STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

Respondent,

v.

FRANK TERRANCE SINGLETON, III,

Appellant

Appellate Case No. 2014-002004.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

I. Although unpreserved for appellate review, the trial court properly allowed Agent Cromer to opine that the recovered .45 shell casing and bullet jacket were fired from a particular firearm because Appellant raised no objection to Agent Cromer's training and expertise and because the field of firearm and toolmark examination carries significant indicia of reliability so as to render an expert opinion admissible under Rule 702, SCRE and the test prescribed within *State v. Council*, *infra*.

STATEMENT OF THE CASE

Appellant Frank Terrance Singleton, III, a/k/a Mae Mae, was indicted by the Kershaw County Grand Jury for the charges of murder, first degree burglary, armed robbery, and possession of a weapon during the commission of a violent crime concerning the November 14, 2008, homicide of Robert Mackay. (R. pp. 567 – 573).

Fifth Circuit Public Defender Douglas Strickler and Assistant Public Defender Jason Kirincich represented Singleton at a jury trial taking place September 8-11, 2014, before the Honorable D. Craig Brown in Kershaw County. (R. p. 1). Kathryn "Luck" Campbell, Joanna McDuffie and Daniel Coble of the Fifth Circuit Solicitors Office prosecuted the case. (R. p. 1). A jury convicted Singleton of all charges. (R. p. 527, line 18 – p. 528, line 2). Judge Brown sentenced Singleton to consecutive life sentences for murder (2012-GS-28-1452) and first degree burglary (2012-GS-28-1451), as well as a consecutive thirty years' imprisonment for armed robbery (2012-GS-28-1450), and one day for possession of a weapon during the commission of a violent crime (2012-GS-28-1449). (R. p. 534, line 15 – p. 535, line 3).

This appeal follows. (R. pp. 536 – 537).

STATEMENT OF FACTS

"Kershaw County Police Department, get down on the floor!" heard twelve-year-old Nick Mackay as he sat at the kitchen table with his father, Robert Mackay, and four-year-old baby sister after school on November 14, 2008. While he did his homework and talked with his father about what to get his mother for Christmas, four masked men wearing all black banged on the trailer door three times and "rushed in" on the family. (R. pp. 396, line 4 – p. 399, line 23). The men were armed. Nick saw two handguns and a shotgun. (R. p. 399, lines 7-14). It was Appellant Frank T. Singleton, III, a/k/a "Mae Mae," who kicked in the front door.[1] (R. p. 185, lines 5-8; R. p. 220, lines 9-19).

Nick grabbed his little sister and lay with her on the floor. (R. p. 400, lines 1-3). He heard the masked intruders hitting his father as they repeated "where's the money, where's the dope?" (R. p. 400, lines 13-15; R. p. 401, lines 20-22). There was a gunshot in the kitchen, and then Nick heard somebody say "that's a lot of blood you're losing." (R. p. 400, lines 15-16). Robert Mackay had been hit in the head with a pistol. Then he was shot in the leg with a shotgun. (R. p. 221, line 20 – p. 223, line 4). One man picked Robert Mackay's four-year-old daughter "off of the floor and held the gun to her head" and threated to shoot her. (R. p. 222, line 13-24; R. p. 402, lines 4-12).

The masked men continued to hit Nick's father and forced him to the master bedroom located on one end of the mobile home. (R. p. 223, lines 7-22; R. p. 401, lines

[1] With the exception of co-defendant Richard Roach, each of Appellant's remaining co-defendants (Jerome Lewis, a/k/a "Sticky" (R. p. 185, lines 9-12), Randy Lewis, a/k/a "D" (R. p. 249, lines 19-20), Darrien Jackson a/k/a "Diablo" (R. p. 214, lines 12-15), and Will Smith a/k/a "Ill Will" (R. p. 249, lines 5-10)), offered corroborating narratives of the events that transpired before, during, and after the episode at Robert Mackay's residence. (*See e.g.* R. pp. 547 – 549 State's Exhibit 97).

11-22). "Where's the money?" they repeated. (R. p. 403, lines 4-6). All of the masked men went to the back bedroom except one, who kept watch over Nick and his sister in the kitchen. (R. p. 402, line 19 – p. 403, line 2).

