STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County
The Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

JEJAUNCEY FERNANDO HARRINGTON,

APPELLANT.

Appellate Case No. 2023-000305

FINAL BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the trial judge err by denying Appellant's motion to suppress his DNA profile developed from Appellant's known blood standard, which was obtained during an unrelated murder investigation in 2005 in which Appellant was charged but subsequently acquitted by a jury in 2007, pursuant to S.C. Code § 17-1-40 since the blood standard was unlawfully retained by law enforcement and should have been destroyed after Appellant's acquittal?

2. Did the trial judge abuse his discretion by admitting expert testimony on footwear impression analysis from Melinda Worley pursuant to Rule 702, SCRE, since the subject matter of her testimony was unreliable, and Rule 403, SCRE since any probative value of the evidence was outweighed by the danger of unfair prejudice given its unreliability?

3. Did the trial judge err by sentencing Appellant to five years for possession of a weapon during the commission of a violent crime when he was sentenced to life without parole for murder in violation of S.C. Code Ann. § 16-23-490(A)?

STATEMENT OF THE CASE

On May 5, 2017, Appellant Jejauncey F. Harrington ("Harrington") murdered Ella Lowery and her daughter 8-year-old Iyana in Marlboro County. Harrington was arrested for the crimes on May 12th and 17th, 2017. A Marlboro County grand jury indicted Harrington on September 12, 2017, for 2 counts of murder, kidnapping, armed robbery, use of a motor vehicle without owner's consent, and possession of a weapon during the commission of a violent crime. R. 1398-1409 (Ind. #s 2017-GS-34-00338, 00285-90). In April 2019, the State served notice of its intent to seek the death penalty. The Honorable Michael G. Nettles was assigned the case and held numerous pretrial hearings including on December 20, 2021, regarding the motion to suppress a blood sample and on January 13, 2023, regarding the motion to exclude expert outer sole footwear impression testimony from SLED expert Melinda Worley. Less than a month before Harrington's case was scheduled for a capital trial, the State agreed to withdraw its notice of intent to seek the death penalty and Harrington agreed to waive his right to a jury trial. Harrington's case was called for a bench trial on February 9, 2023, before Judge Nettles. Heather Weis, Kernard Redmond, and Elizabeth Munnerlyn represented the State. Boyd Young, Emily Crayton, Robert Bank, and Hannah Freedman represented Harrington. (R. 150). On February 24, 2023, Judge Nettles found Harrington guilty of 2 counts of murder, kidnapping, armed robbery, use of vehicle without owner's consent, and possession of a weapon during a violent crime. (R. 1378, l. 19 – 1379, l. 4). Judge Nettles sentenced Harrington to life imprisonment for each count of murder, 30 years for kidnapping, 30 years for armed robbery, 5 years for use of a motor vehicle without owner's consent, and 5 years for the weapons offense. All sentences were ordered to run concurrently. (R. 1380, l. 12 – 1382, l. 12). Harrington appeals raising 3 issues. This is the Initial Brief of Respondent.

RESPONDENT'S STATEMENT OF FACTS

In May of 2017, victim Ella Lowery [deceased] lived with her mother, Delores Lowery, and her children, T.L. and Iyana [deceased], in a 3-bedroom home on Craig Circle in Bennettsville in Marlboro County. T.L., who is autistic, was 10 years old and Iyana was 8. Ella's mother, Delores, worked at BGF Industries in Cheraw. She worked 3rd shift from midnight until 8:00 am. Delores usually left her home in Bennettsville around 11:30 p.m. before her shift and would return home sometime between 8:15 and 8:30 a.m. after Ella had already taken the children to school. (R. 321, l. 19 – 322, l. 19; R. 342, l. 7 – 343, l. 3).

On ***the night of May 4, 2017***, Delores left her home around 11:30 p.m. like usual to go to work. When she left, Ella, T.L., and Iyana were all home and alive and well. Delores returned home from work **the following morning, May 5, 2017**, shortly before 8:30 am. She entered the home through the side door located under the carport as she typically did. (R. 313-342). When Delores reached the steps leading to the door, she noticed a *cigarette butt* on the top step. She was shocked because no one in her home smoked, and she did not allow smoking in or around her home. (R. 323, l. 1 – 324, l. 9). As soon as Delores entered the kitchen, she saw Ella lying face down on the floor of the den in a pool of blood. (R. 324, l. 12 – 325, l. 8). Delores began "screaming," ran down the hallway where the bedrooms were located, and began looking for T.L. and Iyana. A sleepy T.L. came out of his bedroom. Delores asked him where Iyana was, and he incorrectly said she had gone to school. Delores searched for Iyana but did not find her. (R. 334, ll. 3-19). She noticed the contents of Ella's purse were dumped out on Ella's bed where Ella and Iyana usually slept. (R. 334, l. 23 – 335, l. 12). Delores immediately called 911.

Deputies with the Sheriff's Office and EMS responded and determined Ella was deceased. The autopsy determined Ella had multiple stab wounds: 2 on her neck, 1 on her abdomen, 2 on her

back, and 1 on her left hand. The 2 wounds to her neck were fatal as 1 injured the carotid artery and the other the left vertebral artery, which caused extensive bleeding. (R. 248, l. 21 – 250, l. 16). Given the wounds to the neck, Ella's injuries were likely caused by a sharp instrument or knife with a blade about 5 inches long. (R. 284, l. 21 – 288, l. 7. 2). Ella's phone was missing from the home and was never recovered. Police also found a child's shirt near Ella's body which was identified as Iyana's by her grandmother Delores *and* from photographs of the child. This shirt had Ella's blood on the front bottom of the shirt and Iyana's blood around the collar. (R. 402-403; 1198-99).

Law enforcement first confirmed Iyana was not at school and did not ride the school bus that day. As a result, a search began for Iyana. (R. 368, l. 12 – 369, l. 2). The Sheriff's Office requested assistance from SLED and the FBI. (R. 705, ll. 1-13). Agents with SLED's Crime Scene Unit processed the scene. They collected the *cigarette butt* from the steps of the carport, along with other evidence, and submitted the evidence to SLED's laboratory for DNA analysis. There were also 5 footwear impressions [footprints] on the linoleum floor in the kitchen of Ella's home and 1 on the concrete under the carport made in suspected blood. Cuttings from the linoleum floor containing these footwear impressions were collected and the impression in the carport was photographed. (R. 403-405; 406-10; 440-446).

Police initially looked at Dwayne Bright, a former boyfriend, as a suspect but he was eventually eliminated based on surveillance video and phone records. (R. 958-962; 565-567; 734; 538-540; 694-695; 601). As it turned out, Bright and Ella had an altercation on the night of *May 3rd/May 4th* that led to Bright's arrest for Ella's murder. (R. 958-62). But when phone records and local surveillance video were checked, Bright was cleared as Ella was alive and well on May 4th and into the early morning hours of May 5th. (R. 958-62). Plus, Bright could not drive, and was

small in stature, and it would have been almost impossible for him to remove Iyana from the home and transport her on foot. (R. 601). Police also investigated Clifton Benjamin, who had dated Ella. In the days before her death, Benjamin repeatedly called Ella, but she would not answer his calls. Benjamin was also eliminated as a suspect through investigation. (R. 343, l. 13 – 346, l. 16; 1078-79). The hunt for Ella's killer and whoever had taken Iyana continued.

FBI agents interviewed Jamie Campbell [female] on May 7, 2017, at her house in Grayson, Georgia. Campbell had formerly lived in Bennettsville and was a close friend of Ella and had called Ella's phone after her death. (R. 484-507). Among other things, FBI agents questioned Campbell about a number that appeared *on Ella's phone records*: (843)-535-**3480**. Ella texted this number **at 1:08:30 am** on the morning of her death, **May the 5th**. It was ***the last outgoing activity* on Ella's phone**. This number texted Ella back at **1:08:55 am on the 5th.** (R. 1041-69). Campbell informed the FBI, and identified this number at trial, as belonging to Appellant JeJauncey Harrington, Campbell's former boyfriend. (R. 484-507). Campbell testified she had given this phone to Harrington when they were living together in Bennettsville. She had also given Harrington another phone with the phone number ending in **4282**. (R. 494, l. 18 – 497, l. 2). Campbell and Harrington had lived together from 2010 until *July 2016* at 603 Grace Street in Bennettsville, a Section 8 residence in Campbell's name. After Campbell moved to Georgia in July 2016, she allowed Harrington to continue living in the Bennettsville home, and she and Harrington talked every day. (R. 486, l. 5 – 487, l. 14). Campbell was surprised that Ella and Harrington had texted each other as she was unaware those 2 communicated at all. (R. 494, l. 18 – 497, l. 2).

