THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2013-001680

Marcus Bailey,.....Appellant,

v.

The State of South Carolina,.....Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On August 23, 2012, the Appellant Marcus Bailey was arrested and charged with the murder of Almanita Smith (the "decedent").

On October 11, 2012, the Richland County Grand Jury returned an indictment for the charge of murder against Mr. Bailey. On July 15, 2013, counsel for Mr. Bailey moved to quash the indictment on the basis it was overly vague pursuant to S.C. Code § 17-19-20.

The Richland County Solicitor's Office called the case for a jury trial beginning July 22, 2013 before the Honorable Robert E. Hood in the Richland County Court of General Sessions. Appellant was represented by Stanley L. Myers, S. Jahue Moore, and M. Brooks Biediger with the Moore Taylor Law Firm, P.A. The State was represented by Kathryn Cavanaugh, Kathryn Luck Campbell, and Nicole Simpson with the Fifth Circuit Solicitor's Office.

A number of pre-trial motions were heard the afternoon of July 22 and the morning of July 23. These motions included: (1) a motion to suppress the testimony of the cadaver dog handler; (2) a motion to quash the indictment; (3) a motion to suppress testimony which my violate defendant's Sixth Amendment rights; (4) a motion to suppress references to decedent as a victim; (5) a motion to suppress statements of the decedent; (6) a motion to suppress impermissible character evidence; and (7) a motion to suppress evidence for failure to disclose pursuant to Rule 5, S.C.R.Crim.P., and Brady v. Maryland.

The Court denied these motions and the case proceeded for a jury trial. On July 31, 2013, the jury returned a verdict of guilty against Mr. Bailey. Judge Hood sentenced Mr. Bailey to 50 years in jail.

Mr. Bailey respectfully requests this Court overturn Mr. Bailey's conviction and sentence, and remand the matter for a new trial.

STATEMENT OF FACTS

On the morning of August 23, 2012, the body of Almanita Smith (the "decedent") was discovered in the front yard of her home in Northeast Columbia. The decedent's live-in boyfriend, Appellant Marcus Bailey, was asleep inside the house when the body was discovered.

The decedent's house is located in a cul-de-sac in a newer neighborhood in Northeast Columbia. (R. p. 243). The decedent's body lay in her front yard. The decedent was laying face down in the middle of her yard. (R. p. 176). Her body was naked from the waist down. (R. p. 244).

The first person to discover the body was Crystal Bailey (no relation to the Appellant). Crystal discovered the body at approximately 6:30 a.m. Another neighbor, James Postell, was quickly on the scene. Crystal called 9-1-1. (R. p. 178).

Mr. Bailey came out of the house. When he saw the body, he exclaimed "that is my girlfriend." (R. p. 210). He was mumbling and very emotional. (R. p. 191). He held the decedent's body up to his chest and began rocking her. He began patting her head. (R. p. 210). He was too emotional to talk. (R. p. 191). It did not appear Mr. Bailey was expecting to see what he saw. (R. p. 193). He appeared concerned about the decedent. (R. p. 223). After a few moments, Mr. Bailey went back into the house and found a dark blanket to cover the decedent. He came back out of the house and laid the blanket over the decedent. (R. p. 182).

The first responder to the scene was the Richland County Sheriff's Department. (R. p. 367). Law enforcement officers began arriving at the residence at approximately 7:00 a.m. The scene was taped off and a crime scene log was started (R. p. 242).

Investigator Lee with the Richland County Sheriff's Department began photographing the incident location (R. p. 246). There was a strong odor of decomposition coming from the body. (R. p. 247). One of the photographs shows Investigator Lee's foot within inches of the decedent's body. (R. p. 320).

Investigator Martin arrived at the incident location. He called Investigator Mauldin and asked him to obtain a search warrant for the house. (R. p. 496). At the time, Investigator Mauldin was taking his child to day care. (R. p. 495). Once he dropped his child off, Investigator Mauldin went to the magistrate's office and swore out a search warrant on the residence. (R. p. 496). Investigator Mauldin had not been to the incident location when he swore to the warrant and had no personal knowledge of the information he swore to.

Once Investigator Mauldin arrived with the search warrant, law enforcement entered the residence to take photographs and collect evidence. Investigator Lee, who had just recently been standing directly over the decedent's body taking photographs, entered the house to take more photographs. He did not wear any booties or protective clothing to prevent contamination between the decedent's body and the house. (R. p. 321). None of the other investigators at the incident location wore any type of protective clothing. (R. p. 433).

The crime scene lab with the Richland County Sheriff's Department is internationally accredited. (R. p. 346). It is the only crime lab in South Carolina with this type of accreditation. (Tr. 786). Despite this high level of sophistication in crime scene analysis, the investigators found no evidence a dead body was ever inside the house. One investigator noted there were no unusual cleaning solutions or instruments found inside

the house. (R. p. 331). There were no drag marks from the residence to the body. (R. p. 334). There was no decomposition transfer marks on the stairwell or on the edges on the front door. (R. p. 344). There was no evidence of blood inside the house. (R. p. 348). Investigators used an advanced Bluestar blood detection system, but no blood was ever found. (R. p. 347). There was no trace evidence of Mr. Bailey's DNA under the decedent's nails. (R. p. 349). The crime scene investigators thoroughly searched the residence. There was no blood, feces, urine, or any other organic material that came from the decedent's body found inside the residence. (R. p. 424). At one point, the carpet was pulled up to test for any signs of decomposition. (R. p. 357). No evidence of decomposition was found. (R. p. 357).

Shortly after discovering the decedent's body, Mr. Bailey began having a panic attack and required medical attention. (R. p. 210). When EMS arrived on the scene, he was transported to Providence Northeast Hospital. (R. p. 368).

At Providence Northeast, Mr. Bailey was diagnosed with an acute stress reaction. (R. p. 454). Mr. Bailey was provided with the medication Vistaril. (R. p. 449). Vistaril is a prescription medication. (R. p. 458).

Investigators from the Richland County Sheriff's Department began questioning Mr. Bailey at the hospital. (R. p. 989). The investigators had Mr. Bailey sign an advisement of rights form. (R. p. 991). Mr. Bailey gave the investigators a DNA sample. (R. p. 994). Mr. Bailey also allowed investigators to take a gunshot residue kit. (R. p. 997). He also allowed them to scrape underneath his fingernails. (R. p. 998).

