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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Donald B. Hocker, Circuit Court Judge

BRIAN N. WHITE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-002438

APPENDIX

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VOLUME III OF III **PAGES 1001-1329**

INDEX

with the bullets?" Your answer: "I think six. Nicole said she threw a towel over to Scott to cover him up so her mama wouldn't see the wounds." You didn't tell them that?

A I do remember all that. Yes.

Q You did tell them that?

A I do remember something around that.

Q Okay.

A Yes. I do remember that part of the question and answer.

Q And: "How do you think this would end?" "Once I realized I had shot him, I thought, if it didn't fall back on me, they would think it was a crack dealing"?

A I never once said I had shot him.

Q Okay. My question is: Did you -- did you say the rest of it?

A I thought ---

Q I thought ---

A --- if it didn't ---

Q --- if it didn't fall back on me ---

A I can ---

Q --- they would ---

A --- remember ---

Q --- think ---

A --- I can remember saying something along them

lines. I don't ---

Q Okay.

A --- know if I exactly said "thinking it would fall back on me." But I'm not going to -- I'm not going to say -- I do remember saying something around about that. Yes. Yes.

Q And they then ask you: "Do you think Nicole and Crystal should be held responsible in the part they played in this event?" And your answer: "No. I took it upon myself and thought Scott and I were going to go man-to-man, but I guess I went straight for the gun." You say that?

A I do not remember saying that.

Q You don't remember saying that?

A No, I do not.

Q Okay. "Is there anything else you would like to add to your statement that we have not discussed?" Your answer is: "I wasn't intending for Scott to be dead. I am sorry for what I did. I still can't believe I did it, to be honest with you." Didn't say that?

A I know for a fact I never said that I did it. So I do know that those parts of any of those three sentences in there was not said. I'm not saying that -- I -- I -- I do remember possibly saying something around the lines of I can't believe ---

Q Uh-huh.
A --- Scott is dead. I do remember saying something like that. But as I said, I do not -- I do not recall every saying anything about intending for Scott to be dead or I definitely do not remember saying anything about I did or did it or anything of those lines.
Q That's great. So the only thing, now that we've gone through your entire statement, that -- in your statement that you didn't say is anything having to with you being the shooter? Everything else, you said?
A I -- what I'm saying is I never once admitted to this.
Q Exactly. So everything else in your statement is true, except for that? That's ---
A For ---
Q --- what you're telling this jury?
A For the most part, yes, it is.
Q Okay. And you're as sure about not having shot Scott as you are about Nicole going through the back door, correct? After ---
A I ---
Q --- the shooting.
A --- cannot tell you what she actually did. I can only make speculations, honestly, at that point. Because all I did was see her run around that side -- it would be

the side where her bedroom is.
Q And Ms. -- your attorney just showed you a photograph that showed the door, because you said that she went around towards the back door ---
A Yes.
Q --- correct?
A She went around ---
Q Okay.
A --- towards the back of the trailer is what I said.
Q And you're sure about that?
A Yes.
Q Okay. And you said something about -- on the call that you said that Crystal didn't have anything -- or Nicole didn't have anything to do with it and that you'd gotten rid of the gun?
A Yes, ma'am. I can ---
Q And so you lied to your friend, Kelly?
A Oh, yes, ma'am.
Q Okay. And when you're in there, talking to police about someone being killed -- correct? That's what they're talking about ---
A Yes, ma'am.
Q --- about a murder?
A Yes, ma'am.
Q And today you said but you didn't think it would get

this far.

A I definitely never thought by -- my -- what -- what I said after that and my exact reasoning for that is I never thought I would be on this stand, talking to you, being charged with this. No.

Q Although they're talking to you about a murder?

A Yes, that they are.

Q And they're talking to you about a gun that you got?

A Yes, ma'am.

Q They're talking to you about a gun that was used to shoot Mr. Turner?

A Yes, ma'am.

Q They're talking to you about who shot Mr. Turner?

A Yes, ma'am.

Q And they're talking to you about arresting someone for his death?

A Yes, ma'am.

Q And that someone was you?

A They were questioning me in regards to this case. I can say that.

Q The -- well, the person who was arrested was you? That's ---

A Yes.

Q --- my question.

A I -- I ended up -- well, actually, I was arrested

for other incidents. But I was initially charged completely after questioning.

Q Correct.

(Off the record briefly.)

Q So in closing, you lied to your friend, Kelly?

A Yes, ma'am.

Q You lied to your friend, Alex?

A Yes, ma'am.

Q You lied to your -- the police?

A Yes, ma'am.

Q More than once?

A Yes, ma'am.

Q Okay. But you're telling the jury today the truth?

A Yes, ma'am, I am.

Q Okay.

MS. SAMPSON: No further questions, Your Honor.

THE COURT: Yes, ma'am.

MS. EIGENBROT: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MS. EIGENBROT:

Q Brian, it's -- it's safe to say that you lied a good bit, correct?

A A lot. Yes, ma'am, I did.

Q What was going through your mind, like right after this happened?

A A -- a lot, in the same sense also. It was just -- there was a lot going on in my mind. To specify would honestly be hard.

Q Is it safe to say you weren't thinking straight?

A No, not at all.

Q Now, Brian, I know you mentioned Nicole had gone to the doctor. What was she going through at this time?

A She had some personal issues at the time. She actually didn't go into the doctor over a long period of time. It wasn't just something that was just happening.

Q Did you want to tell on Nicole?

A Not at all. I didn't.

Q And why was that?

A I -- as I said, I -- I cared about her. I -- I still didn't want anything to happen to her.

Q Brian, what did you refer to Nicole as during this time?

A I mean, she's -- I've referred to her as -- I -- I actually even end slipping up and calling her "girlfriend" at one time. But she -- I -- I referred to her as "my ex."

Q Have you ever referred to her as "wifey"?

A Oh, yes.

Q Now, Ms. Sampson just went back through your statement with you.

A Yes, ma'am.
Q That's not what happened, right?
A No, it's not.
Q And if you could go back and change it now, would you?
A After this long period of time and being able to think about things for a while, then yes. I definitely would've told them what I just said the jury at first.
Q Okay. Thank you, Brian.

THE COURT: Anything else from the state?

MS. SAMPSON: Beg the Court's indulgence.

(Off the record briefly.)

MS. SAMPSON: No further questions, Your Honor.

THE COURT: All right. Ladies and gentlemen of the jury, there's a matter I need to take up outside of your presence. So I'm going to send you all out for like two minutes, and then I'll bring you right back. I know it's after six o'clock.

(Whereupon, the jury exited the courtroom at 6:09 p.m.)

THE COURT: All right. You can step down.

(Whereupon, the witness exited the witness stand.)

THE COURT: You have any other witnesses tonight?

MS. EIGENBROT: No, Your Honor. At this time we would rest.

1009

THE COURT: Okay. I'm going to let you rest in front of the jury, but I needed to get him off the stand.

MS. EIGENBROT: Yes, ma'am. Thank you.

THE COURT: So I will bring -- as soon as he sits down, we can bring the jury back in.

(Off the record briefly.)

THE COURT: We'll bring them back in. Any rebuttal?

MS. SAMPSON: No -- no, ma'am. No. No rebuttal.

THE COURT: No rebuttal?

MS. SAMPSON: No.

THE COURT: All right. We'll bring them back in. I'm going to tell them to ---

MS. SAMPSON: Sorry.

THE COURT: --- come at 10.

MS. SAMPSON: Okay.

THE COURT: She's worked on a jury charge. It's not final. I'll send it -- she'll have -- I'll have her e-mail it to you.

MS. SAMPSON: And I have a charge to request, I'm sure.

THE COURT: If you have charges to request, we'll send to them. But let's -- I'm going to release them. But I'm going to bring them back in at 10. We'll start at 9. That should be enough time. And then, we'll go into closing arguments at that point in time.

(Off the record briefly.)

THE COURT: All right. You can bring them back in.

(Whereupon, the jury entered the courtroom at 6:11 p.m.)

THE BAILIFF: Jury is seated, Your Honor.

THE COURT: All right. I'm going to ask the defense to call their next witness.

MS. EIGENBROT: Your Honor, at this time the defense would rest.

THE COURT: All right. Thank you.

Does the state have any reply or rebuttal?

MS. SAMPSON: No, ma'am. The state rests.

THE COURT: All right. Ladies and gentlemen of the jury, the state has rested and the defense has rested. At this point in time, we are now ready for closing arguments and the charge on the law. But we're not going to do that tonight because that would take us well into the evening, and it's already after six o'clock.

So we -- there are some matters of law that I need to take up with the lawyers in the morning. So we're going to start at 9, but we don't need you all here until 10. All right?

And when you get here at 10, she'll take your orders for lunch. We don't have a whole lot of options. But we'll -- we'll figure that out, and we'll take your

1011

orders for lunch in the morning. And hopefully, we'll be ready to start right around 10.

I just -- I need to appoint our foreperson. I'm going to ask that Juror No. 41, Ms. -- Ms. Childs?

JUROR: Yes, ma'am.

THE COURT: I'm going to ask that you serve as our forelady. And I will give you instructions tomorrow morning as to what your responsibilities are.

JUROR: Yes, ma'am.

THE COURT: But when we give the -- when I give the jury charge, I'll give you instructions as to exactly what you are to do.

JUROR: Yes, ma'am.

THE COURT: All right. So we -- you have heard all of the evidence. But you have not heard the closing arguments, and you have not received the law from the Court. So please do not discuss this case with anyone. Do not do any independent research the case; no tweeting; nothing about the case.

Once again, if your family members or your friends or anyone wants to know about the case, you can tell them all about it this weekend, but not before the -- you all begin your deliberations. It's also improper, until you've heard the closing arguments and the charge on the law, for you to form any opinion in your minds at this

point in time.

So go home; think about something else, other than what's going on here at the courthouse. The -- it is dark outside, I believe. And I know you all have to walk to your cars. So the deputies are going to escort you there. So if you hang tight in the back, the deputies will escort you to your -- your cars.

Anything else before I release the jury for the night? Anything ---

MS. SAMPSON: I'm sorry?

THE COURT: Anything else before I release the jury for the night?

MS. SAMPSON: No, ma'am.

MS. EIGENBROT: Nothing from ---

THE COURT: All right.

MS. EIGENBROT: --- the defense, Your Honor.

THE COURT: All right. Thank you. Have a -- a restful evening, and we'll see you all at 10. Okay? Ten in the morning. And Ms. -- Madam Forelady, they'll show you where you need to sit.

JUROR: Okay. Thank you.

THE COURT: Okay.

(Whereupon, the jury exited the courtroom at 6:15 p.m.)

THE COURT: All right. So we'll start at 9. If you

1013

have any proposed -- or if you have proposed jury charges, you can get those to us -- Hazel this evening. And then, she will e-mail you what we have. We just put stuff in there. It's not anything set -- I have glanced over it.

So I have been -- that -- don't -- please don't take it to mean that I have ruled on anything. We just -- it's easier to take it out than to put it in. And so we can talk about that tomorrow and then we'll be ready to start with them at ten o'clock.

MS. SAMPSON: Your Honor, and -- if I could, before we break for the day, I see that -- because I can get e-mails on my phone -- Ms. Pinnock has asked for third-party and mere-presence charges. I will tell Your Honor that we will be asking for a hand-of-one charge as well.

THE COURT: Hand of one?

MS. SAMPSON: Hand of -- because he testified that Nicole asked him to go get a gun; he did go get a gun; she shot him in front of him; and then he took the gun back. In any other circumstances, that would "hand of one is the hand of all" charge.

THE COURT: Y'all got a position on that?

MS. EIGENBROT: Your Honor, I can be heard now or we can be heard tomorrow. It's up to Your Honor.

THE COURT: I'll take a look at it, but I don't know

1014

about that. We'll see. Mere presence and -- what was the other one?

MS. EIGENBROT: Third-party guilt ---

MS. SAMPSON: She's ---

MS. EIGENBROT: --- Your Honor.

MS. SAMPSON: And -- and that was part of the reason for the hand of one. If they're going to get mere presence, I think a jury could believe he was acting in concert with her. So I think "hand of one/hand of all" is appropriate.

THE COURT: All right. Well, I'll -- I'll -- we'll -- I'll think about that tonight.

MS. EIGENBROT: Thank you, Your Honor.

THE COURT: And I'll be glad to hear from you all in the morning. Of course, if you have some case law or something, I'll be glad to look at that. All right.

MS. EIGENBROT: Thank you, Your Honor.

THE COURT: I think mere presence -- I had that one written down too. All right. So we'll see you all in the morning at -- at nine o'clock.

MS. EIGENBROT: Yes, ma'am.

(Whereupon, the proceeding adjourned at 6:17 p.m.)

1015

TRIAL DAY 5 - 11/22/19

(Whereupon, the proceeding resumed at 9:18 a.m.)

(Whereupon, Court's Exhibits 4, 5, and 6 were premarked for identification.)

THE COURT REPORTER: Your Honor?

THE COURT: Yes, ma'am.

THE COURT REPORTER: I've received proposed requests for charges from the state and the defense that I've marked as Court's exhibits.

THE COURT: Okay.

THE COURT REPORTER: Have you seen them?

THE COURT: No.

MS. SAMPSON: She -- Your Honor, I think we both gave you copies up there.

THE COURT: Okay.

(Off the record briefly.)

THE COURT: All right. So my law clerk sent you all ---

MS. EIGENBROT: And -- and, Your Honor, unfortunately, I think our e-mails kind of shut down at some point last night. I didn't get anything. And I've been unable to log into my e-mail this whole morning.

MS. SAMPSON: Countywide.

(Off the record briefly.)

THE COURT: So what I'll do is have her print you

1016

all a copy. I'll -- and then, in the meantime, I will be -- we can discuss the jury charges that you all have.

MS. EIGENBROT: And, Your Honor, before we do that, I do need to renew our directed verdict motion, along with all of our pretrial and during-trial motions.

THE COURT: All right. Yes, ma'am.

MS. EIGENBROT: Your Honor, at this time we would move -- move to -- ask Your Honor to consider a directed verdict. Based on Brian's testimony, there's been direct evidence now presented that somebody else is the shooter in this case; somebody else is the one that actually committed this crime, along with all the circumstantial evidence presented during the state's case.

So even taking the light -- evidence in the light most favorable to the state, I believe the state has failed through this point to present credible evidence that Brian is, in fact, the shooter in this case. I believe we've sufficiently shown that Ms. Nicole -- Sheena Nicole Bryant is the actual shooter.

And so I don't believe that they've -- the state's been able to prove any prove any of the elements of their charge. So, Your Honor, at this time we would ask you to consider a directed verdict.

THE COURT: All right. Anything?

MS. SAMPSON: Thank you, Your Honor. May it please

1017

the Court. As Ms. Eigenbrot stated, the correct law is if there is any -- looking at the evidence in the light most favorable to the state, if there's a scintilla of evidence, then the case should be given to the jury. Even after the defendant has testified, that evidence that remains the same -- his confession, all of the circumstantial evidence, him having the gun that shot the victim, the manner in which the victim was shot -- did not change based on his testimony. The jury could believe or disbelieve him. This goes to credibility and weight, not to whether it should go to the jury or not.

Based on that, Your Honor, I think the D.V. motion should should continue to be denied and that any rulings you made as to any other objections and motions should stand.

THE COURT: All right. Based on the testimony and evidence before the Court, I do find that there is sufficient evidence for this -- issues presented before the Court for this matter to go to the jury. There issues affect for the fact for the fact-finder to decide. I will respectfully deny the motion for directed verdict.

But that motion is preserved for the record and all of the other motions that you just renewed.

MS. EIGENBROT: Thank you, Your Honor.

THE COURT: All right. Thank you. All right.

1018

Let's -- let's talk about the jury charges. I think the three -- everything else I -- that she has in there is -- is -- is just the regular language: criminal intent -- let me see -- just the usual language: criminal intent, the murder jury charge, statement of defendant.

So the three that we need to discuss are third-party guilt, "hand of one/hand of all", and mere presence. Does the state object to the mere presence?

MS. SAMPSON: Yes, Your Honor, I do object to the mere presence. And also, before we get started with that, I don't know if you said it -- and I'm assuming that you did it -- that you also added an expert witness ---

THE COURT: Oh, yeah. No. That's in there.

MS. SAMPSON: Okay.

THE COURT: All this stuff is in there.

MS. SAMPSON: Okay.

THE COURT: The -- I assume the three that we're going to discuss this morning for the ---

MS. SAMPSON: Little bit ---

THE COURT: --- 30 minutes or so -- so, the accomplice liability, "hand of one/hand of all", third-party guilt, and mere presence.

MS. SAMPSON: Yes, ma'am. We would request that you deny their request for a mere-presence charge. We

1019

believe that the mere-presence charge is an inappropriate charge in this case because mere presence implies that you were just there; that you did not aid or abet in any way. In this case, even by the defendant's own statement, he brought the gun.

Even if you believe he didn't know what the -- the -- what Ms. -- what Nicole was going to do with the gun, after he saw her shoot the gun, he said he assumed she shot it at a person. He then takes the gun back, lies to everyone; gets rid of the gun; does all of the things he does that would aid and abet in the commission of the murder. That's more than mere presence.

Mere presence is when you literally are just there when a -- when an act occurs and do not participate in it at all. This murder could not have happened without his participation. That's more than mere presence.

That's why we would request that it not be -- I'm sorry. And I'm reading to make sure that that what's theirs says. That's why we would request it.

I understand that they asked for *State v. Kelsey* as their -- as their charge to be used. However, in that case he -- the defendant was merely there. He didn't participate in all.

But that's not what we have in this case. We have that the defendant knows that she asked for a gun;

1020

according to him; and she asked him to park far away. Then, he does all of that. She shows up, and what he says he didn't know is that she was going to shoot anybody.

But once he -- she did do it, he takes the gun back and hides it; does all those things that we've already talked about. That goes to more than mere presence. Therefore, we'd ask that they not receive that charge.

THE COURT: All right. Yes, ma'am.

MS. PINNOCK: Thank you, Your Honor. If it please the Court, Your Honor, I think the -- the charge is appropriate for this. The argument just presented by Ms. Sampson is honestly their argument to the jury. There's been no evidence, and no testimony was elicited from Mr. White on cross-examination that indicated that he knew what Nicole Bryant was going to do that morning.

Actually, after, there are separate charges for that. He is charged with murder. And the requirement would be the state would have to prove that he brought that gun to the scene with the intention of committing a murder.

There's been no evidence elicited in any testimony, through Mr. White or anybody else, that would take away from the fact that he -- his -- our position is he was just present at the scene. She can argue it to the jury;

1021

there is evidence on the record that supports it. He testified that she asked him to bring a gun; she never told him what the gun was for. He did not go to the scene with the intention of shooting anybody; she grabbed the gun; fired the shots; shoved the gun back at him; and he ran away.

That is the testimony that was presented yesterday, Your Honor. There -- it -- it's on the record. It supports the charge of mere presence. And so we are asking that you include it. If the state wants to argue against it in their closing, they can do that. It's their right.

Obviously, they're accusing him of being the shooter. That was their position from the beginning. So, Your Honor, I do believe that there is evidence on the record that would support the jury at least being able to consider it.

THE COURT: All right. I will -- I'm going to give the charge on mere presence.

MS. PINNOCK: Thank you, Your Honor.

THE COURT: So -- the question -- let me look at the one that is in the desk book versus the one you all have. I think it's pretty much the same.

(Off the record briefly.)

THE COURT: She put everything in there, so -- yeah.

1022

So here is a copy of the charge that ---

MS. PINNOCK: Thank you.

THE COURT: And mere presence is on what page?

MR. MCGLOTHIN: Thanks.

THE COURT: It's on page 17.

(Off the record briefly.)

THE COURT: I think -- yeah -- when I read the charge, if you -- if you read the charge, it just says the burden is on the state to prove every element of the crime charged; if you find, after reviewing all the evidence, that the state has proved the defendant was only present at the crime -- at the scene of the crime and that the state has not proved beyond a reasonable doubt any participation in the crime.

So that'll be a issue for the jury decide. So I'm going to -- I'll do it. Yeah. I will charge up.

MS. PINNOCK: Thank you, Your Honor.

THE COURT: All right. I'm trying to decide if we talk about third-party guilt in ---

MS. SAMPSON: Your Honor, we're not objecting to third-party guilt if that's what they want.

THE COURT: All right. And there's a charge in there on third-party guilt also, if you all can take a look at that. And that is the language from the -- on page 16.

1023

I think it's the same thing. Actually, this one probably is better because it talks about not burden-shifting and all of that in this one right here.

All right. So we're going to leave third-party guilt in and leave mere presence in.

(Off the record briefly.)

THE COURT: Yeah. I think that one in the charge better explains it. All right. "Hand of one/hand of all" and accomplice-liability charge?

MS. SAMPSON: Your Honor, especially considering that they're now going to get mere presence and the third-party guilt, Your Honor, I think that the case law supports a charge of "hand of one" or accomplice liability. If there's any evidence that would warrant a jury instruction, the Court must request and -- an admit to request to the Court must give it, Your Honor.

That's what the case law in and most of this -- the cases that we have state, Your Honor. In this case there was evidence put up by them that -- and theoretically, by us as well -- that Nicole may have been involved as well. Their version yesterday was that he shows up with a gun and then she does what she does but he could then -- continues to help her and aid and abet her in her crime by getting rid of the gun, by -- by lying about it, by all of the things that we've already discussed.

1024

The charge itself, as Your Honor has already put it, it states what you were going to use; talks about if this is a natural consequence; talks about looking at the actions afterwards; aiding, abetting, or assisting the crime. She couldn't have done this crime without his gun.

He knew -- he -- he -- there was -- there were texts about going to -- to do something to the victim to take care of it. All of that has come in already; that they're texting each other, according to them, and calling each other prior to and right after. There is evidence that they're acting in concert from both the state and from the defense.

So I think accomplice liability at this point is proper.

THE COURT: Let me ask you this: In reviewing -- I was trying to find what I was looking for. So I guess the part that is troubling a little bit about the accomplice liability is that we're charging accomplice liability on someone who was the -- Nicole was never charged.

MS. SAMPSON: Well, and, Your Honor, it doesn't require that all parties be charged. And there was a third -- another party charged in conspiracy, which was Brittany Steen. But it doesn't require that everybody in

1025

the "hand of one" be charged. That's not a requirement to get the charge.

THE COURT: I understand. But if you read the case law, it says one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his coconspirator incidental to the execution of the common -- common design and purpose.

MS. SAMPSON: And, Your Honor, I would say there was testimony provided, even from Investigator Truluck, that had the defendant not lied about Nicole's involvement, he would have maybe had more information to charge her. He attempted to -- he was looking to charge her and could not. That evidence has already come out there.

Without this charge, the jury is going to get mere-presence charge. They're going to get an accomplice -- a third-party-guilt charge. But they're not going to know that they take into account that even if he brought the gun there with some idea that she might use it, that that would be enough -- and then took it away in all the other actions he did afterwards could make him guilty of "hand of one is the hand of all."

There is scintilla -- they -- they've provided evidence and they've got -- put records in that they're going to say they deleted the messages but there are messages and calls between the two. There've been talk

1026

about what they said in the calls and none of us know. His version is that she didn't tell him but maybe the jury could believe that she did. Or there's already been information given that he admitted he said that he was going to take care of it prior to bringing a gun to the scene.

They already have that. That, he admitted to. Brittany Steen said he said that. Crystal said he said that. He said he said that. And then he shows up to the scene with a gun.

He then takes it away and lies from the get-go. Not later, but as soon as he sees a cop, he lies. As soon as he gets to his friend's house, he lies. That all goes to accomplice liability.

He -- without him bringing a gun to a place he said he was going to take care of a person, that person being taken care of his gun and then him taking the gun away and hiding and lying about it, we wouldn't be here. That is the definition of "hand of one is the hand of all."

If you read the -- the -- even the way that Your -- the one that Your Honor has provided us, if there's any evidence that goes towards that and the charge is requested, it should be given. Without that, they're just going to -- the jury is going to be left with this mere presence, this third-party -- this third-party, but

1027

no way to know that if you connect those things, you can still find him guilty. And that's hampering the state.

And there's evidence that should support accomplice liability or "hand of one/hand of all" that they provided.

THE COURT: And that evidence is primarily from the defendant's testimony.

MS. SAMPSON: The only -- primarily from his testimony, because he's the only one saying he didn't do it, in -- in saying this someone else did and that he worked with that someone else. He -- he brought the gun. He admitted that he talked about help -- doing something to the victim, taking care of the victim, all of that prior to getting the gun. He admits that.

Then he takes the gun but say he didn't know what she was going to do with it. Then, when she does shoot the gun, at a van with, he believes, somebody in it, he then takes the gun back with him, lies immediately about it to the police, who show up at the scene. He -- he tells them he -- bullets were whizzing by, but doesn't mention that, "Oh, this person did it." He then takes the gun back and lies to the person that he got the gun from; then, when he gets caught, continues and then finally tells the truth.

All of that goes to aiding and abetting. She

1028

wouldn't have been able to get away with it, if we want to put it that way, if he'd have stood there with the gun. If he'd have told police, we'd be in an entirely different scenario.

But that is the definition of accomplice liability. She could not have committed the crime, according to him, without him. And he put things in place prior to bringing that gun there that the jury could take to be that there was a plan in place.

And that's all we need, is a scintilla of evidence, and that we request. They admit that he talked to her prior to. They admit -- and everybody admits -- that he said he was going to do something to the victim; that he was going to take care of it.

That's evidence that the jury could take to think that they planned it together. Then he shows up with a gun, takes care of the victim, and leaves with the gun. That's a scintilla of evidence that everybody worked together.

THE COURT: All right. I'll be glad to hear from the defense.

MS. PINNOCK: Thank you, Your Honor. If it please the Court, Your Honor, we would object to that charge being given to the jury. I don't believe there is any evidence of "hand of one" that's been presented

1029

throughout the trial.

I think a lot of the argument by the solicitor was based on evidence that we're assuming said something but there's no proof of it actually being said. We know there was text messages and phone calls. But nobody has testified from, you know, their witnesses who sent the texts what the texts were including. So to assume that there was some sort of plan that was created prior to Mr. White going back there to the house, we're assuming evidence that we have no evidence of.

We know there were text messages. That's about it. All of the -- most of text messages that were referred to by the state happened prior to any knowledge by anybody that Mr. Turner was back at the house.

It -- they occurred prior to the texts that were between Ms. Bryant and Ms. Posey at 5:30 -- 5:21 when Mr. Turner returned to the house. Their witnesses said that they were sleeping and not using their phones. So all -- all the communication that they're -- that they're referring to between Mr. White and Ms. Bryant happened prior to that.

So, Your Honor, I just don't believe they've established that there was any sort of planning or conversation about going back and killing somebody. And the -- the underlying charge, Your Honor, is murder.

1030

It's malice aforethought that they have to prove, not, you know, potentially accessory after the fact. If they wanted to charge him with that, they could have.

But they have to prove that they had been acting in concert with an agreement before the shots went off.

THE COURT: Your client did testify that he went she told him to get a gun. I went got the gun because she told me get a good and they went to house with a gun.

THE COURT: Well, now ---

MS. PINNOCK: So that's ---

THE COURT: --- your client did testify that he went -- that she told him to get him -- get a gun. And he went and got the gun, because she told him to get the gun. And then he went to the house with the gun.

How do -- what's your -- what's your position regarding that? I mean, it doesn't have to be -- it -- I mean, I think it says that the facts -- says -- something I read that said -- talked about facts that lead to circumstantial evidence.

I read that somewhere -- which would all be circumstantial evidence if she -- they had this -- this incident. He tells her he's going to take care of it. I think that's undisputed. He -- he had -- based on his testimony, he goes and get the -- gets a gun because she tells him to get a gun. He goes to the -- the friend and

1031

gets a gun.

The gun -- then he brings the gun to her. Now, he did testify that she took it out of his waistband and started shooting. Then he grabs the gun back from her; he takes the gun and he runs with it. I think he testified that he actually got on him when he runs into the police officer.

I mean, had she been charged with that -- had she been charged, I think, based on his testimony, which is now in evidence, based on his testimony, he would've been charged also with murder and probably accessory after the fact.

MS. PINNOCK: And if he ---

THE COURT: And I'm ---

MS. PINNOCK: --- had been ---

THE COURT: --- noticing ---

MS. PINNOCK: --- charged with accessory after the fact, Your Honor, I think we'd have a different situation. But, you know, our -- our -- our position is, you know, the agreement and the conversations and his reason for going over there with the weapon, the state has not established that he went over there with the intentions of shooting Mr. Turner; that he knew what Ms. Bryant was going to do with the gun when he got there.

That's what's missing. That's why we would object

1032

to this charge be included. Beg the Court's indulgence.

THE COURT: Oh, I know the case that I'm -- I'm talking about I just -- where I read -- it's last night or this morning.

(Off the record briefly.)

THE COURT: In reading *State v. Gibson*, 390 S.C. 347 -- it's a Court of Appeals case from 2010 -- it says: "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by prearrangement, the state need not prove a formal, expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties."

And that's *State v. Gibson*. An alternate, which one is *Barber* -- have y'all read the *Barber* case, *Barber v. State*?

MR. MARSH: Yes.

MS. SAMPSON: Not today.

MR. MARSH: Yes, Your Honor.

THE COURT: "An alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. That's *Barber v. State*.

But the case that -- if you look at *State v. Gibson*, it doesn't say that it has to -- it's -- it actually says

1033

it does not have to be a formal, expressed agreement, but that circumstantial evidence and the conduct of the parties is what the state has to prove. And I'm assuming that's what she's saying.

MS. SAMPSON: And ---

THE COURT: Anything ---

MS. SAMPSON: --- Your Honor, if I may ---

THE COURT: --- in response to that?

MS. SAMPSON: If I would make -- I have one ---

THE COURT: All right.

MS. SAMPSON: --- more to add to you -- to that, Your Honor. I would point you out to *State v. McCall*, 304 S.C. 465, where the Court stated that: Though it's not -- it was not an intended as part of the original design or common plan, you're still criminally liable for everything taught by your confederate or if you've combined with someone.

And you -- and they still gave the "hand of one is the hand of all" theory, even though initially, it wasn't part of the plan, if, looking at the actions during, before -- before, during, and after. So even if initially, your common plan was not that, if it becomes a common plan, then you can't.

I think there's circumstantial evidence the jury could take that they were working together. You outlined

it pretty well. There's no case law that says she had to be charged.

We have cases all the time where the -- one is charged as the principal and we either can't charge the rest or don't charge the rest. That's not unusual. And it's not required that everybody be charged.

What is required is circumstantial evidence of there being acts in concert; there be some sort of aiding, abetting, or assisting. We have all of that. They talk before; they talk right before, according to the defense. They plan where he's supposed to park. They plan him bringing a gun. He then runs away with the gun -- I mean, we -- we're saying the same things over and over. But all of that goes towards aiding and abetting.

THE COURT: Yes, ma'am.

MS. PINNOCK: Your Honor ---

THE COURT: Anything else?

MS. PINNOCK: --- I just stand on my previous argument.

THE COURT: All right. Let me read this -- the jury charge again and then I'll . . .

(Off the record from 9:45 a.m. until 9:51 a.m.)

THE COURT: I'm reading a 2018 case that came out. If you all want to take a look at it, it's *State v. Washington*, 424 S.C. 374.

1035

MS. PINNOCK: 374?

THE COURT: 374.

MS. PINNOCK: Thank you.

THE COURT: It's a 44-page opinion by -- by the Court of Appeals on -- and it's -- but it's -- it talks about accomplice liability. It talks about *Barber*, *Wilds*, and does actually pretty good analogy on it. And it also talks about the *Allen* charge.

MS. SAMPSON: What was the cite again, Your Honor?

THE COURT: 424 S.C. 374.

(Off the record from 9:52 a.m. until 9:59 a.m.)

THE COURT: All right. Anything else?

All right. In looking at the -- and I've read over *Barber* and *Wilds*, *State v. Washington*, and also in looking at *State v. Gibson* -- I think I gave you all the cite for that one earlier -- based on the evidence before the Court, I find that a charge for accomplice liability is appropriate for the following reasons: the following circumstantial evidence as described in *Gibson*. Once again, *Gibson* says in order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by prearrangement, the state need not prove a formal, expressed agreement, but rather can prove the same circumstantial evidence and conduct of the parties.

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And most this is based on the defendant's testimony. But I think it's -- it's undisputed that this conduct regarding taking care of the victim -- I think is undisputed that there were some text messages between the two that morning. Even the defendant testified yesterday that she was texting him but he deleted -- she deleted the texts -- text messages or he told her to delete the text messages, something. The text messages were deleted.

So he said that there were some text messages before them -- between them. He also testified that he leaves the hotel dressed in black; he parks his car down the street because she told him to park the car down the street. He -- his testimony regarding him going to get the gun because she told him to go get the gun; and then, he brings the gun to Nicole. She takes the gun and begin -- takes the gun out of his waist and begins shooting up the van. He snatches the gun back from her; goes through the back cut behind the home; meets up with the officer. He actually has the gun and -- but he says -- you know, he -- he says he didn't say anything to the officer. And then he goes back and takes the gun to the person that the gun was owned by.

I think based on all of that -- and -- and like I said, primarily, his testimony along with the testimony

1037

earlier in the case by the witnesses -- specifically, the witness that says he comes to him and gets the gun from him and tells him he's going to shoot, I think, coyotes or something like that -- based on that, I will allow the jury charge on "hand of one/hand of all."

All right. Anything else? And then, do the verdict form -- yes, ma'am.

MS. PINNOCK: Your Honor, I'm sorry. Just briefly, on page 7, the prior records of the witnesses, I just don't know if that's necessary for this case. The only witness that had any sort of prior convictions was Mr. Wilson, and he didn't testify that he remembered anything, really.

He wasn't questioned long by the state. He wasn't cross-examined by the defense. I just don't know if that's -- you know, would be necessary to charge the jury. So I'd just ask you ---

THE COURT: I just ---

MS. PINNOCK: --- remove it.

THE COURT: --- put in there because he -- there was some testimony regarding a record. So it just says you can -- you can consider it in determining the witness's believability.

Y'all have a position? I mean, I ---

MS. SAMPSON: No. The state has no position, Your

1038

Honor.

THE COURT: I mean, it is -- I -- I mean, I can take it out if y'all want it taken out. It's just that I don't -- I don't even remember what -- what did Mr. Wilson testify to?

MS. SAMPSON: Me either.

MS. PINNOCK: He might've heard shots at some point -- nothing, honestly.

THE COURT: All right. All right. We'll take it out, then.

MS. PINNOCK: All right. Thank you.

(Off the record briefly.)

THE COURT: All right. And the verdict form just -- she'll print a copy and you give you -- but it just has: "As to the indictment alleging murder, we, the jury, unanimously find the defendant" -- and then, side by side, "guilty" or "not guilty." And we'll print that out and give them a copy of it.

All right. For purposes of ---

(Off the record briefly.)

THE COURT: For purpose of -- purposes of closing arguments, the state will open -- I mean, the state will close in full; and then we'll hear from the defense; and then only ---

MS. SAMPSON: Reply.

1039

THE COURT: --- reply as to what they say.

MS. SAMPSON: Yes, ma'am.

THE COURT: All right. All right. Y'all ready?

MS. PINNOCK: One last thing, Your Honor: It's real quick. It's just a housekeeping matter.

THE COURT: Okay.

MS. PINNOCK: The jail call that was introduced through Sgt. Waters that was played for the jury yesterday ---

THE COURT: Uh-huh.

MS. PINNOCK: --- the disc itself is labeled "Jail call." However, when you put the disc into the computer, it -- it comes up with the heading that Investigator Truluck had when they had labeled the call. I didn't realize -- and I don't think any -- any of us realized that it had that -- pretty much a comment from the investigator on it.

THE COURT: What did -- what was the comment?

MS. PINNOCK: Only -- yeah -- "White call, only one outside at the time" or "only one on the scene" or something. If we could just rename that "Jail call" before it gets sent back to the jury, we would like Your Honor to -- to allow us to do that. It takes five seconds.

THE COURT: You mean the label or you wanted to --

the -- when you pull it up in -- on the screen, it comes up as ---

MS. PINNOCK: Yes, ma'am, on the ---

THE COURT: Okay.

MS. PINNOCK: --- screen. The outside of this just says "Jail call." And we would just like to rename the file itself "Jail call" so it doesn't have any comments from the investigator on it.

THE COURT: Yes, ma'am.

MS. SAMPSON: Your Honor, that's how it came in. I played it to the jury, and I actually moved it so that -- and they saw it. That's how it came up. But they already did that.

THE COURT: Is there some way to rename it?

MS. SAMPSON: I don't have a clue.

MS. PINNOCK: Your Honor, if you put the disc in the -- in the computer, you right-click. You hit rename and you rename it. That's it.

MS. SAMPSON: it's already in evidence. I just don't think we should be messing with evidence already in evidence. And it's already been played with that popped up to the jury. jury.

THE COURT: Well, see if you all can get -- if it's -- if it's something that can be done rather quickly to rename it, just rename it, since it's going to be back

1041

there with them. You all have a clean computer for ---

MS. SAMPSON: No, ma'am. We'll have to go find the computer. I don't -- we do -- sorry. We do have one available. I don't know where it is. But I will find it.

