trial testimony Sergeant Creech stated that in murder cases such as this they would get DNA swabs from all significant parties they had contact with. (T. p. 59 l. 11-13). Touch DNA swabs were taken from the shell casings, the sliding glass door, and the deadbolt door lock on the inside of the front door. Sergeant Creech testified that it is standard procedure to ensure they get DNA samples from suspects to run against DNA samples found. (T. p. 65 l. 3-8). Law enforcement retrieved DNA samples from Dr. Sabah Kadhim, the owner of the bicycle the co-defendant was found riding immediately after the incident; Donnovin Haynes the fourth victim who escaped; from each of the three deceased victims; and co-defendant Justin Hopkins. It is safe to assume that eventually they would have gotten a search warrant to obtain DNA samples from the Appellant. DNA collection from Appellant would eventually have been done. This falls under the doctrine of inevitable discovery. The inevitable discovery doctrine constitutes one such exception and allows the government to use information obtained from an otherwise unreasonable

search if it can establish by a preponderance of the evidence that law enforcement would have "ultimately or inevitably" discovered the evidence by "lawful means." *United States v. Bullette,* 854 F.3d 261, 265 (4th Cir. 2017), *quoting, Nix v. Williams,* 467 U.S. 431, 444, 104 S.Ct. 2501 (1984). "[i]f 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 that the fairness of the trial proceedings" *Spears,* 393 S.C. 466, 487, 713 S.E.2d at 332, *quoting, Nix,* 467 U.S. at 447, 104 S.Ct. at 2501.

During his pre-trial testimony Sergeant Creech testified that if he had questioned the voluntariness of the DNA sample or thought that it would have become an issue he would have just gotten a search warrant. (T. p. 106 l. 22-24). This reveals that there was a good faith effort by law enforcement in obtaining DNA samples from the Appellant. Under the good faith doctrine there was no wrongdoing done by the law enforcement. Although the trial court ruled that the original DNA sample was obtained unlawfully, this does not cause a tainting of the second sample retrieved lawfully through a search warrant. There exists no purposeful wrongdoing on the part of law enforcement; therefore, this could not be considered "fruit of the poisonous tree." It is clear from the testimony of Sergeant Creech that there was never an intent to retrieve this sample unlawfully, and the second sample was obtained through a lawful search warrant.

In *United States v. Leon,* the United States Supreme Court held, even when a search warrant affidavit fails to contain probable cause, the fruits of that warrant will not be suppressed where the officers who executed the warrant relied on the search warrant in good faith. *U.S. v. Leon,* 468 U.S. 897, 104 S.Ct. 3405 (1984). The correct standard is whether a reasonably trained officer, in light of all the circumstances, would have known that the search was illegal despite the magistrate's

authorization. No argument has been raised regarding the probable cause presented in the search warrant affidavit, only that this warrant was requested due to the first voluntary sample given. *Leon,* established that, "pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *Id.*, 468 U.S. at 922, 104 S.Ct. at 3420.

Leon establishes that an officer reliance on a warrant will not qualify as "objectively reasonable" only in four circumstances:

> (1) Where "the magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Id.*, 468 U.S. at 923, 104 S.Ct. at 3405.
> (2) Where "the magistrate acted as a rubber stamp for the officers and so 'wholly abandoned his detached and neutral 'judicial role'" *U.S. v. Bynum,* 293 F.3d 192, 195 (4th Cir. 2002), *quoting, Leon,* 468 U.S. at 923, 104 S.Ct. 3405.
> (3) Where a supporting affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon,* 468 U.S. at 923, 104 S.Ct. at 3405.
> (4) Where "a warrant is so facially deficient . . . i.e. in failing to particularize the place to be searched or the things to be seized . . . that the executing officers cannot reasonably presume it to be valid. *Id.*

United States v. Williams, 422 F.3d 311, 317 (4th Cir. 2008), *See, State v. Sachs,* 264 S.C. 541, 216 S.E.2d 501 (1975); *State v. Herring,* 387 S.C. 201, 215, 692 S.E.2d 490, 497 (2009).