Upon his discharge from the hospital, Mr. Bailey was taken to the Richland County Sheriff's Department to be interrogated. (R. p. 1009). He gave a written

statement regarding his interaction with the decedent in the days before her body was discovered. (R. p. 1010). At the bottom of the statement form, there is a signature block to confirm a copy of the statement was given to the defendant. (R. p. 1012). Investigators did not provide Mr. Bailey with a copy of his statement at the time it was made. (R. p. 14). They do not know why they did not give him a copy. (R. p. 13). Investigator Clarke recalled going to the copy machine, which was functioning, but does not recall making a copy or having Mr. Bailey sign off on receiving a copy. (R. p. 14). Shortly after talking with investigators, Mr. Bailey was arrested.

Cadaver Dog Testimony

On the afternoon of August 23, 2012, investigators contacted Deputy Stephen Pearrow to search the residence with a cadaver dog. (R. p. 72).

The dog was a cadaver dog, not a scent sniffer or tracking dog (R. p. 142). The dog is trained to look for dead bodies. (R. p. 123). It is not trained to determine where dead bodies had previously been (R. p. 123). There is not even a certification for the type of search the cadaver dog was requested for. (R. p. 123). The dogs are certified to find human remains, not determine where dead bodies had previously been (R. p. 125). Further, no human remains were found. Whatever the dog alerted to, it was not human remains. (R. p. 126).

Deputy Pearrow works for the Richland County Sheriff's Department. (R. p. 90). He also operates a non-profit corporation called Search Tactics and Rescue Recovery (STARR). (R. p. 55). Part of his work with STARR involves assisting police dog handlers in the training and boarding of police dogs. (R. p. 57).

Deputy Pearrow was called to the scene for a single reason: to determine whether the decedent's dead body had previously been inside the residence. (R. pp 122, 123). He was not called to the scene to find a dead body. (R. p. 123). Deputy Pearrow brought with him a two year old Belgian Malinois named Mia. (R. pp 110, 112). Deputy Pearrow was not Mia's owner and he was not her handler. (R. p. 106). Mia's handler is a Lexington County Sheriff's Deputy Jamie Gunter. (R. p. 99). Mia is a single purpose cadaver dog. (R. p. 70). In other words, she is trained to find dead people or physical evidence of a dead person. (R. p. 125). She is not trained to find where a dead body previously had been. (R. p. 125). This is a very important distinction because the reason she was brought to the house was to determine whether a dead body had ever been inside the house. She is not trained to track living people. Mia's training involves hiding scent sources (usually decaying human tissue) and sending Mia to find the source. Once Mia finds the source, she will alert or give an indication. According to Deputy Pearrow, an alert includes a broad spectrum of dog behavior, including turning her head, turning her ears, and drooling. (R. p. 69).

The dog may have indicated, but nothing was found to determine what the dog was indicating to. (R p. 127). The dog never alerted to the laundry room. (R. p. 128). Even in the areas where the dog alerted, there was no trace or forensic evidence found that a dead body was ever there. (R. p. 426).

The dogs live with their one on one handler. (R. p. 128). Mia lived with Jamie Gunter (R. p. 128). When Deputy Pearrow brought Mia to the scene, it was only the fifth time she had been on an actual search, and Deputy Pearrow was not her handler. At the scene, Mia was taken inside and around the residence. According to Deputy Pearrow's

report at the time of the search, Mia alerted to two areas in the upstairs bedrooms of the house. (R. p. 853). In the report, she did not alert at all downstairs. (R. 854).

During the pretrial hearing on Defendant's motion to suppress, Deputy Pearrow testified she alerted to the original two places, but recalled an additional alert in a third upstairs bedroom which he did not include in his report. (R. p. 84).

In testimony before the jury, Deputy Pearrow increased the number of alerts again. This time, he recalled two additional alerts: an additional upstairs and now another alert downstairs. (R. pp. 851, 852). Before the jury was the first time Deputy Pearrow ever testified to any type of alert downstairs.

Despite the number of actual alerts, whether it was two or five, law enforcement thoroughly searched the areas. Not a single piece of actual physical evidence was found anywhere the dog alerted. Whatever Mia was "alerting" to, it was not evidence of a dead body. (R. p. 863).

Medical Examiner Testimony

On the following morning, August 24, 2012, an autopsy was performed on the decedent by Dr. Amy Durso with Professional Pathology Services. (R. pp. 608, 618). Dr. Durso is board certified in the fields of anatomic pathology, clinical pathology, and forensic pathology. (R. p. 609).

Dr. Durso peformed a full autopsy on the decedent. Dr. Durso noted the decedent's hyoid bone, found in the larynx, was not broken. (R. p. 645). Dr. Durso collected toxicology samples on the decedent. (R. p. 645). Dr. Durso also sent the decedent for an x-ray of the head, neck, and chest. (R. p. 647). Upon Dr. Durso's review of the x-rays, she was able to confirm the hyoid bone was not broken. (R. pp. 647, 648).

Dr. Durso also noted there were no signs of trauma to the decedent. (R. pp. 677, 678). Dr. Durso ultimately concluded the decedent died of asphyxia, either by strangulation, suffocation, or constriction of the chest area. (R. pp. 657, 658).

Under cross examination, Dr. Durso admitted there was no evidence of any asphyxia, either by strangulation, suffocation, or compression. (R. p. 708). There was no traumatic injury to the decedent's hard pallet, oral cavity, lips mandible, or any other hard or soft tissue to the decedent's mouth or neck. (R. p. 708, 709). There was no conjunctive petechia in the eyes, which is a condition that exists in 80% of asphyxia victims. (R. p. 720).

Mr. Moore: There is no way you can say based upon a reasonable degree of professional certainty that she was strangled. That's true, right?
Dr. Durso: That's true.
Mr. Moore: No way you can say based upon a reasonable degree of professional certainty she was suffocated.
Dr. Durso: That's true.
Mr. Moore: And no way you can say based upon a reasonable degree of professional certainty that she died because someone sat on her back or chest, correct?"
Dr. Durso: Yes.
Mr. Moore: The reason why you listed this as homicidal is because you suspected foul play.
Dr. Durso: Yes.
Mr. Moore: There was nothing you found wrong, so you suspected foul play, and that's what you wrote?
Dr. Durso: Yes.

(R. pp. 709-710).

Dr. Durso also admitted there was no other possible means of her findings were not based on the evidence, but rather a lack of evidence:

Mr. Moore: Does the fact that she was placed on the lawn simply mean that someone put her there, right?
Dr. Durso: Yes.
Mr. Moore: The fact that someone put her there doesn't mean that someone killed her, does it?
Dr. Durso: It's awfully suspicious, isn't it?