THE COURT: All right. All right. I'm sure one of your -- I can say this -- younger colleagues can probably figure out how to rename it. Because I don't. I rely my law clerks.

MS. PINNOCK: Yes, ma'am. It doesn't alter the recording; it just changes the file name.

THE COURT: Huh?

MS. PINNOCK: It just changes the file name. It doesn't alter the recording.

THE COURT: Yeah.

(Off the record briefly.)

THE COURT: See, Hazel says she knows how to do it. I don't -- I don't.

MS. PINNOCK: Thank you, Your Honor.

THE COURT: I would end up probably deleting the whole thing, something crazy like that.

All right. We ready to get started? We ready for the jury? Y'all -- do y'all need to take a break before we start? I know we've -- I mean, we've been here about an hour so. If anybody -- if you do, it's okay.

1042

(Off the record briefly.)

THE COURT: Okay. So y'all want to take about five minutes?

MS. EIGENBROT: Sure.

MR. MARSH: Sure.

THE COURT: Okay.

MS. SAMPSON: Sure.

MS. EIGENBROT: Thank you, Your Honor.

(Off the record from 10:09 a.m. until 10:23 a.m.)

THE COURT: All right. We ready to bring them in?

MS. SAMPSON: The state is, Your Honor.

(Off the record briefly.)

(Whereupon, the jury entered the courtroom at 10:24 a.m.)

THE BAILIFF: The jury is seated, Your Honor.

THE COURT: All right. Good morning, Madam Forelady and members of the jury. At this time -- I hope you had a restful evening.

At this time, as I stated to you last night, we are ready for closing arguments. And then I will charge you as to the law. First you will hear from the state. You will hear from Ms. Sampson ---

MS. SAMPSON: Yes ---

THE COURT: --- on behalf ---

MS. SAMPSON: -- yes, ma'am.

1043

THE COURT: --- of the state and Ms. Eigenbrot on behalf of the defendant. And then the state will have an opportunity to reply to the defendant -- the defense. Please play -- pay close attention to the attorneys and -- during their closing arguments.

Yes, ma'am.

MS. SAMPSON: Thank you, Your Honor. May it please the Court. May we have a moment set up?

THE COURT: All right.

(Off the record briefly.)

CLOSING ARGUMENT BY MS. SAMPSON

MS. SAMPSON: Good morning. A real man will be honest, no matter how painful the truth is. A coward hides behind lies and deceit. The truth in this case is that James Scott Turner was shot by Brian White, an admitted liar and a coward. And on December 8th of 2016, he went from being a coward and a liar to being a murderer.

At the beginning of this case, my cocounsel, Sam McGlothin, came before you and he told you that we had charged the defendant with murder; and that we, as the state, had the burden of proof; that we have to prove beyond a reasonable doubt Brian White committed murder. And we've done so. You heard from several witnesses over this week, hundreds of pieces of evidence, lots of

1044

testimony, hours' worth, right? Lots of breaks.

And at this point you now know he did it. Now, when you walked in this courtroom on Monday, I'm sure the last place you wanted to be is still here on Friday, hearing about somebody being dead. But you've paid close attention. You did your duty.

You've heard a lot about all of us and training. You heard people talking about they had training in GSR. We're all lawyers. We've all had training. The judge has had training on being a judge.

But nobody trained you all on how to be a juror, did they? We just sat y'all down in that box and said: "Listen." The only instructions you got was: "Don't talk to each other about this case." Right? That's it. And to listen to us.

So I'm going to give you some training, if you will, on how to be a juror. I've got one really big secret for you: You came in with everything you need to be a juror, which is your common sense.

Use your common sense and think, if the story the defendant told you yesterday made any sense at all. He told you he lies.

In fact, the first question from his attorney on redirect was: "Do you lie?"

And his answer was: "Yeah. I lie a lot."

1045

But now he wants 12 strangers to believe that he didn't do this; that he lied then, but today decided to tell the truth.

Now, you might have, before you walked in this room, heard of first-degree murder, second-degree murder. We've all seen that on TV, right?

Well, in South Carolina we don't have that. In South Carolina we just have murder. All right? So as Mr. Mr. McGlothin told you, we have to prove murder beyond a reasonable doubt. We have to prove to you that there was an -- an intentional, unlawful killing of another with malice of forethought, either expressed or implied. That's a bunch of legal mumbo-jumbo, right?

We lawyers like to make stuff up, use big words, right? So I'm going to break that down for you.

We have to show that he killed somebody. I think we would all agree -- even the defense would agree -- that we've done that. So what's evidence of the unlawful, intentional killing? Crystal and Nicole found Scott Turner shot in his van. Undisputed. He was shot multiple times in his van. Undisputed.

Dr. Durso came appear told you he died from multiple gunshot wounds. Undisputed. She was the one that kind of looks like a soccer mom; came up and told you about all the different holes in his body and how that's how he

1046

died.

What would be a lawful killing? You may be thinking, Well, I don't know that this is unlawful. Lawful would be something like self-defense.

Somebody comes at me; they're about to beat me up, so I shoot them. That would be lawful. I'm crazy as a bedbug and I think you're an alien, so I shoot you. That would be lawful. Okay?

We don't have that in this case. All Scott Turner was doing was sleeping in his van. He was doing nothing wrong. The one place he should be safe is asleep. Yet he died.

That's unlawful. It was intentional. He didn't accidentally get shot. You don't accidentally shoot somebody eight times.

I'm pretty sure that's on purpose. And there's no evidence that it wasn't. So we've proven the first part of murder: unlawful, intentional killing of another.

The second part is the law mumbo-jumbo of malice aforethought, right? So what is malice? It's a word that nobody in regular language ever uses. Have you -- nobody ever uses malice. I'm married and talk to my husband. I don't ever use that word.

You say stuff is bad. You say it's evil. You say it's a black heart. All those things are malice.

1047

How did we prove malice in this case? Well, there was malice aforethought in the defendant's text message. You're going to have copies of this. But I want you to look at what he sent to his friends at 11:52:24 (As read): "On some real shit. I was going to ask if I could take Mama" -- that's Crystal -- "to the room with Cole" -- Nicole -- "tonight and I'm going to come back here and wait and handle this" -- and I'm not saying that word.

That's what he said. And seven hours later he did it. Actually my math is terrible, because I went to law school, not for math. Six hours later he did it.

Because this message is at 11:52. And at 6:59 he's dead. That is aforethought. There was planning before he killed him.

What else did he tell you? What else do we know for sure? Without a doubt, the defendant goes to his friend, his good friend from high school, and tells him, "I'm going to go coyote-shooting. Can I borrow your gun?"

"Sure," his friend said. Because he's going to make some money to pay him the rent.

And his version of why he lied to that friend was, "Well, I didn't know if he'd give it to me."

Now, let's think about that. He told you that he didn't tell his good friend the truth because he didn't

know if he'd believe him. But the truth, according to him yesterday, was that Nicole was afraid the cracked-out victim would show up with a gun and do something to her and her mother.

You saw Jerry Rabon. South Carolina is one of the places where it's the highest crime is killing the women. You don't think that Jerry Rabon would've said, "Hey, if you need to defend your girlfriend, borrow my gun"?

Why'd you need to lie about that if that's truth? Just tell him. Heck, he told him where to carry it. He told him how to carry it. He told him all the rules about the gun.

Don't you think if you had just told him the truth, you needed it to defend yourself, he might've let you just borrow it? What you need to make some stupid story up about a coyote? But that's what he did.

He got a gun. That's malice aforethought. He then goes to the scene. Now, we talked about the scene as this No. 4 here, right? That's the -- that's Patricia Drive.

This is the trailer park. And that one right there is the trailer. If you look on the pictures, the van is right there between two trailers. That's it.

Now, does he pull in and park up here where he could be parking? Nope. Does he park right here where it

1049

would be an easy walk? No.

He parks where nobody can find him over here at the corner of Fairmont and Woodford. Right? So he can hide his car across from the apartments. This is an apartment. It looks like a duplex, but apartments is what everybody calls them. That's where he parks.

And I'm going to go back -- so that he can walk through the cut and go all the way -- and hide out. Because if he'd have parked here, everybody would have seen him leave. Everybody would have known that the person who shot drove off in a car.

And his car -- y'all have pictures -- it's real distinctive, right? It's not like he could just get into a black Ford Explorer or a Nissan Altima. He's got a car covered in rust, a gray Oldsmobile, with paper tags. It's pretty distinctive. You can't just drive that car and not think somebody's going to remember.

So instead, he parks it way over there so nobody will see him. Malice aforethought: He thought about it first. Then he goes to the scene, where our victim, unfortunately, is in the van. Now, I'm going to assume Ms. Eigenbrot's going to get up here and tell you, "Well, he didn't know he was going to be home," or "Only people who knew he was home was Nicole and Crystal, and they're liars."

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I'm not going to stand up and here and you those ladies are the most truthful. But what I am going to tell you is even if they did know he's home, there's no proof they told the defendant he was there. And even if there is, they did somehow put together -- we're going talk about that, plotting together, in a few minutes -- he'd still be guilty.

But when he gets there, the -- what they were supposed to do was have a fight. Remember that? Everybody talked about he was going take care of it. They talked about he was going to beat his ass. I'm sorry I used that language, but that's what they said: that he was going to beat him up. He told his friend Brittany he had brass knuckles to do the job, right?

And I want you to remember what the corner said. Scott Turner is only five-six and 134 pounds. I am bigger than that. Okay?

Now, would I win a fight against him? I don't know. I'm not trying to fight nobody. But neither was Brian White.

Because instead of having a fair fight, he shoots him while he's sleeping. Because Brian White's a coward. Remember, Brittany said he's soft. That's his own friend's description, not mine.

So instead of being a man and fighting him for

1051

taking the TV and selling it for crack, he shoots him in his sleep when he's defenseless. He shoots him so close that he leaves casings less than a foot away from the van. That's how close he is. He stands closer than I am to you to kill him. That is malice.

You stand over a sleeping man, put a gun just a few feet away from him, and shoot him six times. That's malice.

We showed you these pictures, not because I like bloody pictures. Because really, I don't. But we have to prove malice.

He shot him so close, the bullet goes through the back of his arm. Because as the doctor told you, he's laying asleep with his arm over his head. Does that sound like somebody you need to fight? It goes through his back arm, through his -- out his top, and into his head. Malice aforethought.

Shoots another time. Goes through his arm, through his shoulder, into his head, through his face. The man's asleep with his arm over; you shoot him in the face, so close that the bullet continues to go through to his ear. Malice aforethought.

He also shoots him through his arm, again so close, goes through his hand. Malice aforethought. And I want you to think about that bullet that goes through his hand

1052

and his arm. Because the one thing they can't get around -- they're going to tell you, "Oh, he didn't say to the police that he did it. They just made that up." And we're going to talk about that.

But in this made-up confession, according to them, how come he gets that detail right? He says the defendant -- victim is laying down, sleeping. He says the victim puts his hand up.

Here's the thing. And I want y'all to think about this. Use your common sense. No one -- no one knew that when he gave this statement, except for the person who shot Scott Turner.

The police didn't know that at all. Because the autopsy hadn't been done. So they couldn't provide him that statement. They couldn't put it in there, unless he told them.

Now, I assume the defense is going to get up here and say, "Well, Crystal and Nicole, they could have told him before he went and gave the statement," right? But remember, he denied giving it. So how'd it get in there? You can't be both -- you can't have it both ways.

She can't have told him and that's how it gets in there, yet he didn't tell her and the police made it up. He didn't tell them that; they just made it up, a fact they didn't know. They can't make up something they

1053

don't know.

But he can tell them the truth, occasionally. Even a broke clock is, what -- what, right twice? He told them in December because he hadn't had time to make up anything. He told them the truth in December of 2016. But he came before you all and lied.

He lies when it's convenient. He lies when he needs something. He needs you to believe him. And I need you to believe truth.

He continued to shoot him. Remember, there was a slug in his arm? It's not enough that he shot him twice in the head, which Dr. Durso told you would be kill shots. That would've killed him.

He then continues to shoot him in the hands. The poor man -- she told you his hand was probably under his head like a pillow. But he was so -- rigor at the time. She saw him. She can't tell you for sure. But he had so many holes in his hand.

Look at that. There's holes all in this poor man's hand. He's asleep, defenseless. That's when he decides to shoot him. Because that's malice aforethought, and that's what a coward does.

So -- I'm almost done, actually. Because as an attorney, this is what I love doing right now. I went to law school for trials. I went to law school probably to

1054

just talk and make people listen to me. But in honesty, I went to law school because I like doing trials.

But I struggled with what to tell you all. And I kept figuring out, why am I struggling? Because there's so much evidence. And then, I realized, that's the problem. I'm struggling because I don't understand why I'm standing here, having to explain this to you.

And then I remembered where I live. We live in America. If you want a trial, by God, I'll give you one. And that's what we did. He wanted a trial; he got one.

And we prevented -- provided you evidence to show that he's guilty. She's going to get up here, when I'm done, and tell you all the reasons why what I said isn't true. She's going to tell you that all this evidence points to somebody killing Brian -- excuse me -- to killing James Scott Turner, but it's not Brian White. I guarantee you that's what she's going to do.

So let's look at the facts beyond change, the things that point to him being guilty that, no matter what she says, are still going to be there. The defendant said he would take care of Scott Turner. Everybody told you that. Nicole told you that. Brittany told you that. The police told you that. He told you that. Facts beyond change.

The defendant is the only person with a gun that

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morning. Not any gun, this gun, only one. Now, she's going to tell you, "Oh, he -- he didn't know Crystal [sic] was going to use it." Didn't know she was going to use it? You told her you were going to take care of it.

She calls you, according to you, and asks you to get a gun. You go and lie and get a gun, and then you show up with the gun. But you didn't know she's going use it.

Well, what'd you think she was going to do, invited you over for Christmas dinner? I mean, she asked for a gun; you got her one. And you drove far away and point -- parked there so nobody would find you. Wow. She shot someone with it. That's his version.

The only person with a gun that morning is Brian White. He is the only person seen -- seen fleeing the scene, the only one. They stay and call 911. And y'all heard the call.

And I want to think about this: If you just shot a man, which is what they say Crystal -- Nicole did, would you call 911 for him? I mean, you want him dead. Why you want anybody to come help him?

They didn't run. Brian did. They didn't run because they didn't do anything wrong. And I guess they're going to say that, I guess, Crystal and Nicole were in cahoots with each other as well because they're mama and daughter and they'll lie for each other.

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But they were talked to separately. And from the beginning and in front of you all, what did Crystal say? When she hears the shots, she remembers what time it is because she looked at her clock and got immediately up. And they had her draw this, right?

Her bedroom is closest to the front door. She told you, for Nicole to come out the front door, she has to go past her. And that's what happened. Nicole's in the house when the shooting happens. That's what Crystal has always said.

That's what she drew on that board. They want you to believe that she ran around the back to a door that Crystal already told you doesn't work. But that's the truth. She was in the house. Because the only person who fled the scene was Brian White.

He then lied to the brunt responding officer. From the get-go, Brian is lying. He sees the responding officer within a couple minutes of this happening.

If she had -- let's just think about this. You just saw somebody should a man -- and you didn't know that was going to happen. And she gives you the gun. You don't know what to do, so you run.

And when you see a person who can help you, like an officer, do you say, "Hey, I just -- oh, my God, you'll never believe what I just saw. Oh, my God. Oh, my God"

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or do you continue to lie and be a coward like Brian? Which is what he did; he lied from the get-go. "Bullets were whizzing past me. The -- just go over there." Lies to the responding officer. You can't change that.

This gun he borrowed from his friend killed the victim. All the evidence points to that. They can't change that. He borrowed this gun. Not only did he borrow it; he gave it back.

I mean, how bad of a friend are you that a gun kills a man and you give it back to your friend and don't bother to tell him that, "By the way, that was used to somebody. You might want to do something about that."

I mean I hope none of my friends would do something like that to me. Because I surely would not still be calling them a friend. And then he lied to Jerry, not once but twice, about why he needed the gun and what he had done with the gun. They can't change that.

He told Nicole he took care of it. He did it on the control call that the police listened to. She told you about it. Investigator Truluck told you about it. Defendant said, "Yeah, I did that." Facts beyond change.

All these facts go to show he did it. He lied to police, over and over and over. He lied to everybody. Right? But you're supposed to believe that yesterday he told the truth.

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The only evidence that we have, only evidence that even they provided, proves he's guilty. The only evidence you got from the defense -- and they don't have to provide anything. They could've sat over there and not asked a question. He could've sat over there and not said a word.

But once he does, you to judge that. Because you are the only ones who get to judge the credibility of the witnesses and the evidence, only you. And he got up there and told you, "I'm a liar, but today believe me."

Because the only way he's not guilty is if you believe him. Because everything else points to him, everything. Now, you may say, "Ms. Sampson, in his statement, if it's true, he lies in it too."

Well, I want you to think about, when he's giving that statement, the other things he says. He's not a snitch, right? The only thing he lied about in December of 2016 to the police is where he got the gun. He didn't mention Brittany, and he didn't mention anything about Nicole.

Because he didn't want to implicate his friends. I guess there's honor among -- what is it? -- honor among thieves. He didn't want to be a snitch. I've heard snitches get stitches, right? That's what they say. So I guess he didn't want to do that.

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But everything else in his statement is true. And we went over with him every piece of his statement, right? And he said, "Oh, I said all of that, just not the part where I did it. That part was not me. They just made that up."

And I want you to think about that. We put up law enforcement officers who had 70 years' worth of experience between the three of them: Investigator Truluck, Capt. Scott McDonald, Sgt. Rob Martin.

And he -- Rob Martin was about to retire. Remember that? That's why he didn't go back and do a report or anything. Because he really just wanted to get out of there.

Would they really all get together and lie, put their pensions out there, their respect at -- all of that just to -- just to arrest Brian White, when they could've just as easily, if they wanted to pin somebody, pin it on Nicole? They didn't have to pin it on him. But the reason they arrested him is because of all the evidence that shows that he did it.

I'm going to talk to you about one -- a few little -- more things, and then Ms. Eigenbrot is going to get up here. And then you'll, unfortunately, have to listen to me one more time. Sorry about that.

So the judge is going to instruct you, as she said,

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on the law. I'm going to tell you right now, there's going to be a lot of it. It usually takes about 30 to 45 minutes. I'm going to ask y'all to pay attention.

But at some point y'all are going to zone out. Because that's just natural, right? You can only listen to somebody talk for so long before you start thinking about your grocery list or picking up kids or -- or whatever, right?

So try your best to listen, okay? But what I'm going to tell you is about a charge that you may have never heard of, which is called the "hand of one," or accomplice liability, okay? So in South Carolina, we say the hand of one is the hand of all, right? If one of you does something in a crime, then everybody else is guilty. All right.

So why am I talking about that? Well, Brian White got up here yesterday and told you that he and Crystal -- excuse me -- he and Nicole kind of did this together, but he didn't really know what she was going to go do. She just told him -- let me remember what she -- let's see if I can remember. She told him, "Okay. Well, go get a gun. Park far away. Bring it to me" -- but didn't tell him what he was -- she was going to do with it?

And then, after she shoots him, he takes the gun and runs and lies to everyone after that. Because of that,

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if you even want to try to believe that story -- I don't think we should. But if you want to, he's still guilty under what's called "hand of one is the hand of all."

So this law says if a crime is committed by two or more people who are acting together to -- in committing the crime, the act of one is the act of all. A person who joins with the -- another to commit an unlawful act is criminally responsible for everything that happens as a probable or natural consequence of the acts done in carrying out the common, planned purpose.

In other words, you told her, "I will take care of it." She calls you for a gun. You take the gun to her. She uses it to shoot him, and you take the gun away. You are as guilty for any act she did as she is.

So even if you want to believe what he told you -- I don't think you should -- but if you want to, he'd still be guilty. Still guilty.

Now, like I said, Ms. Eigenbrot's going to get up here and talk to you. Then I'm going to do a little reply. As she talks to you, I just want you to use your common sense. Does their version of the story make more sense, or does the truth?

Because the truth is way simpler. He got a gun. He shot him. When he gets caught, he tells.

Or Scott McDonald lied; Rob Martin lied; Cris

Truluck lied. Crystal Posey lied; Nicole Bryant lied; Brittany Steen lied. But he came in here after lying all day and told y'all the truth. That makes absolutely no sense. His version of the story makes absolutely no sense.

The evidence presented to you, the facts presented to you by the witnesses that took that stand, by the photographs, but the evidence, the swabs -- everything shows that Brian White is guilty of murder. And I ask that you find him guilty of murder. Thank you.

THE COURT: Thank you. I need you -- get you to move your board.

(Off the record briefly.)

THE COURT: All right. Yes, ma'am.

MS. EIGENBROT: Thank you, Your Honor. May it please the Court.

CLOSING ARGUMENT BY MS. EIGENBROT

MS. EIGENBROT: "You're not going to keep putting my mother through all this all year long. I'm tired of watching it keep happening to her. I promise that, dot, dot, dot, no more."

Sheena Nicole Bryant is the one that shot Scott Turner. That text says it all. She was done. Tired of him treating her mother like this.

It's a much longer text. And you all can read it

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back in the jury room when you get it. But that is the text that Nicole Bryant sent the victim in this case.

Now, as we said early on, Brian became a pretty fast suspect, understandably so. I mean, we're not denying that he was seen in the area. We're not denying people saw him, and it was weird.

We get that. I'm not denying it. Brian has never denied that.

But that doesn't make him guilty. Now, we've heard a lot about his statement. So I want to talk to you guys about that a little bit first.

Now, you guys will have a copy of his statement back there in the jury room with you. I want you to read it. I want you to read every single word of it.

Because when you do, you will realize that is not Brian talking. That's not how he speaks. So the verbiage she uses. It's not him.

It is the language of this law enforcement officer. I'm sorry not this one, but Mr. Martin, who typed the statement. It is their language, their words.

Now, I know it is extremely hard to understand why somebody in Brian's position, when they're a suspect in a murder case, why you would not read line for line the statement that law enforcement has presented to you. And even more so, why you would sign it without reading it.

But that's what happened.

We can't change it now. It's what happened. And people make mistakes. And Brian owned those mistakes. He got on that stand and owned every single lie he told, every mistake he made in this case, when no one else would.

Now, you have to also remember, as Ms. Sampson just stated, the law enforcement officers involved in this case all have extensive resumes, if you would so put it, in law enforcement for a long time. That means they're good at their jobs. They're good at interrogating people.

I mean, you saw Sgt. Truluck on the stand. You'd probably talk to him too. And Brian told you he made the mistake of trusting him. It's that simple.

And you have to remember, Brian is coming down from a situation where he's popping pills with his friends, smoking weed, staying up all night. Then a situation that he didn't think was going to happen, happens right in front of him. He sees Nicole shoot a man -- or what he believed to be a man at the time -- and then panics and runs away. I mean, seeing something like that would make anyone think not straight.

And then he's getting pulled into an interrogation, not knowing what's going on, not knowing what Nicole has

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said, not knowing where her mind is at. Because she's been with law enforcement the past three or four hours. And I want you to all, like I said, read this. And like Ms. Sampson talked about, there's two major lies in here: the one he told about the gun and where it happened or where he put it; and the one about Nicole. They did very specifically ask him if they were involved, and he said no.

But I want you to keep in mind what he lied about. He lied about bringing other people into this. He lied to protect the people he cared about. He loves Nicole. He sat on the stand and told you that.

Now, I know Nicole mentioned that she had no idea how he was still feeling. But even Mr. Martin told you all yesterday that he wore a fake wedding ring because he was in love with her. And we also heard that Nicole was dealing with some health issues. I -- I -- again, Brian's not thinking straight. But all he knows is he doesn't want Nicole to go to prison for this either.

So he lied to protect the people he cared about. He didn't want the police to go banging down Jerry's door. He didn't want them bothering him. Those are the two lies he told.

And again, I want to go back to their relationship. They both told you they lived together. They had dated

for a year. And Brian was definitely still sticking around.

And I know Crystal told you that she hadn't seen him in -- I don't know -- six months. Well, we know that's not true. And that's why I read those text messages to you guys with Investigator Metz here on the stand. And I know that part was little bit boring and maybe a little hard to follow.

But there was -- there was some evidence there that she was lying about that. He was picking them up; taking them to work; still around; was still doing what he could to help them, because he still wanted to be with Nicole. But you can't be with somebody if you go tattle on them and tell them what they -- tell them what they did.

I'm not saying it's the smartest thing in the world or the best way to deal with this type of situation. But the man loved her.

Now, we also heard a little bit about this controlled phone call that he made, where they keep getting this phrase that he took care of that. Guys, he's talking about the gun. Because he knows that the gun could also implicate her. Again, he's protecting her.

"I took care of it" is not admitting to murder. It is saying, "I took care of the one thing that could get

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you in trouble."

Now, we -- they kept talking about, in this statement, how and corroborated -- corroborated -- apologize -- details of the crime scene. Now, I've established, I think pretty thoroughly, that Brian knows the trailer. He's been there before. He lived there for a period of time. He knows about the tree.

And yeah. He told the same story that, you know, everyone else said about, leading up to the situation, everyone being at the Marriott; being in the hot tub; getting the phone calls from Crystal, those things.

But what Sgt. Truluck also told you is that an eyewitness can also provide those details. And that's what Brian was. He's an eyewitness. And any other details they're saying he provided he could've been told by Nicole.

And the state wants us to focus on this whole hand-raising situation. But their pathologist isn't the -- isn't the one that said that. The pathologist said he was like this. (Gestured.) So the pathologist disagrees with that detail.

Now, I made a huge deal about the police not recording these statements. And I'm going to do it again. Police say it's not their policy, which Sgt. Truluck made pretty clear he disagreed with. And he is

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absolutely right.

There's so many more things you can see in a video-audio-recorded interview that you will not see in a paper statement. That includes my client's demeanor, the specific questions he was asked, how he answered them, the attitude, the -- and the -- and the -- like I said, the questions the investigators asked him. You don't see all that without that recording.

I know. I know. They kept saying, "It's not policy. It's not policy. It's not policy."

You guys recorded the controlled call. You had equipment for that. Databases with this really good evidence? And then Mr. Martin got on the stand and talked about how you got to have databases to store this and that and all the other stuff.

Well, guess what I got in evidence while we talked about it? That recorded phone call. So if you're saying that you can record that, turn it over as appropriate evidence to me, why couldn't you record that call, especially when you agree that it makes a difference. It would be the most reliable way to tell you what somebody said in an interview.

And the fact of the matter is, it's their policy now. If Brian was arrested today, you all would've seen what his interview was like. They could've played an

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entire hour-long video of exactly what was said by all parties.

So what they want you to rely on is this statement that would not satisfy their policies today. (Demonstrated.) That is where Brian's statement belongs: in the trash. What he got on the stand and told you today is the real story. Nicole Bryant is the killer.

Now, I also asked you all -- my colleague asked you all to pay attention to a few things. One of those was the lack of -- what we call lack of investigation. They brought up a lot about GSR. Now, Sgt. Truluck argued with me a little bit about, "Well, I considered the victims at the time. I would never have run that type of test."

Well, let me put it to you this way. They -- when they get to the scene, there's a shooting victim. As an experienced law enforcement agent, he knows that when you shoot a gun, possibility of GSR. Now, we did hear it's a fragile and very easily transferred type of evidence. Totally get that.

The problem I have and the problem they have is that you still can do the test and not use it. You heard. All it takes is a little pad to pat your hands down.

Nicole and Crystal are the only two people at the scene when this victim is discovered. They acknowledged

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touching the body and touching the van where gunshot residue would likely have been. Now, does that prove -- would that have proved they were the shooter if we had a positive GSR test? No. But you know what it could've been used for? It could've been that hard evidence that Sgt. Truluck said he didn't have to confront them with later on.

You also heard, they don't have to test things right away. So even if they decided they were victims in this case and not suspects, even though obviously the suspicion started to arise during their interviews, they didn't have to test it. But they could have.

And they don't have to know that that doesn't prove they're the shooter. But again, it's something they could have used to -- with -- in conjunction with the text messages to confront these women to get the truth out of them.

But no. They were victims. I'm not -- I'm not going to mess with the victim.

Now, I also want to talk a little bit about the -- the clothing we made a big deal about in the trunk of Brian's car. And again, this is a situation where -- could've collected something, tested it when you felt like you needed it, and just didn't.

It doesn't hurt to collect anything. It doesn't

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hurt to collect the evidence and hold it in custody. And I can't find this photograph right now. But I showed it to you when I was talking to Sgt. Truluck. That Marriott video, that screenshot that he wants you just -- he wants to definitively say is Brian White, he cannot.

I don't know about y'all. But I saw one person in that photo. It was complete black back to -- to the back side. You can't see a face. You don't see a second person. I definitely didn't see Sgt. Truluck there, watching this person walk out the door.

So you can't say for sure that was Brian, which means you can't say for sure you knew what he was wearing. You got general descriptions from a law enforcement officer who didn't know what was going on at the -- at that point; from neighbors who only gave general descriptions about the what -- what the man was wearing.

And you have Brian telling you the clothes are in the trunk of the car. You didn't even collect them to try. Again, not something you have to test, but could have tested.

Then, I want to talk about the DNA on the gun. They brought their DNA analyst in here to tell you that Brian was excluded from the gun. Now, that doesn't tell us anything, because Brian's admitted to handling it. Okay?

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It's one of those situations where DNA doesn't always transfer to something. Right? But what the analyst also told you is there is at least a mixture of at least two people on there. Okay? At least two.

She can't say if it was male or female. But you know what that also means? We can't Nicole didn't touch that gun. Because we never tested it against her DNA.

They never went back and said, "Hey, Nicole, let me get a buccal swab from you. Let me test something."

She consented to the use of her phone. She consented to coming in an interview. She said she had nothing to hide. Why wouldn't she have given it up? Again, something that could have been tested later when needed.

Sgt. Truluck kept telling us, "I didn't have hard evidence. I wanted something solid to confront them with. What is more solid than possible DNA on the murder weapon?

But you didn't go do that. Because Brian had given a statement already. And then, again, I'm going to keep coming back to these phone records. Guys, they are long. It is thousands of pages that you go through when you get these things. Because they are loaded with information.

Now, he told you he looked at them. Didn't review page for page. And he also mentioned, you know, when --

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when an investigation is moving quickly, you don't always take the time to stop and sit and review all of that stuff.

There are text messages that prove these women are lying about what they're doing that night. At 5:21: "This MF just came in." It's on both of their phones. There are text messages after that: "I just heard a car. What?"

They weren't sleeping. Those are important. And he acknowledges he knew about the one of them. The one he didn't acknowledge knowing about -- and I'm going to show you -- is this photograph.

Now, I know it is exceptionally dark and difficult to read. But you all will have this in the jury room when you're back there deliberating. Look at it. Turn it this way. Turn it that way. I -- I know I had to when I was looking at it.

Combing through these records, something created the date of the murder at 5:36 the morning is something that should bring your attention. And that's what it did.

So we looked at it. Like I said, we turned it this way and that way to figure out what it was. Ladies and gentlemen, this picture is someone sticking their phone -- pulling back some of the blinds, sticking their phone out there, and taking a shot of the back of a van.

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Something Nicole acknowledged was the view from her window that night -- or would have been when that van was parked there. On her phone, 5:36 a.m.

So when I say lack of investigation, those are the things I'm talking about. Sure, they talked to lots of people; they took a bunch of statements.

But those are the things I'm talking about: when you know you have questions, when you have other suspects that you're not pursuing. Now, let me say rush to judgment. I also want to focus you guys in on the fact that Sgt. Truluck testified that after he spoke to Nicole and after they make the phone call, is when he started working on the warrants for paper -- the paperwork for the warrants. Didn't finish it.

But that's also why he probably didn't go pick them up. He sent two other officers to go do that, to talk to Crystal. He was already working on the warrants solely based on his conversation with Nicole and the fact that he was in the area right after the shooting.

Now, I do want to talk a little bit about motive. Now, the state has no obligation to prove motive to you guys. It's not part of the law. It's not part of the -- any of that. But it does make a cleaner story. Right?

Brian doesn't have a motive. Yes. He loves Nicole. Yes. He knows Scott's been hurting them. But think

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about what also mentioned to you. He'd moved out already. He was not directly being affected by Scott's behavior at that point in time. It was only Nicole and Crystal. All right?

He even mentioned that him and Scott worked together. Scott got him a job. There's no bad blood between the two of them.

Nicole and Crystal, on the other hand, it's a whole other story, guys. Now, I know Crystal got up on the stand. She was exceptionally emotional. I get it. I'm not taking that away from her.

But did you also see how quickly she flipped the script when she was confronted with a lie? How defensive she got?

Like I said, that text that Nicole sent at 1:44 a.m. to Scott, there's your motive. She's done with it. She has watched her mother for over a year suffer time and time again because of Scott's behavior.

Now, guys, I also want to be very clear about something. Scott is the victim in this case. Drug addiction is difficult. It is hard. It's hard on the families.

I'm not saying that justifies anything. But that was what was affecting Nicole and Crystal. You heard them both say it was affecting them both together. They

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are a unit: mother and daughter, who have lived together their entire lives. Nothing wrong with that.

But they've been together this entire time. They know each other's pains. They know each other's heartaches. So Nicole stood by and watched for an entire year as Scott struggled with his addiction and hurt her mother.

Now, I also want to go into the whole situation with Brian lying. He did, guys. I mean, I'm not -- I'm not denying that. Brian is not denying that.

But so did everybody else. Nicole and Crystal also lied. And it's like we don't want to talk about any of that stuff.

Crystal got up on the stand, told her story, and then denied everything else. She denied using her phone in the middle of night. Denied arguing with Scott prior to all this starting. Denied seeing Brian. Denied him helping them out. Denied the fact that he ever came to the house. All of it. Just deny, deny, deny.

And we know it's not true. We have stuff in black and white that proves they are lying. And Nicole -- I mean, she does the same thing.

"I didn't send any of those text messages. I was asleep. I was asleep. I was asleep."

Now, you all will have these T-Mobile records when

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you go back to the jury room. And you saw them on the big screen. And they're kind of tiny here.

But what I want you all to focus on more is after about 5 a.m., Brian and Nicole are exchanging text messages. Now, we know this because we know their phone numbers. Those are Brian's records. I've gone over Nicole's number numerous times; it ends in -[redacted].

The reason I'm talking about these text messages and laying out the time line is, one, again, to show Nicole lied. She was up, texting Brian. Told law enforcement, "I didn't have any communication with him until after the shooting," which is not true.

There were -- he sent her some texts around 2 a.m. And then she responded at 5. And there was a little bit of a conversation right there. And it was -- that conversation stops around 5:11. All right?

And that's when that text message afterwards from Crystal to Nicole happens at 5:21. And the time line in here is important. And Ms. Sampson is right. I am going to bring up the fact that Brian would had -- have had no way of knowing that Scott had come home. Because it's the truth. He would not have known.

And both Crystal and Nicole testified that when he would go on these binges or disappearances, they didn't know when he was coming back. They would never know for

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sure.

Brian went there that night to meet Nicole -- not to murder Scott, not to provide a weapon for her to murder Scott. His ex-girlfriend, but the girl he still wanted to be with, said, "Hey, I'm worried about him coming home. He may be armed. I'd like you to be here just in case. Please bring a gun."

Guys, I -- I know it's stupid. I -- and I -- I -- my client is one of my favorites. All right? But the level of stupidity -- you know, I get it. It's hard. It's -- it's hard to understand it.

But sometimes, y'all, it does happen. We do stupid things for the people we love people without realizing where it can lead. That's what he was going there to do that night.

He had no idea Scott was at the house when he got there. Again, I know, stupid. He listened to Nicole. Park somewhere else. He did it, though. And then he showed up. She snatched the gun from him, and she's the one who shot.

And they want to say, "Oh, well, he then took the gun and ran away and then started lying, covering up for her." I've never witnessed a shooting. I hope none of you have either.

But I don't know how I would react. So putting a

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definition on how someone should act after that situation is very unfair. What Brian did was he freaked out and he ran.

And yes. First cop that came along, he didn't say, "Oh, yeah. My girlfriend did it. Go get her."

Because he's still in shock. This just happened. It's not like 20 minutes had passed and he had time to think about it.

I'm -- the shooting happens; they call law enforcement. And law enforcement's on the scene really shortly thereafter. It's not like he had time to go back in and process all of this stuff.

But what he did do was point him in the right direction, not knowing what had happened, not knowing if someone was in the van, not knowing if it was Scott, knowing if Scott was actually hurt. So he pointed the cops at least in the right direction. And yes. He left. You would freak out too.

And I also want to be very clear that after he leaves, yes. He takes the gun back to Jerry's house. He didn't know what else to do. Jerry is expecting it back.

But no. He didn't tell him what happened. Why would he tell somebody just at that point what he saw when he wants to protect everybody? That's what he was doing. He's protecting everybody.

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Now, we also know from that meeting with Jerry that Brian was on the phone with Nicole. They had time to talk without law enforcement being present. Brian also told you he took them to the hospital.

And he deleted the text messages. Believe me, if I had the content of those text messages, I would've told them to you guys. But both Nicole and Brian deleted them, so we don't know what was said.

I don't know what was said in those phone conversations. We don't know what was said in person. But they had an opportunity to talk about things.

