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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

Honorable Edward Miller, Circuit Court Judge

BRITTANY EPPS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2026-001464

APPENDIX

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1 Does he have any part of her life?

2 MS. BUTCHER: I don't think so, Your
3 Honor.

4 THE COURT: Lives here in Kingstree?

5 MS. BUTCHER: He does, Your Honor.

6 THE COURT: I haven't heard anything any
7 kind of church affiliation. Does she not have any?

8 MS. BUTCHER: I believe that was more
9 sporadic. There was a preacher that she did help
10 out picking okra and stuff, but as far as going to
11 church on a regular basis growing up, no, Your
12 Honor.

13 THE COURT: How about work history? Has
14 she had any job, done any kind of work?

15 MS. BUTCHER: Yes, Your Honor, that's what
16 I was telling you. She was working for her uncle.

17 THE COURT: Doing what?

18 MS. BUTCHER: Construction and
19 landscaping.

20 THE COURT: This uncle, one of them that
21 was here, or somebody else?

22 MS. BUTCHER: That was here. No, not, I
23 don't think it was one of these.

24 THE DEFENDANT: Herbert.

25 MS. BUTCHER: Herbert Fulton. Your Honor,

1 she worked for him sporadically when needed, and
2 that's kind of about all she had had a chance to do,
3 Your Honor. She was just getting herself together
4 after leaving the group home when Jessica came to
5 town and they ended up over at Theos.

6 THE COURT: Tell me about her use of
7 alcohol or drugs.

8 MS. BUTCHER: Your Honor, she to my
9 knowledge has not been someone who has drank, but
10 she has used marijuana, Your Honor. I believe she
11 was very forthcoming with that when she was on the
12 stand.

13 THE COURT: Refresh my memory. It seems
14 like to me that my recollection was at the barbecue
15 they had some alcohol.

16 MS. BUTCHER: I don't believe my client
17 was drinking.

18 THE COURT: Okay.

19 MS. BUTCHER: There was alcohol there, I
20 would imagine. And as a matter of fact, her
21 testimony is that when she got out of the car that
22 night it was when she went to her drug dealers.
23 That's why she had ridden with them and that was
24 what she was gonna do, and she had gone over to
25 smoke, get some marijuana, Your Honor.

1 THE COURT: One of the things, one of the
2 factors under Aiken versus Byars is maturity and
3 truthfulness. I'm concerned having heard the
4 testimony that I don't think that she disputes the
5 fact that she made the 9-1-1 call but did not
6 identify herself and hung up. Is that right?

7 MS. BUTCHER: No, Your Honor. And I went
8 over that very clearly with the 9-1-1 operator. The
9 line kept going in and out, and he said on the stand
10 that they were having trouble hearing each other and
11 the phone cut off.

12 THE COURT: Did she ever identify herself
13 to the 9-1-1 operator?

14 MS. BUTCHER: She, I, I think I'm trying
15 to recall the situation because I think they
16 reconnected after that. I'm not sure if a name was
17 asked but she's always said she made the 9-1-1 call
18 and she waited until the law enforcement came ---

19 THE COURT: But did she ---

20 MS. BUTCHER: ---out there.

21 THE COURT: But did she contend that, she
22 contended that the 9-1-1 call that Jessica shot
23 herself?

24 MS. BUTCHER: In the 9-1-1 call, Your
25 Honor, as the testimony was she didn't know what

1 happened. She was told to tell the law enforcement
2 about the thing with the gun, and the uncle and the
3 out hunting or shooting guns.

4 THE COURT: But she did tell the 9-1-1
5 operator that her friend had shot herself.

6 MS. BUTCHER: Correct, correct. She told
7 them what -- she didn't know that really happened.
8 She was relaying the story she was told to tell, and
9 you know, and she knew that wasn't correct at the
10 time but she didn't know what had really happened.
11 But Your Honor ---

12 THE COURT: She knew that what she told
13 the 9-1-1 operator was not correct.

14 MS. BUTCHER: Correct, Your Honor. But
15 she did not hang up on the 9-1-1 operator, Your
16 Honor, and that was very clear in the testimony.

17 THE COURT: And you referred to the fact
18 that that she having ADHD diagnosis and some other
19 mental health problems. You have any documentation
20 or anything of her mental health problem in the
21 past?

22 MS. BUTCHER: Your Honor, I don't have any
23 documentations of that.

24 THE COURT: Did she ever receive any kind
25 of counseling or help for any of those mental health

1 problems?

2 MS. BUTCHER: No, Your Honor.

3 THE COURT: Anything else, Ms. Butcher?

4 MS. BUTCHER: No, Your Honor. My client
5 would like to speak.

6 THE COURT: All right. Ms. Barr, anything
7 you like to ---

8 MS. BUTCHER: Your Honor, my client would
9 like to speak.

10 THE COURT: Oh, I'm sorry.

11 Yes, ma'am, go ahead.

12 THE DEFENDANT: I'm sorry for y'all loss.
13 I didn't do it. That's it. I know I was found
14 guilty on this charge, but I didn't do it and I know
15 that it's gonna come with time because I was found
16 guilty so I just want to say I'm sorry, but I didn't
17 hurt him and I didn't pull that trigger. And I know
18 if I could go back and I could change trying, not
19 living with my momma and not doing what I was
20 supposed to do I would, and not meeting up and
21 how -- even going to the group home to meet up with
22 this girl I would, but I can't go back and change it
23 so I'm sorry. And I hope y'all find out the truth
24 and just forgive me for the part I did play in it.
25 That's it.

1 THE COURT: All right, thank you.

2 All right, Ms. Butcher, anything else?

3 MS. BUTCHER: No, Your Honor.

4 THE COURT: Ms. Barr.

5 MS. BARR: Judge, the State doesn't have
6 anything else.

7 THE COURT: All right. Again, as we
8 started the sentencing hearing here today I referred
9 to the case of Miller versus Alabama and Aiken
10 versus Byars quoting specifically from Miller --
11 from Aiken versus Byars. Our supreme court --
12 incidentally Aiken versus Byars is a two majority
13 decision in that two judges were in the majority of
14 one concurring opinion. The majority opinion was by
15 Justice Hearn and joined in it by Justice Beatty.
16 Justice Pleicones, now Chief Justice Pleicones,
17 filed a separate concurring opinion and then Chief
18 Justice Toal and Justice Kittredge dissented. And
19 the dissent was really based upon the fact that they
20 interpreted Miller versus Alabama to hold that when
21 only a sentencing inquiry with regard to crimes
22 committed by a juvenile were in those situations
23 where the law of the state was that they, the
24 appropriate sentence was a mandatory life sentence
25 without possibility of parole. That was not, and is

1 not the law of this state. It is not a mandatory
2 life sentence without possibility of parole. It is
3 a 30 year to life sentence. However, the majority
4 opinion written by Justin Hearn says we profoundly
5 disagree with the position advanced by the
6 respondents and the dissent that the import of the
7 Miller decision has no application in South
8 Carolina. Miller is clear that it is the failure of
9 the sentencing court to consider the hallmark
10 features of youth prior to sentencing, the defense
11 of constitution. Contrary to the dissent's
12 interpretation Miller does not, Miller does more
13 than ban mandatory life sentencing schemes for
14 juveniles; it establishes an affirmative requirement
15 that courts fully explore the impact of the
16 defendant's juvenility on the sentence rendered.

17 The Court went on to say that although we
18 do not foreclose the sentences in order to make that
19 judgment in all decide cases we require that you
20 take into account how children are different and how
21 differences counsel against, and those differences
22 counsel against irrevocably sentencing them to life
23 time in prison. In our view whether the sentence is
24 mandatory or permissible, any juvenile defendant who
25 receives a life sentence without the possibility of

1 parole is entitled to the same constitutional
2 protections afforded by the Eighth Amendment
3 guarantee against cruel and unusual punishment. And
4 that's when the State, that's when the majority set
5 forth the factors. Miller requires the sentencing
6 authority take into account how children are
7 different and how these differences counsel against
8 irrevocably sentencing them to lifetime in prison.
9 Miller establishes a specific framework articulating
10 that the factors for sentencing court consider the
11 hearing must include, first, the chronological age
12 of the offender and the hallmark features of youth
13 including immaturity, impetuosity, and failure to
14 appreciate the risk of consequences; two, the family
15 and home environment surrounding the offender;
16 three, the circumstances of the homicide offense
17 including the extent of the offender's participation
18 in the conduct and how family and peer pressures may
19 have affected him or her. The incompetence is
20 associated with youthful and the possibility of
21 rehabilitation. Those are the five factors set
22 forth in Aiken versus Byars. I now need to consider
23 the things that I have been told in connection with
24 this matter and that have been presented to me and
25 apply those factors from Aiken versus Byars with my

1 decision in this case. So to do that I'm going to
2 take about a 15 minute recess while I review the
3 notes that I have made and also the case law, and
4 I'll be prepared to impose sentence in about 15 or
5 20 minutes. Thank you.

6 (WHEREUPON, a recess was taken from the
7 proceedings.)

8 THE COURT: Counsel, what I would like to
9 do in this situation is to have both defendants in
10 the courtroom. Ms. Epps can sit with Ms. Butcher at
11 the table. Ms. Jackson can sit over here in the
12 jury box. I'll call them up when I'm ready to
13 impose sentence, but I got some things I want to say
14 first. My first comment is a general comment to
15 everyone here in the courtroom. And that is that,
16 of course this is a very important and very
17 emotional matter to everybody that is involved in
18 it: The defendants, their families, the family of
19 the victim, the lawyers that are involved. And it's
20 not a matter that I have taken lightly at all, but I
21 do want to emphasize that at the time that I
22 pronounce sentence in this matter I am going to
23 require that order and decorum be maintained in the
24 courtroom. And if there's anybody who thinks they
25 cannot sit quietly when sentence imposed, then I

1 would ask that you leave now. I am going -- this is
2 a court of law and I'm not going to allow any shows
3 of emotion or clapping or any other kind of emotions
4 at the time sentence is imposed. And if you think
5 you can't sit quietly during that portion of this
6 hearing, then I'll tell you when I'm getting to
7 impose sentence and I would require that you leave.
8 You can sit here and listen during the comments that
9 I have to make at this time.

10 I was elected to the Bench over 20 years
11 ago. I was told at that time, as Ms. Barr has
12 already referred to, that I had said before that
13 criminal sentencing was the most difficult thing
14 that we circuit court judges would have to do. And
15 it is the most difficult thing that we have to do.
16 Nothing has changed in the 20 years that has changed
17 that opinion. We judges have no crystal ball.
18 We're not omnipotent; we cannot see the future. All
19 we can do is make a decision based on the facts, the
20 law, and our experience. Often it does not satisfy
21 everyone; sometimes it does not satisfy anyone.

22 Among the things we have to consider are
23 the purposes of punishment: Retribution, deterrent,
24 rehabilitation. Criminal punishment must serve as a
25 retribution to society in general, and the victim in

1 particular. The sentence must send a message that
2 the conduct of the defendants cannot and will not be
3 tolerated in a civilized society. We're a nation of
4 laws, not men, and the rule of law is what permits
5 us to live in a civilized society without fear.
6 That rule of law must be upheld by everyone for
7 everyone. But the imposition of an appropriate
8 punishment must be made and that is one that is fair
9 and just to society, the defendant, and to the
10 victim.

11 Nothing I can say or do here can turn back
12 time. Nothing can bring the defendant -- the victim
13 back, and nothing can change the actions of these
14 defendants on March 29th, 2014. Everyone has 20/20
15 hindsight and I'm sure if these defendants could
16 re-live the events of that day they would do so.
17 However, they must be held responsible for their
18 actions and pay their debt to society. The sentence
19 must also act as a deterrent to others.

20 In fashioning a sentence I must follow the
21 mandates of the law. Murder, for which Brittany
22 Epps has been found guilty and convicted, carries a
23 sentence under South Carolina law of a minimum of 30
24 years to life or the death penalty. The State did
25 not seek the death penalty indeed. The statutory

1 aggravating circumstance may or may not have been
2 present. However, murder is defined in our law as a
3 most serious offense under the law and is classified
4 as a violent crime. A defendant must serve
5 85 percent of any term of years before this, before
6 that defendant can be released on any kind of
7 community supervision. Attempted murder is also a
8 violent crime and is a most serious crime and also
9 carries a sentence of from 0 to 30 years.

10 Another factor or purpose of punishment is
11 rehabilitation. In my view there is some
12 possibility of rehabilitation on both of these
13 defendants. There is no doubt that both of these
14 ladies were young when this occurred. Also, I've
15 had the advantage of hearing a complete presentation
16 of the facts from the many witnesses on two
17 different occasions, including the testimony of both
18 of these defendants. Unlike many cases where we
19 judges only get a summary of the facts in guilty
20 plea situations or less than complete development of
21 facts in a trial often because the defendant does
22 not testify. However, here I have heard the
23 testimony of many witnesses including both of these
24 defendants and had my own opportunity to evaluate
25 the credibility of the witnesses who have testified.

1 As far as Ms. Epps is concerned it is my view that
2 she was the more mature of the two, was the leader
3 or planner of the events that led up to Mr. Brown's
4 death. The version of the facts testified by
5 Ms. Jackson is more credible than the testimony of
6 Ms. Epps. Although the State does not have to prove
7 motive, it appears to me the motive was robbery of
8 Mr. Brown, not sex with him by Jessica.

9 I have carefully considered the factors of
10 Aiken versus Byars as far as Ms. Epps is concerned,
11 her family at home, in situation was definitely not
12 good. Her father left at a young age and she
13 apparently has had no relationship at all with him.
14 At no time during the proceedings has he been
15 identified as being in court. That obviously would
16 be traumatic to any child, and I'm sure it is and
17 was with -- was and is with her. However, Ms. Epps
18 has a history of not conforming her conduct to the
19 standards of society as evidenced by her juvenile
20 record. Also, at age 16 she used illegal drugs.
21 She failed to identify herself to the 911, on 911
22 call and knew what she told the 911 operator that
23 that information was not correct. She it's been
24 stated that she had mental health problems, but
25 there is no documentation of that. After hearing

1 all the testimony and having the opportunity to
2 evaluate the credibility of the two defendants, it
3 is my view that Brittany Epps was the more mature
4 and leader of the two and was the planner and
5 instigator of this plan to rob the victim. In
6 effect, it was a robbery gone bad. Ms. Epps was the
7 planner, but Ms. Jackson was an active participant
8 and willing participant. She could have been
9 convicted of murder under the accomplice liability
10 theory; however, after lying about what happened
11 initially she came forward, told the truth, and
12 testified.

13 Finally, I believe there's some hope for
14 rehabilitation for both these defendants; however,
15 they must pay their debt to society for the part
16 they played in the death of Mr. Brown. The
17 sentences that are going to be imposed are designed
18 to effect punishment and retribution while at the
19 same time giving some hope for the future to the two
20 defendants in this case. Having said that, I am now
21 ready to impose sentence.

22 Ms. Butcher, I would ask that you and
23 Ms. Epps come forward please.

24 With regard to the indictment number
25 2014-GS-45-0159 -- incidentally, this is at any

1 time, if anyone thinks that they cannot sit quietly
2 while this sentence is imposed I would ask that you
3 leave now. The sentence of the Court with regard to
4 indictment number 2014-GS-0159 which is the State
5 versus Brittany Epps who is charged in count one
6 with murder and then count two, possession of a
7 weapon during the commission of a violent crime, the
8 sentence of the Court is defendant is committed to
9 the State Department of Corrections for a
10 determinate term of 45 years. On the charge of
11 possession of a weapon during a violent crime the
12 sentence of the Court is defendant is committed to
13 the State Department of Corrections for a term of
14 five years to run concurrent. She will be given
15 credit for whatever time that she has served. All
16 right, that will conclude the matters as far as
17 Ms. Epps is concerned.

18
19 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *
20
21
22
23
24
25

C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

I, FRANCES B. RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 23rd day of December, 2016.

Frances B. Ray

FRANCES B. RAY, RPR

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County
Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRITTANY EMOESHA EPPS,

APPELLANT

APPELLATE CASE NO 2016-001806

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in not permitting Appellant to impeach two witnesses concerning their pending charges in violation of Appellant's Sixth Amendment right to confrontation where the probative value of the pending charges was not substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

On July 31, 2014, a Williamsburg County grand jury indicted Appellant for murder and possession of a firearm during the commission of a violent crime in a multi-count indictment (2014-GS-45-0159). R. 891-892. The state, represented by Kimberly V. Barr and Julie Swilley, called the case for trial on March 28 – April 1, 2016, before the Honorable Howard P. King and a jury. R. 1. Deborah J. Butcher represented Appellant. Mistrial 1. At the conclusion of the trial, the jury was unable to reach a verdict. R. 10, l. 14 – R. 12, l. 17. Judge King declared a mistrial. R. 12, ll. 18-20.

On July 26, 2016, the state, represented by Barr, called the case for trial again before Judge King and a jury. R. 13. Butcher represented Appellant. R. 13. During the deliberations process, the jury requested to hear the 911 recording again. R. 871, l. 17 – R. 872, l. 19; R. 888. The jurors also requested to hear the testimony of a particular witness. R. 874, ll. 8-22; R. 889. Despite the jurors unanimously agreeing that listening to a portion of the witness's testimony satisfied their needs, the judge, in response to the state's request, required the jurors to listen to the witness's testimony in its entirety. R. 875, l. 12 – R. 878, l. 4. The jurors also asked if it would be possible to find Appellant "guilty of count two but not count one." R. 875, ll. 15-18; R. 890. The judge told the jury foreman, "the simple answer to that question was no." R. 878, ll. 20-21. At the conclusion of the second trial, the jury found Appellant guilty as charged. R. 880, ll. 14-22.

On the state's motion, Judge King deferred sentencing until August 2014. R. 883, ll. 13-16; R. 884, l. 15 – R. 885, l. 5. On August 24, 2016, the state called for the sentencing of Appellant by Judge King. R. 886. At the conclusion of the brief sentencing proceeding, Judge

King sentenced Appellant to forty-five years' imprisonment for murder and to five years' imprisonment for the firearm. R. 887, ll. 3-14; R. 893-894.

On August 30, 2016, Appellant, through counsel, served her notice of appeal. However, trial counsel placed the name of the wrong county in the caption of the notice. In response to a notice of this deficiency, trial counsel filed an amended notice of appeal on September 9, 2016. This brief follows.

STATEMENT OF FACTS

When they were teenagers, Appellant and Jessica Jackson¹ met in a group home and developed a romantic relationship. R. 129, ll. 5-9; R. 130, ll. 3-9; R. 590, ll. 12-15; R. 592, ll. 10-21; R. 754, ll. 22-24. Sixteen-year old Appellant returned to her hometown of Kingstree when she was permitted to leave the group home. R. 128, ll. 22-23; R. 130, ll. 10-15. Although Jackson was not from Kingstree, Jackson followed Appellant to Kingstree. R. 132, ll. 4-13. Appellant's mother did not approve of the relationship between Appellant and Jackson, who was two years older than Appellant. R. 128, ll. 19-21; R. 132, ll. 1-3; R. 134, ll. 3-5; R. 150, ll. 10-18; R. 151, ll. 5-7; R. 754, ll. 18-21. Jackson moved in with Theodore McKnight, who was a friend of Appellant's family. R. 132, ll. 14-20; R. 134, ll. 15-20; R. 591, ll. 19-23; R. 592, ll. 3-4. In light of Appellant's mother's disapproval, Appellant stayed with Jackson at McKnight's home as well. R. 134, ll. 3-5; R. 592, ll. 4-9; R. 754, ll. 3-4; R. 754, ll. 18-21. Appellant suspected that McKnight and Jackson were having sex when she was not around. R. 592, l. 22 – R. 593, l. 18.

In early March 2014, Appellant, Jackson, and Appellant's aunt, Vanity Epps, were at a gas station in Kingstree. R. 140, l. 15 – R. 142, l. 7. They ran into Joseph Brown, the deceased, while there. R. 140, l. 15 – R. 142, l. 7. Brown offered to pay Jackson for sex, but his offer was refused at the time. R. 143, ll. 13-18; R. 595, l. 24 – R. 596, l. 10.

However, on March 29, 2014, Appellant and Jackson walked to Brown's home. R. 158, ll. 20-21; R. 596, ll. 12-13. While Brown left to run an errand, he allowed Appellant and Jackson

¹ At the time of Appellant's trial, Jessica Jackson had entered a guilty plea to attempted murder for involvement in the death of Joseph Brown. R. 127, ll. 3-4. She had not been sentenced, however. R. 127, ll. 5-10. Jackson was charged originally with murder, which carried a mandatory minimum sentence of thirty years' imprisonment and a maximum sentence of life. R. 229, ll. 14-19.

to remain at his home. R. 160, ll. 5-7; R. 596, ll. 15-22. Jackson used this opportunity to steal a few things. R. 160, ll. 21-22; R. 161, ll. 1-9; R. 164, ll. 6-12. When Brown returned, he invited them to a cookout. R. 165, l. 1; R. 596, ll. 23-24. All three went to the cookout in nearby Greeleyville. R. 167, l. 25 – R. 168, l. 6; R. 596, l. 25 – R. 596, l. 2. During the cookout, Jackson led Brown and others to believe she was a prostitute. R. 249, ll. 16-22.

After the cookout, Brown took Jackson and Appellant to McKnight's home. R. 597, l. 5 – R. 598, l. 6. Appellant wanted to buy some marijuana, and McKnight wanted to buy some alcohol. R. 598, ll. 7-9. Jackson had agreed to have sex with Brown in exchange for money. R. 598, ll. 9-17. All four got into Brown's car. R. 250, ll. 6-8; R. 600, ll. 3-4. Brown dropped off Appellant at a store from where she could walk to buy marijuana. R. 600, ll. 8-19. Brown, Jackson, and McKnight drove away as Appellant walked away. R. 600, ll. 20-25.