Ella's phone records and cell site location information (CSLI) and Harrington's phone records and CSLI showed 800 contacts between Harrington and Ella in the months and weeks

leading up to Ella's death. There were approximately 18 contacts between Harrington and Ella shortly before Ella stopped texting anyone the night of her murder. As stated, those records and CSLI also showed Harrington spoke with Ella shortly before her death and Harrington had gone to the area of Ella's home **in the early morning hours of Ella's death, on May 5, 2017**. (R. 1041-69).

After the FBI left Jamie Campbell's house in Georgia on May 7, 2017, Campbell called Harrington and told him she had just been questioned by the FBI, that agents were coming to talk to Harrington, and that he would have to explain why he was talking to Ella. Campbell also demanded that Harrington tell her why he had been talking to Ella. Harrington hung up the phone and Campbell was unable to reach him again after that. When questioned by Jamie Campbell about where he was all night the night of Ella's murder, Harrington told Jamie he was at home asleep. (R. 497, l. 3 – 498, l. 18). After that phone call from Campbell, Harrington fled to North Carolina ending up in Rockingham, N.C. where Harrington had friends and family. (R. 835-870)

The cigarette butt collected from the crime scene was analyzed by Adrienne Hefney, a DNA analyst at SLED. Hefney was able to develop a DNA profile from the cigarette butt, however she was initially unable to identify the profile. Hefney contacted Lieutenant Roxanne Love, of SLED, who was supervising the investigation of Ella's murder. Hefney told Love to notify her if police developed any other suspects or persons of interest and Hefney would look at SLED's databases to see if the profile developed from the cigarette butt could be identified. On May 8, 2017, after learning Harrington's name had been developed as a suspect, Love contacted Hefney and gave her Harrington's name. Heffney looked in the old-maintained files of SLED and found Harrington's DNA profile from a prior murder case. Hefney compared the DNA profile from the cigarette butt to Harrington's DNA profile at SLED and it was a match. Hefney told Love the DNA profile

developed from the cigarette butt matched the profile SLED had in its database for Harrington. Hefney told Love she would need a known DNA standard for Harrington to compare to the DNA profile from the cigarette butt. Hefney told Love where she could obtain the known standard needed; it was an exhibit from Harrington's prior trial for murder maintained by Marlboro County. (R. 665, l. 3 – 667, l. 9). Love then contacted Sandy Wilkes, the evidence custodian for the Marlboro County Sheriff's Office, and requested Wilkes obtain the evidence related to a 2005 murder investigation from storage. Harrington was charged with this unrelated murder in 2005 but acquitted in 2007. Love obtained Harrington's known blood standard from this evidence, and it was transported to SLED's laboratory. (R. 667, l. 7 – 671, l. 4.). Hefney developed Harrington's DNA profile from this blood standard and determined it matched the DNA profile from the cigarette butt found at Ella's house. (R. Dec. 20, 2021, 2-38; R. 1144-45; See also 1158-1160; 1162, 1187-1188).[1]

When Harrington was ultimately arrested, he voluntarily consented to the taking of a buccal swab from his person. He also filled out and signed a Voluntary Consent to Search form. (State's Ex. 6, Dec. 20, 2021 hearing; Dec. 20, 2021 hearing, R, pp. 2-96).

Prior to trial, out of an abundance of caution, Deputy Solicitor Kenard Redmond moved for a Schmerber Order to also obtain a third (3rd) sample of Harrington's DNA. (State's Ex. 7, Dec. 20, 2021 hearing [Schmerber hearing transcript]; Dec. 20, 2021 hearing, R. pp. 2-96). After a Schmerber hearing, in which the State presented probable cause for the issuance of a Schmerber Order, Chief Administrative Judge Roger Henderson issued a Schmerber Order, and a 3rd DNA

[1] At trial, the State did not rely on the DNA profile developed from this blood standard, but the DNA profile developed from a buccal swab obtained pursuant to a Schmerber v. California, 384 U.S. 757 (1966) order after a Schmerber hearing. (R. 1144-45; 1158-1160; 1162, 1187-1188; State's Ex. 7, Dec. 20, 2021 hearing; Dec. 20, 2021 R. pp. 2-96).

sample [the 2nd buccal swab] was taken from Harrington pursuant to the Schmerber Order. (State's Ex. 7, Dec. 20, 2021[Schmerber hearing transcript]; Order for Collection of Suspect Standards, filed May 31, 2017; Order Denying Defense Motion to Suppress Defendant's DNA, filed March 24, 2022). This sample was forwarded to SLED. Agent Hefney also developed a DNA profile from this 3rd DNA sample [2nd buccal swab] of Harrington and it matched the DNA profile developed from the cigarette butt found at the crime scene. (R. 1071-74; 1138-45; 1158-73; 1175-1178; 1185-1199; 1205-1207; 1212-1219).

Law enforcement also obtained surveillance footage from cameras located on Grace Street, across the street from Harrington's home in Bennettsville. The footage revealed Harrington's vehicle coming and going from his home **during the late-night hours *of May 4, 2017*** and **the early hours of *May 5, 2017***, the morning Ella died. Specifically, the footage showed Harrington's vehicle leaving at 10:50 p.m., on May the 4th, returning at 11:35 p.m. on the 4th, leaving at 12:25 a.m. on May the 5th, returning at 1:41 a.m. on the 5th, leaving at 1:46 a.m. on the 5th, and returning at 5:16 a.m. on the 5th. (R. 815, l. 18 – 828, l. 21).

FBI agents interviewed Jamie Campbell again on May 9, 2017, at her home in Georgia. Campbell told the agents that Harrington drove a dark 1998 Mitsubishi Eclipse. Harrington bought this car *in September of 2016* after Campbell had moved to Georgia. Campbell allowed Harrington to title the car in her name. Campbell also assisted Harrington in obtaining insurance for the vehicle on her insurance. Harrington and Campbell both made the insurance payments even though the insurance was solely in her name. (R. 515, l. 4 – 518, l. 7). Campbell put up with this arrangement until December 2016 when Harrington got into a car accident in the car. The insurance representatives and police were calling Campbell. Because Campbell was the one being contacted and she was the titled owner of the car and the insurance was in her name, she told Harrington to

park the car or get somebody with a license to drive him. Harrington's license was suspended. (R. 500, ll. 10-24). However, in the months that followed, Harrington continued to drive the car. (R. 520, l. 23 – 521, l. 12). After Campbell talked to the FBI on May 9, 2017, law enforcement called Campbell and asked her if she had specifically given Harrington permission to drive the car to Charlotte, N.C. Campbell told law enforcement no, she had not spoken to Harrington in days. (R. 501, ll. 7-24; R. 520, ll. 15-22). Based on Campbell's statement, investigators with the Marlboro County Sheriff's Office obtained an arrest warrant for Harrington for use of a vehicle without owner's consent and entered the warrant into NCIC to assist in locating Harrington. (R. 624, ll. 10-24).

While he was hiding in Rockingham, N.C., several friends of Harrington's associated with him. They were aware police were looking for Harrington in relation to the South Carolina murder and missing child. They testified they told Harrington that if he did not commit the crimes in South Carolina, he should go back to Bennettsville and straighten things out. Harrington told them that he was going to. He never did, instead he fled westward to Charlotte, N.C. Before leaving Rockingham, one of Harrington's associates saw a visible injury to Harrington's hand. Harrington stated he injured the hand shutting a car door. (R. 835-870).

Harrington was arrested on May 11, 2017, at a convenience store in Charlotte after a license plate reader utilized by the Charlotte police alerted them to the whereabouts of the Mitsubishi Eclipse. (R. 871, l. 24 – 876, l. 19). The Mitsubishi Eclipse was towed to a secure crime scene bay at the Charlotte Police Department. (R. 881, ll. 5-19). After a search warrant was obtained, the Eclipse was processed by crime scene investigators with SLED. (R. 892, l. 2 – 10 899, l. 1). While processing the Eclipse, investigators used a chemical called Blue Star, which reacts to blood. (R. 898, ll. 7-18). There was a reaction on the lock mechanism on the interior latch of the trunk, the

bottom of the trunk, and the floorboard of the passenger seat. Swabs were collected from these areas. These swabs, along with other evidence collected from the Eclipse, were analyzed for DNA at the SLED laboratory in Columbia. (R. 909, l. 2 – 910, l. 21; 921, l. 25 – 922, l. 19). SLED developed a DNA profile from the swabs of the lock mechanism on the interior latch of the trunk. The DNA profile was a mixture of at least 2 individuals. The profile of the major contributor matched the DNA profile of the missing 8-year-old child, Iyana. The "probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor to this mixture was approximately 1 in 520 septillion." (R. 1219, ll. 2-25). Also found in the Eclipse was the DNA of Harrington in several places and paperwork belonging to Harrington. A partial palm print was lifted from the driver's side exterior rear hatch spoiler of the Eclipse. That palm print was consistent with someone shutting the rear hatch of the vehicle. That palm print matched Harrington's palm print. (R. 939-942).