Now, the state wants to get up here to you and talk about "hand of one/hand of all," accomplice liability. What they didn't make clear was that Brian still has to form some intent prior to acting, meaning he would had to have some knowledge that Nicole wanted to shoot Scott at that point in time and that was the reason he brought her the gun.

That's not what happened. That's not what Brian told us. And like I said, I know the state wants to say how, "He lied; he lied; he lied; so he's lying to you now."

But again, think about all the witnesses that got up on the stand this week. Nicole got defensive when we confronted her with some lies. Crystal got super

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defensive; even tried to get off the stand.

Brittany was pretty open. I know she used some colorful language maybe not all of us appreciated. But she was pretty open about how she felt about the situation. Sgt. Truluck, who I'll -- is great at testifying, explained every single thing. And then, you get Brian. Sat there cool, calm, and collected; did not deny lying; accepted what he did; accepted the lies he told, mistakes he made; acknowledged the text messages he sent; all of those things.

And I know something you need to consider when you're talking about credibility and thinking about who you should believe. Now, whether his story sounds ridiculous or not to the state doesn't change the fact that he's the only one that at least admitted he messed something up.

And the state called him a coward. Well, maybe I have a different definition or a different thought of what coward means. But to me, a coward is -- would never be capable of walking up to somebody and shooting them at point-blank range.

That's not what I think of when I think of coward. I think of someone who got scared that would take from direction from somebody who's more stronger-willed, like Nicole.

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I mean, you heard from his best friend, Brittany. She called him soft. And yeah. I don't disagree with that.

And, you know, yes. Admittedly, Brittany is a friend of Brian's. Okay? And that's something we lawyers like to call bias.

She got up on the stand and told you she loves Brian. Can't -- didn't like Nicole. Okay. But also again, think about her demeanor, things she said, things she accepted, the things -- "Oh, if it's in there, I must've said it," at least acknowledging that, "Yeah, I probably said something like that," instead of outright deny, deny, deny.

She was open and honest. Open book. Didn't lie about her drug use. Didn't lie about stuff she was going through. So think about those things when you're back there, when you're talking about who you should believe in this case.

Now, y'all, it's been a long week. I know there's things I forgot to mention to you. And I'm going to ahve to sit down.

And as Ms. Sampson told you, she gets to get back up here and talk about all the stuff I just said, which is fine. But I want you to take back there with what you all remember and listened to, not just what her and I

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said. I know you all have been paying attention. I know you all have listened to everything, watched everybody.

Please take time to consider every little piece of evidence that you've heard and seen this week. I know it's a lot. I know it's a lot to process.

Brian White did not -- did not shoot James Scott Turner. He is not guilty of this crime. The only thing he's guilty of is loving a woman who knew she could use him.

Also, keep in mind, during her statement and through Sgt. Truluck's testimony, when she started talking about Brian, it's after he realizes she's lying about something, when she talks about how, oh, her phone fell under the trailer; she didn't know where it was and he got suspicious, that's when Brian's name got brought up from her. So also keep that in consideration when you're back there.

Brian is not guilty. Nicole Sheena -- or Sheena Nicole Bryant is. He did not do this. Thank you.

(Off the record briefly.)

REPLY ARGUMENT BY MS. SAMPSON

MS. SAMPSON: I'm going to do my best to keep this brief. Because I think I might be all that's between you and lunch, so I'm going to get this done. I could stand up here and go over point by point everything she said.

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But I think y'all have heard a lot and y'all are smart. And y'all still know that he's guilty.

But there's a couple of things that I want to talk to you about, based on what she said. Okay? In order for her client to be not guilty as she just told you, let's start with the biggest problem with that. She took his statement and threw it in the trash, because she says it's a bunch of trash.

But I want you to remember what he did when I went over his statement with him yesterday. He acknowledged he said everything in it except, conveniently, the part that said he was guilty. Everything else.

And then, he said, "Well, I didn't read it. And when they read it to me, I was busy eating my McDouble and some tea, so I didn't listen." Does that make any sense, when you're being charged with murder, that you wouldn't listen to what they're saying you said?

But let's just say you agree; maybe he didn't read it. Because let's be honest. We have all signed something we didn't read, right? Let's be honest.

You buy a house. Did you read all that stuff? I know I didn't. When you bought a car, did you read all that? No, I didn't. When you signed the waivers on your phone or clicked the buttons for the cookies, do you read all that? Nobody does, right?

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So let's just give him the benefit of the doubt. I blew up his statement so you could see it. Because let's be honest. It's a lot of writing. So maybe he didn't read all this and then signed it twice. I'll give you that.

Maybe he didn't read all this. Because it's a lot of words, right? Liked to read. Maybe he's tired; wants to eat his McDouble and he didn't sign it.

But how about this very last page? Because the reason the last page is so important, it's real short. And why is this important? It's the only part he says is wrong.

That's all he had to do, was read this last page. One line (As read): "Did anyone but you kill James Scott Turner?" "No."

That's all he had to do, was read that and go, "Oh, wait. I didn't say that."

"No. I took it upon myself and thought Scott and I were going to go man to man. But I guess I went straight for the gun. I wasn't intending for Scott to be dead. I'm sorry for what I did."

That's all he had to do, was read that and go, "Oh, wait. I -- I didn't say that. Why y'all putting that in there? I didn't say that."

He didn't have to read all of it, just this one

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page. Yet he signed it, swearing that it was the truth. Because it is.

And while we're talking about this statement, she wants you to believe that the cops just went for him because he was easiest and they just added this stuff in his statement. But let's think about how that would've had to happen. These investigators with 70-plus years of experience would've had to have been psychic. They would've had to somehow psychically connect that we're going to make it up that he's the person instead of somebody else. Because did you hear any evidence about collusion between the three of them? Nope.

They would also have to know he wasn't going to read it. They would also have to know he wasn't going to listen when they read it to him. There's no way they could know that. None.

He never said they forced him to sign it. If he'd have gotten up here and said, "They made me sign it; they held my -- they signed it; I didn't," that's what would've had to happen for that statement to not be true for him to not have signed it and known what was in it. He signed it because it's true. And that's what happened.

Did he try to protect his friends? Yeah, he did. Because he's a liar. That's what he does. Now, she

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wants you to believe -- and I'm just going to go over a couple more of her little points -- that he had no motive; he just loved Nicole and she was the stronger-willed person. There's a lot of quotes about love making you do some stupid stuff. And love's powerful.

And I know, when I was with my husband, I did some stupid stuff. But I never shot anybody. I drove across country and didn't tell nobody but me. But I didn't kill anybody in the process.

You do stupid things. But killing somebody? You might do that if you're Brian White. Because what did she just tell you? She said he didn't have motive because it wasn't affecting him. He had to leave his friends to go deal with it. His mama was having an anxiety attack.

And as far as her demeanor, they told you she flips back and forth. They said she was doing it that night. His mother was having a fit. His girlfriend he loves and wants back was having a fit.

They wanted this handled. And he said he would. He wanted to be the big man. That's what he said. That's what he did. And that's why he killed him.

That's his motive. He wanted her back, so do what she wants you to do. Do what she says. Beat him up. But you're a coward, so you shoot him instead.

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That's why he's a coward. He waited till he was defenseless and shot him. That is a coward, by definition.

She said he lies to protect the protect the people he loves. He's protecting himself today. He lied to y'all today -- yesterday to protect himself. He's a liar.

She's -- wants to blame the police -- wants y'all to focus on things that don't even matter. Did they change their policy to record now? Yeah, they did.

We also now have body cams that we didn't have five years ago. We also have Court TV. We also have Live PD. I think we've all seen that.

All things change, as technology evolves. That doesn't mean it didn't happen then. It doesn't mean it didn't happen. The reason she brings it up is if y'all are focusing on that and what maybe they could've done, then you won't focus on what they did and the truth, which is that he's guilty.

They talk about, "Well, they could've submitted her DNA for testing to see the mixture on this gun." Now, when we did we -- the first even thought in his mind, Investigator Truluck, is when Nicole starts getting fishy. He does think that she's part of it, but not the shooter.

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And why is that? Because Brian White says she's not. Does he think she's -- might be conspiring or covering up or somehow involved? Yeah. Does he get her DNA for the gun? No. Because the only people that touched this gun was Rabon and the defendant, at that time.

The only time the defendant gets in here and tells y'all that Nicole does it, how he could go get her DNA and maybe test it. I don't know. But if Brian White is telling him, "I did it"; if Jerry Rabon is saying, "Brian White had the gun"; if Nicole is saying, "Okay. I did lie about something, but it's about the text messages"; why would he think she was touching a gun?

He had no indication she touched the gun. So apparently, we're supposed to do tests for no good reason when we know it's not going to mean anything. Like we're supposed to test for GSR, even though everybody told you there wouldn't be GSR -- GSR; or, if there was, it wouldn't mean anything. That's what she just said.

But we're supposed to do it anyway? As I heard a lady say one time, ain't nobody got time for that.

Now, she wants you to look at these text messages and that they were lying and that's what you're supposed to use that Crystal and Nicole were lying. I told you in my closing they were lying. They're not the most

1090

truthful people. I got that. We all got that. We're dealing with a bunch of liars.

So let's look at the actual evidence, okay? She talked about that after this was over, Brian and Nicole -- Crystal get together and erase text messages out of their phones, so you don't have what they might've texted each other. Now, the problem with that is we had an expert up here -- remember Mr. Metz, same guy?

And we asked him: "If you delete messages from your phone, can you still download them?"

His answer was: "Yes."

And he said it sometimes depends on the phone. Now, why is that important? Why didn't they ask him: "Were these the phones that you could not see deleted text messages on?" He didn't do it. He told you, you would still see the deleted messages. We don't have them because it didn't happen.

Brian White got up here and lied to you about it. He lies when it's convenient. He is lying now because he wants you to find him not guilty.

Now, she said you shouldn't judge what he did after because that's unfair. My parents and me -- and I teach my children this: Once you lie, that's the worst thing you can do. Right? I tell them: You could cut school; you could have a fight; you could get an F on a test.

1091

You could hurt my feelings.

At least all of that, we can come back from. You can apologize. You can study and get a better grade. We can -- you can get in trouble skipping school. We can get past all that.

But once you lie, I can no longer believe you. I have to look at what everybody says and believe them first instead of you, because you're a liar. Or I have to look at the other evidence to see if you're telling the truth. Right?

You can't believe Brian White. Because every time he opens his mouth, a lie falls out. He told you that. So if you can't believe him, he's guilty. All the evidence points to him. All of it.

She stated he was calm, cool, and collected while he was testifying. That's because he's used to lying. He told you that. So of course, he's calm, cool, and collected.

Let's think about this. For his version to be true, let's talk about it. If he is telling the truth yesterday, he lied to the woman he loved, Nicole, because he said he was going to take care of it, and that he had taken care of it. He lied to her mama, Crystal, when he said he'd take care of it, the woman he -- mama's that he loved. He lied to his best friend, Brittany Steen, when

1092

he said, "I'm going to go take care of it." He lied to a girl that he says is his sister, Kelly, when he said, "The only person out there when James Scott Turner is shot is me and James Scott Turner." He lied to the police when he said he got rid of the gun. He lied to his childhood friend, not once but twice.

But he comes in to 12 strangers and tells the truth. That's the only way he's not guilty. Ladies and gentlemen, that just doesn't make sense.

It just doesn't make sense that law enforcement would lie to you about him saying he did it. It doesn't make sense that he would use this gun and not be involved. It doesn't make sense.

Now, the judge is about to instruct you on the law. And then you'll be able to go back there and be done listening to us talk. I ask that you remember everything you heard because all of it points to the defendant's guilt.

He lies and he lies and he lies. He's a coward. And he shot James Scott Turner, killing him. And that's why you should find him guilty. Thank you.

THE COURT: All right. Let me get you to move the easel.

MS. SAMPSON: Oh, wait. I'm sorry. I didn't hear you.

1093

(Off the record briefly.)

CHARGE OF THE COURT

THE COURT: All right. Ladies and gentlemen of the jury, you have heard all of the -- of the, and you have heard the arguments of the parties involved in the case. It is now my responsibility to charge you as to the law.

I remind you that during this trial, you and I have certain duties to perform. As the trial judge, it is my responsibility to preside over the trial of this case. And I also have the duty to rule on the admissibility of evidence offered during the trial.

You are to consider only the competent evidence before you. If there was any testimony ordered stricken from the record in this case during this trial, you must disregard that testimony. You are to consider only the testimony which has been presented from the witness stand, any exhibits which have been made a part of the record in this case, and any stipulations of counsel.

I have the additional duty to charge you the law applicable to this case. As the presiding judge, I am the sole judge of the law. And it is your duty as jurors to accept and apply the law as I now state it to you.

If you already have any idea as to what the law is or what the law ought to be and it does not agree with what I tell you the law is, you must abandon this idea.

Because you have sworn to accept the law and apply the law exactly as I state it to you.

In every case tried in this Court before a jury, the jury becomes the sole and exclusive judge of the facts in a case. A trial judge cannot state, comment on, or make any statement to a trial jury about the facts in a case. Since you, the jury, are the sole judges of the facts in this case, you are not to infer, from what I have said during the progress of this trial in ruling upon the admissibility of evidence or otherwise or anything that I say now during the course of this instruction to you, that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts in this case. This is a matter solely for you, the jury, to determine.

As jurors, it is your duty to determine the effect, value, weight, and truth of the evidence presented during this trial. You must not consider as evidence any statement of counsel -- any statement of counsel made -- you must not consider as evidence any statement of counsel made during the trial. Statements of counsels do not constitute evidence. Rather, counsel is articulating the position and contention of their clients. This rule applies to opening statements and closing statements.

There are two types of evidence which are generally

1095

presented during a -- a trial: direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to -- given to either direct or circumstantial evidence.

However, to the extent that the state relies on circumstantial evidence, all of the circumstances must be consistent with each other and, when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as -- as suspicious, the proof has failed.

The state has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the state, regardless of whether the state relies on direct evidence, circumstantial evidence, or some combination of the two.

Ladies and gentlemen of the jury, necessarily, you must determine the credibility of witness who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze

1096

and to evaluate the evidence and determine which evidence convinces you of its truth.

In determining the believability of witnesses who have testified in this case, you may believe one witness over several witnesses or several witnesses over one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety.

You made consider whether any witness has exhibited to you any interest, bias, prejudice, or other motive in this case. You may also consider the appearance and manner of a witness while on the witness stand.

Ladies and gentlemen of the jury, during the course of this trial, you've heard from several expert witnesses. As I told you earlier during the trial, the rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call expert witnesses. A witness who, by education and experience, has become an expert in some art, science, profession, or calling may state an opinion as to relevant and material matters in which the witness claims to be an expert and may also state the reason for the opinion.

1097

You should consider any expert opinion received in evidence in this case and, like any other evidence, give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience, or if you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you must disregard the opinion entirely.

An expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted.

There has been evidence presented that witnesses have made prior statements which are not consistent with the witness's present testimony. You may use the evidence to -- to decide whether to believe the witness. You may also use evidence of the earlier contradictory statements to determine the truth of those statements.

It is up to you to decide whether to believe the earlier statements testimony given at trial. If a witness is shown to have knowingly testified untruthfully concerning any material matter, you may consider this in determining whether to trust the witness's testimony as to other matters. You may reject all of the testimony of

that witness or give all or part of the testimony the weight you think it deserves.

Ladies and gentlemen of the jury, the indictment charges the defendant with murder. I remind you that the fact that the defendant was arrested, charged, and indicted in this case is not evidence in this case and cannot be considered by you as evidence of guilt, nor does it create any presumption or inference of guilt. The document is simply the formal written instrument which contains the charge made against the defendant. It is the formal document by which the case is brought into this Court.

The defendant in this case has pled not guilty to this indictment. And that puts the burden on the state to prove the defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent. I charge you that it is an important rule of the law that the defendant in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed to be innocent of the crime for which the indictment was issued, unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

This presumption of innocence does not end when you begin your deliberations, but it accompanies the

1099

defendant throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt. The presumption of innocence is like a robe of righteousness placed about the shoulders of the defendant, which remains with the defendant until it has been stripped by evidence satisfying you of the defendant's guilt beyond a reasonable doubt.

The presumption of innocence is not a mere legal theory. It is not just a legal phrase. It is a substantial right to which every defendant is entitled unless you, the jury, are satisfied from the evidence of the defendant's guilt beyond a reasonable doubt.

What is reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The state has the burden of proving the defendant guilty beyond a reasonable doubt.

Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight, or the preponderance, of the evidence. In criminal cases the state's proof must be more powerful that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves

1100

you firmly convinced of the defendant's guilt. There very few things in this world that we know with absolute certainty. And in criminal cases the law does not require proof that overcomes every possible doubt.

If convinced that the defendant is guilty of the crime charged, you must find the defendant guilty. If, on the other hand, you think there is a real possibility the defendant is not guilty, you must give the defendant the benefit of the doubt and find him not guilty.

Ladies and gentlemen of the jury, in order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the state for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence.

Criminal intent must be proven by the state beyond a reasonable doubt. Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation. There's no way to prove intent to a mathematical certainty. There's no way medical science can dissect a person's brain and determine what the person had in mind.

So the law says that criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the

1101

element requiring intent was present. It is not necessary to establish intent by direct and positive evidence. But intent may be established by inference in the same way as any other fact: by taking into consideration the acts of the parties and all the facts and circumstances of the case.

Criminal intent is a mental state, a conscious wrongdoing. It is up to you to determine what the defendant intended to do based on the circumstances shown to have existed. Criminal intent can arise from action or a failure to act. It may arise from negligence, recklessness, or an indifference to the duty or to consequences that is considered by the law to be the equivalent of criminal intent.

Ladies and gentlemen of the jury, the defendant in this case is charged with murder. The state must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought. Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

Malice aforethought does not require that malice exists for any particular time before the act is

1102

committed. But malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act.

Malice aforethought may be express or inferred. These terms, express and inferred, do not mean different kinds of malice, but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved.

Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind would be express malice.

Where a person -- next we'll talk about proximate cause. Where a person inflicts a fatal injury on another person and that other person dies at a later time, you must be convinced beyond a reasonable doubt that the infliction of the first injury was the proximate cause of the victim's death.

There must be a chain of causation from the time of the injury inflicted by the defendant until the time of the victim's death. Proximate cause does not necessarily

1103

mean that it occurred immediately prior to death.

There -- there may be more than one proximate cause. The acts of two or more persons may combine together to be a proximate cause of the -- of the death of a person. The defendant -- the defendant's act may be regarded as a proximate cause if it is a contributing cause of the death of the victim.

The fact that other causes also contribute to the death of the victim does not relieve the defendant from responsibility. The defendant's acts need not to be the sole cause of death, but must be a proximate cause contributing to the death of the victim.

Ladies and gentlemen of the jury, the defendant in this case gave a statement. A -- a statement alleged to have been made by the defendant has been admitted into evidence in this case. While the Court has determined that the state is -- the statement is admissible, I instruct you that you make the ultimate decision of whether or not the defendant made the statement.

If the defendant did make the statement, you must determine whether the statement was made by the defendant voluntarily and of his own free will. This means that the statement was not caused by pressure, force, fear, threats, coercion, intimidation, or by hope or a promise of leniency or a reward of any kind. In determining

1104

whether the statement was voluntarily -- voluntary, you should consider both the characteristics of the defendant and the details of the questioning.

Some of the factors that you must consider are the age of the defendant, the defendant's education or lack of education, the defendant's mental ability or capacity, the defendant's IQ or intelligence, the defendant's background and environment, the place and length of detention, the nature of the questioning, and the advice or lack thereof to the defendant of his constitutional rights, including but not limited to the right to remain silent; that any statement could be used against him in a court of law; the right to have a lawyer present; that if he could not afford a lawyer, a lawyer would be appointed to represent him without any cost; and that he could stop making a statement at any time.

You must carefully consider all of the surrounding circumstances before you give any weight to any alleged statement. The state has the burden of proving beyond a reasonable doubt that the alleged statement was voluntary. If you determine it was, you may give the statement any further consideration that you deem proper.

You must decide what weight, if any, should be given to the alleged statement. If you determine the alleged statement was not the free and voluntary statement of the

1105

defendant, you should not consider the statement at all.

Ladies and gentlemen of the jury, the defendant contends that there is evidence before you indicating that someone other than he may have committed the crime and that evidence raises a reasonable doubt with respect to the defendant's guilt. In this regard, I charge you that the defendant in a criminal case has the right to rely on any evidence produced at trial that has a rational tendency to raise a reasonable doubt with respect to his own guilt.

I have previously charged you with regard to the state's burden of proof, which never shifts to the defendant. The defendant does not have to produce evidence that prove -- proves the guilt of another, but may rely on evidence that creates a reasonable doubt. In other words, there's no requirement that this evidence must be proved or even raises a strong probability that someone other than the defendant committed the crime.

You must decide whether the state has proven the defendant's guilt beyond a reasonable doubt, not whether the other person or persons may have committed the crime.

Mere presence: The mere presence of a defendant where a crime has occurred or the mere association by a defendant with people who have committed a crime is insufficient proof that the defendant has committed a

1106

crime. Evidence that an individual is present at the time a crime is committed is not in and of itself sufficient proof that the individual committed a crime.

The burden is on the state to prove every element of the crime charged. If you find, after reviewing all the evidence, that the state has proved the defendant was only present at the scene of a crime and that the state has not proved beyond a reasonable doubt any participation the crime, then you are required to find the defendant not guilty.

Next we will talk about accomplice liability. If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan and purpose.

For example, two people can be guilty of killing another person when only one person -- one of the two had a gun. There was only one bullet, and only one of the two fired the shot that caused the death. If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all. As it is sometime said or called, the hand

1107

of one is the hand of all.

Prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed, is not sufficient to convict the defendant is a principal.

Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arranged plan or a common scheme is necessary for a finding of guilt as a principal.

The state must prove beyond a reasonable doubt by competent evidence that a theory of hand of one is the hand of all. A principal in a crime is one who actually commits the crime or who is present, aiding, abetting, or assisting in committing the crime.

When a person does an act in the presence of and with the assistance of another, the act is done by both. Where two or more acting with a common plan or intent are present at the commission of a crime, it does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all.

Present at the commission of a crime means to be sufficiently near to aid and abet and assist in the

1108

commission of the crime. However, mere presence at the scene of a crime is not sufficient to convict one as a principal on the theory of aiding and -- and abetting.

Intent is also a necessary element, for there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act. Intent means intending the result which actually occurs, not accidentally or involuntary. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. The state must prove these elements beyond a reasonable doubt.

Ladies and gentlemen of the jury, the state are entitled to the individual opinion of each juror on the issues of fact in this case. It is the duty of each of you to consider and weigh all of the evidence in case and, from such evidence, to determine, if you can, the question of the guilt or innocence of the defendant.

There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You're expected to use your good sense, consider the evidence in the case for only those purposes for which it has been

1109

admitted, and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If the accused be proved guilty beyond a reasonable doubt, say so. If not so proved guilty beyond a reasonable doubt, say so.

Your verdict in this case will be one of two forms. If, from the evidence and the law, you find that the defendant is not guilty, you will circle not guilty on the verdict form that I will give you and the forelady will sign her name. If, on the other hand, you find that the defendant is guilty, based upon the evidence and the law which you have heard, you will circle guilty on the verdict form and the forelady will sign her name.

It must be guilty or not guilty. Your verdict must be unanimous. The law requires that a jury verdict be unanimous, which means that all jurors must agree. The only two forms of the verdict are guilty or not guilty.

Madam forelady, once the jury reaches a verdict of not guilty or guilty, circle the verdict on the face of the verdict form, sign on the verdict -- under the verdict to signify that what you have circled is the verdict of all jurors; then notify us that you have reached a verdict by knocking out the door.

Ladies and gentlemen of the jury, I will give you a

1110

copy of these instructions in written form. Do you -- during your deliberations, you may refer to the instructions to guide your decision-making. You must consider the instructions as a whole and not follow some and ignore others. Please return the instructions to the Court at the time your verdict is rendered.

Madam Forelady and members of the jury, I have in my hand what we call is -- what we call a verdict form. It reads: "The State of South Carolina, County of Richland, in the Court of General Sessions for the Fifth Judicial Circuit, Indictment No. 2019-GS-40-3681, State of South Carolina v. Brian Neil White, defendant.

"Verdict Form: Please circle the appropriate verdict below and follow the accompanying instructions carefully. Number one: As to the indictment alleging murder, we, the jury, unanimously find the defendant" -- and there is -- you'll written on here, Madam Forelady, it says "guilty" or "not guilty."

You will circle one or the other. Stop in your deliberations. You will sign the verdict form, date the verdict form. Then you will knock on the door and inform the bailiffs that you have reached a verdict.

All right. I am going to send you all back into the jury room. But please do not begin deliberating until you have received the instructions from the bailiffs to

1111

begin deliberations. And you also -- we're going to send back the exhibits.

There is also a laptop?

MS. SAMPSON: Yes, ma'am.

THE COURT: And then, it's a clean laptop? There's nothing else on it? And it has no -- you can't get on the internet or anything with it.

We're going to send that back with you. I think there's some recordings or something that is in evidence. If you wish to use the laptop, it will be back there for you to use.

You -- you will have -- we'll send back the exhibits, the verdict form, the jury charge. And then, once you receive the instruction and -- from the bailiffs, you may begin your deliberations. All right?

JURY FOREPERSON: Thank you.

THE COURT: All right. Thank you.

JURY FOREPERSON: Thank you.

THE COURT: Please do not discuss the case until we tell you to begin your deliberations.

(Whereupon, the jury exited the courtroom at 12:09 p.m.)

(Off the record briefly.)

THE COURT: All right. Any objections or exceptions?

1112

MS. SAMPSON: No, ma'am.

MS. EIGENBROT: No, Your Honor.

THE COURT: All right. We will mark the jury charge as Court Exhibit 7.

I need you all to take a look at the exhibits. Y'all want to look at the laptop to make sure it's clean? You can do that. And we'll send it all back. And then we'll have them begin their deliberations.

All right. Thank you.

(Off the record briefly.

THE COURT: And I need the alternate. Hold up one second. Let me excuse the alternate. Any objection to me excusing the alternate at this time?

MS. EIGENBROT: No, Your Honor.

THE COURT: All right.

MS. SAMPSON: No.

THE COURT: All right.

(Off the record from 12:10 p.m. until 12:13 p.m.)

THE COURT: All right. I -- I was -- actually, I was going to ask you -- the juror -- you can stand right there. One -- the juror in the red, I know -- I saw you saying something, but -- yes, ma'am?

THE DEPUTY: Yeah. He kept looking down. And at one point he looked up at his friends and -- and nodded. So I kind of was, like, watching the side of me. And it

1113

was down, up, down. So it was very suspicious.

So when you dismiss them, I -- "Do you -- do you have a phone?"

He said, "No."

I said, "You weren't texting?"

And he said, "No."

It was very, very suspicious. He wasn't paying attention one bit during the -- the reading and stuff.

THE COURT: All right. No, he wasn't paying -- he wasn't paying attention.

MS. EIGENBROT: That's what -- Your Honor, he was looking around the entire time ---

MS. PINNOCK: Right.

MS. EIGENBROT: --- during both closings.

THE COURT: Yeah. He -- yeah. He wasn't -- yeah. He was -- he's -- I -- he was kind of fidgeting the whole time. I can ask. I can ask. I mean, he was looking back and forth up there. I mean, we can have -- ask the bailiffs to ask him does he have a phone.

(Off the record briefly.)

THE COURT: I -- I thought you -- y'all said that the girl was that said she's his girlfriend.

(Off the record briefly.)

THE COURT: But the guy in the red is the one that keeps making contact with -- eye contact with them.

1114

THE DEPUTY: Yeah. Your Honor, that's what they would be -- be aware of. So I ask -- I ask them, you know, who -- who they with. So they told me -- they told me that they're friend with him. So ---

THE COURT: The guy with the red jacket?

THE DEPUTY: Yes.

THE COURT: Yeah.

(Off the record briefly.)

THE COURT: Okay. All right. I can have the bailiffs ask him does he have a cell phone. I'll be glad to hear from -- or I can bring him in here and ask him does he have a cell phone on him. I mean, she said it appeared as he -- as if he was texting so ---

MS. EIGENBROT: Your Honor, I -- I feel like it's probably sufficient just to have the bailiffs ask him. I mean, I don't -- he's been looking around the entire ---

MS. SAMPSON: Entire time.

MS. EIGENBROT: --- time.

MR. MCGLOTHIN: Yeah.

MR. PRATT: Yeah.

THE COURT: You said it's what, now?

MS. EIGENBROT: IT's sufficient to let the bailiffs ask him. I mean, he's been looking around the -- I would ask that he maybe ask the entire jury group as well, not ---

1115

MS. SAMPSON: Instead ---

MS. EIGENBROT: --- single ---

MS. SAMPSON: --- of just him.

MR. PRATT: Yeah.

MS. EIGENBROT: Yeah.

MR. MARSH: Yeah.

THE COURT: Okay.

MS. EIGENBROT: But, I mean, he was looking around the entire time that we've been ---

MS. SAMPSON: Yeah.

MS. PINNOCK: The trial.

MS. EIGENBROT: --- in trial.

MS. SAMPSON: But I -- I agree with Ms. Eigenbrot. When we were up there, he was doing -- I mean, he was equal-opportunity not paying attention.

THE COURT: So I don't need to ask -- you want me to bring the entire jury in and ask them if ---

MS. EIGENBROT: No.

THE COURT: --- they have ---

MS. EIGENBROT: I -- I ---

THE COURT: --- a cell phone?

MS. EIGENBROT: --- I think ---

THE COURT: I mean, because they've already taken the cell phones from them. But he had his coat -- he had a big coat. Did you take a cell phone from him?

1116

THE BAILIFF: Miss Shirley took his -- when they come in, we ask them for the cell phone. Now, being honest ---

THE COURT: Did she ---

THE BAILIFF: --- or not ---

THE COURT: --- take one from him, though?

THE BAILIFF: I can ask her.

THE COURT: Yeah.

(Off the record briefly.)

THE BAILIFF: Judge, Miss Shirley was back there, so she -- she can explain it.

THE COURT: Did he -- did you collect a cell phone from him?

THE BAILIFF: Judge, I'm not sure. But I know I -- as they come in, I take their phones. I mean, I don't take it. I tell them to put it in the box.

Just now, when they came in, they said he said, "Tell them I didn't have no phone out there."

And I said, "Nobody said anything to me about you had a phone."

And then I got a knock on the door and the forelady said, "They accuse him of having a phone. He was tying his shoestring. He was not texting."

And that's all -- I said, "I don't know anything about what y'all talking about." I mean, you know,

1117

excuse me.

And then I said -- they said, "Do you want me -- do you want us to write something down that we all, you know, witness?"

And I said, "Until I hear something."

So I didn't hear anything until now -- until now. So -- okay. I mean ---

THE COURT: All right.

(Off the record briefly.)

THE COURT: All right. So then, based on the conversation with Miss Shirley, I don't think we need to -- it -- it's -- he doesn't have a phone. And -- and apparently, his fellow jurors are vouching for the fact that he doesn't have a phone. So ---

THE BAILIFF: Unless you want me to go in there and pat him down?

THE COURT: No, ma'am. No, ma'am. No, ma'am. Please do ---

THE BAILIFF: I don't think we need to take that any farther than that.

THE COURT: All right. So everybody's fine with not saying anything additionally to him about a phone?

MS. SAMPSON: Yes, ma'am.

MS. EIGENBROT: Yes, Your Honor.

THE COURT: Okay.

1118

MS. EIGENBROT: Thank you, Miss Shirley.

THE COURT: All right. Well, thank you.

(Off the record briefly.)

THE COURT: All right. Well, we will be -- we will be at ease ---

MS. PINNOCK: We got to ---

MS. SAMPSON: Are you still bringing the alternate ---

MS. PINNOCK: Alternate.

MS. SAMPSON: --- in?

THE COURT: Oh. Bring the alternate. So is any objection to me releasing the alternate?

MS. SAMPSON: No, ma'am.

MS. EIGENBROT: No, Your Honor.

THE COURT: All right.

(Whereupon, the alternate juror entered the courtroom a 12:20 p.m.)

THE COURT: All right. You can stand right there. All right. And your number -- Juror No. 126, Mr. Howard

JUROR: Yes, ma'am?

THE COURT: All right. Mr. Howard, you were selected as our -- one of our alternates. And as you saw, one of the alternates was seated. But at -- we are at the point now where it appears that all of the jurors -- we have 12 jurors. So we no longer need your service.

1119

I do want to thank you on behalf of everyone here for your service this week. And you are more than happy to hang around to see what the -- your fellow jurors come up with, in terms of a verdict. Your lunch should be here. You can grab your boxed lunch and leave if you'd like, or if you want to find a -- a place in the courtroom -- in the courthouse to eat while you wait on a verdict, you are more than welcome to do so.

But you, at this point, are free to leave. And you can discuss the case with anyone that you choose to. If you do not wish to speak with anyone, you do not have to. However, if you do wish to speak with anyone, you can.

And you -- like I said, is his lunch back there?

DEPUTY CLERK OF COURT: Yes, ma'am.

THE COURT: All right. Your lunch is back there. So they'll give you your -- your -- your lunch. And thank you again for your service here, sir.

THE BAILIFF: Yes, Your Honor. Thank you.

THE COURT: All right. Thank you.

(Whereupon, the alternate juror exited the courtroom at 12:21 p.m.)

THE COURT: Okay. All right. So here's the jury charge. She's going to mark that. That's the right one. Yep. . Give that to her.

(Whereupon, Court's Exhibit 7 was marked for

identification.)

THE COURT: Here is the verdict form. Give that to her. And we'll call you all if we hear anything.

(Off the record from 12:21 p.m. until 12:31 p.m.)

(Whereupon, the jury began deliberating at 12:31 p.m.)

(Off the record from 12:31 p.m. until 1:46 p.m.)

THE COURT: I don't know if it's -- this will be Court Exhibit, what, 8?

(Off the record briefly.)

THE COURT REPORTER: Yes, Your Honor.

(Whereupon, Court's Exhibit 8 was marked for identification.)

THE COURT: Okay. So the question is (As read): "Whose number ends in -[redacted]? Whose numbers end in -- whose number ends in -[redacted]? Whose number ends in -[redacted]? And whose number ends in -[redacted]?"

So I'm assuming they must be looking at the text messages y'all sent back there, and they don't know who the text messages belong to. Of course, I -- we can't -- I can't, like, answer the question directly. And us trying to pull the numbers and the testimony is going to be quite a pain.

What -- does anybody have an objection to them knowing which numbers belong to ---

1121

MS. SAMPSON: Without -- to be honest, Your Honor, I don't remember, based on those numbers -- are they all the ones we identified?

MS. PINNOCK: Well -- I'm sorry. Could you run through them again?

THE COURT: Ends in -[redacted], -[redacted], -[redacted], and -[redacted]. I mean, I -- I -- what I was going to suggest is ---

(Off the record briefly.)

THE COURT: If everybody agree to the -- because I was just thinking about this, walking down the hall, the best way to do this, short of having to pull up testimony and then find testimony throughout the trial to -- to identify which number goes with which -- which person, only thing I could think about was doing some kind of stipulation. And I don't know. I've not done that before, a stipulation of counsel, at this point, just stipulating as to who the numbers belong to. That's the only thing that I could think of.

MS. EIGENBROT: I'm -- again, Your Honor, I'm -- I'm -- without looking at the records, I couldn't guarantee it. But I -- I'm fairly certain that -[redacted] number is not anyone related with the case.

MS. SAMPSON: -[redacted] was nobody. That's who the victim called, I believe.

MS. EIGENBROT: Right.

1122

MS. SAMPSON: I don't know who that is.

MS. EIGENBROT: I think there was some -- I think there was some allegation that Scott was cheating on her or talking to another woman and ---

MS. SAMPSON: That didn't come out, but ---

MS. EIGENBROT: Right.

MS. SAMPSON:

MS. EIGENBROT: But that ---

MS. SAMPSON:

MS. EIGENBROT: --- but I'm saying there -- that there was a bunch of phone calls between that -- him and that number at some point.

THE COURT: Okay. So what about [redacted]?

MS. EIGENBROT: That one, I -- I do not know. I would need to know the area code to tell if it's anyone else related to the case.

(Off the record briefly.)

THE COURT: All right. So what do y'all think? How do y'all -- I mean, I don't -- I mean, I can -- we can bring them back in and she can try to figure out the two numbers that we already know. I can't -- short of me saying the parties have stipulated that [redacted] belongs to --- Crystal?

MS. EIGENBROT: Uh-huh.

MS. PINNOCK: Uh-huh.

1123

THE COURT: And [redacted] belongs to ---

MS. EIGENBROT: Nicole.

MS. SAMPSON: I would -- is there a way to say evidence was presented that Crystal -- the number for Crystal, the number for Nicole, and no evidence was presented on the other two numbers? That's more in line what we'd normally say when they ask for evidence to be reread or -- or whatever or they want something that wasn't provided. We'd normally ---

THE COURT: Well, usually ---

MS. SAMPSON: --- say ---

THE COURT: --- we read -- read it. I -- because I -- I'm very careful about trying to comment on the facts.

MS. SAMPSON: Right.