When Appellant was walking to the spot where they had agreed to meet, she saw Jackson, who was wearing only a bra and a pair of shorts, sitting at a driveway. R. 40, l. 22 – R. 41, l. 1; R. 601, ll. 1-2; R. 602, ll. 5-11. Appellant noticed Jackson's fingers were bleeding. R. 601, ll. 4-5; R. 602, ll. 14-15. Appellant and Jackson began panicking. R. 601, ll. 5-6. Appellant suggested they walk to Pearline Pressley's home, which was nearby, to call an ambulance. R. 602, ll. 15-17. While Appellant and Jackson walked to Pearline's home, McKnight met up with them. R. 602, ll. 19-20. They explained they were going to call an ambulance, and McKnight accompanied them to Pearline's. R. 602, ll. 20-24.

Pearline did not have a telephone; therefore, Appellant walked across the street to get a phone from a neighbor. R. 39, ll. 7-10; R. 42, ll. 15-20; R. 203, ll. 17-21; R. 603, ll. 3-6. Appellant carried the neighbor's cordless phone back to Pearline's, where Jackson remained, and called 911. R. 25, ll. 12-23; R. 44, ll. 6-9; R. 207, ll. 5-14; R. 603, l. 3 – R. 604, l. 3; State's

Exhibit #1. Soon, an ambulance and a police officer arrived. R. 44, ll. 21-24; R. 49, ll. 14-20; R. 208, ll. 12-23; R. 604, ll. 4-9. Jackson left with the ambulance while Appellant spoke to the officer. R. 57, ll. 4-20; R. 604, ll. 8-14. Appellant told the officer that Jackson shot her hand during a hunting accident – this was a story she was told to tell. R. 52, ll. 12-20; R. 604, ll. 15-21. Wanting to check on Jackson, Appellant told the officer she was going to her aunt's house and then to the hospital. R. 58, ll. 2-8; R. 61, ll. 17-23; R. 604, ll. 12-14. At some point during this commotion, McKnight left. R. 609, ll. 9-15.

Appellant then walked to her aunt's house. R. 605, ll. 7-17. Appellant and her aunt went to the hospital in Kingstree to check on Jackson, but they discovered she had been taken to the hospital in Florence instead. R. 605, ll. 18-22. Appellant's aunt refused to take her to Florence so they returned to her home where they went to sleep. R. 605, ll. 20-22.

The next day, Appellant learned the police were looking for her when they arrived at her aunt's home. R. 606, ll. 14-22. Young and afraid, Appellant reached out to her mother, who turned to her mother, Appellant's grandmother, in order to determine what to do. R. 606, l. 16 – R. 607, ll. 8. Appellant, along with her mother and grandmother, went to the police station so that Appellant could turn herself in. R. 606, ll. 12-13; R. 607, ll. 9-14.

The reason the police were looking for Appellant quickly became apparent. Jackson told police that she and Appellant were involved in Brown's death.² According to Jackson, while she and Appellant were with Brown, he showed them a gun he had in his jacket pocket. R. 165, l. 24

² Jackson told multiple stories to the police. First, she said she was shot during a hunting accident. R. 214, ll. 3-8. Next, she said she was shot when Brown was trying to rape her. R. 215, l. 1; R. 345, l. 11 – R. 346, l. 8. In relaying this story, Jackson said she agreed to have sex with Brown for money, but that she shot him instead. R. 232, l. 4 – R. 237, l. 11. Third, she told the police that she, Jackson, shot Brown and that Appellant was merely present. R. 215, l. 21 – R. 217, l. 11; R. 238, ll. 1-11; R. 346, ll. 9-18. However, it was not long before Jackson settled on the story she gave at trial regarding the botched robbery. R. 218, ll. 10-16; R. 346, ll. 19-25; R. 347, ll. 6-10.

– R. 166, l. 12. Jackson also claimed that Brown placed the gun in the glove compartment of his Cadillac when the trio went to the cookout. R. 170, ll. 2-8. While at the cookout, Jackson asserted, Appellant said she wanted to shoot Brown with the gun so that she could steal his car and his gun. R. 175, ll. 1-5. Jackson claimed the plan was for her to cut the straps off her pocketbook and wrap those straps around Brown's neck in order to be a distraction to allow Appellant to get the gun from the glove compartment. R. 175, ll. 16-22. Jackson admitted she was going to choke Brown with the pocketbook straps. R. 175, l. 23 – R. 176, l. 1. Jackson elaborated on the plan – (1) Appellant was going to lead Brown into a deserted area, (2) Jackson was going to announce the code word, "take off," (3) Jackson would put the pocketbook straps around his neck, and (4) Appellant would pull the gun out. R. 177, ll. 5-12.

Jackson claimed she used the code word and placed the pocketbook straps around him. R. 183, ll. 10-15. She said her hands were sweaty so she let go, however. R. 183, ll. 16-17. Also, she claimed that Appellant and Brown (and perhaps even Jackson) were going for the gun and a struggle ensued. R. 183, l. 20 – R. 184, l. 1; R. 245, ll. 8-10. According to Jackson, Appellant got the gun and fired. R. 184, ll. 1-2. During the ensuing chaos, a bullet hit Jackson's thumb. R. 184, ll. 3-4. Jackson later returned the gun to the glove compartment. R. 210, ll. 6-10.

Jackson claimed that despite her injury, she helped Appellant place Brown's body in the trunk of the car. R. 192, l. 10 – R. 193, l. 19. Jackson could not explain why Brown's pants were down and his shirt was up when he was found by the police, but she disputed his clothes were arranged this way because he was preparing for sex with her. R. 193, ll. 20-22. According to Jackson, she and Appellant then tried to get the car out of the mud, but it was too bogged down. R. 199, ll. 7-24. Unable to get the car to move, Jackson and Appellant looked for help,

and saw a man walking down the street. R. 202, ll. 7-13. This man referred them to Pearline. R. 202, ll. 15-16.

ARGUMENT

The trial judge erred in not permitting Appellant to impeach two witnesses concerning their pending charges in violation of Appellant's Sixth Amendment right to confrontation where the probative value of the pending charges was not substantially outweighed by the danger of unfair prejudice.

A. The trial judge erred in not permitting Appellant to impeach Theodore McKnight with his pending charge of murder.

Trial counsel planned to call Theodore McKnight as a witness during Appellant's case-in-chief. R. 584, ll. 9-11. Trial counsel advised that she wanted to impeach McKnight "with a criminal record of a later charge pending against him for a murder that occurred some two years after this event." R. 584, ll. 11-14. The judge ruled that "any testimony with regard to Mr. McKnight's criminal record of a pending charge of murder after this [was] not admissible and [could not] be gone into." R. 584, ll. 22-25. The judge offered no other explanation or elaboration of his ruling.

McKnight's testimony was important in light of Appellant's insistence that he was present and likely involved in Brown's death, and Jackson's claim that he was not there. Additionally, an independent witness tended to support Appellant's version of events.

Samuel Barr lived near Pearline. R. 67, ll. 10-20. On March 29, 2010, Barr was listening to his police scanner when he heard about a shooting nearby. R. 67, l. 21 – R. 68, l. 17. "Being nosey," Barr decided to investigate. R. 68, l. 21 – R. 69, l. 6. Barr saw an ambulance in Pearline's yard. R. 69, ll. 17-20. He then saw a reflection of a tail light of a car sitting in the woods farther down the street. R. 70, ll. 9-14. He pulled closer to have a better look. R. 71, ll. 10-13. Shortly, a man approached Barr. R. 71, ll. 15-16; R. 73, l. 25 – R. 74, l. 8. The man said

his girlfriend made him drive his car into the woods. R. 71, ll. 18-22. Barr got back into his truck and left. R. 71, ll. 23-25.

Trial counsel called McKnight as a witness during Appellant's case-in-chief. McKnight denied having anything to do with Brown's death. R. 755, ll. 16-18. He denied being picked up by Appellant, Jackson, and Brown. R. 756, ll. 16-19. He denied receiving a ride in order to pick up some liquor. R. 756, ll. 20-22. He denied having a plan with Jackson to rob Brown. R. 757, ll. 5-15.

McKnight admitted to being incarcerated in the Williamsburg County Detention Center from March 2015 up through day of Appellant's trial. R. 760, l. 24 – R. 761, l. 3. He also admitted to knowing Schain McCrea and that the two were in the jail at the same time in 2015. However, McKnight denied ever speaking to McCrea at the jail. R. 761, ll. 18-20.

After McKnight's denials, trial counsel called McCrea to impeach McKnight. McCrea told the jury he was in the county jail between March 2015 and June 2015. R. 776, ll. 17-18. He also explained that he had known McKnight since he was twelve-years old. R. 776, ll. 19-25. In sharp contrast to McKnight, McCrea stated that he and McKnight talked to each other "just about every morning" while in jail. R. 777, ll. 7-16. McCrea and McKnight discussed the shooting death of Brown while the two men were in jail. R. 778, l. 25 – R. 779, l. 8.

McKnight knew "exactly what happened." R. 779, ll. 10-11. He "was there." R. 779, ll. 14-15. McKnight, Brown, and Jackson dropped Appellant off. R. 779, ll. 16-17; R. 779, l. 21 – R. 780, l. 1. Jackson and Brown were supposed to have sex in exchange for money. R. 779, ll. 17-18; R. 780, ll. 2-9. McKnight and Jackson planned to rob Brown, "but somehow they end[ed] up killing him." R. 779, ll. 17-20; R. 780, ll. 15-19. McKnight admitted that Brown was shot, but he would not say who shot Brown. R. 780, l. 20 – R. 781, l. 4.

During McCrea's testimony, the judge instructed the jurors that "the testimony of" McCrea could not be considered "on whether the alleged statements made by the previous witness to this witness [were] true, but only to the credibility of the previous witness." R. 778, ll. 6-13. He informed the jurors they "must not consider the testimony" of McCrea "for any purpose other than the credibility of the previous witness and not the truth of the matters to which the witness will testify." R. 778, ll. 13-17. He could not "emphasize enough" that the jury "must not consider the testimony of this witness as true of the matters to which he is testifying, but only," and he emphasized only, "as to the credibility of the previous witness." R. 778, ll. 17-21.

B. The trial judge erred in not permitting Appellant to impeach Mark Hatten with his pending charges of malicious injury to property and assault and battery.

The state wanted to call Mark Hatten as a witness to establish that he "was the previous owner of ... [the] '94 Cadillac vehicle that's involved in this case." R. 264, ll. 16-18. According to the solicitor, Hatten sold the car to the deceased in 2012, and his testimony would "be with regard to ownership of that vehicle." R. 264, ll. 19-20. When pressed, the solicitor admitted she wanted Hatten to testimony about "[o]wnership of the vehicle and ... [to] identify the key, remote, and the chain." R. 264, ll. 22-23. Trial counsel explained she wanted to impeach Hatten with charges pending against him in Williamsburg County to show Hatten's "motive to be biased towards the state's side, ... under [Rule] 608." R. 264, ll. 4-8. Trial counsel explained Hatten may be "biased towards the state looking for some leniency towards the adjudication of those pending charges." R. 265, ll. 12-15. She explained this was particularly important as he would identify the remote and key chain in the state's possession as belonging to the specific car. R. 265, ll. 18-24.

During the proffer, Hatten indicated that he sold the Cadillac to the deceased, and identified relevant paperwork to that effect. R. 266, l. 21 – R. 267, l. 6. He also indicated that the police asked him about the key chain and remote to the Cadillac, but that the police had not shown the items to him. R. 267, ll. 7-15. He indicated that by making his “accurate description” he was making a “positive identification.” R. 267, ll. 7-17. He further indicated he gave “the keys, key chain, and key fob” to the deceased when he sold him the car. R. 267, ll. 18-21.

Hatten stated he was not aware of any pending charges in Williamsburg County. R. 273, ll. 2-4. He indicated “everything was dismissed.” R. 273, l. 8. When asked about a pending charge for assault and battery, he stated, the charge was “never filed.” R. 273, ll. 11-12. Regarding a pending charge of malicious injury to property from 2012, Hatten said it was “dismissed or handled.” R. 273, ll. 13-16. He then said “the case was a mistake” and he received “a 25-dollar fine.” R. 273, ll. 16-18. He was “let out of jail on flag day, the day before flag day.” R. 273, ll. 18-19.

The judge queried defense counsel:

Tell me how that, the fact that those two matters is biased, prejudiced, or motive to misrepresent the testimony ‘cause what the issue here is whether he is misrepresenting his testimony and how is that evidence he’s misrepresenting the testimony that (a) he owned the car, (b) that this key fob came from the Arizona dealership with that car. Now how is that evidence of motive to misrepresent those things?

R. 274, l. 22 – R. 275, l. 6. Defense counsel explained the pending charges would provide a motive “to gain some favor from the state on those charges.” R. 275, ll. 7-10. The judge continued to challenge defense counsel by asking how the pending charges were “evidence of bias to misrepresent or prejudice to misrepresent or motive to misrepresent?” R. 275, ll. 14-17. He explained that was “the test,” “if he’s got any reason to say anything that’s not true; that’s why you would impeach him.” R. 275, ll. 17-20. He wanted to know why the pending charges

would show Hatten “would have any reason to show anything is not true based upon the testimony that he gave about the ownership of the car and the key fob?” R. 275, ll. 20-23.

Defense counsel responded that Hatten may claim to recognize the key chain when he actually does not in order to curry favor with the state – “the motive to show the bias of why he would be untruthful.” R. 275, l. 24 – R. 276, l. 3.

The solicitor informed the judge that she had never spoken to Hatten. R. 277, ll. 5-7. She argued that

if the question before the jury is we’re trying to get them to the truth, and trial really is a search for the truth, to put it and throughout this trial and imply throughout this trial this witness who has no interest or bias or motive in this case at all, to just try to effect the well and have this jury believe that, well, the charges may or may not be pending, but if they are pending we’re really trying to get help from the state for a charge that’s apparently by all accounts four years old at this point.

R. 277, ll. 8-18. Then, the state went to her fallback position that the prejudicial effect of mentioning the pending charges from 2012 was clearly outweighed by the probative effect of the evidence. R. 277, l. 19 – R. 278, l. 2.

Judge King refused to permit trial counsel to impeach Hatten with the evidence of his pending charges in Williamsburg County. Judge King “fail[ed] to see how the attempted impeachment evidence of bias, prejudice, or motive to misrepresent the facts,” as required by Rule 608(c), SCRE, “an attempt to misrepresent the facts, which the witness ... testified to.” R. 278, l. 23 – R. 279, l. 3. According to the judge, the facts were “clear regarding the ownership of the vehicle as evidenced by the documentation that the key fob came with the car, that he had the key fob when he got the car and gave it to the new owner, it looks like the same one.” R. 279, ll. 4-8. The judge continued that there was a key fob, remote, and key chain that identified the car to an Arizona dealership. R. 279, ll. 9-11. The judge simply did not “see in any way how the

proposed impeachment of questionable pending charges in any way is motive, bias, or prejudice to misrepresent the facts. That's what the rule requires, that it would show misrepresentation of the facts." R. 279, ll. 15-16.

The judge ruled in the alternative that "even if the evidence were to show bias or misrepresentation," he ruled it inadmissible "because the prejudicial effect substantially outweighs the probative value." R. 279, ll. 17-24.

Thereafter, Mr. Hatten testified before the jury, explaining how he came to own the 1994 green Cadillac and sell it to the deceased. R. 282, l. 8 – R. 291, l. 12. In addition to giving the deceased the car as part of the transaction, Hatten believed he gave the deceased "two sets of keys" for that car. R. 291, ll. 15-21. He also gave him a key chain and a key remote. R. 292, ll. 1-16. He identified a set of keys in the state's possession as "definitely the keys" he had for the car and that he gave to the deceased. R. 292, ll. 17-23. He had no doubt in his mind that the keys he gave to the deceased were the ones in the state's possession. R. 300, l. 22 – R. 301, l. 8.

Hatten also told the jurors that he met with police to discuss the key remote or key chain. R. 293, l. 14 – R. 294, l. 2. Hatten explained the officer "never showed" the key remote or chain to him, but he asked Hatten about the items. R. 294, ll. 1-2. Hatten tried his hardest to remember what the keys looked like, but he could not. R. 294, ll. 8-16. However, after the police left, he recalled an image of the keys in detail: "it was a gold rectangular shape key chain, and it had like a marron [sic] and black plastic Cadillac thing in the middle, an emblem, and the back had like a texture, like a little texture plating type of stuff and it was gold color." R. 294, l. 19 – R. 295, l. 2. Then, he seemed to ask if it had a key fob on it. R. 295, l. 2. Upon hearing his description, the officer said he "described it perfectly." R. 295, ll. 9-10.

The key fob and chain was important evidence in the state's case. On March 31, 2014, the police found a key fob and chain from Appellant's aunt's front yard. R. 435, l. 23 – R. 436, l. 12. The police tested the key fob on Brown's Cadillac, but they were unable to determine if that particular key fob worked on Brown's car. The battery was corroded, but even when the police changed the battery, the key fob did not open the car. R. 365, l. 10 – R. 366, l. 2. The only way the police could connect the key fob to Brown's Cadillac was through Hatten's testimony. R. 366, ll. 3-10.

Discussion

Confrontation Clause

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. U.S. Const. amend VI. “The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility.” State v. Gillian, 360 S.C. 433, 449, 602 S.E.2d 62, 71 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007). “The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.” Id. at 449-450, 602 S.E.2d at 71. This guarantee ensures a defendant has the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). In fact, “[t]he primary interest secured by the Confrontation Clause of the Sixth Amendment is the right to cross-examination.” Gillian, 360 S.C. at 450, 602 S.E.2d at 71. Additionally, Rule 608(c) of the South Carolina Rules of

Evidence states that “[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.”

To establish a violation of the Confrontation Clause, Appellant must show that she was prohibited from asking questions designed to show bias on the part of the witnesses. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the error must not have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002). “The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant’s opportunity for effective cross-examination at trial.” Gillian, 360 S.C. at 450, 602 S.E.2d at 71.

South Carolina has a well-developed body of law providing that a defendant should be allowed to cross-examine witnesses concerning pending charges and the possible punishments following from those charges. Frankly, “[o]n cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness.” Gillian, 360 S.C. at 450, 602 S.E.2d at 71. In Gillian, the judge restricted Gillian’s cross-examination of a key witness for the state. Id. at 449, 602 S.E.2d at 70. The judge permitted the jury to learn that the witness had a pending charge of burglary in the first degree, but refused to allow Gillian to question the witness on the sentencing possibilities. Id. The South Carolina Supreme Court held the trial court erred in excluding evidence concerning the witness’s possible sentence in violation of the Confrontation Clause. Id. at 454, 602 S.E.2d at 73.

In Sims, 348 S.C. at 25-26, 558 S.E.2d at 523, the South Carolina Supreme Court held the trial judge erred when he limited the defendant’s questioning of a state witness about pending charges. The Court was persuaded that the number of the charges pending “and the severity of the

potential sentences” was probative as to the witness’ bias. Id. at 25, 558 S.E.2d at 523 (explaining the witness was charged with burglary in the first degree, among other crimes, which exposed the witness to a possible life sentence). According to the Court, “[t]here was the substantial possibility [the witness] would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated in the instant case.” Id.

In Mizzell, 349 S.C. at 330, 563 S.E.2d at 317, the South Carolina Supreme Court held the trial court erred in refusing to permit the defendant to question the witness on the potential sentences he faced where the witness was charged with the same crimes as the defendant. The Court was not persuaded by the state’s argument that the testimony was not probative because the witness had neither agreed to a plea bargain nor pled guilty and held this fact should not prevent the admission of such evidence. Id. at 332-333, 563 S.E.2d at 318. The Court held “[t]he lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency.” Id. at 333, 563 S.E.2d at 318.

In State v. Graceley, 399 S.C. 363, 373-374, 731 S.E.2d 880, 885-886 (2012), the Court held the trial court erred in improperly limiting the scope of defense counsel’s cross-examination of state’s witnesses concerning the witnesses facing mandatory minimum sentences that were significantly longer than the sentences received in exchange for their cooperation. The prosecution made plea deals with multiple cooperating witnesses against Gracely. Those deals permitted the witnesses to avoid several mandatory minimum terms of imprisonment. Id. at 374, 731 S.E.2d at 885-886. The trial court permitted defense counsel to question the witnesses regarding the maximum sentences permissible for the charged offenses, but limited counsel’s questioning regarding mandatory minimums. Id. at 374, 731 S.E.2d at 886. This limitation prevented counsel “from demonstrating the possible bias arising from the plea deals through an examination reaching

the requisite degree of granularity.” Id. The Supreme Court made clear “[t]he fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury.” Id. at 374-375, 731 S.E.2d at 886 (emphasis in the original); see also State v. Pradubsri, 403 S.C. 270, 279-280, 743 S.E.2d 98, 103-104 (Ct. App. 2013)(finding error in the judge’s refusal to permit the defendant from questioning a witness on the exact potential sentence of each charge the witness faced because the potential legal exposure was relevant to the witness’s bias and motive in testifying).

During Graham’s murder trial, the presiding judge prohibited Graham from asking a witness called by Graham’s co-defendant about an eight-year sentence he received for accessory after the fact of the murder for which Graham was on trial. Graham, 314 S.C. at 385-386, 444 S.E.2d at 527. With little elaboration, as surely none was needed, the South Carolina Supreme Court held this limitation violated Graham’s Sixth Amendment rights. Id.