Harrington was charged with Ella's murder on May 12, 2017. However, Iyana had still not been found. Richard LaBean, who lives on New Bridge Road in McColl, which is in Marlboro County, was familiar with Harrington. Harrington's family owned property across the road from LaBean on New Bridge Road, and Harrington had lived there when he was younger. Harrington had cut Mr. LaBean's grass when Harrington was growing up. After Harrington grew up and moved away, LaBean saw Harrington near the abandoned house across the road from LaBean's property "a couple of times." (R. 1095, l. 12 – 1100, l. 22). On May 13, 2017, after LaBean learned Harrington had been arrested for Ella's murder and the kidnapping of Iyana, LaBean checked the footage from his home surveillance cameras. The footage showed a vehicle turning into the property across the street from LaBean's residence and driving around to the back of the abandoned house **during** ***the early morning hours of May 5, 2017.*** The footage also showed that about 2 to

3 hours later, the vehicle left the abandoned house with its headlights off. The vehicle is consistent with a dark Mitsubishi Eclipse. Once the vehicle reached New Bridge Road, the headlights were turned on. The vehicle then turned left onto New Bridge Road in the direction of the bridge over Gum Swamp Creek. (R. 1100, l. 23 – 1101, l. 15; 1109, l. 3 – 1110, l. 2; 967-68). LaBean immediately reported his findings to the police.

Investigators working on the case responded to LaBean's home and watched the footage confirming what it showed. (R. 626, l. 15 – 629, l. 22; R. 736, l. 16 – 737, l. 15; 967-68). While several witnesses testified the footage showed a vehicle entering the property and leaving several hours later, the footage downloaded by police did not show the vehicle arriving at the property only leaving with its headlights off and turning onto New Bridge Road. (R. 627, l. 19 – 629, l. 22; 645, ll. 8-23; 736, l. 16 – 737, l. 15; 740, ll. 11-23; 957-68).

Based on this footage, the police secured the property and abandoned home across the road from LaBean's home overnight, obtained a search warrant, and commenced a search at daybreak on May 14, 2017. (R. 738, ll. 1-22; 967-68). Investigators found *Ella's debit/credit card and a receipt with Ella's name on it* on the ground near the abandoned house (R. 968-69). Shortly thereafter, investigators found the dead body of a small female child wrapped in a comforter/quilt in Gum Swamp Creek, about 100 hundred to 300 yards from the abandoned house and about 180 feet from the above-described bridge. (R. 422, l. 15 – 426, l. 18; 427-28; 672, l. 19 – 675, l. 25; 969-70). This comforter/quilt was later identified by the grandmother Delores as coming from her home. The little girl's body was severely decomposed, and DNA from Iyana's toothbrush was used to identify the body as that of 8-year-old Iyana. (R. 410-12; 427-28). As a result of the decomposition, the pathologist could not determine a cause of death. (R. 256, 3-11). However, the pathologist concluded Iyana did not die from a stab or a gunshot wound. (R. 256). The only injuries

Iyana had that were detectable were a tooth knocked out and fractures to several of her upper front teeth and a recently absent tooth. (R. 256, ll. 20-24). The pathologist testified she could have died from strangulation, suffocation, or drowning. She was a healthy 8-year-old before her murder. (R. 256-57).

Investigators noticed upon his arrest that Harrington's hand was visibly swollen and injured. (R. 964-66). Harrington's hand was x-rayed pursuant to a court order. The x-ray revealed a "subacute fracture of the distal right fifth metacarpal." (R. 1121, l. 5 – 1124, l. 9; 24, l. 17 – 27, l. 23). The state argued Harrington injured his hand by striking Iyana. Harrington refused treatment for the injury to his hand. The injury Harrington had typically is called a boxer's fracture and can be reaggravated by hitting anything. Contrary to what Harrington had told his associate in Rockingham, N.C., Harrington told a treating physician here that he injured the hand in a fall at a chicken plant in North Carolina. (R. 1120-24).

Although Harrington's home and the vehicle he was driving were searched, police could never locate his cell phones used to contact Ella. Ella's cell phone was never located either. Harrington disposed of the cell phones because they contained incriminating evidence. As previously stated, Harrington's and Ella's phone records showed they were communicating repeatedly in the hours and minutes leading up to her death. Harrington's CSLI also showed he traveled to the area of Ella's home at the approximate time of her murder.

Harrington was subsequently charged with murder related to Iyana's death among other charges. As previously stated, after a bench trial, Judge Nettles found Harrington guilty of both murders, kidnapping, armed robbery, and the weapon charge.

ARGUMENT I.

Judge Nettles did not err in denying the motion to suppress any and all DNA results as S.C. Code Ann. § 17-1-40 does not apply in this situation and even if it did the State obtained Harrington's DNA from independent sources and Harrington's DNA was inevitably discovered in any event through other means.

What Occurred Below

On December 20, 2021, a pretrial hearing was held before Judge Nettles on Harrington's motion to suppress any and all DNA results. (R. Dec. 20, 2021, pp. 2-38). Harrington argued the Court should suppress his DNA results because the State allegedly violated S.C. Code Ann. §17-1-40 by testing a blood sample taken from the defendant in a prior murder case in which he was acquitted. Harrington alleged this prior sample should have been destroyed. At the hearing, rather than call numerous witnesses who were present to testify, the State and Harrington stipulated to the facts set forth by the State as to how Harrington's DNA was obtained 3 separate times, i.e. the previously mentioned blood sample, a consent buccal swab upon arrest, and another buccal swab taken after a Schmerber hearing and order ordering the same. (R. Dec. 20, 2021, pp. 2-38).

After hearing argument on the matter, Judge Nettles denied the motion in a written order filed March 24, 2022. (Order Denying Defense Motion to Suppress Defendant's DNA). In the Order, Judge Nettles specifically found as follows: S.C. Code Ann. § 17-1-40 as it existed at the time of the acquittal in 2007 was only triggered upon the filing of a motion and the entering of an order for destruction of such evidence. Harrington was arrested for the charges in the instant case in 2017. There was no motion filed requesting to destroy evidence pursuant to 17-1-40 prior to the arrest in 2017. In December of 2020, a letter and proposed order for expungement of the prior acquittal was sent by defense counsel on behalf of Harrington [long after his arrest in this case and use of the blood sample by SLED]. At the time of filing in 2020, S.C. Code Ann. §17-1-40(B)(1) was in effect and clarified what existed in the law related to the 2006 version. It states that: "If a

person's record is expunged pursuant to Article 9, Title 17, Chapter 22, because the person was charged with a criminal offense, or was issued a courtesy summons pursuant to Section 22-3-330 or another provision of law, and the charge was discharged, proceedings against the person dismissed, or the person found not guilty of the charge, then the arrest and booking record, associated with bench warrants, mug shots, and fingerprints of the person must be destroyed and no evidence of record pertaining to the charge or associated bench warrants may be retained by any municipal, county, or state agency." Additionally, the S.C. Code Ann. §17-1-40(B)(1)(a) states that law enforcement and prosecution agencies "...may retain the information indefinitely for the purposes of ongoing or future investigations and prosecution of the offense ..." Further, S.C. Code Ann. §17-1-40(C)(5) states that "Nothing in this subsection prohibits evidence gathered or information contained in incident reports or investigation and prosecution files from being used for the investigation and prosecution of a criminal case..." This specifically applies to the investigative file and evidence related to the 2005 arrest and 2007 acquittal of the defendant for murder. Although S.C. Code Ann. §17-1-40 was never triggered, even if evidence was of the charge was required to be destroyed, retaining the vial of blood from the prior acquittal was allowed under §17-1-40. The narrow scope of §17-1-40 did not require the destruction of the vial of blood. Harrington was made a person of interest in this homicide case after seeing that he was connected to a phone number that was one of the last calls on the victim's phone. A vial of Harrington's blood was located in the 2005 evidence stored at the Marlboro County Administration building in the renovated old hospital on May 9, 2017 after SLED identified that there might be a sample to compare with unknown DNA in the instant case located in the prior murder case. The DNA evidence was not part of a record of the charge, it is evidence, and as such was not subject to destruction. It was permissible to be retained in order to use in future investigation and

prosecution. Additionally, any fruits of the vial of blood were a separate line of investigation. While the blood vial was visually compared and tested against evidence from the scene of this homicide and a match found, this is not the only basis for probable cause. A warrant for use of vehicle without owner's consent was issued for Harrington on May 10, 2017, and Harrington was then located in Charlotte, N.C. by a tag reader. The owner of the vehicle told law enforcement that Harrington while staying at her residence, was not allowed to be driving her vehicle. At the time of his arrest in Charlotte, N.C., Harrington consented to give a buccal swab on May 11, 2017, on a signed consent form. After arrest, Harrington invoked his right to counsel. Out of an abundance of caution, a Schmerber hearing was held, and Harrington gave another buccal swab upon the court's order on May 31, 2017. This order, as supported by the transcript of the Schmerber hearing, specifically related to the consent acquired upon the defendant's arrest in Charlotte, N.C. The buccal swab from the Schmerber hearing was tested against the evidence in this case and a match was made. Therefore, it was ordered that the motion to suppress any and all DNA results from Harrington was denied. (Order Denying Defense Motion to Suppress Defendant's DNA, Filed March 24, 2022, pp. 1-4)