Since there are no accusations being made by the Appellant that false information was knowingly given to the magistrate during the application of the warrant; that the magistrate had not "rubber stamped" the warrant prior to its execution; that there was not sufficient probable cause on the face of the affidavit; or that the warrant affidavit was "facially deficient," none of the above listed factors apply.

The Appellant wishes the court to exclude valuable evidence proving that the Appellant was involved in a triple homicide. The retrieval of this DNA sample came from a search warrant

requested by law enforcement in good faith. There is no evidence revealed that the first sample voluntarily given was collected with knowledge from law enforcement that this sample was taken illegally. During his pre-trial testimony Sergeant Creech stated that to him it appeared that the sample was given voluntarily, and it there was a question he wouldn't have done it. (T. p. 112 l. 11-17). So there is no evidence of "bad faith." The search warrant is not part of any unlawful search, the warrant contained probable cause, as admitted by the Appellant, so the retrieval of the DNA was lawful.

There is no element in the Appellant's argument that reveals the warrant was invalid. The State requests that this court confirm the decision of the trial court that the search warrant was not unlawful due to the previous voluntary retrieval of a DNA sample. This case should be upheld.

2. **The trial court did not err in not instructing the jury on alibi, the Appellant admitted to driving his co-defendant to the crime scene so he could have been a possible accessory. The story given to law enforcement is mere presence which was instructed to the jury. Even if the trial court erred this would not have changed trial's outcome so any error should be considered harmless.**

Relevant Facts

Through the request of his counsel, the Appellant was questioned by law enforcement on December 31, 2019. With his counsel present, Appellant informed law enforcement that he was with his co-codefendant that day. He explained that his co-defendant asked if he wanted to smoke some marijuana, and the Appellant replied yes. So, Appellant's co-defendant instructed him to drive to this apartment in order to purchase marijuana. Appellant stated that he sat in the parking lot while his co-defendant entered the apartment to supposedly purchase marijuana. As he told officers, he stated he had no knowledge of the robbery or murders that were occurring inside the apartment.

During trial, Appellant's counsel requested a jury instruction on the law of alibi. The State objected arguing that for it to be considered an alibi the Defendant must be at a place so far away from the crime that there is no way he would have been a part of the commission of that crime, and by the Appellant's story he could have been an accessory. The trial court felt that this was more like a mere presence argument and not an alibi. The trial court's reasoning was that the Appellant's own statement puts himself there. Whether he was in the apartment or not is a question for the jury to decide. (T. p. 1461 l. 16-20). If he was there but had no knowledge that is considered mere presence and not alibi.

Standard of Review

In reviewing jury charges for error, the court must consider the trial court's jury charge as a whole in light of the evidence the issues presented at trial. *State v. Adkins,* 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. *State v. Jackson,* 297 S.C. 523, 377 S.E.2d 570 (1989). 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). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *State v. Burkhart,* 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002). An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. *State v. Pittman,* 373 S.C. 527, 647 S.E.2d 144 (2007). Mere presence at the crime scene is insufficient to convict one as a principal on the theory of aiding and abetting. *State v. Johnson,* 291 S.C. 127, 129, 353 S.E.2d 480, 482 (1987). Error is harmless when it could not reasonably have affected the result of trial. *State v. Simmons,* 423 S.C. 552, 566, 816 S.E.2d 566, 573 (2018).

Discussion

The Appellant argues that since he placed himself at the crime scene, but outside the apartment, he should have gotten the jury instruction of alibi. The State argues that being possibly an accessory takes out the ability to argue alibi. You cannot be a possible accessory of a crime and raise alibi. An alibi is for an individual who was at a place so distant that when the crime was occurring there is no possibility he was involved in any way. These were not the facts presented to the trial court.

