

19632

Volume II of II

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BONDS,

APPELLANT

RECORD ON APPEAL

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1 because that little snippet of the phone call, you
2 know all the phone calls that they listen to,
3 you've got work, dope, crack, whatever, the
4 Jordans. On those that, you know, they're using
5 to incriminate him. There is very little on any
6 tape that they played for you about what happened
7 at Eddings White. And so again, for any proof
8 beyond a reasonable doubt that anything that
9 happened at Eddings White had to do with Marion,
10 you must believe Reggie and he's already
11 compromised his credibility not because he was
12 using drugs while on probation for a drug offense
13 but because of what he's done and what his
14 behavior has been in the course of this trial.
15 And so that's why it's a complicated case. You
16 know that's why it's complicated case.

17 I would say that there's nothing that is in
18 these audio tapes that they've played that says
19 "I possessed a gun". They never find a gun. They
20 never find a shotgun. They never find any of that
21 stuff that would go with an attempted armed
22 robbery. If Marion has this \$2000, if you're
23 doing the math, I think Investigator Rice said
24 \$1000 worth of crack. However, you want to call
25 it, it's not about how much money it is, it's

1 about the weight. But he's got all his stash
2 back at Old School's house. He has absolutely no
3 motive to commit an armed robbery. Why would he
4 even be trying to commit an armed robbery when all
5 he has to do is find, sadly, way too many people
6 who like to smoke crack and the stuff sells
7 itself. There is no reason to go and do violence
8 to somebody in a dangerous way when they're trying
9 to tell you that he's got the equivalence of money
10 stashed at Old School's. So that doesn't really
11 even make any sense.

12 And that's why I, you know, when I started out
13 the case kind of questioning why are we believing
14 Reggie Holmes so much. Why are we going so far
15 down this road because Reggie Holmes says you know
16 -- what is -- I don't want you, the Jurors, to
17 think that just because the police and the
18 Solicitor must know something we don't and they've
19 decided that this must of happened. They laid it
20 out all on the table for you. Everything they
21 had, laid it out on the table. You heard me
22 objecting. And my objections that you heard were
23 overruled for the most part. So there's nothing
24 new -- there's no new information out there.
25 That's all. The only reason why I bring that up

1 is because people a lot of times think just
2 because somebody is arrested, they must be guilty
3 and things like that. And that's one, you believe
4 that you've got to save that for another day.
5 They think like that, just because you're a Juror.
6 But also it doesn't really reflect the reality of
7 the situation when you're hammering anything that
8 looks like a nail, I guess. And when you're a
9 police officer in law enforcement, I think,
10 everybody looks like guilty of everything. And so
11 I just want you to keep that in mind. I know that
12 if I keep on talking too much longer that I will
13 start wishing Grace overlooked and I don't want to
14 do that. I know I've been speaking loudly. I
15 hope it doesn't come off as shouting at you or
16 anything like that. But the one thing I do want
17 to leave you with it's not just these discussions
18 on the fact but one last try at explaining to you
19 how important it is to get this right, to get it
20 right. To not just say oh gosh Marion Bonds, you
21 know, why, why. He's making me miss my holiday
22 time with my family and time I need to be at work.
23 But to really get back there and do what Jurors
24 do. And I know you will. I can tell that's what
25 you guys are going to do. I mean you've been

1 paying attention. It's been a long trial. I just
2 wanted thank you for doing what you're about to do
3 and I guess that's all I have to say. Thank
4 y'all.

5 THE COURT: Thank you, Mr. Deysach. Ladies
6 and Gentlemen, does anyone need to stretch or you
7 all fine? You're all fine?

8 JURORS: We're fine.

9 THE COURT: Mr. Foreperson and members of the
10 jury, you followed very patiently and listened
11 very attentatively to the presentation of the
12 evidence in this case and I want to thank you for
13 that. And also the able arguments made by
14 Solicitor Angie Tanner on the part of the State
15 and Mr. Ian Deysach on behalf of the Defendant.

16 It now becomes the duty of the Trial Judge and
17 the Constitution of this State to charge and
18 instruct you in the law as applicable to this
19 case, and it's your duty as Jurors to accept and
20 apply the law as the Court will now state it to
21 you. As Jurors, it is your exclusive duty to
22 decide all issues of fact in this case. You must
23 determine the effect, the value, the weight, and
24 the truth of the evidence. Both the State and the
25 Defendant have a right to expect you will

1 carefully consider and evaluate the evidence and
2 apply the law that pertains to that evidence. And
3 by doing so, both the State of South Carolina and
4 the Defendant, Mr. Bonds, will receive and obtain
5 a fair and impartial trial in this matter.

6 Now the State of South Carolina, by the bills
7 of indictment in this case charge the Defendant,
8 Marion Bonds, with assault and battery with intent
9 to kill, unlawful possession of a weapon,
10 attempted armed robbery, trafficking in crack
11 cocaine, 28 grams or more but less than 100 grams.
12 Trafficking in crack cocaine, more than 10 grams
13 but less than 28 grams, and possession with intent
14 to distribute crack cocaine within a half mile
15 proximity of a school.

16 Ladies and Gentlemen, I will read the
17 indictments to you. The first is for assault and
18 battery with intent to kill. The State alleges
19 that in Beaufort County on or about February 17,
20 2010, the Defendant, Marion Bonds, with malice of
21 forethought did commit an unlawful act in a
22 violent nature upon the victim, Reginal Jermaine
23 Holmes, and that the Defendant did shoot the
24 victim.

25 The second indictment, is for attempted armed

1 robbery. This indictment alleges that on or about
2 February 17, 2010 in Beaufort County, the
3 Defendant, Marion Bonds, at ■ Eddings White Road
4 on St. Helena Island, did by use of force, threat
5 through intimidation, and while armed with a
6 deadly weapon, did attempt to take and carry away
7 goods and or money from the person or in immediate
8 presence of Reginal Jermaine Holmes with the
9 intent to permanently deprive him of that
10 possession.

11 As to the next charge, it is for unlawful
12 possession of a weapon. This indictments states
13 that in Beaufort County, South Carolina on or
14 about February 17, 2010, Defendant, Marion Bonds,
15 did have in his possession a handgun after having
16 been convicted of a crime of violence.

17 The next indictment is for trafficking in
18 crack cocaine, more than 28 grams but less than
19 100 grams. It states that in Beaufort County on
20 or about February 17, 2010, the Defendant, Marion
21 Bonds, did knowingly sell, manufacture, deliver,
22 purchase, or bring into this State, or did provide
23 financial assistance or otherwise aide, abed,
24 attempt, or conspire to sell, manufacture,
25 deliver, or purchase, or bring into this state, or

1 did possess or attempt to possess a controlled
2 substance or a controlled substance analog.

3 Specifically in this case, it was alleged that it
4 was crack cocaine in excess of more than 28 grams
5 but less than 100 grams.

6 The next indictment is for trafficking in
7 crack cocaine, more than 10 grams but less to 28
8 grams. This indictment alleges that in Beaufort
9 County on or about February 17, 2010 the
10 defendant, Marion J bonds, did knowingly sell,
11 manufacture, deliver or purchase, or bring into
12 this state, or did provide financial assistance or
13 otherwise aide, abet, attempt, or conspire to
14 sell, manufacture, deliver or purchase, or bring
15 into this state, or did possess or attempt to
16 possess a controlled substance or a controlled
17 substance analog and again, in this case, it is
18 alleged that it is crack cocaine in excess of 10
19 grams but less 28 grams.

20 And lastly, he is charged in the last
21 indictment in Beaufort County, South Carolina on
22 or about February 17, 2010, the Defendant, Marion
23 J. Bonds, did unlawfully distribute, sell,
24 purchase, manufacture, or possess with the intent
25 to distribute crack cocaine, a controlled

1 substance, within a one half mile radius of the
2 grounds of St. Helena Elementary School.

3 Now Ladies and Gentlemen, I remind you that
4 the fact the Defendant was arrested, charged, and
5 indicted in this case is not evidence in
6 this case and he cannot be considered by you as
7 evidence of guilt in this case. Nor does it
8 create a presumption or inference of guilt. These
9 indictments are simply the formal, written
10 instruments which contain the charges that are
11 known against the defendant. They are the formal
12 documents by which this case was brought into this
13 courtroom.

14 Ladies and Gentlemen, the Defendant, Mr.
15 Bonds, has pled not guilty to these indictments
16 and that plea puts the burden on the State to
17 prove the Defendant guilty beyond a reasonable
18 doubt. A person charged with committing a
19 criminal offense in South Carolina is never
20 required to prove himself innocent.

21 I charge you that it is an important rule of
22 law that the Defendant in a criminal trial, no
23 matter what the seriousness of the charge may be,
24 will always be presumed to be innocent of a crime
25 for which the indictments were alleged unless

1 guilt has been proved by evidence satisfying you
2 of that guilt beyond a reasonable doubt. This
3 presumption of innocence does not end when you
4 begin your deliberations, but it accompanies the
5 Defendant throughout the trial until you reach a
6 verdict of guilt based on evidence satisfying you,
7 the Jury, of that guilt beyond a reasonable doubt.

8 The presumption of innocence is like a Robe of
9 Righteousness that's placed about the shoulders of
10 the defendant and it remains with the defendant
11 until it has been stripped from him by evidence
12 satisfying you of the defendant's guilt beyond a
13 reasonable doubt.

14 Ladies and Gentlemen, the presumption of
15 innocence is not a mere legal theory. It's not
16 just a legal phrase we use. It is a substantial
17 right to which every defendant is entitled unless
18 you, the Jury, are satisfied from the evidence of
19 the defendant's guilt beyond a reasonable doubt.

20 Now again, the State has the burden of proving
21 the Defendant guilty beyond a reasonable doubt.
22 The term reasonable doubt must be given its plain
23 and ordinary meaning. However, to the extent that
24 I may define it for you, a reasonable doubt is the
25 kind of doubt that will cause a reasonable person

1 to hesitate to act in the most important of their
2 personal decisions. The Defendant, Ladies and
3 Gentlemen, is entitled is entitled to every
4 reasonable doubt arising in this case. If upon
5 any issue of fact essential to a conviction, you
6 have a reasonable doubt as to how that issue
7 should be resolved, you must resolve that
8 reasonable doubt in favor of the Defendant.

9 Now Ladies and Gentlemen, some of you may have
10 served as Jurors in civil cases, where you were
11 told it was only necessary to prove that a fact is
12 more likely true than not true, such as by the
13 greater weight of what we call the Greater weight
14 or the Preponderance of the Evidence. In criminal
15 cases, the State's proof must be more powerful
16 than that. It must be beyond a reasonable doubt.

17 Proof beyond a reasonable doubt is proof that
18 leaves you firmly convinced of the Defendant's
19 guilt. Now Ladies and Gentlemen, there are very
20 few things in this world that we know with
21 absolute certainty and in criminal cases, the law
22 does not require proof that overcomes every
23 possible doubt, but based on your consideration of
24 the evidence, you are firmly convinced that the
25 Defendant is guilty of the crime or crimes

1 charged, you must find the Defendant guilty. If,
2 on the other hand, you think that there's a real
3 possibility that the Defendant is not guilty, you
4 must give the Defendant the benefit of the doubt
5 and find him not guilty.

6 Now Ladies and Gentlemen, I remind you that,
7 during this trial, you and I have certain duties
8 to perform.

9 As the trial Judge, it's my responsibility to
10 preside over the trial of this case and I also
11 have the duty to rule on the admissibility of the
12 evidence that's offered during the trial. Ladies
13 and Gentlemen, you are to consider only the
14 competent evidence that's before you. You are to
15 consider only the testimony which has been
16 presented from the witness stand and any exhibits
17 which were made as part of the record, as well as
18 any stipulations entered into by the parties.

19 I have the additional duty to charge you the
20 law that's applicable in this case. As the
21 presiding Judge, I'm the sole Judge of the law in
22 this case and it's your duty as Jurors to accept
23 and apply the law as I will now state it to you.
24 If you have any idea as to what the law is or what
25 you think the law ought to be and it does not

1 agree with what I now tell you the law in fact is,
2 you must abandon this idea. Because you are sworn
3 to accept the law and apply the law as I state it
4 to you.

5 In every case tried in this court before a
6 Jury, the Jury becomes the sole and exclusive
7 Judge of the facts. The trial judge cannot state,
8 intimidate, or comment or make any statements made
9 to the trial Jury about the facts in this case.
10 Since you, the Jury, are the sole Judge of the
11 facts in this case, you're not to infer from what
12 I've said during the progress of this trial in
13 ruling upon the admissibility of evidence, or
14 otherwise, or anything that I say now during the
15 course of this instruction to you that I have an
16 opinion about the facts in this case. The law
17 does not allow me to have an opinion about the
18 facts in this case. This is a matter solely for
19 you, the Jury, to determine. As Jurors, again, it
20 is your duty to determine the facts, the value,
21 the weight, and the truth of the evidence that's
22 been presented during this trial.

23 Now Ladies and Gentlemen, there are two types
24 of evidence which are generally presented during a
25 trial. That is direct evidence and circumstantial

1 evidence. Direct evidence is the testimony of a
2 person, who claims to have actual knowledge of a
3 fact, such as an eyewitness. It is evidence which
4 immediately establishes the main fact to be
5 proved. Circumstantial evidence is proof of a
6 chain of facts and circumstances indicating the
7 existence of a fact. It is evidence which
8 immediately establishes collateral fact from which
9 the main fact may be inferred. Circumstantial
10 evidence is based on inference and not on personal
11 observation and knowledge. The law makes
12 absolutely no distinction between the weight or
13 value to be given to either direct or
14 circumstantial evidence. Nor is the greater
15 degree of certainty required of circumstantial
16 evidence and direct evidence.