Issue on Appeal

Harrington argues that Judge Nettles should have suppressed his DNA results because the State allegedly violated S.C. Code Ann. § 17-1-40. Harrington claims that pursuant to this statute his blood sample stored in evidence should have been destroyed before police used it to develop his DNA profile in 2017. However, Harrington is wrong for several reasons. First, Judge Nettles did not err in denying the motion to suppress because Section 17-1-40 does not apply to blood or DNA evidence used in this case. Second, the State obtained Harrington's DNA from independent sources including a consent buccal swab and a second buccal swab pursuant to a Scherber Order,

as the result Harrington's DNA would have been and was inevitably discovered through other lawful means. Finally, even if Section 17-1-40 applied, there is no prejudice to Harrington because his DNA profile was obtained through a consent buccal swab and additionally through a Schember order.

The Law

Judge Nettles appropriately denied the *motion to suppress any and all DNA results* from Harrington by written Order. The South Carolina Code of Laws Annotated § 17-1-40 (B)(1) states that:

> If a person's record is expunged pursuant to Article 9, Title 17, Chapter 22, because the person was charged with a criminal offense, or was issued a courtesy summons pursuant to Section 22-3-330 or another provision of law, and the charge was discharged, proceedings against the person were dismissed, or the person was found not guilty of the charge, then the arrest and booking record, associated with bench warrants, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge or associated bench warrants may be retained by any municipal, county, or state agency.[2]

However, under § 17-1-40(B)(1)(a), law enforcement and prosecution agencies "...may retain the information indefinitely for the purposes of ongoing or future investigations and prosecution of the offense..." Id. Further, S.C. Code Ann. § 17-1-40(C)(5) states that: "Nothing in this subsection prohibits evidence gathered or information contained in incident reports or investigation and prosecution files from being used for the investigation and prosecution of a criminal case..." Id. In construing a statute, the intent of the Legislature must prevail. State v. Salmon, 279 S.C. 344, 345, 306 S.E.2d 620, 621 (1983); State v. Harris, 268 S.C. 117, 232 S.E.2d

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[2] See § 17-1-40 that was current until June 2007: "Any person who after being charged with a criminal offense and such charge is discharged or proceedings against such person dismissed or is found to be innocent of such charge the arrest and booking record, files, mug shots, and fingerprints of such person shall be destroyed and no evidence of such record pertaining to such charge shall be retained by any municipal, county or State law enforcement agency."

231 (1977). Where the terms of the statute are clear and unambiguous, they must be applied according to their literal meaning. Green v. Zimmerman, 269 S.C. 535, 238 S.E.2d 323 (1977). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (citation and quotation marks omitted)).

S.C. Code Ann. § 17-1-40 has a narrow scope that does not require the destruction of all information and evidence pertaining to the circumstances of an arrest, but only requires "the destruction of "...the arrest and booking records, files, mug shots, and fingerprints."" Vaughn v. State, 2013 WL 442297, 2 (D.S.C. 2013)(Not Reported in F.Supp.2d).

In Vaughn, the plaintiff contended that, because the original charge against him was dismissed, the evidence of the circumstances surrounding his arrest should have been destroyed under S.C. Code 17–1–40. Based on that argument, he asserted that officer Hogan's use of the evidence to secure an indictment against him was unlawful, rendering the indictment invalid. The Court found that contrary to the plaintiff's argument, though, Section 17–1–40 does not require the destruction of all information pertaining to the circumstances of an arrest when a charge stemming from that arrest is dismissed. Instead, the statute requires the destruction of "the arrest and booking record, files, mug shots, and fingerprints of the person." S.C. Code § 17–1–40. The Vaughn Court noted that the South Carolina Supreme Court recently explained that this language refers to a narrower class of information, and offered a helpful example, writing:

> Section 17–1–40(A) applies only to evidence of the record of the *charge,* including but not limited to the arrest and booking records, files, mug shots, and fingerprints. It therefore does not apply to any recordation of historical events beyond the charge itself. For example, the facts precipitating the charge are not covered by this statute because they are mere events that exist irrespective of any criminal proceedings. As applied to the instant case, the distinction drawn under section 17–1–40(A) is

> the distinction between 'capital—e Escape—a criminal charge—and 'lower-case-e escape'—a mere fact that a person was AWOL. Section 17–1–40(A) prohibits the retention, and by extension the dissemination, of the former; it contains no restrictions with respect to the latter.

Compton v. S.C. Dep't of Corrs., 392 S.C. 361, 369, 709 S.E.2d 639, 643 (2011) (quotations marks omitted, emphasis in original). In light of § 17–1–40's circumscribed scope, the Court in Vaughn found that the plaintiff's protestation that the evidence of the events underlying his arrest should have been destroyed was clearly misplaced. It was permissible to use that evidence as the basis for an indictment on a different charge, as officer Hogan did. Thus, because absolute immunity unquestioningly covers prosecutors acting in the scope of duties "intimately associated with the judicial process," such as initiating and prosecuting cases, and Defendant Hogan merely initiated a case based on evidence assembled by the police, she was protected by prosecutorial immunity. Vaughn v. State, 2013 WL 442297, at *2 (D.S.C. Feb. 5, 2013)(Not Reported in F.Supp.2d).

Vaughn was followed in Grey v. Jaddou, 2022 WL 1751369, at *5 (D.S.C. May 31, 2022)(Not Reported in F.Supp.). In Grey, officers wished not to comply with a subpoena requesting certain records by invoking S.C. Code Ann. Section 17-1-40. The District Court found that the officers were required to comply with the subpoena because as the Supreme Court of South Carolina had explained, the expungement statute "does not apply to any recordation of historical events beyond the charge itself." Compton v. S.C. Dep't of Corrs., 392 S.C. 361, 369, 709 S.E.2d 639, 643 (2011). In other words, "the facts precipitating the charge are not covered by this statute because they are mere events that exist irrespective of any criminal proceedings." Id. Based on the South Carolina Supreme Court's holding, the defendants argued that there is a difference between disclosing documents concerning Grey's arrest for failure to report a crime and facts about Grey's alleged provision of a false report to the police during a shooting investigation. The Grey court agreed this was a distinction that other courts had indeed recognized. Grey, *supra* (citing

Compton, *supra* (determining that § 17-1-40 draws a distinction between records related to the plaintiff's "fugitive from justice" charges and information about whether he was away without leave from prison), and Vaughn v. State, 2013 WL 442297, at *3 (D.S.C. Feb. 5, 2013)(Not Reported in F.Supp.2d)(permitting use of "evidence of the events underlying" the plaintiff's prior arrest as the basis for an indictment on a different charge). Based on prior caselaw analyzing the expungement statute, the Grey Court found that responsive documents that do not directly reflect Grey's charge for misprision of a felony are discoverable. The officers would not violate the statute by complying with the subpoena to this extent. In sum, the Court found South Carolina's expungement statute did not bar the officers from disclosing the information Grey provided them during their investigation, and the officers provided no other argument in support of their request for a protective order or to quash the subpoena. As such, they had not met their burden for relief from compliance with the subpoena. Accordingly, the Court ordered the officers to comply with the third-party subpoena and allowed Grey and defendants to depose the officers. However, for the reasons discussed above, the subpoena for documents should not be construed as one that requests any bench warrants, mug shots, fingerprints, or information directly reflecting Grey's charge for misprision of a felony. Grey v. Jaddou, 2022 WL 1751369, at *5 (D.S.C. May 31, 2022)(Not Reported in F.Supp.).