In a recent post-conviction relief case, this Court held trial counsel performed deficiently by failing to preserve the issue of whether she could cross-examine a state’s witness about the dismissal of his carjacking charge. Smalls v. State, 415 S.C. 490, 501, 783 S.E.2d 817, 822 (Ct. App. 2016), cert. granted Mar. 7, 2017. According to this Court, the witness “provided key evidence for the state’s case, yet the state failed to inform trial counsel about the dismissal of his carjacking charge until the morning” of the defendant’s trial. Id. However, trial counsel “neither sought a ruling on the record concerning whether she could cross-examine [the witness] about the dismissal nor requested to proffer any questions about the circumstances surrounding the dismissal or Green’s potential motivations.” Id.

The next inquiry is whether the error was harmless beyond a reasonable doubt. Gracely, 399 S.C. at 375, 731 S.E.2d at 886; Gillian, 360 S.C. at 454, 602 S.E.2d at 73; Mizzell, 349 S.C. at

333, 563 S.E.2d at 318; Graham, 314 S.C. at 385, 444 S.E.2d at 527. Harmless error analysis is fact-specific. The United States Supreme Court delineated a list of factors for courts to consider in determining whether an error was harmless. These factors include, but are not limited to:

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684; see also Gracely, 399 S.C. at 375, 731 S.E.2d at 886; Mizell, 349 S.C. at 333, 563 S.E.2d at 318-19.

In Gracely, 399 S.C. at 376-377, 731 S.E.2d at 887, the Court found the Confrontation Clause violation was not harmless even where the evidence presented was cumulative regarding Gracely's involvement in drug trafficking. The Court explained that the testimony "only corroborated other testimony," and the prosecution presented no physical evidence connecting Gracely to the charged offenses. This "enhanced the importance of that testimony, and the necessity that [Gracely] be permitted to demonstrate any bias on the part of the State's witnesses." Id. at 376, 731 S.E.2d at 887. The Gracely court also expressed that the background of the witnesses "should have cautioned the trial court against limiting [Gracely]'s cross examination." Id. at 377, 731 S.E.2d at 887. The witnesses in Gracely had significant involvement in criminal activity and cooperated only after arrest and the prospect of long prison terms. "In a case built on circumstantial evidence, including testimony from witnesses with such suspect credibility, a ruling preventing a full picture of the possible bias of those witnesses cannot be harmless." Id.

Likewise, this Court held the violation of Pradubsri's right to cross-examine the witness against him was not harmless beyond a reasonable doubt. Pradubsri, 403 S.C. at 284, 743 S.E.2d at 106. The trial court restricted Pradubsri's cross-examination of the state's main witness against

him. Id. The police officer testified he pulled over Pradubsri's car, in which Pradubsri and the witness were the occupants, but the officer did not see Pradubsri with any drugs. Id. The witness provided the only testimony that the drugs belonged to Pradubsri. Id. According to this Court, "[t]he state failed to present evidence amounting to constructive possession of the drugs without [the witness]'s testimony." Id.

The South Carolina Supreme Court held a violation of the Confrontation Clause was not harmless even where the facts did not fall squarely within the Van Arsdall factors. Graham, 314 S.C. at 385, 444 S.E.2d at 527-528. The witness, Simmons, first invoked his Fifth Amendment right not to incriminate himself where there was still a pending murder indictment against him despite his guilty plea to accessory to murder after the fact. Id. at 386, 444 S.E.2d at 528. The prosecutor claimed the plea agreement was valid only if the state called Simmons and Simmons testified truthfully, which the state defined as consistent with a prior statement that he was drunk and had no knowledge of the surrounding events. Id. at 386-387, 444 S.E.2d at 528. The prosecutor acknowledged he could not prevent Simmons from testifying, but continued to threaten further prosecution unless Simmons testified truthfully, as defined by the prosecutor. Id. Predictably, Simmons testified he was drunk and had no knowledge of the murder. Id. Graham then proffered the testimony of another witness who stated that Simmons informed the witness that he would have no further problems with the victim and that Simmons had killed the victim. Id. The Court stated that the prosecutor's attempted manipulation of Simmons' testimony and the witness' proffered testimony raised the question of the extent of Simmons' involvement in the murder. Id. The Court held the jury was entitled to know Simmons' sentence of only eight years as murder was a serious crime for which Graham, who was sixteen, received a life sentence and Simmons avoided the heavy penalty "for what may have been his silence." Id.

In Mizzell, the Court held the trial court's error in limiting cross-examination of a witness concerning potential sentencing was not harmless because the witness provided the only evidence of the defendants' participation in the crime. 349 S.C. at 334, 563 S.E.2d at 319. Although some of the testimony from the witness was cumulative, the witness provided the only evidence that the defendants were at the crime scene as there was no physical evidence implicating the defendants. Id.

Also, in State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991), the South Carolina Supreme Court held a trial court's limitation on the defendant's cross examination of a state's witness was not harmless error. The witness testified that in return for her testimony she was allowed to plead guilty to one count of conspiracy for which she could receive a maximum of seven and one-half years. Id. However, the defendant was prevented from asking the witness the punishment for trafficking cocaine, the original charge for the witness. Id. The Court noted that the witness faced a mandatory sentence of at least twenty-five years without parole for the trafficking cocaine charge. Id. The Court held the fact that the mandatory minimum was more than three times the duration she would face on her plea to conspiracy was critical evidence of potential bias. Id. Additionally, the witness's testimony was critical to the prosecution's case because she provided the only evidence of the defendant's knowing involvement in the drug deal. Id. at 171-172, 399 S.E.2d at 594.

On the other hand, in Sims, the Court held the error was harmless because the prosecution's case against the defendant was strong where the defendant's fingerprints were found at the scene, the victim's mother testified the defendant was angry with the victim, and the defendant confessed to two officers. 348 S.C. at 26, 558 S.E.2d at 523. Similarly, this Court held the error was harmless where the testimony provided by the two witnesses whose cross-examination was limited

improperly was not the only evidence of the defendant's involvement in the murder. State v. Curry, 370 S.C. 674, 681, 636 S.E.2d 649, 652-653 (Ct. App. 2006). One of the victims unequivocally identified the defendant as the shooter, and a co-conspirator testified regarding the defendant's discussion about the murder weapon; thus, this Court concluded, the testimony of the two witnesses was cumulative to that given by others. Id. at 681-682, 636 S.E.2d at 653.

Rule 403, SCRE, analysis

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible; however, even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 402, SCRE; Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. “Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy.” State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). “Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved.” State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004). “Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent.” State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)).

Probative value

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. “‘Probative’ means ‘[t]ending to prove or disprove.’” State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, “[p]robative value’ is the measure of the importance of that tendency to the outcome of a case.” Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

Danger of unfair prejudice

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. “The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.” State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). “‘Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.’” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, “[t]he term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180 (1997). “Rule 403 only requires suppression of evidence

that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion.” United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011)(citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that “[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one”).

Balancing act

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). “When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Analysis

The trial judge barred Appellant from questioning two critical witnesses regarding their pending criminal charges. Not only were the charges pending against them at the time of their testimony, but their charges were pending in the same judicial circuit in which Appellant was tried. As this Court and the South Carolina Supreme Court have held in numerous cases, evidence of pending charges is evidence of bias and motive. Appellant had a right to confront the witnesses

with the evidence of their prior criminal charges in order to demonstrate this motive and bias. The only real question as far as the Confrontation Clause is concerned is whether the error was harmless.

An examination of the Van Arsdall factors reveals the error was not harmless beyond a reasonable doubt. Appellant pointed to McKnight as being Jackson's co-conspirator; therefore, McKnight's testimony and his credibility was important for the jury to evaluate. Although McKnight denied involvement, his denial was critical for Appellant to present, especially as she was impeaching him with a confession he made to a friend while in jail. Likewise, Hatten's testimony was critical for the state because it connected the key fob found in the front yard of Appellant's aunt's home to the deceased's car. The police were unable to make that connection without Hatten. The state's case against Appellant relied solely upon the jury believing Jackson, a co-defendant. Jackson had told multiple stories to the police, and had been allowed to plead guilty to a lesser offense, which carried significantly less time in prison. Jackson's involvement in the shooting death of Brown could not be denied in light of her injury; however, Jackson cast blame on Appellant to shield herself from the full force of the law. In light of these factors, the state could not prove the errors were harmless beyond a reasonable doubt.

Turning the analysis pursuant to Rule 403, SCRE, the trial judge erred in determining the probative value of Hatten's pending charges was substantially outweighed by the prejudicial effect. The probative value of the charges was high given the critical nature of Hatten's testimony. As stated, Hatten provided the only link between the key fob recovered in an area connected to Appellant and the deceased's car. Thoroughly examining his credibility was crucial for the jurors due to his pivotal role in the state's case against Appellant. The prejudicial effect was not substantial because Hatten was not a defendant in the case. While the existence of pending charges damaged his credibility – and therefore, were prejudicial – there was no danger that the jury would

decide the case on a basis other than the evidence, such as emotion, with the knowledge of those charges. Also, there was no danger the charges would confuse or mislead the jurors. Hearing about the charges would simply inform the jurors that Hatten had a motive to testify in favor of the state and to be biased in favor of the state – to curry favor with the state due to his pending criminal charges. Balancing the high probative value of the criminal charges against the low danger of unfair prejudice reveals the trial judge abused his discretion in denying Appellant her right under the Constitution to cross-examine Hatten regarding the pending charges as motive and bias.

CONCLUSION

Appellant respectfully requests this Court reverse her convictions and remand for a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of November, 2017.

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."

November 29, 2017

A handwritten signature in blue ink, reading "Susan B. Hackett", is written over a horizontal line.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRITTANY EMOESHA EPPS,

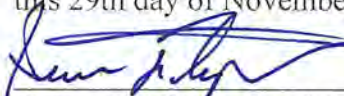
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of November, 2017.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of November, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

ORIGINAL

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Williamsburg County
The Honorable Howard P. King, Circuit Court Judge

THE STATE,

Respondent,

v.

BRITTANY EMOESHA EPPS,

Appellant.

Appellate Case No. 2016-001806

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in not permitting Appellant to impeach two witnesses concerning their pending charges in violation of Appellant's Sixth Amendment right to confrontation where the probative value of the pending charges was not substantially outweighed by the danger of unfair prejudice?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Appellant's Confrontation Clause argument is not preserved for review. South Carolina Rules of Evidence prohibit Appellant's impeachment of a State's witness with pending charges that are unsubstantiated, irrelevant, and needlessly distracting to the jury.

II. Appellant's Confrontation Clause argument is not preserved for review. In her defense, Appellant improperly called the witness solely for the purpose of impeaching his testimony. Further, the pending charge was irrelevant, highly prejudicial, and only offered as subterfuge to suggest the defense witness was the actual murderer.

STATEMENT OF THE CASE

In August of 2014, a Williamsburg County Grand Jury indicted Appellant, Brittany Emoesha Epps, for murder and possession of a weapon during the commission of a violent crime. (Record (R). p. 891-892.) Epps proceeded to a jury trial on July 26, 2016, before the Honorable Howard P. King. Epps was represented by Deborah J. Butcher, Esquire. (R. July 26, 2016, p.1.) Assistant Solicitor Kimberly V. Barr represented the State. (R. p.1.)

The jury found Allen guilty of both charges. (R. p. 880, lines 14-22.) In a separate proceeding held on August 24, 2016, Judge King sentenced Epps to forty-five years' imprisonment for murder and a concurrent term of five years' imprisonment for the weapon charge. (R. August 24, 2016, p. 887, lines 3-14; p. 893-894)

This appeal follows.

THE MURDER OF JOSEPH BROWN

Jessica Jackson's Description of the Cold Blooded Murder

Jessica Jackson participated in the murder of Joseph Brown with her girlfriend, Brittany Epps, and Jackson was the State's primary witness. Jackson and Epps met in February of 2013 at a group home where they both lived. (R. p. 128, line 3- p. 129, lines 6-7.) Although Jackson was from Myrtle Beach, she traveled back to Williamsburg County to see Epps. (R. p. 129, lines 10-22.) She eventually moved to Williamsburg County to live with Epps at a friend's house. (R. p. 132, lines 4-20.) The friend, Theo McKnight, was in his forties and lived in a four bedroom home with no running water and plywood on the floor. (R. p. 133, line 2 – p. 137, line 23.) Neither Epps nor Jackson was employed, and they relied on family for food. (R. p. 137, line 22 - p. 138, line 8.)

Jessica said that the women first met Joseph Brown at the Sonoco gas station. (R. p. 140, lines 15-19.) Epps' aunt had given them a ride, and the women saw the victim in his Cadillac, parked at the station. (R. p. 141, lines 3-9.) Epps approached Brown and asked him where she could "get a good grill." (R. p. 142, lines 3-4.) Jackson testified Brown asked Epps if he could have sex with Jackson for money, and Epps said no. (R. p. 143, lines 2-16.) Brown told Epps if they changed their minds, they could come to his home. (R. p. 143, lines 15-18.) Later, when the women returned to McKnight's house, they discussed tying up the victim and robbing him. (R. p. 145, lines 9-25.)

The women did not see Brown until two weeks later. (R. p. 146, lines 9-14.) On the morning of the shooting, the women decided to walk to Epps' mother's house. (R. p. 149, line 25 – p. 150, line 4.) On the way over, Jackson told Epps she did not want Epps to live with her at McKnight's house anymore because her mother did not like it and it was causing strain on their relationship. (R. p. 150, lines 10-13.) Jackson was trying to apply for housing and encouraged

Epps to get her GED. (R. p. 150, lines 14-19.) Epps' mother eventually dropped the women off at Epps' aunt's house. (R. p. 151, lines 11-20.) The women then walked back to McKnight's house. (R. p. 151, lines 21-25.) At McKnight's, Jackson packed a bag of toiletries so the women could go to Epps' mother's house while she was at work so Jackson could take a shower. Epps told Jackson she felt "like being bad" and then described her plan to rob Brown. (R. p. 156, lines 7-16.) When Jackson asked how Epps planned to rob the victim, Epps said they could overpower him because of his age. (R. p. 157, lines 9-13.)

The women walked to the store to get something to eat and drink and then walked to the building where Brown lived. (R. p. 158 7 – p. 191, lines 21.) When they arrived, Brown was sitting outside in his chair. (R. p. 159, lines 1-3.) The women sat outside with him and talked. Epps reassured Jackson that "she had this." (R. p. 159, lines 6-24.) Brown told the women he had to drive a friend to the store, and he allowed the women to stay in his apartment until he came back. (R. p. 160, lines 3-11.) While he was gone, the women looked through his belongings to find anything of value to steal. (R. p. 160, lines 12-25.) Jackson stole a pack of T-shirts and a pocketknife. (R. p. 160, line 20 – p. 161, line 9.)

When Brown returned, his nephew was with him. (R. p. 165, lines 1-4.) Epps and the nephew, Arthur Gamble, discussed the engine in Brown's Cadillac. The conversation also turned to Brown's ability to take care of himself in spite of his age and the crime in the area. (R. p. 165, lines 10-24.) To prove he could take care of himself, Brown pulled a gun from his pocket to show the women. (R. p. 165, lines 2-24.)

The women agreed to go with Brown to a cookout at his nephew's house. (R. p. 168, lines 1-4.) Brown placed his gun in the glove compartment of the car and drove the women in his Cadillac. (R. p. 199, line 25 – p. 170, line 8.) Jackson had second thoughts about robbing Brown

after seeing his gun and agreeing to go to the cookout. (R. p. 170, line 13 – p. 171, line 3.) The trio stayed at the cookout for approximately two hours before they left together. (R. p. 171, lines 20-24.) As they were leaving, the women got into the car while Brown remained outside and spoke to his family members. At this point, Epps told Jackson she planned to shoot Brown. (R. p. 172, line 19 – p. 173, line 18.) Epps wanted to kill Brown to steal his gun and his car. (R. p. 175, lines 2-5.) The plan was for Jackson to cut the straps off of her purse, wrap them around Brown's neck to "be a distraction," and then Epps would take the gun from the glove compartment and shoot him. (R. p. 175, line 8 – p. 176, line 8.) The women decided they would lead Brown to a deserted area, and then when Epps used the code words "take off," Jackson would strangle him with her purse straps. (R. p. 177, lines 7 – 12.)

Epps told Brown to drive down a dark road to drop them off where they supposedly lived. Brown became suspicious and started to get agitated. (R. p. 180, line 6 – p. 181, line 13.) As he approached the driveway of an abandoned mobile home, Epps used the code words and Jackson put the purse straps around Brown's neck. (R. p. 181, line 11 – p. 183, line 15.) Because her hands were sweaty, Jackson let go of the straps, and then Brown and Epps both struggled to get the gun. (R. p. 183, lines 17-21.) In the struggle for the gun, Epps accidentally shot Jackson in the thumb. (R. p. 183, line 24 – p. 184, line 4.) Jackson saw that the car was going to crash into the woods, so she jumped out of the car. (R. p. 184, lines 5-6.) Jackson thought she heard two more shots. (R. p. 184, lines 10-14.)

Once Jackson realized she was shot she began panicking. (R. p. 188, line 20 – p. 189, line 6.) Epps got out of the car and walked to the other side of the field near where the car crashed. (R. p. 189, lines 3-11.) Epps was angry with Jackson for panicking and called her derogatory names. (R. p. 190, lines 2-10.) When they finally turned their attention to Brown, the women

realized he was still alive, so Epps shot him again. (R. p. 190, line 22 – p. 191, line 12.) Epps told Jackson she needed help putting the body in the trunk. Jackson protested at first, but then helped her move Brown from the driver's side to the trunk of the Cadillac. (R. p. 192, line 12 – p. 193, line 19.) The plan was to take his body to Epps' grandmother's property and throw his body into the swamp. (R. p. 201, lines 3-16.) At some point during the commotion, Jackson took the gun from Epps and put it back in the glove compartment. (R. p. 210, lines 2-10.)

The women realized the Cadillac was bogged down in the mud, so Epps went into the abandoned mobile home and found two pieces of wood to wedge under the tires. (R. p. 199, line 7 – p. 200, line 4.) They were unsuccessful in moving the car. (R. p. 200, lines 14-22.) They decided to walk to their neighbors ask for help with pulling the car out of the woods, and also to call 911 for Jackson's finger. (R. p. 202, line 7 – p. 205, line 19.)

The Poorly Planned Cover Up of the Crime

A neighbor testified Epps and Jackson knocked on her door late the night of the murder. (R. p. 37, lines 15-25.) Epps told the neighbor she needed to use her phone to call for an ambulance because her friend had been shot in the hand in a hunting accident. (R. p. 38, line 21 – p. 39, line 15.) Epps told the neighbor they had been on her father's land hunting with antique guns when the accident happened. Because her phone was not working, the neighbor sent the women across the street to another house to ask for a telephone. (R. p. 42, line 12 – p. 43, line 23.)

When Officer Craig Staggers, of the Kingstree Police Department, arrived on the scene, he found two women: Epps was wearing sweats and Jessica Jackson was wearing athletic shorts, a bra, and had her shirt wrapped around her injured hand. (R. p. 50, lines 12-25.) Epps told Staggers the women were hunting squirrels when Jackson accidentally shot herself in the hand.

(R. p. 52, lines 12-20.) When Staggers asked Epps why they did not drive to the hospital, Epps told him their car was bogged down at Windy's Club. (R. p. 52, line 24 – p. 53, line 3.) Epps also said she gave the gun back to her uncle. (R. p. 53, lines 7-15.) Staggers found the story suspicious because the women had not driven directly to the hospital and could not produce the gun. (R. p. 56, lines 20-24.) EMS arrived and transported Jackson to the hospital shortly after midnight. (R. p. 51, lines 4-20.) Epps told Staggers she would walk to her aunt's house, which was located in a nearby subdivision, and get a ride home from there. (R. p. 61, line 17 – p. 63, line 5.)

Samuel Barr, who had been hanging out at Windy's Club before its closing, heard a call go out on his police scanner that shots had been fired on Kendall Park Road. (R. p. 68, lines 2-17.) Because he was curious, Barr drove back out toward Kendall Park Road and Windy's Club to see what happened. (R. p. 68, lines 14-24.) As he approached Windy's, Barr noticed a car bogged down in the woods across the road. (R. p. 66, line 13 – p. 70, line 21.) As he was looking at the car in the woods, Epps walked up to him and said, "Look what my girlfriend made me do. She made me drive my car in the woods." (R. p. 71, lines 3-21.) Epps then walked off in the direction of a nearby neighborhood. (R. p. 112, lines 11-17.)

Investigator Kennedy responded to the call of the accidental gunshot victim sometime about 12:30 am. (R. p. 310, line 6 – p. 311, line 17.) When he arrived in the neighborhood, the ambulance had taken Jackson to the hospital and no one was present. (R. p. 311, lines 8-13.) One of the earlier responding officers told Kennedy that Epps mentioned a car being bogged down near Windy's club, so he drove to the area to investigate. (R. p. 311, line 21 p. 312, line 20.) Kennedy found the Cadillac stuck in the woods, noticed the car door open, and saw blood on the interior and the trunk. (R. p. 315, line 8 – p. 318, line 23.) The officers attempted to open the

trunk, but could not. Kennedy arranged to tow the Cadillac to the impound lot for further investigation, while he looked into the whereabouts of the victim. (R. p. 320, line 21 – p.321, line 18.) One of the deputies found Jackson's purse and identification in the back seat. (R. p. 319, lines 16-22.) After talking to the victim's family, Kennedy decided to try the trunk of the car again, and was able to pry open the trunk enough to see the victim's body inside. (R. p. 324, lines 14-24; p. 325, line 19 – p. 326, line 6.)

On March 31, Kennedy attended a search of the home of Vanity Epps (Appellant's aunt). (R. p. 333, lines 4-21.) In the grassy area in front of Ms. Epps' house, Kennedy noticed a Cadillac key fob on the ground. (R. p. 334, lines 15-25.) The key chain and fob had distinctive branding of a former Cadillac dealership and phone number from Arizona. (R. p. 338, lines 4-17.)

