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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County
The Honorable William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ISAAC KAREEM HEMINGWAY,

APPELLANT.

Appellate Case No. 2023-000408

AMENDED FINAL BRIEF OF RESPONDENT

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II. **Judge Seals did not err in denying the motion to suppress Hemingway's 2nd statement given on December 1, 2020, because officers did not need a warrant to arrest Hemingway for 2 murders, felonies, where they had probable cause Hemingway had committed 2 murders; additionally, officer's arrested Hemingway for a family court bench warrant for failure to pay child support which was active and in the computer system and officers could rely in good faith on that active warrant; further, the arrest was not in violation of South Carolina Code § 17-13-50 because officers told Hemingway what he was being arrested for and a violation of 17-13-50 does not require suppression of a voluntary statement, and finally, the statement was given knowingly, voluntarily, and intelligently** 21

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

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

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

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

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

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

STATEMENT OF THE CASE

On January 12, 2020, appellant Isaac Hemingway ("Hemingway") murdered Maisha Burch ("Burch") and Andrew Legette ("Legette") in Marion County, S.C. On December 1, 2020, Hemingway was arrested for the murders. Hemingway was then indicted for the 2 murders (Ind. #s 2021-GS-33-00273; -00275) and an accompanying gun charge (-00276). Thurmond Booker represented Hemingway. Hemingway proceeded to a jury trial between February 21 - 24, 2023, and February 27 – March 2, 2023, before the Honorable William H. Seals.[1] At its' conclusion, the jury found Hemingway guilty as charged. He was sentenced to life for each murder and 5 years for the gun charge. Hemingway appealed raising 5 issues. This is Respondent's Final Amended Brief. (R. 102, 258-305; 307-17; 318-74; 377-85; 390-464; 466-566; 569-787; 790-99; 816-78; 884-1005; R. 2/24/23, 36-51; 59-69; 71-86; State's Ex. #s 52; 68; 60-63; Def. Ex. 4).

RESPONDENT'S STATEMENT OF FACTS

Appellant Hemingway and victim Maisha Burch had 5 children together. Hemingway lived in Horry County in an apartment complex close to Coastal Carolina University. Burch lived in a home in Centenary in Marion County, a drive of about 40 minutes from Hemingway's home. Hemingway never lived in Burch's home, which she inherited. Burch had custody of the 5 children. Victim Anthony Legette was a friend of Burch and stayed over at Burch's home the night of the murders. (R. 258-305; 307-74; 377-85; 390-464; 466-566; 569-787; 790-99; 816-78; 884-1005; R. 2/24/23, 36-51; 59-69; 71-86; State's Ex. #s 52; 68; 60-63; Def. Ex. 4).

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[1] *Note: This was a 2-week trial. The transcript is broken up into two separate Volumes which can be confusing. The first Volume contains the trial record of February 21-23, and February 27-March 2, 2023. The second Volume contains only the trial record of February 24, 2023, the last day of the first week of trial. Because of this, Respondent will cite to the first Volume of the transcript as "Tr.". Respondent will refer to second Volume of the transcript as "Tr. 2/24/23". The index for each Volume and the list of exhibits are different in each Volume.

In February of 2019, Burch filed a child support action against Hemingway in Marion County to add their 5 children to Hemingway's existing child support obligations.[2] The child support action was heated and contentious and was the motive for the murders in this case. Shortly after its filing, Hemingway was ordered to pay child support for 1 child with Burch. Hemingway denied paternity of the other 4 children. DNA testing proved Hemingway was the father of the 4 children. Hemingway still refused to agree to any pretrial settlement of the additional child support obligations at pre-trial conferences, including on December 11, 2019, and the case proceeded toward the final hearing scheduled for January 16, 2020, at which Hemingway was going to be ordered to pay about $670 a month in child support just for the children he had with Burch. (R. 261-66; R. 2/24/23 10-51; 59-69; State's Ex. 52; 63; 68; 60; 61; 62; Def. Ex. 4).

On Saturday, January 11, 2020, the day before the murders, Hemingway picked up 4 of his children with Burch[3] from Burch's home and a church in Centenary and took them to his home near Coastal Carolina. This left only Burch and Legette at Burch's home, and Hemingway knew this. Burch had told their children she was going to make Hemingway take care of her through the child support payments. This was passed on to Hemingway by the children shortly before Hemingway picked up the children for weekend visitation the day before the murders. The children also told Hemingway that Burch was just trying to control him with the child support payments. Hemingway eventually confronted Burch about the statement she made. (R. 244; 261-66; 640-701; 817-74; R. 2/24/23 10-51; 59-69; State's Ex. 52; 63; 68; 60; 61; 62; Def. Ex. 4).

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[2] Hemingway had 8 children in all and was already ordered to pay child support for 1 child he had with another woman. Burch had also taken a warrant out on Hemingway previously for a criminal assault which Hemingway claimed she had made up. The mother of the other child Hemingway was paying child support for had also taken out a bench warrant on Hemingway for failure to pay child support in November of 2018 that was still pending during Burch's child support action.

[3] The 5th child had been placed in a group home and was in North Carolina.

Later Saturday night, around 9:00 or 10:00 p.m., Hemingway, his girlfriend Latosha Baines ("Baines"), and her adult son went to a friend's home to play cards and drink leaving his 4 children at his home. Hemingway, Baines, and her son returned home around midnight on January 12, 2020. Phone records proved victim Burch called Hemingway multiple times that night, and *according to Hemingway*, Burch called to check on the children. The last call was shortly after midnight on Sunday, January 12, 2020. This call was 56 seconds in length indicating Hemingway and Burch had a conversation. In his 1st statement to police, January 15, 2020, Hemingway admitted he talked to Burch in this call. Hemingway claimed he then slept all night with girlfriend Baines and got up around 7:00 to 7:30 a.m. In his 2nd statement to police, Hemingway changed his story and claimed he did not speak to Burch in this call because he was asleep. Hemingway in his 2nd statement and his girlfriend Baines at trial both claimed they went to sleep around midnight to 1:00 a.m. on January 12, 2020, and slept until about 7:30 a.m., according to Baines, and 9:00 a.m. according to Hemingway. (R. 244; 640-701; 817-74; State's Ex. 52; 60; 62; 68; R. 2/24/23 10-51; Def. 4).

However, phone records and cell site location information (CSLI) from *Verizon Wireless*, Hemingway's phone carrier, proved this claim was false. The circumstantial evidence introduced at trial showed that at *approximately* 2:00 to 4:00 a.m.,[4] Sunday, January 12, 2020, Hemingway entered through the rear door of Burch's home and murdered Burch and Legette in Burch's home. Phone records proved Hemingway's girlfriend Baines, phoned Hemingway at 4:59 a.m. from Hemingway's home near Coastal Carolina and Hemingway was located near Conway, S.C., away from his home and the cell tower there, and this put Hemingway on his way back from the crime

[4] The exact times of death are unknown and 2:00 a.m. to 4:00 a.m. is only an approximation. The murders could have occurred shortly before or after these times.

scene in Centenary.[5] Phone call records also proved girlfriend Baines called him again a 5:05 a.m. and 6:11 a.m. and Hemingway called her back at 6:39 a.m. The phone records proved Baines phoned Hemingway several times between 4:59 a.m. and 6:11 a.m., long before 7:30 a.m., the time Baines claimed Hemingway awoke in bed with her and long before the times Hemingway claimed he awoke with Baines in his 1st and 2nd statements [7:30 a.m. and 9:00 a.m.]. Phone call records also showed Hemingway called victim Burch's phone using *67 at 4:49 a.m.[6] No one answered these *67 calls from Hemingway to Burch's phone at 4:49 a.m. No one knew the victims were dead for 2 days. (R. 258-305; 307-74; 377-85; 390-464; 466-566; 569-787; 790-799; 816-878; 884-1005; R. 2/24/23, 10-51; 36-51; 59-69; 71-86; State's Ex. 52; 68; 60-63; Def. Ex. 4).

Sunday *evening*, January 12th, about dark, Hemingway took the 4 children back to Burch's home.[7] Hemingway then drove the children to a nearby neighbor's home and asked if they had seen Burch. After receiving the expected negative response, Hemingway then drove to Burch's adult daughter's home, [not a child of Hemingway] Shkyria Edmunds, in Marion, S.C. and left his 4 children with Shkyria's neighbor. Hemingway returned to his apartment near Coastal Carolina. (R. 250; R. 2/24/23, 10-19; State's Ex. 60 & 62).

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[5] Hemingway turned his phone off during the time he drove from his home near Coastal Carolina to the crime scene in Centenary and did not turn it back on until he reached the area near Conway. Thus, he could not be tracked during the actual time of the crimes.

[6] This allowed Hemingway to see if anyone answered the deceased victim's phone at her home in an attempt to determine if the bodies had been discovered, while the person on the other end of the phone line would not know Hemingway was calling by looking at Burch's phone.

[7] While driving to Burch's home, Hemingway called Burch's phone pretending to let her know he was on the way. Not surprisingly, there was no answer to these calls. When Hemingway arrived at the home, he told the children to remain in the car. It was dark and there were no lights on in Burch's home. Hemingway did not go to the front door and knock or attempt to go in the home because he knew the victims were dead inside. He did not go around the house and knock on the back door or attempt to enter there. At a daughter's suggestion, he called the daughter's phone because Burch had the daughter's phone. There was still no answer.

On Monday, January 13th, Shkyria decided to go to Burch's home to check on her because she could still not get her mother on the phone.[8] The home was entered, and Burch's and Legette's dead bodies were found.[9] The causes of death to both victims were gunshot wounds. Legette had been shot while asleep on the couch in the den/living room of the home. Burch had been shot in the hallway after getting out of bed, and prior to her murder there was evidence of a violent struggle with the person who killed her. She was shot multiple times in the head, her hair was pulled out, and her clothing was disheveled.[10] Both victims were shot with a .22 caliber weapon. No fired shell casings were found at the scene even though Legette was shot 2 times through the eye and Burch was shot 4-5 times, indicating a revolver was probably used. DNA samples were taken where Burch struggled [the hallway walls where there were smear marks], from Burch's fingernails, and from Burch's home from the exterior back door handle of the home. (R. 260-90; 627-631; R. 2/24/23, 68-86; 36-51; State's Ex. 61, 64-67).

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[8] Shkyria was unable to reach Burch by phone on Sunday afternoon, January 12th, or on Monday, January 13th. She last spoke to Burch *on Saturday* afternoon or evening. Burch's neighbor and close friend, Stephanie Reed, also last talked with Burch *on Saturday*. On *Sunday morning*, about 9:00 a.m., Reed went to Burch's home and knocked on the door but there was no answer.

[9] Shkyria, called Hemingway after discovering the bodies reaching him while on the job. When told of the murders, Hemingway stated: "for real" and "I'm on the job." Hemingway stayed on the job and did not drive to Centenary to be with his 4 children after their mother's death. Shkyria kept 4 of the children for the next several days and 1 was in a group home. Hemingway only appeared for a birthday party on January 15th and a wake. He did not attend the funeral of the mother of his 5 children. (R. 261-76; R. 2/24/23, 10-19).

[10] Burch was first shot in the face, but that shot did not kill her. She was also shot in the shoulder, but this could have been a secondary entrance from another gunshot. She was then shot 3 times in the top of the head killing her.

The murder weapon was never located.[11] But, 1 of Hemingway's children testified at trial to seeing Hemingway with a revolver in his possession prior to the murders. The gun was wrapped in a towel and laying in the back seat of Hemingway's vehicle. The child was told to leave the gun alone. Hemingway put the gun away. In interviews with police, Hemingway denied he owned or possessed a firearm. (R. 2/24/23, 10-35; State's Ex. 60 & 62; State's Ex. 63).