17 Ladies and Gentlemen, you should weigh all the
18 evidence in this case. And after weighing all the
19 evidence, if you're not convinced of the guilt of
20 the Defendant, beyond a reasonable doubt, you must
21 find the Defendant not guilty.

22 Now the rules of evidence ordinarily do not
23 permit witnesses to testify to opinions or
24 conclusions. An exception to this rule exists for
25 witnesses we call expert witnesses. A witness who

1 by education and experience, has become an expert
2 in some art, science, or profession, may give an
3 opinion as to the subject the witness claims to be
4 an expert in and they also give the reasons for
5 their opinion.

6 You should consider an expert opinion given by
7 witness and, like any other evidence give it the
8 weight you think it deserves. If you decide that
9 an expert witness's opinion is not based on
10 sufficient education and experience, or you decide
11 that the reasons given in supporting the opinion
12 are not sound, or the opinion is outweighed by
13 other evidence, you may disregard the opinion
14 entirely.

15 An expert witness's testimony is to be given
16 no greater weight from that of other witnesses
17 simply because the witness is an expert. And you
18 do not have to accept an expert's opinion even
19 though it is uncontradicted.

20 Now Ladies and Gentlemen of the Jury, it's
21 your duty to determine the credibility of
22 witnesses who testified in this case. And
23 credibility simply means believability. It
24 becomes your duty as Jurors to analyze and
25 evaluate the evidence and determine which evidence

1 convinces you of its truth.

2 In determining the believability of witnesses
3 who have testified in this case, you may believe
4 one witness over several witnesses or several
5 witnesses over one. You may believe a part of the
6 testimony of a witness and reject the remaining
7 part of the testimony of that same witness. You
8 may believe the testimony of a witness in its
9 entirety or reject the testimony of a witness in
10 its entirety. You may consider whether the
11 witness exhibited to you any interest, any bias or
12 prejudice, or other motive for the case. You may
13 also consider the appearance and manner of the
14 witness while on the witness stand.

15 Now Ladies and Gentlemen, I instruct and
16 emphasize that the fact that the Defendant did not
17 testify is not a factor to be considered by you in
18 any way in your deliberation and in your
19 consideration on the question of the guilt or the
20 innocence of the Defendant. It must not be
21 considered by you in any manner whatsoever. A
22 Defendant has a Constitutional right to remain
23 silent. And the assertion of this right must not
24 be considered by you in your deliberations. I
25 repeat, under your oath, you are to draw no

1 conclusion whatsoever from the fact the Defendant
2 in this case did not testify. The fact that this
3 defendant did not testify should not even be
4 discussed in the Jury room. The burden of proof
5 as I stated is on the State. The Defendant is not
6 required to prove his innocence. And the burden
7 of proof remains on the State to prove guilt
8 beyond a reasonable doubt.

9 Now Ladies and Gentlemen, the indictments in
10 this case are alleged multiple charges against the
11 Defendant, which I stated to you those are assault
12 and battery with intent to kill, attempted armed
13 robbery, unlawful possession of a weapon,
14 trafficking in crack cocaine, more than 28 but
15 less than 100 grams, trafficking in crack cocaine,
16 more than 10 but less than 28 grams, and
17 possession with the intent to distribute crack
18 cocaine within a half mile proximity of a school.

19 Ladies and Gentlemen, each indictment, charge
20 is a separate and distinct offense. You must
21 decide each item separately on the evidence and
22 the law that's applicable to them, uninfluenced by
23 your decision as to any other indictment. The
24 Defendant may be convicted or acquitted on any or
25 all of the offenses charged. And you will be

1 asked to write a separate verdict of guilty or not
2 guilty for each indictment.

3 Now ladies and gentlemen, the Defendant has
4 been charged with assault and battery with intent
5 to kill. In order to prove assault and battery
6 with intent to kill, the State must prove beyond a
7 reasonable doubt that the defendant committed an
8 unlawful act of a violent nature to the person of
9 another with malice of forethought.

10 Ladies and gentlemen, an assault occurs when a
11 person unlawfully attempts or offers to commit a
12 violent injury upon another person and had the
13 present ability to complete the attempted injury.
14 An assault is the intentional creation of
15 reasonable fear or immediate bodily harm. It's
16 not necessary if the attempted injury or harm
17 actually takes place. For example, ladies and
18 gentlemen, if I walk up to you and we are within
19 arms reach and I reach or draw my hand back as if
20 I'm going to hit you, that is an assault.

21 Now battery is the unlawful touching of
22 another person by the person who's committed the
23 assault. Unlawful touching can be caused by a
24 part of the accused's body or by any object the
25 accused puts in motion. A battery is the

1 completion of the assault by using or applying
2 force to another person, however slight, in a
3 rude, angry, or resentful manner without legal
4 justification for doing so. In using my earlier
5 example, if I carry through with that assault by
6 hitting you, that is the battery portion of it.

7 Ladies and Gentlemen, malice is hatred, ill
8 will, or hostility towards another person. It is
9 the intention of doing a wrongful act without just
10 cause or excuse and with an intent to inflict an
11 injury or if under circumstances that the law will
12 infer an evil intent.

13 Malice aforethought does not require that
14 malice exists for any particular time before the
15 act is committed, but malice must exist in the
16 mind of the defendant just before and at the time
17 the act is committed. Therefore, there must be the
18 combination of the previous evil intent and the
19 act.

20 Ladies and Gentlemen, malice aforethought
21 may be express or inferred. These terms, express
22 and infer, do not mean different kinds of malice
23 but merely the manner in which malice may be shown
24 to exist. That is either by direct evidence or
25 inference from the facts and circumstances which

1 are proved. Expressed malice is shown when a
2 person speaks words which express hatred or ill
3 will for another or when the person prepared
4 beforehand to do the act which was later
5 accomplished; For example, lying in wait for a
6 person or any other acts of preparation for which
7 it shows the deed was in the defendant's mind in
8 the expressed malice.

9 Malice may be inferred from conduct showing a
10 total disregard for human life.

11 If facts are proved beyond a reasonable doubt
12 sufficient to the raise an inference of malice to
13 your satisfaction, this inference would simply be
14 an evidentiary fact to be considered by you along
15 with other evidence in the case, and you may give
16 it the weight you decide it should receive.

17 A specific intent to kill is not an intended
18 element of assault and battery with intent to
19 kill, but there must be a general intent to commit
20 serious bodily injury. Intent means intending the
21 result which actually occurs; not accidentally or
22 involuntary. Intent means shown by acts and
23 conduct of the defendant in other circumstances
24 for which he may naturally and reasonably infer
25 intent. Evidence of the character of the assault,

1 the character of the instrument used, the manner
2 in which it was used, the purpose to be
3 accomplished, and the resulting wounds or injuries
4 may be considered to determine the intent for
5 which the assault is committed. Intent may be
6 inferred when it is demonstrated the defendant
7 voluntarily and willfully commit to that. The
8 natural tendency of which is to destroy another's
9 life.

10 Ladies and Gentlemen, if you find the State
11 has not proven that the defendant is guilty of
12 assault and battery with intent to kill, you must
13 then determine whether the State has proved that
14 the defendant is guilty of assault and battery of
15 a high and aggravated nature. Assault and battery
16 of a high and aggravated nature includes all the
17 elements of assault and battery with intent to
18 kill except malice aforethought. In addition, the
19 State must prove, beyond a reasonable doubt, an
20 aggravating circumstance.

21 Circumstances of aggravation include the use
22 of a deadly weapon with intent to commit a felony
23 -- excuse me -- use of a deadly weapon with the
24 intent to commit a felony, infliction of serious
25 bodily injury, or a great disparity between the

1 ages or physical conditions of the parties.

2 Now Ladies and Gentlemen, the Defendant is
3 also charged with attempted armed robbery. In
4 order to prove this offense, the State must first
5 prove beyond a reasonable doubt that the Defendant
6 attempted to take personal property from the
7 person or presence of another person.

8 Property is in the presence of a person if
9 it's within a persons reach, inspection,
10 observation, or control so that the person could,
11 if not overcome with violence or prevented by
12 fear, keep possession of the property.

13 Ladies and Gentlemen, an attempt is an effort
14 to accomplish a crime which does not succeed. An
15 attempt includes a specific intent to do a
16 particular criminal act along with an act falling
17 short of the act intended. The State must show
18 more than mere preparation of an intent. There
19 must be some overt act committed in the effort to
20 commit the crime.

21 Intent means intending the result which
22 actually occurs; not accidentally or involuntary.
23 An intent may be shown by acts of conducts of the
24 defendant and other circumstances for which he may
25 naturally and reasonably infer intent.

1 And then finally, Ladies and Gentlemen, the
2 State must prove beyond a reasonable doubt to
3 prove attempted armed robbery that the defendant
4 was armed with a deadly weapon during the
5 attempted armed robbery.

6 A deadly weapon is an article, instrument, or
7 substance which is likely to cause death or great
8 bodily harm. Whether the instrument's been used
9 as a deadly weapon, Ladies and Gentlemen, depends
10 on the facts and circumstances in each case. The
11 following are examples of instruments that may be
12 used as deadly weapons: a pistol, a shotgun, a
13 rifle, a dirk, a dagger, a knife, a slingshot,
14 metal knuckles, a razor, gasoline, a fire bomb or
15 Molotov cocktail, and lighter fluid.

16 Ladies and Gentlemen, the Defendant is also
17 charged with unlawful carrying of a pistol. It is
18 unlawful for a person who has been convicted of a
19 crime of violence in any court of the United
20 States to possess or acquire handguns within this
21 state.

22 Ladies and Gentlemen, for the purpose of this
23 offense only, the Parties stipulate the Defendant
24 has been convicted of a crime of violence and
25 therefore was prohibited from possessing a gun at

1 the time of this alleged incident. Ladies and
2 Gentlemen, this stipulation cannot be used as
3 evidence as to any other offense charged and it
4 would be completely inappropriate for you to
5 consider this stipulation when evaluating the
6 Defendant's guilt or innocence as to any other
7 offense. Again, the stipulation states only that
8 the Defendant is prohibited from carrying a gun.

9 Now Ladies and Gentlemen, an issue in this
10 case is the identification of the Defendant as the
11 perpetrator of the crimes charged. The State of
12 South Carolina has the burden of proving identity
13 beyond a reasonable doubt. Identification
14 testimony is an expression of belief or impression
15 by a witness. You may consider the opportunity a
16 witness had to observe the alleged offender at the
17 time of the offense and to thereafter make an
18 identification. It is for the Jury to determine
19 the accuracy of the identification of a Defendant.
20 You must consider the credibility of each
21 identification witness in the same way as any
22 other witness. And you must consider his or her
23 truthfulness as well as the capacity, opportunity,
24 and circumstances of the observation of the
25 matters about which he or she has testified.

1 Now Ladies and Gentlemen, the Defendant is
2 also charged with two counts of trafficking in
3 crack cocaine. To prove trafficking in crack
4 cocaine, the State must prove beyond a reasonable
5 doubt the Defendant knowingly sold, manufactured,
6 cultivated, delivered, purchased, brought into the
7 state, provided financial assistance or otherwise,
8 aided, abetted, attempted or conspired to sell,
9 manufacture, cultivate, deliver or purchase, or
10 bring into this state, was knowingly in actual or
11 constructive possession or knowingly attempted to
12 become an actual constructive possession of crack
13 cocaine.

14 Now Ladies and Gentlemen, on the first
15 trafficking charge, the State must prove, beyond a
16 reasonable doubt, that the amount of the crack
17 cocaine was 28 grams or more but less than 100
18 grams.

19 Ladies and Gentlemen, on the second
20 trafficking charge, the State must prove, beyond a
21 reasonable doubt, that the amount of the crack
22 cocaine was 10 grams or more but less than 28
23 grams.

24 Ladies and Gentlemen, the weight of any
25 controlled substance in this section includes the

1 substance in pure form or any compound or mixture
2 of the substance.

3 Now Ladies and Gentlemen, lastly, the
4 Defendant is charged with possession with the
5 intent to distribute crack cocaine within one half
6 mile proximity of a school. It is a separate
7 criminal offense for a person to unlawfully
8 possess, with the intent to distribute, a
9 controlled substance while in, on, or within a one
10 half mile radius of the grounds of a public or
11 private elementary, middle or secondary school, a
12 public vocational or trade school, or technical
13 educational center, or a public or private
14 university. Before you can convict the Defendant
15 of this defense or this offense, the State must
16 prove the following two elements beyond a
17 reasonable doubt. The Defendant did in fact
18 unlawfully possess with the intent to distribute a
19 controlled substance, in this case is alleged
20 crack cocaine and that the actual offense was done
21 within a one half mile radius of the grounds of a
22 public, vocational or trade school, or technical
23 educational center.

24 Mr. Foreperson, members of the Jury, as you
25 retire to begin your deliberations, I wish to

1 express the hope that each of you will be mindful
2 of the importance of your responsibility here
3 today. You're not called upon very often to serve
4 as Jurors and the proper performance of the duty
5 requires each of you to reach the height of
6 freeing your minds of all improper influences.
7 You and I are acting for the community and that's
8 why you must see to it that this trial is fair and
9 the verdict is just.