Mr. Moore: Yes ma'am but we don't convict people in this country on suspicion do we?
Dr. Durso: No.
Mr. Moore: And as you already told the jury, you reach your conclusions based upon suspicion, right?
Dr. Durso: Yes.
Mr. Moore: You wouldn't expect a jury to convict anybody based upon suspicion, would you?
Dr. Durso: No.
Mr. Moore: And your report, as you told us, is the result of a suspicion of foul play?
Dr. Durso: Yes.
Mr. Moore: Not upon any type of objective medical finding?
Dr. Durso: It's based on the effective lack of medical findings.
Mr. Moore: Basically, it's a lack of anything there, something not being there.
Dr. Durso: Right.
Mr. Moore: What you basically said is, "I can't find what killed her, so somebody must have done it"?
Dr. Durso: Like I said, 26 years olds don't drop dead for no reason.
Mr. Moore: But that's a conclusion. "I can't find anything wrong with her that would have killed her, so somebody must have done it," right?
Dr. Durso: Right.
Mr. Moore: That was basically the suspicion you had?
Dr. Durso: Right.
Mr. Moore: And as a result of your suspicion, a result of your suspicion and lack of medical proof, you issued a report that caused a young man to be arrested and prosecuted based on your suspicion?
Dr. Durso: Yes.
Mr. Moore: And that alone?
Dr. Durso: I see --
Mr. Moore: Because, as you told us, you can't go forward unless you say it's there, right?
Dr. Durso: I'm not the one who pushes these cases forward, sir.

(R. p. 732-733).

Testimony of Inmate Edward Walker

During the jury trial, an inmate from Kershaw County Detention Center was called to testify against Mr. Bailey. (R. p. 552). This inmate is Edward Walker. (R. p. 552). He was cellmates with Mr. Bailey at Alvin S. Glenn Detention Center. (R. p. 552).

At the time of trial, Mr. Walker had his own pending charges for murder, armed robbery, and attempted armed robbery stemming from a 2011 crime. (R. p. 552).

Mr. Walker testified Mr. Bailey gave him a jailhouse confession. (R. pp. 554-555). According to Mr. Walker, Mr. Bailey essentially admitted to killing the decedent but said it was unintentional. (R. p. 555).

Out of the presence of the jury, defense counsel was allowed to cross-examine Mr. Walker regarding his pending charges. (R. p. 587). Judge Hood admonished Mr. Walker he did not have to answer questions. (R. p. 587). After this admonishment, Mr. Walker invoked his right to remain silent to all further questions. (R. p. 587).

Character Testimony of Twyla Perkins and Jason Parker

During trial, a friend of the decedent named Twyla Perkins was called to testify against Mr. Bailey. (R. p. 592). During redirect, Ms. Perkins claimed Mr. Bailey was discharged from the Army under a bad conduct discharge. (Supp. R. p. 16). Defense counsel objected on the basis it was inappropriate character evidence, but was overruled. (Supp. R. p. 17).

Later in the trial, over defense counsel's objection, the trial court admitted the testimony of Army Captain Jason Parker. (R. p. 881). Cpt. Parker testified that Mr. Bailey had a number of mental issues following his return from Iraq, including a threat made to himself and other soldiers. (R. pp. 883-899). Cpt. Parker correctly testified Mr. Bailey was separated by a general discharge under honorable conditions for a pattern of misconduct. (R. p. 899)

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE TESTIMONY OF THE CADAVER DOG HANDLER WHEN THERE WAS NO EVIDENCE TO CORROBORATE THE DOG'S ALERTS, THE HANDLER WAS NOT AN EXPERT, AND THE PROBATIVE VALUE OF THE TESTIMONY WAS OUTWEIGHED BY THE DANGER OF UNDUE PREJUDICE

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 199 S.E.2d 61 (1973)). *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166-167 (2007).

A. The trial court abused its discretion by admitting testimony of the non-expert cadaver dog handler because no evidence was found to corroborate the dog's "alerts."

At trial, the Court admitted the testimony of Deputy Pearrow over Defense counsel's objection. Deputy Pearrow works for the Richland County Sheriff's Department. He also operates a non-profit corporation called STARR. Part of his work with STARR involves assisting police dog handlers in the training and boarding of police dogs.

Deputy Pearrow was called to the scene for a single reason: to determine whether the decedent's dead body had previously been inside the residence. He was not called to the scene to find a dead body. Deputy Pearrow brought with him a two year old Belgian

Malinois named Mia. Deputy Pearrow was not Mia's owner and he was not her handler. Mia's handler is a Lexington County Sheriff's Deputy, Jamie Gunter. Mia is a single purpose cadaver dog. In other words, she is trained to find dead people. She is not trained to find where a dead body previously had been. This is a very important distinction because the reason she was brought to the house was to determine whether a dead body had ever been inside the house. She is not trained to track living people. Mia's training involves hiding scent sources (usually decaying human tissue) and sending Mia to find the source. Once Mia finds the source, she will alert or give an indication. According to Deputy Pearrow, an alert includes a broad spectrum of dog behavior, including turning her head, turning her ears, and drooling.

When Deputy Pearrow brought Mia to the scene, it was only the fifth time she had been on an actual search, and Deputy Pearrow was not her handler. At the scene, Mia was taken inside and around the residence. According to Deputy Pearrow's report at the time of the search, Mia alerted to two areas in the upstairs bedrooms of the house. In the report, she did not alert at all downstairs.

During the pretrial hearing on Defendant's motion to suppress, Deputy Pearrow testified she alerted to the original two places, but recalled an additional alert in a third upstairs bedroom which he did not include in his report.

In testimony before the jury, Deputy Pearrow increased the number of alerts again to five. This time, he recalled two more alerts: an additional upstairs and now another alert downstairs. In front of the jury was the first time Deputy Pearrow ever testified to any type of alert downstairs.

Despite the number of actual alerts, whether it was two or five, crime scene investigators thoroughly searched the areas. Not a single piece of actual physical evidence was found anywhere the dog alerted. Whatever Mia was "alerting" to, it was not evidence of a dead body. Over defense counsel's objection, the State was allowed to admit the testimony of Deputy Pearrow to support its contention the decedent's dead body was inside the house at some point. Essentially, the dog's alert itself – without any corroborating evidence – was admitted before the jury on the issue of whether the body had been inside the residence.

The admission of the uncorroborated cadaver dog testimony was an error of law for a number of reasons. First, the testimony should not have been admitted because cadaver dog's "alerts" were never corroborated by forensic evidence. Secondly, the testimony was unreliable non-expert testimony pursuant to *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). Finally, the probative value of a number of false positives is significantly outweighed by the danger of undue prejudice pursuant to Rule 403, SCRE.