The Corroborating Evidence Linking Epps to the Murder

Arnold Gamble was the victim's nephew, and hosted the cookout the day of the shooting. (R. p. 95, line 10 – p. 96, line 7.) Gamble confirmed that at about 3:00 pm that afternoon, Brown left the cookout in his Cadillac and then later returned, driving the same Cadillac, accompanied by Epps and Jackson. (R. p. 96, line 14 – p. 99, line 12.) The trio stayed at the cookout until approximately 9:30 pm, and Gamble made plans to see his uncle the following morning. (R. p. 99, line 16 – p. 100, line 16.) When they left in the Brown's car, Gamble confirmed Brown was driving, Epps was in the front passenger seat, and Jackson was in the back seat behind the driver. (R. p. 100, line 19 – p. 101, line 6.) Gamble learned of his uncle's death the next day, when the sheriff's department notified him about finding his body. (R. p. 102, line 19 – p. 103, line 11.)

The State's pathologist testified the only signs of injury to the body of Joseph Brown were the gunshot wounds to his head. (R. p. 458, line 20 – p. 503, line 5.) The eighty-seven year old victim was five feet, ten inches tall and weighed one hundred seventy-six pounds. (R. p. 460, lines 8-12.) One bullet wound indicated the bullet entered the left temple and exited behind the left ear. That wound was not fatal. (R. p. 462, line 16 – p. 463, line 9.) Another gunshot wound entered the bony area above the right eyebrow, traveled through the sinuses and the face and stopped in the left side of the victim's neck. (R. p. 463, line 23 – p. 464, line 25.) The third wound entered on the top of the victim's head, through the brain, and ended in the base of the skull. (R. p. 465, lines 9-18.) The victim's toxicology report came back negative for drugs and alcohol. (R. p. 475, lines 2-10.)

The purse straps in the rear floorboard of the Cadillac contained the DNA of Jackson and Joseph Brown. (R. p. 541, line 6 – p. 543, line 11.) Jackson's DNA was present on her the red shorts she was wearing the night of the murder, a plastic bag found in the backseat floorboard of the Cadillac. (R. p. 543, line 22 – p. 544, line 24.) Jackson's DNA was also on the center of the back seat. (R. p. 547, line 22 – p. 548, line 15.) The camouflaged hoodie found on the passenger floorboard of the front seat contained a mixture of DNA from Jackson and Epps. (R. p. 550, line 9 – p. 551, line 13.)

Jackson first told police she hurt her hand in a hunting accident. (R. p. 214, lines 14-26.) She then changed her story and told investigators the victim tried to rape her. (R. p. 214, line 24 – p. 215, line 1.) When the police didn't believe Jackson was able to place the body in the trunk by herself, she then said Epps was present, but had nothing to do with the shooting. (R. p. 215, line 7 – p. 216, line 2.) Not long after her incarceration, she told the officers about their plan to rob and kill Brown. (R. p. 216, line 25 – p. 218, line 16.)

ARGUMENT

I. Appellant's Confrontation Clause argument is not preserved for review. South Carolina Rules of Evidence prohibit Appellant's impeachment of a State's witness with pending charges that are unsubstantiated, irrelevant, and needlessly distracting to the jury.

The trial court committed no error when he prohibited the impeachment of two witnesses with evidence of pending charges against them. This Court must consider the admissibility of the pending charges differently for witness Hatten, called during the State's case in chief, and witness McKnight, called by the defense. Appellant argues on appeal the trial court's limitation on her scope of examination of Hatten and McKnight violated her rights under the Confrontation clause, but this issue was never raised to the trial court. *See* IBOA at 9. Instead, Appellant argued the charges were admissible under South Carolina Rule of Evidence 608 (c) as evidence of motivation to misrepresent the facts. (R. p. 265, lines 4-8; p. 274, lines 1-6.)

In the case of Hatten, the court found the pending charges were not of any significance to show bias in his identification of a key fob for the automobile he once owned. (R. p. 275, line 14 – p. 280, line 10.) The trial court also determined the charges were not relevant, and were unduly prejudicial, so he properly limited Appellant's cross examination on the magistrate level charges. (R. p. 278, line 3 – p. 279, line 24.)

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. *State v. Kelley*, 319

S.C. 173, 177, 460 S.E.2d 368, 370 (1995). “As a general rule, a trial court’s ruling on the proper scope of cross-examination will not be disturbed on appeal.” *State v. Dial*, 405 S.C. 247, 256, 746 S.E.2d 495, 499 (Ct. App. 2013).

The Constitutional Argument Is Not Preserved For Review

The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal. *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691(2003); *State v. Lee*, 350 S.C. 125, 564 S.E.2d 372 (Ct.App.2002). Our courts have “consistently refused to apply the plain error rule.” *Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) (citations omitted). Instead, we have held: “it is the responsibility of counsel to preserve issues for appellate review.” *Id.*

The issue preservation requirement applies to assertions of constitutional violations as well. In *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003), the court held that “[a] due process claim raised for the first time on appeal is not preserved.” *Id.* at 625, 576 S.E.2d at 163 (citing *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995)). And in *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), where appellant asserted violations of due process and his Eighth Amendment rights, the court said, “this issue is not preserved for review because at trial, appellant never cited any constitutional basis for his request to give a parole eligibility charge.” *Id.* at 391, 472 S.E.2d at 238 (citations omitted).

At no point during the trial proceedings did Appellant raise a Confrontation clause issue to the trial court in support of her argument the pending criminal charges against both witnesses should be admitted. Appellant only argued Rule 608(c), SCRE, permitted the impeachment of Hatten to show evidence of bias. (R. p. 274, lines 1-6.) The trial court gave a lengthy analysis of the application of Rule 608(c) to the facts at hand. (R. p. 278, line 3 – p. 279, line 16.) Epps

sought only to have the pending charges admitted for the purpose of impeaching Hatten's credibility, without specifying she was relying on the Confrontation Clause in making her request. Appellant failed to put the trial judge on notice that she was making a Confrontation Clause argument. Because the trial judge did not have the opportunity to rule upon Confrontation Clause rationale, the issue is not preserved for appeal. However, even on the merits, Appellant cannot show the trial court abused his discretion in limiting her questioning of Hatten.

Even on the Merits, the Pending Charges Were Not Admissible

"A defendant demonstrates a Confrontation Clause violation when he is prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias . . . from which jurors . . . could draw inferences relating to the reliability of the witness." *State v. Gracely*, 399 S.C. 363, 372, 731 S.E.2d 880, 884 (2012). "The right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. On the contrary, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant.'" *State v. Aleskey*, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000) (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)).

Although Appellant addresses the Confrontation Clause as it applies to both witnesses, the limitation on her right to confront Hatten, as a State's witness, is entirely different from the limitation on her right to confront McKnight, her own witness. "The principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and

particularly its use of ex parte examinations as evidence **against the accused.**" *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (emphasis added). Generally speaking, the Confrontation Clause guarantees an opportunity for effective **cross-examination**, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis added).

"Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. However, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than a conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." Rule 608(b), SCRE (emphasis added). In the discretion of the court, specific instances may be inquired into on cross-examination if the specific instances concern "the witness' character for truthfulness or untruthfulness." *Id*

How the Issue Arose at Trial: Hatten

The State elected to call Mark Hatten, who was the previous owner of Joseph Brown's Cadillac. Hatten sold the car to the victim in 2012, and he could identify the car key, key chain, and remote key fob. Hatten's testimony was limited in relevance to the ownership and identification of the Cadillac and its component parts. (R. p. 264, lines 16-20.)

Appellant sought to impeach Hatten's credibility with pending charges pursuant to Rule 608, SCRE. (R. p. 265, lines 4-8.) Appellant argued the pending charges gave Hatten a bias toward the State because he might receive leniency on the pending charges if he testified favorably to the State on the identification of the Cadillac's keychain and remote control. (R. p. 265, line 12 – p. 266, line 6.) The State then proffered the testimony of Hatten. (R. pp. 266-273.) In his proffer, Hatten identified the key chain, which contained the logo and telephone

information of the Arizona dealership from where the Cadillac was purchased. (R. p. 268, line 16 – p. 269, line 15.)

When questioned about his pending charges, Hatten testified he did not believe he had any pending charges. Hatten explained the assault and battery charge was never filed and a malicious injury to property charge involved a \$25 fine, which he paid. (R. p. 273, lines 1-20.) When the court asked Appellant what the charges had to do with his identification of the car, keychain, and remote, Appellant argued the charges gave him motive to lie to help the State. (R. p. 274, line 18 – p. 275, line 10.) Appellant also acknowledged she was unable to provide a certified copy of the pending charges to prove they were actually pending. (R. p. 274, lines 15-16.) Appellant conceded, however, the charges were not admissible pursuant to Rule 609, SCRE. (R. p. 280, lines 5-8.)

The solicitor explained that they were unaware of any charges against Hatten, having performed a criminal records check four days prior to the start of trial. (R. p. 276, lines 14-23.) Regardless, however, the State argued that pending charges of this minor significance did not present the requisite relevance under a 403 analysis and would instead be highly prejudicial to suggest the witness would lie to the jury about the identification of dealership information on the keychain. (R. p. 277, line 4 – p. 278, line 2.)

Trial court analyzed admissibility under 608(c) and determined the pending charges, which were questionable at best, presented no motive, bias, or prejudice to misrepresent the facts. (R. p. 279, lines 16.) The trial court went on to find the evidence of pending charges was inadmissible because the prejudicial effect substantially outweighed its probative value. (R. p. 279, lines 17-24.)

Appellant argues Mark Hatten's pending charges in Williamsburg County were evidence of motive for him to lie on the stand. (R. p. 265, lines 4-8.) However, Appellant fails to demonstrate any tangible link between the disposition of the charges, which Hatten claimed were long since effectuated, and his testimony in this case. Appellant presents no evidence whatsoever that Hatten's testimony would in any way benefit him in prior assault and battery charge and malicious injury to property charges. In fact, Hatten denied knowing anything about the charges when he proffered his testimony to the court. (R. p. 273, lines 2-16.) The charges were magistrate level charges and the solicitor knew nothing about the charges until Appellant brought them to her attention. (R. p. 274, line 8 – p. 316, line 4.)

Neither the law enforcement agency with responsibility for the charges nor the prosecuting entity was the same for the two matters, so any connection is speculative. *See State v. Dial*, 405 S.C. 246, 256, 746 S.E.2d 495, 500 (Ct. App. 2013). Appellant failed to present anything more specific for the trial court's consideration other than it appears the magistrate's level offenses arose before Appellant's trial and were dismissed or adjudicated by the magistrate before Appellant's trial. It is unknown why the charges were showing as still pending from Appellant's records search, but the statements of the solicitor and the testimony of Hatten clearly show no motivation to testify favorably for the State in exchange for some kind of leniency. Where Appellant fails to present any evidence and merely speculates as to Hatten's bias or motivation for testifying, a trial court does not abuse its discretion in limiting the cross-examination. *Id.*; *see also Alesksey*, 343 S.C. at 34, 538 S.E.2d at 255 (finding that dismissed drug charges are not admissible as prior bad acts under Rule 609, "[n]or are the dismissed indictments evidence of 'bias, prejudice or any motive to misrepresent' under Rule 608(c)).

The sole purpose of Hatten's testimony was to identify the keychain and fob found in the yard of Appellant's aunt as belonging to the Cadillac he owned before Joseph Brown. (R. p. 264, lines 16-25.) The keychain was distinctive because it advertised the dealership in Arizona where Hatten's mother originally purchased the car before giving it to Hatten. (R. p. 268, line 16 - p. 269, line 17.) The information about the dealership was clearly visible on the keychain and the title work to the car showed Mark Hatten as the owner. (R. p. 270, lines 3 – 16.) Hatten simply had no reason to lie about his recognition of the keychain.

The trial court correctly determined the possible existence of pending charges did not have a legitimate tendency to show bias on the part of Hatten in favor of the State. The incidents occurred before Appellant's trial, do not relate to Appellant or bias in favor of anyone, and do not otherwise relate to his credibility. *See State v. Burgess*, 393 S.C. 396, 712 S.E.2d 1 (Ct. App. 2012) (stating that while incidents documented in law enforcement officer's employment records might show the officer was hot-tempered, the trial court properly denied cross-examination about the matters because they did not show bias or otherwise relate to credibility where the incidents occurred after the defendant's arrest and did not relate to the defendant or the manner of the defendant's apprehension).

Moreover, no prejudice is shown and any error in the exclusion of the evidence is harmless. *See Delaware v. Van Arsdall*, 475 U. S. 673, 684 (1986) (finding the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to harmless-error analysis); *see also State v. Whatley*, 407 S.C. 460, 468 – 69, 756 S.E.2d 393, 397 (Ct. App. 2014) (stating a violation of the Confrontation Clause is subject to a harmless error analysis and whether error is harmless depends on a number of factors, including the importance of the witnesses' testimony in the State's case, whether the

testimony is cumulative, the presence of corroborating or contradictory testimony of the witness on significant points, the extent of cross-examination conducted by the defendant, and the strength of the State's case.); *State v. McEachern*, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012) (stating that a violation of the Confrontation Clause is subject to harmless error analysis). The prosecution in this case could prove ownership of the car and its place of purchase through the title work. The keychain had distinctive markings from the Arizona dealership. As such, Hatten's supposed motivation to falsely testify would be thwarted by a plain visual inspection of the keychain. Regardless of whether the jury heard about Hatten's previous charges, the admissibility of the keychain into evidence rendered the limitation harmless.

II. Appellant's Confrontation Clause argument is not preserved for review. In her defense, Appellant improperly called the witness solely for the purpose of impeaching his testimony. Further, the pending charge was irrelevant, highly prejudicial, and only offered as subterfuge to suggest the defense witness was the actual murderer.

Appellant is constitutionally guaranteed an effective cross-examination of the witnesses against her. Appellant is **not** constitutionally guaranteed an unlimited direct examination of a witness she elects to call at trial in her own defense. As noted earlier, however, Appellant did not raise a Confrontation Clause concern at trial. Instead, the trial court ruled on the admissibility of the pending charges in accordance with the rules of evidence. In her defense, Appellant improperly called McKnight solely for the purpose of impeaching his testimony with a pending murder charge and with the testimony of Schain McCrea. Appellant has no Confrontation Clause protection for a witness she called. Further, the trial court properly found the pending murder charge was inadmissible. The pending charge was highly prejudicial and irrelevant to McKnight's testimony, unless Appellant sought to use the pending charge to cast McKnight as

the actual killer. Appellant is not permitted to use the pretense of impeachment evidence as subterfuge to introduce otherwise inadmissible information to the jury.

How the Issue Arose at Trial: McKnight

At the close of the State's case, Appellant informed the court she intended to call Theodore McKnight, primarily so she could impeach his testimony with a pending murder charge, as well as with the testimony of a jailhouse informant named Schain McCrea. (R. p. 584, lines 5-19.) The matter was discussed in chambers and then the trial court put the discussion on the record. (R. p. 584, lines 5 – 22.) No Confrontation Clause issue was asserted or ruled upon in the record; the court instead ruled on the impeachment issue. The trial court ruled any testimony regarding McKnight's pending murder charge was not allowed, but did permit Appellant to impeach the credibility of McKnight with jailhouse informant McCrea's testimony. (R. p. 584, line 19 – p. 585, line 14.) The court then said it would give an instruction to the jury limiting the testimony only for the purpose of assessing McKnight's credibility, and not for the truth of McCrea's allegations. (R. p. 585, lines 14-22.) The trial court also instructed Appellant she could not argue the substance of McCrea's claims in her closing argument, but could only argue the inconsistency between what McKnight supposedly told McCrea and what McKnight testified to at trial. (R. p. 585, line 22 – p. 586, line 4.)

Appellant called McKnight, and he testified he knew Appellant and Jessica Jackson, that they lived with him briefly in 2014, and they appeared to be involved with each other romantically. (R. p. 751, line 20 – p. 754, line 24.) McKnight consistently testified he was not present during the murder of Joseph Brown and had nothing to do with the crime. (R. p. 755, line 3 – p. 758, line 16.) Repeatedly during his testimony, Appellant asked questions of McKnight

suggesting McKnight and Jackson committed the murder together, but McKnight maintained his innocence. (R. p. 757, line 2 – p. 758, line 16.)

Appellant then called Schain McCrea, who was incarcerated at the Williamsburg County Detention Center at the same time as McKnight. (R. p. 775, line 4 – p. 777, line 10.) McCrea said he talked to McKnight during their shared recreation time at the detention center. (R. p. 777, lines 7-23.) McCrea testified McKnight admitted he and Jackson dropped Appellant off and then the pair intended to rob the victim but “somehow they ended up killing him. (R. p. 779, line 10 – p. 780, line 19.) McCrea said McKnight never told him who actually “shot him or whatever.” (R. p. 780, lines 22-23.)

On cross examination, McCrea admitted he recently sought out a “telephone buddy” during his incarceration and was put in touch with Brittany Epps’ mother. (R. p. 785, lines 1-10.) McCrea spoke to Epps’ mother three times a week for approximately a year leading up to Appellant’s trial. (R. p. 785, lines 1-18.) However, the week before the trial, McCrea for the first time mentioned McKnight’s statements to Epps’ mother, and then agreed to talk to Epps’ attorney. (R. p. 785, line 1 – p. 787, line 21.) McCrea also admitted that when officers interviewed him about his conversations with McKnight, McCrea initially told them McKnight did not know anything about the details of who shot the victim. (R. p. 788, line 19 – p. 792, line 7.) McCrea also admitted he talked to Epps’ mother on an illegal contraband cell phone from within the prison. (R. p. 794, line 4 – p. 795, line 25.) McCrea admitted McKnight never gave him specific details of the crime, but said he “put two and two together” and “knew [McKnight] had something to do with it.” (R. p. 797, lines 2-22.)

McKnight Should Not Have Been Permitted to Testify

Whether the trial court erred in his ruling the defense could call McKnight solely for the purpose of impeachment is not before this court. However, Respondent must address the issue before determining whether the court's subsequent limitation of McKnight's impeachment was appropriate. Formerly, in South Carolina, the State could not impeach its own witness through a prior inconsistent statement. *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982); *State v. Ellefson*, 266 S.C. 494, 224 S.E.2d 666 (1976). The reasons underlying the common law were, first, that the party by calling the witness to testify vouches for the trustworthiness of the witness, and second, that the power to impeach is the power to coerce the witness to testify as desired, under the implied threat of blasting the character of the witness if the witness does not. *State v. Bailey*, 298 S.C. 1, 3, 377 S.E.2d 581, 583 (1989). With the adoption of Rule 607, SCRE, however, either party is allowed to attack the credibility of a witness, including the party calling the witness. Rule 607 is not unlimited, nevertheless. Despite Rule 607's permissive impeachment of a witness by either party, the rule does not go so far as to permit the use of the rule as a subterfuge to present otherwise inadmissible evidence to the jury. *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975).

The trial court actually considered the question of whether McKnight should be allowed to testify at all in light of the Fourth's Circuit's ruling in *Morlang*. (R. p. 585, lines 1-9.) The court concluded, however, that *Morlang* was inapplicable to the instant case because in *Morlang*, the State sought to introduce testimony solely for the purpose of impeaching the witness and not the defense. (R. p. 585, lines 5-9.) However, the State respectfully submits the trial court's interpretation of *Morlang* as inapplicable to the defense was error. Other jurisdictions have held evidence that is inadmissible for substantive purposes may not be purposely introduced under the

pretense of impeachment. *See, e.g., Burgin v. State*, 747 So.2d 916, 918-921 (Ala. Crim. App. 1999) (recognizing an abuse of Rule 607 when a party calls the witness for the primary purpose of placing before the jury substantive evidence which is otherwise inadmissible); *Smith v. U.S.*, 26 A.3d 248 (D.C. 2011) (impeachment of one's own witness cannot be permitted where employed as a mere subterfuge to present to the jury evidence not otherwise admissible); *Jones v. State*, 941 A.2d 498, 509 (Md. 2008) (finding the State had a "legitimate" purpose in calling witness to stand other than solely for impeachment testimony). *See also United States v. Peterman*, 841 F.2d 1474, 1479 n.3 (10th Cir. 1988), *United States v. Frappier*, 807 F.2d 257, 259 (1st Cir. 1986); *Whitehurst v. Wright*, 592 F.2d 834, 839 (5th Cir.1979); *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir. 1980).

In South Carolina, the court holds the defense to the same standard it holds the State in prohibiting a party to call a witness it knows will invoke the Fifth Amendment. *See State v. Hughes*, 328 S.C. 146, 152, 493 S.E. 2d 821, 823 (1997); *see also United States v. Duran*, 884 F.Supp. 573 (D.D.C.1995) (neither defendant nor government may ask questions of witness solely for purpose of requiring witness to invoke privilege before jury). The same logic applies when the defense seeks to call a witness solely for the purpose of impeachment and when the impeachment evidence is subterfuge to introduce highly prejudicial information otherwise inadmissible. Here, Appellant knew McKnight would deny involvement in the crime when she called him to the stand. His testimony offered nothing of value to Appellant's case other than affording Appellant the opportunity to suggest McKnight's involvement in the crime with the nature of her questions. McKnight should not have been permitted to testify at all. Appellant enjoyed a benefit from McKnight's limited testimony to which she was not entitled.

McKnight's Pending Charge Was Irrelevant

In allowing Appellant to call McKnight solely for the purpose of impeaching his testimony with the testimony of McCrea, the trial court granted Appellant more leniency than she was entitled. Appellant certainly cannot now claim the court violated her right to confront a witness against her when she called the witness during the defense's case. Appellant's attempt to introduce McKnight's pending murder charge was apparently part of her strategy to portray McKnight and Jackson as the perpetrators of the crime, thereby improperly offering character evidence in violation of Rule 404, SCRE.