10 You've observed that the presiding Officer of
11 the Court is always addressed as Your Honor. The
12 reason is because the Court is intrusted with the
13 honor of this community, the honor of this state,
14 and the honor of this country in seeking that
15 every case tried here receives fair impartial
16 justice.

17 Now you, the Jury, take into your care and
18 keeping the preservation the honor of this
19 community, the honor of this state, and the honor
20 of this country.

21 Now Ladies and Gentlemen, please don't get the
22 idea that I'm trying to intimate to you how I
23 think you should decide this case. As I've
24 already told you, the laws in the state of South
25 Carolina, you, The Jury, are the sole judge of all

1 questions of fact and it would be highly improper
2 for me to influence you in the performance of that
3 duty.

4 Ladies and Gentlemen, but as the presiding
5 Officer of this Court, I am vitally concerned that
6 whatever verdict you reach will be the result of
7 you going back into your jury room and confining
8 your consideration to the evidence and the law
9 that you heard in this courtroom, weighing it
10 fairly and impartially, which I have confidence
11 you will.

12 Ladies and Gentlemen, everyone is entitled to
13 justice in this case, both the State and the
14 Defendant. You owe no support or sympathy to
15 anyone. The Court is the confirmed opinion that
16 whatever verdict you reach will represent truth
17 and justice for all the parties concerned.

18 Mr. Foreperson and members of the Jury, I
19 remind you that your verdict must be unanimous.
20 It must be the verdict of all twelve Jurors. And
21 to that end, my law clerk has prepared a verdict
22 form. It has the case caption and it lists the
23 indictment numbers. Sir, there are six questions
24 all of which you need to answer. The first
25 question states, As to indictment number 2010 GS 7

1 2010 GS 7 600, on the charge of attempted armed
2 robbery, we the Jury unanimously find the
3 Defendant, Marion Bonds, again guilty or not
4 guilty.

5 As to indictment 2010 GS 7 602, trafficking
6 cocaine base crack, 28 grams or more less than 100
7 grams, we the Jury, unanimously found the
8 Defendant, Marion J. Bonds, again guilty or not
9 guilty.

10 Question number five, as to indictment number
11 2010 GS 7 603, trafficking in cocaine base crack,
12 10 grams or more but less than 28 grams, we the
13 Jury, unanimously find the Defendant, Marion J.
14 Bonds, either guilty or not guilty.

15 And lastly, as to indictment number
16 2010 GS 7 634, possession with the intent to
17 distribute crack cocaine within a one half mile
18 radius of a school, we the Jury, unanimously find
19 the Defendant, Marion J. Bonds, either guilty or
20 not guilty.

21 Ladies and Gentlemen, the order that I put
22 guilty or not guilty has absolutely no meaning in
23 every single trial, I just reverse that.

24 Ladies and Gentlemen and Mr. Foreperson, after
25 that there is a signature line printed on the

1 verdict form. I will ask Mr. Foreperson, if he
2 could please sign that signature line. And when
3 the Jury has reached the verdict, you knock on
4 your jury room door and we will accept you back
5 into the courtroom to go ahead and receive your
6 verdict.

7 Mr. Foreperson and members of the Jury, I want
8 thank you for your attention. For the very last
9 time, I'm going to send you back to your jury room
10 and I'm going to tell you not to begin
11 deliberating this case. There may be something
12 further that the attorneys want me to charge you
13 on the law. If that's the case, I will bring you
14 back out again and I will charge you further. If
15 not, Mr. Foreperson and members of the Jury, I'm
16 going to send this verdict form along with all the
17 evidence that's been entered into this case back
18 to you. And that will be your signal to begin
19 your deliberation. Again, thank you. I
20 appreciate it and you are excused back to your
21 jury room.

22 (Whereupon the Jury exited the courtroom at 11:12 A.M.)

23 THE COURT: Any exceptions or additions to the
24 charges, from the State?

25 MS. ANGIE TANNER: Nothing from the State.

1 THE COURT: From the Defense?

2 MR. IAN DEYSACH: No, Your Honor. Just the
3 prior points that I already brought up, renew
4 those.

5 THE COURT: All right. Thank you, y'all. I'm
6 going to go ahead and give Debbie the verdict form
7 and I'm going to make sure you both go through all
8 the evidence and make sure it's there.

9 (Whereupon evidence was received by the Jury at 11:20
10 A.M.)

11 (Court was at ease at 11:20 A.M.)

12 (Whereupon Court resumed at 12:09 for Jury Question)

13 THE COURT: Thank ya'll. Please be seated.
14 I understand from the Jury that they want to hear
15 the phone tapes, so they are going to knock on the
16 door when they are ready, I know that they are
17 hashing out something else right now, so we are
18 going to sit tight. I'm going to make sure your
19 client gets out here.

20 (Whereupon the Court started other business while
21 waiting on the Jury)

22 THE COURT: Well, to start with, I've got the
23 Bailiff's getting the jury some lunch. All right,
24 we have the question is, The first thing is we
25 would like to hear the audio tape of the jail and

1 of course, we've already agreed, previously, we
2 would have to bring them in here. Do you have it
3 all queued up?

4 MS. TANNER: Yes, Your Honor.

5 THE COURT: The second question says, Does
6 possession of a weapon require that it be brought
7 with him or simply using a weapon? Possession, it
8 means possession, I guess.

9 MS. TANNER: The conversations Mr. Deysach and
10 I had, I think we agreed the way we would answer
11 that is just recharge the law on that offense.

12 THE COURT: Okay.

13 MS. TANNER: I think it covers the definition
14 ---

15 THE COURT: Okay.

16 MS. TANNER: I don't know if there is anything
17 else we could add, unless there is some
18 constructive way we could add to it.

19 THE COURT: The next question on that, Does
20 conviction on one of the counts require a
21 conviction on count number two?

22 MS. TANNER: What we determined -- what we
23 think that means -- well, we came up with two
24 answers. One, if they are asking about Count One
25 being the ABWIK charge, because you gave them a

1 lesser offense of ABHAN, if they are asking if a
2 conviction on ABHAN, ABWIK is an automatic
3 conviction on ABHAN, if they didn't understand if
4 they convict on ABWIK then they don't have to get
5 to AGHAN.

6 THE COURT: I'm thinking -- I interpreted it
7 differently. I wanna say just to make sure I'm
8 correct, I think she put on the verdict form
9 number two being unlawful carrying and not
10 attempted armed robbery, but I'm not sure so with
11 that the problem is that if we find that he was
12 shot, how can we not find for the unlawful
13 carrying ---

14 MS. TANNER: And I think that was our second
15 answer is if it's not the ABWIK thing -- if it's
16 another question, then I think you just recharge
17 them that each charge is to be decided separately.
18 And I think that that's the only way to answer
19 that one. But it's not the ABWIK.

20 THE COURT: Right.

21 MR. DEYSACH: I agree, without the verdict
22 form in front of us, we lack a little bit of
23 context ---

24 THE COURT: I can handle that. Just tell
25 Robin to get me another copy of it. Okay. Number

1 three, Does each charge for trafficking cover a
2 specific location of the drugs that we are
3 required to consider each separately?

4 MS. TANNER: We both came up with the answer,
5 no. It's not about a specific location. We both
6 just said no. I don't know how you would frame
7 that to them but that was...

8 MR. DEYSACH: Or you can't answer the question
9 is the other possibility. I think that the true
10 answer is no. I'm not sure if that is the
11 appropriate answer for the jury. I think no is
12 what I would like to hear you say but if that is
13 not an accurate statement of law then all you are
14 left with is again, charging them on the law. We
15 want to make sure ---

16 THE COURT: So then just recharge them on
17 trafficking then?

18 MS. TANNER: You could give them the option on
19 recharging them on trafficking. Or tell them that
20 specific location is not an element. It sounds
21 like they are asking about specific location and
22 that language is not in there.

23 THE COURT: Okay. Well, okay. What I am
24 going to do is this. I'm going to bring them in
25 here. I am going to answer these other questions.

1 Then I think at the very end we will play them the
2 tape they wanted to hear. And we will do it that
3 way. Oh, also another note it says, can we get a
4 transcript of the audio of the jail calls. And
5 again, I don't know if we have one but it's not a
6 certified copy and my answer was just, no.

7 THE COURT: Okay, I've got the verdict form.
8 She put number two as unlawful possession, so
9 that's what I think they are asking for. So what
10 they are saying -- and I'll say there are multiple
11 charges, each to be considered separately.

12 MS. TANNER: Yes, ma'am.

13 THE COURT: Okay. All right are we ready for
14 them to come in? The State ready?

15 MS. TANNER: Yes, ma'am.

16 THE COURT: The defense ready?

17 MR. DEYSACH: Yes, Your Honor.

18 THE COURT: Okay.

19 (Whereupon the Jury entered the Courtroom at 1:32 P.M.)

20 THE COURT: Welcome back, ladies and
21 gentlemen. I'm going to go ahead and tell you
22 that I believe my bailiff's have gone ahead and
23 ordered you Pizza so hopefully we can get you fed
24 and you can go about your deliberations.

25 Additionally, you have sent out three notes

1 to me and I'm going to go ahead and address them
2 at this time in the best way I possibly can.

3 The first question was, We would like to hear
4 the audiotape of the jail phone calls and I
5 instructed you that I would need to bring you back
6 out here to play those. And I'm going to do that
7 although it will be at the end. I've got a few
8 other instructions I'm going to give you before
9 that, so that's the last thing we are going to do,
10 okay?.

11 The next of our three questions said, the
12 first is, Does possession of a weapon require that
13 it be brought with him or simply using a weapon
14 possession? What I'm going to do ladies and
15 gentlemen is I'm going to charge you on the
16 elements of the charge of unlawful carrying of a
17 pistol again, which should answer your question,
18 all right, so I'm going to go ahead and do that
19 right now.

20 The defendant is is also charged with unlawful
21 carrying of a pistol. It is unlawful for a person
22 who has been convicted of a crime of violence in
23 any court of the United States to possess or
24 acquire handguns within this State.

25 Then I went on to say for purposes of this

1 offense only, the parties stipulate the defendant
2 had been convicted of a crime of violence and
3 therefore was prohibited from possessing a gun at
4 the time of this alleged incident. This
5 stipulation cannot be used as evidence as to any
6 other offense charged, and it would be
7 inappropriate for you to consider this stipulation
8 when evaluating the defendant's guilt or innocence
9 as to any other charge. Again, this stipulation
10 states only that the defendant was prohibited from
11 carrying a gun. All right.

12 The second question asks does conviction of
13 the counts in number one require conviction on
14 count number two? And I understand count number
15 one is to be considered of assault and battery
16 with intent to kill or assault and battery of a
17 high and aggravated nature. And then your
18 question number two was unlawful possession of a
19 hand gun.

20 Ladies and gentlemen, I am going to charge you
21 again on multiple indictments. Again the
22 indictments in this case allege multiple charges
23 against the defendant. Each indictment charge is
24 a separate and distinct offense. You must decide
25 each indictment separately on the evidence and the

1 law applicable to it, uninfluenced by your
2 decision as to any other indictment. The
3 defendant may be convicted or acquitted on any or
4 all of the offenses charged. Okay.

5 Lastly -- I'm sorry, not lastly. I apologize.
6 The next question, the third question on the
7 second page is, Does each charge for trafficking
8 cover a specific location of the drugs so that we
9 are required to consider each separately and the
10 answer to that is no. And further, Mr.
11 Foreperson, once I send you back to the jury room,
12 if you want me to aid you in recharging you as to
13 trafficking I can certainly to that. The answer
14 to your question, again, is no. Okay.

15 Lastly, it says, Can we get a transcript of
16 the audio of the jail calls and my answer to that
17 is no. So that's your answer to that.

18 Ladies and gentlemen, at this time what I'm
19 going to do is we are going to play those jail
20 calls, again. So, Solicitor if you would come on
21 up and do that for us I would appreciate it. And
22 Mr. Foreperson, while she is doing that, when you
23 return back to your jury room, and there is
24 something further as a result of what you've heard
25 or my answers, if you need more information or you

1 need to hear anything further charging, just let
2 me know. Okay. Solicitor.

3 (Whereupon the Solicitor played the Jail recordings)

4 THE COURT: Mr. Foreperson, you can retire
5 back to your jury room and if there is anything
6 further you need from us you can let the Bailiff
7 know. Thank you.

8 (Whereupon the Jury left the Courtroom at 1:46 P. M.)

9 THE COURT: Anything from the State?

10 MS. TANNER: Nothing from the State.

11 THE COURT: Anything from the Defense?

12 MR. DEYSACH: No, Your Honor.

13 THE COURT: Okay, we'll be at ease until we
14 hear back from them.

15 (Whereupon Court was at ease at 1:47 P.M.)

16 (Whereupon at 2:58, the Court was informed a verdict
17 had been reached)

18 THE BAILIFF: All rise, Judge Carmen Mullen
19 presiding.

20 THE COURT: Thank y'all. Please be seated. I
21 understand they have reached a verdict. I would
22 just ask that if you are hear in the courtroom and
23 cannot contain yourselves in regard to this
24 verdict, I'm going to ask you to excuse yourselves
25 now. Again, if there are any outbursts I'm going

1 to have to take you into custody, so...

2 THE BAILIFF: Do you want me to bring them in?

3 THE COURT: Absolutely.

4 (Whereupon the Jury returned to the courtroom at 3:00
5 P.M.)