Dog tracking cases are common in South Carolina. What separates this case from all the other dog tracking cases is the complete lack of corroboration to the dog's behavior. There is no case in South Carolina history where the police dog's conduct, without corroborating evidence, has been used to support a conviction. Dog sniff cases generally fall into two categories: 1) identification of a fleeing suspect or; 2) identification of contraband in a particular area. In either of these instances, the dog's behavior is not evidence of the crime itself, rather it is used as a tool to lead law enforcement to a particular suspect or piece of evidence.

For example, if a dog is trained to detect cocaine alerts law enforcement that cocaine is in a vehicle and no cocaine is found in the vehicle, the evidence of the dog's false positive cannot be used in a drug case against someone.

In the present case, Deputy Pearrow testified to a number of "alerts" and "indications" he interpreted the dog made. During the pretrial hearing, Deputy Pearrow testified to 3 alerts upstairs. During the trial, Deputy Pearrow increased the number of alerts he recalled the dog making. However none of these alerts yielded a single piece of physical or forensic evidence to corroborate the dog's behavior (as interpreted by the law enforcement handler).

Deputy Pearrow was called to the scene to find evidence of a crime. When the forensic team was unsuccessful at finding the evidence, the prosecution used the dog's behavior itself as the evidence of the crime. This is not the appropriate or correct use of cadaver dog testimony.

Pursuant to Rule 702, SCRE, before expert testimony may be admitted, the trial judge must find evidence the testimony: (1) will assist the trier of fact; (2) the witness is qualified, and; (3) the underlying science is reliabile. *State v. Council*, 335 S.C. 1, 20. 515 S.E.2d 508 (1999). The testimony of Deputy Pearrow fails each of these categories.

In *State v. Council*, the S.C. Supreme Court held mitochondrial DNA evidence assisted the trier of fact because it was "objective confirmation" of the trace evidence analysis. *Id.* at 21, 515 S.E.2d 518. In Mr. Bailey's case, there is simply no trace evidence to confirm, nor is there any symblance of objectivity in the handler's determination as to what the canine was confirming.

There is also no way for defense counsel to effectively test the reliability of the dog or dog handler because the scene was immediately shut down. Deputy Pearrow testified the scent dissipates rapidly. Even if defense counsel were able to hire its own expert dog handler and cadaver dog to review the scene (an impossible task given the circumstances), whatever scent the dog allegedly alerted to would have dissipated.

The only person to testify Mia alerted to anything inside the residence is Deputy Pearrow. The search of the residence was not video recorded. Deputy Pearrow admitted he was not an expert in the field of dog handling. He admitted he was not Mia's handler. He admitted that his job was basically the interpretation of the body language of a two year old dog that did not belong to him. According to the STARR team policy, a handler and a dog are a "one-on-one team." Deputy Pearrow was not Mia's handler, but the State claims he is an expert in interpreting Mia's behavior.

In *State v. White*, 382 S.C. 265, 271, 676 S.E.2d 684, 687 (2009) the dog and handler had been working as "partners" in excess of seven years, with some 750 tracks together. In the present case, Deputy Pearrow and Mia were not partners at all. Deputy Pearrow claims he supervised Mia's training, but none of the training records corroborate his claim. Additionally, Mia was a somewhat aggressive and immature dog barely older than a puppy. The search on day in question was Mia's fifth search over all. The State did not present any credible evidence regarding the science behind the cadaver dog and its reliability.

While there is no South Carolina case law dealing with cadaver dogs, the Maryland Court of Special Appeals has addressed the issue of cadaver dog admissibility. In *Clark v. State of Maryland*, 140 Md.App. 540, 781 A.2d 913 (2001), law enforcement

was lead to a cemetery as part of a murder investigation. At the cemetery, two cadaver dogs were released at two separate times. Both dogs converged on an area of disrupted dirt near a grave. *Id.* at 578, 781 A.2d 935. The Court noted that "[i]t is true, as appellant points out, that [the forensic anthropologist] testified in the motion *in limine* hearing that the fact that a cadaver dog alerted at a certain spot was 'not enough by itself' to prove the presence (or presence at some time in the past) of human remains to reasonable degree of scientific certainty." *Id.* at 577, 781 A.2d 931. The dog's alert was corroborated by other circumstantial evidence, including disturbed soil, a second cadaver dog alert, and a map with a spot marking the burial spot in the appellants truck. Due to the corroborative evidence, the Court held there was adequate foundation to admit the cadaver dog evidence.

Unlike the *Clark* case, law enforcement found no trace, forensic, or physical evidence to corroborate Deputy Pearrow's testimony. There was no second dog brought to the scene to corroborate Mia's alleged alerts. There was no forensic evidence any part of the residence every had any human remains of any kind.

Therefore, the trial court should not have admitted the cadaver dog evidence because there was no other evidence which corroborated the dog's "alerts." The admission was an error of law. Counsel for Mr. Bailey respectfully requests this Court reverse the trial courts determination and remand this case for a new trial.

B. The trial court abused its discretion because the State failed to show the dog and its handler were reliable pursuant to *State v. White.*

The primary case South Carolina for police dogs in general is *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). The *White* Court addressed the foundational requirements of admitting testimony of tracking dog handlers in a criminal case. Mia is

not a tracking dog: she is a cadaver dog. It appears the issue of cadaver dog admissibility is a matter of first impression for the Court. Half of the elements of the tracking dog analysis simply do not apply in the cadaver case. To the extent the *State v. White* analysis regarding reliability of cadaver dog evidence should apply, this dog and handler combination was simply too unreliable to be put before the jury.

In *State v. White*, the South Carolina Supreme Court addressed the foundational requirements of tracking dog testimony. In *White*, the defendant was spotted by a police officer fleeing the scene of a convenience store robbery. *Id.* at 268, 676 S.E.2d 685. The officer did not give chase, and a tracking dog and handler were called to the scene. The dog and handler tracked the defendant, who was found asleep in some bushes with a gun in his hand. *Id.* In allowing the evidence of the tracking dog, the Court adopted the following evidentiary framework to determine the admissibility of dog tracking evidence:

> "By extrapolating from our case law and other authorities, we conclude a sufficient foundation for the admission of dog tracking evidence is established if: (1) the evidence shows the dog handler satisfied the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trial where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated."

State v. White, *Id.* at 272, 676 S.E.2d at 687.

For the reasons stated above, Deputy Pearrow does not qualify as an expert because he admitted he was not an expert, the dog he handled did not belong to him, and there was no credible evidence of the reliability of the cadaver dog. While there was some evidence Mia was a dog of acute scent by virtue of being born a Belgian Malinois,

there was evidence to the contrary that she was still much of a puppy at the time of the search.