The State introduced the 2 police interviews of Hemingway at trial. In the 1st, Hemingway admitted when he picked up the children on Saturday, January 11th, he briefly entered the front door and front room of Burch's home to chastise his son for picking on his sisters and spoke to Burch there but left the home and did not go anywhere else in the home. He claimed the child support dispute with Burch was not a big deal and he did not mind paying child support for his children. (R. 392, 401-08; 563-65; 579-87; State's Ex. 60). On December 1, 2020, Hemingway gave a 2nd statement that was audio and video recorded. He stated Burch inherited the home she lived in from an uncle and he, Hemingway, had never lived in this home. He had only entered the home through the front door that Saturday he picked up the children because Burch asked him to speak with his son about hitting his sisters; he did so and left with the children and returned to his home. He did not go anywhere else in the home but the front room. He admitted he returned to Centenary later that afternoon and picked up an older daughter, doing community service at a church, and returned to his home with her. Hemingway complained about the child support action and about the amount of money he was supposed to pay for his children. He also stated his children had told him Burch was just trying to control him with the child support payments. Hemingway admitted Burch had told his children before he picked them up that she was going to make

[11] It must be remembered that there were several phone calls between Hemingway and girlfriend Baines between 4:49 a.m. and 6:39 a.m. the morning of the crimes after Hemingway was back in Conway. This would have given Hemingway sufficient time to dispose of the murder weapon.

Hemingway keep her up by making him pay child support. Hemingway admitted he confronted Burch about this. Hemingway also admitted he had gotten rid of his cell phone after the murders. He claimed he was having trouble with the phone, threw it away, and got a whole new phone. (R. 464-65; 570-76; 579-87; 599-602; 621-24; State's Ex. 62).

The DNA evidence also incriminated Hemingway.[12] One (1) DNA sample taken from an interior hallway of Burch's home was a mixture of 2 people. The DNA evidence showed moderate support that Hemingway' DNA contributed to this sample near Burch's body. Another sample was taken from under Burch's fingernail, and it was also a mixture of 2 people. The DNA evidence also showed moderate support that Hemingway's DNA was under Burch's fingernails. And on the back door exterior door handle of Burch's home, the evidence was even stronger, very strong support. This sample was a mixture of 3 people. It was 1 billion times more likely that Hemingway and 2 unknown unrelated individuals contributed to the DNA sample taken from the exterior back door handle compared to 3 unknown unrelated individuals. It was 2.3 quintillion times more likely that Hemingway, the male victim Leggett, and an unknown unrelated individual contributed to this sample as opposed to 3 unknown unrelated individuals. More people than have lived on the earth. In his 2nd interview, Hemingway denied he had ever been near the back door of Burch's home. He informed police he had only been in Burch's home 2 times. The first time was about 4 years earlier, and he only entered the front door and went to the bathroom. He did not go near the back door or touch the interior walls of Burch's home. The second and only other time was the Saturday before

[12] As will be explained, the DNA evidence in this case was touch DNA. The analysis used was STR PCR DNA analysis and the interpretation used was STR mix, not Random Probability Match. This DNA evidence gives the fact finder a likelihood scenario that a subject contributed to a DNA sample as opposed to an unknown, unrelated, individual or individuals.

the murders, but he only entered the front door and never left the front living room/den and left out the front door.[13] (R. 408; 464-65; 570-76; 579-87; 599-602; 621-24; 702-793; State's 61; 62).

As a result of Burch's murder, the child support action was dismissed January 16th, when Burch did not appear for the final hearing. Hemingway eventually got custody of 3 of his minor children [the 2 oldest daughters were placed elsewhere], and Hemingway did not have to pay child support to Burch. (R. 258-305; 307-74; 377-85; 390-464; 466-566; 569-787; 790-99; 816-78; 884-1005; R. 2/24/23, 36-51; 59-69; 71-86; State's Ex. #s 52; 68; 60-63; Def. Ex. 4).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Halcomb, 382 S.C. 438, 676 S.E.2d 152 (Ct. App. 2009). The appellate court is limited to determining whether the trial court abused its discretion. State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). An abuse of discretion occurs when the trial court's ruling is based on an error of law or based on unsupported factual conclusions. State v. Prather, 429 S.C. 583, 840 S.E.2d 551 (2020). This Court does not reassess the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence. State v. Mattison, 352 S.C. 577, 583, 575 S.E.2d 852, 855 (Ct. App. 2003). Furthermore, this Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The admission of evidence is within the sound discretion of the trial court, and an appellate court will not reverse unless there was an abuse of

[13] The DNA expert also testified the fact that Hemingway's children lived in Burch's home did not change her expert opinions as to the probability that Hemingway contributed to the 3 DNA samples tested. Specifically, as to the sample taken from the exterior back door handle of Burch's home, the DNA expert testified she did not believe Hemingway's son contributed to this sample as she found the likelihood Burch's DNA contributed to this sample was low, and Hemingway's son would have received his DNA from *his father **and** his mother*. (R. 406; 464-65; 570-76; 579-87; 599-702; 621-25; 702-793; State's 61; 62).

discretion resulting in prejudice to the defendant. State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989). Appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This Court reviews the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion is a question of law subject to *de novo* review. State v. Frasier, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022).

ARGUMENT I.

Judge Seals did not abuse his discretion in denying the motion to suppress the phone records *and* CSLI obtained from *Verizon* by way of a search warrant as a search warrant is not needed for less than 7 days of phone records *or* CSLI; the search warrant affidavit contained sufficient probable cause to issue a search warrant to *Verizon* for phone records and CSLI of Hemingway; and, the exclusionary rule would not apply in this situation in any event as the SLED agent was acting in good faith because a search warrant was not required for less than 7 days of CSLI.

Pre-trial, Hemingway moved to suppress the phone records and CSLI the State obtained from *Verizon Wireless* ("*Verizon*") pursuant to a search warrant.[14] (R. 193-210). Hemingway argued the search warrant affidavit did not contain sufficient probable cause. A suppression hearing was conducted by Judge Seals, and he denied the motion to suppress, finding the affidavit contained sufficient probable cause to obtain cell phone records and CSLI from *Verizon*. (R. 192-210). Hemingway now raises the same challenge on appeal. (IBOA, 8, 12-14). As Judge Seals correctly found, there is no merit to this argument. First, a search warrant is not needed for phone records held by a phone company and a search warrant is not needed for *4 days of CSLI*. Second, the search warrant affidavit contained probable cause. Third, the exclusionary rule would not apply where police were acting in good faith where the United States Supreme Court and this state's appellate courts have not issued a binding opinion requiring a search warrant for 4 days of CSLI.

[14] The State did not search Hemingway's phone but served *Verizon* with a search warrant for cell phone records **and** CSLI related to Hemingway's cell phone. Hemingway admitted to police he got rid of his cell phone after the murders occurred. (State's Ex. 62).

I. A search warrant was not required for Hemingway's phone records of who he called and when he called them.

First, Hemingway's **phone records** of who he called and when he called them are not protected by the Fourth Amendment because he has no legitimate expectation of privacy in what he voluntarily turned over to a 3rd party. Carpenter v. United States, 138 S.Ct. 2206 (2018); Smith v. Maryland, 442 U.S. 735 (1979); United States v. Miller, 425 U.S. 435 (1976). As the Court in Carpenter recognized, even after Carpenter this remains unchanged. Id. As a result, Hemingway cannot challenge the admission of *the record of phone calls he made or received, when he made or received them, how long they lasted, and to whom he called or received.* Carpenter, 138 S.Ct. 2206; Smith, 442 U.S. 735. A search warrant was unnecessary for this particular information. The issue before this Court is the admissibility of **the 4 days of CSLI** requested on January 24, 2020, *for January 10-13, 2020, the dates surrounding the murders* of Burch and Legette.

II. A search warrant for CSLI was not required because only 4 days of CSLI [the dates surrounding the murders] were requested.

On June 22, 2018, in a sharply divided 5-4 decision, in which each dissenter filed a separate opinion, the United Staes Supreme Court decided Carpenter, which held for the first time a person has a legitimate expectation of privacy in his CSLI held by a third party *of 7 days or more*. The majority held Miller did not apply to CSLI *of 7 days or more*, and the government could only obtain *such* by complying with the Fourth Amendment. Carpenter did not hold that 6 days or less of CSLI requires a search warrant; and, as discussed herein, one was not required here where only *4 days* were requested and the request was reasonable because the time of death was uncertain, and the bodies were not discovered until Monday January 13, 2020.

The Court in Carpenter was faced with a situation where the Government had obtained 2 warrants under the Stored Communications Act (SCA). The first sought 152 days of CSLI and "produced records spanning 127 days." The other sought 7 days of CSLI and "produced two [2]

days of records." Carpenter, 138 S.Ct. at 2212. The **majority** emphasized: "this case is not about 'using a phone' or a person's movement at a particular time." Id. at 2220. "It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years." Id. The Court reasoned, "Such a chronicle implicates privacy concerns far beyond those considered in Smith and Miller." Id. The same concerns are not present when the prosecution only seeks 6 days or less of CSLI. The same concerns are not present when the State requests only 4 days surrounding 2 murders, where the time of death was not exact at the time of the request.

Whether a person has an expectation of privacy in the amount of historical CSLI records accessed turns on the significance of the invasion of a protected privacy interest. *See* Carpenter. at 2217. As the Court explained in People v. Edwards, 97 N.Y.S.3d 418, 421-22 (N.Y. Sup. Ct. 2019):

> The Supreme Court had good reason to expressly exempt *short-term* CSLI data from its Carpenter decision. Gathering *long-term* CSLI data is much more clearly an invasion of a cellular telephone holder's legitimate expectation of privacy; it is, in a sense, the modern day electronic equivalent of sending a government spy out to follow the defendant both day and night, wherever he or she goes, in public or in private. *See* Carpenter, 138 S.Ct. at 2218 ("Whoever the suspect turns out to be, he has effectively been tailed every moment of any day for five years and the police may—in the government's view—call upon the results of that surveillance without regard to the Constitution or the Fourth Amendment").
>
> By way of contrast, in this Court's view, *short-term* CSLI data that is carefully targeted to a specific time in order to determine whether defendant was present at the scene of a crime that was committed in a public place is *not* a search, and is therefore not subject to Fourth Amendment warrant requirements.
>
> The difference between long-term and short-term CSLI data is stark: *long-term* data can be likened to filming a person's entire life for weeks, or months, or even years; *short-term* CSLI data is like taking a single snapshot of that person on the street. *See* United States v. Jones, 565 U.S. 400, 418-419, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (Alito, J., concurring) (*short-term* GPS monitoring does not constitute a search, but *long-term* GPS monitoring does); *see*

> *also* People v. Weaver, 12 N.Y.3d 433, 882 N.Y.S.2d 357, 909 N.E.2d 1195 (2009) (distinguishing *short-term* visual surveillance of a car from far more intrusive *long-term* GPS monitoring).[15]

Edwards, *supra* (Footnote added).[16]

A warrant was not required here– like the 2 days of information in Edwards - the 4 days of CSLI requested here is not fraught with the concerns that resulted **in the 5 to 4 decision** in Carpenter. *See also* Sims v. State, 569 S.W.3d 634, 646 (Tex. Crim. App. 2019), *cert. denied*, 139 S.Ct. 2749 (2019) ("Appellant did not have a legitimate expectation of privacy in his physical movements or his location as reflected in the less than 3 hours of real-time CSLI records accessed by police by pinging his phone less than five times"); Sanderson v. State, 2023 WL 2692407, at *2 (Tex. App. Mar. 29, 2023)(*Not reported in S.W. Rptr.*)(similar); *Compare* Holder v. State, 595 S.W.3d 691, 703–04 (Tex. Crim. App. 2020) (noting "the third-party doctrine alone cannot defeat a person's expectation of privacy in at least 23 days of historical" cell phone data); *Contrast* United States v. Hammond, 996 F.3d. 374, 389-92 (7th Cir. 2021), *cert. denied*, 142 S.Ct. 2646 (Apr. 25, 2022)(individuals do not have a reasonable expectation of privacy in their real-time CSLI traveling on public roads and pinged twice during a 6-hour chase)[17]; United States v. Riley, 858 F.3d 1012, 1018 (6th Cir. 2017)(the use of 7 hours of GPS location data to find a suspect for whom a valid search warrant had been issued was not a search "so long as the tracking [did] not reveal movements *within* the home (or hotel room), [did] not cross the sacred threshold of the home.");

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[15] In Edwards, the order was for a period of 2 days of CSLI. The Court found "[i]f any case would seem to fall into the category of short-term CSLI data that the Supreme Court expressly carved out from its Carpenter decision, this would appear to be that case." Id. at 831, 97 N.Y.S.3d at 421.