6 THE COURT: Mr. Foreperson, I understand you
7 have reached a verdict?

8 MR. FOREPERSON: Yes, Your Honor. We have.

9 THE COURT: All right. If you will hand it
10 to Bob, please.

11 Mr. Deysach, In the case of the State of
12 South Carolina versus Marion J. Bonds, as to
13 indictment number 2010 GS 7 598 for the charge of
14 Assault and Battery with Intent to Kill, we the
15 Jury unanimously find the Defendant, Marion Bonds,
16 Not Guilty.

17 As to indictment number 2010 GS 7 598, on the
18 charge of Assault and Battery of a High and
19 Aggravated Nature, we the Jury unanimously find
20 the Defendant, Marion Bonds, Guilty.

21 As to indictment number 2010 GS 7 599, the
22 charge of Unlawful Possession of a Handgun, we the
23 Jury unanimously find the Defendant, Marion Bonds,
24 Guilty.

25 As to indictment number 2010 600, Attempte

1 Armed Robbery, we the Jury unanimously find the
2 Defendant, Marion Bonds, Not Guilty.

3 As to indictment number 2010 GS 7 602,
4 Trafficking in Cocaine Base Crack, 28 grams or
5 more but less than 100 grams, we the Jury
6 unanimously find the Defendant, Marion Bonds,
7 Guilty.

8 As to indictment number 2010 603, Trafficking
9 in Cocaine Base, 10 grams or more but less than 28
10 grams, we the Jury unanimously find the Defendant,
11 Marion J. Bonds, Not Guilty.

12 At to indictment 2010 GS 7 634, Possession
13 with Intent to Distribute Crack Cocaine within a
14 one half mile radius of a School, we the Jury find
15 the Defendant, Marion J. Bonds, Guilty.

16 Ladies and Gentlemen of the Jury, if this is
17 your verdict, would you please indicate by raising
18 your right hand. (All Jurors raised their right
19 hand) Thank you. You may go ahead and be seated,
20 Mr. Deysach and Mr. Bonds.

21 Would anybody like this jury individually
22 polled?

23 MS. TANNER: Not from the State, Your Honor.

24 MR. DEYSACH: No, Your Honor.

25 THE COURT: Okay. Anything further required

1 of this Jury?

2 MS. TANNER: Not from the State.

3 MR. DEYSACH: No, Your Honor.

4 THE COURT: All right. Ladies and gentlemen
5 of the Jury, I want to tell you, Thank you for
6 being here. I appreciate the hard work you did on
7 this case. I don't think this was an easy case.
8 And again I appreciate you all listening very
9 diligently and carefully to the testimony.

10 Ladies and gentlemen, at this time, there are
11 a couple of matters of law that I need to take up
12 with the attorney's and I'm going to go ahead and
13 sentence Mr. Bonds. You are free to stay if you
14 would like. Again, you are not required to, you
15 don't have to. I'm going to go ahead and excuse
16 you from your service.

17 I will also tell you, Ladies and gentlemen, at
18 this time you are free to discuss this case, if
19 you would like to. Again, ladies and gentlemen,
20 you don't have to. If anyone persists or tries to
21 talk to you and you say, No Thank You, I'm not
22 interested in discussing this case, just call to
23 the Clerks and let me know who it is and I'll take
24 care of them.

25 Ladies and gentlemen, I want to tell you

1 again, the proverbial check is in the mail,
2 unfortunately as you all know, it's a ridiculously
3 small, I say all this so you can thank your County
4 Council person because they are the one who sets
5 the rate, it's not myself.

6 Again, it's not indicative of your time, it's
7 just a token. So again, I want to tell you while
8 I wish we could do more, please understand that
9 this service has helped us not only resolve this
10 case, but so many other cases. When people know
11 that people are sitting in judgement to decide
12 these cases, people become more reasonable and we
13 either negotiate pleas or they plead guilty or
14 it's resolved in another manner.

15 So, I want you to know that while we only
16 tried two case here this week, we started out
17 with about a hundred on our roster. In addition,
18 we will take probably another fifty or sixty
19 guilty pleas this week.

20 So, with that I will tell you thank you. I'm
21 going to go ahead and, if you would like to, I
22 will excuse you now and if any of you would like
23 to stay for the sentencing, you are welcome to do
24 so. I do have a matter of law that I need to
25 discuss with the attorney's before I go ahead and

1 do the sentencing. You are free to sit here, if
2 you like, as we do that. So Ladies and Gentlemen,
3 it is completely up to you. You are free to stay
4 if you would like. If not, then you are free to
5 go. Again, I thank you, ladies and gentlemen.
6 I'm going to see the attorney's just to discuss
7 something.

8 (Whereupon some of the jury members left at 3:06 P.M.)

9 THE COURT: Why don't we just sit tight for
10 a few moments while Ms. Tanner gets the sentencing
11 sheet ---

12 MR. DEYSACH: Your Honor, I still -- I still -
13 - in this posture I think I do need to renew all
14 of my objections, pre-trial and I guess, during
15 the trial. All of those objections that I made.
16 I would renew my directed verdict motions that
17 would still apply, given the posture that the
18 cases have come to you. I know some of the cases
19 weren't all convictions. And I would ask for a
20 new trial on the same basis that I asked for the
21 directed verdicts on.

22 THE COURT: All right.

23 MR. DEYSACH: I wanted to make sure that I
24 renew all my objections and motions that I made
25 pre-trial and during the trial.

1 THE COURT: Okay. Additionally, we need to
2 put on the record, Solicitor, I know you were
3 counting these as all third drug offenses and It's
4 my understanding -- no one's ever given me the
5 record sheet, which I would like to see and that
6 would assist me.

7 MS. TANNER: Actually, I have copies that are
8 certified.

9 THE COURT: Why don't you go ahead and pass
10 those up. Mr. Deysach, why don't you go ahead and
11 put on the record what your argument is as to them
12 making it to second offenses.

13 MR. DEYSACH: Your Honor, under the case law
14 that we have in our State and it's State v. Boyd
15 and State v. -- I think Robinson is the newer case
16 that goes through a PCR type of procedure to get
17 to the core. They both stand for the proposition
18 that where a defendant has been convicted on two
19 or more counts that are violation of a controlled
20 substance acts, arising out of simultaneous acts
21 committed in the force of a single incident, the
22 conviction will be considered to be only one, as
23 only one, for the purpose of sentencing under a
24 subsequent conviction for a violation of a
25 controlled substance act.

1 THE COURT: Mr. Deysach, I know what the law
2 is. My question is I need to know what charges
3 he pled to.

4 MR. DEYSACH: She's got ---

5 THE COURT: I'm looking at them right now. I'm
6 just going through what I see to be the drug
7 charges. Looking to see if any of these others...

8 MR. DEYSACH: I know what the arrest date was
9 for those charges.

10 THE COURT: I can tell you the only two that
11 I'm seeing, Solicitor, is this what you are
12 relying on? I'm seeing that one is 2007, 2273.
13 One is for possession with intent to distribute
14 cocaine. The other one is for possession crack
15 cocaine. They are both seconds, looks like Perry
16 Buckner on April 29, 2008. Is that correct?

17 MS. TANNER: Yes, ma'am.

18 THE COURT: And those are the two that you are
19 relying on and what you are saying is that they
20 were separate indictments; is that correct?

21 MS. TANNER: Yes, ma'am. That's correct. I
22 am saying that they are separate charges. They
23 are separate substances and he pled guilty to
24 both; that's why the State would count them as two
25 prior convictions, not one.

1 THE COURT: My question is, did the actual
2 offense occur on the same date?

3 MS. TANNER: I have the same offense date, yes
4 ma'am.

5 THE COURT: Okay. So I would agree, Mr.
6 Deysach, that it is part of the common scheme plan
7 and all at the same time relating to the same
8 thing, so I am going to treat this case as second
9 offenses as opposed to a third. All right. Thank
10 you, Solicitor.

11 MS. TANNER: Yes, ma'am.

12 THE COURT: All right. Ms. Lempesis, while
13 I'm waiting on them, what do you have that is
14 short?

15 (Whereupon a plea was taken before sentencing)

16 THE COURT: Please go ahead and bring Mr.
17 Bonds forward. Solicitor, anything else you need
18 to put on the record?

19 MS. TANNER: Your Honor, you've heard about
20 the prior drug offenses. Those occurring just
21 a couple of years ago, 2007 ---

22 THE COURT: Which he did a YOA for; is that
23 correct?

24 MS. TANNER: I believe so.

25 THE COURT: Was he revoked on his Yes?

1 MR. DEYSACH: I can shed a little light. The
2 burglaries, that were the crime of violence that
3 we referenced, he got a YOA on that. I'm not sure
4 if it was suspended or active at the time. I know
5 that as a result of that he has done an active
6 YOA. I'm not sure if it was the SHOCK Program.
7 He went through the SHOCK Program. It may have
8 been after his probation was revoked.

9 THE COURT: Let's ask Mr. Bonds. Mr. Bonds,
10 when you were originally sentenced, did you get a
11 suspended sentence or did you actually go to the
12 SHOCK?

13 MR. BONDS: I did the SHOCK Program.

14 THE COURT: You did the SHOCK, that's what
15 I figured.

16 MS. TANNER: 2002, he was convicted of four
17 counts of burglary in the 2nd degree, four counts
18 of -- I'm sorry -- three counts of grand larceny.
19 He received a suspended YOA but that was revoked
20 in 2003. Then he was arrested in May of 2004 for
21 pointing and presenting a firearm. That charge
22 was null prosed but his parole was revoked. Then
23 in 2006 -- February 2006, he was convicted of
24 resisting arrest. His parole was revoked again.
25 May 2008, possession of marijuana, receiving

1 stolen goods, possession with intent to distribute
2 and the sale and distribution of cocaine times
3 two. He received two years for those offenses.
4 So the convictions for the '07 charges but not
5 until '08.

6 THE COURT: Okay.

7 MR. DEYSACH: He -- he -- after his time at
8 the detention center, he tells me that when he
9 went to the Department of Corrections it was
10 something less than 90 days of a two year sentence
11 after all the time he had already done in County.
12 He was basically a turn around there on that two-
13 year, non-violent sentence.

14 THE COURT: Okay. I don't see the victim in
15 this case ---

16 MS. TANNER: He had exams this week, Your
17 Honor, so he has not been able to come back to
18 Court. We are staying in constant phone
19 conversation with him. Miss Rhonda updates him
20 several times a day.

21 THE COURT: Okay. Thank you. All right. Mr.
22 Deysach?

23 MR. DEYSACH: Thank you very much, Your Honor.
24 I have plenty I want to say but I think the first
25 person that I wanted you to hear from was his

1 mother, and so I ask Marion Bonds -- Ms. Bonds,
2 would you say a few words to the Judge about
3 Marion?

4 THE COURT: Ma'am, would you give me your
5 name for the record?

6 MS. BONDS: I want ya'll to know that Marion
7 is not a bad guy. He grewed up in the church. We
8 raised him to the best way that I knew how. He
9 went to school, Beaufort High School. I just
10 think he had found the wrong crowd to hang out
11 with and he just started getting into a little
12 trouble. He has two babies, two years old and one
13 years old. I kind of like to step in now and try
14 to raise them. It's hard 'cause I take care of a
15 75 year old, disabled sister. I work full-time.
16 I work with Beaufort County School District. I
17 hope Marion learned from this lesson. Well, if he
18 do get out or something, it could be a lesson he
19 could teach his babies.

20 MR. DEYSACH: Thank you, thank you.

21 THE COURT: Thank you, Ms. Bonds.

22 MR. DEYSACH: I guess the first thing I want
23 to say about this trial is that I think it's
24 pretty clear that it was never a trial because
25 Marion wasn't going to admit the trafficking

1 aspect of it. It was pretty clear, from the
2 evidence that the case from that side was very
3 strong. It was that the sticking point was always
4 the attempted armed robbery and the ABIK, on that
5 side of it.

6 Negotiations with the Solicitor's office broke
7 down because there never was any accommodation
8 made to us on -- as part of plea negotiations, as
9 that goes. And so, even though I let Marion know
10 the, kind of the peril, that he put himself in by
11 taking it before a jury and allowing them to
12 decide. He still -- I don't want, Your Honor to
13 think he was never going to take responsibility
14 for things he had done. It's just that what they
15 found him guilty of is different of what he had
16 originally been accused of. And so, in that way,
17 I guess that's what Jury's are for and it's a
18 point I tried to make to them and it's not about
19 is somebody completely guilty or is somebody
20 completely innocent. That there is this gray area
21 in between and that's what the Jury was able to
22 help flesh out for us.

23 I don't think that he should be -- I hope you
24 don't punish him for a failure to take
25 responsibilities for his actions because I think

1 the actions that he didn't take responsibility for
2 are actions that the Jury didn't find him guilty
3 of in the end.

4 So, I just wanted to make that point because
5 Your Honor you have so much discretion in a case
6 like this where we are talking about a minimum
7 seven years and a maximum thirty on that
8 trafficking and minimum ten and maximum fifteen on
9 the school zone charge. And then when you add the
10 other charges together if you were to run them
11 consecutively, he could spend a long time in
12 prison, under the law.

13 So, I want to ask you on Marion's behalf for
14 the shortest amount of jail time you would deem
15 appropriate and before you pass sentence, if there
16 was something that was in one of these tapes from
17 the jail that I wanted to let you hear before you
18 passed sentence. And it's a candid moment, ya'
19 know, Marion doesn't think that he's being -- he's
20 not doing this -- it's just a real moment. And I
21 want to let you hear it if I can get this
22 microphone down here.