The trial court ruled that any questioning regarding McKnight's pending murder charge, which was alleged to have occurred two years after the murder of Joseph Brown, was not permitted. (R. p. 584, lines 10-25.) Although the issue appears to have been discussed in chambers, the reasoning for the trial court's decision was not placed on the record. However, because McKnight had not been convicted of the crime, the pending charge was not properly admissible pursuant to Rule 609, SCRE. Because the defense called the witness, the pending charge was not admissible as evidence of bias pursuant to Rule 608(c) because McKnight did not testify on behalf of the State. Finally, 608(b)(1), SCRE, is also inapplicable because Appellant sought to inquire into McKnight's charge during her **direct examination** of the witness. Further, Rule 404(b) specifically prohibits the type of evidence Appellant sought to elicit here. Rule 404(b) says "evidence of other crimes, wrongs, or acts is **not admissible** to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE (emphasis added).

If the charges were not properly admissible for impeachment under Rules 607, 608, and 609, and were not admissible under Rule 404 as evidence of other wrongs to prove McKnight's

character as a killer, then Appellant's only avenue for admission of the pending charge, against her own witness, was claiming the charge was highly relevant and not unduly prejudicial, thereby surviving a SCRE Rule 403 analysis.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. *State v. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009); *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 69, 536 S.E.2d 666, 669 (2000). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Tynes*, 402 S.C.211 740 S.E.2d 512 (Ct. App. 2013). Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing *Toole v. Salter*, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation. *See State v. Pipkin*, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct.App.2004).

Neither the relevance nor the probative value of the pending murder charge is preserved for review. Although Appellant now argues McKnight's testimony was important "in light of Appellant's insistence that he was present and likely involved in Brown's death," (IBOA at 9),

Appellant has not explained how the murder charge, which had nothing to do with Joseph Brown's murder and occurred two years later, had any relevance to his testimony. Appellant was not entitled to introduce irrelevant and prejudicial evidence of a pending murder charge against her own witness. Appellant's claim is without merit.

THE TRIAL COURT COMMITTED NO ERROR

Appellant was not entitled to impeach the credibility of two witnesses with pending charges because the charges were irrelevant, unfairly prejudicial and confusing, and in the case of McKnight, not properly admissible as impeachment evidence. In ruling on the limitations of impeachment, the court committed no error. The record before this Court supports the trial court's finding. The judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

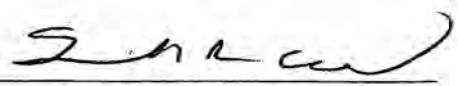
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BY: 

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November 29, 2017.
Columbia, South Carolina

ATTORNEY(S) FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Williamsburg County
 The Honorable Howard P. King, Circuit Court Judge

RECEIVED
 NOV 29 2017
 SC Court of Appeals

THE STATE,

Respondent,

v.

BRITTANY EMOESHA EPPS,

Appellant.

Appellate Case No. 2016-001806

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

ALAN WILSON
 Attorney General

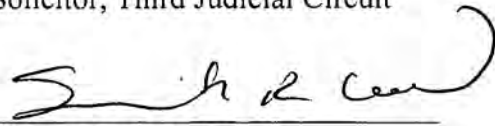
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ATTORNEYS FOR RESPONDENT

November 29, 2017

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Brittany Emoessa Epps, Appellant.

Appellate Case No. 2016-001806

Appeal From Williamsburg County
Howard P. King, Circuit Court Judge

Unpublished Opinion No. 2018-UP-415
Submitted September 1, 2018 – Filed November 7, 2018

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Attorney General Melody Jane Brown, and Assistant
Attorney General Susannah Rawl Cole, all of Columbia;
and Solicitor Ernest Adolphus Finney, III, of Sumter, for
Respondent.

PER CURIAM: Brittany Epps appeals her convictions and sentences for the murder of Joseph Brown and possession of a firearm during the commission of a violent crime, arguing the trial court erred in not permitting her to impeach two witnesses concerning their pending charges. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Epps's attempted impeachment of State's witness Mark Hatten: *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) ("A constitutional claim must be raised and ruled upon to be preserved for appellate review."); *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *State v. Dickerson*, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."); *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009) ("[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.").

2. As to Epps's impeachment of her own witness Theodore McKnight: *McCracken*, 346 S.C. at 92, 551 S.E.2d at 238 ("A constitutional claim must be raised and ruled upon to be preserved for appellate review."); *Douglas*, 369 S.C. at 429, 632 S.E.2d at 847-48 ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."); Rule 609(a), SCRE (allowing the credibility of a witness, other than an accused, to be attacked by evidence that the witness has been convicted of a crime); Rule 608(b), SCRE ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on *cross-examination* of the witness" (emphasis added)); *Small v. State*, 422 S.C. 174, 182-83, 810 S.E.2d 836, 840 (2018) ("[A]nything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony" (quoting *State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976))); *State v. Burgess*, 408 S.C. 421, 442, 759 S.E.2d 407, 418 (2014) (upholding the trial court's decision to prohibit a defendant from cross-

examining a police officer about the officer's personnel records and further stating there was no abuse of discretion because the defendant "failed to offer evidence that [the officer] lacked credibility due to bias against [the defendant]").

AFFIRMED.¹

LOCKEMY, C.J., and THOMAS and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA)

County of Williamsburg, SC)Brittany Epps 369462)

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

v.)

State of South Carolina)

2019-CP-45-296
IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

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 Camille Griffin Graham, SCDC
2. Name and location of Court which imposed sentence Williamsburg county
3. Name(s) of co-defendant(s) (if any) 1. Jessica Jackson
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 1# 2014GS4500159 murder 14-GS-45-0159
 - (b) 2# Possession of a weapon 2014A4510100232

5. The date upon which sentence was imposed and the terms of the sentence:

(a) August 25, 2016; 45 years ran with 5 together

(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. SC Appellate Court

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. denied

ii. _____

iii. _____

(c) the date of each such result:

i. November 18, 2018

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. n/a

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) n/a

(b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ineffective assistance of counsel
- (b) co-defendants statement / testimony invalid
- (c) trial court error concerning the jury
- (d) new evidence
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) see included paper
- (b) co-defendant inconsistent statements
- (c) misinformed
- (d) confessions by co-defendant
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- 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?

no

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) _____
 (b) _____
 (c) _____

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

(a) your arraignment and plea? nil
 (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?
nil

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. (Butcher) Deborah J. Butcher - (camden law firm)
Williamsburg Co., Public Defender

ii. _____
 iii. _____

(b) the proceedings at which each such attorney represented you:

i. trial
 ii. appellant defense
 iii. _____

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

new trial or sentence reduction

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

no

STATE OF SOUTH CAROLINA)

County of Williamsburg)

VERIFICATION

I, Brittany Epps, 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.

Brittany Epps

SWORN to and subscribed before me this 13th
day of May, 2019.

Cristal Jones (L.S.)
Notary Public

My Commission Expires: July 22nd, 2026

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

I, Brittany Epps, 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.

Brittany Epps
Applicant

SWORN or affirmed to and subscribed before me this

13th day of May, 2019.

Cynthia Lane
Notary Public

My Commission Expires: July 22nd, 2026

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

Brittany E. Epps, #369462,
Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2019-CP-45-296

**RETURN, MOTION FOR MORE
DEFINITE STATEMENT, AND
PARTIAL MOTION TO DISMISS**

Respondent, making its return and partial motion to dismiss the application for post-conviction relief filed by Brittany Epps (Applicant) on May 15, 2019, Respondent would respectfully show this Court:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. During the August 2014 term, the Williamsburg County Grand Jury indicted Applicant for murder and possession of a firearm during the commission of a violent crime (2014-GS-45-0159). On March 28, 2016, Applicant proceed to five day jury trial before the Honorable Howard P. King, circuit court judge. Applicant was represented by Deborah J. Butcher, Esquire (Counsel). Assistant Solicitors Kimberly V. Barr, and Julie Swilley, of the Third Circuit Solicitor's Office prosecuted the case. At the conclusion of that trial, the jury was deadlocked and Judge King declared a mistrial.

On July 26, 2016, Applicant again proceeded to a jury trial before Judge King. Counsel represented Applicant during the second trial and Barr prosecuted the case. At the conclusion of this trial, Applicant was convicted as indicted. Both sides requested sentencing be delayed so they could prepare for Applicant's sentencing due to her age. On August 24, 2016, Applicant

appeared before Judge King for sentencing. At that time, aggravating and mitigating evidence was presented to Judge King for consideration. Prior to imposing his sentence, Judge King stated, "I have carefully considered the factors of Aiken versus Byars as far as [Applicant] is concerned[.]" (Sentencing Transcript 52.) Judge King sentenced Applicant to forty- five years for murder and a concurrent five years for the weapons offense.

Thereafter, Applicant filed a timely notice of appeal. Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense perfected the appeal. In the appeal, Applicant raised the following issue:

- I. The trial judge erred in not permitting Appellant to impeach two witnesses concerning their pending charges in violation of Appellant's Sixth Amendment right to confrontation where the probative value of the pending charges was not substantially outweighed by the danger of unfair prejudice.

On November 7, 2018, the South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion. State v. Epps, Op. No. 2018-UP-415 (S.C. Ct. App. Filed November 7, 2018). The remittitur was issued on November 28, 2018.

II. Factual Summary

Jessica Jackson (Jackson) participated in the murder of Joseph Brown with girlfriend, Applicant, and Jackson was the State's primary witness. Jackson and Applicant met in February of 2013 at a group home where they both lived. (Trial Tr. 160-161.) Although Jackson was from Myrtle Beach, she traveled back to Williamsburg County to see Applicant. (Trial Tr. 161.) She eventually moved to Williamsburg County to live with Applicant at a friend's house. (Trial Tr. 164.) The friend, Theo McKnight, was in his forties and lived in a four bedroom home with no running water and plywood on the floor. (Trial Tr. 165 – 169.) Neither Applicant nor Jackson was employed, and they relied on family for food. (Trial Tr. 169-170.)

Jessica said the women first met Joseph Brown (Victim) at the Sonoco gas station. (Trial Tr. 172.) Applicant's aunt had given them a ride, and the women saw Victim in his Cadillac, parked at the station. (Trial Tr. 173.) Applicant approached Victim and asked him where she could "get a good grill." (Trial Tr. 174.) Jackson testified Victim asked Applicant if he could have sex with Jackson for money, and Applicant said no. (Trial Tr. 175.) Victim told Applicant if they changed their minds, they could come to his home. (Trial Tr. 175.) Later, when the women returned to McKnight's house, they discussed tying up Victim and robbing him. (Trial Tr. 177.)

The women did not see Victim until two weeks later. (Trial Tr. 178.) On the morning of the shooting, the women decided to walk to Applicant's mother's house. (Trial Tr. 181.) On the way over, Jackson told Applicant she did not want Applicant to live with her at McKnight's house anymore because her mother did not like it and it was causing strain on their relationship. (Trial Tr. 182.) Jackson was trying to apply for housing and encouraged Applicant to get her GED. (Trial Tr. 182.) Applicant's mother eventually dropped the women off at Applicant's aunt's house. (Trial Tr. 183.) The women then walked back to McKnight's house. (Trial Tr. 183.) At McKnight's, Jackson packed a bag of toiletries so the women could go to Applicant's mother's house while she was at work so Jackson could take a shower. Applicant told Jackson she felt "like being bad" and then described her plan to rob Victim. (Trial Tr. 188.) When Jackson asked how Applicant planned to rob Victim, Applicant said they could overpower him because of his age. (Trial Tr. 189.)

The women walked to the store to get something to eat and drink and then walked to the building where Victim lived. (Trial Tr. 190.) When they arrived, Victim was sitting outside in his chair. (Trial Tr. 191.) The women sat outside with him and talked. Applicant reassured Jackson that "she had this." (Trial Tr. 191.) Victim told the women he had to drive a friend to the store,

and he allowed the women to stay in his apartment until he came back. (Trial Tr. 192.) While he was gone, the women looked through his belongings to find anything of value to steal. (Trial Tr. 192.) Jackson stole a pack of T-shirts and a pocketknife. (Trial Tr. 192.)

When Victim returned, his nephew was with him. (Trial Tr. 197.) Applicant and the nephew, Arthur Gamble, discussed the engine in Victim's Cadillac. The conversation also turned to Victim's ability to take care of himself in spite of his age and the crime in the area. (Trial Tr. 197.) To prove he could take care of himself, Victim pulled a gun from his pocket to show the women. (Trial Tr. 197.)

The women agreed to go with Victim to a cookout at his nephew's house. (Trial Tr. 200.) Victim placed his gun in the glove compartment of the car and drove the women in his Cadillac. (Trial Tr. 231.) Jackson had second thoughts about robbing Victim after seeing his gun and agreeing to go to the cookout. (Trial Tr. 202-203.) The trio stayed at the cookout for approximately two hours before they left together. (Trial Tr. 203.) As they were leaving, the women got into the car while Victim remained outside and spoke to his family members. At this point, Applicant told Jackson she planned to shoot Victim. (Trial Tr. 204-205.) Applicant wanted to kill Victim to steal his gun and his car. (Trial Tr. 207.) The plan was for Jackson to cut the straps off of her purse, wrap them around Victim's neck to "be a distraction," and then Applicant would take the gun from the glove compartment and shoot him. (Trial Tr. 207-208.) The women decided they would lead Victim to a deserted area, and then when Applicant used the code words "take off," Jackson would strangle him with her purse straps. (Trial Tr. 209.)

Applicant told Victim to drive down a dark road to drop them off where they supposedly lived. Victim became suspicious and started to get agitated. (Trial Tr. 212-213.) As he approached the driveway of an abandoned mobile home, Applicant used the code words and

Jackson put the purse straps around Victim's neck. (Trial Tr. 213-215.) Because her hands were sweaty, Jackson let go of the straps, and then Victim and Applicant both struggled to get the gun. (Trial Tr. 215.) In the struggle for the gun, Applicant accidentally shot Jackson in the thumb. (Trial Tr. 215-216.) Jackson saw that the car was going to crash into the woods, so she jumped out of the car. (Trial Tr. 216.) Jackson thought she heard two more shots. (Trial Tr. 216.)

Once Jackson realized she was shot she began panicking. (Trial Tr. 220-221.) Applicant got out of the car and walked to the other side of the field near where the car crashed. (Trial Tr. 221.) Applicant was angry with Jackson for panicking and called her derogatory names. (Trial Tr. 222.) When they finally turned their attention to Victim, the women realized he was still alive, so Applicant shot him again. (Trial Tr. 222-223.) Applicant told Jackson she needed help putting the body in the trunk. Jackson protested at first, but then helped her move Victim from the driver's side to the trunk of the Cadillac. (Trial Tr. 222-223.) The plan was to take his body to Applicant's grandmother's property and throw his body into the swamp. (Trial Tr. 233.) At some point during the commotion, Jackson took the gun from Applicant and put it back in the glove compartment. (Trial Tr. 242.)

The women realized the Cadillac was bogged down in the mud, so Applicant went into the abandoned mobile home and found two pieces of wood to wedge under the tires. (Trial Tr. 231 - 232.) They were unsuccessful in moving the car. (Trial Tr. 232.) They decided to walk to their neighbors ask for help with pulling the car out of the woods, and also to call 911 for Jackson's finger. (Trial Tr. 234 - 237.)

A neighbor testified Applicant and Jackson knocked on her door late the night of the murder. (Trial Tr. 65.) Applicant told the neighbor she needed to use her phone to call for an ambulance because her friend had been shot in the hand in a hunting accident. (Trial Tr. 66-67.)

Applicant told the neighbor they had been on her father's land hunting with antique guns when the accident happened. Because her phone was not working, the neighbor sent the women across the street to another house to ask for a telephone. (Trial Tr. 70-71.)

When Officer Craig Staggars, of the Kingstree Police Department, arrived on the scene, he found two women: Applicant was wearing sweats and Jessica Jackson was wearing athletic shorts, a bra, and had her shirt wrapped around her injured hand. (Trial Tr. 78.) Applicant told Staggars the women were hunting squirrels when Jackson accidentally shot herself in the hand. (Trial Tr. 80.) When Staggars asked Applicant why they did not drive to the hospital, Applicant told him their car was bogged down at Windy's Club. (Trial Tr. 80-81.) Applicant also said she gave the gun back to her uncle. (Trial Tr. 81.) Staggars found the story suspicious because the women had not driven directly to the hospital and could not produce the gun. (Trial Tr. 84.) EMS arrived and transported Jackson to the hospital shortly after midnight. (Trial Tr. 79.) Applicant told Staggars she would walk to her aunt's house, which was located in a nearby subdivision, and get a ride home from there. (Trial Tr. 89-91.)

Samuel Barr, who had been hanging out at Windy's Club before its closing, heard a call go out on his police scanner that shots had been fired on Kendall Park Road. (Trial Tr. 98.) Because he was curious, Barr drove back out toward Kendall Park Road and Windy's Club to see what happened. (Trial Tr. 98.) As he approached Windy's, Barr noticed a car bogged down in the woods across the road. (Trial Tr. 96-100.) As he was looking at the car in the woods, Applicant walked up to him and said, "Look what my girlfriend made me do. She made me drive my car in the woods." (Trial Tr. 101.) Applicant then walked off in the direction of a nearby neighborhood. (Trial Tr. 142.)

Investigator Kennedy responded to the call of the accidental gunshot victim sometime about 12:30 am. (Trial Tr. 351-352.) When he arrived in the neighborhood, the ambulance had taken Jackson to the hospital and no one was present. (Trial Tr. 352.) One of the earlier responding officers told Kennedy that Applicant mentioned a car being bogged down near Windy's club, so he drove to the area to investigate. (Trial Tr. 352-353.) Kennedy found the Cadillac stuck in the woods, noticed the car door open, and saw blood on the interior and the trunk. (Trial Tr. 356-359.) The officers attempted to open the trunk, but could not. Kennedy arranged to tow the Cadillac to the impound lot for further investigation, while he looked into the whereabouts of the victim. (Trial Tr. 361-362.) One of the deputies found Jackson's purse and identification in the back seat. (Trial Tr. 360.) After talking to the victim's family, Kennedy decided to try the trunk of the car again, and was able to pry open the trunk enough to see Victim's body inside. (Trial Tr. 365 - 367.)

On March 31, Kennedy attended a search of the home of Applicant's aunt. (Trial Tr. 374.) In the grassy area in front of the aunt's house, Kennedy noticed a Cadillac key fob on the ground. (Trial Tr. 375.) The key chain and fob had distinctive branding of a former Cadillac dealership and phone number from Arizona. (Trial Tr. 379.)

Arnold Gamble was the victim's nephew, and hosted the cookout the day of the shooting. (Trial Tr. 125-126.) Gamble confirmed that at about 3:00 pm that afternoon, Victim left the cookout in his Cadillac and then later returned, driving the same Cadillac, accompanied by Applicant and Jackson. (Trial Tr. 126-129.) The trio stayed at the cookout until approximately 9:30 pm, and Gamble made plans to see his uncle the following morning. (Trial Tr. 129-130.) When they left in the Victim's car, Gamble confirmed Victim was driving, Applicant was in the front passenger seat, and Jackson was in the back seat behind the driver. (Trial Tr. 130-131.)

Gamble learned of his uncle's death the next day, when the sheriff's department notified him about finding his body. (Trial Tr. 132-133.)

The State's pathologist testified the only signs of injury to the body of Victim were the gunshot wounds to his head. (Trial Tr. 502-503.) The eighty-seven year old victim was five feet, ten inches tall and weighed one hundred seventy-six pounds. (Trial Tr. 504.) One bullet wound indicated the bullet entered the left temple and exited behind the left ear. That wound was not fatal. (Trial Tr. 506-507.) Another gunshot wound entered the bony area above the right eyebrow, traveled through the sinuses and the face and stopped in the left side of Victim's neck. (Trial Tr. 507-508.) The third wound entered on the top of Victim's head, through the brain, and ended in the base of the skull. (Trial Tr. 509.) Victim's toxicology report came back negative for drugs and alcohol. (Trial Tr. 519.)

The purse straps in the rear floorboard of the Cadillac contained the DNA of Jackson and Victim. (Trial Tr. 589-591.) Jackson's DNA was present on her the red shorts she was wearing the night of the murder, a plastic bag found in the backseat floorboard of the Cadillac. (Trial Tr. 591-592.) Jackson's DNA was also on the center of the back seat. (Trial Tr. 595-596.) The camouflaged hoodie found on the passenger floorboard of the front seat contained a mixture of DNA from Jackson and Applicant. (Trial Tr. 598-599.)

Jackson first told police she hurt her hand in a hunting accident. (Trial Tr. 246.) She then changed her story and told investigators Victim tried to rape her. (Trial Tr. 246-247.) When the police didn't believe Jackson was able to place the body in the trunk by herself, she then said Applicant was present, but had nothing to do with the shooting. (Trial Tr. 247-248.) Not long after her incarceration, she told the officers about their plan to rob and kill Victim. (Trial Tr. 248-250.)

III. Allegations Raised and Relief Requested

In her application for post-conviction relief, Applicant alleges she is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "see included paper"¹
2. "co-defendants statement / testimony invalid"
 - a. "co-defendants inconsistent statements"
3. "Trial Court Error Concerning the Jury"
 - a. "misinformed."
4. "new evidence"
 - a. "confessions by co-defendant"

Attached and incorporated herein are the records of the Williamsburg County Clerk of Court, the first trial transcript, the second trial transcript, the sentencing transcript, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the records from this post-conviction relief action. Respondent reserves the right to amend this Return upon receipt of any relevant information.