[16] It should be noted Justice Ginsburg was 1 of the 5 Justices in the majority. Thus, it is uncertain the same result would be reached in the future should it be presented in the appropriate case.

[17] Hammond noted because Carpenter did not answer the question of real-time CSLI collection, judges must look to the Court's *pre*-Carpenter jurisprudence to answer the question at hand.

United States v. Dewilfond, 54 F.4th 578, 580-81 (8th Cir. 2022)(no Fourth Amendment violation where police monitored defendant's movements on public roads for 2 days using a GPS tracker a cooperating source had consented to being installed); United States v. Castellanos, 2023 WL 2466789, at *8 (N.D. Ga. Feb. 17, 2023), report and recommendation adopted, 2023 WL 2471337 (N.D. Ga. Mar. 10, 2023)(real time CSLI of 18 hours over 2 days did not require a search warrant or constitute a search); In re Google Location History Litigation, 428 F.Supp.3d 185, 198 (N.D.Cal. 2019)(the location information collected by Google fell outside Carpenter as "not all of Plaintiff's movements were being collected, only specific movements or locations." (emphasis omitted.) reasoning that "[s]uch 'bits and pieces' do[es] not meet the standard of privacy established in Carpenter."); State of Ohio, v. Mamadou Diaw, 2024 W.L. 2952122 (Ohio App. 2024)(*Slip Copy*)(there was no reasonable expectation of privacy over the single coordinate disclosed by the phone company to an investigative subpoena).

As a result of the majority's clear rationale and statements of what they were holding in Carpenter, a warrant was simply not required here. Carpenter; Edwards; Sims. Simply, put, the United States Supreme Court **even to this day** has not held a search warrant is necessary to obtain 4 days of CSLI from a phone company such as *Verizon.* And suppression is not a remedy for a violation of the SCA. United States v. Guerrero, 768 F.3d 351 (5th Cir. 2014); United States v. Smith, 155 F.3d 1051 (9th Cir. 1998); United States v. Ferguson, 508 F.Supp.2nd 7 (D.C. 2007); Sims v. State, *supra*; Holder v. State, 595 S.W.3d 691, 697 (Texas Crim. App. 2020).

III. A warrant was not required on January 24, 2020 when the request for 4 days of CSLI was made, so there was no police misconduct, good faith would apply, and the exclusionary rule would not apply.

These murders occurred on January 12, 2020. The State obtained the *4 days of CSLI* surrounding the murders by a search warrant from a magistrate issued on January 24, 2020. As recognized in Carpenter, at the time the 4 days of CSLI were requested from *Verizon*, the State was

not required to obtain a search warrant for 6 days or less of CSLI. Id. On the date the SLED agent requested 4 days of CSLI, neither the 5 Justice majority nor the 4 Justice minority in Carpenter required a search warrant for 4 days of CSLI. As a result, the exclusionary rule would not apply. United States v. Calandra, 414 U.S. 338, 347 (1974)("prime purpose" of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.").[18] There is no deterrent value in suppressing this evidence because the information was obtained by a SLED agent trying to obtain evidence through lawful means and there is no evidence of any fraud or deceit committed by him in the request to *Verizon*. He did not put anything false in the affidavit but was completely honest in his request for the search warrant, the records, and CSLI and he requested less than what required a search warrant. *See* Calandra, 414 U.S. at 348; Hudson, 547 U.S. at 591; Carpenter. The SLED Agent could rely on Carpenter and was not required to obtain a search warrant. Illinois v. Krull, 480 U.S. 340, 342, 352 (1987).[19] The good faith exception must apply here where the request was post-Carpenter but for less than the 7 days before a search warrant was necessary. *See* State v. Warner, 430 S.C. 76, 92–94, 842 S.E.2d 361, 369–70 (Ct. App. 2020)(finding the exclusionary rule would not apply), *aff'd in part and remanded* State v. Warner, 436 S.C. 395, 872 S.E.2d 638 (2022)(remanding to determine if CSLI warrant was supplemented and if not for the trial court to determine if the exclusionary rule should apply)).[20] *See* United States v. Todd, 2022 WL 3210717,

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[18] Davis v. United States, 564 U.S. 229, 237 (2011); Hudson v. Michigan, 547 U.S. 586, 591 (2006). *see also* State v. Moore, 429 S.C. 465, 478, 839 S.E.2d 882, 889 (2020)(same); State v. Sachs, 264 S.C. 541, 566, 216 S.E.2d 501, 514 (1975).

[19] In Krull, good-faith applied where officers "act[ed] in objectively reasonable reliance upon a statute authorizing warrantless administrative searches" where the statute was later found to be unconstitutional (emphasis omitted)); Davis, 564 U.S. at 232 ("searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule").

[20] In Warner, Justice Hearn wrote a dissenting opinion in which she concurred with this Court and would have found remand was unnecessary because the exclusionary rule should not apply.

*3 (4th Cir. 2022)(*Unpublished*); United States v. Chavez, 894 F.3d 593, 608 (4th Cir. 2018); United States v. Goldstein, 914 F.3d 200, 203–07 (3d Cir. 2019); Reed v. Commonwealth, 71 Va.App. 164, 834 S.E.2d 505, 510–12 (2019); United States v. Carpenter, 926 F.3d 313, 317-18 (6th Cir. 2019)("*Carpenter II.*")(on remand from the Supreme Court, finding government agents reasonably relied on the SCA at the time they acquired certain CSLI); State v. Burke, 2019 WL 2172718, *5 (Oh. App. 2019)(*not reported in N.E. Rptr.*)(applying good-faith exception to pre-Carpenter CSLI acquired *by grand jury subpoena*). Here, there is no necessity for a remand, and the exclusionary rule would not apply. At the time this limited CSLI was requested from *Verizon*, a search warrant was simply not necessary for 4 days of CSLI, **and** exclusion would not apply even if the affidavit was insufficient. Davis; Warner (Hearn, J., *dissenting*).[21] Even after Carpenter, police would have known from that Opinion they *were not required to obtain a warrant to obtain 4 days of CSLI.* A SLED agent, who is not a trained legal technician, obtained the CSLI post-Carpenter, and only requested 4 days.[22] Notably, those concerns are not present here.[23]

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[21] Crucially, Carpenter was a targeted response to Justices Sotomayor and Alito's concurrences in United States v. Jones, which reasoned, generally, that collecting large swaths of historical data violated "society's expectation that ... law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual[ ] ... for a very long period." United States v. Trice, 966 F.3d 506, 518 (6th Cir. 2020) (quoting Carpenter, 138 S. Ct. at 2217 (quoting Jones, 565 U.S. at 430 (Alito, J., concurring))).

[22] As Chief Justice Roberts made clear in Carpenter, historical CSLI presents several legitimate and serious privacy concerns, such as the state's ability to reconstruct an individual's "familial, political, professional, religious and sexual associations." Id. at 2217 (quoting United States v. Jones, 565 U.S. 400, 415, (2012) (Sotomayor, J., concurring))..

[23] Again, the exclusionary rule would not apply to a violation of SCA. Guerrero; Smith; Ferguson; 18 U.S.C. Section 2701(b)(allows for criminal punishment); 18 U.S.C. Section 2707 (allows for civil remedies); 18 U.S.C. Section 2708 ("The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for non-constitutional violations of this chapter.").

V. The exclusionary rule should not apply due to the *exigency of the situation.*

Additionally, this Court should find the SLED agent's request *for the 4 days of CSLI surrounding the murder* was appropriate at the time it was made given the violent nature of the murders and their killer was armed and on the loose. *See* United States v. Takai, 943 F. Supp. 2d 1315, 1323 (D. Utah 2013) (emphasizing "the violent shooting of [a store] clerk in the face at point blank range" to support the finding of an exigent circumstance supporting voluntary disclosure by the phone company). These murders were the result of a surreptitious entry into the sanctity of someone's home at night to commit murder and those murders were extremely violent. The murderer then fled the scene and was still at large at the time of the request. The rule set forth in Carpenter does not limit the police ability to respond to an ongoing emergency. Carpenter 138 S.Ct. at 2223. "Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." Carpenter, *supra.* The exigent circumstances exception applies in this case. The SLED Agent who completed the warrant only requested CSLI from *Verizon* for the time-period surrounding the murders and its discovery. Thus, this was not a standard mind run criminal investigation; rather, this request sought to address an ongoing emergency because the killer was armed and dangerous and had been involved in a violent crime only days prior to the request. *Cf.* Carpenter, 138 S.Ct. at 2220; State v. Carter, 438 S.C. 463, 470–72, 884 S.E.2d 195 (Ct. App. 2022), *cert. granted.*

VI. The Search Warrant Affidavit contained sufficient probable cause.

The affidavit, when read as a whole, clearly supports Judge Seals' and the magistrate's finding of probable cause to issue the search warrant to obtain 4 days of CSLI. Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984). "Probable cause ... is not a high bar,[.]" State v. Jones, 435 S.C. 138, 145, 866 S.E.2d 558, 562 (2021)(quoting Kaley v. United States, 571 U.S. 320, 338, (2014)). Probable cause is a flexible, common-sense

standard. Texas v. Brown, 460 U.S. 730 (1983). It is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules. Maryland v. Pringle, 540 U.S. 366 (2003); Illinois v Gates, 462 U.S. 213 (1983). The probable cause standard is incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of the circumstances. Pringle, 540 U.S. 366; Gates. 462 U.S. 213. In dealing with determinations of probable cause, as the very term implies, a just determination must deal with probabilities, which are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160, 169 (1949). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown. 460 U.S. at 742. Probable cause to issue a search warrant is different than that to issue an arrest warrant. *See* Beck v. Ohio, 379 U.S. 89 (1964); State v. Ellis, 263 S.C. 12, 207 S.E.2d408 (1974). Probable cause to issue a search warrant is whether given the evidence available to the issuing magistrate there is reasonable grounds to believe evidence of a crime will be found in the place sought to be searched. Gates, 462 U.S. at 238[24]; State v. Tench, 353 S.C. 531, 534, 579 S.E.2d 314 (2003)(same). Probable cause that a crime has been committed is also different *See* Brinegar, 338 U.S. at 175-76. Finally, the Supreme Court has recognized police officers are not legal technicians and draft warrants in the heat and hurry of a criminal investigation. United States v. Ventresca, 380 U.S. 102, 108 (1965); Gates; Bowie, *supra.*

[24] More specifically, the magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in the particular place to be searched. Gates, 462 U.S. at 238.