MS. EIGENBROT: I think the only problem with that, though, is those numbers are in evidence, because those records were ---

MS. SAMPSON: No.

MS. EIGENBROT: --- submitted ---

MS. SAMPSON: No information ---

MS. EIGENBROT: --- into evidence.

MS. SAMPSON: --- about the numbers -- who those numbers belong ---

MS. EIGENBROT: Oh.

MS. SAMPSON: --- to was ---

1124

MS. EIGENBROT: Okay.

MS. SAMPSON: --- provided. I guess ---

THE COURT: So ---

MS. SAMPSON: --- I didn't say that right.

THE COURT: --- what I was thinking is that we just tell them that the parties have stipulated that [redacted] is Crystal; [redacted] is Nicole; no one knows [redacted] and [redacted] -- I mean, say -- not knowing this -- there has not been any evidence presented as to who [redacted] and [redacted] ---

MS. SAMPSON: That's what I was trying to say.

THE COURT: Oh, okay.

MS. SAMPSON: That way ---

THE COURT: Okay.

MS. SAMPSON: --- it's in line with what we'd normally say.

THE COURT: So y'all are fine ---

MS. EIGENBROT: I would not object to that, Your Honor.

THE COURT: Okay.

MS. SAMPSON: No objection.

THE COURT: So what's her last name, Crystal?

MR. MARSH: Posey.

MS. EIGENBROT: Posey.

MS. SAMPSON: Posey.

MS. EIGENBROT: P-o-s-e-y.

1125

THE COURT: And Nicole?

MS. SAMPSON: Bryant.

MS. EIGENBROT: Bryant, B-r-y-a-n-t.

THE COURT: Okay. And that's -[redacted] is Nicole?

MS. EIGENBROT: Nicole.

THE COURT: And -[redacted] is Crystal?

All right. Bring them in.

And no evidence has been presented as to who those other two numbers belong to.

(Off the record briefly.)

(Whereupon, the jury entered the courtroom at 1:53 p.m.)

THE BAILIFF: The jury is seated, Your Honor.

THE COURT: All right. Ladies and gentlemen of the jury, I have -- I have received your question. And I'll just tell you this, in terms of all questions, that if -- any other questions you may have. Just remember that I -- you're the finders of the fact. And so therefore, I can -- I cannot answer any questions directly. However, if there's testimony or -- or if there's testimony, then we can direct you to that testimony and play the testimony.

But in this -- in this -- on this question, I believe the question is: Whose numbers end in -[redacted], -[redacted], -[redacted], and -[redacted]. Is that correct?

1126

JURY FOREPERSON: Yes, Your Honor.

THE COURT: All right. After speaking with the attorneys, they all agree and have stipulated that -[redacted] belongs to Crystal Posey and that -[redacted] belongs to Nicole Bryant. There is no evidence in the record as to who -[redacted] and -[redacted] belong to. All right?

JURY FOREPERSON: Okay.

THE COURT: All right. You need me to repeat that or you good?

JURY FOREPERSON: No, ma'am.

THE COURT: You good? You got it? Okay.

JURY FOREPERSON: Thank you.

THE COURT: All right. Thank you. And this is Court Exhibit No. 8. You may begin -- continue your deliberations.

JURY FOREPERSON: Thank you.

(Whereupon, the jury exited the courtroom at 1:55 p.m.)

THE COURT: All right. We'll take a break until ---

MS. EIGENBROT: Thank you, Judge.

THE COURT: --- next question.

MS. PINNOCK: Thank you.

(Off the record from 1:56 p.m. until 2:28 p.m.)

THE COURT: All right. You may be seated. It's my understanding they have a verdict.

1127

All right. You can bring them in.

(Off the record briefly.)

(Whereupon, the jury entered the courtroom at 2:28 p.m.)

THE BAILIFF: The jury is seated, Your Honor.

THE COURT: All right. Madam Forelady, it's my understanding that you all have reached a verdict.

JURY FOREPERSON: Yes ---

THE COURT: Is that correct?

JURY FOREPERSON: --- Your Honor.

THE COURT: And is that verdict unanimous?

JURY FOREPERSON: Yes, Your Honor.

THE COURT: All right. If you can hand the verdict for to the bailiff.

JURY FOREPERSON: (Complied.)

THE COURT: All right. I'm going to ask the clerk to publish the verdict.

VERDICT OF THE JURY

DEPUTY CLERK OF COURT: (As read): In the Court of General Sessions for the Fifth Judicial, State of South Carolina, in the County of Richland: State of South Carolina v. Brian Neil White, Indictment No. 2019-GS-40-3691, as to the indictment alleging murder, we, the jury, unanimously find the defendant guilty. It's signed by the forelady and it's dated November 22nd, 2019.

1128

Madam Forelady, is this your verdict and the verdict of the entire jury?

JURY FOREPERSON: Yes, ma'am.

DEPUTY CLERK OF COURT: Thank you.

THE COURT: All right. All right. Anything else from the jury before I release them?

MS. EIGENBROT: Your Honor, the defense would ask that the jury be polled.

THE COURT: Yes, ma'am. Madam clerk, will you poll the jury by number, please.

DEPUTY CLERK OF COURT: Yes, ma'am.

Madam Forelady, ladies and gentlemen of the jury, I'm going to call your name now, and I'm going to ask you each two questions. I need you to answer both the questions.

Mary Childs, was this your verdict?

JURY FOREPERSON: Yes, ma'am.

DEPUTY CLERK OF COURT: Is it still your verdict?

JURY FOREPERSON: Yes, ma'am.

DEPUTY CLERK OF COURT: Alexis McRant, was this your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Kieron Booth, was this your

1129

verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Melanie Floyd, was this your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Ala Luck [sic], was this your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Beverly Peele, was this your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Dorothy Garrick, was this your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Benjamin Walters, was this

1130

your verdict?

JUROR: Yes.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Andre Garner, was this your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Tanya Temple, was this your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Cassandra Myrick, was this your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Paulette Price, was this your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR: Yes, ma'am.

DEPUTY CLERK OF COURT: Jury is polled, Your Honor.

1131

THE COURT: All right.

JUROR: (Gestured.)

THE COURT: Yes? Hold on.

JUROR: I -- I'll ask later. Hold up. You go ahead. I'm going to be out.

THE COURT: All right. Let me see -- all right. Let me speak to you all one second. Hold on one second, okay?

(Whereupon, a bench conference was held off the record in the presence of the jury, but out of the hearing of the jury.)

THE COURT: All right. Juror Number -- what's your juror number?

JUROR: 19.

THE COURT: 19?

JUROR: Yeah.

THE COURT: Okay. I'm going to meet -- why don't you step out here -- y'all stay right there. You step out here one second.

JUROR: All right.

THE COURT: And if the lawyers can come with me.

(Whereupon, the Court conferred with Juror 19 outside the courtroom in the presence of counsel.)

THE COURT: Okay.

MS. EIGENBROT: He didn't want his name called.

1132

JUROR: Yeah. I ain't want ---

THE COURT: Huh?

MS. EIGENBROT: He didn't want his name called.

THE COURT: I told her to call by number.

MS. SAMPSON: And she used names.

JUROR: Yeah. She called my government I DON'T. I -- I mean, I ain't got no problem with it or nothing. But I'm just saying, like, I don't ---

THE COURT: Okay.

JUROR: Know what I mean?

THE COURT: Yeah. No. It's -- she should have called by number. I did instruct her to do that. And --

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JUROR: And I ain't want no trouble or nothing.

THE COURT: No, no, no.

JUROR: It may not be a problem. I'm just saying, you know ---

THE COURT: No, no. I will remind her the next time not to do that again. Okay. All right.

JUROR: Okay. All right.

THE COURT: Okay. All right. Thank you.

(Whereupon, the proceeding resumed in the courtroom.)

THE COURT: All right. Keep your seats. All right. Ladies and gentlemen of the jury, I want to thank you all

1133

for your service this week. I know that it has been a long week. And -- but I do want to thank you, because I -- you all have been very attentive and very patient. And I'll be honest with you. The bailiffs even commented that you all were very pleasant to deal with. It ain't always that way. And so they told me earlier in the week that -- that you all were very pleasant to deal with. So I do appreciate you and your cooperation and participation here this week.

You are free to leave. You are free to talk about the case with whoever you want to talk about the case. And the attorneys may contact you to talk about the case to find out, you know, your thoughts on -- sometimes how -- how they did or -- or what -- what your thoughts on the case. And you're free to talk to them. And if you don't want to talk to them, you don't have to talk to them.

So I will go ahead and let you know you're -- let you know you're free to leave. You can discuss the case with anyone you wish to discuss it with. And I will -- if you all step out, I'll meet you out in -- in the jury room.

(Whereupon, the jury exited the courtroom at 2:35 p.m.)

THE COURT: All right. Give me one second. And

I'll -- and I'll be right back in after I speak to them.

(Off the record from 2:35 p.m. until 2:45 p.m.)

THE COURT: Yes, ma'am.

MS. SAMPSON: Thank you, Your Honor. May it please the Court. I'm not going to go over the facts. You've already heard them. I think I have said already that this was an -- a senseless murder. The victim was asleep. There's no evidence that he wasn't.

As Your Honor's very well aware of the sentence range, it's 30 years to life. And I think somewhere in there is appropriate. I will leave that up to Your Honor's discretion.

The victim's family would like to speak to Your Honor at the appropriate time.

THE COURT: All right. I'll be glad to hear from them now. And if they can just state their name for the record.

MR. JAMES TURNER: Thank you, Your Honor. Actually, I have two statements. One will be from a family member who wasn't able to make it here today.

THE COURT: Yes, sir.

MR. JAMES TURNER: I will read hers first, if that's okay with you.

THE COURT: Yes, sir.

MR. JAMES TURNER: Her name ---

1135

THE COURT: State your name.

MR. JAMES TURNER: Her name is Kim Roper. And her statement reads (as read): "It has been almost three years since Scott was violently murdered. He was not perfect, but he was loved. Scott could find humor in almost all things. He was great at storytelling and would have your ribs hurting from laughing so much.

"I will never hear another story of his or never receive another phone call or spend another Thanksgiving with him. Cherry pie was his favorite, by the way. I will never see his smile or hug his neck again, all because Mr. White took his life.

"It sickens me to my core that Scott was killed with such a malicious manner. I am proud to say that James Scott Turner was my cousin. And I loved him very much.

"Mr. White is a monstrous, despicable, and purely evil man. May God have mercy on his soul. Thank you for your time. Kim Roper."

THE COURT: Yes, sir.

MR. JAMES TURNER: And then, my statement -- my name is James Christopher Turner. My statement is: My name is James Chris Turner, named after my father, his only son. My dad may not have been a perfect man. But he was a good man.

To have been murdered by a cold-blooded killer while

1136

asleep, having no way to defend himself, makes me sick to my stomach. It takes an evil person to commit murder. But more so, it takes a coward to do it in this fashion.

The murder -- the murderer wanted to show how powerful he could be, but instead showed how weak he is: a weak person with an evil mentality and a cowardly persona. He didn't kill a crackhead. He killed a father, a brother, a cousin, an uncle, a grandfather, and a friend. He killed a family, because this action wasn't only felt by one, the one he shot. And it is my hope that he never sees freedom or has this opportunity again.

THE COURT: All right. Thank you, sir. Thank you for being here during the trial. I know this has been -- has been difficult for you to have to sit here and be here under these circumstances. And I do want you to know that we're very sorry for your loss. Thank you.

MS. SAMPSON: Have -- from the state, just for the record, the defendant had no prior record.

THE COURT: How old was the victim?

MS. SAMPSON: Forty -- forty-one. I was trying to do the math.

MR. JAMES TURNER: I was too.

THE COURT: All right. All right. Anything else from the state?

MS. SAMPSON: No, ma'am.

1137

THE COURT: All right.

Yes, ma'am ---

MS. EIGENBROT: Thank you ---

THE COURT: --- Ms. Eigenbrot.

MS. EIGENBROT: --- Your Honor. Please the Court. Your Honor, I've represented Brian for the majority of the past three years. And I have come to know a young man who is very kind, kindhearted, and very positive, and remains positive, no matter what's been thrown at him.

He had a little bit of rough upbringing; not so much of his family has been around. His mother and him have a pretty estranged relationship. I know he speaks to his stepmother occasionally. But for the most part, his parents have been kind of absent from his life.

And so Brian has kind of created this situation where he was becoming a part of other people's families. I think for a period of time, Nicole and Crystal were that family, along with Scott. And despite what was insinuated here, Brian has always maintained his innocence with me; has always denied shooting Scott; will continue to deny that he shot Scott.

I think we presented at least some evidence that Nicole, at the very least, was involved. And I do think Brian very -- cared very dearly for her. I think he is somebody that would do things to be there for -- for

1138

other people.

And it saddens me that we are here right now. I don't believe he is the person that's been described here in this courtroom. And, Your Honor, I would ask you to consider the minimum of 30 years.

But I don't think he did this. And I would like Your Honor to take that into consideration. He has 1,079 days' credit.

THE COURT: All right. Anything from the state?

MS. SAMPSON: No, ma'am.

THE COURT: And ---

MS. EIGENBROT: And, Your Honor, I -- I also failed to mention: He has been accompanied by Ms. Kelly Gold. She is pretty much the only family he has that he -- she's been pretty involved in this the entire time: very supportive of Brian, only good things to say. Her daughter looks to him as an uncle. I've spoken to her. She loves Brian very, very much.

THE COURT: All right. Let me see you all one second.

(Whereupon, a bench conference was held off the record.)

THE COURT: All right. Yes, ma'am.

MS. EIGENBROT: And that's it, Your Honor.

THE COURT: All right. All right.

1139

SENTENCE OF THE COURT

THE COURT: On Indictment No. 2019-GS-40-3681, sir, you will be sentenced to the state department of corrections for 38 years. You will be given credit for the 1,079 days that you have currently served.

All right. Thank you.

MS. SAMPSON: You need ---

MS. EIGENBROT: Thank you, Your Honor.

THE COURT: And, Ms. Eigenbrot, I did not -- when I came back in, we came back in and did sentencing. I need to give you opportunity to put your motions on the record.

MS. EIGENBROT: Yes, Your Honor. At this time the defense would move for a new trial based on the brevity of the jury's deliberations. We've been in trial for an entire week. I believe they deliberated for approximately an hour and a half. And based on the nature and -- of the charges, based on the information that has been presented, including all the documentation, and then, we would also -- so I would move for a new trial based on those circumstances, Your Honor.

I would also renew all of our prior motions and objections, especially the mistrial motion that was made during Sgt. Truluck's testimony as a comment on Brian's constitutional right to remain silent.

1140

THE COURT: All right. I am going to deny the motion for a new trial. But your motions and your -- you've renewed all the other motions and the motion ---

MS. EIGENBROT: Yes. All ---

THE COURT: --- for directed ---

MS. EIGENBROT: --- all -- all ---

THE COURT: --- verdict ---

MS. EIGENBROT: --- pretrial motions, all motions and objections made throughout the course of the trial, Your Honor, we renew all of those.

THE COURT: All right. They are noted for the -- preserved for the record.

MS. EIGENBROT: Thank you, Your Honor.

THE COURT: All right. Thank you.

MS. SAMPSON: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon, the proceeding concluded at 2:53 p.m.)

--- END OF TRANSCRIPT OF RECORD ---

1141

CERTIFICATE

I, the undersigned Maryann S. Nevers, CVR-M-CM, RVR, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Circuit Court for Richland County, South Carolina, on the 18th through 22nd days of November, 2019.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

Maryann S. Nevers, CVR-M-CM, RVR
Official Court Reporter

Columbia, South Carolina
February 20, 2020

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN NEIL WHITE,

APPELLANT

APPELLATE CASE NO. 2019-001971

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

Violating the Fourth Amendment to the United States Constitution, did the trial judge err by admitting a phone call made by Appellant while he was awaiting trial in the detention center where the state failed to present any evidence that the phone call was intercepted pursuant to the law enforcement exception or consent exception to the federal law prohibiting interception of communications?

STATEMENT OF THE CASE

On June 19, 2019, a Richland County grand jury indicted Appellant for murder (2019-GS-40-3681). R. 956-957. The state, represented by April W. Sampson, Samuel C. McGlothin, and Harrison M. Pratt, called the case for trial before the Honorable DeAndrea Gist Benjamin and a jury on November 18-22, 2019. R. 1. Megan A. Eigenbrot, Tracy E. Pinnock, and Richard E. Marsh represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 923, ll. 19-25. Judge Benjamin sentenced Appellant to thirty-eight years imprisonment for murder. R. 935, ll. 2-4; R. 958.

Appellant served his notice of appeal on November 26, 2019. This brief follows.

STATEMENT OF FACTS

Crystal Posey and James Scott Turner were romantically involved for almost eight years. R. 204, ll. 4-3; R. 795, ll. 11-13. Posey and Turner lived in a home along with Posey's adult daughter, Shena Nicole Bryant. R. 202, ll. 23-24; R. 203, ll. 8-16; R. 262, ll. 5-8. Appellant also lived in Posey's home when he was romantically involved with her daughter. R. 203, ll. 8-10; R. 262, ll. 5-8; R. 792, ll. 10-17; R. 792, ll. 19-24. Appellant moved out during the summer of 2016 when he and Bryant broke up. R. 235, ll. 19-23; R. 263, ll. 7-22. Nevertheless, Bryant and Appellant remained close friends. R. 263, ll. 23-25; R. 792, ll. 16-18.

In December 2016, Posey worked at Hardee's on Garners Ferry Road in Columbia. R. 203, ll. 3-7. On December 7, 2016, Posey worked until 11 p.m. R. 205, ll. 4-19. Although she had no driver's license, she had recently purchased a car with Turner. R. 205, l. 22 – R. 206, l. 2. Turner had taken her to work that day and was supposed to pick her up. R. 206, ll. 1-9. Throughout her shift, Posey exchanged phone calls and text messages with Turner. R. 239, l. 15 – R. 240, l. 16. At some point during the evening, Posey sent a text message to Turner, confronting him about his drug use, because she could tell he was intoxicated during one of the earlier telephone calls. R. 240, ll. 9-19. Turner contacted Bryant because of Posey's suspicions and her aggressive behavior toward him. R. 289, l. 25 – R. 290, l. 8. Bryant indicated that Turner always called her when he and Posey argued; he always tried to pull her "into the middle of it." R. 290, ll. 9-20

When Turner did not arrive at Hardee's, Posey sent Bryant numerous text messages and called her many times. R. 242, ll. 15-19; R. 793, ll. 18-24 (testimony showing Posey called Appellant as well). However, Bryant was with Appellant and his friends at the Marriott. R. 265, ll. 4-7; R. 266, ll. 4-14; R. 791, ll. 8-9; R. 792, ll. 4-9. Initially, Bryant did not respond to

Posey's messages and calls. R. 242, ll. 20-22. When Bryant and Posey finally spoke by phone, Posey was "irate." R. 268, ll. 11-18. Hearing how upset Posey was, Bryant insisted Appellant take her home right away. R. 268, ll. 12-22; R. 795, l. 24 – R. 796, l. 1. Bryant was "mad" and "started freaking out" and "yelling." R. 434, ll. 10-14.

Eventually, Posey got a ride home from a coworker. R. 206, ll. 10-13. Posey believed Turner was high on crack cocaine because Turner had been battling his drug addiction over the last year. R. 206, ll. 17-23; R. 287, ll. 2-11. It was not unusual for Turner to "go missing" in light of his proclivity for drugs. R. 207, ll. 4-7; R. 262, ll. 11-22.

Posey had no key to her home as the house key was on the same ring as the car keys. R. 207, ll. 14-19. As a result, she had to break into her home after her coworker gave her a ride home. R. 207, ll. 14-19. She immediately saw that her television was gone, and she suspected Turner of selling it for drugs. R. 208, ll. 2-11.

Shortly thereafter, Bryant arrived home. R. 208, ll. 17-20; R. 269, ll. 2-3. Bryant was accompanied by Appellant and two of his friends. R. 208, ll. 21-23; R. 269, ll. 4-7; R. 796, ll. 2-4. Posey told them what had happened with Turner, and they offered her comforting words in return. R. 209, ll. 1-5; R. 269, ll. 8-13; R. 796, ll. 15-18. Posey was "in hysterics." R. 436, ll. 16-19; R. 796, ll. 19-22. Bryant was even more upset than Posey. R. 436, ll. 24-25. In general, Posey and Bryant were "being very dramatic about the situation." R. 451, ll. 12-13. "They were angry." R. 451, l. 13; R. 796, ll. 19-25.

Eventually, Appellant and his friends left. R. 209, ll. 5-6; R. 269, ll. 21-23; R. 438, ll. 14-15; R. 798, ll. 20-24. Bryant held and reassured an upset Posey until the two went to bed. R. 209, ll. 9-10; R. 246, ll. 14-15; R. 269, ll. 24-25. During this time, Bryant sent a text message to Turner in which she warned that he would not continue hurting Posey. R. 284, ll. 5-15. When

confronted with her statement to police, Bryant asserted that she called Appellant after he left to talk about what had happened because he was her best friend. R. 297, l. 24 – R. 300, l. 19. Bryant claimed Appellant told her not to worry about it because he would take care of it. R. 270 ll. 8-13; see also R. 438, ll. 7-10.

According to Appellant, Bryant worried Turner had a gun and would be violent when he returned to the residence. R. 800, ll. 1-8. Bryant asked Appellant to return to her house with a gun in the event Turner arrived. R. 800, ll. 1-8. Based upon Bryant's request, Appellant went to the home of his friend, Jerry Rabon, with whom he had been living. R. 382, ll. 6-13; R. 386, ll. 4-12; R. 800, ll. 21-25. Appellant indicated he was going coyote hunting with someone and asked to borrow Rabon's rifle. R. 386, ll. 15-20; R. 803, ll. 1-6. Rabon offered to loan his pistol – a Smith and Wesson 9-millimeter – to Appellant because he had no ammunition for his rifle. R. 387, ll. 2-5; R. 803, ll. 1-5.

Although Posey would deny it at trial, her phone records showed she sent a text message to Bryant at 5:21 a.m., stating, "This m.f. just came in." R. 249, l. 1 – R. 250, l. 25. Further, Bryant denied taking photographs, receiving or making calls, and receiving or sending text messages around 5 a.m. despite clear evidence on her phone records to the contrary. R. 302, l. 16 – R. 305, l. 13.

After Appellant borrowed the gun from Rabon, he parked his car down the road from Bryant's home. R. 804, ll. 19-22. He did so at Bryant's specific instruction. R. 804, l. 23 – R. 805, l. 1. He then walked to Bryant's home. R. 805, ll. 2-7. As he approached the house, he saw Bryant outside. R. 805, l. 15 – R. 806, l. 11. Bryant asked if Appellant had the gun, and Appellant responded by showing her the gun. R. 806, ll. 16-19. Bryant immediately grabbed the gun, turned toward the door, and started shooting. R. 806, ll. 20-21. After shooting, Bryant

shoved the gun at Appellant and told him to get rid of it. R. 807, ll. 1-5. Bryant then went back inside. R. 807, ll. 4-5. Appellant panicked and ran. R. 807, ll. 6-7.

Later, Posey awoke to the sound of gunshots. R. 210, ll. 8-9. Posey yelled for Bryant, and the two met at the front door. R. 210, ll. 23-25; R. 273, ll. 9-20. Posey and Bryant saw no one outside. R. 211, ll. 3-5; R. 275, ll. 6-8. Bryant walked to the van and opened the door. R. 211, ll. 9-12. Posey called for help. R. 211, ll. 12-14. Bryant took some towels from Posey, got into the van, and placed the towels on Turner's head. R. 212, l. 2-3; R. 274, ll. 3-24.

Appellant ran into a neighbor, Randell Wilson, while he was leaving.[1] He stopped briefly to discuss the gunshots with him. R. 195, ll. 14-20; R. 195, l. 23 – R. 196, l. 4; R. 199, l. 1-7; R. 809, ll. 10-17. Additionally, Appellant flagged down a police officer who was on the way to Patricia Drive. R. 104, ll. 18-24; R. 809, ll. 21-24. Appellant informed that he officer that he was near the scene at the time of the shooting. R. 104, ll. 23-24; R. 105, ll. 12-13; R. 810, ll. 2-5.

Richland County Sheriff's deputies and emergency medical personnel responded to a call regarding a shooting on Patricia Drive. R. 102, ll. 17-21; R. 114, ll. 9-16; R. 133, ll. 8-15. The police found a man, later identified as Turner, sitting inside a van parked outside of a residence. R. 103, ll. 2-5; R. 108, ll. 5-12. Turner was pulseless and apneic. R. 109, ll. 2-3. Turner had what appeared to be gunshot wounds to the left side of his head. R. 109, ll. 7-10. Law

[1] Samuel Knowles lived near Patricia Drive. R. 125, ll. 23-25. As he was leaving his house, he heard five or six gunshots. R. 126, ll. 3-8. He looked around, but he did not see anyone running. R. 126, ll. 9-11. He circled the block and returned home to check on his children. R. 126, ll. 12-15. As he pulled in the driveway, he saw two people standing across the street from his home: one was a black gentleman, and the other was a white gentleman. R. 127, ll. 2-5. Knowles asked the men if they heard any gunshots, and both responded affirmatively. R. 127, ll. 6-8. The white man informed Knowles that he had just run from the trailer park where bullets were flying past his head. R. 127, ll. 8-11.

enforcement found a projectile in the passenger door skin on the exterior of the van and eight 9-millimeter fired cartridge cases on the ground. R. 134, ll. 12-24.

Eventually, Appellant made it back to his car. R. 810, l. 19. He then went back to Rabon's home around 7:45 a.m. when Rabon was leaving for work. R. 391, ll. 6-12; R. 810, ll. 20-24. Appellant returned the gun[2] to Rabon. R. 391, ll. 20-23; R. 811, l. 24. Meanwhile, Bryant called Appellant, asking for a ride to the hospital because Turner had been shot. R. 812, ll. 3-4. Appellant, Posey, and Bryant went to the hospital where they learned Turner had died.[3] R. 812, ll. 9-14. Appellant then took Posey and Bryant back to their home. R. 813, ll. 1-2.

Bryant claimed Appellant sent her a text message after the shooting stating, "I took care of that." R. 281, ll. 2-5. Later in the evening, Appellant arrived at Bryant's house, where he was arrested. R. 213, ll. 16-25; R. 214, ll. 5-7; R. 499, ll. 14-16; R. 814, ll. 22-23; R. 815, ll. 1-3. According to the lead investigator, Appellant claimed he shot Turner. R. 507, l. 1 – R. 510, l. 15; R. 650, l. 3 – R. 653, l. 7.

At trial, Appellant emphatically denied shooting Turner. R. 790, ll. 23-24; R. 821, ll. 13-15. Further, Appellant denied confessing to police, and explained he did not read the typed statement prepared by law enforcement before signing it. R. 817, ll. 2-4; R. 819, ll. 5-7.

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[2] When Rabon learned that Appellant was charged with murder, he contacted the police about the firearm. R. 397, ll. 16-24. Forensic testing showed the handgun fired two projectiles and several fired cartridge cases found at the shooting scene. R. 360, l. 9 – R. 362, l. 2; R. 363, l. 20 – R. 366, l. 3. The projectiles recovered during the autopsy were fired by the same firearm. R. 167, ll. 14-23; R. 366, l. 4 – R. 368, l. 7.

[3] Turner died as a result of multiple gunshot wounds. R. 582, ll. 1-3. Testing of Turner's blood revealed cocaine, a metabolite for cocaine, tetrahydrocannabinol (THC), and a metabolite of marijuana. R. 422, ll. 11-23.

Appellant did not tell the police what Bryant had done because he still cared about her and did not want anything to happen to her. R. 817, ll. 7-17.

The lead investigator admitted that although he considered Posey and Bryant to be "victims," he was suspicious of their involvement almost immediately. R. 630, ll. 12-18; R. 632, ll. 6-15; R. 633, ll. 12-25. He noted that when he asked to look at the contents of her cell phone she was "very hesitant" and told him that "something crazy happened to her cell phone" on the night Turner was shot and killed. R. 634, ll. 1-24. The lead investigator "never deemed [Bryant] to be a suspect as far as a shooter," but he "always suspected them of being involved." R. 637, ll. 20-23; R. 718, ll. 10-12; R. 721, ll. 9-16. He "always felt that they put [Appellant] up to it or -- or he did it for them. ... [He] always suspected them of being involved." R. 636, l. 24 – R. 638, l. 5. The lead investigator "fe[lt] like this [was] all coordinated between all of them." R. 721, ll. 9-16. He elaborated that he "felt like [Posey] might've had knowledge of it, especially after it, but wasn't going to throw her daughter under the bus, so to speak. [He] never felt [Posey] really was in the plannings of it. [Bryant]? [He] felt she had knowledge of what was going to happen." R. 724, ll. 1-6.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only. Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Appellate review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500-501 (Ct. App. 2003).

ARGUMENT

Violating the Fourth Amendment to the United States Constitution, the trial judge erred by admitting a phone call made by Appellant while he was awaiting trial in the detention center where the state failed to present any evidence that the phone call was intercepted pursuant to the law enforcement exception or consent exception to the federal law prohibiting interception of communications.

Relevant facts

During a pre-trial hearing, the defense moved to exclude recorded telephone calls made by Appellant while he was in pre-trial detention. R. 19, ll. 6-7; R. 941. Defense counsel explained the local jail used AmTel to provide telephone services to the detainees. R. 19, ll. 16-20; R. 941. After recording the calls, AmTel provided the recordings to the solicitor's office and law enforcement "almost in real time." R. 19, ll. 21-24; R. 941. The defense argued the recording of the phone calls and the use of the recordings of those phone calls violated Appellant's Fourth Amendment rights. R. 21, ll. 8-14; R. 941.

Defense counsel argued the warrantless recording of phone calls by detainees violated the detainee's right to be free from unreasonable searches and seizures. R. 26, ll. 16-18; R. 941. Counsel argued detainees had a reasonable expectation of privacy in their phone calls. R. 26, l. 18 – R. 27, l. 2; R. 941. Defense counsel recognized prior cases in which courts approved of jails recording phone calls for safety and security purposes. R. 22, ll. 1-11; R. 941. However, such a purpose was not accomplished by providing access to the recordings to the solicitor's office and law enforcement. R. 22, ll. 11-15; R. 941. Counsel argued there was "no nexus between the solicitor's office having direct access to these phone calls [and] to the state's administration of the detention center." R. 23, ll. 9-11; R. 941. Further, counsel argued that the

alternative means of communicating with family and friends were not equivalent substitutes due to the length of time involved in a letter reaching a loved one. R. 23, ll. 15-25; R. 941. Of course, letters and emails sent and received by the detainees were subject to warrantless searches and seizures as well. R. 24, ll. 1-5; R. 941. Counsel distinguished in-person visits from telephone calls. R. 24, ll. 6-25; R. 941.

Further, defense counsel explained that the public defender office refused to accept phone calls from the detention center because *all* calls were recorded. R. 36, ll. 19-24. Neither the phone service nor the detention center provided a mechanism for not recording phone calls between attorneys and clients. R. 36, ll. 19-24. The detention center allowed immediate access to the solicitor of all recorded detainee phone calls without regard to attorney-client privilege or confidentiality. R. 36, ll. 19-24.

The state argued the rights of the detainees were not violated because they were not prohibited from making phone calls. R. 30, ll. 19-21; R. 952. Detainees were permitted to make phone calls, but the calls were recorded. R. 30, ll. 22-25; R. 31, ll. 12-13; R. 952. The state admitted to having access to the jail calls in real time. R. 31, ll. 14-20; R. 44, ll. 5-13. The detention center provided a password to the solicitor's office to use to log on to the phone system, which allowed the solicitor's office to access phone calls made by detainees. R. 42, ll. 3-8. The state claimed the defense had equal access to the calls as long as the defense requested such access through a subpoena. R. 32, ll. 1-9. Additionally, the solicitor admitted the detention center recorded all phone calls placed by detainees, even those made to attorneys. R. 38, ll. 12-18. The solicitors engaged in some self-policing through "a rule in place" that if "the P.D.'s number pops up, nobody listens to it." R. 38, ll. 12-18. As for lawyers outside the public defender office, the solicitor does not listen to those calls either as long as the solicitor knows the

number being called is to a lawyer. R. 38, ll. 19-24. In the past, the solicitor's office had listened to a call between a detainee and a lawyer when the detainee called the lawyer's cell phone, a number with which the solicitor was unfamiliar. R. 38, ll. 19-21. "The minute" the solicitor "realized that it was an attorney," the solicitor turned over the phone call and informed the attorney that the solicitor had stopped listening. R. 38, ll. 21-24.

Regarding the phone calls sought to be admitted, the solicitor claimed the calls were found by the sheriff's department, who listened to Appellant's phone calls. R. 42, ll. 9-11; R. 952. The investigator who listened to the calls, made a recording for the police file, which was then turned over to the solicitor for prosecution. R. 43, ll. 3-6; R. 952. In short, the investigator listened to Appellant's phone calls to further his investigation by finding incriminating evidence against Appellant. R. 45, ll. 7-14; R. 952. The calls were not made to ensure security or safety at the detention center. R. 45, ll. 7-14; R. 952.

Investigator Cris Truluck with the Richland County Sheriff's Department obtained two phone calls made by Appellant while he was in the detention center. R. 76, ll. 8-16. Truluck explained how he got the calls:

> [W]hen a defendant gets arrested, he is booked into jail and he's given a ID number. AmTel, which is their phone service, they record all calls. All calls that - - the telephones that are at the jail are marked that the calls are recorded. And prior to the call even beginning, it - - it is a specific line that it's automated that tells you again these calls are recorded.
>
> So - - and we also had that police at the sheriff's department too. If you use our phones, they're all marked as recorded.
>
> However, normally what you do, you get their ID number that they are given. And you can go to the AmTel website and put in that PIN number or that ID number. And you can set a date - - a - - a time range on it.
>
> Now, as was brought up before, there is a section where you can listen live. But that's a crap shoot. You might get - - click on it and see their name that they are making a live call.

> But that's very rare that you can do that. However, that's a possibility. Me personally, I've never done that. I've never been able to do that.
>
> This process you put down and it - - it lists all the cases and the times that are made. All's you ever have to do is you click on it and you can listen to the call.

R. 76, l. 20 – R. 77, l. 19.

Truluck followed this process when listening to Appellant's phone calls. R. 77, ll. 20-21. He provided two calls to the solicitor. R. 77, ll. 22-24. These calls were part of his investigative file. R. 77, l. 25 – R. 78, l. 2. Listening to calls made by pre-trial detainees was "pretty much standard" practice for the sheriff's department. R. 78, ll. 7-11.

Truluck was *not* employed by the detention center. R. 79, ll. 108. Thus, he was not in charge of any security at the detention center. R. 79, ll. 1-8. His examination of the jail calls was strictly for investigative purposes. R. 79, ll. 11-13; R. 79, ll. 20-21; R. 81, ll. 10-15. He has never obtained a search warrant in order to listen to jail calls. R. 79, ll. 16-19. Truluck explained that he was listening to Appellant's phone calls "to see if there's investigative leads" revealed in the call. R. 80, ll. 1-3.

Truluck explained there was a "section" showing the person being called by the detainee. R. 80, ll. 21-24. He provided that he had never clicked on the button and learned that the number belonged to an attorney. R. 80, l. 24 – R. 81, l. 3. He was unsure "whether those calls are already screened." R. 81, ll. 4-6. However, he assured the court that he engaged in self-policing, like the solicitor, because he knew "that if [it] does go to the attorney, not to listen to it." R. 81, ll. 8-9.

The warning provided to the participants on the phone call was simply that the call was being monitored and recorded. R. 83, ll. 8-20. The recording did not indicate by whom. R. 179, ll. 11-14.

Citing 18 U.S.C. § 2512, the state argued that a federal statute permitted law enforcement to record "any phone calls." R. 177, ll. 3-15; R. 952. According to the solicitor, "[t]he courts ha[d] looked at this when it – in terms of when it talks about jail calls and specifically said it's not an unreasonable search and seizure, more specifically because it tells you that that's what they're doing." R. 177, ll. 16-20; R. 952. Further, the state argued that any concerns the judge may have regarding the solicitor's ability to listen to the calls were misplaced because "in this case," the solicitor did not listen to the calls; rather, the lead investigator did. R. 178, ll. 14-16. Finally, the state argued the "third party doctrine." R. 179, ll. 4-14. Specifically, the state claimed that when a third party is involved, a person loses "some" of the right to privacy. R. 179, ll. 6-8. Here, according to the state, the third party was AmTel, the telephone service provider. R. 179, ll. 8-9. The state claimed AmTel recorded all telephone calls and "could provide it to whomever they want to." R. 179, ll. 9-10.

The solicitor argued that it is not necessary for the recording, monitoring, or reviewing of the calls to be done for purposes of security. R. 180, ll. 5-10. The law only requires that it "simply be done by law enforcement, period." R. 180, ll. 7-10.

Defense counsel clarified that in accordance with case law, the detention center may record phone calls made by detainees for purposes of safety and security at the detention center. R. 182, ll. 9-14. However, defense counsel explained that the ability of the detention center to record the calls for security purposes did not mean the recordings of the calls should be reviewable by law enforcement for investigative purposes. R. 182, ll. 15-22.