Thus, it is clear the scope of this section only applies to evidence of the charge itself. Compton v. S.C. Dep 't of Corrs., 392 S.C. 361, 369, 709 S.E.2d 639, 643 (2011)("Section 17–1–40(A) applies only to "evidence of the record pertaining to the *charge,*" including but not limited to the arrest and booking records, files, mug shots, and fingerprints)(emphasis added). It therefore does not apply to any recordation of historical events beyond the charge itself or to evidence uncovered during the investigation of the case. *See* Gray, *supra* (recognizing that this type of

evidence be maintained for 3 ½ years but there is no requirement in the statute that this type of information and evidence be destroyed). For example, the facts precipitating the charge are not covered by this statute because they are mere events that exist irrespective of any criminal proceedings. It is permissible to use the evidence from the underlying arrests, such as blood in this case, as the basis for indictment on a different charge. S.C. Code Ann. §17-1-40; Vaughn. v. State, *supra.*

Analysis

Harrington was previously charged in 2005 and acquitted of murder in 2007. He was charged with these present crimes in May of 2017. Pursuant to the S.C. Code and case law, only evidence of the charge itself is required to be destroyed. This includes the arrest warrants, booking records, mug shots, and fingerprints. Evidence gathered or information contained in incident reports or investigation and prosecution files is permitted to be used in investigation and prosecution of future criminal cases. S.C. Code Ann. § 17-1-40(B)&(C). The blood sample evidence remaining from the prior murder acquittal was being maintained in the county administration building. Harrington's DNA profile was developed from this blood sample by SLED prior to his arrest in 2017. No motion to expunge Harrington's prior record was made or order of expungement submitted until 2020, by Harrington's current counsel, years after SLED obtained and analyzed the sample. Regardless, the DNA evidence is not a part of a record of the charge, it is evidence, and as such is not subject to destruction. S.C. Code Ann. § 17-1-40. It was permissible to be retained in order to use in future investigation and prosecution. S.C. Code Ann. §17-1-40.

Harrington was made a person of interest in this homicide case after police discovered that he was connected to a phone number which contacted victim Ella's phone shortly before her death

[through her phone records]. A vial of Harrington's blood was collected from the old evidence stored at the county municipal offices on May 9, 2017, by SLED Special Agent Roshani Parikh to develop a DNA profile to test against evidence collected in this homicide investigation, the cigarette butt found at the crime scene. A match of Harrington's DNA profile previously in SLED's DNA database to the DNA profile developed from the cigarette butt had already been made. However, a profile was also developed from this blood evidence, and it matched the DNA profile from the cigarette butt as well.

Harrington was known to be driving a vehicle, a Mitsubishi Eclipse. This could be seen on video footage of Harrington leaving his place of residence, driving the car, after calling the victim's phone and just before the victim's time of death. He was then later seen returning to his residence in the car, and leaving again, staying gone for several hours, and returning again to his residence. The owner of the vehicle told law enforcement that Harrington specifically was not allowed to drive the vehicle to Charlotte, N.C. A warrant for use of a vehicle without owner's consent was issued for Harrington on May 10, 2017, and Harrington was then located in Charlotte, N.C. by a tag reader operated by the Charlotte police. Upon his arrest, Harrington gave his consent to give a buccal swab to law enforcement. Harrington invoked his right to counsel. (State's Ex. 6/Dec. 20, 2021 hearing [Consent to Search]).

A Schmerber hearing was held out of an abundance of caution. At the hearing on May 31, 2017, another buccal swab was taken from Harrington after the judge who heard the State's request, Chief Administrative Judge Roger Henderson, found there was probable cause to order Harrington to give a buccal swab for DNA purposes. (State's Ex. 7, December 20, 201 hearing [Schmerber hearing transcript]; Order for Collection of Suspect Standards, filed May 31, 2017). The DNA profile developed from this buccal swab was tested against evidence from the scene of

this incident, the profile developed from the cigarette butt, and a match was discovered. (R. 1144-45; 1158-1160; 1162, 1187-1188; State's Ex. 7, Dec. 20, 2021 hearing; Dec. 20, 2021 pp. 2-38).

Even if evidence of the prior charge [such as booking reports and fingerprints] was required to be destroyed, retaining the vial of blood from the prior acquittal is allowed under S.C. Code of Laws Ann. § 17-1-40. The narrow scope of § 17-1-40 did not require the destruction of the vial of blood

Additionally, any fruits of the vial of blood are a separate line of investigation. While the DNA profile developed from the blood vial was visually compared and tested against the evidence from the scene of this homicide and a match was found, that is not the only basis of probable cause or the only way the State obtained Harrington's DNA. At the time of arrest in Charlotte, N.C., Harrington consented to give a buccal swab on May 11, 2017. (State's Ex. 6/Dec. 20, 2021 hearing [Consent to Search]). After arrest, Harrington invoked his right to counsel. Out of an abundance of caution, a Schmerber hearing was held, and Harrington gave another buccal swab upon the court's Schmerber order. (State's Ex. 7/Dec. 20, 2021 hearing [Schmerber transcript]; Order For Collection of Suspect Standards, filed May 31, 2017). Part of the probable cause for the Schember order was the fact that the child victim's DNA was found in the trunk of the car Harrington was driving when Harrington was captured in Charlotte, N.C. (Order for Collection of Suspect Standards, filed May 31, 2017 [Schmerber Order]: State's Ex. 7/Dec. 20, 2021 hearing [Schmerber transcript]). The 2nd buccal swab was obtained properly. As stated, a DNA profile was developed from the buccal swab from the Schmerber hearing and order and that sample was tested against the evidence from the crime scene and a match was found. Any and all evidence of DNA collected from Harrington was not unlawful and should not be suppressed. Judge Nettles appropriately

denied Harrington's motion to suppress the DNA evidence in this case. (Order Denying Defendant's Motion to Suppress Defendant's DNA, filed March 24, 2022).

Regardless, any violation of Section 17-1-40, if such occurred, would be harmless and not prejudicial as Harrington's DNA profile was obtained from an independent source or sources and was inevitably discovered through other means and matched to the evidence at the crime scene. Nix v. Williams, 467 U.S. 431 (1984); United States v. Allen, 159 F.3d 832 (4th Cir. 1998). There is no merit to this appellate ground.

Finally, a buccal swab could be taken after the Harrington's arrest for either murder charge pursuant to a lawful search incident to arrest. Maryland v. King, 133 S.Ct. 1958 (2013). In Maryland v. King, the United States Supreme Court recognized that when police take a buccal swab from a defendant arrested for a dangerous felony, it is a lawful search incident to arrest, and individualized suspicion is not necessary. As a result, the taking of the 1st or 2nd buccal swab did not violate the Fourth Amendment. Id. The United States Supreme Court decided Maryland v. King, *supra* on June 3, 2013. Harrington's trial did not begin until 2023. As a result, the State would have inevitably discovered the DNA in any event. Id.; Nix v. Williams, 467 U.S. 431 (1984); United States v. Allen, 159 F.3d 832 (4th Cir. 1998). *See* S.C. Code Ann. § 23-3-620 (effective January 1, 2009).

ARGUMENT II.

Judge Nettles did not abuse his discretion in admitting expert testimony on outer sole footwear impression comparison analysis from the SLED expert pursuant to Rule 702, SCRE, since the subject matter of her testimony was reliable, and its probative value was not substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE; regardless, the admission of this evidence was harmless on this record given the other evidence of Harrington's guilt.

Harrington moved pre-trial to exclude expert outer sole footwear impression comparison analysis testimony from SLED expert Melinda Worley pursuant to Rule 702, SCRE, and Rule 403, SCRE. Judge Nettles held a pre-trial hearing on the motion on January 13, 2023, in which the State proffered Worley's qualifications. (R. Jan. 13, 2023-p. 1394). Judge Nettles decided to wait until a later date to hear the substance of Worley's testimony. (R. Jan. 13, 2023, p. 99, l. 7 – p. 120, l. 10). Judge Nettles directed both sides to submit proposed orders on the issue of whether Worley was qualified to testify as an expert in the field of outer sole footwear impression comparison analysis. And, Judge Nettles directed Agent Worley to provide defense counsel and the court with a written copy of her qualifications including the date and time of training and when she had testified previously as an expert in this field. Expert Worley agreed to do the same immediately. (R. Jan. 13, 2023, p. 99, l. 7 – p. 120, l. 10).