The Search Warrant Affidavit in the present case, was drafted by SLED agent Jared Barkdol, who was assisting the Marion County Sheriff's Office in an on-going investigation of 2 violent murders in which the killer had not been apprehended. Summarizing the Affidavit and the reasonable inferences from the Affidavit, it set forth as follows:

Without a doubt a crime took place, i.e. the victims Burch and Leggette were murdered by gunshot wounds on Sunday, January 12th or 13th, 2020, at Burch's home, but the murders were not discovered until Monday, January 13th by the victim's older daughter [no relation to the defendant] and a friend. Hemingway saw the victim Burch alive as he picked up at least some of the children from her home [the eventual crime scene] on Saturday, January 12, 2020. Hemingway removed the children from the home leaving the victim alone at her home on Saturday night and into early Sunday morning, except for Legette, who was also murdered. Because he removed the children from the home on Saturday, Hemingway would have known Burch was at home alone, except for the other victim Legette. Hemingway was at and around the crime scene on Saturday, January 11, 2020. Hemingway spoke with the victim Burch by phone sometime after midnight, early Sunday morning, January 12, 2020, not long before her death, and Hemingway claimed it was about their children. As a result, Hemingway was the last living person known to speak with the victim Burch alive. His phone records could establish when exactly Burch was last alive. The following day, Hemingway returned to Burch's home [the crime scene] and was there allegedly trying to return his children. As a result, Hemingway admitted he was at the crime scene the day before the murder [Saturday, the 11th] and the day of the murder [Sunday, the 12th]. His CSLI could establish his presence at the crime scene the day before and the day of the murders, and the exact time he was there. Before going to the crime scene on Sunday evening January 12, 2020, Hemingway admitted he phoned the victim Burch and claimed he got no response. Hemingway further admitted when

he was driving to the crime scene and after arriving, he again called the victim Burch on his phone and on a daughter's phone without getting any response. As a result, Hemingway's phone records and CSLI could establish when victim Burch did not answer and hence her approximate time of death in relation to the phone calls around 12:50 a.m. on Sunday, the 12th when she was alive and spoke with Hemingway and then when she first did not answer. Further, reading the Affidavit as a whole, Hemingway did not enter Burch's home on Sunday evening, where the bodies were located. As a result of all of the above, Hemingway admitted several times that he was communicating with the victim Burch by phone or at least attempting to and he was in and around the crime scene the day before the victims' deaths and the day of the victims' deaths. (Search Warrant, Affidavit). As a result, there was sufficient probable cause to obtain a search warrant to search *Verizon's* records for 4 days of phone records and CSLI of Hemingway, for evidence of the murders of Burch and Leggette. Not only was there a fair probability that those records and CSLI contained evidence of Hemingway's guilt, but also this evidence was important and critical to establishing the time of the victims' death because Hemingway claimed he last spoke with the victim around 12:50 a.m. on early Sunday morning and she did not respond to calls Hemingway made later in the day, Sunday and Sunday evening. As a result of all of the above, this issue has no merit.

VII. The case should be remanded to determine if the record before the Magistrate was supplemented by sworn testimony.

Even if this Court were to find the affidavit insufficient, the case should be remanded to the Circuit Court to determine if the affidavit was supplemented with sworn testimony and to determine if the exclusionary rule should apply. Warner, 436 S.C. at 404–05, 872 S.E.2d at 642–43; State v. Johnson, 302 S.C. 243, 249, 395 S.E.2d 167, 170 (1990).

ARGUMENT II.

Judge Seals did not err in denying the motion to suppress Hemingway's 2nd statement given on December 1, 2020, because officers did not need a warrant to arrest Hemingway for 2 murders, felonies, where they had probable cause Hemingway had committed 2 murders; additionally, officer's arrested Hemingway for a family court bench warrant for failure to pay child support which was active and in the computer system and officers could rely in good faith on that active warrant; further, the arrest was not in violation of South Carolina Code § 17-13-50 because officers told Hemingway what he was being arrested for *and* a violation of 17-13-50 does not require suppression of a voluntary statement, and finally, the statement was given knowingly, voluntarily, and intelligently.

On December 1, 2020, Hemingway was picked up by police on the family court bench warrant for failure to pay child support that was active in the computer system. He was informed of the reason for his arrest, the family court bench warrant. Police also had probable cause to arrest Hemingway for the murders when he was picked up. Police had received a DNA report and cell phone records regarding the case. Police also had arrest warrants, for both murders and the gun charge, in their possession, but they did not tell Hemingway about them at the time. (R. 408-11; 448-59; 640-701; 569-75; 579-87; 599-602; 621-24; State's Ex. 61-63; 52; 68; & Def. Ex. 4.). Hemingway subsequently signed a Voluntary Waiver of Rights and gave a 2nd voluntary statement.

Hemingway contended below that his 2nd statement should have been suppressed because police *allegedly* did not tell him what he was being arrested for in violation of S.C. Code Ann. § 17-13-50, his bench warrant for failure to pay child support should have been previously removed from the computer system by family court personnel, and the arrest warrants Hemingway claims were used to arrest him [the murder and gun warrants] were not supported by probable cause. (R. 217-225). There is no merit to this appellate issue because Judge Seals did not err in denying the motion to suppress for multiple reasons.

Analysis

First, Hemingway's arguments regarding the arrest warrants [whether the bench warrant for failure to pay child support or the murder and gun warrants] are all irrelevant because investigators could arrest Hemingway without a warrant because they had probable cause to arrest him for both murders [felonies] and he was not in a constitutionally protected location when arrested that required an arrest warrant. United States v. Watson, 423 U.S. 411 (1976); State v. Thompson, 304 S.C. 85, 87, 403 S.E.2d 139, 140 (Ct. App. 1991). In his 2nd statement, Hemingway admits he walked up to officers coming from another location while officers were sitting in their car outside his residence, an apartment, and was taken into custody there. (State's Ex. 62 [2nd statement]). Police were in a common area of an apartment complex when Hemingway walked up to them on foot and was arrested outside their car for a family court bench warrant for failure to pay child support that was pending. At that time, investigators at that scene, the chief investigator and a SLED Agent, had probable cause to arrest Hemingway for both murders and could arrest him without a warrant. Watson, 423 U.S. at 417–18; Thompson, 304 S.C. at 87, 403 at 140; State v. Robinson, 355 S.C. 620, 518 S.E.2d 269 (arresting officer had probable cause to arrest and detain the defendant on April 4, even though he did not procure an arrest warrant until April 8, after the defendant gave a detailed confession); State v. Goodwin, 384 S.C. 588, 604, 683 S.E.2d 500, 509 (Ct. App. 2009)(where a cigar butt with defendant's DNA was discovered within inches of point of entry to a burglarized house, and the homeowner murdered, such evidence was sufficient to establish probable cause for defendant's arrest with the defendant's subsequent confessions being therefore admissible).

In the present case, investigators knew both victims, Burch and Legette, had been murdered in Burch's home during the early morning hours of Sunday, January 12, 2020, and the murderer

had to enter the home to kill the victims. Leggette was killed while asleep on the couch in the den/living room, and Burch was murdered after a struggle in the hallway of the same home. Before coming into contact with Hemingway on December 1, 2020, investigators received the DNA report indicating a high probability, more than a billion, that Hemingway's DNA was on the exterior back door handle of Burch's home. (State's Ex. 62 [2nd statement wherein the investigators reviewed the DNA report with Hemingway]; State's Ex. 61 [DNA report]). And the probability was even higher Hemingway's DNA and victim Legette's DNA was on the back door handle of Maisha's home, 2.3 octillion to 1. (Id.) Hemingway had never lived in Burch's home. Further, police had received Hemingway's phone records and CSLI showing he was not at home with his girlfriend, Baines, on the morning of the murders as he claimed in his 1st statement of January 15, 2020, but his phone pinged away from his home and Hemingway had called Burch's number and dialed *67 so whoever answered Burch's phone could not tell it was Hemingway calling. (State's Ex. 52, 68, Def. Ex.). Further, these records showed Baines was calling Hemingway during the same time period that Hemingway claimed he was at home in bed with Baines. (State's Ex. 52, 68, Def.'s Ex. 4). Investigators were also aware that at the time of the victims' murders, Hemingway and Burch, were involved in a heated child support action in which Burch was attempting to force Hemingway to pay child support for 4 more additional children. (State's Ex. 63). The final hearing occurred on January 16, 2020, just days after the murders. (Id.). Police had probable cause to arrest Hemingway for both murders. In Goodwin, *supra*, this Court held:

> Here, a cigar butt with Goodwin's DNA was discovered within inches of the point of entry to a house that had been burglarized. These facts and circumstances are sufficient to warrant a prudent person in believing Goodwin committed the burglary. Accordingly, evidence supports the trial court's findings and we find the trial court properly determined there was probable cause for Goodwin's arrest, and properly admitted his statements which arose therefrom.

Goodwin, 384 S.C. at 604, 683 S.E.2d at 509. Hemingway's arguments about the warrants, are irrelevant. Police had probable cause to arrest Hemingway for a felony [2 murders] and he was arrested in public, an apartment complex parking lot. (State's Ex. 62 [2nd statement]). An arrest warrant was unnecessary, and his 2nd statement is therefore not subject to suppression.

Furthermore, police took Hemingway into custody on December 1, 2020, for a bench warrant for failure to pay child support that was active in the computer system. (R. 153-171; 816-17; State's Ex. 62; State's Ex. 63). A Family Court Clerk testified this bench warrant was active on December 1, 2020, and remained active until December 2, 2020, when it was dismissed by Order of the Family Court of Marion County. (R. 816-17). Hemingway **was told** at that time he was being arrested for the bench warrant for failure to pay child support. (R. 162-65; State's Ex. 62). As Judge Seals found, there was no violation of S.C. Code Ann. §17-13-50 (requiring an officer to tell an arrestee what he is being arrested for or there are criminal penalties for the officer). Furthermore, a violation of §17-13-50 would not obviate a voluntary statement. There are criminal penalties for a violation of that statute but exclusion of a voluntary statement from evidence is not a remedy. Id. Further, that bench warrant was not dismissed until December 2, 2020, according to the sworn testimony of the Family Court Clerk at trial. (R. 816-17). Hemingway was not arrested on the murder and weapon charges until after the completion of his 2nd statement to police and at that time he was told he was being arrested for 2 counts of murder and the weapon charge. (R. 164, 165; State's Ex. 62). There was no violation of § 17-13-50. Even if there was, it would not obviate his voluntary 2nd statement.

Hemingway argues this family court bench warrant had been voided by a Family Court Order ending the child support action of Burch on February 27, 2020, because she was dead, so it

was invalid when served on him on December 1, 2020. Hemingway is wrong.[25] A Family Court Clerk testified this bench warrant had been issued, was active, and was pending on December 1, 2020, and was not dismissed until the following day, December 2, 2020, by Order of Family Court Judge Christy M. Gray. (*See* Marguita Middleton-DSS-State v. Isaac Hemingway, Case # 2006-DR-33-00059, Case ID. 0569936; JR No. 32277; Order to Dismiss, dated December 2, 2020; State's Ex. 62; R. 816-17). This Court can take judicial notice of its own documents and records. S.C. Dep't of Soc. Servs. v. Janice C., 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009); Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct.App.1984); Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011). This bench warrant was in a different action brought by the mother of another child of Hemingway's, Mauguita Middleton, for Hemingway's son by her. (*See* Marguita Middleton-DSS-State v. Isaac Hemingway, Case # 2006-DR-33-00059, Bench Warrant 00005431). This bench warrant was issued on November 15, 2018, long before Burch's death, and was pending before and at the time of Burch's murder on January 13, 2020, and still pending on the date of Hemingway's arrest, December 1, 2020. (Id.; R. 162-66; State's Ex. 62). It could not be dismissed by an Order issued on February 27, 2020, because that Order only dealt with Burch's child support action.[26] Hemingway's 2nd statement should not be suppressed.[27]

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[25] Hemingway has misread the record, instead relying on counsel's arguments or motions below and not the record including the sworn testimony of witnesses and family court records. *Compare* IBOA, 23-26 & Def. Ex. 2 to 2/24/23 R. 59-68; R. 816-17; State's Ex 62; State's Ex. 63).