In ruling on the motion, the trial judge reviewed the Omnibus Crime Control and Safe Streets Act to address defense counsel's argument on the Fourth Amendment. R. 189, l. 22 – R. 190, l. 3. The judge noted there were two exceptions to the prohibition of the interception of

communications in the absence of a court order. R. 190, ll. 4-5. One exception was for "law enforcement to record conversations and review recorded conversations kept in an ordinary course of business that were – were monitored as a - - and here, it says a safety measure." R. 190, ll. 4-11. "The second exception was consent." R. 190, l. 12. In light of appellant being placed on notice that the calls were being recorded and monitored, which the judge determined amounted to consent, and the law enforcement exception, the judge found the calls were admissible. R. 191, ll. 7-8; R. 191, ll. 15-19.

Robert Waters, who worked in the professional standards division at the Alvin S. Glenn Detention Center, indicated that he was the "custodian of the calls" made by detainees. R. 493, ll. 18-21; R. 494, ll. 10-11. He identified State's Exhibit #92 as a CD containing "a jail call" from the detention center. R. 494, l. 15 – R. 495, l. 3. Waters was clear that he "couldn't tell anybody who was on that call." R. 495, ll. 20-22. The trial judge admitted State's Exhibit #92 over defense counsel's objection. R. 495, ll. 8-19; R. 703, ll. 17-21. Truluck informed the jurors that he listened to jail calls made by Appellant. R. 702, ll. 5-7. He explained that law enforcement has access to a website where the phone company stores the calls made by pre-trial detainees. R. 702, l. 8 – R. 703, l. 2. Truluck told the jurors that the recording was of appellant "saying the only person around when James Turner was shot was him and James Turner." R. 704, ll. 14-17.

Discussion

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (citing Horton v. California, 496 U.S. 128, 133 (1990)). The Fourth Amendment prohibits "unreasonable searches and seizures" by the Government. Terry v. Ohio, 392 U.S. 1, 9 (1968). Pre-trial detainees maintain protections afforded under the Fourth Amendment, including a diminished expectation of privacy. Bell v. Wolfish, 441 U.S. 520, 557 (1979).

The United States Congress passed legislation to protect individuals from the unauthorized interception of telephone calls. See 18 U.S.C. § 2511. The law "protects an individual from all forms of wiretapping except when the statute specifically provides otherwise." Abraham v. County of Greenville, 237 F.3d 386, 389 (4th Cir. 2001). Those protections apply to prisoners and pre-trial detainees, like Appellant. See United States v. Faulkner, 439 F.3d 1221, 1222 (10th Cir. 2006) (explaining the protections afforded under Title III apply to prisoners and pretrial detainees); United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002) (same). According to the law, when information is obtained in violation of the statute, "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial." 18 U.S.C. § 2515.

Specifically, it is unlawful to "intentionally intercept[] ... or procure[] any other person to intercept ... any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). Additionally, it is unlawful to "intentionally disclose[] ... to any other person the contents of any wire, oral, or

electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c). Likewise, it is unlawful to use such ill-gotten communications. 18 U.S.C. § 2511(1)(d). The statute exempts devices used to intercept communications "being used ... by an investigative or law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a). "'Investigative or law enforcement officer' means any officer ... of a State or political subdivision thereof, who is empowered to conduct investigations of or to make arrest for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(7). See also United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002). Finally, the statute provides that "[i]t shall not be unlawful ... for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(d); see also 18 U.S.C. § 2515.

The Fourth Circuit analyzed (1) whether the Bureau of Prisons (BOP) recording of an inmate's phone call with a friend violated the statute, and (2) if the BOP's recording was lawful, whether the FBI's seizure of the recording through a subpoena, rather than court order, violated the statute. United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002). The court first held the BOP's recording of the phone call fell within the "law enforcement" and "consent" exceptions of the statute. Id. Next, the court turned to whether "the FBI's acquisition of the BOP's tapes through subpoena itself constituted an independent 'interception' subject to Title III's requirements." Id. at 192-193. The court concluded that once the recordings were obtained lawfully pursuant to Title III by the BOP, then the BOP was free to do with them as it saw fit. Id. at 193. In other words, "the FBI was free to use the intercepted conversations once they were excepted under either §

2510(5)(a)(1) or § 2511(2)(c)." Id. The court explained that the statute applied only to the initial capture of the communication, and the FBI's conduct was not in using a device to acquire the communication. Id.

The state failed to establish the call at issue was intercepted by law enforcement for investigative purposes. Rather, the call was intercepted by AmTel, a telephone service provider, in connection with the Alvin S. Glenn Detention Center. There was no evidence presented that Alvin S. Glenn Detention Center was an institution run by law enforcement. In fact, Investigator Truluck, who was employed by the Richland County Sheriff's Department, disavowed any role whatsoever in the managing and operating of the detention center. According to publicly available information, the detention center is administered by Richland County independent of the sheriff's department. http://www.richlandcountysc.gov/Government/Departments/Public-Safety/Detention-Center.

Neither Truluck nor anyone connected with the Richland County Sheriff's Office intercepted the calls as that term is understood under the federal law. Thus, it was incumbent upon the state to show that the person or entity that actually intercepted the call fell within an exception under the law. The state simply failed to do so. See United States v. Lanoue, 71 F.3d 966, 981 (1st Cir. 1995) overruled on other grounds by United States v. Watts, 519 U.S. 148 (1997) (expressing concerns over whether the government could show the phone call was intercepted pursuant to the law enforcement where the phone call was intercepted from a pre-trial detainee at the Wyatt Detention Center, which was owned and operated by Cornell Cox Management, a private corporation). Truluck obtained access to the calls only by grace from the detention center, not pursuant to the law enforcement exception under the Act.

Additionally, the state failed to show Appellant consented to the recording of his call. "'Consent' is a broad term and is defined as 'agreement, approval, or permission as to some act or

purpose.'" State v. Whitner, 399 S.C. 547, 554, 732 S.E.2d 861, 865 (2012) (quoting Black's Law Dictionary 346 (9th Ed. 2009). "Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 856 (2003). "The state bears the burden of establishing the voluntariness of the consent." Id.

Here, per the actual recording, he was told "all phone calls are subject to monitoring and recording." State's Exhibit #92. Such notice was a far cry from the notice deemed to be sufficient to infer consent by the Fourth Circuit in Hammond, supra. There, the Fourth Circuit explained that inmates "receive two handbooks that state that all calls other than those to their attorneys are monitored. They sign a consent form acknowledging that their calls may be monitored and recorded and that use of the telephones constitutes consent of monitoring." Hammond, 286 F.3d at 191. Further, "[t]hey also receive an orientation lesson plan stating that calls are monitored and are told that such is the case orally during an orientation lesson. Finally, the BOP reminds the inmates that their calls may be monitored by placing notices of monitoring on or near the actual telephones." Id.

Quite simply, the state presented evidence that the only notice Appellant received was that his call was "subject to monitoring and recording" at the beginning of the telephone call that he placed. The minimal warning could hardly satisfy the strictures of consent to waiving one's constitutional right to be free from warrantless searches and seizures. See Lanoue, 71 F.3d at 981 ("Deficient notice will almost always defeat a claim of implied consent.").

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

s/Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of February, 2021.

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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 8, 2021

s/Susan B. Hackett
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2019-001971

THE STATE, Respondent,

v.

BRIAN NEIL WHITE, Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse her discretion in admitting Appellant's recorded jail phone call, when the issue of the State's noncompliance with the Omnibus Crime Control and Safe Streets Act is not preserved for appeal, because Appellant did not object to the admission of the phone call on those grounds at trial and when Appellant conceded the jail was allowed to record his call? And if Appellant properly preserved the issue for appeal, was the phone call properly admitted under the law enforcement and consent exceptions to the Act? Furthermore, was the phone call obtained in violation of the Fourth Amendment when Appellant did not have a reasonable expectation of privacy in his jail phone call? Finally, even if the call was admitted in error, was any error in its admission entirely harmless in light of the overwhelming evidence presented against Appellant at trial?

STATEMENT OF THE CASE

In June 2019, a Richland County Grand Jury indicted Appellant for murder. On November 18-22, 2019, Appellant proceeded to trial before a jury in the Richland County Court of General Sessions with the Honorable DeAndrea G. Benjamin, presiding. Appellant was represented by Megan Eigenbrot, Esq., Tracy Pinnock, Esq., and Richard Marsh, Esq. The State was represented by Deputy Solicitor April Sampson, and Assistant Solicitors Samuel McGlothin and Harrison Pratt of the Fifth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant as charged. Following the verdict, the trial judge sentenced Appellant to a term of thirty-eight years' imprisonment. Appellant timely filed a notice of appeal and an initial brief.

STATEMENT OF FACTS

On December 7, 2016, Crystal Posey returned to her mobile home on Patricia Drive in Richland County and discovered her TV was missing. (R. 208). Posey suspected her TV was stolen and sold by her longtime boyfriend, James Scott Turner (Victim). (R. 204-08). Posey theorized Victim sold her TV to buy drugs and that he was currently high on crack cocaine. (R. 206-08). Posey contacted her daughter, Shena Nicole Bryant, and asked her to come home. (R. 208). When her mother called, Bryant was at the Marriott Hotel in downtown Columbia with Appellant, Brittany Steen, and Elexia Tucker[1]. (R. 265-68, 432-33). At Bryant's request, Appellant drove Bryant, Steen, and Tucker to Posey's residence. (R. 268-69).

Appellant, Bryant, Steen, and Tucker arrived at Posey's residence and tried to comfort her. (R. 269). While at the residence, Appellant told both Steen and Bryant he would "handle" or "take care of" Victim. (R. 270-72, 438). At some point in the early morning hours of December 8, 2016, Appellant, Steen, and Tucker left the residence to return to the Marriott. (R. 438). Bryant remained with Posey and they both went to bed at Posey's residence. (R. 209, 273). Bryant and Posey were awakened by gunshots outside the front door. (R. 210, 273). When Bryant and Posey went outside to investigate the gunshots, they witnessed Victim's van riddled with gunshots on the driver's side door. (R. 211, 273). Bryant opened the driver's side door and witnessed Victim bleeding and laying across the front seat of the van. (R. 274). Bryant asked Posey to call 911 and bring towels from inside to help stop the bleeding. (R. 211).

[1] Bryant and Appellant had a previous romantic relationship. (R. 261-62). After Appellant and Bryant began dating, Appellant lived with Bryant, Posey and Victim at the residence on Patricia Drive until approximately August or September of 2016 when Appellant and Bryant broke up. (R. 262-63). Appellant moved out of the residence after his breakup with Bryant, but their relationship remained amicable. (R. 263).

Deputy Jeffrey Cahill of the Richland County Sheriff's department was the first law enforcement officer to arrive at the scene. As Cahill approached the residence, he was flagged down by a white male individual who was walking away from the scene. The white male identified himself as Appellant and told Cahill he was smoking a cigarette when he felt bullets "whiz by him." (R. 104-05). Cahill continued to the residence to secure the scene. Paramedic Richard Hill arrived soon thereafter and tended to Victim's injuries. Hill observed that Victim had no pulse and multiple gunshot wounds to the left side of his body including his head, shoulder and chest. (R. 109-11). Victim was subsequently pronounced dead as a result of multiple gunshot wounds. (R. 582).

Investigator Cris Truluck of the Richland County Sheriff's Department arrived on the scene and questioned Posey's neighbors. Truluck learned Cahill encountered Appellant leaving the scene and two neighbors, Samuel Knowles and Randell Wilson, also saw Appellant near Posey's residence that morning. (R. 626-28). Truluck considered Appellant a suspect and asked Bryant to call Appellant. As Truluck listened to their phone conversation[2], Appellant told Bryant that he "took care of it" and got rid of the gun, but Appellant did not confess to the shooting. (R. 636-37). Truluck returned to Posey's residence later that day to speak with her again and saw Appellant at the residence. (R. 639). Posey and Appellant were taken to the Sheriff's office for questioning. (R. 640). Appellant waived his Miranda rights and agreed to speak with Truluck. (R. 643-47, 937). Appellant confessed to shooting Victim. (R. 649-53, 938-40). Appellant stated he parked his car on Woodford Street and walked to Posey's house in the early morning hours of December 8th. (R. 938-40). Appellant fired a pistol approximately six times into Victim's driver's side window. (R. 938-40). After shooting Victim, Appellant claimed he ran from the

[2] It does not appear this phone call was played for the jury. Truluck testified there were technical issues with the volume of Appellant's voice on the phone call. (R. 16, 636).

scene, took his gun apart, and threw the pieces into the woods. (R. 938-40). Appellant did not tell law enforcement where he obtained the gun. (R. 938-40). After his confession, Appellant was arrested and charged with murder. (R. 659).

On December 9th, Jerry Rabon contacted the Richland County Sheriff's Office to tell them he may be in possession of the murder weapon. (R. 398). Appellant was living with Rabon at the time and had access to his home. (R. 383-84). Rabon explained that he awoke early on the morning of the 8th to find Appellant looking for something in Rabon's spare bedroom. (R. 386). Appellant asked Rabon to borrow his gun so Appellant could help his boss shoot some coyotes. (R. 386-87). Rabon gave Appellant his pistol and some ammunition. (R. 387). Appellant returned the pistol a few hours later and told Rabon he shot at some coyotes, but missed. (R. 391-92). When Appellant returned the gun, he was speaking to Bryant on the phone. (R. 392). Bryant told Rabon that Victim had been shot. (R. 392). Rabon contacted law enforcement after learning that Appellant had been arrested for murder. (R. 397-98). Rabon gave his gun to law enforcement. (R. 413). Forensic analyst Amanda Metz of the Richland County Sheriff's office analyzed the gun and determined the bullets extracted from Victim's body were fired by the same gun. (R. 371).

Appellant testified in his own defense at trial. Appellant admitted telling Steen via text message that he would "handle" Victim. (R. 828). Appellant further admitted he borrowed a pistol from Rabon and lied to Rabon about why he needed the weapon. (R. 803-04). However, Appellant claimed he obtained the weapon from Rabon because Bryant asked him to bring her a gun. (R. 800). Appellant claimed Bryant shot Victim. (R. 806). At the conclusion of trial, Appellant was convicted of murder.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The trial judge's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error." Id. "A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

Because Appellant did not object to the admission of his recorded jail phone call based on the State's noncompliance with the Omnibus Crime Control and Safe Streets Act and because Appellant conceded the jail was allowed to record his phone calls, Appellant's argument is not preserved for appeal. Furthermore, the phone call was properly admitted under the law enforcement and consent exceptions to the Act, and Appellant did not have a reasonable expectation of privacy in his jail phone call. Finally, any error in the call's admission is entirely harmless in light of the overwhelming evidence presented against Appellant at trial.

Appellant argues the trial judge erred in admitting a jail phone call made by Appellant because the phone call was obtained in violation of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. § 2511, hereafter referred to as the Act) which prohibits the unauthorized interception of electronic communications. Specifically, Appellant claims the State violated the Act because the State failed to prove the phone call was obtained pursuant to either the law enforcement or consent exceptions of the Act. Additionally, Appellant asserts the interception of his phone call was a violation of the Fourth Amendment to the United States Constitution. As an initial matter, Appellant's argument regarding whether the State complied with the Act is not preserved for appellate review because it was not raised by Appellant at trial and because Appellant conceded the jail was allowed to record his phone call. Even if Appellant properly preserved the issue for appeal, Appellant's argument fails for three reasons. First, the trial judge properly admitted Appellant's jail phone call because the call was admissible under both the law enforcement and consent exceptions to the Act. Second, to the extent Appellant preserved a general objection under the Fourth Amendment, Appellant's argument fails because Appellant did not have a reasonable expectation of privacy in his jail phone call. Finally, even if the trial judge erred in admitting the phone call, any error was harmless in light of the overwhelming evidence presented against Appellant at trial.

Error Preservation

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). "The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." State v. Freiburger, 366 S.C. 125, 135, 620 S.E. 2d 737, 742 (2005). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). "[A]n issue is not preserved for appeal merely because the trial judge mentions it." State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005) *rev'd on other grounds by* State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). "A litigant cannot concede an issue at trial and then raise it on appeal." CFRE LLC v. Greenville County Assessor, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011).

At trial, Appellant offered a thorough objection to the admission of his jail phone call based on multiple grounds. Appellant alleged the interception of his phone call violated Rule 5 of the South Carolina Rules of Criminal Procedure, the First, Fourth, and Sixth Amendments to the United States Constitution, and the Equal Protection Clause of the United States Constitution. (R. 19-46, 941-51). However, Appellant never alleged the interception of his phone call violated the Act. The Act was not mentioned by either party until the State raised it as a possible sustaining ground shortly before the trial judge made her ruling on the admissibility of the call. (R. 177). The Assistant Solicitor noted the interception of the phone call didn't violate the Act because

both the law enforcement and consent exceptions applied. (R. 177). Counsel for Appellant responded to the State's argument as follows:

> Ms. Eigenbrot: ...as to the solicitor's first point about this not violating any federal laws, the rule that the solicitor is citing to is essentially a federal wiretapping allowance. There's still things that they're required to do in order to listen in on people's conversations. That's besides (sic) the point. I'm not—and I'm not arguing that the jail or AmTel is not allowed to record and/or monitor these phone calls. That has been litigated, Your Honor, recognizing that is in—that the recording of those phone calls is needed for the safety and assurances of the detention center. Again, it goes back to solicitors and law enforcement having direct access to these phone calls without any other protections in place. As I stated the—the before, [Appellant] stands in—in the detention center as an innocent individual. And he still has constitutional rights. While limited and curtailed by his incarceration, that doesn't mean they disappear completely.

(R. 182, lines 2-22). Counsel for Appellant then proceeded to reiterate the constitutional arguments raised in her initial objection, but she did not argue the phone call should be suppressed because of a violation of the Act. (R. 182-86). In fact, Counsel for Appellant explicitly conceded the jail was allowed to record and monitor Appellant's phone calls, going so far as to note the issue "has been litigated." (R. 182, line 9-14). In making her ruling on the admissibility of the call, the trial judge responded to Appellant's objection on Fourth Amendment grounds by noting the State complied with the law enforcement and consent exceptions to the Act. (R. 189-91). However, the trial judge's ruling was made in response to Appellant's Fourth Amendment objection, not an objection under the Act because Appellant made no such objection.

Appellant failed to preserve any issue for appeal related to the State's noncompliance with the Act. Not only did Appellant fail to raise noncompliance with the Act as a ground to suppress the phone call, but Appellant explicitly conceded the jail was allowed to record Appellant's phone calls. (R. 182). The mere fact that the trial judge noted the State's compliance with the Act in her ruling does not excuse Appellant's failure to properly preserve this issue for

appellate review. Appellant is attempting to raise the State's alleged non-compliance with the Act for the first time on appeal after he explicitly conceded his phone call was properly recorded at trial. Appellant cannot concede an issue at trial and then raise it on appeal. Even if this Court determines Appellant did not concede this issue at trial, Appellant certainly did not raise noncompliance with the Act as a ground to suppress the call to the trial judge. Therefore, this issue is not preserved for appellate review. Appellant's conviction and sentence should be affirmed.

Exceptions to the Act

Title III of the Omnibus Crime Control and Safe Streets Act generally prohibits the unauthorized interception of "any wire, oral, or electronic communication." 18 U.S.C. § 2511 (1)(a). The Act "protects an individual from all forms of wiretapping except when the statute specifically provides otherwise." Abraham v. County of Greenville, 237 F.3d 386, 389 (4th Cir. 2001). The statute provides two notable exceptions to the prohibition against intercepting communications. First, the law enforcement exception "excludes from the definition of 'interception' recordings made by 'any telephone or telegraph instrument, equipment or facility, or any component thereof...being used by...an investigative or law enforcement officer in the ordinary course of his duties.'" United States v. Hammond 286 F3d 189, 192 (4th Cir. 2002) (quoting 18 U.S.C. § 2510(5)(a)(ii)). Second, the consent exception provides that "it shall not be unlawful...for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c).

Even if Appellant preserved this issue for appeal, the trial judge properly admitted the phone call because the call was obtained pursuant to the law enforcement exception and the

consent exception to the Act. Appellant asserts the State did not comply with the Act pursuant to the law enforcement exception, because the "state failed to establish the call at issue was intercepted by law enforcement for investigative purposes." (Initial Brief of Appellant 18). Appellant's argument is meritless. The law enforcement exception to the Act doesn't require law enforcement to intercept the call for investigative purposes. The Act merely requires a law enforcement officer to be acting in "the ordinary course of his duties" when a call is intercepted. 18 U.S.C. § 2510(5)(a) Even if an investigative purposes requirement existed, Truluck explicitly testified he intercepted the call for investigative purposes. (R. 81). Therefore, the trial judge correctly ruled the State complied with the law enforcement exception to the Act.

Appellant additionally argues the consent exception to the Act does not apply to the interception of his phone call, because he was not sufficiently notified his calls were being recorded. On the contrary, Appellant was notified before he made his call that "all phone calls are subject to monitoring and recording." (State's Exhibit #92). Appellant compares this warning with the thorough warning given to the defendant in United States v. Hammond. Hammond 286 F3d at 191. Appellant argues the warning he received "could hardly satisfy the strictures of consent to waiving one's constitutional right to be free from warrantless searches and seizures." (Initial Brief of Appellant 19). While the straightforward warning Appellant received may not have been as exhaustive as the warning Hammond received, the Fourth Circuit did not specify a litmus test or a minimum threshold for what constitutes a sufficient warning to a defendant to satisfy the consent exception to the Act. The Fourth Circuit merely noted the consent exception applies to prison inmates and other Federal Circuit Courts have reached the same conclusion. Hammond 286 F3d at 192. See United States v. Footman, 215 F.3d 145, 154-56 (1st Cir. 2000); See also United States v. Horr, 963 F.2d 1124, 1126 (8th Cir. 1992). Furthermore, the text of the

Act merely requires that "one of the parties to the communication has given prior consent to such interception" for the exception to apply. 18 U.S.C. § 2511(2)(c). It strains credulity to suggest the simple warning given to Appellant, "all phone calls are subject to monitoring and recording", was not sufficient for the trial judge to determine Appellant had consented to the recording of his phone call. Therefore, the trial judge correctly ruled the State complied with the consent exception to the Act. Appellant's conviction and sentence should be affirmed.

No Expectation of Privacy

The Fourth Amendment to the United States Constitution protects citizens "against unreasonable searches and seizures" by the State. U.S. Const. Amend. IV. "Nonetheless, the State's intrusion into a particular area...cannot result in a Fourth Amendment violation unless the area is one in which there is 'a constitutionally protected reasonable expectation of privacy.'" New York v. Class, 475 U.S. 106, 112 (1986) (quoting Katz v. United States, 389 U.S. 347, 360 (1967)). "Such a 'constitutionally protected reasonable expectation of privacy' exists only if (1) the defendant has an 'actual subjective expectation of privacy' in the place searched and (2) society is objectively prepared to recognize that expectation." United States v. Van Poyck, 77 F.3d 285, 290 (9th Cir. 1996) (quoting United States v. Davis, 932 F.2d 752, 756 (9th Cir. 1991). "[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell...accordingly, the Fourth Amendment proscription against unreasonable searches and seizures does not apply within the confines of a prison cell." Hudson v. Palmer, 468 U.S. 517, 526 (1984). Even if a prisoner believes his phone calls are private, "no prisoner should reasonably expect privacy in his outbound telephone calls." Van Poyck, 77 F.3d at 290-291.

To the extent Appellant argues the admission of his phone call was an unreasonable search or seizure under the Fourth Amendment, apart from the State's alleged noncompliance with the Act, such an argument is preserved for appeal. However, Appellant's argument on this ground fails because Appellant had no reasonable expectation of privacy in his prison phone call. Therefore, the interception of Appellant's phone call could not be a Fourth Amendment violation. Appellant did not have a subjective expectation of privacy in his phone call because he was explicitly informed that "all phone calls are subject to monitoring and recording." (State's Exhibit #92). Furthermore, even if Appellant had a subjective expectation of privacy in the phone call, there is no objective expectation of privacy in prison phone calls recognized by society. Appellant's conviction and sentence should be affirmed.

Harmless Error

An "error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence." State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008).

Even if the trial judge erred in admitting Appellant's jail phone call, any error was harmless in light of the overwhelming evidence presented against Appellant at trial. Appellant made the following statement in the challenged call:

> Appellant: "I ain't worried about nothing but the fact that I'm in here for a murder that I didn't commit, I am not worried about anything except for the fact that the only people who were anywhere around at any time whenever [Victim] got shot by somebody was me, [Victim], and whoever was in their houses at that time."

(State's Exhibit #92). The aforementioned statement is the only inculpatory statement from the phone call and the only statement from the call highlighted by the State at trial. (R. 704). Appellant's statement places him at the scene of the crime and acknowledges he was one of the few people present when Victim was shot. However, Appellant does not confess during the call. In fact, Appellant maintains his innocence and insists Victim was shot by someone else.

It is unlikely Appellant's phone call affected the outcome of his trial in light of the overwhelming evidence presented against him. First and foremost, Appellant confessed to shooting Victim. (R. 649-53, 938-40). Appellant's admission in the jail phone call that he was at the scene of the crime when Victim was shot is merely cumulative to his written confession of guilt. Steen and Bryant both testified that Appellant told them he would take care of Victim. (R. 270-72, 438). Truluck overheard Appellant tell Bryant he "took care of it" and disposed of the gun. (R. 636-37). Rabon testified Appellant borrowed a gun on the morning of December 8th and returned it later that morning after he claimed he shot at some coyotes. (R. 386-92). The bullets removed from Victim's body were matched to the gun Rabon provided to law enforcement. (R. 371). Because the evidence presented against Appellant at trial was overwhelming, any error in the admission of Appellant's jail phone call was entirely harmless and cumulative to other evidence. Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

BYRON E. GIPSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
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(803)-748-4785

BY: s/ Scott Matthews
SCOTT MATTHEWS
Bar # 101464

Office of the Attorney General
Post Office Box 11549
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(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 25, 2021

RECEIVED
Jan 25 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2019-001971

THE STATE, Respondent,

v.

BRIAN NEIL WHITE, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

BYRON E. GIPSON
Solicitor, Fifth Judicial Circuit

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BY: s/ Scott Matthews
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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
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Appeal from Richland County
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2019-001971

THE STATE, Respondent,

v.

BRIAN NEIL WHITE, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by email to the address listed in AIS and with a copy of the same to be deposited in the United States mail

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This twenty-fifth day of January, 2021.

Sally Ellison

SALLY ELLISON
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Brian Neil White, Appellant.

Appellate Case No. 2019-001971

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Unpublished Opinion No. 2022-UP-451
Submitted November 1, 2022 – Filed December 14, 2022

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia, for Respondent.

PER CURIAM: Brian Neil White appeals his conviction of murder and sentence of thirty-eight years' imprisonment. On appeal, White argues the trial court erred by admitting a recording of a phone call into evidence that violated the Fourth Amendment to the United States Constitution and did not fall into the law

enforcement or consent exception to the Omnibus Crime Control and Safe Streets Act (the Act).[1] We affirm.

We hold the trial court did not err in finding the recording was admissible under both the law enforcement and consent exceptions to the Act. *See State v. Frasier*, Op. No. 28117 (S.C. Sup. Ct. filed Sept. 28, 2022) (Howard Adv. Sh. No. 35 at 12, 17) (explaining that appellate review of a motion to suppress based on Fourth Amendment grounds in South Carolina is a two-step analysis where 1) the trial court's factual findings are reviewed for any evidentiary support and 2) whether reasonable suspicion exists is a question of law subject to de novo review); *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) ("The trial [court's] factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error."); *State v. Butler*, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003) (explaining that appellate review in Fourth Amendment search and seizure cases is "limited to determining whether any evidence supports the trial court's finding" (quoting *State v. Green*, 341 S.C. 214, 219 n.3, 532 S.E.2d 896, 898 n.3 (Ct. App. 2000))). First, the recordings were admissible under the law enforcement exception because law enforcement monitored White's calls as part of its normal procedure and standard practices. *See* 18 U.S.C. § 2511(1)(a), (prohibiting, in the absence of an exception, the interception of "any wire, oral or electronic communication" without a court order); 18 U.S.C. § 2510(5)(a)(ii) (defining the law enforcement exception as interception by "an investigative or law enforcement officer in the ordinary course of his duties"). Second, the recordings were admissible because White consented to having his calls recorded. *See* 18 U.S.C. § 2511(2)(d) (defining the consent exception as when "one of the parties to the communication has given prior consent to such interception"); *United States v. Hammond*, 286 F.3d 189, 192 (4th Cir. 2002) (joining the First, Second, Eighth, and Ninth Circuits in concluding the consent exception applies to prisoners who are "required to permit monitoring as a condition of using prison telephones").

AFFIRMED.[2]

WILLIAMS, C.J., THOMAS, J., and LOCKEMY, A.J., concur.

---

[1] 18 U.S.C. §§ 2510-2523.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

RECEIVED
Dec 29 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2022-UP-451 (filed Dec. 14, 2022)

THE STATE,

RESPONDENT,

V.

BRIAN NEIL WHITE,

APPELLANT

APPELLATE CASE NO. 2019-001971

PETITION FOR REHEARING

On December 14, 2022, this Court affirmed Appellant's conviction for murder. State v. White, 2022-UP-451 (S.C. Ct. App. filed Dec. 14, 2022). On appeal, Appellant challenged the trial court's erroneous admission into evidence of phone calls purportedly made by Appellant while he was awaiting trial in pretrial detention. This Court held the phone recordings were admissible under the law enforcement and consent exceptions to the Omnibus Crime Control and Safe Streets Act. Pursuant to Rule 221(a), SCACR, Appellant requests this Court grant rehearing on this matter due to several significant points overlooked and misapprehended by this Court. Specifically, this Court held "the recordings were admissible under the law enforcement exception

because law enforcement monitored [Appellant]'s calls as part of its normal procedure and standard practices." The facts presented to the circuit court showed that law enforcement was not monitoring Appellant's calls as part of any normal procedure or standard practice; rather, the detention center intercepted and recorded Appellant's calls for safety and security, independent of any law enforcement involvement. Further, this Court held "the recordings were admissible because [Appellant] consented to having his calls recorded." Again, the facts presented to the circuit court showed Appellant could not have impliedly consented to the recordings as the alleged warnings were insufficient to justify implied consent.

The Omnibus Crime Control and Safe Streets Act

The United States Congress passed legislation to protect individuals from the unauthorized interception of telephone calls. See 18 U.S.C. § 2511. The law "protects an individual from all forms of wiretapping except when the statute specifically provides otherwise." Abraham v. County of Greenville, 237 F.3d 386, 389 (4th Cir. 2001). Those protections apply to prisoners and pre-trial detainees, like Appellant. See United States v. Faulkner, 439 F.3d 1221, 1222 (10th Cir. 2006) (explaining the protections afforded under Title III apply to prisoners and pretrial detainees); United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002) (same). When information is obtained in violation of the statute, "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial." 18 U.S.C. § 2515.

Specifically, it is unlawful to "intentionally intercept[] ... or procure[] any other person to intercept ... any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). Additionally, it is unlawful to "intentionally disclose[] ... to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection."

18 U.S.C. § 2511(1)(c). Likewise, it is unlawful to use such ill-gotten communications. 18 U.S.C. § 2511(1)(d).

Law enforcement exception

The statute *exempts* devices used to intercept communications "being used ... by an investigative or law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a). "'Investigative or law enforcement officer' means any officer ... of a State or political subdivision thereof, who is empowered to conduct investigations of or to make arrest for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(7). See also United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002).

The Fourth Circuit analyzed (1) whether the Bureau of Prisons (BOP) recording of an inmate's phone call with a friend violated the statute, and (2) if the BOP's recording was lawful, whether the FBI's seizure of the recording through a subpoena, rather than court order, violated the statute. United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002). The court first held the BOP's recording of the phone call fell within the "law enforcement" and "consent" exceptions of the statute. Id. Next, the court turned to whether "the FBI's acquisition of the BOP's tapes through subpoena itself constituted an independent 'interception' subject to Title III's requirements." Id. at 192-193. The court concluded that once the recordings were obtained lawfully pursuant to Title III by the BOP, then the BOP was free to do with them as it saw fit. Id. at 193. In other words, "the FBI was free to use the intercepted conversations once they were excepted under either § 2510(5)(a)(1) or § 2511(2)(c)." Id. The court explained that the statute applied only to the initial capture of the communication, and the FBI's conduct was not in using a device to acquire the communication. Id.

Not intercepted by law enforcement for investigative purposes

Here, the local jail used AmTel to provide telephone services to pre-trial detainees. R. 19, ll. 16-20; R. 941. The detention center recorded *all* calls made by pre-trial detainees. R. 36, ll. 19-24. Neither the phone service nor the detention center provided a mechanism for not recording phone calls between attorneys and clients. R. 36, ll. 19-24; R. 38, ll. 12-18. After recording the calls, AmTel provided the recordings to the solicitor's office and law enforcement "almost in real time." R. 19, ll. 21-24; R. 941; R. 31, ll. 14-20; R. 44, ll. 5-13. The detention center allowed immediate access to the solicitor of all recorded detainee phone calls without regard to attorney-client privilege or confidentiality. R. 36, ll. 19-24. In fact, the detention center provided a password to the solicitor's office to use to log on to the phone system, which allowed the solicitor's office to access phone calls made by detainees. R. 42, ll. 3-8. The recording of the phone calls and the use of the recordings of those phone calls violated Appellant's Fourth Amendment rights. R. 21, ll. 8-14; R. 941.

In light of the detention center's policy of recording all calls regardless of confidentiality or privilege, the the solicitors engaged in some self-policing through "a rule in place" that if "the P.D.'s number pops up, nobody listens to it." R. 38, ll. 12-18. As for lawyers outside the public defender office, the solicitors did not listen to those calls either as long as the solicitor knew the number being called wais to a lawyer. R. 38, ll. 19-24. In the past, the solicitor's office had listened to a call between a detainee and a lawyer when the detainee called the lawyer's cell phone, a number with which the solicitor was unfamiliar. R. 38, ll. 19-21. "The minute" the solicitor "realized that it was an attorney," the solicitor turned over the phone call and informed the attorney that the solicitor had stopped listening. R. 38, ll. 21-24.

Regarding the phone calls sought to be admitted here, the solicitor claimed the calls were found by the sheriff's department, who listened to Appellant's phone calls. R. 42, ll. 9-11; R. 952. Importantly, the calls were *not* found by the detention center, which was the entity that intercepted and recorded the calls. The investigator who listened to the calls, made a recording for the police file, which was then turned over to the solicitor for prosecution. R. 43, ll. 3-6; R. 952. In short, the investigator listened to Appellant's phone calls to further his investigation by finding incriminating evidence against Appellant. R. 45, ll. 7-14; R. 952. The recordings made by the investigator were *not* made to ensure security or safety at the detention center. R. 45, ll. 7-14; R. 952.

During the in camera hearing, Investigator Cris Truluck with the Richland County Sheriff's Department elaborated upon the information provided by the solicitor. Truluck obtained two phone calls made by Appellant while he was in the detention center. R. 76, ll. 8-16. Truluck explained how he got the calls:

> [W]hen a defendant gets arrested, he is booked into jail and he's given a ID number. AmTel, which is their phone service, they record all calls. All calls that - - the telephones that are at the jail are marked that the calls are recorded. And prior to the call even beginning, it - - it is a specific line that it's automated that tells you again these calls are recorded.
>
> So - - and we also had that policy at the sheriff's department too. If you use our phones, they're all marked as recorded.
>
> However, normally what you do, you get their ID number that they are given. And you can go to the AmTel website and put in that PIN number or that ID number. And you can set a date - - a - - a time range on it.
>
> Now, as was brought up before, there is a section where you can listen live. But that's a crap shoot. You might get - - click on it and see their name that they are making a live call.
>
> But that's very rare that you can do that. However, that's a possibility. Me personally, I've never done that. I've never been able to do that.

> This process you put down and it - - it lists all the cases and the times that are made. All's you ever have to do is you click on it and you can listen to the call.

R. 76, l. 20 – R. 77, l. 19.

Truluck followed this process when listening to Appellant's phone calls. R. 77, ll. 20-21. He provided two calls to the solicitor. R. 77, ll. 22-24. These calls were part of his investigative file. R. 77, l. 25 – R. 78, l. 2. Listening to calls made by pre-trial detainees was "pretty much standard" practice for the sheriff's department. R. 78, ll. 7-11.

Truluck was *not* employed by the detention center. R. 79, ll. 108. Thus, he was not in charge of any security at the detention center. R. 79, ll. 1-8. His examination of the jail calls was strictly for the sherriff's office's investigative purposes. R. 79, ll. 11-13; R. 79, ll. 20-21; R. 81, ll. 10-15. He never obtained a search warrant in order to listen to jail calls. R. 79, ll. 16-19. Truluck explained that he was listening to Appellant's phone calls "to see if there's investigative leads" revealed in the call. R. 80, ll. 1-3.

Truluck explained there was a "section" showing the person being called by the detainee. R. 80, ll. 21-24. He provided that he had never clicked on the button and learned that the number belonged to an attorney. R. 80, l. 24 – R. 81, l. 3. He was unsure "whether those calls are already screened." R. 81, ll. 4-6. However, he assured the court that he engaged in self-policing, like the solicitor, because he knew "that if [it] does go to the attorney, not to listen to it." R. 81, ll. 8-9.