Under the third element of the *State v. White* analysis, the State must submit some evidence Mia was trained to follow a trail by scent. This element of the *State v. White* analysis does not translate smoothly between tracking dogs and cadaver dogs. Mia was never trained to follow a trail and she was never trained to track. She was trained to locate a dead body. During her training, there was always some sort of human remains for Mia to find. However, law enforcement did not call for Deputy Pearrow and Mia to help locate the body of the alleged victim. Mia was called to determine if a dead body had ever been inside. Despite Mia's "alerts" no human remains were ever found.

The State also failed to admit any evidence of reliability in the relationship between dog and her handler. The State admitted a number of training records during the pretrial hearing. Deputy Pearrow was not mentioned in any of the training records. However, on the day of the search, Mia allegedly "alerted" to various locations at various times. The number "alerts" increased by the time the jury was present. Despite all these alerts, as interpreted by Deputy Pearrow, law enforcement found no trace evidence of any dead body inside the house as a result of Mia's alerts.

Under the fifth element of the *State v. White* analysis, the State must submit evidence Mia was placed on the trail where the suspect was known to have been within a reasonable time. This element is important because it is the corroboration element. It shows that for whatever the dog was tracking, there is evidence to corroborate the dog's actions. This element keeps the tracking search from turning into a wild goose chase. This element is nonexistent in Mr. Bailey's case. There is absolutely no evidence to

corroborate the dog's "alerts" as interpreted by Deputy Pearrow. Despite the lack of evidence in this regard, the Court admitted the testimony over defense counsel's objection.

Under the final element of *State v. White*, the State must submit evidence the trail was not otherwise contaminated. In Mr. Bailey's case, the residence was an active crime scene investigation for several hours before Deputy Pearrow and Mia arrived at the scene. Over thirty members of law enforcement were on the scene. There are pictures of crime scene investigator's foot within inches of the dead body prior to walking through the house. These investigators admitted they did not take any prophylactic measures to prevent the scene from becoming contaminated. The State does not know how many people walked over the yard where the dead body was found. Deputy Pearrow admitted Mia herself may have inadvertently contaminated the inside of the house. Despite this overwhelming evidence the residence was contaminated by law enforcement, the Court admitted the testimony of Deputy Pearrow over defense counsel's objection.

Therefore, the trial court should not have admitted the cadaver dog evidence because it was unreliable testimony from a non-expert. The admission was an error of law. Counsel for Mr. Bailey respectfully requests this Court reverse the trial courts determination and remand this case for a new trial.

C. The trial court abused its discretion in admitting evidence of the dog's false positive alerts because the probative value of the false positives was outweighed by the danger of undue prejudice

Prior to the admission of the dog handler, defense counsel also objected to the testimony pursuant to Rule 403, SCRE. The essential question is whether the dog handler's testimony that the dog alerted to a particular area, standing alone and without

any corroborating evidence of the alleged source of the scent, is sufficiently probative to overcome the danger of unfair prejudice by creating evidence where none is to be found.

There is no probative value to the testimony regarding Deputy Pearrow search of the residence. Deputy Pearrow testified to a number of "alert" type behaviors of the dog. He testified he was called to the scene to find where the decedent's dead body had previously been, which is not what a cadaver dog is trained to do. The dog was used in a manner it was never trained for and the handler claims the dog "alerted" to certain areas. These areas were thoroughly investigated by crime scene analysts and no evidence was found to corroborate the dog's "alerts." There was no trace evidence, DNA, or human remains found inside the house as a result of Mia's "alerts." The necessary evidence that would have corroborated the dog's alert would have been the decomposing material and it was never found.

Deputy Pearrow's testimony regarding the "alerts" simply created evidence where none was to be found. The role of law enforcement is to discover evidence, not invent it. At best, Mia's "alerts" were between two and five false positives regarding any type of body inside the house. What probative evidentiary value does a false positive have? None. What scientific or non-scientific value does a false positive have? None.

What possible prejudicial effect does the testimony of Deputy Pearrow have? Enormous. Without Deputy Pearrow's testimony, the State's entire theory of the case falls apart. The State argued Mr. Bailey killed the decedent and left her decaying body inside the house for a week. Despite the crime scene unit's thorough search, zero evidence of a decaying corpse was found inside the house. If Deputy Pearrow is not

allowed to testify to how he interpreted his dog's behavior as an "alert" to a dead body, the State has no evidence a dead body was ever inside the house.

There is a cultural mystique about the infallibility of a dog's nose and scent tracking ability. 42 Hastings L.J. 15. Unlike forensic or physical evidence, there is no test to determine the accuracy of the dog or its handler in interpreting the dog's body language. The evidence submitted by Deputy Pearrow is nothing more than hearsay from a dog as interpreted through a person who is not the dog's handler.

Therefore, the trial court should not have admitted the cadaver dog evidence because the false positive "alerts" have no probative value and unduly prejudice Mr. Bailey. The admission was an error of law. Counsel for Mr. Bailey respectfully requests this Court reverse the trial courts determination and remand this case for a new trial.

D. The trial court's errors of law were not harmless.

The admission of Deputy Pearrow's testimony was in error, and it was not a harmless error. "No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 880, 889 (1971). Whether an error is harmless depends on the facts of each case, including:

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

State v. Clark, 315 S.C. 478, 482, 445 S.E.2d, 633, 635 (1994).

Deputy Pearrow's testimony played a key role in the State's presentation of the case. During the hearing on defense counsel's motion *in limine*, the trial court initially

indicated it would suppress Deputy Pearrow's testimony. Judge Hood instructed the parties to not discuss the cadaver dog or handler in opening statements. The prosecution immediately requested a ruling and indicated they might appeal if Judge Hood suppressed the testimony:

The Court:	All right. I'm going to take this issue under advisement as we proceed through this. Nobody is to mention the cadaver dog or the use of it in opening statements. When you get close getting ready to call that witness, you let me know.
Ms. Campbell:	Respectfully, Your Honor, we would request a ruling from the court, if possible, before we swear the jury.
The Court:	Before you swear the jury?
Ms. Campbell:	Yes, sir.
The Court:	Why?
Ms. Campbell:	Because it may be something we need to discuss as far as whether it's an interlocutory appeal.
Mr. Moore:	That's fair. If they want to appeal it, that's okay by us. It's a fair request. I'm not standing. I apologize sir.
Ms. Campbell:	I'm not saying that we would, Judge. I'm just saying that we would like the opportunity to discuss it.

(R. p. 142).