23 (Whereupon Mr. Deysach plays a CD from the jail tapes)

24 MR. DEYSACH: That's the sound of a light bulb
25 going off in Marion's head, where he knows that

1 his actions have consequences. When we were
2 sitting there and we were looking at maybe twenty-
3 five, a minimum twenty-five, attempted armed
4 robbery, just years that are hard for a man of
5 twenty-three to even really imagine.

6 We were trying to find -- you know, trying
7 to find meaning. Ya know. So what we are asking
8 for is for Marion to take what he's learned and be
9 able to teach it to his son's when they are still
10 impressionable. So he'll be able to say, Hey,
11 this is the consequence and it's a tough
12 consequence. And he'll be able to come back to
13 them, when they are still young enough, where
14 learning that lesson will make a difference in
15 their lives.

16 And so, Your Honor, I have no problem standing
17 before you, knowing Marion, asking for the minimum
18 seven, asking for the minimum ten on the school
19 zone charge. Asking for concurrent time. I have
20 absolutely no problem doing that. I think the way
21 that the sentence came, you could give probation
22 to follow where things were more structured in a
23 certain way.

24 And so, that's what I'm asking you to do. You
25 know, Marion has -- he says, "I'll see you tomorrow

1 and he never did see them tomorrow. He's been in
2 jail the whole time. He's not been out. He's
3 been locked up -- so I don't think I can probably
4 tug on any heartstrings any more than I've done.
5 Probably just that I do apologize for the language
6 used but I hope it's something that anybody hasn't
7 really heard before.

8 I told Marion -- Marion's nervous, first of
9 all. He doesn't really want to speak. We've
10 talked about what I was saying and really, he
11 said, Would I get a chance to speak and he was
12 talking about these types of things, being able to
13 teach the lesson when he gets out of jail to his
14 kids when they are still ten years old or
15 somewhere along there at that age. But I told him
16 not to -- it might have something to do with an
17 appeal if he says the wrong thing, but he's also
18 quite nervous and obviously, a bit emotional.

19 THE COURT: Mr. Bonds is there anything you
20 want to say, sir?

21 MR. BONDS: No, ma'am.

22 MS. TANNER: Your Honor, there is something
23 the State would like to add when have the
24 opportunity. There's no light bulb that has gone
25 off. Mr. Bonds, he's been convicted of

1 burglaries, he's been convicted of prior drug
2 offenses. He's a convicted felon in possession of
3 a gun. He's convicted of shooting someone. He's
4 convicted of trafficking drugs, again. He's on
5 the phone, with the mother of that child, talking
6 about hiding those drugs and she's "down with it",
7 she says, "I'm with you".

8 So before we get too touched by that
9 conversation, we need to go back and listen to it
10 in it's entirety about what that phone call was
11 about. And also, at the time, there was a CDV
12 charge against Mr. Bonds.

13 MR. DEYSACH: Your Honor, I don't think it's--

14 -
15 MS. TANNER: --- She can hear anything ---

16 MR. DEYSACH: --- I think ---

17 MS. TANNER: Yes, she can. You can hear
18 hearsay. You can hear anything that's on the
19 record at sentencing hearings. So, I don't know--
20 I don't know -- you're aware of the negotiations
21 that were attempted. You know the efforts that
22 were made and the opportunities that were given
23 and we discussed, in Chambers, what the State
24 would be asking for. The trafficking carries up
25 to thirty years. The State thinks he deserves it.

1 He is what this community is concerned about. He
2 is a convicted felon. He is a drug dealer. He is
3 an armed drug dealer who is not afraid to pull the
4 trigger. He has been found guilty of that today.
5 And we ask for the thirty years because he's
6 earned it.

7 MR. DEYSACH: Just briefly. I did want to
8 point out -- I didn't say the burglaries were at
9 age sixteen when they occurred. He's twenty-
10 three, now. That's all.

11 THE COURT: Thank you. On indictment number
12 2010 GS 7 598, it's for Assault and Batter of a
13 High and Aggravated Nature, the sentence of this
14 Court is that you be committed to the Department
15 of Corrections for a period of ten years.

16 On indictment number 2010 GS 7 599 for Felony
17 Possession of a Handgun, sentence of this Court
18 is that you be committed to the Department of
19 Corrections for a period of five years.

20 On indictment number 2010 GS 7 602 for
21 Trafficking Crack Cocaine, more than 28 but less
22 than 100 grams, second offense, sentence of this
23 Court is that you be committed to the Department
24 of Corrections for a period of 20 years.

25 On indictment number 2010 634 for Possession...

1 with Intent to Distribute within a half a mile of
2 a school, sentence of this Court is that you be
3 committed to the Department of Corrections for a
4 period of 15 years.

5 Those are to all run concurrent to each other.
6 I'm giving you credit for the time you've served
7 while awaiting trial. Good luck to you, Mr.
8 Bonds.

9 MR. DEYSACH: Thank you, Your Honor.

10 MS. TANNER: Thank you.

11 MR. DEYSACH: At this time, I would make a
12 motion for you to reconsider, possibly to be heard
13 at a later time.

14 THE COURT: Noted for the record and preserved
15 your right.

16 MR. DEYSACH: Thank you.

17 MS. TANNER: Thank you.

18 (Whereupon Court was dismissed at 3:38 P. M.)
19

20 --- END OF TRANSCRIPT OF RECORD ---
21
22
23
24
25

DOCKET NO. 2010GS0700598

WITNESSES

Kelleher - BCSC

The State of South Carolina

County of Beaufort

Defendant

COURT OF GENERAL SESSIONS

March Term 2010

Hereby appear in my own proper person and plead guilty to the within indictment or to

THE STATE

vs.

Marion J Bonds

Defendant

Witness:

C.C.C. PLS. and G.S.

ARREST WARRANT NUMBER

M056058

ACTION OF GRAND JURY

True Bill

Signature of Grand Jury
Date: MAR 25 2010

VERDICT

Indictment for
Assault and battery with Intent to Kill (ABWIK)

SC Code: 16-03-0620
CDR Code:0014

Foreperson of Petit Jury

Date:

INDICT

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

ABHAN

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

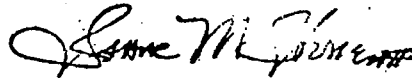
INDICTMENT
2010GS0700598

At a Court of General Sessions, convened on March 25, 2010, the Grand Jurors of Beaufort County present upon their oath:

Assault and battery with Intent to Kill (ABWIK)

That in Beaufort County, South Carolina, on or about February 17, 2010, the Defendant, Marion Bonds, with malice aforethought, did commit an unlawful act of a violent nature upon the victim, Reginal Jermaine Holmes, to wit: the Defendant did shoot the victim; all in violation of the Common Law of South Carolina and Section 16-03-620 of the Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Solicitor

DOCKET NO. 2010GS0700599

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

March Term 2010

THE STATE

vs.

Marion J Bonds

Indictment for

Weapons / Sale or delivery of pistol to, and possession by, a person unlawfu

SC Code: 16-23-0030; 16-23-0050(A)
CDR Code:2364

WITNESSES

Kelleher - BCSO

ARREST WARRANT NUMBER

TM056059

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: MAR 25 2010

VERDICT

Foreperson of Petit Jury

Date:

INDICT

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. and G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

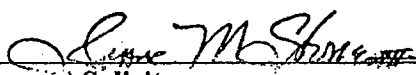
INDICTMENT
2010GS0700599

At a Court of General Sessions, convened on March 25, 2010, the Grand Jurors of Beaufort County present upon their oath:

Weapons / Sale or delivery of pistol to, and possession by, a person unlawful

That in Beaufort County, South Carolina, on or about February 17, 2010, the Defendant, Marion J Bonds, did have in his possession a handgun, after having been convicted of a crime of violence; all in violation of Section 16-23-30(B), Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


Solicitor

DOCKET NO. 2010GS0700602

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

March Term 2010

THE STATE

vs.

Marlon J Bonds

Indictment for

Drugs / Trafficking in meth. or cocaine base - 28
grams or more, but less than 100 grams

SC Code: 44-53-0375(C)(2)(c)
CDR Code:0349

After being fully advised as to my legal
rights, I hereby waive presentment to the
Grand Jury.

Defendant

Hereby appear in my own proper person
and plead guilty to the within indictment or
to

Defendant

Witness:

C.C.C. PLS. and G.S.

WITNESSES

Rice - BCSO

ARREST WARRANT NUMBER

J348354

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: 3/15/2010

VERDICT

Foreperson of Petit Jury

Date:

INDICT

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

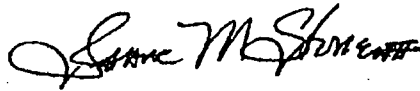
INDICTMENT
2010GS0700602

At a Court of General Sessions, convened on March 25, 2010, the Grand Jurors of Beaufort County present upon their oath:

**Drugs / Trafficking in meth. or cocaine base - 28 g or more,
but less than 100 grams**

That in Beaufort County, South Carolina, on or about February 17, 2010, the Defendant, Marion J Bonds, knowingly did sell, manufacture, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: crack cocaine, in excess of more than 28 grams but less than 100 grams; in violation of 44-53-375 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

DOCKET NO. 2010GS0700634

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

March Term 2010

THE STATE

vs.

Marion J Bonds

Indictment for

Drugs / Distribute, sell, purchase, manuf. crack
within 1/2 mile proximity of school

SC Code: 44-53-0445(B)(2)
CDR Code: 0108

WITNESSES

Rice/Florencia - BCSO

ARREST WARRANT NUMBER

J338091

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: MAR 25 2010

VERDICT

Foreperson of Petit Jury
Date: INDICT

After being fully advised as to my legal
rights, I hereby waive presentment to the
Grand Jury.

Defendant

Hereby appear in my own proper person
and plead guilty to the within indictment or
to

Defendant

Witness:

C.C.C. PLS. and G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT
2010GS0700634

At a Court of General Sessions, convened on March 25, 2010, the Grand Jurors of Beaufort County present upon their oath:

Drugs / Distribute, sell, purchase, manuf. crack within ½ mile proximity of school

That in Beaufort County, South Carolina, on or about February 17, 2010, the Defendant, Marion J Bonds, unlawfully did distribute, sell, purchase, manufacture, or possess with intent to distribute crack cocaine, a controlled substance, within a one-half mile radius of the grounds of St. Helena Elementary School; all in violation of Section 44-53-445, Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

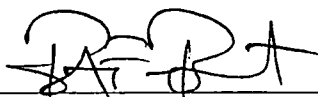


Solicitor

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 23rd, 2012



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Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BONDS,

APPELLANT

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court judge erred when she did not suppress the fruits of a warrantless search of appellant's bedroom in a home owned by another, because appellant had a reasonable expectation of privacy in the room, and law enforcement could not reasonably have believed the landowner when he informed them that appellant did not reside there?

II. Whether the trial court judge erred when she did not suppress the photo line-up which contained a picture of the appellant, because the accuser was related to appellant--and they knew one another well—and when the introduction of the photo lineup bolstered the accuser's testimony?

STATEMENT OF THE CASE

Marion Bonds was indicted by the Beaufort County grand jury for robbery, assault and battery with intent to kill, possession of a pistol by a person convicted of a crime of violence, 2 counts of trafficking in crack cocaine, and distribution within a school zone. He was tried before the Hon. Carmen T. Mullen between December 13- 16, 2010. The jury found appellant guilty of the lesser included offense of assault and battery of a high and aggravated nature, and acquitted him on attempted armed robbery, and acquitted him on trafficking, 10 grams to 28 grams. The jury found him guilty of unlawful possession of a handgun, the other count of trafficking in cocaine, 28 grams -- 100 grams, and possession with intent to distribute within 1/2 mile radius of the school. He was sentenced to 20 years incarceration. He was represented by Ian Deysach, Esquire. The State was represented by Angela Tanner, Esquire.

This appeal timely follows.

ARGUMENTS

I. The trial court judge erred when she did not suppress the fruits of a warrantless search of appellant's bedroom in a home owned by another, because appellant had a reasonable expectation of privacy in the room, and law enforcement could not reasonably have believed the landowner when he informed them that appellant did not reside there.

RELEVANT FACTS

Appellant was convicted of offenses alleged to have occurred on or about February 17, 2010. On that date, appellant and another person allegedly went to the accuser's trailer at around 7:00 AM and demanded money. The accuser's name is Reginal Holmes, and he is related to the appellant. After a brief altercation, appellant allegedly shot Holmes in the arm. Appellant and the other person then left the trailer and approximately 3 hours later appellant was discovered in a closet at a residence purportedly owned by Mr. Richard Lewis. Crack cocaine was found in the closet where appellant was located, and in other places throughout the house. Crack cocaine was found located in a bathroom under a sink. R. 53, ll. 9-21. Appellant was charged with all of it.

Lewis's street name is Old School and he is from New York City. R. 365, l. 25- 63, l. 14. His mother owned the house where he stayed. R. 367, ll. 1-2. He testified at trial that appellant and his girlfriend lived at that residence but had moved out a couple of months before the police descended on the house in February. R. 367, l. 16- 25. According to his testimony at trial, he received a phone call from appellant that morning and appellant wanted to come by his house to "freshen up." R. 368, l. 6-12. Old School also testified that he had significant drug problems over the years, and has used drugs for the last 35 years. He

also has had a number of legal problems as result of his drug use, and additional legal problems resulting from his forging his mother's checks. R. 374, l. 3- 375, l. 10.