Subsequently, after receiving the written updated copy of Worley's qualifications, and after counsel received the same, and did not ask for further cross-examination of Worley, Judge Nettles held in a written Order, after considering all of the testimony and evidence submitted at the pre-trial hearing, that Agent Worley was qualified as an expert in the field of outer sole footwear impression comparison analysis in a written Order. (Order, January 23, 2023, pp. 1394-97). Judge Nettles specifically found that Senior Criminalist Melinda Worley is employed at SLED in the latent prints unit and has been certified in footwear impression analysis since she was in the crime

scene division when she passed the Impression Evidence Examination Certification in March 2014. She had been employed with SLED since 2011. She had a bachelor's degree in anthropology from the University at Tennessee at Chattanooga (2003); a bachelor's degree in forensic science from Mercyhurst College (2007); and a master's degree in pharmaceutical sciences from the University of Florida (2010). She also received a graduate certificate from the University of Florida in forensic death investigation in 2010. She also completed a 40-hour course entitled Examination & Comparison of Footwear Evidence in September of 2013; a 40-hour course entitled Courtroom Testimony, Daubert Hearings, and Mock Trials related to Footwear & Tire Track Examination and Comparison in January of 2014; 3 lectures at the International Association for Identification (IAI) Educational Conference related to footwear analysis in 2018; and a 6-hour course at the 2018 IAI conference entitled Footwear Examination Concepts Workshop, among other evidence analysis training. And, she is a member of the International Association for Identification. (Order, January 23, 2023, pp. 1394-97).

Judge Nettles also found Worley was certified using a protocol established by SLED, overseen by a qualified footwear impression analysis examiner, engaged in both study and practice throughout the certification process, and was certified as a footwear impression analyst in March of 2014. This training provided her with such knowledge and skill in 2014 to be "better qualified than the jury to form an opinion on" footwear impression analysis. Nelson v. Taylor, 347 S.C. 210, 553 S.E.2d 488 (Ct. App. 2001) and at that time could have been qualified to testify as an expert in footwear impression analysis. Worley had conducted 50 different footwear impression analyses using her training and all her opinions were peer reviewed by a certified analyst to verify the procedure used and the conclusions reached for reliability purposes. Worley completed 24 of these examinations prior to finishing her examination in this case which was completed on March 20,

2019. Prior to conducting her analysis on the evidence in this case, Worley testified in Chester, South Carolina on footwear impression analysis and was qualified as an expert in that field in a South Carolina General Sessions Court case. Since the completion of her analysis on this case, she had completed 25 additional footwear impression analysis cases and testified 9 more times. Of the eight cases in General Sessions Court, she was qualified every time as an expert in footwear analysis, at least two of the examinations were completed around the same time she completed the examination in this case. The one case where she was not declared an expert by the court was in a Family Court hearing and the issue was never brought up. Judge Nettles further found that Worley testified she reviewed her methods and results and opinions for this case before testifying in this hearing and still agrees with her methods and findings after years of additional experience and expert testimony. (Order, January 23, 2023-R. 1394).

Based on the above information, Judge Nettles found that Worley possessed the "necessary learning, skill, or practical experience to enable the witness to give opinion testimony" State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996), (*overturned on other grounds*); State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (2018). Therefore, she was qualified as an expert in outer sole footwear impression comparison analysis, and the defense motion as to her qualifications was denied. (Order, January 23, 2023). Judge Nettles reserved the decision on whether her testimony was admissible until he could hear her testimony *in camera*. (Order, January 23, 2023).

Before Worley testified at trial, Harrington argued Worley was not qualified as an expert in the analysis of outer sole footwear impressions and that her testimony was unreliable because she did not follow standard scientific procedures followed by other experts in the field. (R. 981, ll. 5-18). The State responded that Worley "is an expert in the field" of outer sole footwear impression comparison analysis and that she followed proper procedures "step by step." The State

also argued that Worley's conclusions as to outer sole footwear impression comparison analysis were reviewed by her superior at SLED and confirmed. Because Worley followed "SLED's process" and her analysis was peer reviewed, the State argued Worley's testimony was reliable and should be admitted. (R. 981, l. 5 – 982, l. 11).

Judge Nettles stated that since this was a bench trial, he would have to hear Worley's testimony and then make a ruling on whether it was admissible. (R. 982, l. 22 – 983, l. 2). Because the judge had previously found Worley qualified as an expert in the field, by Order, the State did not have to have Worley repeat her qualifications again. (R. 984, ll. 11-20).

Worley testified she and SLED's laboratory follow the ACE-V procedure. (R. 985).[3] Worley explained that she received Dwayne Bright's shoes [an initial suspect who was excluded] and shoes Harrington was wearing when arrested in Charlotte on May 11, 2017. Brights' shoes were size 12 Nike Air Force One's, which were marked as SLED Item 52 and State's Exhibit no 109. Harrington's shoes were size 13 Nike Air Force One's, which were marked as SLED's Item 100 and State's Exhibit No. 153. (R. 983, l. 1 – 991, l. 22; R. 1008, l. 23 – 1009, l. 6). Worley also received 5 cuttings from the crime-scene kitchen linoleum floor bearing footwear impressions. She sent these to the "photography studio" to be photographed and printed to scale. (R. 991 l. 23 – 994, l. 22). She also requested the photography lab print photographs of the impression found on the ground of the carport of the crime-scene. These photographs were printed to scale. (R. 992 l. 23 – 994, l. 16).

[3] ACE-V is an acronym for the methodology used by the forensic footwear community. "A" stands for analysis, "C" stands for comparison, "E" stands for evaluation, and "V" stands for verification. (R. 190).

Worley created "inked impressions of the known shoes" [Bright's and Harrington's] to compare to the photographs of the 6 unknown impressions collected from Ella's house. In order to create the test impressions, Worley had someone who wears a similar size shoe wear the known shoes. She then applied ink to the shoes and had the person step directly onto "the transparency." Worley admitted that she no longer uses this method to create test impressions, but it was the correct method at the time according to the laboratory. The method was changed because of the unavailability of materials not because the method was incorrect. (R. 985, l. 13 – 986, l. 7). The test impressions of Bright's shoes were marked as State's Ex. No. 115 while the test impressions of Harrington's shoes were marked as State's Ex. No. 154. (R. 1001, ll. 7-10).

After Worley created the test impressions, she overlayed those transparencies onto the printed photographs of the unknown impressions from the crime-scene to compare. (R. 995, ll. 13-16). Before doing so, Worley concluded the quality and clarity of the unknown impressions was suitable for comparison. (R. 1002, l. 4-1003, l. 11).

During her comparisons, Worley first looked for class characteristics, such as size, shape, and outsole design. If the class characteristics are consistent, Worley then looks for wear and any random characteristics in the impression. (R. 1004, ll. 5-16). Worley testified that the size 12 and size 13 test impressions were "very close together in size." She determined that there was "not a lot of difference in the toe end" of the size 12 and size 13 shoes and the heel of the shoes "were basically same." (R. 1004, l. 17-1005, l. 23). However, by observation, she concluded that the "length of the parallel lines in the middle" were "slightly longer" in the size 13 shoes than in the size 12 shoes. (R. 1006, ll. 4-9). The arcs of the different size shoes were slightly different as well. (R. 1006, ll. 13-20).

Worley concluded that 3 of the unknown footwear impressions found on the kitchen floor of the crime scene could have been made by both Bright's and Harrington's shoes, or another Nike Air Force One shoe with the same class characteristics, because they displayed the same class characteristics. She further concluded that 2 additional impressions found on the kitchen floor as well as the impression found in the carport *could have* been made by Harrington's shoes, or another Nike Airforce One of the same size, but not by Bright's shoes. It was her opinion that these unknown impressions were "more consistent with the size 13 than the size 12." (R. 1007, l. 13 – 1013, l. 8). Worley summarized, "Some of them I couldn't tell a difference between the [size] 12 and the 13. I couldn't rule one out; so I included both of them. And others I determined that they were corresponding in combined class characteristics of the size 13 shoe more so than the size 12." (R. 1017, ll. 13-20). However, there was no "wear that was visible in any of the impressions" so Worley's results were that they corresponded in "combined class characteristics only." Because of this, she could not positively identify any footwear impression submitted as being made by Harrington's shoes or Bright's shoes. (R. 1017, ll. 6-12). Worley's report was introduced without objection.

Worley testified that she followed "the same procedure" she was taught by SLED when she was trained on how to conduct footwear comparisons "from start to finish" and that she uses the same procedure for every case she analyzes. She explained that all of her work is peer reviewed by 1 of 2 qualified examiners at SLED. The peer reviewer receives Worley's "examination worksheet and table of contents, all of the photographs of the unknown impressions, [and] the test impressions that [she] created. The peer reviewer then overlays the test impressions onto the photographs of the unknown impressions and determines whether he agrees with her results or does not agree with her results. If the peer reviewer notices a "discrepancy" with her conclusions

then he will "send it back" to Worley and ask her to take a closer look. After Worley corrects any error, if found, she sends it back to the peer reviewer, and if he is then satisfied, he will approve her report. (R. 1006, l. 15-1007, l. 19).