In addition to the importance the State placed upon Deputy Pearrow's testimony, there were a number of allegations the State had no evidence of without his testimony Aside from the alleged alerts, there was no evidence to support the State's contention the decedent's body was decaying inside the house for a week. There was no trace evidence, DNA, fecal matter, or any other evidence of a dead body inside the house. This was the case unless Deputy Pearrow was allowed to testify about his interpretations of his dog's body language while inside the house. Deputy Pearrow's testimony was not cumulative because no other witness was able to testify that a dead body had every previously been inside the house.

The testimony of Deputy Pearrow should have been suppressed because of how unfounded and potentially damaging it was. The error in admitting his testimony was not harmless. The Defendant therefore respectfully requests this Court reverse the trial judge's decision to admit the testimony of Deputy Pearrow, and remand the case for a new trial.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE APPELLANT WHEN THERE WAS NO EVIDENCE OF HOMICIDE TO SUPPORT THE MEDICAL EXAMINER'S CONCLUSIONS

The trial court should have directed a verdict in favor of the Defendant because the State failed to admit evidence the decedent died by means of homicide.

The case turns upon the testimony of forensic pathologists Amy Durso and Bradley Marcus. At trial, the doctors gave the opinion the decedent died by "probable homicidal asphyxiation." Under cross examination, the forensic pathologists were not able to identify a single fact to support this opinion:

Mr. Moore: There is no way you can say based upon a reasonable degree of professional certainty that she was strangled. That's true, right?
Dr. Durso: That's true.
Mr. Moore: No way you can say based upon a reasonable degree of professional certainty she was suffocated.
Dr. Durso: That's true.
Mr. Moore: And no way you can say based upon a reasonable degree of professional certainty that she died because someone sat on her back or chest, correct?"
Dr. Durso: Yes.
Mr. Moore: The reason why you listed this as homicidal is because you suspected foul play.
Dr. Durso: Yes.
Mr. Moore: There was nothing you found wrong, so you suspected foul play, and that's what you wrote?
Dr. Durso: Yes.

(R. pp. 709-710).

When questioned whether the decedent may have died by means of asphyxia, the Chief Forensic Examiner testified there were a no objective signs that asphyxia was the cause:

Mr. Moore: Now, there's been some testimony -- or let me ask you this: Can you suffocate somebody by simply applying slight pressure on the neck?
Dr. Marcus: Slight pressure? It depends. You know, if they have got a medical condition or an elderly person, I believe you could.
Mr. Moore: Let's talk about a 26 year old ex-military trained woman in good health.

Can you kill a person just by putting slight pressure?

Dr. Marcus: I guess you could. I guess you could.

Mr. Moore: The person would pretty much have to just lay there and let you do it.

Dr. Marcus: Probably so.

Mr. Moore: Actually, it takes great -- it takes enough force on the neck to strangle a person to where the traumatic pressure actually crushes off the wind pipe to the point where the air will go through, right?

Dr. Marcus: It depends. It depends. Sometimes you break -- you cut down the blood supply, the vessels, the jugular and carotids. Other times, you can -- you crush the windpipe. It depends. You can do both or you can do either/or.

Mr. Moore: But it take a crushing of those vessels.

Dr. Marcus: Yeah, you have to-- you have to constrict.

Mr. Moore: There was no physical finding of any such crushing of the vessels, correct?

Dr. Marcus: Dr. Durso didn't see any.

Mr. Moore: And she looked for them.

Dr. Marcus: Yes.

Mr. Moore: Right? And when those vessels were crushed and those windpipes were crushed, those are the types of things that you generally can find on autopsy, aren't they?

Dr. Marcus: Yes.

(R. pp. 975-977).

In either event, the State's key witnesses to the decedent's cause of death were not able to testify to a single fact to support their opinions. Rather, the opinions were based upon mere suspicion:

Mr. Moore: Does the fact that she was placed on the lawn simply mean that someone put her there, right?

Dr. Durso: Yes.

Mr. Moore: The fact that someone put her there doesn't mean that someone killed her, does it?

Dr. Durso: It's awfully suspicious, isn't it?

Mr. Moore: Yes ma'am but we don't convict people in this country on suspicion do we?

Dr. Durso: No.

Mr. Moore: And as you already told the jury, you reach your conclusions based upon suspicion, right?

Dr. Durso: Yes.

Mr. Moore: You wouldn't expect a jury to convict anybody based upon suspicion, would you?

Dr. Durso: No.

Mr. Moore: And your report, as you told us, is the result of a suspicion of foul play?

Dr. Durso: Yes.
Mr. Moore: Not upon any type of objective medical finding?
Dr. Durso: It's based on the effective lack of medical findings.
Mr. Moore: Basically, it's a lack of anything there, something not being there.
Dr. Durso: Right.
Mr. Moore: What you basically said is, "I can't find what killed her, so somebody must have done it"?
Dr. Durso: Like I said, 26 years olds don't drop dead for no reason.
Mr. Moore: But that's a conclusion. "I can't find anything wrong with her that would have killed her, so somebody must have done it," right?
Dr. Durso: Right.
Mr. Moore: That was basically the suspicion you had?
Dr. Durso: Right.
Mr. Moore: And as a result of your suspicion, a result of your suspicion and lack of medical proof, you issued a report that caused a young man to be arrested and prosecuted based on your suspicion?
Dr. Durso: Yes.
Mr. Moore: And that alone?
Dr. Durso: I see --
Mr. Moore: Because, as you told us, you can't go forward unless you say it's there, right?
Dr. Durso: I'm not the one who pushes these cases forward, sir.

(R. pp. 732-733).

The State charged Mr. Bailey with murder. To survive a direct verdict motion, the State must have put in some evidence regarding the conduct of Mr. Bailey, particularly the conduct in causing the decedent's death with malice aforethought.

Based on the State's evidence, the State doesn't know what caused the decedent's death. All the State's forensic pathologist are able to do is eliminate other homicide causes of death. For instance, the decedent did not die by gunshot, stabbing, or blunt force trauma. Instead of submitting evidence of homicide, the State has proven the decedent did not die by a number of other means of death.

The State's inability to submit credible evidence the decedent died by means of homicide, much less a homicide caused by the Appellant with malice aforethought, entitles the Appellant to a verdict directed in his favor.

In *State v. Commander*, 396 S.C. 254, 721, S.E.2d 413 (2011), the South Carolina Supreme Court addressed the issue of whether a forensic pathologist invaded the province of the jury. In *Commander*, the forensic pathologist testified the decedent was killed by asphyxia based on his medical opinion. The basis of this opinion was a lack of other findings for cause of death. The Supreme Court held this line of questioning into the alleged homicide was permissible because it did not deal with an issue of law.