IV. Allegations of Ineffective Assistance of Counsel²

Applicant asserts Counsel was constitutionally ineffective but wholly failed to state with any specificity facts to support her general allegations. Based on this, it is impossible for Respondent to discern how exactly Applicant believes Counsel was ineffective. Respondent moves for Applicant, through counsel, to amend this allegation to include sufficient, specific facts to support her claim of ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S.

¹ The clerk's office informed Respondent that Applicant did not include an attachment for her ineffective assistance of counsel claim.

² Respondent interprets Applicant allegation regarding the "co-defendants statement / testimony invalid" as an allegation of ineffective assistance of counsel.

668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989.) Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690.) The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690.) The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have 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, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985.)

As discussed above, it is impossible for Respondent to adequately respond to Applicant's allegation of ineffective assistance of counsel because Applicant has completely failed to provide any specific allegations or facts to support such claims. Respondent requests Applicant, through counsel, provide specific claims and facts to support this vague allegation.

V. Summary Dismissal Based on Trial Court Error Issue

Applicant claims the trial court erred "concerning the jury" in her application for post-conviction relief. However, this allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal, and his failure to do so has waived this allegation as grounds for relief.

This allegation should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An applicant may commence a post-conviction relief action on the following grounds:

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 [was] 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.... Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

S.C. Code Ann. § 17-27-20. Further, section 17-27-20(B) expressly states PCR “*is not a substitute for. . . direct review of the sentence or conviction.*” (emphasis added). PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). “In a direct appeal, the focus generally is upon the propriety of rulings made by the circuit court in response to a party’s motions or objections. In PCR, the focus usually is upon alleged errors made by trial or plea counsel. Therefore, when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the applicant generally must frame the issue as one of ineffective assistance of counsel.” Id. at 363-64, 527 S.E.2d at 747.

Accordingly, Respondent hereby moves for summary dismissal for Applicant’s allegation relating to the alleged trial court error pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis this allegation should be dismissed as a matter of law as they are direct appellate review issues which are not cognizable in a PCR action.

VI. Newly Discovered Evidence

Applicant does seem to indicate there exists newly-discovered evidence, such that she should be entitled to an evidentiary hearing. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date

when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

Applicant identifies “confessions by co-defendant” as newly discovered evidence. Applicant’s co-defendant, Jackson, provided numerous statements to law enforcement prior to confessing her and Applicant’s involvement in the murder of Victim. Jackson testified during Applicant’s trial. In Applicant’s claim of “newly discovered evidence,” she does not identify what “confessions” of Jackson’s she is referring, or why the “confessions” could not have been discovered before the trial by the exercise of due diligence, or anything to show that this “new evidence” would not be merely cumulative to that provided at trial. As such, Applicant fails to establish a *prima facie* case of newly-discovered evidence and Respondent moves for summary dismissal of this allegation.

VII. Motion for More Definite Statement

In her application, Applicant fails to set forth with specificity the facts and circumstances upon which her claims of ineffective assistance of counsel are based. The Uniform Post-Conviction Procedure Act requires the Applicant must “. . . specifically set forth the grounds

upon which the application is based.” Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965).

Applicant has failed to state with any specificity the specific facts giving rise to these allegations. Additionally, these allegations are not supported by any other additional information in the application. Respondent moves pursuant to Rule 12(e), SCRCP, to require Applicant to provide a more definite statement of her allegations of ineffective assistance of counsel. The Uniform Post-Conviction Procedure Act requires applicants to “specifically set forth the grounds upon which the application is based.” S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Furthermore, Rule 8(a), SCRCP, requires all civil pleadings include “a short and plain statement of the facts showing that the pleader is entitled to relief.” Therefore, Respondent moves to require Applicant to file an amended application well in advance of the hearing scheduled in this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the application.

VII. Any Future Amendments and Invocation of Discovery Process

Applicant must specify any claims he intends to raise at the evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has an attorney, the attorney, and 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 Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VIII. Denial of All Other Claims

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

IX. Conclusion

WHEREFORE, having made its return, the State requests applicant, through her counsel, amend the application to provide the required specificity for her allegations of ineffective assistance of counsel. Respondent moves for summary dismissal regarding Applicant's claim of trial court error and newly discovered evidence as this is a direct appeal issues and not a cognizable post-conviction relief claim. Until Applicant files an amended application, Applicant has not shown sufficient cause to warrant an evidentiary hearing on this application and requests a hearing not be schedule until after an amended application is so filed.

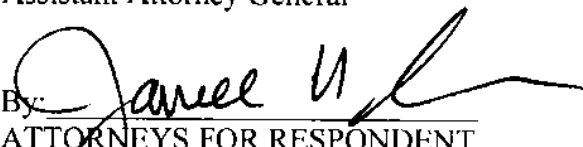
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JANELL H. GREGORY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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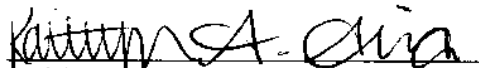
September 9th, 2019

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF WILLIAMSBURG	)	
	)	
	)	2019-CP-45-296
	)	
BRITTANY EMOESHA EPPS, #369462,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL.
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return, Partial Motion to Dismiss, and Motion for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James K. Falk, Esquire
 Falk Law Firm, LLC.
 Post Office Box 1058
 Charleston, South Carolina 29402

DATED this the 9th day of September, 2019.


 Kaitlyn S. Slice, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

Brittany E. Epps, SCDC # 269462,

Applicant,

v.

State of South Carolina,

Respondent.

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

) Case No.: 2019-CP-45-0296
)

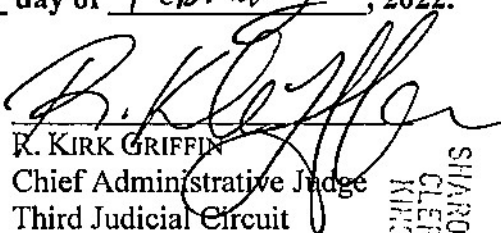
) **ORDER OF CONTINUANCE**
)
)
)
)

This matter comes before this Court by way of an application for post-conviction relief. In response, the State filed a return and requested an evidentiary hearing be convened. A hearing was scheduled to be held on February 16, 2022. Prior to this hearing, Applicant's counsel advised Respondent and this Court that he is scheduled for a jury trial for this date. Based on this conflict, Respondent consented to a continuance of this matter to the next term of court.

Accordingly, this Court finds that this matter should be continued to the next regularly scheduled term of court for Third Circuit post-conviction relief matters.

AND IT IS SO ORDERED this 9th day of February, 2022.

Scunten, South Carolina


R. KIRK GRIFFIN
Chief Administrative Judge
Third Judicial Circuit

2022 FEB 11 AM 10:27
SHARON W. STAGGERS
CLERK OF COURT
KINGSFEE, S.C.

2022 FEB 11 AM 10:27
SHARON W. STAGGER
CLERK OF COURT
KINGSFEE, S.C.

FILED

FILED

BRITTANY E. EPPS)
369462

PETITIONER,)

TRANSCRIPT OF RECORD
19-CP-45-296

V.)

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

October 31, 2022
Sumter, South Carolina

B E F O R E :

THE HONORABLE EDWARD W. MILLER, JUDGE

A P P E A R A N C E S:

JAMES K. FALK, ESQ.
Attorney for the Petitioner

ZACHARY W. JONES, ESQ.
Attorney for Respondent

FRANCES B. RAY, RPR
Circuit Court Reporter, Retired

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(There were no exhibits submitted.)

1 MR. JONES: This is the matter of Brittany Epps
2 versus The State of South Carolina, case number
3 2019-CP-45-00296. My name is Zachary Jones for the State of
4 South Carolina. This case arises out of charges from
5 Williamsburg County grand jury for murder and possession of
6 a firearm during the commission of a violent crime, number
7 2014-GS-45-159. On March 28, 2016, Ms. Epps proceeded to a
8 jury trial before the Honorable Howard P. King. That trial
9 ended in a hung jury and a mistrial so Ms. Epps was re-tried
10 in July 26th of 2016. At the conclusion of that trial, she
11 was convicted as indicted and had a subsequent sentencing
12 hearing in August of that year. She was sentenced to 45
13 years imprisonment for murder and a concurrent 5 years for
14 the weapon offense. Ms. Epps filed a timely notice of
15 appeal. Her convictions and sentences were affirmed and
16 unpublished opinion by South Carolina Court of Appeals, and
17 this timely application for post-conviction relief was filed
18 on May 15th, 2019.

19 Your Honor, at this time I'd like to turn it over
20 to Mr. Falk and ask him to put the allegations he's going
21 forward with on the record.

22 THE COURT: Okay.

23 MR. FALK: Thank you, Your Honor. I have filed
24 two amendments to this PCR. The first one I -- the first
25 amendment that I filed stated that, you know, allege that

1 trial counsel erred in failing to prepare a comprehensive
2 mitigation package before her client was sentenced and that
3 was really filed by my mistake because I had not had a copy
4 of the actual sentencing transcript. I was going off of the
5 trial transcript and there was a sort of a lengthy --
6 there's nothing that trial counsel did wrong that we would
7 allege that trial counsel did wrong at that point so we're
8 not going forward on those allegations. But we're going
9 forward on the allegations that are set forth when I called
10 the second amended PCR application, and it really sort of
11 flows out of the opinion from the Court of Appeals on
12 whether or not trial counsel erred in failing to properly
13 preserve an issue for appeal. And that concerns the
14 cross-examination of two witnesses, Mark Hatten and Theodore
15 McKnight.

16 And then -- and then we have a concern about the
17 State's closing argument where the solicitor talked about
18 what a witness would have testified to had she -- had she
19 taken the stand and --

20 MR. JONES: Your Honor, do you need a copy of
21 that?

22 THE COURT: I do not have the second amended
23 application.

24 MR. JONES: Permission to approach.

25 THE COURT: Yes, please. Yeah.

D. Butcher - Direct by Mr. Falk

1 (Document tendered to the Court.)

2 THE COURT: Okay.

3 MR. FALK: So at this time I believe we'd like to
4 call trial counsel here.

5 THE COURT: All right.

6 THE CLERK: Place your left hand on the Bible,
7 raise your right hand. State your full name.

8 THE WITNESS: Deborah Butcher.

9 WHEREUPON,

10 **DEBORAH J. BUTCHER,**

11 having been duly sworn by the clerk, testified
12 as follows:

13 THE CLERK: Thank you, ma'am. Step around please,
14 ma'am. Be careful. State your full name and spell your
15 last name for the record please, ma'am.

16 THE WITNESS: Deborah Johnson Butcher. Butcher is
17 B-U-T-C-H-E-R.

18 **D I R E C T E X A M I N A T I O N**

19 BY MR. FALK:

20 Q So could you tell me a little bit about your
21 representation of Ms. Epps in this case? How did you --
22 were you retained or were you -- is this a conflict case?

23 A I believe this was a conflict case, and I can't --
24 I just can't remember if -- yes, this was a conflict case,
25 okay. I used to do some part-time PD work, but I think this

D. Butcher - Direct by Mr. Falk

1 arose out of a conflict case.

2 Q I got you.

3 A There were two trials. The first one, there was a
4 hung jury. They made an offer, you know, after that. I
5 remember telling her that she needs to consider it because
6 on the second trial the State's gonna fix all their mistakes
7 and then we proceeded to another trial.

8 Q Okay. And did you have a chance to kind of review
9 the facts of that case?

10 A I -- to be honest with you, the allegations had
11 changed. I didn't know until the other day what they had
12 changed to so I did not review what's probably more relevant
13 to what you're bringing forward today.

14 Q Okay. Do you recall what role Mark Hatten had in
15 this case?

16 A Was he either the prior owner of the car? I --
17 no, I do not recall.

18 Q Okay.

19 A I'd be guessing.

20 Q Do you recall trying to impeach his testimony with
21 his prior?

22 A I don't remember his role, so no, I do not.

23 Q I'm gonna show you -- here's a transcript from the
24 second trial and if you -- so Mr. Hatten's testimony starts
25 about on Page 305. If you could just look through that to

D. Butcher - Direct by Mr. Falk

1 kind of familiarize yourself.

2 A He was the prior owner of the vehicle.

3 Q And do you recall that -- if you'd sort of move on
4 closer to page -- I'm sorry. And do you recall that at the
5 time he was testifying he had a pending charge for malicious
6 injury to property?

7 A I -- I don't recall that, but...

8 MR. FALK: Your Honor, if I could just have a
9 minute. My notes that I made on that are still laying on my
10 desk next to my office so I'm just trying to recreate my
11 argument here.

12 THE COURT: Okay.

13 THE WITNESS: And I did just find that.

14 BY THE MR. FALK:

15 Q Okay.

16 A And I'm reading that now.

17 Q Okay.

18 THE COURT: What page are you on?

19 THE WITNESS: 312.

20 THE COURT: Okay.

21 (Pause.)

22 BY MR. FALK:

23 Q Okay. So you, during your cross-examination of
24 Mr. Hatten you wanted to ask him about his pending charges,
25 that he had a pending charge; is that right?

D. Butcher - Direct by Mr. Falk

1 A Correct.

2 Q And I think your argument was, when it was
3 objected to for relevancy is that you were trying to show
4 that it could possibly show bias?

5 A Correct.

6 Q And that he wanted to try and curry a favor by
7 being a cooperative witness. But you didn't -- so is it
8 fair to say that your argument was basically on the South
9 Carolina Rules of Evidence as far as what's impeaching
10 somebody with a prior?

11 A Yes.

12 Q Okay. But you didn't base your argument on the --
13 Ms. Epps' Sixth Amendment confrontation clause, right? Is
14 that fair to say?

15 A I didn't bring that out specifically, but I think
16 in questioning him as a witness.

17 Q The only reason why I say it is because that was
18 the issue that was raised on appeal.

19 A Uh-huh.

20 Q Is that the judge erred in -- the judge erred in
21 not allowing you to cross-examine the person based on that.
22 I mean, that was the issue that was raised on appeal so.

23 A Okay. I didn't read the appeal.

24 Q That the judge erred there. And the Appellate
25 Court said that -- and one of the issues that was raised on

D. Butcher - Direct by Mr. Falk

1 appeal was whether or not there was a -- in addition to the
2 sort of rules of evidence, there's a constitutional
3 component to that, mainly the Sixth Amendment right
4 confronting your witnesses. And although that issue was
5 briefed on appeal, the appellate court said that since you
6 did not raise the constitutional issue at trial it was
7 preserved.

8 A Okay.

9 Q All right. So that's just where I'm going.

10 A And I would defer to the record. If I didn't say
11 that was the other reason, then I guess I did not.

12 Q And so it's similar with Mr. McKnight who I think
13 at that time had more serious charges pending?

14 A And --

15 Q Theodore McKnight? I think he might have had a
16 murder charge pending?

17 A Yeah, and I think he didn't remember anything.
18 Any -- these were both proffered as I recall. And just from
19 the proffer testimony, the judge didn't rule that it was
20 prejudicial or en-- I mean, probative enough. And I think
21 one of the charges, the malicious injury, I don't think that
22 would have qualified anyway because it was a magistrate
23 level maybe.

24 Q Again, under the rules --

25 A Yeah.

D. Butcher - Direct by Mr. Falk

1 Q -- under the evidentiary rules but --

2 A Right.

3 Q -- as far as whether or not there's a
4 constitutional confrontation clause issue there, it wasn't
5 covered?

6 A I defer to the record.

7 Q Okay. Let me just, if I can grab that from you
8 again. If you could just look at your cross-examination of
9 Ms. McCray. It starts on Page 787.

10 (Pause.)

11 BY MR. FALK:

12 Q So I guess when you get to about Page 848 is where
13 there's testimony where the --

14 A Oh.

15 Q Where the State impeached McCray on his felony
16 convictions?

17 A 848, hang on. If you want to go ahead, I'm not
18 sure what all I'm supposed to read.

19 Q I'm just saying so the State, they brought up his
20 felony conviction on cross-examination.

21 A Uh-huh.

22 Q And you did not make an objection to that at that
23 time as far as whether or not that would be permissible for
24 cross-examination?

25 A I think I brought it up earlier the judge has

D. Butcher - Direct by Mr. Falk

1 ruled --

2 Q Exactly.

3 A -- but I didn't bring it up again.

4 Q There was a ruling --

5 A Yeah.

6 Q -- about 100 pages earlier.

7 A Uh-huh.

8 Q But there -- you didn't make a contemporaneous
9 objection?

10 A I -- I don't see that I did.

11 Q Okay. That's --

12 A I would defer to the record.

13 Q -- what I'm getting to.

14 A Right. I think I did at the very end of
15 everything, just all former objections. I probably didn't
16 here.

17 Q All right. And then if we can just get to the
18 State's closing argument. Let me just get the line on it.
19 Where she starts, I guess, around lines 8 and 9.

20 THE COURT: What page are you looking at?

21 MR. FALK: Page 905.

22 BY MR. FALK:

23 Q Where she's talking about, yeah, I could have
24 called Juan Ballard to the stand, but I didn't, guess what,
25 we wouldn't know anything different, something to that

D. Butcher - Direct by Mr. Falk

1 effect?

2 A Okay.

3 Q Did you consider making an objection to that
4 comment in the closing argument about witnesses that the
5 State could have called and what the witnesses would have
6 said? Did you make a -- did you consider making an
7 objection to the closing argument, that portion of it?

8 A I -- I don't see that she specifically says what
9 they would have said, just that she could have called a lot
10 more witnesses and we'd have been there a lot longer.

11 Q And we'd still know the same stuff?

12 A Yeah. I -- I try not to object to anyone's
13 opening and closing unless I think it's really hurting the
14 case because one, I think it's just not really professional;
15 but two, mainly it -- I don't think a jury likes it when you
16 make so many objections. You look like you're hiding stuff.
17 I didn't see this as hurting us.

18 Q Okay.

19 A So no, I did not.

20 Q How strong were the witnesses -- what did you
21 feel -- if going back to Hatten's testimony, how -- how did
22 that -- what kind of role did that have in the State's case,
23 do you feel?

24 A Was that Mark Hatten?

25 Q Mark Hatten, yeah?

D. Butcher - Direct by Mr. Falk

1 A Well, when we did the first trial that was one
2 thing they didn't do. They didn't bring in the prior owner,
3 anybody, to identify the key fob and the key chain; and
4 that, I think, is one reason we got a hung jury. And I had
5 told Brittany they will fix their mistakes. That was a
6 mistake they fixed. I think he was -- I think he was a fine
7 witness for the State, not for me.

8 Q Right.

9 A He identified, you know, the key and everything
10 that pretty much I think, you know, sealed the deal for a
11 jury, among other things that, Brittany had been there that
12 night and all.

13 Q And just to summarize on what you said is that he
14 didn't testify in the first trial, you got a hung jury, he
15 testified in the second trial, you got a conviction, and he
16 was able to close up some of the issues about the ownership
17 of the car. Is that right?

18 A Correct.

19 Q And then what about Mr. McKnight's testimony,
20 Theodore McKnight?

21 A And I'm sorry, I don't recall his testimony. Was
22 he the person that the girl said he was with him or and he
23 said wasn't -- I apologize, I'm...

24 Q Well, that's fine then. I'll withdraw that
25 question. Let me just grab the transcript. No, no, you're

D. Butcher - Cross by Mr. Jones

1 fine.

2 MR. FALK: Your Honor, I don't have anymore
3 questions.

4 THE COURT: Okay. Cross-exam.

5 **C R O S S - E X A M I N A T I O N**

6 BY MR. JONES:

7 Q Thank you, Ms. Butcher. The -- so Mark Hatten was
8 the prior owner of the Cadillac in this case. And could you
9 tell us some more about the Cadillac and its relevance to
10 the facts of this case?

11 A As I recall, the Cadillac was owned by the victim.
12 There were two co-defendants, Brittany and another young
13 girl, and so the victim was found dead in his car. Brittany
14 had possession of that key fob and that key chain. In the
15 first trial they had no one to come in and identify that
16 that was indeed what went with that car. For some reason, I
17 can't recall, but the key fob wouldn't open the trunk or
18 open the car, I don't, I don't know why. Maybe it sat for
19 so long or they didn't bother to -- I think they tried to
20 make it work, but they couldn't recharge or something. I
21 have no idea; I can't remember. For some reason they
22 couldn't identify it as being connected with that car in the
23 first trial. So the second trial, that's when they brought
24 in the prior owner who could identify the fob and the key
25 ring that was on it as belonging to that Cadillac. So that

D. Butcher - Cross by Mr. Jones

1 is what put Brittany in possession of the keys and
2 everything.

3 Q And do you remember if Mr. Hatten brought any of
4 the ownership documents?

5 A He did bring some ownership documents and it
6 show -- as I recall, it seemed to -- I remember it showed
7 him as the owner but maybe had been an open-back title or
8 something along those lines that transferred it to the
9 victim.

10 Q So with regard to the magistrate's court charge
11 for, I believe, malicious injury to property, would -- in
12 your estimation would calling into que-- would establishing
13 a bias for -- or would establishing that Mr. Hatten had
14 those pending charges have called in to question the
15 validity of the ownership documents that he had brought?

16 A I -- I don't think so.

17 Q All right. Thank you. The -- do you remember
18 where he obtained the -- where he said he obtained the
19 Cadillac from?

20 A I can -- I know there's something with Arizona. I
21 do not know if he lived in Arizona or he purchased it from
22 Arizona; and it even seems like, I could be totally wrong,
23 that law enforcement was able to talk to the dealership or
24 somebody out in Arizona. Maybe they brought him in from
25 Arizona; I don't know. I'm sorry.

D. Butcher - Cross by Mr. Jones

1 Q That's alright. I'll just stipulate that the
2 transcript says what it says --

3 A Okay.

4 Q -- in that respect. Similarly, the -- do you
5 remember if there was anything identifying the dealership on
6 the key fob that was found at Ms. Epps' aunt's house? And
7 if not, then I'll just stipulate that that's in the
8 transcript too at around page --

9 A It's -- it seems like the phone number for the
10 dealership was on it.

11 Q Thank you.

12 A I think that's how they found it.

13 Q Thank you. The -- and again, that would just
14 attested to in the transcript Page 379, I believe. And do
15 you remember why the judge ruled that Mr. Hatten's prior
16 pending charges were not rel-- or were not probative or were
17 more prejudicial than probative?