[26] Hemingway sought to show the jury that police detained him unlawfully on December 1, 2020, *and* police were testifying falsely about why and how Hemingway was detained. (R. 816-17). This attempt failed. **(R. 816-17).** Hemingway elicited this testimony *in his case in chief*, i.e. that there was a bench warrant for his arrest for failure to pay child support that was pending on December 1, 2020, and that it was not dismissed until December 2, 2020. (R. 816-17).

[27] Regardless, police can rely in good faith on the fact that a warrant is listed as pending in a computer database and shown as active in making an arrest. Arizona v. Evans, 514 U.S. 1, 15-16 (1995). In Evans, a clerical error by the court system caused a quashed warrant to remain in the

Further, in a case where the evidence is a statement, the test is still voluntariness. In State v. Funchess, 255 S.C. 385, 391, 179 S.E.2d 25, 28 (1971), our Supreme Court held as follows:

> We conclude and hold that every statement or confession made by a person in custody as the result of an illegal arrest, is not involuntary and inadmissible, but the facts and circumstances surrounding such an arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Under our interpretation of the Wong Sun'[28] decision, the contention of the appellant that his confession was inadmissible is without merit.

State v. Funchess, 255 S.C. 385, 391, 179 S.E.2d 25, 28 (1971) (*relying on* Prescoe v. State, 191 A.2d 226 (Md. 1963); People v. Freeland, 218 Cal.App.2d 199 (Cal. 1963); Ellenbur v United States, 328 F.2d 399 (1st Cir. 1964); United States v. Close, 4349 F.2d 841 (4th Cir. 1965); and State v. Moore, 275 N.C. 141, 166 S.E.2d 55 (N.C. 1969). In Close, *supra*, the court stated:

> Assuming, [a]rguendo, that the initial arrest by the Roanoke police was illegal, we construe Wong Sun as holding, in effect, that not all oral statements are the fruit of the 'poisonous tree' simply because they would not have been made but for the illegal actions of the police. We think the Court in Wong Sun clearly indicates the view that a statement which is shown to have been freely and voluntarily [sic] made without coercion, either physical or psychological, may be thereby purged of any stigma of illegality and the statement is admissible.

Funchess, 255 S.C. at 390, 179 S.E.2d at 27 (quoting Close). In the present case, the totality of the circumstances shows this 2nd statement by Hemingway was knowingly, voluntarily, and

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computer system. The officer in question arrested the defendant on that warrant based on it appearing in the computer system. The Supreme Court held the good faith exception applied to clerical errors of court employees. Id. E*ven if* Hemingway is correct and his family court bench warrant for failure to pay child support should have been extinguished by a previous family court order and a court clerical error did not remove it from the computer database, which he is not, the investigators here relied in good faith on that family court bench warrant in arresting Hemingway and as a result there was no constitutional violation and his confession is still admissible. Evans.

[28] Wong Sun v. United States, 371 U.S. 471 (1963).

intelligently made. (State's Ex. 62; R. 152-172). This 2nd statement was audio and video recorded. Hemingway even states in the video recorded statement that he was coming to see officers when he was picked up by them. He states that it was unnecessary for officers to have arrested him on the family court bench warrant because he has cooperated from the beginning of the investigation, and he will continue to cooperate and answer any questions the officers have. (State's Ex. 62). Hemingway even states that if officers needed to get in touch with him, they could have called his probation officer, and she would have reached out to him. (States Ex. 62). In the video, Hemingway is read his Miranda rights again [which he was already aware of], and he executes a voluntary waiver on the video recorded statement. (Id.). Hemingway acknowledges he is waiving and giving up each right and voluntarily agreeing to speak with police officers. Hemingway is not threatened or coerced in any way and gives a voluntary video recorded statement. (Id.). Hemingway does not confess to committing the murders in the statement but is self-protective. (Id.). It is clear from reviewing the statement, the 2nd statement is knowingly, voluntarily, and intelligently given. (Id.). As a result, Hemingway's 2nd statement was properly admitted in evidence after a Denno hearing pre-trial, after which Judge Seals found the statement was freely and voluntarily made. (R. 152-172). Judge Seals did not err in admitting Hemingway's 2nd statement because the statement was freely and voluntarily entered. Funchess; Close. Therefore, there is no merit to this ground.

Finally, police had arrest warrants for 2 counts of murder and the gun charge that they obtained from a South Carolina Magistrate *and* the investigating officer supplemented the arrest warrant affidavits with sworn testimony. (R. 168-171). S.C. Code Ann. Section 22-3-710; Law v. South Carolia Department of Corrections, 368 S.C. 424, 629 S.E.2d 642 (2006); State v. Crane, 296 SC. 336, 372 S.E.2d 587 (1988) (an arrest warrant affidavit that is by itself, insufficient to establish probable cause may be supplemented before a magistrate by sworn oral testimony).

Investigator, Reggie Hotaling, testified he supplemented the arrest warrant affidavits with sworn testimony about the entire investigation of the case and what led them to arrest Hemingway, specifically the DNA evidence. (R. 168-71). As discussed in the Statement of Facts, the DNA report indicated an astronomical probability that someone other than Hemingway's DNA and victim Legette's DNA were contained within a DNA mixture found on the exterior back door handle of Maisha's home, the crime scene. (R. 168-171; State's Ex. 61; R. 702-793). There was sufficient evidence of probable cause to support the arrest warrant affidavits given the sworn supplemental testimony of the affiant given to the issuing Magistrate. (Id.).

ARGUMENT III.

Judge Seals did not err in denying Hemingway's motion arguing against the admissibility of the DNA evidence pursuant to State v. Phillips.

Prior to the State's DNA expert testifying before the jury or any DNA report being introduced, Hemingway requested an in camera hearing pursuant to State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020), to vet the DNA testimony pursuant to Rule 702, Rule 403, and Rule 402, SCRE. Judge Seals agreed to the request, had reviewed the Phillps opinion carefully, and a full Phillips hearing was conducted outside the presence of the jury. (R. 470-555).

S.L.E.D. DNA expert, Maryann Bohem, testified *in camera* to the method of DNA testing used in this case , STR PCR DNA analysis, the reliability of the methodology used [it was accepted throughout the United States, the world, and by the FBI Laboratory], the limitations of the technology, that her analysis in this case was peer reviewed and approved by 2 other analysts who agreed with her findings, and what exactly she would be testifying to before the jury. (R. 470-555). She explained the concepts of touch DNA, involved in this case, as opposed to semen, hair, or blood DNA comparison; the *type of interpretation* used in this case [STR mix] and that Random Match Probability ("RMP") used in Phillips was not used in this case. She explained that in 2018

SLED transitioned to STR mix and away from RMP, though RMP is still used with some amplification kits. (R. 450-55). STR mix, used in this case, is a probabilistic genotyping software that uses likelihood ratios instead of RMP for representation of the weight of the evidence in comparisons. She also explained the concept of proposition or likelihood ratio sets used in comparison in STR mix interpretation and how that was done in this case. (R. 450-555). She explained she *was not* going to be testifying before the jury that there was a DNA match but to the statistical likelihood that someone contributed to a sample as opposed to an unknown, unrelated individual. She also explained the concept of a "mixture" DNA sample and how that type of sample is interpreted. She also explained she was going to be testifying she could not exclude Hemingway's DNA from 3 different samples taken from the crime-scene or Burch's body, but this did not mean she could testify his DNA was included in those samples. The DNA expert explained each finding in her report (State's Ex. 61) as to Hemingway and what each finding meant. As to the sample taken from underneath Burch's fingernails, a mixture of 2 people, it was 270 times more likely if Burch and Hemingway contributed to this mixture than Burch and an unknown individual. This was moderate support for that proposition set. As to the sample from the front hallway in Burch's home, a mixture of 2 individuals, it was 100 times more likely that Hemingway and an unknown unrelated individual contributed to this mixture than 2 unknown unrelated individuals. This was moderate support for that proposition set. As to the sample from the back door of Burch's home, a mixture of 3 individuals, it was a billion times more likely if Hemingway and 2 unknown unrelated individuals contributed to the mixture than 3 unknown unrelated individuals. This was very strong support for this proposition set. As to the same sample, it was 2.3 octillion times more likely that Hemingway, Legette, and an unknown unrelated individual contributed to this sample than 3 unknown unrelated individuals. This was very strong support for

this proposition set. She also explained how a computer program validated by SLED computed the likelihood ratios; she had been trained in the mathematical computation herself in training to do STR mix, and how she compared the result the computer program came up with to her expected findings to ensure quality control. She also testified to the fact it is sometimes difficult to differentiate whether parents or a child are contributing DNA when there is a mixture and a child lives in the home, but this would not change her opinions in this case as to Hemingway contributing to a sample. She also explained the concept of transference, and a DNA sample can be deposited in a number of different ways, including through a 3rd party. She also explained she could not age DNA. The DNA expert was also subject to full cross-examination by Hemingway's counsel on these issues and the challenges raised by Hemingway. (R. 470-545).

At the conclusion of the hearing, Judge Seals heard full argument from both the State and Hemingway's counsel on whether the DNA evidence should be admitted. (R. 545-552). After consideration of all of the evidence, testimony, and argument presented, Judge Seals specifically ruled the DNA evidence was admissible because the methodology used was reliable, the DNA expert was a qualified DNA expert, her findings had been peer reviewed by 2 other DNA experts, the proper procedures were followed in conducting her DNA analysis, and the testimony that would be offered was within the limits of the science. (R. 552-55). Judge Seals also found the testimony was relevant and would assist the trier of fact, Rule 402, SCRE, and its probative value was not substantially outweighed by the danger of unfair prejudice or confusing the issues or misleading the jury, the Rule 403, SCRE, concerns. (R. 552-55).

Thereafter, the DNA expert testified before the jury to her findings and expert opinion, the limits of touch DNA identification, and her report was also admitted for the jury's consideration. (R. 694-793; State's Ex. 61). She specifically explained what touch DNA evidence is, compared

to blood, semen, or hair DNA profile comparison to a known standard. She explained the samples she tested and compared in this case to Hemingway's DNA profile were mixtures, and to the difficulty in comparing a touch DNA mixture sample to a known standard, and what proposition or likelihood sets are and what likelihood ratios are. She explained she could not exclude Hemingway's DNA from 3 samples taken from the victim's home and body that were tested [under the victim's fingernails, from a front hall wall, and the exterior back door handle], but that did not mean she was saying his DNA was included in those samples. She testified and explained she was not saying Hemingway's DNA matched a particular sample but to the likelihood ratio that Hemingway and another or others left that sample instead of another unknown unrelated individual or individuals. She explained it was 277 times more likely that Hemingway and Burch contributed to the sample from under Burch's fingernail than 2 unknown unrelated individuals and this was moderate support for this proposition set. She also explained it was 100 times more likely that Hemingway and another contributed to the sample on the front hall wall than 2 unknown unrelated individuals, and this was moderate support for this proposition set. She explained it was 1 billion times more likely Hemingway and 2 other individuals contributed to the mixture taken from the exterior back door handle than 3 other unknown unrelated persons, which was very strong support for this proposition set; and, it was 2.3 octillion times more likely Hemingway, the victim Legette, and another unknown unrelated individual contributed to the mixture found on the exterior back door handle than 3 unknown unrelated individuals, which was very strong support for this proposition set. She also explained that the fact that Hemingway's son lived in Maisha's home did not change her calculations in this case or opinions given regarding Hemingway. She also testified she did not believe Hemingway's son contributed to the sample on the exterior of the back door handle because a child gets ½ of his DNA from his father and ½ from his mother and the probability

Burch contributed to the sample on the back door was very low due to the proposition set results she received for Burch. She explained the likelihood ratios are generated by a computer program that relies on a complicated mathematical computation. She explained she did not hand calculate the likelihood ratios, did not run the computer program twice, but did compare the computer programs' results with her own estimate of expected findings and the likelihood ratios were in line with what she expected. (R. 699-793). All of the concepts the Court in Phillips was concerned about were testified about or explained to the jury by the DNA expert, and she testified to her findings as to each of the 3 DNA samples consistent with her *in camera* testimony. (R. 699-783).