The issue with the medical examiner's testimony is not whether they were qualified to give an expert opinion, but rather what the opinion was. The medical examiners essentially admit they do not know what killed the decedent. They admit there was no objective manifestation of asphyxia, which is their proposed cause of death. They are not able to say what caused the decedent's death. The evidence they present is essentially a lack of evidence.

Therefore, the trial court should have directed a verdict in favor of Mr. Bailey because the medical examiners were unable to identify evidence to support their proposed theory of the case. Mr. Bailey respectfully requests this Court direct a verdict of acquittal based on the trial court's error of law.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE TESTIONY OF INMATE EDWARD WALKER AND NOT PERMITTING DEFENSE COUNSEL TO CROSS-EXAMINE HIM FULLY ON HIS PENDING CHARGES

Prior to trial, the State disclosed an inmate named Edward Walker from the Alvin S. Glenn Detention Center to testify against Mr. Bailey. Mr. Walker was awaiting trial for a murder, attempted armed robbery and armed robbery committed in 2011. (R. p. 552). His testimony involved an alleged jailhouse confession by Mr. Bailey while he was incarcerated awaiting trial. (R. p. 552).

Counsel for Mr. Bailey moved *in limine* to suppress the testimony of Mr. Walker or any other witnesses who may invoke their Fifth Amendment right against self-incrimination during cross examination on the basis it would unconstitutionally limit the defendant's ability to cross examine witnesses. Over defense counsel's objection, the trial court allowed Mr. Walker's testimony. Following Mr. Walker's testimony, defense counsel was allowed to proffer testimony. In response to questions concerning his involvement in the charges against him, Mr. Walker took the Fifth Amendment and refused to answer defense counsel's objections. (R. p. 587).

Pursuant to Rule 608(c), SCRE, "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." The question of Mr. Walker's guilt or innocence was elicited to show his motive to lie about the alleged jailhouse confession. Mr. Walker was facing a significant amount of time in jail. If he committed the crime alleged, or the evidence against him is so strong he simply has run out of options in his defense, the motive to lie and invent a jailhouse confession is present.

Pursuant to the Sixth Amendment of the United States Constitution, a defendant is entitled to confront the witnesses against him. One of the witnesses in this case had a strong motive to fabricate a jailhouse confession to save his own neck. Despite this motive the trial court prevented defense counsel from questioning Mr. Walker about his guilt in front of the jury and refused to suppress the testimony when Mr. Walker invoked his right to remain silent.

Therefore, Mr. Bailey respectfully requests this Court reverse the trial court's admission of Mr. Walkers testimony, or, in the alternative, allow a full cross-examination in the presence of the jury, and remand this case for a new trial.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING CHARACTER EVIDENCE OF THE APPELLANT WHEN DEFENSE COUNSEL DID NOT OPEN THE DOOR TO EVIDENCE OF A PERTINENT CHARACTER TRAIT

There are two significant instances where improper character evidence was admitted before the jury over defense counsel's objection. The first was during the testimony of the decedent's friend, Twyla Perkins. Defense counsel moved for a mistrial when Ms. Perkins testified the defendant was kicked out of the military on a bad conduct discharge.

The second incident was Army Captain Jason Parker. Cpt. Parker testified that Mr. Bailey had a number of mental issues following his return from Iraq, including a threat made to himself and other soldiers. Cpt. Parker correctly testified Mr. Bailey was separated by a general discharge under honorable conditions for a pattern of misconduct. (R. p. 899).

Defense counsel objected on the basis that Mr. Bailey's character was not in issue and therefore Ms. Perkins and Cpt. Parker's testimony constituted improper character evidence. Judge Hood overruled the objection on the basis of *State v. Dunlap*, 353 S.C. 539, 579 S.E.2d 318 (2003).

Pursuant to Rule 404, SCRE, evidence of a pertinent trait of character may be offered by the State in rebuttal to prove the accused acted in conformity with the character trait. In *State v. Dunlap*, the South Carolina Supreme Court held a defense attorney's statement regarding his client's conduct opened the door to character evidence. The defendant was charged with distribution of cocaine. In his opening statement, the defense attorney essentially characterized the defendant as an addict, not a drug dealer.

The State was then allowed to admit evidence of the defendant's criminal history of drug dealing.

Unlike the *Dunlap* case, the evidence of Mr. Bailey's military career has nothing to do with the allegation of murder. Mr. Bailey's service in Iraq is not a pertinent character trait to determine the issue of whether he committed the crime accused. Evidence he was separated from the military under conditions other than honorable is not pertinent to whether he committed a particular crime. Whether Mr. Bailey was separated for misconduct or any other reason, it simply is not a pertinent character trait to determine whether murdering an individual would be an act in conformity with his military separation. Unlike the *Dunlap* case, where the defendant's character trait of prior drug deals was pertinent to rebut an allegation of being a mere addict, the alleged negative character trait in Mr. Bailey's case has nothing to do with whether he is a murderer.

Therefore, the trial court was in error in admitting the testimony of Twyla Perkins and Cpt. Jason Parker concerning Mr. Bailey's character. This error was not harmless because it essentially painted Mr. Bailey as a bad person and a trouble maker. It was irrelevant to the allegations of murder and constitutes improper character evidence. The character evidence was completely without probative value and was outweighed by the danger of undue prejudice. Based on the foregoing, Mr. Bailey respectfully requests the Court reverse the trial court's admission of the improper character evidence and remand the case for a new trial.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SUPPRESS OR STRIKE EVIDENCE GATHERED PURSUANT TO A SEARCH WARRANT BASED UPON AN AFFIDAVIT OF AN OFFICER WITH NO PERSONAL KNOWLEDGE OF THE FACTS ATTESTED

During the testimony of Deputy Mauldin with the Richland County Sheriff's Department, it became apparent Deputy Mauldin swore to a search warrant to which he had no personal knowledge. Counsel for Mr. Bailey objected to this testimony and moved to strike all evidence admitted pursuant to a defective search warrant.