Prior to the start of trial, defense counsel made a motion to suppress the drugs that were recovered in this case because the search and seizure were unlawful. R. 29, ll.4-5.

Officer Kelleher testified on behalf of the State, and admitted that he did not have warrant when they entered 28 Ball Park Road, the location where appellant was ultimately found. This location is approximately 2.5 miles from the site of the shooting. R. 30, l. 1-31, l. 12. Prior to approaching this location, law enforcement had gone to other locations looking for appellant. R. 35, l. 23- 36, l. 5.

According to the officer's testimony, they received consent from the homeowner to enter the house. R. 38, ll. 18 -- 24. The officer also testified that the accuser and appellant's relative, Holmes, told him he should look for him at Old School's house. He conceded that law enforcement knew that appellant had stayed there in the past. R. 43, ll. 3- 44, l. 18. Kelleher also conceded that his written report noted that appellant "often" stayed at that location. R. 63, ll. 9- 64, l. 1. Officer Fraser also testified that he knew that appellant stayed at that location based on his prior dealings. R. 75, l. 10- 76, l. 2. Fraser conceded that Old School told him that appellant stayed with him and that he knew which bedroom appellant stayed in because of his prior dealings with that household. R. 76, l. 11- 77, l. 21. In the bedroom, law enforcement located an extra pair of shoes, about the closet, Vaseline on the nightstand, lotion on the dresser, an iron on the dresser, three pairs of jeans on the dresser, some hats and jackets, and some jeans being pressed underneath the mattress. There was also a camouflage jacket on the bed which matched the description the accuser gave of what

appellant was wearing earlier that morning. R. 85, l. 9- 87, l. 3. Fraser also testified that Old School did not give the consent to enter the bedroom. R. 88, ll. 13-15.

Fraser also testified that they did not really obtain consent to search, so much as they just followed him into the house:

Q: At that point do you get consent again to go into his house?

A: I Mirandized him and told him why we were there and asked him where the crack was. He said it was under the sink in the bathroom.

Q: And so were you—you did enter the house, right?

A: Yes, sir.

Q: Did you do that because you had already gotten consent earlier in the day?

A: No, sir.

Q: Did you do it because you got consent right—

A: No. He took us in the house.

Q: So you don't really come out and ask him for consent but you follow him in as he leads you in?

A: Yes, sir.

R. 89, ll. 7-21.

At trial, Lewis testified that "Yes. They came in with me. They were supposed to wait at the door but as we were coming in someone knocked the screen out my window in front and they all rushed the house the same time." R. 372, ll. 4-7.

During the pretrial suppression hearing, appellant testified that he stayed at the house, and had given Old School \$40 to stay there for the entire week. He also testified that he had a key to the residence. R. 98, ll. 1-17. He further testified that he kept all of his

clothes, and underwear at Lewis's house. R. 99, ll. 2-- 15. He also kept his tooth brush and his deodorant at that address. R. 99, lines 16 -- 20.

Defense counsel objected to the search, and argued that Old School did not have the authority to consent to the search. R. 105, line 1 -- 112, line 3. The State argued that appellant did not have any expectation of privacy in the bedroom. R. 112, ll. 5 -- 17. After lengthy argument, the trial court judge found that appellant did not have any expectation of privacy:

THE COURT: All right. Well, respectfully I think there was no expectation of privacy. At the Richard Lewis gave permission and he was the only one home and I'm not going to suppress the results of that search or the results of that arrest. What is your next motion?

R. 117, ll. 18-23.

The trial court judge erred because appellant had a reasonable expectation of privacy, and law-enforcement and could not reasonably have believed that Old School had the authority to consent to the search of the bedroom occupied by appellant.

Evidence obtained as a result of an unlawful search constitutes a violation of the 4th amendment and is inadmissible at trial. State v. Nelson, 336 S.C. 186, 192 n.3, 519 S.E.2d 786, 789 n. 3 (1999). When a defendant has a reasonable expectation of privacy in the property being searched, 4th amendment rights apply to the search. Minnesota v. Olson, 495 U.S. 91, 95-96. A reasonable expectation of privacy exists when the defendant has a relationship with the property or property owner. State v. Missouri, 352 S.C. 121, 129, 572 S.E.2d 467, 470-471 (Ct. App. 2002).

The South Carolina Supreme Court adopted the test regarding third-party consent articulated in U. S. v. Matlock, 415 U.S. 164 (1974):

In Matlock, the test devised for determining whether a third party had sufficient status to consent to a search was whether the third party possessed common authority over or had some other sufficient relationship to the premises or effects searched.

State v. Middleton, 266 S.C. 251, 258-59, 222 S.E.2d 763, 766 (1976).

Common authority is defined as “mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable” for the searching officers to believe that the person granting consent had the authority to do so. State v. Moultrie, 271 S.C. 526, 248 S.E.2d 486 (1978). See Illinois v. Rodriguez, 497 U.S. 177 (1990).

In Moultrie, the South Carolina Supreme Court found that the owner of the home had common authority and a sufficient relationship to the premises to consent to a search. The court also noted that the appellant was a guest in that home. Id. 528-29.

By their own testimony, law enforcement was aware that appellant spent a significant amount of time at the home where Old School resided. They knew that he spent nights there, and they were aware that the accuser also stated that appellant spent time there since he is the one who directed them to that location. In short, law enforcement understood that appellant had an expectation of privacy in that home. Additionally, it should have been evident from the time that they entered the bedroom that it was occupied by appellant. It was not reasonable for them to believe that Old School could grant consent to search the property. Law enforcement was obligated to secure a warrant before they entered appellant's bedroom. Their failure to do so rendered the search and seizure illegal. The trial court judge erred when she found that appellant did not have a reasonable expectation of privacy in that home, especially in light of appellant's testimony that he paid money to Old

School for the privilege of staying there. Respectfully, appellant asks this court to reverse his convictions.

II. The trial court judge erred when she did not suppress the photo line-up which contained a picture of the appellant, because the accuser was related to appellant-- and they knew one another well—and when the introduction of the photo lineup bolstered the accuser’s testimony.

Appellant is related to the accuser. Nevertheless, law-enforcement, in connection with this investigation, presented a photo lineup to the accuser to see if he could identify his assailant. At the pretrial hearing, defense counsel objected to the introduction of the six-pack photo ID on the basis that it constitutes improper bolstering since the parties know one another. R. 27 -- 28. The State argued that it was not bolstering, but was part of the investigation, “just another piece of evidence.” R. 28, l. 21-22. The trial court judge ruled that it would be admissible. R. 29, lines 4-5.

During trial, the state moved the photo lineup and the evidence. R. 125. Defense counsel objected to its admission. R. 123- 125.

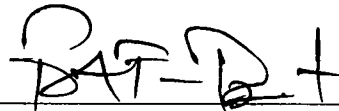
The trial court judge erred when she allowed the State to introduce this evidence, because it improperly bolstered the testimony of the accuser. See State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003) (improper admission of statement that was insufficient to invoke Rule 801(d)(1)(B) improperly bolstered the witness’s testimony). As an introduced piece of evidence, this photo lineup was sent back to the jury for their consideration, even though it lacked any probative value. Admission of this photo lineup unduly emphasized the accuser’s testimony that he claimed appellant, his relative, committed this crime. It was improper, and appellant was prejudiced. State v. Gullledge, 277 S.C. 368, 287 S.E.2d 488

(1982); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980). Respectfully, appellant asks this Court to reverse his convictions.

CONCLUSION

For the preceding reasons, appellant respectfully asks this Court to reverse his convictions, and grant him a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "EAT-Best", written over a horizontal line.

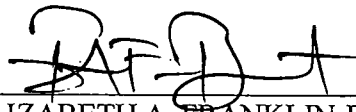
Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of April, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

A handwritten signature in black ink, appearing to read 'EAFB', is written over a horizontal line.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

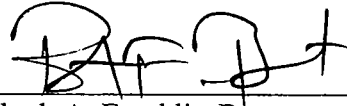
V.

MARION BONDS,

APPELLANT

CERTIFICATE OF SERVICE

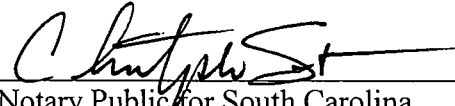
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 12th day of April, 2012.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of April, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021 .

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

The State,

Respondent,

vs.

Marion Bonds,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly denied Appellant's suppression motion because the investigators' search of the residence was performed with consent from a party with apparent authority over the premises, exigent circumstances justified the search regardless of any obtained consent, and the evidence was discovered in plain view. Furthermore, Appellant did not possess the capacity to challenge the searches under the Fourth Amendment because he did not have a reasonable expectation of privacy in the Ball Park Road residence.

II.

The trial judge properly allowed the State to introduce the photo line-up that contained a picture of Appellant because the photo line-up did not bolster the victim's testimony, and even if the admission amounted to improper bolstering, any error was harmless.

STATEMENT OF THE CASE

On March 25, 2010, a Beaufort County Grand Jury indicted Appellant for assault and battery with intent to kill, unlawful possession of a handgun by a person convicted of a crime of violence, attempted armed robbery, trafficking in crack cocaine (28 grams or more but less than 100 grams), trafficking in crack cocaine (more than 10 grams but less than 28 grams), and possession with intent to distribute crack cocaine within a one-half mile radius of a school. (R. pp. 557-564.)

On December 13, 2010, Appellant proceeded to trial on all charges. The Honorable Carmen T. Mullen presided over the trial. (R. p. 1.) Ian Deysach represented Appellant, and Angela Tanner represented the State. (R. p. 2.)

On December 16, 2010, the jury found Appellant guilty of the following crimes: 1) assault and battery of a high and aggravated nature, 2) unlawful possession of a handgun by a person convicted of a crime of violence, 3) trafficking in crack cocaine (28 grams or more but less than 100 grams), and 4) possession with intent to distribute crack cocaine within a one-half mile radius of a school. (R. pp. 538-39.) The jury found Appellant not guilty of the following crimes: 1) assault and battery with intent to kill, 2) trafficking in crack cocaine (10 grams or more but less than 28 grams), and 3) attempted armed robbery. (R. pp. 538-39.)

After the jury returned the verdict, Judge Mullen sentenced Appellant to ten years of imprisonment for assault and battery of a high and aggravated nature, five years of imprisonment for unlawful possession of a handgun by a person convicted of a crime of violence, twenty years of imprisonment for trafficking in crack cocaine (28 grams or more but less than 100 grams), and fifteen years of imprisonment for possession with intent to distribute crack cocaine within a one-half mile radius of a school. (R. pp. 555-56.) In total, Appellant was sentenced to 50 years of imprisonment.

Appellant filed his Notice of Appeal on December 23, 2010. Appellant served his Initial Brief on December 8, 2011. This brief follows.

STATEMENT OF FACTS

On February 17, 2010, Appellant went to his cousin's, Reginal Holmes ("Holmes"), residence and shot Holmes. (R. p. 172; R. p. 178; R. p. 181; R. p. 187.)

At trial, Holmes testified that on February 17, 2010, a little before 7:00 a.m., Appellant and another individual showed up at Holmes' residence pointing a gun at Holmes and demanding money. (R. pp. 175-76; R. pp. 177-78.)

Around 7:00 a.m. that morning, Corporal Paul Green and Investigator John Kelleher responded to a "shots fired" call at Holmes' residence. (R. pp. 152-153; R. pp. 239-240.) When Corporal Green arrived at scene, Corporal Green saw Holmes' gunshot wound. (R. p. 155.) Eventually, Holmes took an ambulance to the hospital. (R. p. 183.)

Approximately 9:00 a.m. that morning, Appellant called Richard Lewis ("Lewis") to see if Appellant could come over to Lewis' house, located on Ball Park Road, in order to "freshen up." (R. p. 187.) Lewis told Appellant he could come over. (R. p. 187.) Around 9:30 a.m., Appellant arrived at the Ball Park Road residence. (R. p. 190.) Lewis had to let Appellant inside because Appellant did not have key. (R. pp. 368-69.)

According to Lewis, Appellant used to live with Lewis at the Ball Park Road residence; however, Appellant moved out a few months before the February 17, 2010 shooting. (R. p. 367.) Lewis' mother owned the Ball Park Road residence. (R. p. 367.) On the day of the shooting, Lewis was the only person residing in the trailer. (R. p. 367.) On occasion, Appellant would pay Lewis \$40 a week to stay at the Ball Park Residence; however, Appellant did not pay Lewis any money to stay at the Ball Park Road residence on the day of the shooting. (R. p. 389.)

At trial, Investigator Jeremiah Fraser testified that he went to the hospital with Investigator Brian Chapman to interview Holmes on the day of the shooting. (R. pp. 312-13.)

After questioning Holmes, the two investigators were able to determine two suspects in the shooting—Appellant and Jason Thomas (“Thomas”). (R. pp. 313-14.) Moreover, Holmes gave the investigators a list of addresses where Appellant and Thomas might be hiding. (R. p. 315.)

First, the investigators searched the area where the shooting occurred for Appellant and Thomas. (R. p. 314.) Next, the investigators went to three different residences to look for Appellant and Thomas. (R. pp. 314-15.) However, the investigators were unsuccessful in locating the two suspects at that point. (R. pp. 314-15.) Finally, around 10:00 a.m. on the day of the shooting, the investigators went to the Ball Park Road residence, which was one of the residences Holmes listed. (R. p. 315.)