The state failed to establish the calls at issue were intercepted by law enforcement for investigative purposes. Rather, the calls were intercepted by AmTel, a telephone service provider, in connection with the Alvin S. Glenn Detention Center. There was no evidence presented that Alvin S. Glenn Detention Center was an institution run by law enforcement. In fact, Investigator Truluck, who was employed by the Richland County Sheriff's Department, disavowed any role whatsoever in the managing and operating of the detention center. According to publicly available information, the

detention center is administered by Richland County independent of the sheriff's department. http://www.richlandcountysc.gov/Government/Departments/Public-Safety/Detention-Center.

Neither Truluck nor anyone connected with the Richland County Sheriff's Office intercepted the calls as that term is understood under the Act. Thus, it was incumbent upon the state to show that the person or entity that actually intercepted the call fell within an exception under the law. The state simply failed to do so. See United States v. Lanoue, 71 F.3d 966, 981 (1st Cir. 1995) overruled on other grounds by United States v. Watts, 519 U.S. 148 (1997) (expressing concerns over whether the government could show the phone call was intercepted pursuant to the law enforcement where the phone call was intercepted from a pre-trial detainee at the Wyatt Detention Center, which was owned and operated by Cornell Cox Management, a private corporation). Truluck obtained access to the calls only by grace from the detention center, not pursuant to the law enforcement exception under the Act.

Not consensual

The Act also provides that "[i]t shall not be unlawful ... for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(d); see also 18 U.S.C. § 2515. In short, the Act exempts interception of calls for which there is consent.

Here, the evidence showed there was a warning provided to the participants on the detention center phones. This warning during the phone call was simply that the call was being monitored and recorded. R. 83, ll. 8-20. The recording did not indicate by whom. R. 179, ll. 11-14.

"'Consent' is a broad term and is defined as 'agreement, approval, or permission as to some act or purpose.'" State v. Whitner, 399 S.C. 547, 554, 732 S.E.2d 861, 865 (2012) (quoting Black's Law Dictionary 346 (9th Ed. 2009). "Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 856 (2003). "The state bears the burden of establishing the voluntariness of the consent." Id.

Here, per the actual recording, he was told "all phone calls are subject to monitoring and recording." State's Exhibit #92. Such notice was a far cry from the notice deemed to be sufficient to infer consent by the Fourth Circuit in Hammond, supra. There, the Fourth Circuit explained that inmates "receive two handbooks that state that all calls other than those to their attorneys are monitored. They sign a consent form acknowledging that their calls may be monitored and recorded and that use of the telephones constitutes consent of monitoring." Hammond, 286 F.3d at 191. Further, "[t]hey also receive an orientation lesson plan stating that calls are monitored and are told that such is the case orally during an orientation lesson. Finally, the BOP reminds the inmates that their calls may be monitored by placing notices of monitoring on or near the actual telephones." Id.

Quite simply, the state presented evidence that the only notice Appellant received was that his call was "subject to monitoring and recording" at the beginning of the telephone call that he placed. The minimal warning could hardly satisfy the strictures of consent to waiving one's constitutional right to be free from warrantless searches and seizures. See United States v. Lanoue, 71 F.3d 966, 981 (1st Cir. 1995) ("Deficient notice will almost always defeat a claim of implied consent.").

Conclusion

Appellant respectfully requests rehearing to consider these points that were overlooked or misapprehended by this Court in arriving at its conclusion. The state failed to present evidence that

Appellant's phone calls were being intercepted by law enforcement in order to satisfy the law enforcement exception. The evidence showed the phone calls were intercepted and recorded by non-law enforcement officials. Further, the evidence showed Appellant did not consent to his phone calls being recorded simply by using the phone.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

This 29th day of December, 2022.

RECEIVED
Dec 29 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2022-UP-451 (filed Dec. 14, 2022)

THE STATE,

RESPONDENT,

V.

BRIAN NEIL WHITE,

APPELLANT

APPELLATE CASE NO. 2019-001971

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the petition for rehearing in the above-referenced case has been served upon Jonathan Scott Matthews, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is smatthews2@scag.gov; and on Brian Neil White, #382851, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 29th day of December, 2022.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

Brian Neil White, Appellant.

Appellate Case No. 2019-001971

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C. J.

J.

A. J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Jonathan Scott Matthews, Esquire
The Honorable DeAndrea G. Benjamin

FILED
Jan 20 2023

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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March 10, 2023

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Brian N. White
Lower Court Case No. 2019GS4003681
Appellate Case No. 2019-001971

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

The following exhibit was filed in this appeal:

State's Exhibit #92 (Recorded Phone Call)

It will be necessary for the Attorney General's Office, or its designee, to pick up this exhibit from the Clerk's office for transport to the trial court clerk.

Very truly yours,

Jenny A. Kitchings

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Jonathan Scott Matthews, Esquire

1204

6-17-23

FORM 5

STATE OF SOUTH CAROLINA)
County of Richland)
Brian N. White 382851)
Full name and prison number (if any) of Applicant)
v.)
State of South Carolina)

IN THE COURT OF COMMON PLEAS

2023CP4003877

APPLICATION FOR POST-CONVICTION RELIEF

2023 JUL 26 AM 9:00
JEANNETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

INSTRUCTIONS – READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Kershaw C.I. MB-64
4848 Goldmine Hwy, Kershaw S.C. 29067

2. Name and location of Court which imposed sentence Richland County Court of General Sessions

3. Name(s) of co-defendant(s) (if any) N/A

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2019-GS-40-3681, Murder

(b)

(c)

5. The date upon which sentence was imposed and the terms of the sentence:

(a) Nov, 22nd 2019 38 Years in SCDC

(b)

(c)

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii.

iii.

(b) the result in each such Court to which you appealed:

i. Conviction Affirmed

ii.

iii.

(c) the date of each such result:

i. Nov, 1st 2022

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i.

ii.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Inafective Counsel

(b) Convicted with No Actual Evidence

(c) Lack of Actual Investigation

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Please See Extra page

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? N/A

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A

(d) any other petitions, motions or applications in this or any other Court? N/A

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is first applications since trial other than apeal

(b) "

(c) "

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

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Public Defender Megan Eigenbrot
1701 Main St. Columbia S.C. 29202

ii. Indigent Defense Susan B Hackett
1330 Lady St. Columbia S.C. 29201

iii.

(b) the proceedings at which each such attorney represented you:

i. Megan Eigenbrot - Trial, Sentencing

ii. Susan B. Hacket - Appeal

iii.

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

A new trial

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

No

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Richland)

I, Brian N. White, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Brian White

SWORN to and subscribed before me this 30th day of June, 2023.

Cathrine A Amaya (L.S.)
Notary Public

My Commission Expires: 1-22-2029

1210

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

I, Brian N. White, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Brian N. White
Applicant

SWORN or affirmed to and subscribed before me this 30th day of June 2023.

Catherine A Amos
Notary Public

My Commission Expires: 1-22-2029

RICHLAND COUNTY
FILED
2023 JUL 26 AM 9:00
JEANETTE W. McBRIDE
C.C.P. & G.S.

Revised 3/2003

6-17-23

Application for Post Conviction Relief
Continued.

Queston 11 section (A) - Inafective Councel. From the Very begging I was given too a Public Defender who was already [redacted] leaving the firm, Rebecca Williams I believe, And the first couple weeks [redacted] are very important especially in my case. Then I was to Megan Eigenbrot who was newer to the job and already had a lot of cases. When it come [redacted] closer to trial time 3 years later, the one thing I said was I wanted to take the stand but I did not want point out or physically say Nicole did it. Then when I got on the stand one of first things asked was did you kill Scott Turner? then asked who did? Forcing me to quickly decide to say Nicole did to not seal my fate in front of the jury. Also leaving me mentaly stressed and perplexed for the remainder of my testimony and cross-examination

witch left me to not answer and respond in ways I know I should have and [redacted] lose track of things during this very important peice of my trial. There [redacted] was also a few instances where Salicitor Sampson did things during trial where Megan turned to her co worker and asked shouldnt I object and she was told it wouldnt matter. In my [redacted] circumstances, I am on trial for a murder I didnt Commit and any type of objection is important and worth trying wether it "wouldnt matter" or not.

6-17-23

Application For Past Conviction Relief
Continued

Queston 11 Section (B) - Convicted With No Actual Evidence. My entire case against me nathing but statements. Including my falsified statement in witch the RCSD took what I did say and re-worded it to turn it into what they called a confession, witch it was not, then during a stressful situation and while eating was gotten to sign said statement without realizing that my statement was changed. Said statement was never placed in my possesion. Investigator Trueluck held on too it and escorted me all the way to intake at Alvin S. Glenn where he directed them to place the copy of the statement in my property. This making me unable to see what they had done in the time frame of the short window I have to change or add to my statement after giving it. Also, the day after my arrest, Alexander Raba

came forth with the murder weapon giving a statement that the weapon was in my possesion at the time. But he was never truely investigated. The gun given and bullets still in said gun had absolutely no DNA or finger print matching me to it in any form and there was a DNA Sample they found on the gun, with the cromosone meaning it could be female, that they had no match for. They also could not place any DNA or finger print evidence that matched me on Scene. Also No eye witness saying I did it or seen me do it. And No Video or Photo Evidence showing me doing the crime. Therefore, is absolutely no physical evidence, DNA or otherwise, showing I was the one Murdered Scott Turner, only statements. Witch none of them actually said I did it, other than my VERY falsified Statement.

6-17-23

Application For Post Conviction Relief
Continued.

Questan 11 Section (C) - Lack of Actual Investigation. When Investigata arrived on scene. No one did the simplist procedures with would have found the actual Killer before I could have ever been charged, let alone convicted. Nobody on Scene was D.N.A Swabbed, G.S.R. Tested, or even seen as a possible suspect everyone knows that in any investigation, especially a murder, you exhaust every avenue to cancel out any one that may or may not be a [redacted] Suspect. Even family or any body found on scene just to rule out possibilies. Instead [redacted] The people found on scene were seen as "victims", said so by Investigator Trueluck on stand, and was never tested for anything, even just to rule out possibilities. Then when finges were pointed at me they questaned me after arresting me

for a warrant from back Child support, they then turned around my answers and changed theyre questions to turn it into a confession, witch is NOT what it was, and then got me to sign it while mentally and physically distracted as explained in Question 11 section (B). Then Even after someone else completely came in the next day with murder weapon stating it was in my posession, It was just added in without thaurogh investigation into anything else and the case was "closed" pretty much. If theyre had been any actual investigation into this murder, or even just the basics from the begining, I could have never been wrongfully charged and convicted of a murder I didnt commit.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Brian N. White, #382851, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2023-CP-40-3877 **RETURN AND PARTIAL MOTION TO DISMISS** (Counsel Appointed)

In response to Brian White's (Applicant) action for post-conviction relief (PCR) filed on July 26, 2023, Respondent makes this Return.[1]

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. In June 2019, the Richland County Grand Jury indicted Applicant for Murder (2019-GS-40-03681). On November 18-22, 2019, Applicant proceeded to a jury trial before the Honorable DeAndrea G. Benjamin. Fifth Circuit Assistant Public Defenders Megan A. Eigenbrot (Trial Counsel), Tracy E. Pinnock, and Richard E. Marsh, III, represented Applicant. Fifth Circuit Deputy Solicitor, April W. Sampson, and Assistant Solicitors Samuel C. McGlothin and Harrison M. Pratt prosecuted the

[1] Respondent's return was due to be filed within ninety days of receipt of Applicant's instant post-conviction relief application. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial."). Now, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, Respondent respectfully asks this Court to accept this return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

case. The jury convicted Applicant as indicted. Judge Benjamin sentenced Applicant to a term of thirty-eight years' imprisonment.

Applicant timely filed a notice of appeal. Appellate Defender Susan B. Hackett perfected Applicant's appeal. On December 14, 2022, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. White, Unpub. Op. 2022-UP-451 (S.C. Ct. App. Filed December 14, 2022). The Remittitur was returned on March 24, 2023.

SUMMARY OF FACTS ADDUCED AT TRIAL[2]

On December 7, 2016, Crystal Posey ("Posey") returned to her mobile home on Patricia Drive in Richland County and discovered her T.V. was missing. (Trial Tr. p. 293). Posey suspected her T.V. was stolen and sold by her longtime boyfriend, James Scott Turner (Victim). (Trial Tr. pp. 289-93). Posey theorized Victim sold her T.V. to buy drugs and that he was currently high on crack cocaine. (Trial Tr. pp. 293-93). Posey contacted her daughter, Shena Nicole Bryant ("Bryant"), and asked her to come home. (Trial Tr. p. 293). When her mother called, Bryant was at the Marriott Hotel in downtown Columbia with Applicant, Brittany Steen ("Steen"), and Elexia Tucker ("Tucker").[3] (Trial Tr. pp. 350-53). At Bryant's request, Applicant drove Bryant, Steen, and Tucker to Posey's residence. (Trial Tr. pp. 353-54).

Applicant, Bryant, Steen, and Tucker arrived at Posey's residence and tried to comfort her. (Trial Tr. p. 354). While at the residence, Applicant told both Steen and Bryant he would "handle" or "take care of" Victim. (Trial Tr. pp. 355-57). At some point in the early morning hours of

[2] The facts are taken from the Record on Appeal (2019-001971).

[3] Bryant and Applicant had a previous romantic relationship. (Trial Tr. pp. 346-47). After Applicant and Bryant began dating, Applicant lived with Bryant, Posey, and Victim at the residence on Patricia Drive until approximately August or September of 2016, when Applicant and Bryant broke up. (Trial Tr. pp. 347-48). Applicant moved out of the residence after his breakup with Bryant, but their relationship remained amicable. (Trial Tr. p. 348).

December 8, 2016, Applicant, Steen, and Tucker left the residence to return to the Marriott. (Trial Tr. p. 526). Bryant remained with Posey, and they both went to bed at Posey's residence. (Trial Tr. p. 294). Bryant and Posey were awakened by gunshots outside the front door. (Trial Tr. p. 295). When Bryant and Posey went outside to investigate the gunshots, they witnessed Victim's van riddled with gunshots on the driver's side door. (Trial Tr. p. 296). Bryant opened the driver's side door and witnessed Victim bleeding and lying across the front seat of the van. (Trial Tr. p. 359). Bryant asked Posey to call 911 and bring towels from inside to help stop the bleeding. (Trial Tr. p. 296).

Deputy Jeffrey Cahill ("Deputy Cahill") of the Richland County Sheriff's Department was the first law enforcement officer to arrive at the scene. As Deputy Cahill approached the residence, he was flagged down by a white male individual who was walking away from the scene. The white male identified himself as Applicant and told Deputy Cahill he was smoking a cigarette when he felt bullets "whiz by him." (Trial Tr. pp. 189-90). Deputy Cahill continued to the residence to secure the scene. Paramedic Richard Hill ("Hill") arrived soon thereafter and tended to Victim's injuries. Hill observed that Victim had no pulse and multiple gunshot wounds to the left side of his body including his head, shoulder, and chest. (Trial Tr. pp. 194-96). Victim was subsequently pronounced dead as a result of multiple gunshot wounds. (Trial Tr. p. 741).

Investigator Cris Truluck ("Investigator Truluck") of the Richland County Sheriff's Department arrived on the scene and questioned Posey's neighbors. Investigator Truluck learned Deputy Cahill encountered Applicant leaving the scene, and two neighbors, Samuel Knowles and Randell Wilson, also saw Applicant near Posey's residence that morning. (Trial Tr. pp. 785-87). Investigator Truluck considered Applicant a suspect and asked Bryant to call Applicant. As

Investigator Truluck listened to their phone conversation[4], Applicant told Bryant that he "took care of it" and got rid of the gun, but Applicant did not confess to the shooting. (Trial Tr. pp. 795-96). Investigator Truluck returned to Posey's residence later that day to speak with her again and saw Applicant at the residence. (Trial Tr. p. 798).

Posey and Applicant were taken to the Sheriff's office for questioning. (Trial Tr. p. 799). Applicant waived his Miranda rights and agreed to speak with Investigator Truluck. (Trial Tr. pp. 802-06). Applicant confessed to shooting Victim. (Trial Tr. pp. 808-12). Applicant stated he parked his car on Woodford Street and walked to Posey's house in the early morning hours of December 8, 2016. (ROA pp. 938-40). Applicant fired a pistol approximately six times into Victim's driver's side window. Id. After shooting Victim, Applicant claimed he ran from the scene, took his gun apart, and threw the pieces into the woods. Id. Applicant did not tell law enforcement where he obtained the gun. Id. After his confession, Applicant was arrested and charged with murder. (Trial Tr. p. 818).

On December 9, 2016, Jerry Rabon ("Rabon") contacted the Richland County Sheriff's Office to tell them he may be in possession of the murder weapon. (Trial Tr. p. 486). Applicant was living with Rabon then and had access to his home. (Trial Tr. pp. 471-72). Rabon explained that he awoke early on the morning of the 8th to find Applicant looking for something in Rabon's spare bedroom. (Trial Tr. p. 474). Applicant asked Rabon to borrow his gun so Applicant could help his boss shoot some coyotes. (Trial Tr. pp. 474-75). Rabon gave Applicant his pistol and some ammunition. (Trial Tr. p. 475). Applicant returned the pistol a few hours later and told Rabon he shot at some coyotes but missed. (Trial Tr. pp. 479-80).

[4] It does not appear this phone call was played for the jury. Investigator Truluck testified there were technical issues with the volume of Applicant's voice on the phone call. (Trial Tr. p. 94).

When Applicant returned the gun, he was speaking to Bryant on the phone. (Trial Tr. p. 480). Bryant told Rabon that Victim had been shot. Id. Rabon contacted law enforcement after learning that Applicant had been arrested for murder. (Trial Tr. pp. 485-86). Rabon gave his gun to law enforcement. (Trial Tr. p. 501). Forensic analyst Amanda Metz of the Richland County Sheriff's Office analyzed the gun and determined the bullets extracted from the Victim's body were fired by the same gun. (Trial Tr. p. 459).

Applicant testified in his own defense at trial. Applicant admitted telling Steen via text message that he would "handle" Victim. (Trial Tr. p. 987). Applicant further admitted he borrowed a pistol from Rabon and lied to Rabon about why he needed the weapon. (Trial Tr. pp. 962-63). However, Applicant claimed he obtained the weapon from Rabon because Bryant asked him to bring her a gun. (Trial Tr. p. 959). Applicant claimed Bryant shot Victim. (Trial Tr. p. 965). At the conclusion of trial, Applicant was convicted of murder.

CURRENT APPLICATION

Applicant timely commenced this PCR action on July 26, 2023. In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following reasons:

1. Ineffective Assistance of Counsel
   a. " Question 11. Section (A)- Inafective [*sic*] Councel [*sic*]. From the very beggining [*sic*] I was given too [*sic*] a Public Defender who was already leaving the firm, Rebecca Williams I believe, and the first couple weeks are very important especially in my case. Then I was to [*sic*] Megan Eigenbrot who was newer to the job and already had a lot of cases. When it come [*sic*] closer to trial time 3 years later, the one thing I said was I wanted to take the stand but I did not want to point out or physically say Nicole did it. Then when I got on the stand one of the first things asked was did you kill Scott Turner? then [*sic*] asked who did? Forcing

me to quickly decide to say Nicole[5] did to not seal my fate in front of the jury. Also leaving me mentally stressed and perplexed for the remainder of my testimony and cross-examination witch [*sic*] left me to not answer and respond in ways I know I should have and lose track of things during this very important peice [*sic*] of my trial. There was [*sic*] also a few instances where Solicitor Sampson did things during trial where Megan turned to her co worker and asked shouldnt [*sic*] I object and she was told it wouldnt [*sic*] matter. In my circumstances, I am on trial for a murder I didnt [*sic*] do and any type of objection is important and worth trying wether [*sic*] it "wouldnt [*sic*] matter" or not.

2. "Convicted with No Actual Evidence [*sic*]"
   a. "Question 11 Section (B)- Convicted With No Actual Evidence [*sic*]. My entire case against me nothing [*sic*] but statements. Including my falsified statement in witch [*sic*] the RCSD took what I did say and re-worded it to turn it into what they called a confession, witch [*sic*] it was not, then during a stressful situation and while eating was gotten to sign said statement without realizing that my statement was changed. Said statement was never placed in my possesion [*sic*] Investigator Trueluck held on too [*sic*] it and escorted me all the way to intake at Alvin S. Glenn where he directed them to place the copy of the statement in my property. Thus making me unable to see what they had done in the timeframe of the short window I have to change or add to my statement after giving it. Also, the day after my arrest, Alexander Rabon[6] came forth with the murder weapon giving a statement that the weapon was in my possesion [*sic*] at the time. But he was never truely [*sic*] investigated. The gun given and bullets still in said gun had absolutely no D.N.A. or fingerprint matching me to it in any form and there was a D.N.A. sample they found on the gun, with the cromosone [*sic*] meaning it could be female, that they had no match for. They also could not place any D.N.A. or finger print evidence that matched me on scene [*sic*] Also No [*sic*] eye witness saying I did it or seen me do it. And no video or photo Evidence [*sic*] showing me doing the crime. Therefore, is [*sic*] absolutely no physical evidence, D.N.A. or otherwise, showing I was the one Murdered [*sic*] Scott

[5] Applicant is referencing Shena Nicole Bryant, whom he alleges committed the crimes for which he has been convicted.

[6] In his testimony at his trial Applicant clarified that Alexander Rabon is also known by the name Jerry Rabon. (Trial Tr. pp. 951).

Turner, only statements. Witch [*sic*] none of them actually said I did it, other than my VERY [*sic*] falsified statement."

3. "Lack of Actual Investigation"
   a. "Question 11 Section (c)- Lack of Actual Investigation. When Investigators arrived on scene. No one did the simplist [*sic*] procedures witch [*sic*] would have found the actual killer before I could have ever been charged, let alone convicted. Nobody on scene [*sic*] was D.N.A. swabbed, G.S.R. Tested [*sic*] or even seen as a possible suspect everyone knows that in any investigation, especially a murder, you exhaust every avenue to cancel out anyone that may or may not be a suspect. Even family or anybody found on scene [*sic*] just to rule out possibilities. Then when finges [*sic*] were pointed at me they questioned me after arresting me for a warrant from back child support, they then turned around my answers and changed they're [*sic*] questions to turn it into a confession, witch [*sic*] is NOT [*sic*] what it was, and then got me to sign it while mentally and physically distracted as explained in question 11 section (B). Then Even [*sic*] after someone else completely came in the next day with murder weapon [*sic*] stating it was in my posession, [*sic*] It [*sic*] was just added in without thurogh [*sic*] investigation into anything else and the case was "closed" pretty much. If they're [*sic*] had been any actual investigation into this murder, or even just the basics from the beginning, I could have never been wrongfully charged and convicted of a murder I didnt [*sic*] commit."

Applicant requests relief in the form of a "new trial."

Attached to this return and incorporated by reference are the Richland County Clerk of Court records regarding the subject's conviction and sentence; Applicant's records from the South Carolina Department of Corrections; the trial transcript; the record on Appeal; and the records of this current PCR action. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

RESPONSE TO ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges he is entitled to post-conviction relief based on allegations of ineffective assistance of Trial Counsel. Applicant's claim stems from two main allegations; 1) Applicant

alleges that Trial Counsel was ineffective for improperly coercing Applicant's testimony implicating Nicole's guilt during direct examination, and 2) Applicant alleges that counsel was ineffective for failing to object at every possible opportunity to do so. The State asserts that the Applicant's Claims are without merit.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, GENERALLY

In Strickland v. Washington,[7] the United States Supreme Court established that to challenge a conviction based on ineffective assistance of counsel, a prisoner must prove two elements: (1) his counsel was deficient in his representation, and (2) he was prejudiced as a result. To satisfy the first prong, a prisoner "must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. To satisfy the second prong, a prisoner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The Supreme Court has cautioned that "[j]udicial scrutiny of counsel's performance must be highly deferential," and "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant—like all other defendants— the right to "assist[ance] by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Id. at 685. Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of

[7] 466 U.S. 668 (1984).

fact that an evidentiary hearing can only determine. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. Strickland, 466 U.S. at 687. Applicants seeking PCR relief must provide claims that satisfy both prongs in Strickland, and failure to satisfy both prongs defeat the ineffectiveness claim. Id. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

In the first prong of Strickland, constitutional deficiency is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). An applicant claiming ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. Id.

Further, because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that

the absence of evidence cannot overcome [it].'" Dunn v. Reeves, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting Burt v. Titlow, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen.*" Id. (alteration in original) (emphasis added) (quoting Titlow, 571 U.S. at 23– 24).

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (citing Strickland, 466 U.S. at 690). In determining the deficiency, the court must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109– 10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 8; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, 466 U.S. at 688– 89; see id. at 693 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant

in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." Dunn, 594 U.S. ___, 141 S. Ct. at 2410 (quoting Harrington, 562 U.S. at 106– 107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." Id. (quoting Harrington, 562 U.S. at 108).

Thus, a fair assessment of attorney performance requires every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. The ultimate question is not whether counsel's actions were reasonable but whether there is any reasonable argument counsel satisfied the Strickland deferential standard.

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel that ensures a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691– 92. An applicant seeking to prove prejudice must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117– 18, 386 S.E.2d 624, 625 (1989). A reasonable probability is one that is "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see id. at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

To determine prejudice, the reviewing court must consider the totality of the evidence before the jury. Id. at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding— counsel's errors must be "so serious as to *deprive the*

defendant of a fair trial." Id. at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691. Moreover, the South Carolina Supreme Court has repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony according to the rules of evidence at the PCR hearing to establish prejudice. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy considering the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. Strickland, 466 U.S. at 690.

Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

RESPONSE TO ALLEGATIONS OF IMPROPER DIRECT EXAMINATION

Applicant contends Trial Counsel was ineffective for improperly coercing Applicant's

testimony implicating Nicole's guilt during direct examination. Specifically, Applicant argued the following in an addendum attached to his application for PCR:

> [T]he one thing I said was I wanted to take the stand but I did not want to point out or physically say Nicole did it. Then when I got on the stand one of the first things asked was did you kill Scott Turner? then [*sic*] asked who did? Forcing me to quickly decide to say Nicole did to not seal my fate in front of the jury. Also leaving me mentally stressed and perplexed for the remainder of my testimony and cross-examination witch [*sic*] left me to not answer and respond in ways I know I should have and lose track of things during this very important peice [*sic*] of my trial.

(PCR Application pp. 6-7).

However, Respondent submits that the record wholly refutes this allegation. During his trial Applicant was questioned twice on direct examination regarding the identity of the individual who killed the victim. The following colloquy occurred between Trial Counsel and Applicant, early on in direct examination at Applicant's Trial:

> Trial Counsel: Did you shoot Scott Turner?
> Applicant: No ma'am.

(Trial Tr. pp. 949, ll. 23-24). Following this question Trial Counsel questioned Applicant about the events that occurred on the day prior to and the morning of the crime in question. It was during this recitation of facts that Applicant, of his own volition, alleged that Nicole was the individual who committed this crime. That conversation occurred as follows:

> Trial Counsel: And, Brian, what happens when you see Nicole?
> Applicant: Well, at – everything that I'm about to say, honestly happened kind of fast. I don't even know if it was a complete minute in the time frame that it happened. But I approach her. She asks, "Did you bring the gun?' I say "Yes." When I do, I— say "yes," lifting my shirt exposing it. And she immediately grabs the gun from my waist, turns towards the door, and starts shooting.

(Trial Tr. pp. 965, ll. 12-21). The conversation that Applicant refers to in his application for post-conviction relief did not occur until the end of Trial Counsel's direct examination. That conversation occurred as follows:

> Trial Counsel: I am going to ask you again: Did you shoot Scott Turner?
> Applicant: No, ma'am, I did not.
> Trial Counsel: Who did?
> Applicant: Nicole did.
> Trial Counsel: Brian, I'm – I'm—I'm going to stop asking questions. I'm going to let Ms. Sampson get up here and talk to you. Please answer any questions, okay?
> Applicant: Okay.

(Trial Tr. pp. 980, ll. 13-21).

Applicant's contention that Trial Counsel was ineffective for asking him direct questions coercing his testimony that Nicole was the individual who committed the murder of Scott Turner is without merit. This allegation along with Applicant's contention that he was prejudiced by Trial Counsel's questioning in his further responses, as the interaction left him "mentally stressed and perplexed for the remainder of [his] testimony and cross-examination," fails to consider the timeline in which these facts were brought to the attention of the court.

Further, Applicant's entire defense rested on third-party guilt of the named individual, therefore, it would have been crucial for Trial Counsel to elicit testimony from Applicant supporting that defense. "Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." Strickland, 466 U.S. at 688. (citing Cuyler v. Sullivan, supra, 446 U.S., at 346, 90 S.Ct., at 1717). "Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688 (internal citations omitted). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.

Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." Strickland, 466 U.S. at 691.

RESPONSE TO ALLEGATIONS OF FAILURE TO OBJECT

Applicant contends Trial Counsel was ineffective for failing to object at any potential opportunity to do so. Specifically, Applicant argues that where Trial Counsel conferred with co-counsel regarding the applicability of an objection to certain statements made by opposing counsel and was informed that objecting in those moments "would not matter," Trial Counsel should have objected in spite of that advice. Respondent asserts that it is impossible for the State to respond specifically to these vague allegations without more definite facts and circumstances to support Applicant's claims. Instead, Respondent generally responds and moves for Applicant through counsel to file an amended application with specific allegations.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland,

466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Respondent submits that Applicant cannot satisfy either requirement of Strickland. However, the allegations of ineffective assistance of counsel probably raise questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue after Applicant, through counsel, amends his application. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application "alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court").

PARTIAL MOTION TO DISMISS

Respondent moves for partial summary dismissal pursuant to § 17-27-70 of the South Carolina Code on Applicant's claims of insufficient evidence and investigation, because there are no genuine issues of material fact that necessitate an evidentiary hearing. See S.C. Code Ann. § 17-27-70(c) (establishing procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). Before the Court will hold an evidentiary hearing, a PCR applicant must make a *prima facie* showing he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). As set forth more fully below, Respondent submits Applicant has not made a *prima facie* showing that he is entitled to relief on his claims insufficient evidence and investigation.

RESPONSE TO ALLEGATIONS OF INSUFFICIENT EVIDENCE AND INVESTIGATION

Applicant alleges that he was convicted without the utilization of actual evidence or an actual investigation. These allegations should be summarily dismissed. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. See S.C. Code Ann. § 17-27-20(b); Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)); Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001). Trial court error is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant's allegations of insufficient evidence and investigation could have been raised at trial and thereafter on appeal. Therefore, Applicant's allegations that he was convicted without the utilization of actual evidence, or an actual investigation should be dismissed as not cognizable under the Uniform Post-Conviction Procedure Act.

ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY PROCESS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has retained an attorney, the attorney, not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to Love v. State, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. Id., 428 S.C. at 245, 834 S.E.2d at 203 (Kittredge, J., dissenting) ("If, however, the proposed amendment . . .

would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.").

Pursuant to S.C. Code Ann. § 17-27-150, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. As noted above, the State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last-minute resulting in undue prejudice to the State. See Love, 428 S.C. 231, 834 S.E.2d 196.

|CONCLUSION PAGE FOLLOWS|

CONCLUSION

WHEREFORE, Respondent respectfully moves this Court to partially dismiss Applicant's claim on the sufficiency of the evidence and requests an evidentiary hearing be held on the other claims of Ineffective Assistance of Counsel.

Respectfully submitted,

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Attorney General

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November 27, 2023

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
COUNTY OF RICHLAND) COMMON PLEAS

BRIAN N. WHITE,)
Plaintiff,)
Vs.) CASE NO. 2023-CP-40-03877
THE STATE,)
Defendants.)

APRIL 7, 2025
RICHLAND, SOUTH CAROLINA

HONORABLE DONALD B. HOCKER, JUDGE

A P P E A R A N C E S:

BY: CHELSEY F. MARTO, ESQUIRE
Attorney for the Plaintiff
BY: D. RUSSELL BARLOW, II, ESQUIRE
Attorney for the Defendants

KATHERINE A. SPIRES
REGISTERED PROFESSIONAL REPORTER

INDEX

THE COURT: Okay. Mr. Barlow, you want to call the next case, please.

MR. BARLOW: Thank you, Your Honor. May it please the Court. Russ Barlow on behalf of the State of South Carolina. This is the post-conviction relief matter of *Brian N. White verses the State*, Case Number 2023-CP-40-03877 out of Richland County.

In June of 2019, the Richland County grand jury indicted applicant for murder. 2019-GS-40-03681. On November 18th through the 22nd of 2019, Applicant proceeded to a jury trial before the Honorable DeAndrea Benjamin. Fifth Circuit Assistant Public Defenders Megan A. Eigenbrot, Tracy E. Pinnock, and Richard E. Marsh, III, represented Applicant. Fifth Circuit Deputy Solicitor April W. Sampson and Assistant Solicitors Samuel C. McGlothin and Harrison M. Pratt prosecuted the case. The jury convicted Applicant as indicted and Judge Benjamin sentenced Applicant to a term of 38 years in prison.

Applicant timely filed a notice of appeal and Appellate Defender Susan B. Hackett perfected Applicant's appeal. On December 14, 2022, the South Carolina Court of Appeals affirmed

Applicant's conviction and sentence. That was by unpublished opinion *State v. White*, 2022-451 filed on December 14th of 2022. The remitter was returned on March 24, 2023.

Applicant timely commenced this PCR action on July 26, 2023. And in his application, Your Honor, Applicant alleged -- or is alleging that he's being held in custody unlawfully. In his original application, it was ineffective assistance of counsel, convicted with no actual evidence, and lack of actual investigation. Applicant was requesting relief in the form of a new trial.

And, Your Honor, on his amended application which is provided to Your Honor in his packet, he has alleged multiple alligations of ineffective assistance of counsel and I'll ask Ms. Marto which allegation she intends to move forward on.

THE COURT: Okay. Ms. Marto?

MS. MARTO: Yeah. Judge, we're just moving forward on the allegations that are raised in the amended application.

THE COURT: Okay. All right. Before you get started, let me find that. It would be the top one, Mr. Barlow?

MR. BARLOW: Yes, sir. It should say, PCR packet on it on the front.

THE COURT: I've got it. Thank you. All right. Ms. Marto, you want to call your first witness?

MS. MARTO: Yes, sir. We call Mr. Brian White.

BRIAN WHITE,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MARTO:

Q. Good morning, sir. How are you doing?

A. Good morning.

Q. Now what were you initially charged with?

A. I believe I was actually, initially charged with two charges. It was murder and with possession of a weapon during a violent crime.

Q. And what type of sentence did you get?

A. I got 38 years.

Q. And you went to trial on those charges; correct?

A. Yes, ma'am.

Q. Who were you represented by?

A. Ms. Eigenbrot, Ms. Pinnock and I still can't -- I believe it was Marsh. He had just said it and I still can't remember.

Q. And how do you feel like they did representing you?

A. It was ineffective. It was -- I mean, honestly, I know I didn't do it and there was not enough evidence to say I did it and I was still found guilty at trial.

Q. And you understand that if you go forward today and you were to win, you'd go back to General Sessions Court where you'd be facing up to life?

A. Yes, ma'am.

Q. And you still want to go forward?

A. Yes, I do.

Q. Now, you said that counsel was ineffective. Do you feel like they were prepared to go to trial?

A. Honestly, there's a lot -- I believe there's a lot that could have been done from the beginning that I just don't know if it was done.

THE COURT: Can you speak up a little bit, please, Mr. White.

MR. WHITE: I apologize.

THE COURT: It's all right.

A. And just to clarify that, I mean, as in I was -- I sat in Alvin S. Glenn for three years and I do know that there's a lot of caseflow and there's a lot of cases going on, but I know there's a lot that I feel that wasn't done through those first two years while I sat there in the county.

Q. Do you feel like counsel met with you enough?

A. I felt like there could have been more. At the same time, being fair, I do know there's a lot of caseload, but I do feel like there could have been more communication.

Q. And how many times did you meet?

A. That's -- let me try to give you my best answer. I know there was only a couple of times in the first year, but I can't really remember how many times was in second year. I know most of the time that we met was in that last third year when we knew we was going into trial.

Q. Now, did y'all discuss trial strategy together?

A. We did somewhat. I know that -- I'm trying to remember specifics. I apologize, it was a while ago. I know from what we was told or from

what we did talk about, I feel like we could have done better. I feel like we could have talked more. We could have planned more.

Q. Now, when you say you could have talked more and planned more, what specifically do you feel like counsel should have done, but they didn't?

A. I feel like we could of -- when it came time for my testimony itself, I think we could have talked more on that. I think I could of -- I know and they even informed me, they can't tell me what to say. I felt like we could have had more -- I feel like I could have got more guidance, so to say.

Q. So did you feel like you were prepared to testify on the stand? Did everything come out the way you wanted it to?

A. No. No, it didn't.

Q. What didn't come out right in retrospect?

A. There was numerous times where and I don't know how much the transcripts themselves show because actually a lot of the printed transcripts, I've been looking over them for years now, a lot of it's jumbled up, so a lot of it's missing. If you

weren't there, you really don't know what was said. But there's a lot of times where I just got -- I was more flustered. I think that's where a lot of where I say, we could have had more planning, we could have done more to really work on what might come my way, what to say against it.