Deputy Mauldin testified he was on his way to drop his child off at day care when another officer called him regarding the murder investigation. (R. p. 496). After dropping his child off at day care, Deputy Mauldin then went straight to the magistrate's office to swear out a search warrant on the residence. (R. p. 497). When he swore out the search warrant he had never been at the residence and had no personal knowledge to support the search warrant. Deputy Mauldin swore the decedent was killed by an apparent gunshot wound. (R. p. 497)

In *State v. Dunbar*, 361 S.C. 240, 603 S.E.2d 615 (2004), the Court of Appeals for South Carolina addressed the issue of a law enforcement officer who signed a search warrant based upon information supplied by another officer. In *Dunbar*, the investigating officer called the magistrate and relayed the information to be typed into the search warrant. Another officer was sent to sign the search warrant. *Id.* at 248, 603 S.E.2d at 620. The Court of Appeals held the warrant was invalid because the warrant affidavit was not based upon the personal knowledge of the affiant. *Id.*

In addressing the hearsay exception to the personal knowledge requirement, Judge Hood and the *Dunbar* court both note that a search warrant may be based upon an

affidavit sworn upon hearsay information. *State v. Dunbar* (quoting *State v. Sullivan*). But in *State v. Sullivan*, 267 S.C. 610, 230 S.E.2d 621 (1976), the South Carolina Supreme Court did not give a blanket exception to the personal knowledge requirement. Rather, the magistrate "is called upon to evaluate this information as well as all other information in the affidavit in order to determine whether it can be reasonably inferred that the informant had gained his information in a reliable way.'" *Id.* at 617, 230 S.E.2d 624.

In Mr. Bailey's case, the magistrate was never given the information by an officer with personal knowledge. There is no evidence the issuing magistrate knew Deputy Mauldin was swearing to hearsay information. There is no evidence the magistrate was aware Deputy Mauldin had no personal knowledge of the information he swore to. He swore the decedent died of a gunshot wound, which was not true. Had he been present on the scene or had some type of personal knowledge, he may not have misled the magistrate.

In any event, the search warrant was invalid because it was not based upon personal knowledge as required by *State v. Dunbar*. The hearsay exception noted by Judge Hood does not apply because there is no evidence the issuing magistrate was aware Deputy Mauldin was testifying upon hearsay. The hearsay exception to personal knowledge is not a blanket exception, and the magistrate should have been made aware Deputy Mauldin was testifying to hearsay.

The search warrant in question was the primary search warrant in the case. The entire investigation stems from the defective search warrant. By denying the Appellant's motion to suppress and strike, the court committed an error of law that was not harmless.

Therefore, Mr. Bailey respectfully requests this Court reverse the trial court's denial of the motion to suppress and strike, and order a new trial in this matter.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE STATEMENT OF THE APPELLANT WHEN THE APPELLANT WAS NOT PROVIDED A COPY OF THE STATEMENT IN VIOLATION OF S.C.CODE §§ 19-1-90 AND 8-15-50

Pursuant to S.C. Code § 19-1-90, a witness statement may not be admitted unless certain criteria are followed:

> Unless the provisions of §§ 8-15-50 and 19-1-80 have been complied with, no statement such as is referred to in those sections shall be admissible in evidence in any case, nor shall any reference be made to it in the trial of any case.

S.C. Code § 19-1-90.

If a law enforcement officer takes a written statement, a copy of the statement must be provided to the person making the statement and the law enforcement officer must obtain a written receipt that the copy was delivered. S.C. Code § 8-15-50. If the officer fails to provide a witness with a copy of the statement, or fails to obtain a receipt of delivery, the statement is in violation of § 18-5-50 and is therefore inadmissible pursuant to § 19-1-90.

In *State v. Motes*, the South Carolina Supreme Court held a witness statement is inadmissible if the witness was not provided with a copy of the statement. *State v. Motes*, 264 S.C. 317, 324, 215 S.E.2d 190, 193 (1975). In this case, law enforcement obtained a written statement from the wife of the defendant. The wife signed the statement, but was not given a copy. The trial court properly refused to admit the statement into evidence under the precursor to S.C. Code § 19-1-90.

During the trial, the State admitted the Defendant's statement over the objection of defense counsel. One of defense counsel's primary objections to the statement was the statement was obtained in violation of the above referenced code section.

> Mr. Myers: I think it's clear that [Clarke] just failed to do what he was required The statute doesn't say that it needs to be intentional or whether or not it needs to be unintentional. Investigator Clarke just simply failed to do what he was required to do by law. It is obvious that the copy machine was working. There's no evidence to contradict Mr. Bailey's statement, and he admitted that he failed to do his job. We're not talking something out of the ordinary. All we're asking is that the defendant be given a copy, which he did not-- he was not provided of copy of it. The only remedy in this case is a suppression of the statement and any references to it.

(R. pp. 16-17).

The trial court admitted the statement over defense objection based on *Butler v. State* and *Bannister v. State,* 333 S.C. 298, 509 S.E.2d 807 (1998). The trial court was in error because this case is distinguishable.

In *State v. Butler*, 277 S.C. 452, 290 S.E.2d 1 (1982), the defendant gave a written statement at a police station. Law enforcement attempted to give the defendant a copy of his statement, but the copy machine at the police department was broken and a copy could not be made.

There is no question the State violated S.C. Code sections 8-15-50 and 19-1-90 by failing to provide Mr. Bailey with a written copy of his statement at the time it was made. There is also no question law enforcement had no excuse for its noncompliance. Unlike in *State v. Butler*, Deputy Clarke testified the Sheriff's Department's copier was not malfunctioning. He also testified he intended to give Mr. Bailey a copy of his statement but simply forgot. This was a critical violation of Mr. Bailey's rights pursuant to due process and statutory law.

Mr. Bailey should have been given a copy of his statement at the time it was made. This is important because he was in a mentally compromised position when he wrote the statement. On the morning he gave the statement, Mr. Bailey discovered the dead body of his girlfriend in the front yard and had a panic attack. He was rushed to the hospital and given medical treatment, including medication.

Based on Mr. Bailey's infirmity, he was unusually susceptible to manipulation and was likely inclined to misspeak. Law enforcement's failure to provide him with a copy of his statement significantly prejudiced him because of his weakened state.

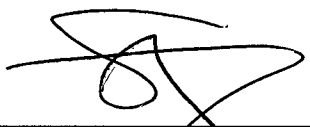
There is additional prejudice because the statement was used heavily in the case against the defendant. The State constantly attacked the timeline established by Mr Bailey's statement and used it as evidence of malice aforethought. Without the timeline brought in by the statement, given during a period of mental confusion, the State would not have established any sort of malice aforethought.

Therefore, the admission of the statement taken in violation of S.C. Code §§ 19-1-90 and 8-15-50 was an error of law. Counsel for Mr. Bailey respectfully requests the Court reverse the trial courts admission of the statement and remand the case for a new trial.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests this Court reverse the trial court's verdict and sentence, direct a verdict of acquittal, or, in the alternative, remand the case for a new trial.

Respectfully submitted,



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Court of General Sessions

The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2013-001680

Marcus Bailey,.....Appellant,

v.

The State of South Carolina,.....Respondent.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I certify that I have served the filed Final Brief of the Appellant on the parties listed below by depositing a copy in the United State Mail, postage prepaid, on February 23, 2015, addressed as indicated below:

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