When the investigators arrived at the Ball Park Road residence, they heard loud, heavy movement inside the trailer, which indicated to them that something was going on inside the trailer. (R. p. 316.) Thereafter, Investigator Fraser walked to the back door and made contact with Lewis. (R. p. 316.) Investigator Fraser asked Lewis if Appellant and Thomas were inside the trailer. (R. p. 316.) At first, Lewis told the investigators that Appellant and Thomas were not inside the trailer. (R. p. 316.) However, once Investigator Fraser told Lewis about the shooting, Lewis indicated to Investigator Fraser that Appellant and Thomas were in the back bedroom. (R. pp. 316-17.)

At that time, Lewis told the investigators that he was the only one that lived in the Ball Park Road residence. (R. p. 93.) Additionally, Lewis told the investigators that Appellant moved out of the Ball Park Road residence months ago; however, Appellant stayed at the residence a week before the shooting. (R. p. 94.)

According to Investigator Lewis, Investigator Kelleher, and Investigator Chapman, Lewis gave the investigators consent to go inside the trailer to search for Appellant and

Thomas. (R. p. 38; R. p. 42; R. p. 317.) However, Lewis testified that he wanted to go inside and tell Appellant and Thomas to come outside and talk to the police. (R. p. 390.) Before Lewis could go inside to mediate, everyone heard a loud crash from the back bedroom window. (R. pp. 390-91.) Thereafter, Investigator Fraser and Investigator Chapman entered the trailer. (R. p. 317; R. p. 391.) Police surrounded the trailer. (R. p. 317.) At trial, Lewis stated he gave Investigator Fraser "implied permission" to enter the residence in order to search for Appellant and Thomas. (R. p. 397.)

When the investigators first entered the trailer, they moved towards the back bedroom where they heard all of the commotion. (R. pp. 317-18.) Before the investigators got to the back bedroom, a man named Larry Holmes came out of the bathroom; Investigator Fraser detained him and passed him back to Investigator Chapman. (R. p. 318.) Thereafter, the investigators heard a window slam and the police officers outside yelled "Sheriff's Office, show me your hands." (R. p. 318.)

Once Investigator Fraser heard the window slam, he hit the bedroom door. (R. p. 318.) As soon as the door opened, Investigator Fraser saw Thomas running towards him. (R. p. 319.) Investigator Fraser detained Thomas and passed him back to Investigator Chapman. (R. p. 319.) Investigator Fraser did not see Appellant until Investigator Fraser yelled for Appellant to show his hands. (R. p. 319.) Appellant displayed his hands on the closet floor, per Investigator Fraser's instructions. (R. p. 319.) Investigator Fraser saw Appellant lying on the closet floor on top of a camouflage jacket. (R. p. 323.) Because Holmes told the investigators that Appellant was wearing a camouflage jacket when Appellant shot him, Investigator Fraser removed the jacket from the floor to keep as evidence. (R. p. 320; R. p. 324.) Once Investigator Fraser moved the camouflage jacket, he saw a shoe that contained a large quantity of crack cocaine. (R. p. 320; R. p. 324.) In addition, the investigators found two pill bottles

containing crack cocaine underneath the mattress in the bedroom where Appellant was found. (R. p. 320.)

At 10:37 a.m., after the police detained Appellant, Lewis signed a consent form, which allowed the investigators to search the house for a weapon. (R. p. 392; R. p. 396.)

After the investigators processed the Ball Park Road residence, they returned to their office. (R. p. 328.) At that point, Appellant was in jail and the investigators began listening to the phone calls Appellant was making. (R. p. 328.) Appellant called Lewis and asked Lewis to get Appellant's drugs of the trash can. Appellant told Lewis to hold on to the drugs. (R. p. 376; R. p. 424.) When Lewis looked in the trash can, he found crack cocaine. (R. p. 376.)

Thereafter, Investigator Fraser sent Corporal Green to the Ball Park Road residence to secure the house. (R. p. 329.) Once Investigator Fraser arrived at the Ball Park Road residence, he immediately spoke with Lewis. (R. p. 329.) At that time, Lewis gave Investigator Fraser consent to enter the residence. (R. p. 329; R. p. 396.) Lewis took Investigator Fraser inside the residence and showed him the crack cocaine that Lewis just hid underneath the bathroom sink. (R. p. 329.)

On February 18, 2010, the day after the shooting, Investigator Kelleher prepared a photo line-up and presented it to Holmes. (R. p. 329.) Holmes identified Appellant and Thomas from the photo line-up. (R. p. 329.)

During the suppression hearing, Appellant's trial counsel moved to suppress the drugs found in both searches of the Ball Park Road residence. In addition, Appellant's trial counsel objected to the introduction of the photo line-up identification made by Holmes.

At the suppression hearing, Appellant testified he stayed at the Ball Park Road a week before the February 17, 2010 incident. (R. p. 98.) Other times, Appellant stayed at his girlfriend's house. Although Lewis testified at trial that Appellant did not pay him any money

to stay at the Ball Park Road residence on February 17, 2010, Appellant claimed he paid Lewis \$40 to stay the week of February 17, 2010. (R. p. 98.) Furthermore, Appellant claimed he owned the clothes, toothbrush, deodorant, and lotion found in the back bedroom of the Ball Park Road residence. (R. p. 99.) However, the address listed on Appellant's license was his mother's address. Moreover, all of Appellant's mail went to his mother's address. (R. p. 103.) Ultimately, the trial judge denied Appellant's trial counsel's motion to suppress the evidence found during the searches of the Ball Park Road residence and the motion to suppress the photo line-up identification made by Holmes. (R. p. 29; R. p. 117.)

After analyzing the crack cocaine found in the Ball Park Road residence, Renata Berry ("Berry"), an expert in forensic chemistry, testified about the quantity of crack cocaine that was found in the residence. (R. pp. 348-59.) According to Berry, during the first search of the Ball Park Road residence, the investigators found 43.04 grams of crack cocaine located in Appellant's shoe, 5.80 grams of crack cocaine in a pill bottle located underneath a mattress, and 16.30 grams of crack cocaine in a pill bottle located underneath a mattress. In total, the investigators found 65.14 grams of crack cocaine in the back bedroom during the first search. (R. pp. 353-59.) During the second search of the Ball Park Road residence, the investigators found 20.40 grams of crack cocaine located underneath the bathroom sink. (R. pp. 356-57.)

ARGUMENT

- I. The trial judge properly denied Appellant's suppression motion because the investigators' search of the residence was performed with consent from a party with apparent authority over the premises, exigent circumstances justified the search regardless of any obtained consent, and the evidence was discovered in plain view. Furthermore, Appellant did not possess the capacity to challenge the searches under the Fourth Amendment because he did not have a reasonable expectation of privacy in the Ball Park Road residence.

Appellant maintains the trial judge erred in not suppressing the evidence recovered in the search of the Ball Park Road residence. Appellant asserts that Appellant had a reasonable expectation of privacy, and the officers could not reasonably of believed Lewis when he informed them that Appellant no longer resided at the Ball Park Road residence. However, the investigators had consent to search the home from a person with apparent authority over the residence. Additionally, the search was further justified by exigent circumstances, and the crack cocaine was discovered in plain view. The investigators' actions in searching the home were entirely reasonable. Moreover, the trial judge properly refused to suppress the evidence because Appellant did not have a reasonable expectation of privacy in the residence. Therefore, the evidence recovered in the search was properly admitted at trial, and the trial judge's ruling is supported by the evidence. For these reasons, Appellant's conviction should be affirmed.

Standard of Review

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is *any* evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004) (emphasis added). The appellate court will not reverse merely because it would have reached

a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). The appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005).

General Fourth Amendment Law

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " United States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) the automobile exception; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Additionally, exigent

circumstances can justify a warrantless search of a home which would otherwise be unreasonable. State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009).

A. Consent

Even if Appellant had an expectation of privacy at the Ball Park Road residence, Lewis, the tenant of the residence, gave the investigators consent to enter the residence to search for Appellant and Thomas. (R. p. 38; R. p. 42; R. p. 317; R. p. 396.) When the investigators found Appellant hiding in the closet, they saw, in plain view, Appellant lying on top of his shoe, which contained 43.04 grams of crack cocaine. (R. p. 320; R. p. 324.) Additionally, after the investigators detained Appellant, Lewis gave the investigators consent to search the residence for a weapon. (R. p. 392; R. p. 396.) Thereafter, the investigators found two pill bottles containing crack cocaine underneath a mattress in the bedroom where Appellant was found.¹ Furthermore, when the investigators returned to the residence later in the day, Lewis gave the investigators consent to search the residence when he led the investigators to the crack cocaine that he hid underneath the bathroom sink. (R. p. 329; R. p.

¹ During the first search of the Ball Park Road residence, the investigators found 43.04 grams of crack cocaine located in Appellant's shoe, 5.80 grams of crack cocaine in a pill bottle located underneath a mattress, and 16.30 grams of crack cocaine in a pill bottle located underneath a mattress. In total, there was 65.14 grams of crack cocaine found in the bedroom during the first search. Although it is not entirely clear from the record whether or not the investigators found the two pill bottles containing crack cocaine before or after Lewis signed the consent form at 10:37 a.m. that morning, any error would be harmless. Appellant was charged with trafficking in crack cocaine 28 grams or more but less than 100 grams. Therefore, the 43.04 grams of crack cocaine that was found in Appellant's shoe was enough to find Appellant guilty of trafficking in crack cocaine 28 grams or more but less than 100 grams. In other words, the 22.1 grams of crack cocaine found in the pill bottles underneath the mattress did not increase Appellant's trafficking charge.

396.) Moreover, because Lewis had common authority over the residence, his consent to both of the searches was valid. Therefore, the trial judge properly ruled Lewis consented to the search of the residence. (R. p. 117.)

i. When the police first arrived at the Ball Park Road residence, Lewis consented to a search of the Ball Park Road residence in order to detain Appellant and Thomas, and Lewis consented to the search of the residence in order to find the weapon used in the shooting.

A warrantless search may be justified based on consent obtained from a third party. Flowers, 360 S.C. at 5, 598 S.E.2d at 728. In order to give consent, the third party must have "common authority over or some other sufficient relationship to the premises or effects being searched." Id.; see United States v. Matlock, 415 U.S. 164, 171 (1974) ("These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or sufficient relationship to the premises or effects sought to be inspected."). "Common authority is defined as mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for officers to believe the person granting consent has the authority to do so." State v. Laux, 344 S.C. 374, 376, 544 S.E.2d 276, 277 (2001).

Furthermore, landlords and hotel managers may not validly consent to a search of a tenant or hotel guest's room. State v. Moultrie, 271 S.C. 526, 529, 248 S.E.2d 486, 487-488 (1978). However, where no landlord-tenant relationship exists, a host can validly consent to a search of premises occupied by a guest. Id. at 529, 248 S.E.2d at 488. Guests assume the risk home residents will allow others into the premises. Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916.

In the case at hand, Lewis gave the investigators consent to search the Ball Park Road residence for Appellant and Thomas. In addition, after the investigators detained Appellant and Thomas, Lewis signed a consent form to allow the investigators to search the residence for the weapon used in the shooting. (R. p. 392; (R. p. 396.) Although there were some discrepancies in Investigator Fraser's testimony during the suppression hearing and his testimony during the trial concerning consent during the first search, there is evidence in the record to support the trial judge's ruling that Lewis consented to the first search. (R. p. 88; R. p. 317; R. p. 397.) During the trial, Investigator Fraser testified Lewis gave consent to search the Ball Park Road residence for Appellant and Thomas. (R. p. 317.) Moreover, Lewis testified at trial that he gave the investigators his "implied permission" to enter the Ball Park Road residence to search for Appellant and Thomas. (R. p. 397.) See United States v. Hylton, 349 F.3d 781, 786 (4th Cir. 2003) ("Consent may be inferred from actions as well as words.").

Moreover, because Lewis had common authority over the residence, his consent was valid. At most, Appellant was Lewis' guest on the morning of the shooting. (See Flowers, 360 S.C. at 6, 598 S.E.2d at 728, where the court held that the defendant was a guest in his girlfriend's home. Id. The defendant spent approximately five nights a week at the girlfriend's house. Id. Furthermore, he kept a change of clothing at the girlfriend's house and occasionally paid rent. Id.); see also Moultrie, 271 S.C. at 529, 248 S.E.2d at 488 ("In this case there is no evidence that appellant was renting the room he shared with the owner's daughter. We hold that where no landlord-tenant situation exists, a host can validly consent to a search of the premises occupied by a guest.").

Furthermore, there was no evidence Appellant had exclusive possession of the room where the investigators found him located. See Flowers, 360 S.C. at 6, 598 S.E.2d at 728; see also State v. Vaster, 24 Wash. App. 405, 601 P.2d 1292, 1294-95 (1979) ("holding where a

guest does not maintain exclusive control over any portion of the residence, even if the guest has a legitimate expectation of privacy, a homeowner's power to consent to a search of his own home overrides the objection of a guest to a search). Flowers, 360 S.C. at 6, 598 S.E.2d at 728.

Here, Lewis resided in the trailer and occasionally allowed Appellant to stay in the room where Appellant was found. However, Appellant did not rent the room that day. He was just at the residence to "freshen up." As a guest, Appellant assumed the risk that Lewis would allow others into the premises. See Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916. In summary, because there is evidence to support the trial judge's finding that Lewis gave consent to the search, this Court should uphold the trial court's ruling on the issue of consent.

ii. When the police went to the Ball Park Road residence the second time, Lewis consented to the search by leading the police to the crack cocaine he hid underneath the bathroom sink.