> During deliberations, the jury sent a question to Judge Seals. Judge Seals read the note:
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> We do have a note. It says can we get more clarification on DNA evidence concerning what the wording and numbers mean. We have a person who wants to know if these numbers mean it is the suspect's DNA or not.

(R. 892, ll. 17-21; Court's Ex. 2). Judge Seals did not answer this question but asked if the jury would like the DNA expert's testimony replayed. (R. 995-98). The jury was brought into the courtroom and **the entire testimony of the DNA expert given before the jury (R. 699-783),** was **replayed** for the jury again. This would have clarified any misunderstanding by the jury. The DNA report had been previously admitted as well. (State's Ex. 61). As previously stated, the DNA expert testified before the jury that she could not say Hemingway's DNA matched that taken from inside Maisha's home, under her fingernails, or that on the exterior back door handle. She could only testify to the random probability sets she previously set forth in her testimony. She also testified while she could not exclude Hemingway's DNA from being in the samples she tested; she could not say definitively Hemingway's DNA was in the samples she tested, only to the likelihood ratio that he contributed to the sample in question. (R. 995-98).

Analysis

Hemingway contends the DNA evidence in this case was admitted in error in violation of Phillips. Hemingway is simply wrong. In Phillips, our Supreme Court held the DNA evidence in that case, RMP, should not have been admitted for several reasons that did not occur here. Id.

Further, STR mix interpretation of DNA used in this case has been admitted throughout the country as reliable and accepted by the relevant scientific community. United States v. Gissantaner, 990 F.3d 457, 463-467 (6th Cir. 2021)(collecting cases); People v. Muhammad, 931 N.W.2d 20 (Mich App. 2018); People v. Gholston, 2021 WL 2181079 (Mich. Ct. App. 2021)(*Not Reported in N.W. Reporter*); United States v. Lewis, 442 F. Supp. 3d 1122, 1155-1160 (D. Minn., 2020) ("[T]here is no doubt that STRmix has gained general acceptance."); United States v. Washington, 2020 WL 3265142, at *2 (D. Neb. June 16, 2020)(*Unpublished*)("Authority and evidence demonstrate that STRmix is generally accepted by the relevant community."); People v. Blash, 2018 WL 4062322, at *6 (V.I. Super. Ct. Aug. 24, 2018); People v. Bullard-Daniel, 42 N.Y.S.3d 714, 724–25 (N.Y. Co. Ct. 2016); United States v. Christensen, 2019 WL 651500, at *2 (C.D. Ill. Feb. 15, 2019)(*Unpublished*)("STR mix has been repeatedly tested and widely accepted by the scientific community."); United States v. Russell, 2018 WL 7286831, at *7–8 (D.N.M. Jan. 10, 2018)(*Unpublished*)("[STRmix's] analyses are based on calculations recognized as reliable in the field."); United States v. Pettway, 2016 WL 6134493, at *1 (W.D.N.Y. Oct. 21, 2016)(discussing "exhaustive[ ] research[ ]" concluding that "the scientific foundations of the STRmix process are based on principles widely accepted in the scientific and forensic science communities"); People v. Davis, 75 CalApp.5th 694, 705-24 (Cal App. 2022); *See also* United States v. Jones, 965 F.3d 149, 160 (2d Cir. 2020)(admitting a similar DNA method). STR mix is used in several federal

laboratories, in more than 40 states, and in at least 13 other countries. *See* United States v. Tucker, 2020 WL 93951, at *4 (E.D.N.Y. Jan. 8, 2020). "Courts have overwhelmingly admitted expert testimony based on STRmix results." Id.; *see also* Lewis; Christensen; Russell,; Pettway. "These cases demonstrate that STRmix has been accepted by the relevant community." Washington.

In Phillips and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the Court set forth what has become the standard South Carolina formulation of the elements of the foundation for scientific evidence under Rule 702. "When admitting scientific evidence under Rule 702, []the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." 335 S.C. at 20, 515 S.E.2d at 518. Hemingway concedes in his brief that Judge Seals found all of the 702 factors were met. (IBOA, p. 21, ll. 3-5). Judge Seals determination is fully supported by the record. (R. 470-555). The DNA expert's testimony at the Phillips hearing laid the foundation for admissibility of the DNA expert's testimony regarding the DNA in this case: the evidence would assist the trier of fact, the expert witness was qualified, and the underlying science of the DNA used in this case was reliable. (R. 470-552). And Judge Seals covered each of the Rule 702 factors in his findings of fact and conclusions of law. (R. 552-55).

If the evidence is admissible under Rule 702, then the trial court must determine whether the probative value is substantially outweighed by the dangers listed in Rule 403. Id. at 20. Hemingway complains Judge Seals did not make a determination under Rule 403. (IBOA, p. 21, ll. 5-11). He is incorrect. (R. 552-55). In fact, in making his analysis, Judge Seals stated as follows:

> I'm going to walk through a 702 analysis and then I'll get into a 403 analysis. Then I'm going to talk about State v. Phillips. First of all, under 702 analysis .....

(R. 552, ll. 19-21). Judge Seals then went through a careful Rule 702 analysis including finding the subject matter of the expert's testimony would be helpful to the jury as DNA analysis, including touch DNA analysis, is beyond the jury's knowledge and skill; the DNA expert was qualified as

she had the requisite training, experience [14 -17 years], and skill [testified 83 times as an expert]; the subject of the testimony was reliable and had been peer reviewed and prior applications of the method had been used in past trials, and quality control procedures had been used to ensure reliability [her work in this case had been peer reviewed by 2 other SLED DNA analysts] and SLED was an accredited DNA lab; and the method applied was consistent and recognized with scientific procedures and it is recognized throughout the United States, South Carolina, the F.B.I., and others. (R. 553-54). Therefore, Judge Seals appropriately found that under Rule 702, the DNA expert was qualified to testify and give her opinion. (R. 554).

As to the Rule 403 analysis, Judge Seals held, after hearing all of Hemingway's arguments, including those in his Brief, regarding why this DNA evidence should be excluded, as follows:

> I find that the testimony is relevant and that in this case it substantially outweighs the danger of unfair prejudice, confusion of the issues or misleading the jury.

(R. 554, ll. 6-10). As to State v. Phillips, Judge Seals distinguished it from this case as follow:

> Now, in regards to the State v. Phillips analysis, I think this case is very different. This case is very streamlined, very down to basics of DNA expert testimony and how it applies at trial. In State v. Phillps, there were several failures on behalf of the States that led to the reversal.
>
> First, the State failed to present the testimony of an expert witness at the hearing, but we have it here. Secondly, the State presented an incomplete actual and scientific basis for the admission of the expert's opinion. We had that here clearly. Third, the State did not explain to the jury the complicated DNA concepts involved. We did have that explained today and it was flushed out in detail by the defense attorney. And then the fourth thing that took place in that trial is that the Solicitor misled the trial court with some facts. So the appellate court took all of that into consideration and used all of that to have a reversal of the trial court judge. This is much more plain. This is much more basic. This is much more streamlined than I think that she is an expert. I think she can testify. I think she can give an opinion. And, I've given my 403 analysis, so I do think it comes in tomorrow.

(R. 554, ln. 11- 555, ln. 8). Judge Seals' list of distinguishing features to this case from Phillips was not exhaustive.

First, this case reaches this Court in a different posture. In Phillips, there was no pre-trial hearing vetting this testimony under Rules 702, 402, or 403 pursuant to Council. This case reaches this Court after Judge Seals conducted a pre-trial hearing, vetted the testimony under Rule 702, 402, and 403, and found the testimony and DNA report were relevant, reliable, and admissible. This Court must review Judge Seals' determination under an abuse of discretion standard. Council, 335 S.C. 1, 515 S.E.2d 508.

Judge Seals did not abuse his discretion. Judge Seals held a Phillips hearing prior to the DNA expert testifying before the jury or her report being admitted in evidence and vetted the DNA expert's testimony, the science, and the methodology pursuant to Phillips. (R. 470-555). After the DNA expert **testified** and **was cross-examined** *in camera* on the DNA methodology used in this case and what the results were and what she could and could not testify to, Judge Seals specifically found the testimony was admissible under Rule 702, Rule 402, and Rule 403. (R. 552-55). There was no such testimony *in camera* in Phillips or findings of fact and conclusions of law based on *in camera* testimony of the D.N.A. expert. Phillips.

Second, in Phillps, the Court noted the defendant admitted he touched the gun earlier before the murder occurred, so the probative value of the defendant's DNA being on the gun was not high and the likelihood of the defendant's DNA being in the victim's pocket was only 50% of the population. Id. This case is clearly distinguishable from Phillips. Hemingway adamantly denied his DNA could be on the back door exterior handle, under Burch's fingernails, or on the wall in the front hallway. (State's Ex. 62). There was moderate support for his DNA being on the wall and under Burch's fingernails. It was 100 times more likely he and an unknown unrelated individual contributed to the mixture on the front hallway wall than 2 unknown unrelated individuals. It was 277 times more likely that Hemingway and Burch contributed to the mixture

under Burch's fingernails than Burch and an unknown unrelated individual. And there was very strong support his DNA was on the back door exterior handle, a billion times more likely for him and 2 other unknown unrelated individuals to have contributed to this mixture than 3 unknown, unrelated individuals, and 2.3 octillion time more likely Hemingway's DNA and Legette's DNA along with another unknown unrelated individual contributed to the mixture on the exterior back door handle rather than 3 unknown individuals.

Third, the DNA expert in the present case testified before the jury and correctly explained to the jury the limitations of this type of DNA evidence. The DNA expert explained to this jury she could only give the jury probability sets, what probability sets were, and the likelihood ratio Hemingway contributed to the specific sample involved rather than an unrelated individual or individuals. She did not testify to a DNA match, but to the probability Hemingway contributed to the respective samples taken from the crime scene and Burch's body as opposed to an unknown unrelated individual or individuals. She explained the difference between exclusion and inclusion. She testified she could not exclude Hemingway's DNA from any of the 3 samples, but she could not categorically include his DNA in any of the 3 samples. She explained that was simply not possible with touch DNA and where there was a mixture. She also explained "transference" which was not properly explained in Phillips. And, she explained she could not date DNA. What occurred in Phillips that caused the case to be reversed did not occur in this case. *See* Phillips.

Fourth, the requirements of Rule 702, SCRE were met by testimony of the expert prior to the testimony being admitted before the jury; the trial court found the requirements of Rule 702, SCRE were met; and, the trial court found the evidence was relevant and admissible under Rule 402, SCRE, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under Rule 403, SCRE.

Phillips, *supra*. These findings are fully supported by the record including the *in camera* testimony of the expert, her testimony before the jury, and her DNA report [State's Ex. 61] admitted in evidence. Judge Seals did not abuse his discretion in admitting the evidence, and the limits of touch DNA evidence and mixtures were fully explained to the jury. Id.