There were numerous times where I just -- I know my answer that got given or even down to the reaction that it was -- it could -- I feel like I could have got coached to do it or say what I was saying better.

Q. Now, what was your understanding of what the trial defense was?

A. The main trial defense, to my understanding, was that it was supposed to be that there was no evidence that I did it. And my statement itself already was altered from what -- okay, let me clarify that. The statement that was signed and turned in was not what I had said. The word had been changed to make it seem like I had confessed to this. And one of our main things was trying to hit on that and supposed to be lack of evidence, lack of DNA. I'm sorry, I'm trying to think of anything else.

Q. Okay. Going back to your statement.

The statement read the confession; correct?

A. The paper, yes.

Q. And you're saying that the paper didn't line up with what you told the officers?

A. No, not at all.

Q. So you're saying that the officers wrote something completely foreign?

A. Yes.

Q. And when did you discover that?

A. I discovered this whenever -- I wish I could remember the exact date that I got my motion, but it wasn't until I actually got my motion of discovery back which was well into my first year of being in Alvin S. Glenn that I realized what was actually on this signed statement due to the fact that I didn't get a copy. I wasn't -- the one copy that was give that was supposed to be given to me that got filed into my property going into the jail system instead of me actually getting it.

So I believe it even passed by -- this is not something I looked into, but I believe there's even a timeframe you can go through and be, like, hey, no, it was well past that before I ever even seen what was on the statement.

MR. BARLOW: I still can't hear him.

MR. WHITE: You still can't hear me good? Is this better?

THE COURT: Yeah, that's good.

Q. Not to embarrass you so, but you did get some teeth pulled; right?

A. Yeah, nothing but about a month ago they just cut my entire top row out.

Q. That's giving you difficulties talking; right?

A. (Nodded.)

Q. So why didn't you -- were you asked to sign the police statement?

A. I was.

Q. And why didn't you catch it when you signed it?

A. Boy, I wish I did. When I was given the copy or whatever, whenever the copy of said statement was put in front of me, it was given to me while I was eating, while they were reading off, like, talking to me the whole time and it was more of -- it had already been a long day. It was a really long day. I just ended up looking at it, listening to what they were saying, signing it, and went on.

Q. Now, part of what came out at trial was

that you were armed; right? You had a gun on you?

A. Yes, ma'am.

Q. And one of your allegations is that you wanted counsel to question you as to why you were armed; is that correct?

A. Yes, ma'am.

Q. And why were you armed?

A. I had the gun that I had with me as protection for myself. I was actually told before ever showing up to the scene -- what I was told was that the victim in the case was that he had a weapon. And so that's why I had the gun that I had on my possession.

Q. So you were prepared in case the other person shot at you; is that correct?

A. Yes, ma'am.

Q. And you wanted that to come out during your testimony?

A. Yes, ma'am.

Q. And why did you want that to come out during your testimony?

A. Because this was being brought out as if I had a full plan to actually go here and shoot this man and I didn't.

Q. Now, you mentioned earlier that you

wanted an investigation into DNA, GSR, fingerprint evidence; is that correct?

A. Yes, ma'am.

Q. And who do you think should have been investigated for that?

A. I know that there wasn't much investigation into it at all, like, from anybody. I don't even think there was too much of a push for it. Even whenever they did -- whenever the investigators asked for DNA test on me, I believe I asked if anybody else was getting DNA tested and I was told, no.

As far as I know, I'm the only one that got a DNA test at all that had to do with the case and nothing -- also, as far as my knowledge, my DNA did not match any sample taken off of anything. As a matter of fact, you have the DNA expert got on the stand and said my DNA didn't match anything.

Q. Now, you wanted counsel to also investigate and meet with Crystal and Nicole; is that correct?

A. Yes, ma'am.

Q. Who were Crystal and Nicole?

A. Crystal and Nicole is family members directly involved in this case. They were actually

who was there living at the house.

Q. Okay. And what was Crystal's relation to the victim, do you know?

A. Crystal is the -- they weren't married, but they had been together for eight, eleven years, it was a long time. They had been together for a long time.

Q. And that's Nicole, Crystal's daughter?

A. Nicole is Crystal's daughter.

Q. And what did you want them to be investigated for?

A. Towards their parts in any of this. That was -- this was more -- so from the beginning, I never pointed anybody out. I didn't. That's not -- I didn't believe that was my job. But my main focus on this was and what I did say from the beginning was, I didn't do it and nobody else is getting investigated. Nobody else that should have been investigated was getting investigated. And it was pretty much just -- well, we have this confession -- or we have this statement put out as a confession and so we don't need to investigate. That was what I was pretty much getting the vibe of.

Q. Now is it -- were you out there the

night of the shooting?

A. I was there that morning, yes. I showed up. I came there.

Q. And is it your position that somebody else on the scene was the shooter?

A. Yes, ma'am.

Q. Is it your belief that Nicole was the shooter?

A. Yes, ma'am.

Q. Now, she testified at your trial; correct?

A. Yes, she did.

Q. What did you want counsel to bring out in cross-examination of her that she didn't?

A. Mostly just how far into the lies that were actually put whenever she testified. There was numerous things that she said that didn't match up with what happened at all. Some of them were found out, like, some of them did come to life. But there was a good bit of her story that she got on the stand and said that didn't. That, actually, if I remember, there's some of the things that didn't even match up with her initial statements to police.

Q. Is one of them specifically about a

phone she said she lost?

A. Yes, ma'am.

Q. Can you explain that a little bit?

A. Apparently, she -- not apparently, she got on the stand and said something about that she had lost her phone and didn't even have her phone through the night, didn't find it until the next morning.

Q. Do you know what really happened with the phone instead?

A. As far as my knowledge, when they found her phone -- whenever they got her phone and went through it that she had been on it the entire night.

Q. You wanted counsel to point that out; is that correct?

A. Dig deeper into that, yeah.

Q. Okay. Is there anything else concerning Nicole that you wanted counsel to cross-examine her on?

A. As far as Nicole herself, I don't want to say, no, and then me think of something.

Q. Well, we can kind of move on. Is there anything concerning Crystal that you wanted to be cross-examined?

A. More -- just more of her -- I'm trying to think of the right way to say this. More of her possible involvement. Because I do believe that she was -- I believe her story was completely false also of not having any knowledge of this at all or even said position she played in this. That's what I believe.

Q. What position do you feel like she did play?

A. I think she knew something about this from the beginning just to be honest.

Q. So you think Crystal and Nicole were in on it?

A. I could almost guarantee it. They were -- they were pretty close. If anything, they were together no matter what.

Q. And you wanted counsel to, I guess, cross-examine or try and figure out if she knew more than she was letting on?

A. Yes, ma'am.

Q. Is there anything else you wanted counsel to cross-examine Crystal on?

A. Not that I can think of.

Q. Are there any issues concerning ineffective assistance of counsel or anything else

that we haven't talked about already that you want to raise today?

A. Not that I can think of, no.

MS. MARTO: No further questions, Judge.

THE COURT: Okay. Mr. Barlow?

MR. BARLOW: Thank you, Your Honor. May it please the Court.

CROSS-EXAMINATION

BY MR. BARLOW:

Q. All right. Mr. White, I know that your counsel has already told you this, but do you realize the relief this Court gives you is a new trial and you realize the maximum that you're facing at a new trial?

A. Yes, sir.

Q. And what's that maximum?

A. I can face life.

Q. Okay. And you still want to move forward?

A. Yes, I do.

Q. All right. Well, let's jump right in. I know that on direct you testified that you -- that the police had a statement that you did, but you did not -- they falsified the information

within that statement; correct?

A. Yes, sir.

Q. Okay. And you initialled and signed every single page of that confession or that statement; correct?

A. Yes, sir, I did.

Q. And do you recall your trial counsel going through that in cross-examining on that?

A. My trial counsel, yeah, I do remember them asking questions about it, yes.

Q. And you took the stand at this trial; correct?

A. Yes, sir.

Q. And do you recall on direct your counsel going through this with you?

A. Yes, sir.

Q. And that was before the jury; correct?

A. Yes, sir.

Q. So the jury was able to hear you tell them that what was in that statement was not what you said?

A. Yes, sir.

Q. And you gave them the reasons why it wasn't what you said?

A. Yes, sir.

Q. They walked through every single line in that confession with you, did they not?

A. I don't know if we walked through every single line or not. It has been a while, but, no, I don't believe we walked through every single line. I believe we key pointed it really to the main points that we were trying to say was.

Q. So what further could they have done with your statement that would have changed the result of your trial?

A. Most of the things dealing with the statement would have been something that should have been pursued before trial and during trial. I believe that we could of gone through more thoroughly even if it was wording. There was a big point on wording not just in my trial defense, but whenever it came to prosecution. That it's all in the wording of the statement itself and what was actually said. What the statement was turned into and compared to what was actually said and I believe we could have hit more on that.

Q. Mr. White, as I asked you previously, that was before the jury, they went through that statement, did they not?

A. Yes, sir.

Q. Okay. And, you know, what you just testified to just now, are you saying that they should have coached you into what to say?

A. I'm not saying they should have told me what to say. That I'm not saying. I'm saying we could of ran through a strategy better or prepared me more.

Q. What further preparation would have changed the result at trial?

A. More along the lines of, now you know you could be asked something like this. Or they could take this and turn it into this, what would your reaction be to that? Or this is the possibility of what this could get turned into against you, what would your defense, like, more of that I believe could have happened beforehand.

Q. So is it your -- is it your -- are you saying that they should have speculated as to what would have come across to you?

A. I believe that they could have gone through more scenarios just to have me mentally prepared.

Q. Okay. And let me move on to your next allegation, failure to question you about the -- why you brought the gun to the scene.

A. Yes, sir.

Q. And do you recall them actually questioning you about that?

A. I honestly cannot recall the effect -- exactly what was said, no, I can't.

Q. It was on your direct and --

MR. BARLOW: Your Honor, if I may approach him?

THE COURT: You sure can.

Q. I'm going to hand up a copy of the transcript and if you just take a moment and read through, it's going to be page 950 -- let's see. Yep. Just take a moment and read through 959 and just read down through there and let me know when you're done.

A. Okay.

Q. So the allegation of that they should have talked to you or they should have brought out why the gun was brought to the scene, that came out in testimony; correct?

A. Right here I see where it was -- I see what you're saying where it was said, yes. I believe we could of hit on that fact more, but, yes, it was said. It was brought up.

Q. Would it surprise you that's not the

only page about that? I just pointed you to a specific one.

A. If you're ready to show me, no, it wouldn't surprise me.

Q. Well, we'll move on. In terms of the confession, you had a *Jackson v. Denno*; correct hearing on the confession?

A. I apologize, a what?

Q. Well, there was a hearing where they objected to or they objected to the statement coming into evidence and it was found that you freely and voluntarily gave it; correct?

A. (No response.)

Q. Your attorneys argued to keep that statement out, did they not, at the beginning of trial?

A. I believe that happened, yeah, I believe so.

Q. Okay.

A. I honestly -- I think I do remember that, but I can't say for sure.

Q. What trial strategy or trial defense did they fail to do that would have changed the outcome of your trial?

A. I'm sorry, what do you mean by that? I

apologize.

Q. No, your allegation is they failed to discuss any trial strategy or trial defenses with you. What trial strategy and trial defenses would have changed the outcome of the trial?

A. More of preparedness for me getting on the stand. That's what I was getting to earlier. Just more of -- more of making sure I was ready as far as my testimony, me -- my statements making sure I was not only mentally, but that I had, so to say, all my ducks in a row about whatever may come my way and how -- what a better way to answer -- not even that because they can't tell me what to say, but I wanted -- I don't know if I'm explaining it the right way or not. But just more -- more or less preparedness on my part before getting on the stand. I do truly believe my testimony is one of the bigger parts that could have been done a lot better.

Q. In your approximation, how many times did trial counsel meet with you?

A. Are you talking over the course of three years or right before trial?

Q. Through the entire representation of you.

A. Like I said, I think I seen them three or four times in the first year maybe. Almost the same in the second year. And it was more focused on seeing them before -- right before trial, right there in the last stretch. I'm trying to think of an actual number.

Q. Was it more than 10 or less than 10 total?

A. Overall it would have been more than 10, but over a stretch of three years.

Q. How about more than 20 or less than 20?

A. Twenty might be pushing it.

Q. Okay. So moving on to another allegation of your failure to investigate DNA, GSR, and fingerprint evidence of by-standards or bystanders rather, do you recall them using that in your defense?

A. I can recall where specifically an investigator was asked about why he didn't do that to begin with or why he didn't, but I don't believe it went as far as it should have. That was my main concern with it. It was more of why didn't you do that and then he gave -- I believe he gave the excuse that he was treating everybody there as victims not possibility of, so to say, not possible

suspects and then it was just left at that as far as I can remember.

Q. And that came out in your direct too as well, they brought it out in that too, did they not?

A. I believe so, yes.

Q. So you were able to testify to the jury about that; right?

A. I believe so, yes.

Q. So, I guess -- it also came out in their closing, they used it. They said they had people that they could have investigated, but they did not. They have people that would do it, they did not. The DNA, GSR, the fingerprint evidence, they brought all that out before the jury in their closing; correct? So what further could they have done that would have changed the outcome of your trial?

A. I believe different if not more questioning of the actual investigator. So to put it bluntly, as far as asking me questions myself, I had already been charged. The jury's already going to see me in one light or another. I understand it's supposed to be a fair trial, but once something's put into the air, it's put into the

air. The questions needed to be more focused on the investigator himself, the one that the jury is looking at that is supposed to be doing the job. I just feel there could have been more.

Q. Okay. So let's move on. Failure to clearly argue your claim that the police rewrote your statement. I want to touch back on that real quick. What exactly could they have argued that would have changed the result of trial on that?

A. I apologize, you asked a specific question, I want to give a specific answer. I believe they could of questioned the investigator more on -- I believe they could have questioned the investigator more specifically on what they asked and what I responded to.

Like, an actual, not just going through the so-called statement. I believe there could have been more, so this is how you worded this and this is actually what was said. And I believe if we had gone through more of that, we might have actually been able to get further into that. Like, get further with the fact that what I said is not what was on paper.

Q. And, Mr. White, as I stated previously and I'll ask you again, did that not come out in

your direct examination when you took the stand? You were able to tell the jury, were you not, what parts of the statement were yours and which parts were not?

A. Yes, sir.

Q. Okay.

A. That just goes back into where it was more of -- it's going to have a different impact in my trial on the jury of my trial with the answers coming from the investigator that needed to come from the investigator than from me per se.

Q. Moving on. There's a failure to investigate and met with Crystal and Nicole, but Crystal and Nicole were the State's witnesses; correct?

A. I believe they were, yes.

Q. And they did cross-examine them, did they not?

A. Yes, sir.

MR. BARLOW: Beg the Court's indulgence?

THE COURT: Sure. Take your time.

Q. And we'll jump over to the Nicole allegation because investigating her about her phone and playing on her phone. Do you recall

during cross-examination of Nicole that trial counsel did go into with them about their inconsistent statements, the phone being missing or not being missing, how they were on their phone at certain times of the day or certain times of that early, early morning when they stated they were asleep? Do you not recall that coming out on cross-examination by both Nicole and Crystal?

A. I do recall something coming out. I'm not saying it wasn't said. I'm saying there could -- I'm saying it could have been done, I want to say done better or done more -- more effectively.

Q. How so?

A. I believe it could have been actually done to a point to where that -- I don't want to use the word perjury or purge and it not be used right, so -- but I believe that they could have been questioned to a point to where what their defense was really wouldn't of -- it wouldn't have held up.

Q. Mr. White, the record is clear on their cross-examination they went after Nicole and Crystal both based upon the inconsistencies of their statements especially the facts about the text messages; do you recall that?

A. Yes, sir.

Q. That they were texting at the times that they said they were asleep; do you recall that?

A. Yes, sir.

Q. Do you recall the picture that was taken outside, I believe it was Nicole's bedroom window of the van at 5 -- I think it was like 5:30, I don't have the exact time --

A. I do remember the picture now, yes, and I remember it being brought up, I do.

Q. When Nicole was on the stand, do you recall her saying, no, I didn't take that picture?

A. I believe she did, yes.

Q. So exactly what could they have done differently with respect to either Nicole or Crystal, exactly what they could have done that would have changed the outcome when they did do what you're saying they didn't do?

A. As far as exactly, it's hard for me to come up with an answer for that.

Q. Fair enough. And just to, you know, be clear, do you recall how long Crystal's cross-examination was?

A. No, I don't. I actually think -- if I

remember right, Crystal actually tried getting off the stand in the middle and I don't remember exactly how long hers was, no.

Q. Would it surprise you it was 27 pages long, just the cross-examination?

A. Of Crystal's?

Q. Yes.

A. That would surprise me. I remember -- from what I can remember is, again, it was a while ago, from what I can remember Nicole's was actually longer than Crystal's. That might have just been a time thing or what it felt like while I was in trial.

MR. BARLOW: Beg the Court's indulgence?

THE COURT: Sure.

Q. I'll wrap up with this last one. What communications could have occurred that would have changed the result of your trial?

A. Specifically during trial or before trial?

Q. The allegation is failure to communicate with you. What could trial counsel have communicated further with you that would have changed the result at trial?

A. The reason I say failure to communicate was mostly the -- before the trial, mostly the back and forth that could have happened. More questions into, per se, even this is kind of going, but that specific goes into a little bit of everything we just talked about. More of going into, well, why isn't there any other DNA samples? Who could -- where would it go or why isn't this happening? Where -- is this being investigated or what really went on with this? I believe there could have been more early on where most of our actual in-depth, so to say, interactions was more towards the end closer to trial after time had already passed.

Q. Two more questions, once for clarification. So basically are you saying that the failure to communicate is tied in with the failure to investigate, failure to prepare, that's all kind of one allegation?

A. It would be fair to say that they coincide with each other, yes.

Q. Okay. And my last question is, did they hire an investigator for your case?

A. I believe that was done by the first public defender that was on my case. Whenever I was first brought in, it was not Ms. Eigenbrot that

was assigned to me, it was somebody that they actually already knew was leaving and then afterwards Ms. Eigenbrot was then put onto my case.

And the investigator that was put into was somebody that was -- that was brought in by, I believe her name was -- I don't remember her last name, but I believe it was Rebecca something, at first. And then even when he did come and ask questions, I seen him one time. He asked -- to be honest, he asked very minimal questions and I never heard from the investigator again the entire three years I had been there.

MR. BARLOW: Nothing further, Your Honor. Thank you.

THE COURT: Any redirect?

MS. MARTO: Just briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. MARTO:

Q. So most of your issues aren't necessarily that counsel didn't do something at all, but that she maybe didn't approach it as thoroughly or emphasize as much; is that correct?

A. Most of it is that there could have been more or done better.

Q. So just to follow-up on that you. You

wanted counsel to ask more questions of Crystal and Nicole and of yourself; is that correct?

A. Yes, ma'am.

Q. And you were the only evidence or witness in your own defense; right?

A. Yes, ma'am.

Q. So you were really the only one that defense could use to, you know, help your side of the case out; is that correct?

A. Yes, ma'am.

Q. And then when it comes to the investigation, did you want -- you wanted the investigation to happen before the trial; correct?

A. Yes, ma'am.

Q. And then you're saying that you wanted the investigator cross-examine himself; is that correct?

A. More. He was cross-examined, but I believe there could have been more.

Q. And I just got to make sure I'm understanding. That's to keep it from -- those questions about not investigating, you wanted those the come from somebody other than yourself; is that correct?

A. Yes, ma'am.

Q. And your concern with the trial strategy and defense is that it wasn't relaid to you; is that correct? They didn't discuss it with you before the trial?

A. It's more -- like I said, it's more of getting me prepared for, like, my actual statement, me getting on the stand.

MS. MARTO: No further questions, Your Honor.

THE COURT: Any recross?

MR. BARLOW: No, Your Honor.

THE COURT: You can step down, Mr. White. Thank you.

MS. MARTO: No further witnesses, Your Honor.

THE COURT: All right. State ready to call it's first witness?

MR. BARLOW: Yes, Your Honor. One moment, please.

THE COURT: Sure.

MR. BARLOW: Your Honor, the State would call Megan Eigenbrot.

THE COURT: Come around, please, ma'am.

MEGAN EIGENBROT,

being first duly sworn, was examined and testified

as follows:

DIRECT EXAMINATION

BY MR. BARLOW:

Q. Ms. Eigenbrot, how long have you been practicing law?

A. I think this is my twelfth year.

Q. And how long or how much of that has been in criminal law?

A. The entire time. I've been at the public defender's office that entire time.

Q. And, roughly, how long before trial were you appointed to this case?

A. I received this case in May of 2017.

Q. So that's, roughly, two and a half years?

A. Yes.

Q. And during that time, did you receive *Brady* material?

A. I did.

Q. Okay. Did you have any issues with receiving discovery?

A. As usual there's always a few issues here and there. There's definitely some motions to compel conversations with law enforcement, but, ultimately, we did receive all the discovery in the

case.

Q. And did you review that with Mr. White?

A. I did.

Q. Can you give us a brief overview of your understanding of the State's evidence in this case?

A. It's been a very long time since I've looked at this case, but there was a shooting at Crystal and Nicole's residence which was a trailer park. The victim was in his van in the, kind of like, parked right in front of the trailer. Brian was sort of on-scene, but not there. When law enforcement was responding, he was in the area. He appeared to be running. They interview Crystal and Nicole upon arriving at the scene. I don't remember exactly what they told law enforcement initially, but Brian did become a suspect very quickly.

Then once he became a suspect, I think once they actually brought him in and interviewed him and received that statement that Brian was referring to, that's kind of where that ended. But then another individual, a friend of his, Alex Rabon had brought in a pistol and said I think this is the murder weapon and told police that Brian had

come to the house the night of the shooting and gotten the gun and then brought it back that morning. I think that was the gist of everything.

Q. Okay. And based off the State's evidence that you had before you and based off your conversations with Mr. White, what was your defense strategy in this case?

A. Well, law enforcement always believed Crystal and Nicole were involved in this shooting as did we. And so I think, ultimately, our strategy at trial was to put the blame on the two of them and do our best and take Brian out of the situation.

Q. So were you here for Mr. White's testimony?

A. I was.

Q. The failure to prepare Applicant for his testimony, that's the first allegation, can you tell me approximately how many -- well, let me ask you this first, approximately how many times do you recall that you met with Mr. White?

A. Can I refer to my notes briefly?

Q. Sure.

A. I have 27 times.

Q. Okay. And Mr. White has given some

claims that you could have talked with him more, you could have planned with him more, you could have given him more scenarios on when he took the stand. So my question for you is, what did you do to prepare Mr. White for the stand?

A. So, initially, we had all been in agreement that Brian was not going to testify. When the trial was initially scheduled, we started preparing for things, that was the understanding. At some point while I was in another trial, Brian had given some information to my co-counsel that kind of rearranged our strategy a little bit and that's when we decided that Brian would have to testify in order to present that -- present that information and evidence at trial.

So I think we did spend as much time as we possibly could with him, preparing him. I don't know that you can ever fully prepare everybody to be testifying in a hearing when their life is on the line. I know we met with him on several occasions to go through testimony. We did practice directs. I know we discussed issues of cross and what we thought would get brought up. I can't remember if we practiced cross-examination with him, but I do know that we practiced his direct

several, several times.

Q. In you're practice as a defense attorney, when you have a client that's going to take the stand, is it your standard practice to review cross-examination with them?

A. Generally, yes.

Q. Okay. And there was an allegation of the failure to question the Applicant about the reason that he brought the gun to the scene. But do you recall that in your direct with him you going through and laying out why he brought the gun, do you recall that?

A. I don't specifically recall the line of questioning. I know that he had told law enforcement and myself about obtaining the weapon to shoot coyotes. And in our research and preparation for the trial, it does turn out that he was correct in that you can get paid to shoot coyotes. So, I mean, that was a plausible explanation for it, so we went with that.

Q. But the reason he brought the gun is because Nicole told him, do you recall that?

A. If you're telling me that's what was in the transcript, I -- it could be.

Q. Ms. Eigenbrot, if you would, I believe

you have a transcript right in front of you. If you would look at page 958 and 959.

A. I do see that where we did talk about that, yes.

Q. Okay. Did you discuss the trial or your trial strategies with Mr. White?

A. Yes. He was aware of what we planned to do. That was, again, in the discussion with him testifying.

Q. And did you prepare him for trial?

A. Like I said, I know we had several conversations about his direct. It is my standard practice when a client is going to trial to walk them through the entire process, how it would be. Again, I don't know that you can really know what trial is going to be until you're in trial, but we do our best to make at least give them the information.

Q. Did you hire an investigator in this case?

A. I was not the one that actually requested the investigator, Ms. Williams did that when she was initially assigned to the case, but we did continue to work with a gentleman by the name of Eric Devan throughout this case.

Q. Okay. And did that investigator, do you have any notes to indicate what the investigator did?

A. I don't have any of those notes specifically. But I do have notes in here where I know we received some new information and did send Eric to go out and continue meeting with people. As far as Nicole and Crystal, I think they refused to talk to us.

Q. Okay. Maybe if I point you to a specific page it may refresh your recollection because I was a little confused by it as well. Let me find it.

MR. BARLOW: Beg the Court's indulgence. Your Honor, may I approach?

THE COURT: You sure can.

Q. And I'm not sure if this is going to help you or not, but page 523, and, if you will, it's right through here through that line of questioning and I believe that was Brittany?

A. Yes. Brittany Steen was a witness. She had been with Brian earlier in the night along with Nicole. We were able to meet with her and her attorney because she had some pending criminal charges unrelated to all of this. But we were able

to meet with her and talk to her prior to trial.

Q. So the record is -- shows that at least you did have an investigator that was working, your testimony is that you hired an investigator -- or you didn't, but someone else did; correct?

A. Correct.

Q. And what the allegation here is that you failed to investigate DNA, GSR, and fingerprint evidence?

A. I think what Brian's mostly referring to in that his situation is, I think his frustration with law enforcement for not testing anybody else. For instance, the gun itself, it was swabbed and tested. There was a DNA profile developed. I know -- I think we consented to providing a sample of his DNA and on the DNA sample on the gun was not his. But no samples were ever collected from Crystal or Nicole in that situation nor were any GSR tests. And so I think his frustration was with law enforcement for not doing those things.

Q. Would that be something that would fall under your purview?

A. No. I couldn't do anything about that unfortunately.

Q. Okay. And would you agree with me that you used those points in your defense?

A. From my recollection, I know we brought those things up during trial.

Q. And another argument is that you failed to clearly argue that the police rewrote the statement. Do you recall cross-examining on that and direct examination of Mr. White about that?

A. I do.

Q. And that was before the jury; correct?

A. It was all before the jury.

MR. BARLOW: Beg the Court's indulgence.

Q. Do you recall your cross-examinations of Nicole and Crystal?

A. I actually did not do those cross-examinations, that was Ms. Pinnock. She was my second seat. I think she just walked out.

Q. She just walked out. Have you read through them?

A. Not in preparation for this, no.

Q. Okay. I'll let the record stand on that then.

MR. BARLOW: Your Honor, I think that's it. Nothing further.

THE COURT: Ms. Marto, any cross-examination?

MS. MARTO: Just briefly, Judge.

CROSS-EXAMINATION

BY MS. MARTO:

Q. Now, is there anything that you could have done to prepare Mr. White to make his testimony better?

A. Aside from bringing him in here to sit in the courtroom and just recognize the gravity of the situation from the witness stand, I don't know that there was much else we could have done.

Q. But you don't recall specifically practicing cross-examination; is that correct?

A. I do not specifically remember, no. I know we met with him, like I said, multiple times and I know -- I have notes where we definitely discussed issues that could come up on cross.

Q. Do you think running him through cross-examination would have been to his betterment?

A. I usually do it. I believe it does help them, yes.

Q. Now, is there anything that your investigator could have done to investigate other

suspects or witnesses?

A. Again, I think we tried to speak with the two people that we believed were involved, if not the actual culprits in this situation. I could not force them to cooperate. In fact, I talked to the lead investigator about it on several occasions. Again, he did believe they were very much involved, but Brian's initial statement said that nobody else was a part of it and they had nothing else to go on at that time.

Q. Do you think that Mr. White had a fair understanding of what was going to happen at trial, what the strategy would be?

A. I did my best to make sure he understood everything. I can't speak to exactly what his mindset was though.

Q. There's no guarantees as to --

A. I know it was a lot of stress for him.

Q. Is there anything you feel like you could have more thoroughly explored during cross-examination of Crystal and Nicole?

A. No. In fact, I had Ms. Pinnock do those crosses because I felt like she would have been the better attorney to handle those two. We both, I think, expected some attitude from either

of them and I thought Ms. Pinnock handled those crosses very well.

Q. And did you talk with Mr. White concerning the police statement, how it was?

A. At length. That was, I think, one of the initial issues Brian brought to my attention when I began representing him. Very frustrated about that. From the beginning, I knew where or what his issues were what he said happened, so I was very aware of the statement issues.

Q. And did the story concerning what happened with the police statements ever change during the course of your representation?

A. No, it never changed not once.

Q. Do you feel like the fact that the police statements didn't lineup with what he believed happened was stressed enough to the jury?

A. I felt like I did as much as I could in that situation. I had two very experienced investigators on the case that I think knew exactly what they needed to say. There was no way I was going to get them to say anything different.

I actually feel like in closing, one of my finest closing moments was ripping the statement in half and throwing it in the trash can in front

of the jury.

MS. MARTO: One moment, Your Honor.

Nothing further.

THE COURT: Any redirect?

MR. BARLOW: No, Your Honor.

THE COURT: You can step down, ma'am. Thank you.

MR. BARLOW: Your Honor --

THE COURT: Sure.

MR. BARLOW: Your Honor, I have one more witness, she'll be really quick and brief.

THE COURT: Okay.

MR. BARLOW: We're going to call April Sampson.

THE COURT: Okay.

APRIL SAMPSON,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BARLOW:

Q. Ms. Sampson, how are you?

A. Good. How are you?

Q. Good. This won't take long. You were are the prosecutor on this case?

A. I was.

Q. And how long have you been practicing law?

A. Now, 26 years.

Q. And how much of that has been in criminal law?

A. All of it. Sorry, I did some civil in between there, but all of it's been criminal too.

Q. And in this case, there was some testimony about failure to investigate DNA and so forth. Can you -- or can you tell us why no DNA or GSR was done?

A. Yes. So they did take DNA swabs, but just no DNA came back that came back to anyone that we had a swab or sample from. They did not do GSR. By the time they actually had Mr. White it had been more than six hours, so they're not going to swab him because it's been more than six hours. The way that I understand with GSR it only lasts for so long even on clothing, so they weren't going to do that for six hours. If the six hours had passed since the shooting.

As far as with DNA, he did, if I remember correctly, Ms. Eigenbrot is correct, they consented, we didn't have to have a *Schmerber* hearing for that. However, we didn't have probable

cause to swab Nicole or Crystal or anyone else and they wouldn't consent. So we can't just go swabbing everybody to see if they -- if they're DNA matches, you've got to have probable cause either for a search warrant or to have a *Schmerber* hearing for that. And we didn't have that to have either of them swabbed.

Secondly, Mr. White was specifically asked in his statement about whether either of them were part of this crime and he said, no. So you add those two things together, they had absolutely no probable cause to swab the females. In his statement, if I remember correctly, in his cross, I went through each and every line of his statement and he said that every single one of them were true except for one. And it was where he said that he did it and that they weren't involved. Those were the two that he said were not his.

But up until then, as far as we knew, everything he had in that statement was correct. Although, as Ms. Eigenbrot said, our law enforcement thought that they were probably involved because there never really seemed to be a reason for him to do it without the two of them. But with him saying that they weren't involved and

there are no direct evidence that they were other than they were in the house, they said asleep when it happened, we didn't have any other evidence that they did it.

Q. And, Ms. Sampson, thank you for correcting me, I believe on Mr. White's direct I was saying that -- or on his cross, I was saying that it was Ms. Eigenbrot who did it with him, but it was you who went through each and every line and I apologize for that.

MR. BARLOW: But nothing further, Your Honor.

THE COURT: Okay. Anything in cross-examination?

MS. MARTO: Just briefly, Judge.

CROSS-EXAMINATION

BY MS. MARTO:

Q. Is there anything that y'all could have investigated that you didn't in order to determine whether or not Crystal and Nicole were involved?

A. We interviewed -- when I say interview, I mean, me, we always sit down with witnesses and talk to them. They were reticent to talk to us. We only were able to meet with them, if I remember correctly, one time prior to trial. They just did

not really want to be here. Crystal, the mom, had, like, an anxiety disorder or some issue. If I remember correctly, she might have started crying on the stand, like, the minute that she sat down she started crying. And she just didn't like talking about it. In her mind, this guy that she had known for, I think, it was eight or nine years that she had been with this whole time, she had to see him dead. Like, they walked out and he was shot, so she saw that and so she didn't want to talk about it at all.

Nicole was a little more easily to talk about it, but she didn't like to either. So as me as a prosecutor, I didn't get to meet with them that often. Law enforcement did meet with them, but, again, they were just not very cooperative. Now, Ms. Eigenbrot knew that from the beginning. That was part of her case as well is that they were never very cooperative.

Q. And interviewing them was her only way to establish probable cause, is that your position?

A. I think so. Because of, partly, because of his statement where he exonerated them. But, also, any evidence we had kind of pointed towards him. He was at the scene and what I mean

by that, he's not there when they -- according to Nicole and Crystal, when they go outside, no one is there. They hear the shooting. They go outside. They can see that he's been shot, but there's no people outside.

But there were people in the trailer park who saw Mr. White running away from the scene. And in fact, the cop going to the scene stopped and spoke to Mr. White just seeing him running and he said that bullets had gone whizzing past him. And then some other people saw him running and then you had his friend who had the gun who said that he had taken the gun from him.

So everything we had sort of pointed to Mr. White being in the area, being the person involved. Although, both women were at the scene, there was nothing to show that they had done anything other than be there. And so, did they think they were probably involved because there was some texting going on between them and Mr. White? They thought so, but we didn't have anything to prove that.

And, in fact, Ms. Eigenbrot kept saying, you know, Brian does not -- did not do this. She was very adamant that he was not

involved according to him, but that the women were more involved, but we just didn't have anything to do anything more than that. We or her.

MS. MARTO: One moment, Your Honor.

THE COURT: Sure.

Q. Now there were, I guess, third party witnesses to the crime; right? That testified at trial?

A. What do you mean by, third party?

Q. People that were on the scene?

A. Yes.

Q. At the time, wasn't it Crystal and Nicole and at least one other person?

A. That were at the trailer park?

Q. Yes.

A. Yes.

Q. Okay. Now do you recall Mr. Randall Wilson? I believe he was -- he woke to gunshots.

A. I'm not going to sit here and tell you I remember the names, but I know there were other people who either heard the gunshots or saw someone running from the area.

Q. And did you -- did your investigator follow-up with any of those people about -- specifically, Crystal and Nicole's involvement?

A. What I remember is they talked to them about what they heard or saw. And they only either heard the gunshots or saw a male running from the area. I do remember they talked about when it was brought up that maybe Crystal or Nicole was outside, like, I think there was a question about whether Nicole could have gone outside with the defendant because that's what he said had happened. We had them go and look at the photographs and the backdoor was not only locked, but blocked. So there was no way she could have kind of came back in the house. Because her mother testified that when she went to the door after hearing the gunshots, that Nicole came from the back, so she couldn't have been outside. And so there was some questions, well, couldn't she have gone through the backdoor? But there were photographs where the backdoor was locked and blocked with something, so she couldn't have come through the backdoor.

So I'm not going say that they asked any of the neighbors did they see Crystal or Nicole outside, although, everybody saw them outside after it happened and nobody was outside before -- at least not right there.

Q. And to the best of your knowledge,

there wasn't anybody that specifically saw the confrontation of the shooting itself; right?

A. No, no one other than Mr. White was outside when it happened according to the testimony that we got.

MS. MARTO: Nothing further, Your Honor.

THE COURT: Any redirect?

MR. BARLOW: Nothing, Your Honor.

THE COURT: You can step down, ma'am. Thank you. State have any other witnesses?

MR. BARLOW: No, Your Honor.

THE COURT: All right. Ms. Marto, do you have any reply case?

MS. MARTO: No, Your Honor.

THE COURT: Okay. All right. Well, I'm going to take this under advisement. In all candor, Mr. White, I'm not optimistic that I'm going to grant you relief on your amended application, but I do want to review the transcript that has been provided to me, so I'll take it under advisement and let the lawyers know something as soon as possible.

MR. BARLOW: Thank you, Your Honor.