18 A It seems like there were two charges. Please
19 correct me if I'm confusing this. One was just a magistrate
20 charge or something like that. The other charge was not a
21 crime of dishonesty, I believe was why.

22 Q Okay. And I apologize for asking you these
23 questions about this 2016 case here so.

24 A And I'm sorry, if I'd known the exact allegations
25 I would have.

D. Butcher - Cross by Mr. Jones

1 Q I apologize, but the -- I want to move on to Mr.
2 McCray. The -- Mr. Falk went in to about that you raised
3 the objection initially in your motion in limine to exclude
4 his felony convictions from being used to impeach him. Is
5 that correct?

6 A If the record says that, yes.

7 Q All right. And did you renew those objections at
8 a later point?

9 A Typically at the end of each case I ask to renew
10 all objections in case I forgot something along the way so I
11 believe I did that in this case. So that's when I would
12 have...

13 Q All right. The -- as for the arguments against
14 Mr. -- or the Solicitor's closing arguments, I believe you
15 testified to your trial strategy in that respect; but I'd
16 also ask, did you bring up Officer Ballard's lack -- failure
17 to testify in your closing argument?

18 A I would have to defer to the record, I'm sorry.

19 Q All right. Well, then I'll just stipulate that
20 the transcript shows what it shows. And do you remember
21 the -- whether there was any DNA evidence in this case?

22 A I don't believe there was any DNA evidence --

23 Q Okay.

24 A -- if I -- well, I don't recall. Maybe there was
25 something from the car. If you can refresh my memory, I'm

D. Butcher - Cross by Mr. Jones

1 sorry.

2 Q That's all right. Sure, hang on.

3 MR. JONES: I beg the Court's indulgence.

4 THE COURT: What page?

5 MR. JONES: This is Page 598 to 599.

6 THE WITNESS: Oh, yeah. Okay, it was.

7 Co-defendant's DNA that was found on some clothing.

8 BY MR. JONES:

9 Q And the --

10 A I think she -- the -- Brittany's could not be
11 excluded from one piece --

12 Q All right.

13 A -- from the hoodie.

14 Q And finally, do you recall Mr. McKnight's
15 relevance to the -- to the theory of the defense?

16 A Could you just refresh my memory as what his role
17 was? I apologize.

18 Q Yeah. Mr. McKnight, the -- and was known to
19 Ms. Epps. I believe Ms. Epps and the co-defendant lived
20 in -- in his house, and there was some question whether he
21 had been present at the -- at the scene of the crime and
22 the -- sorry.

23 A Yeah. And he -- I think he said he wasn't there
24 at the time, and I think the question on that 'cause it
25 seems like Brittany was saying he was present when they

D. Butcher - Cross by Mr. Jones

1 dropped her off somewhere and but he -- that's not how his
2 testimony went.

3 Q All right. And if -- and do you recall
4 Mr. McCray's, the relevance of Mr. McCray's testimony
5 regarding Mr. McKnight?

6 A No, I'm sorry.

7 Q All right, it's okay. The -- again, I'd submit
8 that the record speaks for itself in that respect that --

9 THE COURT: It does, so why don't you just ask her
10 about it.

11 MR. JONES: All right.

12 BY MR. JONES:

13 Q In that case -- so, in other words, Mr. McCray was
14 trying to -- or your argument at the end that Mr. McCray's
15 testimony about what he was told in the jail by
16 Mr. McKnight, were you attempting to use that to impeach
17 Mr. McKnight's denial of being present at the scene?

18 A I was. And I apologize. The mother, I think, of
19 Brittany Epps had said was good friend of McCray, as I
20 recall, and I think that's where that came out. But he, I
21 think in the end it didn't -- he didn't say that Theodore
22 McKnight had said what he said, what they were saying.

23 Q All right. That's all the questions I have at
24 this time. Thank you.

25 THE COURT: Any redirect?

D. Butcher - Redirect by Mr. Falk

1 MR. FALK: Yes, Your Honor.

2 **R E D I R E C T E X A M I N A T I O N**

3 BY MR. FALK:

4 Q If you can look, this is part of the proffer from
5 McKnight in your cross-examination sort of starting on Page
6 777, and we're talking about statements that he made to
7 McCray. And if you look at -- so if you look at Page 778,
8 Line 25 through 779, Line 8, is there not a discussion
9 there about McCray and McKnight discussed the shooting death
10 of Brown while the two were in the jail?

11 A I asked him about a statement he made; he denied
12 it.

13 Q And also you were asking him about the statement
14 that he had made that McKnight and Jackson planned to rob or
15 just planned to just rob Mr. Brown but somehow he ended up
16 getting shot, and that shows up on Line 17 through 20 on
17 Page 779 and 15 through 19 on Page 780?

18 A 779, 16 through 20, I don't think that -- what
19 page are you talking about? It's not on that page.

20 Q All right.

21 A Brittany had said he was with him and he dropped
22 her off at a store prior to them going to rob the victim and
23 then the victim got shot. He was just saying I wasn't
24 there, I didn't do that, you know.

25 Q Okay.

1 A And he denies it. He just denied everything.

2 Q So what was the strategy in calling McKnight?

3 A Well, Brittany had told me he was the witness
4 that -- and kept insisting he was there and he knew I got
5 dropped off, and so that's why I called him.

6 MR. FALK: No further questions.

7 THE COURT: Okay.

8 MR. JONES: No recross, Your Honor.

9 THE COURT: All right. Thank you. You may step
10 down.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: Thank you.

13 MR. FALK: We have no other witnesses.

14 THE COURT: All right. Do you have anything?

15 MR. JONES: The State has no witnesses. If you'd
16 like, Your Honor, we could have a -- the State's argument
17 was basically going to be based on the record and legal
18 arguments arising from it. I don't know if you'd like us to
19 send a brief or just make an argument here on the record.

20 THE COURT: Well, let's why belabor the point. Go
21 ahead. What do you want -- why should I grant a PCR,
22 Mr. Falk?

23 MR. FALK: Your Honor, 'cause we believe that the
24 testimony, first of all, I believe that the testimony --
25 excuse me, the closing argument where the State is in effect

1 saying why -- what Mr. Barr would have testified to was an
2 improper statement to make during the closing argument and
3 trial counsel, the only explanation for not doing anything
4 about that was basically not -- her trial strategy was she
5 didn't like to interrupt closing arguments. But we, we
6 maintain that that statement kind of bolstered the rest of
7 their witnesses and that had they called him, he would
8 have -- he would have said the same thing that EMT,
9 Mr. Barr, would have said the same thing.

10 And with regard to the cross-examination testimony
11 of Mr. Hatten who we believe is a key witness in this case
12 'cause that is the witness, one could look and think that
13 that witness may have made the difference in this case and
14 that he wasn't called the first time there was a mistrial.
15 He was called the second time and there wasn't a mistrial,
16 and they got the conviction and his testimony regarding the
17 ownership obviously was important. We believe that our
18 client had a right under the constitutional right to
19 cross-examine him and that that right to cross-examine is
20 more expansive than the rights -- or than the procedure
21 allows under the South Carolina Rules of Evidence and the
22 fact that -- and that is the issue that the --

23 THE COURT: So are you suggesting that the rules
24 of evidence are unconstitutional?

25 MR. FALK: No, I'm --

1 THE COURT: That's the basis of that argument?

2 MR. FALK: No, not at all. No, not at all. I'm
3 saying that the weighing, the weighing that the Court has
4 to -- the Court has to make a weighing of, you know, what's
5 more probative and what's not; but that we believe that that
6 analysis is different when it is regarding testimony in a
7 criminal case and where that testimony would then limit
8 their right to confront the witness.

9 THE COURT: And this is about a non-conviction,
10 correct?

11 MR. FALK: Yes, Your Honor.

12 THE COURT: Okay, all right. Any other?

13 MR. FALK: No, Your Honor.

14 THE COURT: Okay. Anything the State want to say?

15 MR. JONES: To address those issues, first
16 regarding the closing argument, the -- Mr. Falk said that
17 the -- that Ms. Butcher's only reason for not objecting to
18 it that she brought up was the trial strategy, that's not
19 entirely true as the -- as she stated and as the record
20 reflects, the State pointed out that bringing up every --
21 absolutely every witness who had been involved in the
22 investigation would be -- would be an unduly burdensome
23 waste of court time. The -- the solicitor's statements in
24 that respect was actually made in reference to a statement
25 by Ms. Butcher saying in the course of her argument

1 attacking the quality of the State's investigation basically
2 that why didn't they call Officer Ballard, among other
3 things. And in rebuttal to that, the State made the
4 argument that Mr. Falk is complaining of. We would -- the
5 State now -- now we argue that not only was there -- was the
6 State's point mainly regarding the undue waste of court
7 resources that would be caused by calling all these
8 different investigators to come up and testify, but also
9 that Ms. Butcher's trial strategy reason was sound. The --
10 it doesn't always look good to come up and make objection
11 after objection during a closing argument. And also, it can
12 bring attention to portions of the State's closing argument
13 that might be better not having the jury's attention brought
14 to them. However, that's -- that's how we would respond to
15 that issue.

16 The other issue brought up about Mr. Hatten, the
17 man with the Cadillac key fob, the key fob was recovered
18 after the crime at -- in the vicinity of Ms. Epps' aunt's
19 house. It had the number of the Arizona dealership on it so
20 the State would argue that Mr. Hatten's testimony in the
21 second trial is not what sunk her case. It -- his testimony
22 merely corroborated what could be inferred from the
23 distinctive number on the key fob itself that this was the
24 key fob that belongs to the Cadillac that Mr. Brown was
25 killed in.

1 In addition, the probative weight of such a minor
2 conviction, or not even conviction but pending charge, and
3 that the argument seems to be that Mr. Hatten might have
4 been misrepresenting his ownership of the -- of the car or
5 the characteristics of the key fob in exchange for, who
6 knows, some leniency or something on that, on those charges.
7 It's simply the State would argue that's far too weak to say
8 that counsel is ineffective for going into it. It's also
9 worth pointing out that counsel did -- did raise the issue
10 and attempts to get the charges brought up before the jury,
11 but the judge ruled that this would be more prejudicial than
12 probative. And, of course, the judge's belief on that is in
13 accord with the State's position this was not probative at
14 all so there's plenty of evidence about the identity of the
15 key fob.

16 As for the issues regarding Mr. McKnight and
17 Mr. McCray, Mr. McCray's testimony was simply that of a,
18 again, a sort of jailhouse informant who said that he was
19 receiving this information from Mr. -- from Mr. McKnight.
20 Mr. McKnight completely denied it. The -- Mr. Falk has not
21 actually brought up a reason why there was anything wrong
22 with the State impeaching Mr. McCray with his -- his
23 criminal record, because the State now submits there is no
24 reason for it and Ms. Butcher was not ineffective for
25 failing to not only raise, which she did raise the issue,

1 but re-raise it again and again to obtain -- to try to
2 obtain a different result when there's not even been an
3 argument made that a different result would have been proper
4 in this case.

5 So for all those reasons, the State submits
6 Ms. Epps has not alleged ineffective assistance of counsel
7 sufficient to merit a grant of post-conviction relief.
8 Thank you, Your Honor.

9 THE COURT: Okay. I'm going to agree with the
10 State. I don't think -- I think it's very questionable
11 whether or not Defense counsel's conduct fell below an
12 objective standard of reasonableness which I don't believe
13 it did. And even if it did, I don't find that the -- had
14 she done those things it would have prejudiced, it would
15 have been enough to turn the jury's mind in this case.

16 So I'm going to deny your PCR, Ms. Epps, and hope
17 you're doing well. Where are you? Where do they have you?

18 PETITIONER EPPS: Camille.

19 MR. FALK: I think she's saying Camille Graham.

20 THE COURT: Okay. Are you doing all right? Okay,
21 all right. Well, I wish you the best of luck.

22 I would ask the State to prepare an order to
23 reflect those findings along with the arguments that you
24 made and I agree with.

25 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA))
COUNTY OF FLORENCE)

I, FRANCES B. RAY, Registered Professional Reporter (RPR), retired court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this
24th day of January, 2026.

FRANCES B. RAY, RPR
Third Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)
BRITTANY EPPS, #369462)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
_____)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

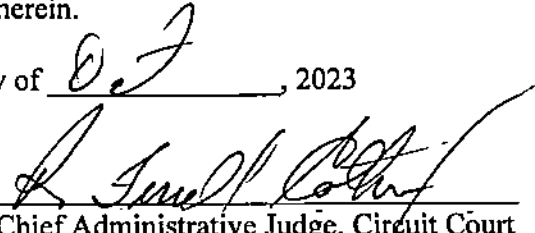
2019-CP-45-296

**CONSENT ORDER TO
SUBSTITUTE COUNSEL**

It appears to the Court that Applicant's court appointed counsel, James K. Falk, is deceased and Applicant needs new counsel appointed. Because Mr. Falk was appointed pursuant to a contract with the SC Commission on Indigent Defense, SCCID moves this court to appoint CHESLEY F. MARTO to substitute as new counsel for the Applicant. Attorney Marto consents to this substitution of counsel.

NOW, THEREFORE, IT IS HEREBY ORDERED that **CHESLEY F. MARTO** is appointed as the counsel of record for the Applicant herein.

AND IT IS SO ORDERED this 4 day of Oct, 2023


Chief Administrative Judge, Circuit Court
Third Judicial Circuit

I SO MOVE:

s/ Hervery B. O. Young

Hervery B. O. Young, SC Bar 7013
Counsel for SCCID

I CONSENT:

s/ Chesley F. Marto

Chesley F. Marto, SC Bar 104191

FILED

10/10/2023
Williamburg County
Clerk of Court
Kingstree SC

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Brittany Epps, #369462,)
Applicant,)

Case No.: 2019-CP-45-00296

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

CLERK OF COURT
DEBORAH BUTCHER
JULIE SWILLEY
KIMBERLY BARR
JAMES FALK
ZACHARY JONES

This matter comes before this Court by way of Applicant's post-conviction relief application filed May 15, 2019. Respondent made its return on September 10, 2019, requesting an evidentiary hearing be convened. An evidentiary hearing was held on October 31, 2022, at the Sumter County Courthouse. James Falk, Esquire, represented Applicant. Assistant Attorney General Zachary Jones represented Respondent.

Deborah Butcher, Esquire ("Counsel"), also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet her requisite burden of proof of establishing she is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. In August 2014, the Williamsburg County Grand Jury indicted Applicant for murder and possession of a firearm during the commission of a violent crime (2014-GS-45-0159).

On March 28, 2016, Applicant proceeded to a jury trial before the Honorable Howard King, circuit court judge. Counsel represented Applicant. Assistant Solicitors Kimberly Barr and Julie Swilley, Esquires, prosecuted the case. The jury was hung and Judge King declared a

mistrial accordingly.

On July 26, 2016, Applicant proceeded to trial before Judge King, and a jury. Counsel represented Applicant at trial and Barr prosecuted the case. Applicant was found guilty as indicted and sentencing was deferred upon consent of the parties, due to Applicant's age.

On August 24, 2016, Applicant appeared before Judge King for sentencing. After thoroughly considering the factors addressed in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), Judge King sentenced Applicant to a forty-five-year sentence for murder and a concurrent five-year sentence for the weapons offense.

Applicant filed a timely notice of appeal that was perfected by Appellate Defender Susan Hackett, Esquire. The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Epps*, Op. No. 2018-UP-415 (S.C. Ct. App. Filed Nov. 7, 2018). The Remittitur was issued on November 28, 2018.

Summary of Relevant Facts

Jessica Jackson ("Jackson") participated in the murder of Joseph Brown with her girlfriend, Applicant, and Jackson was the State's primary witness. Jackson and Applicant met in February of 2013 at a group home where they both lived. (Trial Tr. 160-161.) Although Jackson was from Myrtle Beach, she traveled back to Williamsburg County to see Applicant. (Trial Tr. 161.) She eventually moved to Williamsburg County to live with Applicant at a friend's house. (Trial Tr. 164.) The friend, Theo McKnight, was in his forties and lived in a four bedroom home with no running water and plywood on the floor. (Trial Tr. 165 – 169.) Neither Applicant nor Jackson was employed, and they relied on family for food. (Trial Tr. 169-170.)

Jessica said the women first met Joseph Brown ("Victim") at the Sonoco gas station. (Trial Tr. 172.) Applicant's aunt had given them a ride, and the women saw Victim in his Cadillac, parked

at the station. (Trial Tr. 173.) Applicant approached Victim and asked him where she could “get a good grill.” (Trial Tr. 174.) Jackson testified Victim asked Applicant if he could have sex with Jackson for money, and Applicant said no. (Trial Tr. 175.) Victim told Applicant if they changed their minds, they could come to his home. (Trial Tr. 175.) Later, when the women returned to McKnight’s house, they discussed tying up Victim and robbing him. (Trial Tr. 177.)

The women did not see Victim until two weeks later. (Trial Tr. 178.) On the day of the shooting, Applicant told Jackson she felt “like being bad” and then described her plan to rob Victim. (Trial Tr. 188.) When Jackson asked how Applicant planned to rob Victim, Applicant said they could overpower him because of his age. (Trial Tr. 189.)

The women walked to the store to get something to eat and drink and then walked to the building where Victim lived. (Trial Tr. 190.) When they arrived, Victim was sitting outside in his chair. (Trial Tr. 191.) The women sat outside with him and talked. Applicant reassured Jackson that “she had this.” (Trial Tr. 191.) Victim told the women he had to drive a friend to the store, and he allowed the women to stay in his apartment until he came back. (Trial Tr. 192.) While he was gone, the women looked through his belongings to find anything of value to steal. (Trial Tr. 192.) Jackson stole a pack of T-shirts and a pocketknife. (Trial Tr. 192.)

When Victim returned, his nephew was with him. (Trial Tr. 197.) Applicant and the nephew, Arthur Gamble, discussed the engine in Victim’s Cadillac. The conversation also turned to Victim’s ability to take care of himself in spite of his age and the crime in the area. (Trial Tr. 197.) To prove he could take care of himself, Victim pulled a gun from his pocket to show the women. (Trial Tr. 197.)

The women agreed to go with Victim to a cookout at his nephew’s house. (Trial Tr. 200.) Victim placed his gun in the glove compartment of the car and drove the women in his Cadillac.

(Trial Tr. 231.) Jackson had second thoughts about robbing Victim after seeing his gun and agreeing to go to the cookout. (Trial Tr. 202-203.) The trio stayed at the cookout for approximately two hours before they left together. (Trial Tr. 203.) As they were leaving, the women got into the car while Victim remained outside and spoke to his family members. At this point, Applicant told Jackson she planned to shoot Victim. (Trial Tr. 204-205.) Applicant wanted to kill Victim to steal his gun and his car. (Trial Tr. 207.) The plan was for Jackson to cut the straps off of her purse, wrap them around Victim's neck to "be a distraction," and then Applicant would take the gun from the glove compartment and shoot him. (Trial Tr. 207-208.) The women decided they would lead Victim to a deserted area, and then when Applicant used the code words "take off," Jackson would strangle him with her purse straps. (Trial Tr. 209.)

Applicant told Victim to drive down a dark road to drop them off, claiming it was where they lived. Victim became suspicious and started to get agitated. (Trial Tr. 212-213.) As he approached the driveway of an abandoned mobile home, Applicant used the code words and Jackson put the purse straps around Victim's neck. (Trial Tr. 213-215.) Because her hands were sweaty, Jackson let go of the straps, and then Victim and Applicant both struggled to get the gun. (Trial Tr. 215.) In the struggle for the gun, Applicant accidentally shot Jackson in the thumb. (Trial Tr. 215-216.) Jackson saw that the car was going to crash into the woods, so she jumped out of the car. (Trial Tr. 216.) Jackson thought she heard two more shots. (Trial Tr. 216.)

Once Jackson realized she was shot she began panicking. (Trial Tr. 220-221.) Applicant got out of the car and walked to the other side of the field near where the car crashed. (Trial Tr. 221.) Applicant was angry with Jackson for panicking and called her derogatory names. (Trial Tr. 222.) When they finally turned their attention to Victim, the women realized he was still alive, so Applicant shot him again. (Trial Tr. 222-223.) Applicant told Jackson she needed help putting the

body in the trunk. Jackson protested at first but then helped her move Victim from the driver's side to the trunk of the Cadillac. (Trial Tr. 222-223.) The plan was to take his body to Applicant's grandmother's property and throw his body into the swamp. (Trial Tr. 233.) At some point during the commotion, Jackson took the gun from Applicant and put it back in the glove compartment. (Trial Tr. 242.)

The women realized the Cadillac was bogged down in the mud, so Applicant went into the abandoned mobile home and found two pieces of wood to wedge under the tires. (Trial Tr. 231 - 232.) They were unsuccessful in moving the car. (Trial Tr. 232.) They decided to walk to their neighbors ask for help with pulling the car out of the woods, and also to call 911 for Jackson's finger. (Trial Tr. 234 - 237.)

A neighbor testified Applicant and Jackson knocked on her door late the night of the murder. (Trial Tr. 65.) Applicant told the neighbor she needed to use her phone to call for an ambulance because her friend had been shot in the hand in a hunting accident. (Trial Tr. 66-67.) Applicant told the neighbor they had been on her father's land hunting with antique guns when the accident happened. Because her phone was not working, the neighbor sent the women across the street to another house to ask for a telephone. (Trial Tr. 70-71.)