Contrary to Hemingway's argument in his brief, the fact that his son or children lived in the victim Burch' home, did not render the DNA samples taken meaningless or irrelevant. (R. 742-57). The DNA expert testified under oath this factor would not change her expert opinion as to the likelihood Hemingway contributed to any sample compared to an unknown unrelated individual or individuals. While the son or a sibling could possibly have contributed to the sample from the wall or from Burch's fingernails, given the limited number of alleles, this is true of any DNA sample and could be true of anyone with those same alleles and was explained to the jury. This does not render the evidence admitted inadmissible. McDaniel v. Brown, 130 S.Ct. 665 (2010). Further, as to the sample taken from the exterior back door handle, the DNA expert testified she did not believe the son [or any child of Burch and Hemingway] contributed to that sample, because the son's DNA profile, as would any child of Hemingway and Burch, would have half of the father's DNA ***and*** half of the mother's DNA, and based on the results of her testing, the likelihood of Burch contributing to that sample was very low given the probability sets and the likelihood ratios she received regarding Burch contributing to this particular sample. (R. 742-57). She further testified, the fact she did not have the son's or any other child's DNA sample would have made no difference in her opinion in this case. (R. 742-57).

The expert also explained the difference between YSTR testing for male markers and autosomal testing. Hemingway confuses this in his brief. YSTR was a different test that the expert ran in addition to the regular touch DNA autosomal testing she did on the 3 samples in question

[the exterior of the back door handle, the swab from the hallway wall, and the sample taken from under the victim's fingernails]. YSTR results would be exactly the same for father and son. However, they would not be for autosomal testing which was done on all 3 samples discussed herein. Regardless, the fact that Hemingway's son lived in Burch's home and his DNA contained half of his father's DNA was fully vetted before the jury and that factor was there for the jury's consideration if they did not believe the DNA expert or to consider in weighing the DNA evidence. (Tr. 639-54). Phillips. Furthermore, all of these factors were explained to the jury and argued by both the prosecution and the defense, eliminating any chance of misrepresentation by either side to the jury. *See* Phillps. Additionally, the jury had the DNA report and could read the same. (State's Ex. 61). Finally, during deliberations, the jury reheard the entirety of the DNA expert's testimony, including direct, cross-examination, re-direct, and re-cross examination which would have clarified any testimony of the DNA expert and would have prevented any confusion or misunderstanding of the DNA expert's testimony. (R. 995-98).

As a result of all of the above, Judge Seals did not abuse his discretion in admitting the DNA, and Hemingway cannot show prejudice. This case is the antithesis of Phillips.

ARGUMENT IV.

Judge Seals did not err in denying the motion to prevent mention of Hemingway's family court bench warrant for failure to pay child support as it went to the motive in the case, was res gestae of the crime, and it was why Hemingway was picked up by police before his 2nd statement; and, any error in its admission was harmless as it was cumulative to other similar evidence admitted and the State did not argue it as propensity evidence but as evidence of motive which is proper under Rule 404(b), SCRE.

The motive for the murder of Burch and indirectly for the murder of Legette was the heated child support dispute between Burch and Hemingway. The murders took place in the early morning hours of January 12, 2020, just a few days before the final hearing in the child support dispute, January 16th; and, as a result, the child support action ended, and Hemingway did not

have to pay any child support. (R. 2/24/23 59-68; State's Ex. 63). Below, Hemingway objected pre-trial to the admission in evidence of the family court child support dispute *and* mention of a family court bench warrant issued against Hemingway for failure to pay child support. (R. 231-235; 555-58; R. 2/24/23, 88-101). On appeal, he only challenges *mention* of the bench warrant.[29] (IBOA). As discussed under Appellate Issue II., this bench warrant was active on December 1, 2020, and was the justification for Hemingway being picked up by police on that date before he gave his 2nd video-recorded statement. A Family Court Clerk testified this bench warrant was active on December 1, 2020, and remained active until December 2, 2020, when it was dismissed by Order of the Family Court. (R. 816-17). After hearing argument on both issues, Judge Seals agreed with the State that the child custody dispute was admissible as evidence of motive for the murders *and* mention of the bench warrant for failure to pay child support during Hemingway's 2nd statement was relevant to the motive in this case for the 2 murders; there was extensive testimony in the record regarding the child support dispute, and the bench warrant [for failure to pay child support] was briefly mentioned in the 2nd statement as the reason Hemingway was arrested by police on that date and subsequently questioned. Judge Seals also found it was *res gestae* of the crime evidence to fully explain the circumstances surrounding the crimes. (R. 231-35; 555-58; R. 2/24/23, 88-101; See also 816-17). Judge Seals also found the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice as the jury was not going to find that because someone failed to pay child support, they would also commit 2 murders, i.e. it was not propensity evidence. (R. 231-35; 555-58; R. 2/24/23, 88-101; See also 816-17). The fact that the bench warrant was later dismissed the following day after Hemingway's 2nd

[29] The bench warrant was not introduced in evidence and is not part of the Family Court records of the child support dispute between Hemingway and Maisha marked State's Ex. 63. This is why Hemingway's brief only challenges the "mention" of the bench warrant at trial. (IBOA).

recorded statement to police, December 2, 2020, did not change the fact it was evidence of the motive for the murders, was the reason Hemingway was picked up on December 1, 2020, and explained the crimes. (R. 231-35; 555-58; 816-17).

Analysis

Hemingway mistakenly argues: (1) no bench warrant existed, (2) if it existed it was issued after the murders for conduct after the murders; (3) it was dismissed 6 weeks after the murders, on February 27, 2020, and (4) it did not exist when Hemingway was arrested on December 1, 2020. (IBOA, 23-26). Hemingway argues, as a result, the bench warrant was irrelevant, prejudicial, and inadmissible. (Id.). Hemingway is wrong and has misread the record. Hemingway is relying on counsel's arguments or motions below and not the record below. (Compare IBOA, 23-26 & Def. Ex. 2 to 2/24/23 R. 59-68; R. 816-17; State's Ex 62; State's Ex. 63). As discussed under Appellate Issue II., Hemingway was taken into custody on a family court bench warrant for failure to pay child support on December 1, 2020, that was previously issued in November of 2018, was active when the murders occurred, and remained active until Hemingway was arrested, and was not dismissed until December 2, 2020. (State's Ex. 62; R. 816-17). This bench warrant was not dismissed on February 27, 2020, and could not be, because this bench warrant was in a different action involving a different mother (Tr. 410-11; 569-73; State's Ex. 62). That bench warrant was dismissed by an Order issued on December 2, 2020, by Family Court Judge Christy M. Gray, and filed the same date. (See Marguita Middleton-DSS-State v. Isaac Hemingway, Case # 2006-DR-33-00059; Bench Warrant 00005431 & Order to Dismiss, Dec. 2, 2020).

Additionally, Hemingway is wrong that this bench warrant was not relevant to his case. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004). It was relevant for 3 reasons. First, it was the basis that Hemingway was picked up and questioned on December 1, 2020, so it went

directly to the lawfulness of his detention, the reasonableness of investigators actions, and resultingly the voluntariness of his statement, which the jury had to determine before considering the 2nd statement. Hemingway specifically sought to show the jury police detained him unlawfully, *and* they were testifying falsely about why and how Hemingway was detained. This attempt failed. (R. 816-17). Further, Hemingway elicited this testimony *in his case in chief*, i.e. that there was a bench warrant for his arrest for failure to pay child support that was pending on December 1, 2020, and that it was not dismissed until December 2, 2020, by Order of the Family Court. (R. 816-17).

Second, the bench warrant was further evidence of motive for the murder of Burch and *res gestae* of the crime. Sweat. The bench warrant against Hemingway for failure to pay child support was issued in November of 2018, and Burch's action against Hemingway for failure to pay child support was brought in January/February of 2019. As a result, when Burch brought her action seeking child support for her 5 children, Hemingway was already under a child support obligation for another child; and, he had failed to pay that child support, i.e. he was in arrears, and a bench warrant was pending for his arrest [incarceration] for the same. Further, during the entire pendency of Burch's child support action seeking additional child support from Hemingway for 5 more of his children, the bench warrant for his arrest [incarceration] for failure to pay child support for another child was pending against him, and Hemingway did not make up the arrears as to that child until **July 1, 2020**, almost **6 months after the murders** of Burch and Legette.[30]

Third, as Judge Seals found in his analysis of this issue, Rule 404(b) specifically provides evidence of prior bad acts [if this is even a prior bad act], is admissible to prove "motive." Rule 404(b), SCRE. The evidence was not offered to show propensity to commit a crime, but to show

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[30] *See* Marguita Middleton-DSS-State v. Isaac Hemingway, Case # 2006-DR-33-00059, Case II 0569936, JR No. 32277; Bench Warrant 00005431; Order to Dismiss, December 2, 2020, the Honorable Christy M. Gray.

motive for the murder; i.e. Hemingway was already under financial stress and threatened with incarceration for failure to pay child support for 1 child before Burch filed a child support action against Hemingway alleging failure to pay child support for 5 more children. And, on the eve of being ordered to pay child support for 5 more children, Hemingway murdered Burch and Legette, and never had to pay any child support for any of his 5 children. There was no abuse of discretion. *See* Sweat, 362 S.C. 117, 606 S.E.2d 508 (prior CDV arrest 2 months earlier was admissible evidence of motive and *res gestae* of the crime where it was motivation for the attack on the victim 2 months later and provided the jury with the context of the crime).

Harmless error

Regardless, the mention of a bench warrant for failure to pay child support could not have been prejudicial in this case. In Hemingway's 2nd statement, police mention they picked up Hemingway on a bench warrant for failure to pay child support from Marion County, not for some criminal offense. Hemingway explains there should not be any bench warrant for failure to pay child support as his child support obligation for his oldest son had ended several months earlier when the child became emancipated, or the Court ended the child support obligation. (State's Ex. 62). The interrogating officers state on the video they were not aware of these facts; the bench warrant was simply in the computer system and was still active, so officers had to arrest him. (State's Ex. 62). The Family Court Clerk testified the bench warrant for failure to pay child support was dismissed the following day by Order of the Court, and she was not aware if Hemingway actually owed any child support or not. (R. 816-17). The bench warrant was not admitted in evidence. The jury could have believed the bench warrant was mistakenly issued or should have been dismissed before December 2, 2020. There could be no unfair prejudice from mention of the same. The State did not argue this bench warrant as propensity evidence. Hemingway admits

(IBOA, pp. 23-26), the bench warrant was cumulative to other testimony and the family court records admitted in evidence of the motive for the crimes, victim Maisha seeking to put Hemingway under a child support obligation for 5 more children. (R. 261-66; 816-17; R. 2/24/23, 36-40; State's Ex. 63; R. 2/24/23, 59-69). State v. Haselden, 353 S.C. 190, 577 S.E.2d 445, 488 (2003)(erroneous admission of prior bad act evidence is harmless beyond a reasonable doubt if its' impact is minimal given the entire record.); State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006)(prior bad act is harmless where its' admission was minimal, it is dissimilar to the crime for which defendant is on trial, and other bad acts of were admitted without objection); State v. Broaddus, 331 S.C. 534, 605 S.E.2d 549 (Ct. App. 2004)(any error in admission of prior bad act testimony is harmless where it is cumulative to other objected to testimony properly admitted);

ARGUMENT V.