When questioned by Judge Nettles, Worley testified that outer sole footwear impression comparison analysis has achieved widespread acceptance in the scientific and law enforcement community. She testified that there are scientific publications on the subject and that the technique used by her has been tested. However, she was unaware of the error rate or whether an error rate had been calculated. Lastly, she maintained that there are guidelines or standards set forth and that she follows these guidelines when conducting her analysis. (R. 1018, l. 7 – 1019, l. 12).

On cross-examination, Worley admitted that her laboratory does not have a copy of *Forensic Footwear Evidence,* a book by Will Bodziak and since she did not have the book and had not read the book she could not say if SLED follows all the protocols outlined in the book. Worley testified though that SLED follows accepted protocols and that she follows the accepted protocols utilized by the SLED laboratory. (R. 1020, l 10 – 1021, l. 11).

Worley acknowledged that no 2 footwear impressions even from the same shoe are identical given various factors, such as whether the individual touches the floor with his toes first or his heel. In Harrington's case, Worley created 2 test impressions for each shoe, right and left, thus 4 test impressions for 1 pair of shoes. She testified the point is to get all of the bottom of the shoe on the transparency. (R. 1026-27).

Worley also agreed that it is "notoriously hard" to determine size differences in Nike Air Force One's. Bodziak reports that the "standard deviations in sizes for Air Force One's range from approximately 2.6 millimeters for a size 10 shoe and 1.6 millimeters for a size 12 shoe." This means that a size 12 Air Force One shoe could vary from another size 12 Air Force one shoe by

as much as 1.16 millimeters. Given this, Worley admitted it is difficult to detect differences between sizes on an Air Force One shoe. However, Worley maintained that she spent a lot of time "going back and forth between" the test impressions and the unknown impressions "until [she] was comfortable with [her] result." (R. 1027, l. 18 – 1028, l. 17).

Worley testified that she had to rely on size differences in this case because she did not have a "specific wear pattern." She admitted that she measured from heel to toe on the test impressions with a ruler in an attempt "to do something to try to determine what the difference is between them [Bright's size 12 shoes and Harrington's size 13 shoes]." (R. 1029, l. 5 – 1030, l.2). However, she testified that the fact that she measured from heel to toe had no impact on her analysis or the results of her examination, which were the result of her visual comparison of the overlays of Bright's shoe impressions, and the overlays of Harrington's shoe impressions, on the unknown impressions taken from the crime scene kitchen and the crime scene carport. (R. 1029-1031).

Lastly, Worley admitted that her analysis consisted of overlaying the test impression on top of the unknown impression to see "if it agrees or does not agree and where it agrees or doesn't agree." This is the way S.L.E.D.'s laboratory has "always done it". (R. 1031, l. 18 – 1032, l. 12).

After Worley testified, Judge Nettles found "footwear analysis and the discipline is something that is not within the ordinary knowledge of an ordinary lay person" and is the type of testimony that would "aid the factfinder in understanding the evidence." He further found Agent Worley was qualified as he had previously found, and that her testimony was admissible as it met the qualifications as required by the case law. (R. 1035, l. 16 – 1036, l. 2). Judge Nettles found that the State's expert's testimony was admissible for the same reasons just as he had found the defense expert's testimony in the same field was admissible. (R. 1035-1036; See also R. 181-238).

Harrington called his own expert in the field of outer sole footwear impression comparison analysis, Dr. Alicia Wilcox. (R. 181-238). Dr. Wilcox testified before Agent Worley because this was a bench trial, and she had a scheduling conflict. Judge Nettles heard Dr. Wilcox's testimony about how an outer sole footwear impression comparison analysis should be conducted before admitting Agent Worley's testimony. Dr. Wilcox testified there is no "gold standard" for footwear impression analysis but the process she uses, like Agent Worley is ACE-V. (R. 190-91). She testified that she was not aware of an error rate either for this analysis either. She testified the method of creating impressions of known footwear that Agent Wilcox used is an accepted method, but there are other methods. Dr. Wilcox testified she disagreed with expert Worley's findings though she followed the same ACE-V method. Dr. Wilcox testified she too found all 6 impressions could have been made by either the size 12 or size 13 shoe [Bright's or Harrington's]. However, she believed 2 impressions were more consistent with Bright's shoe and inconsistent with the wear on Harrington's shoe. However, Dr. Wilcox admitted even though she follows the ACE-V method in conducting her analysis, and the V stands for verification, no one verified her [Dr. Wilcox's] work in this case. She also admitted she mostly testifies for defendants challenging a State's expert's findings. Finally, and importantly, Dr. Wilcox herself admitted she did not follow all of the protocols listed in Dr. Bozdiak's book *Forensic Footwear Evidence*, but followed the protocols of her laboratory, just like Agent Worley did. (R. 181-238).

Respondent submits Appellant Harrington conceded the science of outer sole footwear impression comparison analysis is reliable by calling Dr. Wilcox and introducing her testimony which followed the same procedure, ACE-V, as Agent Worley. Of note, Dr. Wilcox and her testimony in this case is nowhere mentioned in Appellant Harrington's brief. (IBOA). That is because Harrington argues extensively in his brief that Agent Worley's testimony should not have

been admitted because she did not follow Mr. Bodziak's protocol set forth in his book *Forensic Footwear Evidence*, when Harrington's own expert Dr. Wilcox did not follow Mr. Bodziak's protocol either. (Compare IBOA to R. 181-238). Yet, Harrington offered Dr. Wilcox as an expert in this very field and introduced her testimony on this science and argued it was credible and reliable, even though she did not follow Mr. Bodziak's treatise. (R. 181-238).

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)(citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Id. (citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)).

Analysis

South Carolina has historically allowed the admission in evidence of footprints found near a crime scene and that they are consistent with the defendant's recovered shoes. State v. Waitus, 226 S.C. 44, 83 S.E.2d 629 (1954)(In prosecution for murder, accused's shoes were properly admitted in evidence where they fit tracks which were found in soft ground at scene of crime and officer, who was experienced in identification, testified to distinguishing features of shoes which indicated that they made the tracks, of which latter casts were in evidence)(*overruled on other grounds by*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)); State v. Washington, 220 S.C. 442, 445–46, 68 S.E.2d 400, 401 (1951)(similar); State v. Pittman, 137 S.C. 75, 134 S.E. 514, 522 (1926); State v. Campbell, 131 S.C. 357, 127 S.E. 439, 440 (1925); State v. Smith, 133 S.C. 291, 130 S.E. 884, 885 (1925); Our neighboring states have similarly admitted such evidence even from non-expert or lay witnesses. State v. Hunt, 297 N.C. 447, 255 S.E.2d 182 (1979); State v.

Mewborn, 131 N.C. App. 495, 507 S.E.2d 906 (1998); State v. Reid, 91 S.W.3d 247 (Tenn. 2002); State v. Hall, 81 N.C. App. 650, 344 S.E.2d 811 (1986); Medlin v. State, 285 Ga. App. 709, 647 S.E.2d 392 (2007); Williams v. State, 151 Ga. App. 683, 261 S.E.2d 430 (1979).

The admission of expert testimony is now governed by Rule 702, SCRE, which provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." State v. Council, 335 SC. 1, 20, 515 S.E.2d 508, 518 (1999); *See* Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010). "Reliability is a central feature of Rule 702 admissibility." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009)(citing State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001)(finding error in the trial court's decision to admit "unreliable" expert evidence on barefoot insole impressions).

"The trial judge should apply the Jones factors to determine reliability. Council, 335 S.C. at 20, 515 S.E.2d at 518. "The Jones reliability factors take into consideration: (1) the publications and peer reviews of the technique; (2) prior application of the method to the type of evidence involved in this case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." Jones, 343 S.C. at 573, 541 S.E.2d at 819. "Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is [substantially] outweighed by [the danger of] its prejudicial effect." Council, 335 S.C. at 20, 515 S.E.2d at 518 (citing Rule 403, SCRE).