When Officer Craig Staggers, of the Kingstree Police Department, arrived on the scene, he found two women: Applicant was wearing sweats and Jessica Jackson was wearing athletic shorts, a bra, and had her shirt wrapped around her injured hand. (Trial Tr. 78.) Applicant told Staggers the women were hunting squirrels when Jackson accidentally shot herself in the hand. (Trial Tr. 80.) When Staggers asked Applicant why they did not drive to the hospital, Applicant told him their car was bogged down at Windy's Club. (Trial Tr. 80-81.) Applicant also said she gave the gun back to her uncle. (Trial Tr. 81.) Staggers found the story suspicious because the women had

not driven directly to the hospital and could not produce the gun. (Trial Tr. 84.) EMS arrived and transported Jackson to the hospital shortly after midnight. (Trial Tr. 79.) Applicant told Stagers she would walk to her aunt's house, which was located in a nearby subdivision, and get a ride home from there. (Trial Tr. 89-91.)

Samuel Barr heard a call go out on his police scanner that shots had been fired on Kendall Park Road. (Trial Tr. 98.) Because he was curious, Barr drove out toward Kendall Park Road to see what happened. (Trial Tr. 98.) Across the street from Windy's Club, Barr noticed a car bogged down in the woods. (Trial Tr. 96-101.) As Barr was looking at the car in the woods, Applicant walked up to him and said, "Look what my girlfriend made me do. She made me drive my car in the woods." (Trial Tr. 101.) Barr asked where Applicant's girlfriend was, and Applicant said she was "in the ambulance back up there at the house." (Trial Tr. 104.) Applicant then walked off in the direction of a nearby neighborhood. (Trial Tr. 142.)

Investigator Kennedy responded to the call of the accidental gunshot victim sometime about 12:30 am. (Trial Tr. 351-352.) When he arrived in the neighborhood, the ambulance had taken Jackson to the hospital, and no one was present. (Trial Tr. 352.) One of the earlier responding officers told Kennedy that Applicant mentioned a car being bogged down near Windy's Club, so he drove to the area to investigate. (Trial Tr. 352-353.) Kennedy found the Cadillac stuck in the woods, noticed the car door open, and saw blood on the interior and the trunk. (Trial Tr. 356-359.) The officers attempted to open the trunk but could not. Kennedy arranged to tow the Cadillac to the impound lot for further investigation, while he looked into the whereabouts of the victim. (Trial Tr. 361-362.) One of the deputies found Jackson's purse and identification in the back seat. (Trial Tr. 360.) After talking to the victim's family, Kennedy decided to try the trunk of the car again, and he was able to pry open the trunk enough to see Victim's body inside. (Trial Tr. 365-367.)

On March 31, Kennedy attended a search of the home of Applicant's aunt. (Trial Tr. 374.) In the grassy area in front of the aunt's house, Kennedy noticed a Cadillac key fob on the ground. (Trial Tr. 375.) The key chain and fob had distinctive branding of a former Cadillac dealership and phone number from Arizona. (Trial Tr. 379.)

Arnold Gamble was the victim's nephew and hosted the cookout the day of the shooting. (Trial Tr. 125-126.) Gamble confirmed that at about 3:00 pm that afternoon, Victim left the cookout in his Cadillac and then later returned, driving the same Cadillac, accompanied by Applicant and Jackson. (Trial Tr. 126-129.) The trio stayed at the cookout until approximately 9:30 pm, and Gamble made plans to see his uncle the following morning. (Trial Tr. 129-130.) When they left in the Victim's car, Gamble confirmed Victim was driving, Applicant was in the front passenger seat, and Jackson was in the back seat behind the driver. (Trial Tr. 130-131.) Gamble learned of his uncle's death the next day, when the sheriff's department notified him about finding his body. (Trial Tr. 132-133.)

The State's pathologist testified the only signs of injury to the body of Victim were the gunshot wounds to his head. (Trial Tr. 502-503.) The eighty-seven-year-old victim was five feet, ten inches tall and weighed one hundred seventy-six pounds. (Trial Tr. 504.) One bullet wound indicated the bullet entered the left temple and exited behind the left ear. That wound was not fatal. (Trial Tr. 506-507.) Another gunshot wound entered the bony area above the right eyebrow, traveled through the sinuses and the face and stopped in the left side of Victim's neck. (Trial Tr. 507-508.) The third wound entered on the top of Victim's head, through the brain, and ended in the base of the skull. (Trial Tr. 509.) Victim's toxicology report came back negative for drugs and alcohol. (Trial Tr. 519.)

The purse straps in the rear floorboard of the Cadillac contained the DNA of Jackson and Victim. (Trial Tr. 589-591.) Jackson's DNA was present on the red shorts she was wearing the night of the murder and a plastic bag found in the backseat floorboard of the Cadillac. (Trial Tr. 591-592.) Jackson's DNA was also on the center of the back seat. (Trial Tr. 595-596.) The camouflaged hoodie found on the passenger floorboard of the front seat contained a mixture of DNA from Jackson and Applicant. (Trial Tr. 598-599.)

Jackson first told police she hurt her hand in a hunting accident. (Trial Tr. 246.) She then changed her story and told investigators Victim tried to rape her. (Trial Tr. 246-247.) When the police didn't believe Jackson was able to place the body in the trunk by herself, she then said Applicant was present but had nothing to do with the shooting. (Trial Tr. 247-248.) Not long after her incarceration, she told the officers about their plan to rob and kill Victim. (Trial Tr. 248-250.)

Applicant testified in her own defense at trial. She admitted that she left the cookout with Victim and Jackson in Victim's Cadillac after the cookout, although she claimed Theo McKnight was with them. (Trial Tr. pp.656-57). She also admitted that she accompanied the group to Kendall Park Road near Windy's Club. (Trial Tr. pp.658-59). However, she claimed that she was dropped off at "Ms. Bee store" to get some marijuana; then, while she was walking back on foot along Kendall Park Road, she saw Jackson sitting down in the driveway near a trailer in front of Windy's Club. (Trial Tr. pp.660-61; p.662, lines 5-8). Applicant claimed Jackson's fingers started to bleed, causing them both to panic and start yelling. (Trial Tr.p.661, lines 2-7). Applicant testified that the two women went to a neighbor's house to call an ambulance, and Theo McKnight appeared and started walking with them. (Trial Tr. p.662, lines 13-24). Applicant admitted she lied to police about the gun being with her uncle. (Trial Tr. p.664, lines 8-11). She also claimed

she did not know how Jackson's hand was injured, but she told police it was injured in a hunting accident because that was what Jackson told her to say. (Trial Tr. p.664, lines 15–25). She claimed Theo McKnight was present when she made the 911 call, but he left sometime afterward without her noticing. (Trial Tr. p.669, lines 9–20). She denied making any plans to rob or kill the victim, and she claimed she did not know how he was shot; the last time she saw him was when he dropped her off at Bee's store. (Trial Tr. pp.674–75, p.677, lines 5–7).

The defense then called Theo McKnight, who testified—contrary to Applicant's testimony—that he was home all night on the date Victim was killed. (Trial Tr. pp.821–25). The defense then called Schain McCrae, who testified that he had been incarcerated with Theo McKnight and that McKnight had confessed that he and Jackson had participated in the robbery and killing of Victim after Applicant had been dropped off. (Trial Tr. pp.844–46).

Current Action Before this Court

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

1. Ineffective assistance of counsel
2. Co-defendants statements/testimony invalid
3. Trial court error concerning the jury
 - a. "misinformed"
4. New evidence
 - a. Co-defendant confession

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of counsel for:
 - a. Failure to properly impeach Mark Hatten with his criminal record and to properly preserve this issue on appeal by alleging that failure to admit the record would have constituted a Confrontation Clause violation.
 - b. Failure to properly impeach Theodore McKnight based on his prior record by raising the issue was a Confrontation Clause issue.
 - c. Failure to contemporaneously object to the State mentioning Shae McCrae's felony convictions during cross-examination.
 - d. Failure to object to the State's closing argument when they mentioned

witnesses that they did not call at trial and stated what they would have testified to.

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

Summary of Counsel's Testimony

Counsel testified that Applicant's case was conflicted out to them from the Public Defender's Office. (PCR Tr. 5). She testified that this case was tried twice because the jury was hung the first time. (PCR Tr. 5). She stated that the State extended a plea offer and that she encouraged Applicant to take it because the State would correct their mistakes before proceeding to the second trial. (PCR Tr. 6).

She testified that she did not remember Mark Hatten's role in the case and did not remember impeaching him with his prior record. (PCR Tr. 6). Upon reviewing the trial transcript, she testified that he was the prior owner of the vehicle. (PCR Tr. 7). She testified that she did not remember that he had a pending malicious injury to property charge but saw that she asked him about the charge upon reviewing the transcript. (PCR Tr. 7). She testified that the malicious injury charge did not qualify because it was a magistrate level offense. (PCR Tr. 9). She stated that she argued that when the State objection based on relevance, she argued that she was trying to establish bias. (PCR Tr. 8). She stated that she did not base her argument on the violation of the Confrontation Clause in Applicant's case. (PCR Tr. 8). She stated that she would defer to the record regarding the question of whether she properly preserved an allegation of the violation of the Confrontation Clause on appeal. (PCR Tr. 9).

Counsel was questioned regarding the fact that Theodore McKnight had a pending murder charge. She testified that he provided proffer testimony but did not remember anything and the Court ruled that the pending murder charge was not probative enough. (PCR Tr. 9). She

deferred to the record when asked if she raised a Confrontation Clause issue. (PCR Tr. 10).

Counsel did not contemporaneously object to the State raising Shae McCrae's felony convictions during cross-examination, though she testified that she brought this objection up to the Court beforehand. (PCR Tr. 10-11).

Counsel testified that she did not object to the Solicitor's closing when the prosecutor mentioned witnesses they could have called and what they would have said. (PCR Tr. 11-12). She testified that she does not object during opening and closing arguments "unless I think it's really hurting the case" because it is not professional and because the jury does not respond well to a flurry of objections and comes to believe that you are hiding things. (PCR Tr. 12). She stated that she did not think the State's comments would hurt the defense. (PCR Tr. 12).

Counsel testified that the State did not call Mark Hatten, the prior owner of the Victim's Cadillac, to identify the key fob and chain at the first trial, which Counsel believed contributed to the jury being hung. (PCR Tr. 13). She stated that she told Applicant that this would be corrected at the second trial, which it was. (PCR Tr. 13). She stated that he identified the key, which solidified the jury's finding that Applicant was there that night. (PCR Tr. 13).

On cross-examination, Counsel testified that the Cadillac was owned by the victim and that Applicant was in possession of the key fob and chain. (PCR Tr. 14). She stated that the State could not connect the key fob and the car at the first trial, but that this was corrected at the second trial through bringing on the prior owner of the car to identify the fob and key ring. (PCR Tr. 14). Counsel testified that Mr. Hatten had brought documents proving his prior ownership of the Cadillac, and she did not believe that questioning Mr. Hatten about his pending magistrate level offense would call into question the validity of those documents. (PCR Tr. 15). Counsel also explained that the trial court sustained the State's objection to bringing up Mr. Hatten's

pending charge when Counsel attempted to do so. (PCR Tr. 16).

Counsel testified that she initially objected to Mr. McCrae's felony convictions being used to impeach him and she renewed all objections in the case towards the end of the trial. (PCR Tr. 17). She also testified that she did not recall if she argued in closing that Officer Ballard failed to testify at trial but rested on the record. (PCR Tr. 17).

Counsel did not recall the DNA evidence from the trial; however, on reviewing the transcript, she testified that DNA found on some clothing matched Applicant and her co-defendant. (PCR Tr. 17-18). She testified that Applicant claimed Theo McKnight was at the crime scene that night, but his testimony was different. (PCR Tr. 18-19). Counsel attempted to impeach him on this point at trial. (PCR Tr. 19).

On redirect, she testified that McKnight denied discussing the case with McCrae when in jail. (PCR Tr. 20). She testified that he denied involvement in the crime when on the stand. (PCR Tr. 20). She testified that he was called because Applicant was insistent on calling him to establish that he was present and knew she was dropped off at a store prior to the robbery. (PCR Tr. 20-21).

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Williamsburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the mistrial, trial, and sentencing transcripts, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina

Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong

presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. For a reviewing court to find prejudice, “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Mark Hatten

Counsel was not constitutionally ineffective for failure to raise the Court’s decision to exclude Hatten’s criminal history from being entered into evidence as a Confrontation Clause violation or for failing to preserve this issue on appeal. The record shows that Counsel did attempt to impeach Hatten with his pending charges, but the trial court ruled that the charges were inadmissible because their probative value was substantially outweighed by their prejudicial effect. (Trial Tr. p.313–p.318). Regardless of what basis Counsel sought to enter the

impeachable evidence under, she still needed to establish relevance; something Counsel was unable to do. Counsel attempted to bring this information up at trial. Thus, the issue is not whether this was addressed by Counsel but rather that the Court did not rule in Applicant's favor. Failure to procure a favorable ruling from the Court does not render Counsel deficient. Further, there has been no showing that Applicant was prejudiced even if this Court were to find Counsel deficient. As the trial court correctly noted, Hatten's testimony that he had previously owned the car and could identify the key fob was corroborated by the paperwork proving his prior ownership and by the identifiable features of the key fob itself. Thus, relief is denied on this ground.

Theodore McKnight

Counsel was not constitutionally ineffective for failure to raise the Court's decision to exclude McKnight's pending murder charge from being entered into evidence as a Confrontation Clause violation. The trial transcript clearly reflects that Counsel attempted to bring up this charge for impeachment purposes, but the Court ruled that it was inadmissible. (Trial Tr. 639). This charge was not admissible pursuant to Rule 609, SCRE, which concerns only proof of a prior *conviction*.

In addition, it must be remembered that McKnight was called as a witness by the *defense*, not by the prosecution. Of course, a party may impeach its own witness under Rule 607, SCRE, and the trial court in fact permitted Counsel to impeach McKnight through the testimony of Schain McCrae. Counsel was able to call McCrae and to question him extensively about a purported jailhouse confession made by Theo McKnight while the two of them were incarcerated together. This not only allowed Counsel to argue that McKnight had previously confessed to his involvement in the crime, but it also necessarily implied that McKnight had been arrested and

incarcerated, which made the fact that he had a pending charge for murder much less probative than it would have been if there had been no evidence of McKnight's incarceration. To the extent Counsel wanted to establish that McKnight had a potential motive to testify against Applicant due to his incarceration, McCrae's testimony would have been sufficient to support such an inference. The evidence of McKnight's pending charge would be mostly cumulative to McCrae's testimony.

The only additional effect from specifying the nature of McKnight's pending charge would be to show the jury that he had been charged with an unrelated murder. This would have been highly prejudicial, since Applicant's position was that McKnight participated in the murder of Victim; evidence that McKnight was arrested for a different murder would have had a strong tendency to act as propensity character evidence, which is inadmissible. *State v. Robinson*, 438 S.C. 421, 435, 882 S.E.2d 883, 891 (Ct. App. 2023). It is highly likely that the trial court would have determined that the prejudicial effect of this evidence would have substantially outweighed its marginal probative value.

Regardless of what ground Counsel might have raised to argue that this evidence should come in, this Court finds it is not reasonably likely that the evidence would have been admissible. Accordingly, the Court finds Counsel was not deficient, nor was Applicant prejudiced. Thus, relief is denied on this ground.

McCrae

Applicant has failed to establish that Counsel was constitutionally ineffective for failure to renew their objection to the State's mention of Mr. McCrae's prior criminal history on cross-examination. Counsel acknowledged at the PCR hearing that they initially objected to entry of criminal history but failed to renew this objection so it could be properly preserved on appeal.

Applicant has failed to establish how, if Counsel had renewed this objection at trial, the Court's decision would have been different from its initial decision on the matter or how the appellate court would have decided this matter in a way favorable to Applicant. It should be noted that McCrae was impeached with a prior *conviction*, not merely a pending charge, and that there was never any argument that McCrae "acted in conformity with" any of his convictions which would suggest impermissible propensity character evidence. Accordingly, this Court finds it is not likely that merely renewing the same objection would have caused the trial court to change its decision, nor would the court of appeals be likely to reverse it on appeal under the deferential abuse of discretion standard. Applicant has failed to establish prejudice and relief is denied accordingly.

Closing Argument

Counsel was not constitutionally ineffective for failure to object to the State's closing argument. Specifically, the prosecutor argued in closing:

Yeah, I didn't call Juan Ballard. Guess what? I didn't call about 10, 15 different people that I could. I guess I could have called, had every EMS worker who came out there, could have had the firefighter come out here, put Ballard up, could have put all the SLED agents who were involved. Now we'd be here till next month or the month after; but yeah, I could have done that. And guess what, folks, you wouldn't know no more than a month down the road than you know right now. You'd just have 10, 15 different people saying the same thing. So I don't want you to buy that whole notion 'cause it's easy to just try to, you know throw stuff out there. It's a trick that we like to do with folks. We don't want you focused right here on the truth so we tell you, oh, we throw a little rock over there, look over there. That's what the Defense is doing to you today.

Tr. 905-906.

This argument appears to be a response to Counsel's earlier argument criticizing the State for failing to call Officer Juan Ballard as a witness: "Did you notice Officer Ballard? We didn't hear from him. He'd been the one that was the lead investigator up until about three months ago,

never heard from him, wasn't on the stand." (Tr. p.887, lines 12-16).

In response to Counsel's argument, the prosecutor was entitled to argue that she chose not to call Officer Ballard for the same reason she omitted to call every other investigator, EMS worker, firefighter, and SLED agent remotely involved in the case: calling so many witnesses would unreasonably prolong the trial. The prosecutor was also entitled to argue that Counsel's criticism of the State for failing to call Officer Ballard was nothing more than a distraction from the substantive evidence presented in the case. On those two points, the prosecutor's argument was permissible.

However, the prosecutor arguably strayed outside the bounds of proper argument when she claimed those additional witnesses would all "say[] the same thing" the jury had already heard from the law enforcement officers who actually testified. This statement arguably could be interpreted as improperly vouching, to the extent it implied that the prosecutor knew of evidence not presented to the jury that would have corroborated the testimony of the investigators who actually did take the stand.

Nevertheless, this Court finds Counsel was not deficient for failing to object. Counsel credibly testified that she generally does not object during opening and closing arguments unless she thinks a remark was really damaging to the defense because it appears unprofessional and because the jury does not respond well to numerous objections and comes to believe that you are hiding things. (PCR Tr. 12). She stated that she did not think the State's comments hurt the defense. (PCR Tr. 12).

This Court agrees with Counsel's appraisal of the challenged comments. The prosecutor merely mentioned that she could have called duplicative witnesses that would not have produced any new evidence or, frankly, played any meaningful role in the State's case. Although

prosecutors should generally avoid comments to the jury concerning what an absent State's witness purportedly would have said, the possibility of prejudice is insignificant when, as in this case, the prosecutor merely assures the jury that those absent witnesses would have given irrelevant or cumulative testimony and would not have substantially supported the State's case. In other words, while it would be highly problematic for a prosecutor to ask the jury to consider evidence that was not presented at trial, it is far less damaging for the prosecutor to tell the jury *not* to consider such evidence, which is clearly what the prosecutor was trying to convey in this case. Furthermore, insofar as the prosecutor's comment could be interpreted as vouching for the law enforcement witnesses who testified at trial, there can be no prejudice because the substance of those law enforcement witnesses' testimony was not seriously disputed. Thus, this Court finds that an objection likely would not have been sustained, Counsel was reasonable in deciding not to object, and this alleged failure had no prejudicial impact. Thus, relief is denied on this ground.

[conclusion and signature on following page]

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 her application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that she must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCF provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 19 day of June, 2026.



EDWARD MILLER
Presiding Judge
Third Judicial Circuit

Greenville, South Carolina.

JUN 20 2026
CLERK OF COURT
CENTRAL M. JOHNSON
2026 JUN 20 11:00 AM
FILED

WITNESSES

Inv. Juan Ballard
Williamsburg County Sheriff's Office

1157

ARREST WARRANT NUMBER

2014A4510100232 2014A4510100233
2014A4510100237

2014A4510100231

ACTION OF GRAND JURY

TRUE BILL

Date: 7/31/14

Foreperson of Grand Jury

Date: 7/31/14

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2014-GS-45-0159

The State of South Carolina

County of WILLIAMSBURG

COURT OF GENERAL SESSIONS

AUGUST TERM 2014

THE STATE

vs.

BRITTANY EMOESHA EPPS

JESSICA BLAIR JACKSON

Indictment for

**MURDER AND POSSESSION OF A FIREARM
DURING THE COMMISSION OF A VIOLENT CRIME**

Ernest A. Finney III

ERNEST A. FINNEY, III, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

INDICTMENT FOR
**MURDER AND POSSESSION OF A FIREARM
DURING THE COMMISSION OF A VIOLENT
CRIME**

At a Court of General Sessions convened on July 31, 2014, the Grand Jurors of
WILLIAMSBURG County did present upon their oath:

COUNT ONE - MURDER

That the defendants, Brittany Emoeshia Epps and Jessica Blair Jackson, did in
Williamsburg County, South Carolina on or about March 29, 2014, willfully, feloniously,
and intentionally kill the victim, Joseph Brown, with malice aforethought, by means of
shooting, and the victim did die as a proximate result thereof, in violation of §16-3-10 of
the South Carolina Code of Laws (1976, as amended).

**COUNT TWO – POSSESSION OF A FIREARM DURING THE COMMISSION OF A
VIOLENT CRIME**

That the defendants, Brittany Emoeshia Epps and Jessica Blair Jackson, did in
Williamsburg County, South Carolina on or about March 29, 2014, possess a firearm or
visibly display what appeared to be a firearm, during the commission or attempted
commission of a violent crime, in violation of §16-23-490 of the South Carolina 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.

Solicitor