In the South Carolina Supreme Court case of *State v. Robbins*, the Supreme Court quotes the Am.Jur.2d definition of alibi. In *Robbins* it states:

> "The literal significance of the word 'alibi' is 'elsewhere'; as used in criminal law, it indicates that the line of proof by which an accused undertakes to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime. In other words, by an alibi the accused attempts to prove that he was at a place so **distant that his participation in the crime was impossible.** To be successful, his alibi must cover the entire time when his presence was required for accomplishment of the crime. To establish alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime. It is not enough for the accused to say that he was not at the scene and must therefore have been elsewhere. The latter statement does not constitute an alibi. And since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be guilty person **is no alibi at all.**"

State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980), *quoting,* 21 Am.Jur.2d *Criminal Law* §136. (emphasis added).

The Appellant requested a jury instruction for the defense of alibi when there was a possibility that he was involved in this crime. That does not fit the definition of alibi. There must be a physical impossibility that you were involved with this crime at all for you to be allowed to raise the defense of alibi. If the Appellant knew what was going to happen within that apartment then he is as guilty as the person who pulled the trigger. Under accomplice liability theory a person must personally

commit the crime or be present at the scene of the crime, and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act. *State v. Mattison,* 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). There is a possibility that the Appellant was involved so this does not equate to alibi.

The story of the Appellant was that he drove his co-defendant to the apartment for the purpose of buying marijuana, not robbery and murder. He was at the scene; however, he claims he had no knowledge that the crime was going to occur. That is the definition of mere presence not alibi. Because the lack of knowledge removes you as an accessory. Mere presence at the scene is not sufficient to establish guilt as an aider or abettor. *Mattison,* 388 S.C. at 480, 697 S.E.2d at 584. The fact he was in the parking lot as the crime was occurring does not equate to an alibi because there is a possibility that he was involved and does not allow him an alibi jury instruction.

Appellant's counsel stated during the argument that, "there is evidence that defendant was in the truck without knowledge the crime was being committed. (T. p. 1460 l. 2-5). That reveals that the Appellant was arguing mere presence not alibi.

The State also argues that if the Appellant was entitled to a jury instruction for the crime of alibi, the failure of the court to provide this instruction should be considered harmless error. This is due to the fact that the jury's conviction revealed they believed the state's theory that he was somehow involved with this crime. An alibi jury instruction would not have changed the outcome so if unlawful it must be considered harmless error. The harmless error rule embodies the commonsense principle that whatever does not make any difference does not matter. *State v. Ostrowski,* 435 S.C. 364, 867 S.E.2d 269 (Ct. App. 2021).

The instruction given by the trial court was sufficient for the jury to make a decision on whether or not the Appellant was involved in this crime to a point that he could be considered guilty. Within the trial court's instructions, it states:

> "Prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime even if the defendant is present when the crime is committed is not sufficient to convict the defendant as a principal. Guilt as a principal is shown by actual or constructive presence at the scene as a result of the prior arraignment. Therefore, a finding of a prior arranged plan or common scheme is necessary for finding – for a finding of guilt as a principal. The State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all." (T. p. 1561 l. 23 – p. 1562 l. 9).

This jury instruction was sufficient for the jury to make the determination of the innocence or guilt of the Appellant. If they believed his story then they would have found him innocent; however, the guilty verdict proves the State proved their case beyond a reasonable doubt. The jury believed that the Appellant was not only at the scene of the crime but participated in the murder of these three individuals. An alibi jury instruction would not have made a difference in the outcome of this trial. So, if there was any error made by the trial court it must be recognized as harmless. The harmless error doctrine recognizes the principal that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promote the public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. *Delaware v. Van Arsdall,* 475 U.S. 673, 681, 106 S.Ct. 1431, 1436 (1986).

CONCLUSION

The trial court made the proper decisions regarding this matter so the Respondent respectfully requests this Court affirm the decision of the trial court.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

TOMMY EVANS, JR.
Assistant Attorney General

S.R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

By: *Tommy Evans, Jr.*
Tommy Evans, Jr.
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

June 12, 2024