Regardless of the type of expert testimony, the trial court must act as a "gatekeeper" to ensure reliability of the evidence. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). But the "gatekeeping" role does not mean the trial court decides if the expert is "correct." State v. Jones, 423 S.C. 631, 640, 817 S.E.2d 268, 272 (2018). In fact, the trial court must be careful to avoid doing so. Id. Only the jury or factfinder gets to accept or reject the expert's opinion. Id. Instead, "[t]rial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it *may be offered* into evidence." Id. Stated differently, "the trial judge must remain at the gatepost and not tread on the advocate's or the jury's [or fact-finder's] turf." State v. Warner, 430 S.C. 76, 87, 842 S.E.2d 361, 366 (Ct. App. 2020) *overturned on other grounds*, 436 S.C. 395, 872 S.E.2d 638 (2022). Once a party demonstrates that "the expert's testimony consists of a reliable method faithfully and reliably applied, the gate of admissibility should be opened." Id. On appeal, the ruling is reviewed for abuse of discretion. White, 382 S.C. at 269, 676 S.E.2d at 686.

Judge Nettles did not abuse its discretion as gatekeeper by qualifying the State's witness, Agent Worley, as an expert in outer sole footwear impression comparison analysis and by admitting her testimony regarding a "correspondence" between footprints found at the victim's house and Harrington's own shoe impressions. *See* State v. Wallace, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023) ("We review a trial court's ruling on the admission or exclusion of evidence—when the ruling is based on the South Carolina Rules of Evidence—under an abuse of discretion standard."); State v. Jones, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018) ("A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion where the ruling is unsupported by the evidence or controlled by an error of law."). "To admit expert testimony under Rule 702, SCRE, the proponent—in this case the State—must demonstrate, and the trial court must

find, the existence of three elements: 'the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.'" Wallace, 440 S.C. at 544, 892 S.E.2d at 313 (quoting State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)). Judge Nettles found each of these. A trial court considers these reliability factors when admitting scientific testimony: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures"). Council, 335 S.C. at 19, 515 S.E.2d at 517. The learned trial judge, Judge Nettles, considered all of these in finding the State's expert's testimony was admissible as was Harrington's expert's testimony.

During the State's proffer, the witness explained her experience and training in footwear impression analysis. Her training was extensive, it began in 2014, and she was certified after approximately 2 years of training. She testified she had been qualified as an expert in outer sole footwear impression comparison analysis approximately 10 times. *See* State v. Prather, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020) ("To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." (quoting Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997))).

The expert testified that the methodology of determining whether a footprint corresponds with a certain shoe, ACE-V, had been peer reviewed, published, and internationally accepted; the process for collecting photographs for comparison was standardized; and her conclusions must be reviewed and agreed upon by another examiner before SLED could issue a report. *Compare* Jones, 343 S.C. at 573, 541 S.E.2d at 819)(holding the science of "barefoot insole impression" did not

meet the reliability factors under Rule 702 and Council because the expert testified "he had published several peer-reviewed articles ... [but] was still in the process of collecting data in order to determine which standards were appropriate for comparison purposes ... [and] acknowledged that earlier work in this area had been discredited") *with* Council, 335 S.C. at 21, 515 S.E.2d at 518 (concluding that although Mitochondrial DNA analysis was new it "[had] been subjected to peer review and many articles [had] been published about this technology").

Agent Worley testified that she followed the procedures set up by SLED's laboratory in conducting the analysis in this case. She used the ACE-V method, like the defense expert Dr. Wilcox. This was the method she had been taught when trained and had been used by SLED for years. The method she used had been peer reviewed and published and accepted in her field. While she did not follow Mr. Bozdiak's protocols in his book *Forensic Footwear Evidence* neither did the defense expert, Dr. Wilcox. (R. 181-228). After completing her examination, Agent Worley's results were peer reviewed by another expert in the SLED laboratory that agreed with and confirmed her findings. She testified to her limited findings that 3 impressions could have been made by either the size 12 [Bright's] shoe or the size 13 [Harrington's] shoe or another similar shoe. And, 3 impressions, were more consistent with Harrington's shoe or another size 13 Nike Air Force One shoe. She did not testify to a match to any shoe as there were no distinguishing characteristics of any unknown impression allowing her to do so.

Judge Nettles appropriately found Agent Worley was qualified, as was the defense expert Dr. Wilcox. Judge Nettles appropriately found the testimony was outside the knowledge of the average juror or factfinder and would be helpful to the fact finder, as he did the defense expert Dr. Wilcox's testimony. Judge Nettles also appropriately found the evidence met the reliability factors required by Jones, *supra*, as he did the defense expert's, Dr. Wilcox's testimony.

As the testimony was reliable and properly admitted, its probative value could not have been substantially outweighed by the danger of any *unfair prejudice*. Rule 403, SCRE. Further, as Judge Nettles also admitted the testimony of the defense expert, who contradicted the State's expert, the probative value of the State's expert's testimony could not have been substantially outweighed by the danger of any unfair prejudice to Harrington. Rule 403, SCRE.

Judge Nettles appropriately considered both the testimony of the defense' expert Dr. Wilcox and that of the State's expert Agent Worley in rendering a verdict in this case. Since Judge Nettles was the fact finder, it is impossible to know which testimony he found more credible, or if he gave any or no weight to any of the testimony at all. However, those decisions have nothing to do with admissibility. Judge Nettles determination to admit the evidence was correct and he did not abuse his discretion. Therefore, there is no merit to this appellate issue.

Harmless error

Even assuming *arguendo* some error in the admission of the SLED expert's testimony, its admission was harmless beyond a reasonable doubt given the other evidence of Harrington's guilt and the other evidence establishing Harrington's presence at the scene of the crime.

Harrington was not convicted based on the footprints found at the scene. Principal among the evidence of Harrington's presence at the scene was the cigarette butt that victim Ella's mother Delores noticed immediately upon coming home from work on May the 5th immediately before she discovered her daughter's murdered body. Harrington's DNA was found in this cigarette butt found on the backdoor steps within a few feet of Ella's body. Additionally, Harrington's phone records showed repeated contact with the victim, 800 times in the months and weeks leading up to her murder, and 18 times right before her murder, and his CSLI showed he traveled to the area of Ella's home at the approximate time of her murder. Further, video surveillance camaras captured

Harrington leaving his own home several times and returning during the early morning hours of May the 5th surrounding the time of the murders, which corresponded with the phone records and CSLI, and then captured him leaving his home one final time and not returning for several hours which corresponded with when Iyana's body was disposed of. Immediately upon being notified he was a suspect or person of interest in Ella's murder, Harrington fled to Rockingham, N.C., and he did not return to South Carolina even after promising others he was going to return here. He eventually fled to Charlotte where he was arrested. Iyana's DNA was found on the interior of the trunk latch of the car Harrington was driving at the time of his arrest. Harrington's DNA was found in this car and his palm print on the back trunk of the car near Iyana's DNA. Finally, video surveillance captured Harrington driving to the abandoned house, which his family previously owned, in the early morning hours of May 5th and then leaving several hours later with his headlights off. It was at this abandoned house that police found a receipt belonging to the adult victim Ella and Ella's cash/debit car. And, it was behind this abandoned home, and near the bridge toward which Harrington turned on surveillance video, that police found Iyana's murdered body in a nearby swamp. As a result of the strong evidence of guilt, and the other evidence of Harrington's presence at the crime scene, any error in admitting the footwear expert's testimony was harmless. State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 910 (2015)(admission of DNA evidence was harmless where there was other evidence of the defendant's guilt).

ARGUMENT III.

Harrington's 5 year sentence may be vacated.

Harrington objects to his sentence of 5 years on the weapon charge. He alleges this sentence is illegal since he was sentenced to life on the murder charges. Harrington was sentenced to 5 years concurrent on possession of a weapon during a violent crime on the indictment for

murder. The plain language of S.C. Code Ann. Section 16-23-490)(A) is unambiguous. The 5 year sentence for possession of a weapon during the commission of a violent crime does not apply when the defendant is sentenced to life without parole for the violent crime. S.C. Code Ann. Section 16-23-490(A); State v. Owens, 346 S.C. 637, 666-667, 552 S.E.2d 745, 760 (2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Palmer, 415 S.C. 502, 525, 783 S.E.2d 823, 835 (Ct. App. 2016). The 5 year sentence on the weapon charge may be vacated. State v. Plumer, 439 S.C. 34-6, 887 S.E. 2d 134 (2023).

CONCLUSION

For the above stated reasons, Harrington's convictions for 2 counts of murder, kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime should be affirmed. The 5 year sentence for possession of a weapon during a violent crime should be vacated.

Respectfully Submitted,

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December 16, 2024.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County
The Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

JEJAUNCEY FERNANDO HARRINGTON,

APPELLANT.

Appellate Case No. 2023-000305

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 Final Brief of Respondent has been forwarded to Appellant's counsel, Lara M. Caudy, Esq., via email today, December 16, 2024 to lcaudy@sccid.sc.gov, and to her assistant at smcinnis@sccid.sc.gov.

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

This 16th day of December, 2024.

s/ Donna D'Alessio
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