- - -END OF REQUESTED TRANSCRIPT OF RECORD- - -

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

I, KATHERINE A. SPIRES, Registered Professional Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 7th of April, 2025.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 18, 2025

s/Katherine A Spires

Katherine A. Spires

Registered Professional Reporter

STATE OF SOUTH CAROLINA COUNTY RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Brian N. White, #382851, Applicant, v. State of South Carolina, Respondent.	CASE NO. 2023–CP–40–03877 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. Donald B. Hocker
Applicant's Attorney:	Chelsey F. Marto, Esq.
Respondent's Attorney:	D. Russell Barlow II, Esq.
Trial Counsel:	Megan A. Eigenbrot, Esq. Tracy E. Pinnock, Esq. Richard E. Marsh, III, Esq.
Date of Hearing:	April 7, 2025
Court Reporter:	Katherine A. Spires

This matter comes before this Court by way of Applicant Brian N. White's post-conviction relief (PCR) application filed on July 26, 2023. Respondent made its Return and Partial Motion to Dismiss on November 29, 2023, requesting that an evidentiary hearing be convened.

An evidentiary hearing was held on April 7, 2025, at the Richland County Courthouse before the Honorable Donald B. Hocker. Applicant was present and represented by Chelsey F. Marto, Esquire. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. Applicant testified on his own behalf at the evidentiary hearing. Fifth Circuit Public Defender Megan A. Eigenbrot (Counsel Eigenbrot) and then Fifth Circuit Deputy Solicitor April W. Sampson (Sol. Sampson) also testified.

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any

constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. In June 2019, the Richland County Grand Jury indicted Applicant for Murder (2019-GS-40-03681). On November 18-22, 2019, Applicant proceeded to a jury trial before the Honorable DeAndrea G. Benjamin. Fifth Circuit Assistant Public Defenders Counsel Eigenbrot, Tracy E. Pinnock, and Richard E. Marsh, III (collectively Trial Counsel), represented Applicant. Fifth Circuit Deputy Solicitor April W. Sampson and Assistant Solicitors Samuel C. McGlothin and Harrison M. Pratt prosecuted the case. The jury convicted Applicant as indicted. Judge Benjamin sentenced Applicant to a term of thirty-eight years' imprisonment.

Applicant timely filed a notice of appeal. Appellate Defender Susan B. Hackett perfected Applicant's appeal. On December 14, 2022, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. White, Op. No. 2022-UP-451 (S.C. Ct. App. filed December 14, 2022). The Remittitur was returned on March 24, 2023.

SUMMARY OF RELEVANT FACTS

On December 7, 2016, Crystal Posey ("Crystal") returned to her mobile home on Patricia Drive in Richland County and discovered her TV was missing. (Trial Tr. p. 293). Crystal suspected that her TV had been stolen and sold by her longtime boyfriend, James Scott Turner (Victim). (Trial Tr. pp. 289–93). Crystal theorized that the Victim sold her TV to buy drugs and that he was currently high on crack cocaine. (Trial Tr. pp. 293–93). Crystal contacted her daughter, Shena Nicole Bryant ("Nicole"), and asked her to come home. (Trial Tr. p. 293). When her mother called, Nicole was at the Marriott Hotel in downtown Columbia with Applicant,

Brittany Steen ("Steen"), and Elexia Tucker ("Tucker").[1] (Trial Tr. pp. 350–53). At Nicole's request, Applicant drove Nicole, Steen, and Tucker to Crystal's residence. (Trial Tr. pp. 353–54).

Applicant, Nicole, Steen, and Tucker arrived at Crystal's residence and tried to comfort her. (Trial Tr. p. 354). While at the residence, Applicant told both Steen and Nicole that he would "handle" or "take care of" Victim. (Trial Tr. pp. 355–57). At some point in the early morning hours of December 8, 2016, Applicant, Steen, and Tucker left the residence to return to the Marriott. (Trial Tr. p. 526). Nicole remained with Crystal, and they both went to bed at Crystal's residence. (Trial Tr. p. 294). Nicole and Crystal were awakened by the sound of gunshots outside the front door. (Trial Tr. p. 295). When Nicole and Crystal went outside to investigate the gunshots, they witnessed Victim's van riddled with gunshots on the driver's side door. (Trial Tr. p. 296). Nicole opened the driver's side door and witnessed Victim bleeding and lying across the front seat of the van. (Trial Tr. p. 359). Nicole asked Crystal to call 911 and bring towels from inside to help stop the bleeding. (Trial Tr. p. 296).

Deputy Jeffrey Cahill ("Deputy Cahill") of the Richland County Sheriff's Department was the first law enforcement officer to arrive at the scene. As Deputy Cahill approached the residence, he was flagged down by a white male individual who was walking away from the scene. The white male identified himself as Applicant and told Deputy Cahill he was smoking a cigarette when he felt bullets "whiz by him." (Trial Tr. pp. 189–90). Deputy Cahill continued to the residence to secure the scene. Paramedic Richard Hill ("Hill") arrived soon thereafter and tended to Victim's injuries. Hill observed that Victim had no pulse and multiple gunshot wounds to the

[1] Nicole and Applicant had a previous romantic relationship. (Trial Tr. pp. 346–47). After Applicant and Nicole began dating, Applicant lived with Nicole, Crystal, and Victim at the residence on Patricia Drive until approximately August or September of 2016, when Applicant and Nicole broke up. (Trial Tr. pp. 347–48). Applicant moved out of the residence after his breakup with Nicole, but their relationship remained amicable. (Trial Tr. p. 348).

#3

left side of his body, including his head, shoulder, and chest. (Trial Tr. pp. 194–96). Victim was subsequently pronounced dead as a result of multiple gunshot wounds. (Trial Tr. p. 741).

Investigator Cris Truluck ("Investigator Truluck") of the Richland County Sheriff's Department arrived on the scene and questioned Crystal's neighbors. Investigator Truluck learned that Deputy Cahill encountered Applicant leaving the scene, and two neighbors, Samuel Knowles and Randell Wilson, also saw Applicant near Crystal's residence that morning. (Trial Tr. pp. 785–87). Investigator Truluck considered Applicant a suspect and asked Nicole to call Applicant. As Investigator Truluck listened to their phone conversation[2], Applicant told Nicole that he "took care of it" and got rid of the gun, but Applicant did not confess to the shooting. (Trial Tr. pp. 795–96). Investigator Truluck returned to Crystal's residence later that day to speak with her again and saw Applicant at the residence. (Trial Tr. p. 798).

Crystal and Applicant were taken to the Sheriff's office for questioning. (Trial Tr. p. 799). Applicant waived his Miranda rights and agreed to speak with Investigator Truluck. (Trial Tr. pp. 802–06). Applicant confessed to shooting Victim. (Trial Tr. pp. 808-12). Applicant stated he parked his car on Woodford Street and walked to Crystal's house in the early morning hours of December 8, 2016. (Trial Tr. pp. 964–66). Applicant fired a pistol approximately six times into Victim's driver's side window. Id. After shooting Victim, Applicant claimed he ran from the scene, took his gun apart, and threw the pieces into the woods. Id. Applicant did not tell law enforcement where he obtained the weapon. Id. After his confession, Applicant was arrested and charged with murder. (Trial Tr. p. 818).

[2] It does not appear this phone call was played for the jury. Investigator Truluck testified there were technical issues with the volume of Applicant's voice on the phone call. (Trial Tr. p. 94).

On December 9, 2016, Jerry Rabon ("Rabon") contacted the Richland County Sheriff's Office to tell them he may be in possession of the murder weapon. (Trial Tr. p. 486). Applicant was living with Rabon then and had access to his home. (Trial Tr. pp. 471–72). Rabon explained that he awoke early on the morning of the 8th to find Applicant looking for something in Rabon's spare bedroom. (Trial Tr. p. 474). Applicant asked Rabon to borrow his gun so Applicant could help his boss shoot some coyotes. (Trial Tr. pp. 474–75). Rabon gave Applicant his pistol and some ammunition. (Trial Tr. p. 475). Applicant returned the gun a few hours later and told Rabon he shot at some coyotes but missed. (Trial Tr. pp. 479–80).

When Applicant returned the gun, he was speaking to Nicole on the phone. (Trial Tr. p. 480). Nicole told Rabon that Victim had been shot. Id. Rabon contacted law enforcement after learning that Applicant had been arrested for murder. (Trial Tr. pp. 485–86). Rabon gave his gun to law enforcement. (Trial Tr. p. 501). Forensic analyst Amanda Metz of the Richland County Sheriff's Office analyzed the firearm and determined the bullets extracted from the Victim's body were fired by the same gun. (Trial Tr. p. 459).

Applicant testified in his own defense at trial. Applicant admitted to telling Steen via text message that he would "handle" Victim. (Trial Tr. p. 987). Applicant further admitted he borrowed a pistol from Rabon and lied to Rabon about why he needed the weapon. (Trial Tr. pp. 962-63). However, Applicant claimed he obtained the weapon from Rabon because Nicole asked him to bring her a gun. (Trial Tr. p. 959). Applicant claimed Nicole shot Victim. (Trial Tr. p. 965). At the conclusion of the trial, Applicant was convicted of murder.

#5

CURRENT ACTION BEFORE THIS COURT

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

1. Ineffective assistance of counsel:
   a. Public defender's appointed had too high a caseload to effectively handle Applicant's case.
   b. Failure to properly prepare Applicant for testifying.
   c. Failure to make proper objections.
2. Convicted with no actual evidence.
3. Lack of actual investigation.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective Assistance of Trial Counsel for:
   a. Failure to prepare Applicant's testimony properly.
   b. Failure to question Applicant regarding the reason why he brought the gun to the scene.
   c. Failure to discuss trial strategy and the trial defense with Applicant.
   d. Failure to properly prepare for trial.
   e. Failure to investigate DNA, GSR, and fingerprint evidence of bystanders.
   f. Failure to clearly argue Applicant's claim that the police rewrote his police statement.
   g. Failure to properly communicate with Applicant.
   h. Failure to investigate and meet with Crystal and Nicole.
   i. Failure to meet with Applicant enough.
   j. Failure to thoroughly cross-examine Nicole regarding lies and inconsistencies, specifically regarding her claim that she lost her phone.
   k. Failure to thoroughly cross-examine Crystal.

Any and all other tenable allegations not raised at the PCR hearing are deemed waived and abandoned and, accordingly, will not be addressed in this order.

SUMMARY OF THE PCR EVIDENTIARY TESTIMONY

Applicant's Testimony

Applicant testified that he was charged with murder and possession of a weapon during the commission of a violent crime and received a thirty-eight-year sentence after being found guilty as convicted at trial. (PCR Tr. p. 5). Applicant stated he was represented by Ms. Eigenbrot and

Ms. Pinnock. (PCR Tr. p. 6). He stated that Trial Counsel was ineffective in their representation. Applicant stated that he did not believe that there was enough evidence presented at trial for him to be found guilty. (PCR Tr. p. 6). He stated that he understood that by proceeding with the PCR hearing, if he were granted relief, he would face a maximum exposure of life imprisonment. (PCR Tr. p. 6).

Applicant testified that he believed Trial Counsel could have done more for him at trial, which would have resulted in a different outcome. (PCR Tr. p. 6). He stated that he was in county jail for two years with limited contact with Trial Counsel before the trial. (PCR Tr. p. 7). Applicant testified that he believed that Trial Counsel met with him between ten and twenty times, but that Trial Counsel should have met with him more so that he would be better prepared. (PCR Tr. p. 25). He stated that he thought Trial Counsel should have met with him more and been more communicative throughout the course of their representation of him. (PCR Tr. p. 7). Applicant indicated that Trial Counsel met with him multiple times before trial. (PCR Tr. p. 7). Applicant failed to come up with a substantive issue he wanted to discuss with Trial Counsel prior to trial that they did not discuss. (PCR Tr. p. 32). Instead, he simply stated that they should have addressed everything in more depth. (PCR Tr. p. 32).

Applicant stated that they discussed the trial strategy "somewhat," but failed to recall specifics. (PCR Tr. p. 7). He stated that he wanted Trial Counsel to discuss his testimony with him more and give him more guidance on how to testify and what to convey to the jury. (PCR Tr. p. 8). He stated that he got flustered on the stand and thought that this could have been avoided had he and Trial Counsel planned better. (PCR Tr. pp. 8–9).

Applicant stated that he wanted Trial Counsel to question him about why he was armed. (PCR Tr. p. 12). He testified that he was armed to protect himself after being told that the victim

was armed prior to arriving on the scene. (PCR Tr. p. 12). He stated that this would have been important for the jury to know because the State's theory of the case made it seem like he arrived on scene with plans to kill the victim, which he did not. (PCR Tr. p. 12).

Applicant testified that the primary trial defense was to show the jury that there was no evidence to suggest he had committed the crime. (PCR Tr. p. 9). Applicant testified that he wanted Trial Counsel to investigate DNA, GSR, and fingerprint evidence. (PCR Tr. p. 13). He stated that the case was not investigated much and that he was the only person given a DNA test. (PCR Tr. p. 13). He noted that the DNA expert testified that his DNA did not match any of the samples tested. (PCR Tr. p. 13).

Applicant stated that Trial Counsel should have argued that there was no physical evidence of DNA found linking him to the crime. (PCR Tr. p. 9). He acknowledged that Trial Counsel used the fact that there was no physical evidence in the case in his defense, but that Trial Counsel should have pursued this line of defense more thoroughly at trial. (PCR Tr. p. 25). He was upset that other individuals on the scene were not pursued as potential suspects. (PCR Tr. pp. 25–26). He testified that he wanted Trial Counsel to question the investigator further about why no additional investigation was conducted. (PCR Tr. p. 26). Applicant acknowledged that he addressed this issue in his own testimony at trial. (PCR Tr. p. 26). He also acknowledged that it was mentioned during Trial Counsel's closing argument. (PCR Tr. p. 26).

Applicant stated that his police statement was fabricated and came across as a confession. (PCR Tr. p. 9). He stated that he signed the statement without reading it. (PCR Tr. p. 11). He stated that he did not know the statement had been rewritten by the officers until he received his motion for discovery, well into his first year of being housed in the Alvin Glenn Detention Center. (PCR Tr. p. 10).

Applicant testified that he wanted Trial Counsel to meet with Crystal and Nicole. (PCR Tr. p. 13). He stated that he believed Nicole was the shooter. (PCR Tr. p. 15). He stated that Crystal was in a long-term relationship with the victim and that Nicole was Crystal's daughter. (PCR Tr. p. 14). He stated that he wanted Trial Counsel to investigate whether they had any part in the murder. (PCR Tr. p. 14). He noted that the investigation essentially ended after he provided his confession. (PCR Tr. p. 14).

He stated that he wanted Trial Counsel to conduct a more thorough cross-examination of Nicole. (PCR Tr. p. 15). Specifically, he wanted Trial Counsel to draw greater emphasis to her lies on the stand, as many of the things she said did not happen. (PCR Tr. p. 15). He testified that her testimony did not match up with her initial statement, and he wanted Trial Counsel to better examine that during cross. (PCR Tr. p. 15). He stated that he wanted Trial Counsel to question her about her testimony that she lost her phone and did not have it with her until the next morning, when, after finding her phone, they saw she had been using it all night. (PCR Tr. p. 16).

Applicant testified that he wanted Trial Counsel to better cross-examine Crystal. (PCR Tr. p. 17). He testified that he wanted Trial Counsel to probe into her possible involvement in the crime. (PCR Tr. p. 17). He stated that he did not believe that she did not have knowledge of the crime or that she was not involved. (PCR Tr. p. 17). He stated that he believed Nicole and Crystal were involved in the crime. (PCR Tr. p. 17).

On cross-examination, Applicant testified that he initialed and signed every page of his police statement. (PCR Tr. p. 19). He stated that he remembered being questioned about the statement at trial and that he testified at trial that his statement did not line up with what he told the police. (PCR Tr. p. 19). He stated that he explained to the jury what in the statement was true and what was fabricated. (PCR Tr. pp. 19–20). Applicant testified that he wished Trial Counsel

had reviewed his police statement more thoroughly than they did. (PCR Tr. p. 20). He stated that he believed he had a Jackson v. Denno hearing had been held prior to trial. (PCR Tr. p. 23).

Applicant stated that he wished Trial Counsel had spent more time preparing him to testify. (PCR Tr. p. 21). He stated that he wished Trial Counsel had told him what to expect on cross-examination. (PCR Tr. p. 21). Applicant testified that he was asked why he brought a gun to the scene, but that Trial Counsel should have examined the issue more thoroughly in front of the jury. (PCR Tr. 22).

Applicant testified that he believed that Crystal and Nicole were the State's witnesses. (PCR Tr. p. 28). He stated that Trial Counsel cross-examined Nicole regarding her inconsistent statements, specifically regarding the phone. (PCR Tr. p. 29). He stated that he thought Trial Counsel should have done that more effectively. (PCR Tr. p. 29). He also acknowledged that Trial Counsel cross-examined Crystal concerning her inconsistent statements. (PCR Tr. pp. 29–30). He stated that he would be surprised to find out that Trial Counsel's cross-examination of Crystal was twenty-seven pages long. (PCR Tr. pp. 30–31).

Applicant testified that he believed his first attorney had hired an investigator. (PCR Tr. pp. 32–33). He stated that the investigator met with him once, asked a few questions, and never spoke with him again. (PCR Tr. p. 33).

Counsel Eigenbrot's Testimony

Counsel Eigenbrot testified that she is in her twelfth year of practicing law. (PCR Tr. p. 36). She stated that she represented Applicant for about two and a half years. (PCR Tr. p. 36). Counsel Eigenbrot testified that she met with Applicant twenty-seven times. (PCR Tr. p. 38).

She testified that she received the discovery in the case and reviewed it with Applicant. (PCR Tr. pp. 36–37). Counsel Eigenbrot stated that she discussed the trial process with Applicant

before the trial. (PCR Tr. p. 41).

Counsel Eigenbrot testified that the State's case showed that a shooting occurred at Crystal's and Nicole's residence, which was in a trailer park. (PCR Tr. p. 37). Applicant was in the area when the police arrived and appeared to be running. (PCR Tr. p. 37). After speaking with Crystal and Nicole, Applicant became a suspect quickly. (PCR Tr. p. 37). Counsel Eigenbrot testified that Applicant was interviewed and, after providing an inculpatory statement, the investigation ended soon after. (PCR Tr. p. 37). She testified that Applicant's friend, Alex Rabon, brought a pistol to the police, stating that he thought it was the murder weapon. (PCR Tr. p. 37). He told the police that Applicant went to his house the night of the shooting, got the gun, and returned it the next morning. (PCR Tr. p. 38).

Counsel Eigenbrot testified that, based on the evidence and her conversations with Applicant, the defense strategy was to blame Crystal and Nicole and, by extension, to take it off Applicant. (PCR Tr. p. 38). She testified that prior counsel requested an investigator be brought on the case and that she continued to work with him throughout the case. (PCR Tr. p. 41). She stated that she sent the investigator out to meet with people who may know what happened, but that Nicole and Crystal refused to talk to them. (PCR Tr. p. 42). She stated that she directed her investigator to attempt to speak with Crystal and Nicole on several occasions. (PCR Tr. p. 46). She testified that the investigator believed that the women were involved in the crime, but that Applicant's initial statement indicated that no one else was involved and there was nothing else to challenge that assertion at the time. (PCR Tr. p. 46). She testified that she met with Brittany Steen, who had been with Applicant earlier that day, and her attorney, who was representing her on unrelated charges before trial. (PCR Tr. p. 42).

Counsel Eigenbrot testified that Applicant was the only person tested on scene, and no

testing for DNA, GSR, or fingerprint analysis was done on Crystal or Nicole. (PCR Tr. p. 43). She testified that there was nothing she could do about the failure of law enforcement to test others on the scene. (PCR Tr. p. 43).

Counsel Eigenbrot testified that the decision to have Applicant testify occurred later, after Applicant provided new information to her co-counsel, which prompted them to change their strategy. (PCR Tr. p. 39). She testified that they spent as much time as possible with Applicant, preparing him. (PCR Tr. p. 39). She testified that they met and discussed his testimony several times, did practice direct examinations, and informed him of what he might be asked on cross-examination. (PCR Tr. p. 39). She testified that she did not recall if they did a mock cross-examination, but that they did several mock direct examinations. (PCR Tr. pp. 39–40). She stated that she believed a mock cross-examination is usually helpful to her clients and that she typically conducts them. (PCR Tr. p. 45).

After reviewing the transcript, Counsel Eigenbrot acknowledged that she questioned Applicant about why he brought the gun when he testified at trial. (PCR Tr. pp. 40–41). She testified that the only additional preparation she thought she could do regarding Applicant's testimony was to bring him into court and have him sit in the witness stand while practicing his testimony. (PCR Tr. p. 45). Counsel Eigenbrot testified that she recalled questioning Applicant about his statement and specifically about which parts were fabricated. (PCR Tr. p. 44). She testified that Applicant's version was at odds with his police statement, but his narrative of what happened, as conveyed to her, remained unchanged. (PCR Tr. p. 47). Counsel Eigenbrot testified that she challenged the statement at trial as much as she could. (PCR Tr. p. 47).

Counsel Eigenbrot testified that she did not personally cross-examine Crystal and Nicole, but that her co-counsel did. (PCR Tr. p. 44). She stated that she did not believe there was anything

that Crystal and Nicole could have been cross-examined on that they were not asked about at trial. (PCR Tr. p. 47).

Deputy Solicitor Sampson's Testimony

Sol. Sampson testified that she was the prosecutor on the case and that she had been practicing criminal law for twenty-six years. (PCR Tr. pp. 48–49). She testified that DNA swabs were taken, but no DNA came back to anyone specifically. (PCR Tr. p. 49). She testified that no GSR was taken from anyone because over six hours had passed between when the crime was committed and when officers arrived on the scene. (PCR Tr. p. 49). She testified that the defense consented to Applicant's DNA being taken, so there was no Schmerber hearing. (PCR Tr. p. 49). She testified that law enforcement did not have probable cause to swab Crystal and Nicole, who refused to consent to testing. (PCR Tr. p. 50). Sol. Sampson testified that Applicant told law enforcement that Crystal and Nicole were not involved in the crime, which contributed to the lack of probable cause. (PCR Tr. p. 50).

She testified that Applicant claimed every line in his police statement while testifying at trial, except for his claim that he committed the crime and that Crystal and Nicole were not involved. (PCR Tr. p. 50). She testified that they presumed Applicant's police statement was correct, though law enforcement presumed that Crystal and Nicole probably participated in the crime since there was no reason for him to be connected to the crime without their involvement. (PCR Tr. p. 50). However, Sol. Sampson testified that there was no direct evidence of their involvement beyond the fact that they were in the house and were asleep when it happened. (PCR Tr. p. 51).

On cross-examination, Sol. Sampson testified that Crystal and Nicole were reluctant to speak with the State, and the State was only able to meet with them once before trial. (PCR Tr. p.

#13

51). She testified that Crystal had anxiety and began crying as soon as she took the stand. (PCR Tr. p. 52). She stated that Crystal was with the victim for eight or nine years and walked out of her house just to see her dead. (PCR Tr. p. 52). She stated that Nicole was easier to talk to, but she still did not want to speak to the State or cooperate otherwise. (PCR Tr. p. 52). She testified that interviewing Crystal and Nicole was the only way to establish probable cause, especially since Applicant had exonerated them and whatever evidence the State had pointed towards Applicant, not Crystal and Nicole. (PCR Tr. p. 52).

She testified that, according to Crystal and Nicole, they heard shooting, went outside, and saw that no one was there besides the victim, who was shot. (PCR Tr. p. 53). She stated that people in the trailer park heard gunshots and saw Applicant running from the scene, including a responding officer. (PCR Tr. pp. 53–54). She acknowledged that there was a question regarding whether Nicole was outside with Applicant at the time of the shooting, though this was undermined by the fact that doors to the house Nicole was in immediately thereafter were locked and blocked. (PCR Tr. p. 55).

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STANDARD OF REVIEW

The Uniform Post–Conviction Procedure Act[3] (the Act) provides that any person who has been convicted of a crime may seek post–conviction relief based upon the following types of allegations:

> 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> 2. That the court was without jurisdiction to impose sentence;
> 3. That the sentence exceeds the maximum authorized by law;
> 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> 5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
> 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17–27–20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post–conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient

[3] S.C. Code Ann. §§ 17–27–10 to –160.

to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two–part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly

#16

deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then–existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of Trial Counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S.at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post–trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second–guessing counsel's trial tactics, and

where counsel articulates a valid reason for employing such a strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel and appellate counsel through the post–conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at Applicant's evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post–trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very

#18

position far better equipped to make findings of fact which will have the reliability that we need and desire.").

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post–conviction relief. See Rule 71.1(e), SCRCP (stating that in a post–conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post–conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17–27–80 of the South Carolina Code:

INITIAL FINDINGS

As a matter of general impression, this Court finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant he rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

#19

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Allegation 1a: Trial Counsel failed to properly prepare Applicant to testify.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to properly prepare him to testify. This Court finds this allegation to be without merit

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. [However], if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." Id. "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id. A criminal defendant has the right to testify and the right to zealous representation by a lawyer. United States v. Scott, 909 F.2d 488 (11th Cir. 1990). Moreover, the right to testify "does not extend to testifying falsely." Nix v. Whiteside, 475 U.S. 157, 173 (1986). While no specific inquiry must occur on the record, the decision to testify or not to testify is ultimately up to the defendant.

To establish that counsel failed to adequately prepare for trial, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768; see Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). When claims of ineffective assistance of counsel are based on lack of preparation time, an applicant challenging his conviction must show specific prejudice resulting

#20 10/24

from counsel's lack of time to prepare. U. S. v. LaRoache, 896 F.2d 815 (4th Cir. 1990).

Findings

This Court, after a thorough evaluation, finds that the Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Counsel Eigenbrot *credibly* testified that she practiced Applicant's testimony with him extensively and told him what to anticipate on cross-examination. (PCR Tr. 39–44). The concerns raised by the Applicant, particularly regarding the justification for possessing a firearm and the allegations of what parts of his police statements were fraudulent, were thoroughly addressed during the trial. This was a point that Applicant himself acknowledged during his PCR hearing. (PCR Tr. pp. 19–20; p. 22). This Court further finds Applicant has failed to identify anything specifically that he would have testified to that a) he did not testify to at trial, and b) would have led to a different outcome at trial.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and

DISMISSED.

Allegation 1b: Trial Counsel failed to question Applicant why he brought a gun to the scene.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failure to adequately question him regarding why he brought the gun to the scene. This Court finds this allegation to be without merit.

Findings

This Court, after a thorough evaluation, finds that the Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Contrary to Applicant's assertion, the record before this Court provides that at trial Applicant testified to why he brought the gun during direct examination. (Trial Tr. pp. 958–61). Consequently, the record decisively counters the Applicant's claims, and this Court concludes that Trial Counsel demonstrated competence on this matter, as they explicitly addressed the issue with the Applicant while he was testifying during his jury trial. Applicant provided no evidence of what further testimony would have changed the outcome of his trial on this matter.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

#22 1877

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

Allegation 1c: Trial Counsel failed to discuss trial strategy and defenses with Applicant.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failure to discuss trial strategy and defenses with him. This Court finds this allegation to be without merit.

"The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8 (2003); see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Id. at 688–89; cf. id. at 693 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." Dunn v. Reeves, 594 U.S. 731, 739 (quoting Harrington, 562 U.S. at 106–107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." Id. (quoting Harrington, 562 U.S. at 108).

Thus, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689; The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied Strickland's deferential standard.

Findings

This Court, after a thorough evaluation, finds that the Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court further finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra.* This Court finds Counsel Eigenbrot *credibly* testified that they met with Applicant twenty-seven times, and the defense they decided on was to place the blame on Crystal and Nicole, and not Applicant. (PCR Tr. p. 38). The crux of this argument rested upon Applicant's own testimony, which Counsel Eigenbrot *credibly* testified they discussed at great length. (PCR Tr. pp. 39–40). This Court finds it difficult to believe that Applicant was unaware of the trial strategy when he was the central focus of the defense's strategy at trial. Furthermore, this Court finds Applicant has failed to point to anything specific that he did not understand or that should have been explored at trial by way of a defense or strategy.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or

omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

Allegation 1d:	**Trial Counsel failed to properly prepare for trial.**
Allegation 1e:	**Trial Counsel failed to investigate DNA, GSR, and fingerprint evidence of bystanders.**
Allegation 1h:	**Trial Counsel failed to investigate and meet with Crystal and Nicole.**

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failure to properly prepare for trial, failure to investigate DNA, GSR, fingerprint evidence of bystanders, and for failure to investigate and meet with Crystal and Nicole. This Court finds these allegations to be without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the

defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Findings

This Court, after a thorough evaluation, finds that the Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*.

Applicant asserts that Trial Counsel was ineffective due to insufficient trial preparation. However, a thorough review of the trial and PCR transcripts reveals that Trial Counsel demonstrated exemplary preparation and commitment to the case. Moreover, Applicant has not

identified any specific shortcomings in Trial Counsel's actions that could have reasonably changed the outcome of the trial. Thus, Applicant has failed in his burden of proving any deficiency and any prejudice flowing from that alleged deficiency.

Furthermore, Applicant asserted claims of ineffective assistance of Trial Counsel, specifically for an inadequate investigation into DNA, GSR, and fingerprint evidence. While Counsel Eigenbrot expressed concern that only the Applicant underwent testing for these critical pieces of evidence, she candidly admitted that nothing could alter this circumstance. (PCR Tr. 43). This Court concurs with that assessment.

Additionally, Counsel Eigenbrot *credibly* testified that an investigator was engaged in the case, making efforts to visit the scene and speak with witnesses about the events that transpired. (PCR Tr. 42-43). This approach to investigation is deemed reasonable and strategic. Counsel Eigenbrot further *credibly* emphasized their diligent efforts to highlight the deficiencies present in the police department's investigative procedures before the jury. (PCR Tr. 44).

This Court finds Trial Counsel's decisions to be both objectively reasonable and founded in sound strategy; therefore, Applicant has not sufficiently demonstrated any deficiencies or resulting prejudice from these alleged shortcomings. Moreover, Applicant has failed to articulate any specific evidence that further inquiry would have uncovered, which could have been advantageous to the defense. Consequently, even if there were a lack of diligence on Trial Counsel's part, Applicant has not established any prejudicial impact as a result.

Applicant contends that Trial Counsel's representation fell below constitutional standards due to an alleged failure to investigate witnesses Crystal and Nicole. However, this Court finds the claim unpersuasive. Counsel Eigenbrot provided *credible* testimony indicating that her investigator made attempts to engage with both Crystal and Nicole, who ultimately proved to be

#27

uncooperative. It is a fundamental principle that Trial Counsel cannot compel the State's witnesses to engage with them against their will. Once these witnesses chose not to meet with the defense, Trial Counsel's options were effectively exhausted. Therefore, it cannot be said that Trial Counsel acted deficiently in this regard.

Furthermore, Applicant has not demonstrated how a meeting between Trial Counsel and Crystal and Nicole would have yielded any beneficial outcomes during the trial. Without evidence of potentially helpful information that could have emerged from such meetings, the Applicant has failed to establish any resulting prejudice. In summary, the claims lack merit and do not support a finding of ineffective assistance of counsel.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, these allegations must be **DENIED** and **DISMISSED.**

Allegation 1h: Trial Counsel failed to clearly argue Applicant's statement to police was fabricated.

Applicant contends Trial Counsel's representation was constitutionally ineffective for failing to effectively argue that his police statement was fabricated. However, both Applicant and his Counsel Eigenbrot acknowledged that this statement was thoroughly scrutinized during the trial. Applicant had the opportunity to clarify for the jury which aspects of his statement were

#28

accurate and which were misleading. At the PCR hearing, Applicant's sole argument was that Trial Counsel should have investigated this matter more thoroughly. Yet, Applicant failed to provide compelling examples to substantiate this claim or demonstrate that he satisfied the burden of proof under either prong of the Strickland analysis. Consequently, Trial Counsel cannot be deemed deficient for not revisiting an issue that had already been comprehensively addressed, and no prejudice has been established.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, these allegations must be **DENIED** and **DISMISSED.**

Allegation 1g: **Trial Counsel failed to properly communicate with Applicant.**

Allegation 1i: **Trial Counsel failed to meet with Applicant enough.**

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to properly communicate and failing to meet with Applicant enough. This Court finds these allegations to be without merit.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency);

#29

United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) (finding "Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Additionally, "brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." Id.; see Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); Skeen v. State, 325 S.C. 210, 214–15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

#30

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Findings

This Court, after a thorough evaluation, finds that the Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Trial Counsel *credibly* testified that she met with Applicant twenty-seven (27) times. (PCR Tr. 38). Further, this Court finds Applicant failed to identify anything with specification that could have changed had Trial Counsel communicated or met with him more often. Thus, Applicant has failed to meet his burden of proving deficiency and any prejudice flowing from the alleged deficiency.

#31 DNA

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, these allegations must be **DENIED** and **DISMISSED.**

Allegation 1j: **Trial Counsel failed to thoroughly cross-examine Nicole regarding lies and inconsistencies, specifically regarding her claim that she lost her phone.**

Allegation 1k: **Trial Counsel failed to properly cross-examine Crystal.**

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to thoroughly cross-examine Nicole[4] regarding lies and inconsistencies surrounding her claim that she lost her phone. Applicant further claims Trial Counsel failed to properly cross-examine Crystal[5]. This Court finds these allegations to be without merit.

Findings

This Court notes that the approach and scope of cross-examination should not be second-guessed. See Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Marzullo not intended to promote judicial second-guessing on questions of strategy as basic as handling of a witness); see also Dunham v. Travis, 313 F.3d 724, 732 (2d Cir.2002) ("Decisions about 'whether to engage in cross-examination, and if so to what extent and in what manner, are ... strategic in nature' and

[4] Nicole refers to witness Shena Nicole Bryant. (Trial Tr. p. 4).
[5] Crystal refers to witness Crystal Posey. (Trial Tr. p. 3).

#32

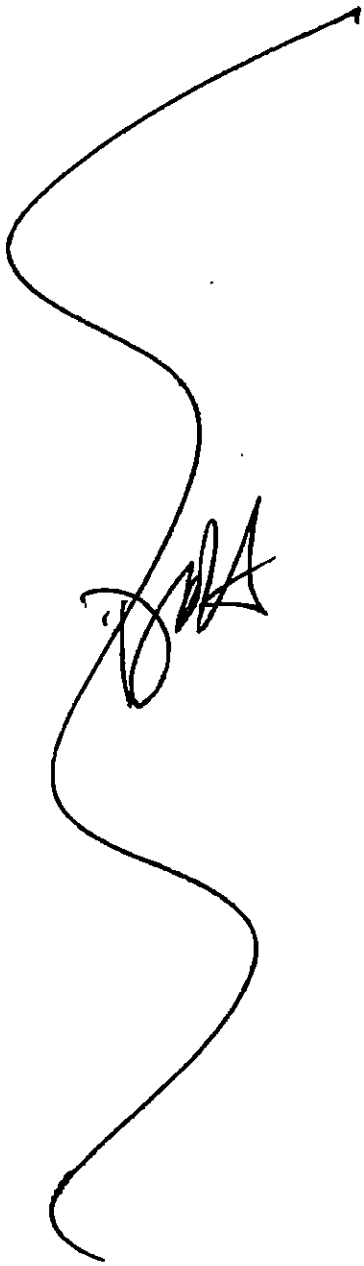
generally will not support an ineffective assistance claim." (quoting United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir.1987)); Johnson v. Hofbauer, 159 F.Supp.2d 582, 607 (E.D.Mich.2001) ("Impeachment strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available.") (citing Gallo v. Kernan, 933 F.Supp. 878, 881 (N.D.Cal.1996); aff'd 141 F.3d 1175 (9th Cir.1998); cert. den. 525 U.S. 856 (1998)). This Court has thoroughly reviewed the cross-examination of Nicole and Crystal conducted by Trial Counsel and finds no deficiencies. Furthermore, Applicant failed to competently show how Trial Counsel's failure to "properly cross-examine" Crystal or Nicole was prejudicial.

Notably, this Court highlights that Applicant failed to produce Nicole or Crystal for the additional questioning that Applicant alleges should have been asked during cross-examination. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). This Court cannot speculate as to how Nicole or Crystal would have responded to any additional questions Applicant asserts Trial Counsel should have asked during cross-examination. See Glover v. State, supra, 318 S.C. at 498-99, 458 S.E.2d at 540 (Applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.)

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

#33

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, these allegations must be **DENIED** and **DISMISSED.**



#34

|CONCLUSION & SIGNATURE PAGE FOLLOWS|

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for the appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 17 **day of** NOV. **, 2025.**

DONALD B. HOCKER
Presiding Judge
Fifth Judicial Circuit

Laurens, South Carolina

#35

WITNESSES

(S) Cris Truluck
– Richland County Sheriff Dept

ARREST WARRANT NUMBER

2016A4010203994

ACTION OF GRAND JURY

TRUE BILL

Kenneth L. Jones
Foreperson of Grand Jury
Date: JUN 19 2019

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2019GS4003681

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JUNE TERM 2019

91

THE STATE
vs.

Brian Neil White

Indictment for
MURDER / MURDER

SC Code: **16-03-0010**
CDR Code: **0116**

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____ hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

1328

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on June 18, 2019, the Grand Jurors of Richland County present upon their oath:

MURDER

That Brian Neil White did in Richland County, on or about December 8, 2016, kill the victim, James Scott Turner, with malice aforethought, either express or implied, and the victim did die as a proximate result thereof. All in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

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

BYRON E. GIPSON, SOLICITOR