The trial court did not err in denying the request for a curative instruction in response to an alleged improper burden shifting argument

During defense counsel's closing argument, he specifically argued the cell phone records and CSLI corroborated Hemingway's timeline and 2 statements regarding his whereabouts surrounding the time of the murders. (R. 931-945). In Reply, the Solicitor argued that what the *phone records*, *CSLI*, and *timeline* or defense counsel could not explain was what was the most important, what occurred during the time when the murders occurred. (R. 976, ln. 5 - 978, ln. 5).[31] Here is exactly what the Solicitor stated in Reply:

> He also touched on, ladies and gentlemen, *the cell phone evidence and the timeline*. He's right, I don't' know why he keeps bringing it up. I don't dispute everything - - we don't dispute everything up to midnight. What *they* can't account for - - and he glossed right over it. Its what happened from midnight until 7:00 a.m.

[31] *Cell phone records* (State's Ex. 68) and a *cell phone report* (Def. Ex. 4) were introduced at trial. Defense counsel argued from a *timeline* he put together as a demonstrative exhibit.

MR. BOOKER: You Honor, may we approach? May we approach? (Whereupon a bench conference was held in the presence of the jury but out of the hearing of the jury on the record).

MR. BOOKER: Your Honor, I think he just made a critical error that you may have to instruct the jury. He can't say what they can't account for. Burden of proof is not on us. You can't ---

MR. WHITE: That is what you said in your closing.

THE COURT: He's just replying to what you brought up.

MR. WHITE: Yeah, that's all it was.

MR. BOOKER: I'm bringing up the evidence, but he can't say that we can't account for it where he's basically saying - - -

MR. WHITE: You glossed over it.

MR. BOOKER: We have something to prove. We don't have to account for anything.

THE COURT: I'm going to charge them.

(WHEREUPON, a bench conference was held in the presence of the jury, but out of the hearing of the jury on the record has ended).

MR. WHITE: And again, you didn't hear much about from 12:00 midnight to seven a.m. that's the time that I'm talking about. And he wants to say that I didn't want to move this [Def. Ex. 4, the cell-phone report] in, but that was strategic because I knew he would. And he fumbled backwards and emphasized my point and that is exactly what he did. He had no when he ask that expert he said on this slide you don't see the 4:49 call why is that. And you can tell it caught him off guard because that is a different tower he's moving.

Ladies and gentlemen, despite what he says at 4:49 a.m. he is not in his house. I can't emphasize that enough. Twelve o'clock he says he is in his house and talks to Maisha [Burch]. The last person to talk to her alive. Savion says after midnight sees a car come up at 4:49. He star 67 the call both times and he is not in his house where he says that he is. That's the issue that I'm bringing up.

(R. 976, ln. 5 - 978, ln. 5)(emphasis added). The Solicitor's argument was fully supported by the record and in direct response to counsel's closing argument regarding what the phone records, CSLI, and timeline showed. (R. 640-701; St.'s Ex. 68; Def. Ex. 4). The Solicitor immediately goes

on to other things defense counsel said during the trial and closing argument and how those things are not correct or even evidence, the testimony is evidence. (R. 978, ln. 6). During jury instruction, Judge Seals instructed the jury numerous times the burden of proof is on the State to prove the defendant guilty beyond a reasonable doubt and the defendant does not have to prove anything. (R. 985-88; 991). Hemingway argues Judge Seals erred in not striking the argument and not giving a curative instruction. (BOA). Hemingway is wrong. (R. 931-45; 976, ln. 5 - 978, ln. 5).

Lack of Preservation

While counsel interrupted the Solicitor's Reply argument, and asked for a side-bar conference, he did not object to the argument or move to strike, he simply asked for a curative instruction. (R. 976, ln. 5 - 978, ln. 5). Since there was no objection, or motion to strike, this issue is not preserved for appeal. State v. Navy, 370 S.C. 398, 635 S.E.2d 549 (Ct. App. 2006)(closing argument challenge was not preserved for appeal because there was no contemporaneous objection); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974)(counsel must object to closing argument); State v. Harry, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996)(if the trial judge denies the request for a curative instruction, counsel must object to preserve the issue).

Standard of Review/the Law

The trial judge is vested with broad discretion regarding the manner of closing argument and ordinarily his rulings on such matters will not be disturbed. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990); State v. Green, 48 SC. 136, 26 S.E. 234 (1897); State v. Jernigan, 156 S.C. 509, 153 S.E. 480 (1930). A prosecutor may argue the evidence in the record and the reasonable inferences from that record. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990); State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995); State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976). A prosecutor should argue his case vigorously and give his version of the testimony and what

weight and credibility should be given to the evidence. Caldwell, 300, S.C. 494, 388 S.E.2d 816; Allen, 266 S.C. 468, 224 S.E.2d 881. A prosecutor may characterize or argue the credibility of witnesses presented by either side. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995); Caldwell, *supra.* A prosecutor may argue to a jury to return a verdict he conceives it is their duty to return based upon the evidence presented in the trial. Allen. A party who injects an argument into the case, is in no position to complain about the argument in reply. State v. Gilstrap, 205 S.C. 412, 32 S.E.2d 163, (1944); Jernigan, 156 S.C. 509, 153 S.E. 480. In response to opposing counsel's argument, an attorney may fairly point out evidence that a jury should or should not consider. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975).

Analysis

Even if preserved, there is no merit to this issue because in a Reply argument the Solicitor is allowed to respond to counsel's argument and matters brought up in the same. *See* State v. Hill, 382 S.C. 360, 675 S.E.2d 764 (Ct. App. 2009)(Solicitor's statements were made in Reply to defendant's strategy to place direct or indirect responsibility for the murders on a 3rd party and were not intended to comment on defendant's failure to call any witnesses in his defense). That is the very purpose of Reply argument. State v. Beaty, 423 S.C. 26, 32, 813 S.E.2nd 502 (2018)(Party must limit its Reply to those matters raised by the other party in its closing argument); *See* State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018). That is why the final closing argument of the State is given the name "Reply." Beaty, 423 S.C. at 46, 813 S.E.2d at 513. Defense counsel argued extensively in his closing argument that cell phone records and CSLI supported Hemingway's purported alibi he related to police in his 2 recorded statements **and** as testified to by his girlfriend. (R. 931-45). The Solicitor was specifically responding to that argument of counsel when he made his argument. (R. 976, ln. 5 - 978, ln. 5). In fact, that is how this portion of

the Reply began, referring to what opposing counsel said or brought up. (R. 976, ln. 5 - 978, ln. 5). Judge Seals, who saw and heard the argument, properly denied the request for a curative instruction [and any implied objection contained in this request] finding the Solicitor's comments were in direct response to what Hemingway's counsel brought up in his closing argument not an attempt to shift the burden of proof to the defendant. (R. 976, ln. 5 - 978, ln. 5).

Based on the language used itself and its context (R. 976- 978), the Solicitor was referring to the *cell phone records*, *CSLI*, and Hemingway's *timeline* in referring to "they". The Solicitor was specifically arguing to the jury that this evidence, the *timeline*, *CSLI*, and *phone records* [they], could not show what occurred during the relevant time, the time the murders occurred. (R. 976, ln. 5 - 978, ln. 5). Even if the Solicitor was not referring to the specific evidence he was talking about, at most, he was referring to defense counsel, in Reply. (R. 976, ln. 5 - 978, ln. 5).

The record fully supports Judge Seals' denial of the request to give a curative instruction and any implied objection. (R. 931-45; 976, ln. 5 - 978, ln. 5). The Solicitor's Reply argument directly responded to counsel's argument that the *phone records* and *CSLI* supported the purported *timeline* and alibi, by informing the jury this evidence did not support counsel's argument or the purported alibi. (R. 931-45; R. 976, ln. 5 - 978, ln. 5). The Solicitor's argument in this regard was fully supported by the record. (R. 640-701; State's Ex. 68; Def. Ex. 4). In fact, after Judge Seals ruled, the Solicitor explained in detail to the jury exactly what he was arguing to the jury, that *the evidence in question* did not support *defense counsel's* closing argument about the *timeline* and *phone records*. (R. 976, ln. 5 - 978, ln. 5). The phone records and CSLI did not show Hemingway was in bed with his girlfriend at the time of the murders. They showed he was not in his home as

Hemingway claimed to police and as his girlfriend claimed at trial. (R. 640-701; State's Ex. 68; Def. Ex. 4).[32] This was proper Reply and was in direct response to counsel's closing argument.

This was also an invited response. (R. 931-45; 976-978). United States v. Robinson, 485 U.S. 25, 32 (1988). Under our current system of closing argument where the State opens, the defense argues, and the State replies, counsel cannot raise and argue something in closing argument and not expect the Solicitor to give a fair response in the Reply, as long as that response is supported by the evidence or the inferences therefrom. Robinson, 485 U.S. at 32; Young, 470 U.S. 1; Vaughn, 362 S.C. 163, 607 S.E.2d 72; Caldwell, *supra*. Hemingway's argument would eliminate the very purpose of Reply argument. Counsel "opened the door" to the State's argument with his closing. *See* State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991).[33] "Once the defendant opens the door, the Solicitor's invited response is appropriate, so long as it ...does not unfairly prejudice the defendant;" the Solicitor's response must be proportional. Ellenburg v. State, 366 S.C. 66, 69, 635 S.E.2d 224, 226 (2006). *See* Bowman v. State, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018)(the State responded proportionally when defendant "opened the door."). Hemingway "opened the door" when he argued the phone records and CSLI corroborated his alibi when they did not. *See* Robinson, *supra*; Culbreath, *supra*. The Solicitor's response was proportional to the closing argument of defense counsel. There was no abuse of discretion.

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[32] The DNA evidence also showed both Hemingway, in his statements to police, and his girlfriend, in her testimony, were deceiving the jury. In this case, Hemingway also introduced evidence. His girlfriend and a friend testified. The Solicitor can argue the lack of credibility of a defense' witness based on the evidence in the record, including the phone records and CSLI. Caldwell; Raffaldt. This was proper Reply to counsel's argument and arguing the lack of credibility of Hemingway's claims to police and those of his girlfriend at trial based on evidence introduced by the State, the phone records and CSLI. (R. 640-701; State's Ex. 68; Defense Ex. 4).

[33] *See also* Vaughn, 362 S.C. 163, 607 S.E.2d 72; State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984).

Harmless Error

Further, any error would be harmless. Not only did the Solicitor go on to explain to the jury he was specifically responding to what counsel raised in his argument and the phone records and CSLI did not support the purported alibi given to police in 2 recorded statements as counsel contended (R. 976, ln. 5 - 978, ln. 5), but also Judge Seals instructed the jury repeatedly, as he said he would, Hemingway was presumed innocent, and the burden of proof was on the State and Hemingway had no burden to prove anything. (R. 984-91). Any error on this record would be harmless. *See* State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004)(any error was not prejudicial enough to mandate reversal where defendant's counsel first asked the jury to contemplate why defendant would have stayed at the crime scene and stood over the victim and the trial court gave a curative instruction); *See generally* State v. Goodwin, 384 S.C. 588, 683 S.E.2d 500 (Ct. App. 2009)(prosecutor's comments did not so infect the trial as to result in a denial of due process, moreover, any alleged error was cured by the court's extensive charge to the jury).

CONCLUSION

For the above stated reasons, Hemingway's convictions for the murders of Maisha Burch and Andrew Legette and for the accompanying gun charge must be affirmed.

Respectfully Submitted,

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November 26, 2024.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County
The Honorable William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ISAAC KAREEM HEMINGWAY,

APPELLANT.

Appellate Case No. 2023-000408

PROOF OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to J. Anthony Mabry, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Amended Final Brief of Respondent has been forwarded to Appellant's counsel, Jillian Lesley, Esq., via email today, November 26, 2024 to jill@franklnbestlaw.com.

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

This 26th day of November, 2024.

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