As mentioned above, "[c]onsent may be inferred from actions as well as words." Hylton, 349 F.3d at 786. In the present case, Appellant, called Lewis to get Appellant's crack cocaine out of the trash can located in the Ball Park Road residence. (R. p. 376.) The police heard this entire conversation because Appellant made the phone call while he was in jail; therefore, the conversation was recorded. Thereafter, Lewis removed the crack cocaine from the trash can and threw it underneath the bathroom sink cabinet. (R. p. 378.) While Lewis was on the phone with Appellant, Corporal Green was already at the Ball Park Road residence in order to secure the scene. (R. p. 377.) Corporal Green told Lewis to come outside. (R. p. 379.)

When Investigator Fraser arrived at the Ball Park Road residence for the second time that day, Lewis showed Investigator Fraser where he hid the crack cocaine. (R. p. 329.) According to Lewis' testimony, he willingly showed the investigators where he hid the crack

cocaine. (R. p. 379.) Moreover, he stated he consented to the investigators searching the residence the second time. (R. p. 379.) Because Lewis consented to the second search of the residence, the trial judge properly admitted the crack cocaine into evidence.

B. Exigent Circumstances

When the investigators visited Holmes in the hospital, Holmes told them that Appellant was the one that shot him. Furthermore, Holmes informed the investigators that Appellant might be hiding at the Ball Park Road residence. When the investigators arrived at the Ball Park Road residence, they heard loud, heavy movement inside the trailer, which indicated to them that something was going on inside the residence. (R. p. 316.) Lewis told Investigator Fraser that Appellant and Thomas were inside the residence. (R. pp. 316-17.) Lewis testified that he wanted to go inside himself and tell Appellant and Thomas to come outside and talk to the police. (R. p. 390.) But before Lewis could go inside to mediate, everyone heard a loud crash from the back bedroom window. (R. pp. 390-91.) Faced with exigent circumstances, Investigator Fraser and Investigator Chapman justifiably entered the residence in order to protect their own lives and the lives of others. (R. p. 317; R. p. 391.)

The exigent circumstances doctrine permits law enforcement officers to act without a search warrant where the exigencies of the situation make the officers' course of action immediately imperative. State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). "The exigent circumstances doctrine provides an exception to the Fourth Amendment's protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." Id. "A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement." Herring, 387 S.C. at 210, 692 S.E.2d at 494. Exigent

circumstances justifying a warrantless search include an imminent risk of flight from the suspect or a risk of danger to officers or others. Id. at 210, 692 S.E.2d at 494-495. The imminent destruction of evidence can also constitute exigent circumstances permitting a warrantless search. State v. Simmons, 384 S.C. 145, 174, 682 S.E.2d 19, 34 (Ct. App. 2009).

In Warden v. Hayden, 387 U.S. 294, 298 (1967), the United States Supreme Court considered whether the search of a residence in which a suspected armed robber was believed to have fled to was justified by the exigencies of the situation. Officers were alerted by a cab driver that an armed robbery suspect ran into a particular residence. Id. at 297. The officers responded to the scene within five minutes, entered the home, and searched for the suspect. Id. at 298. Hayden challenged the lawfulness of the search, and the Supreme Court found the search was reasonable and justified. Id. The Court concluded:

The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

Id. at 298-299.

In the case at hand, Holmes informed the investigators that Appellant shot him. Furthermore, when the investigators arrived at the Ball Park Road residence, Lewis informed the investigators that Appellant and Thomas were inside the residence. The investigators reasonably believed Appellant was armed and dangerous at that time. Moreover, once the investigators heard all of the commotion inside the residence, there was an immediate need

to secure the premises and assist potential victims. Because the Fourth Amendment does not require the police to delay their investigation when doing so would cause a grave danger to their lives or the lives of others, the investigators search of the Ball Park Road residence was reasonable.

C. Plain View

Furthermore, the crack cocaine the investigators discovered underneath Appellant's camouflage jacket was properly found in plain view. See State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999) ("Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence."). "In order for evidence to be seized under the plain view exception, three things must be shown: 1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities." Id.

First, in the case at hand, the investigators had consent and exigent circumstances that justified their initial entry. Therefore, the initial intrusion which afforded the investigators the plain view was lawful.

Second, the discovery of the crack in the tennis shoe was inadvertent. Holmes told the investigators Appellant was wearing a camouflage jacket when Appellant shot him. Therefore, when the investigators saw Appellant lying on top of the camouflage jacket, the investigators properly seized the jacket under the plain view doctrine. Moreover, once the investigators removed the jacket, they saw, in plain view, what appeared to be crack cocaine located in Appellant's shoe.

Finally, the incriminating nature of the evidence was immediately apparent to the seizing authorities. In Beckham, the court held that the latex gloves located in the defendant's home was in plain view of the officers. Id. The defendant's accomplice told the officers that the defendant wore gloves during the commission of the murder. Id. Therefore, the trial judge properly admitted the gloves into evidence. Id. Although a camouflage jacket in itself is not incriminating, the fact that the victim told the investigators that Appellant was wearing the jacket when Appellant shot the victim made the jacket incriminating. Moreover, once the investigators removed the jacket, they saw the crack cocaine in Appellant's shoe.

In summary, the trial judge's decision to admit the evidence was supported by consent, exigent circumstances, and the plain view doctrine, and her ruling was supported by the evidence. See Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings.")

D. Reasonable Expectation of Privacy

A criminal defendant asserting a challenge to an allegedly unreasonable search and seizure must establish his own personal Fourth Amendment rights were violated. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987). "[C]apacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978) (citing Katz v. United States, 389 U.S. 347, 353 (1967)). A subjective expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable. Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990). "Although a person present only intermittently or for a purely commercial purpose does not have a reasonable expectation of

privacy, an overnight guest may have a reasonable expectation of privacy in the host's property." Flowers, 360 S.C. at 5, 598 S.E.2d at 728.

In State v. Missouri, the court held that the defendant had a reasonable expectation of privacy. 361 S.C. 107, 115, 603 S.E.2d 594, 598 (2004). The police found the defendant in an apartment standing over a large quantity of crack cocaine. 361 S.C. at 110, 603 S.E.2d at 595. Although the defendant did not reside in the apartment, the defendant testified that the apartment was a "place of comfort and solace for him and that he felt a sense of privacy there." Id. The defendant did not stay at the apartment the night before the search took place, and the tenants of the apartment testified that they could not remember the last time the defendant stayed at their apartment. Id. The defendant would sometimes have a key to the apartment and kept clothes here. 361 S.C. at 115, 603 S.E.2d at 597. Furthermore, the defendant did not pay to stay at the apartment. Id. Moreover, the defendant was at the apartment for at least seven hours before the search occurred. Id. Because there were facts to support the trial judge's finding that the defendant had a reasonable expectation of privacy, the Court upheld the trial court's decision. 361 S.C. at 115, 603 S.E.2d at 598.

Here, Appellant did not have the capacity to challenge the search of the Ball Park Road residence because he did not have a legitimate expectation of privacy in the residence. On the day of the shooting, Appellant went to the Ball Park Road residence to change clothes and freshen up; however, Appellant was not spending the night. (R. p. 368.) Appellant had only been at the Ball Park Road residence for 30 minutes when the investigators arrived. Moreover, Appellant did not have a key to the residence. (R. pp. 368-69.)

Although, Lewis' mother owned the Ball Park Road residence, Lewis was the only person living in the residence on February 17, 2010. Additionally, Lewis told the investigators that Appellant moved out of the Ball Park Road residence months before the

shooting occurred. (R. p. 367.) Although Appellant did have some clothing and toiletries at the Ball Park Road residence, he testified during the suppression hearing that he would stay at his girlfriend's house. (R. p. 98.) Furthermore, the investigators went to three other residences before they found Appellant at the Ball Park Road residence. (R. p. 73-74.) Appellant's aunt told the investigators that Appellant stayed with her from time to time. (R. p. 74.)

Without a legitimate expectation of privacy in the residence searched, Appellant did not have the requisite capacity to challenge the search on Fourth Amendment grounds. See Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916 (“[Bailey] had no possessory or privacy interests in the premises. As a guest, he assumed the risk that the home resident would allow others into the area.” (citations omitted)).

Therefore, because there is evidence to support the trial judge's ruling that Appellant did not have a reasonable expectation of privacy, Appellant's conviction should be affirmed.

- II. The trial judge properly allowed the State to introduce the photo line-up that contained a picture of Appellant because the photo line-up did not bolster the victim's testimony, and even if the admission amounted to improper bolstering, any error was harmless.**

On February 18, 2010, the day after the shooting, Investigator Kelleher prepared a photo line-up and presented it to Holmes. (R. p. 247.) Holmes identified Appellant from the photo line-up. (R. p. 247.) During the pretrial hearing, Appellant's trial counsel objected to the introduction of the photo line-up because Holmes knew Appellant. (R. pp. 27-28.) Furthermore, Appellant's trial counsel argued that because Holmes knew Appellant, the introduction of the photo line-up identification would amount to improper bolstering. (R. pp. 27-28.) The State argued that the photo line-up identification was not bolstering; it was just part of the investigation and "just another piece of evidence." (R. p. 28.) The trial judge properly ruled in favor of the State and allowed the State to introduce the photo line-up identification at trial. (R. p. 29.)

Standard of Review

"The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Foster, 354 S.C. 614, 620-621, 582 S.E.2d 426, 429 (2003) (citations omitted).

- A. Admitting the victim's photo line-up identification did not amount to improper bolstering.**

Black's Law Dictionary defines bolstering as the following: "To enhance (unimpeached evidence) with additional evidence. This practice is often considered improper

when lawyers see to enhance the credibility of their own witnesses.” Generally, bolstering is a hearsay objection used when a party improperly offers evidence to support an unimpeached witness or to add credibility to earlier-introduced evidence. State v. Balderas, 915 S.W.2d 913, 919 (Tex. App.-Houston [1st Dist.] 1996, pet. ref’d.) Other times, bolstering objections occur when an attorney makes an implication that the testimony of a witness is corroborated by evidence known to the government but not known to the jury. United States v. Sanchez, 118 F.3d 192, 198 (4th Cir. 1997).

In Foster, the Supreme Court of South Carolina held that the witness’ prior consistent statement was inadmissible hearsay, which improperly bolstered the witness’ own testimony. 354 S.C. at 622-623, 582 S.E.2d at 430. On cross-examination, the defendant questioned the witness about her prior inconsistent statements. 354 S.C. at 619, 582 S.E.2d at 429. Trying to rehabilitate the witness’ testimony, the State introduced the witness’ prior consistent statement into evidence. Id. The Court looked at the plain language of Rule 801(d)(1)(B) and determined that the witness’ prior consistent statement was inadmissible hearsay because the witness had not been charged with recent fabrication or improper motive or influence. 354 S.C. at 622, 582 S.E.2d at 430.

Unlike the statement in Foster, the photo line-up identification in this case is not hearsay. See Rule 801(d)(1)(C), SCRE (1976). Pursuant to Rule 801, prior consistent statements of a witness are not inadmissible hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person.” Id.; see also U.S. v. Jarrad, 754 F.2d 1451, 1456 (9th Cir. 1985) (holding one witness may testify regarding an

identification made by another witness if the declarant also testifies and is available for cross-examination.).

Because Holmes, the declarant, testified at trial and was available for cross-examination, Investigator Kelleher's testimony regarding Holmes' identification of Appellant during the photo line-up did not amount to impermissible hearsay.

Furthermore, because Holmes saw Appellant multiple times a week and had a close personal relationship with Appellant, his testimony did not need to be bolstered. Holmes' testimony as to the identity of the shooter was much stronger evidence than the photo line-up identification. The purpose of Investigator Kelleher's testimony regarding Holmes' successful photo identification of Appellant was not to add credibility to Holmes' testimony, but rather to outline the steps the law enforcement officers took during the investigation. Moreover, Holmes' in-court testimony, where he identified Appellant as the shooter, was more powerful than Investigator's Kelleher's testimony regarding the photo line-up procedure he prepared the day after the shooting occurred.

Moreover, this was not a situation where the solicitor implied that the testimony of a witness was corroborated by evidence known to the government but not known to the jury. In fact, the State did not even mention the photo line-up identification in its closing argument.

In summary, the introduction of the photo line-up identification did not amount to improper bolstering.

B. Even if admitting the victim's photo line-up identification amounted to improper bolstering, any error was harmless.

Error without prejudice does not warrant reversal on appeal. State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996). Appellate courts will generally not set aside a

judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). An admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). When overwhelming evidence of guilt has been established, any trial error may be harmless. State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988).

Here, Holmes testified that Appellant was the person that shot him. Furthermore, Holmes testified that he knew Appellant very well and was even familiar with the teardrop tattoo on Appellant's face. Although Holmes had doubts as to the identity of the second individual at his house during the shooting, Holmes never had any trouble identifying Appellant as the shooter. Furthermore, the investigators testified the reason they went looking for Appellant was because Holmes identified Appellant as the shooter when they first arrived at the scene of the shooting. Therefore, the admission of the photo line-up identification was merely cumulative to the other properly admitted evidence. In summary, if the photo line-up identification improperly bolstered Holmes' testimony as to the identification of the shooter, that error was harmless.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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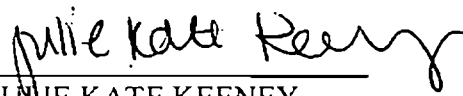
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April 12, 2012

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IN THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

The State,

Respondent,

vs.

Marion Bonds,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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

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