Then, there was a knock on the front door. One of the masked men opened it. (R. p. 403, lines 5-10). It was about ten past four o'clock in the afternoon, and Robert Sullivan had arrived at Mackay's home looking to buy marijuana. (R. p. 89, line 18- p. 90, line 11). Sullivan was not greeted by Mackay as he expected. Instead, the door opened "and a gun was stuck in [his] face" by one of the masked men. (R. p. 90, line 16 – p. 91, line 6). "It escalated to[o] bad out in the front yard when that knock happened." (R. p. 227, lines 20-21). Sullivan "turned and ran" outside, struggling with the masked, armed men that followed him. Sullivan was shot in the head. (R. p. 91, lines 2-22). Bleeding, he drove across the street to his cousin's house to seek help. (R. p. 91, line 23 – p. 92, line 13).

Robert Mackay and the other masked men also ran outside into the front yard. (R. p. 227, lines 14-25). Mackay jumped on one intruder's back, causing that intruder's gun to go off. (R. p. 301, lines 12-19). Then Mackay grabbed Appellant, jumped on his back, and Appellant shot Mackay in the chest. (R. p. 229, lines 14-25; R. p. 303, line 13 – p. 304, line 5). "[T]hey were actually going in circles." (R. p. 228, lines 7-17). Mackay started running away, "limping" as a result of the earlier gunshot to the leg. (R. p. 229, lines 6-12). Another shot rang out from one of the masked men, causing Mackay to fall to the ground. (R. p. 305, lines 3-15).

After that final gunshot, Appellant returned to Mackay's master bedroom and took a safe that Robert Mackay had pointed out to his assailants earlier during the attack.

(R. p. 231, lines 9-14; R. p. 300, lines 1-6). The other masked men ran away through the woods from which they had arrived. (R. p. 228, lines 3-6; R. p. 229, lines 19-23). Appellant took the safe, ran to the car where his co-defendants were waiting, and put the safe in the trunk. (R. p. 231, lines 1-25). The co-defendants also brought back to the vehicle an additional weapon, "a small .22" that came from Mackay's person during the struggle. (R. p. 309, line 19 – p. 310, line 11). The masked men drove off together and enlisted the assistance of a man "in the country" to open the safe. (R. p. 308, line 17 – p. 309, line 9). Inside, the men only found some papers. The co-defendants recovered no money or drugs from their efforts. (R. p. 309, lines 10-18).

Meanwhile, Mackay's neighbor across the street called law enforcement to render assistance to the victims who fled there. (R. p. 404, line 10 – p. 405, line 24). Mackay called his cousin Marlo Patterson from his neighbor's house around 4:30 that afternoon. "He said man get over here I've been shot, man, hurry up, please hurry up. . . . He was at his neighbor's house, Patricia, across the road from him." (R.p. 276, lines 11-20). When Patterson arrived, he found Mackay bleeding from his stomach, his leg and the back of his head. "[Y]ou could really about see his skull he had got beat so bad." (R. p. 277, lines 6-18). Sullivan recovered from his gunshot wound to the head, but Robert Mackay was unable to do the same. (R. p. 95, lines 10-12; R. p. 127, lines 22-23).

Mackay sustained gunshot wounds to the chest, abdomen and right leg. (R. p. 131, lines 4-21). He was admitted to the hospital shortly after seeking shelter across the street, and remained there in a coma until his death on January 24, 2008. (R. p. 128, lines 2-9; R. p. 160, lines 13-21). The shot to the abdomen lacerated Mackay's intestines, resulting in their partial removal. Mackay ultimately suffered from peritonitis and sepsis, an internal

infection resulting from the bullet's tearing through his organs. The infection caused Mackay liver failure, kidney failure, and ultimately led to his death just a little more than two months later.[2] (R. p. 132, line 3 – p. 136, line 10).

The Investigation Goes Cold

Law enforcement was dispatched to the crime scene at Mackay's residence at 4:40 that afternoon. (R. p. 60, lines 1-3). Kershaw County Lieutenant Eric Tisdale responded to the single-wide mobile home with the dirty, kicked-in front door still ajar. (R. p. 99, lines 2-10). The Kershaw County Sherriff's Office Blood Hound Team was called to the scene. (R. p. 171, lines 19-25). "The blood hound tracked through the woods from the residence to a location on Quarry Road." (R. p. 172, lines 1-2). That road runs behind Mackay's residence. (R. p. 58, lines 15-18; R. p. 170, lines 20-21).

In processing the scene, law enforcement recovered a blue South Carolina ball cap near the front steps, a spent casing from a .45 near the rear of a vehicle in the front yard, and a shotgun shell a little further away and behind the red vehicle. (R. p. 106, lines 11-17; R. p. 107, lines 20-24; R. p. 108, lines 18-21; R. pp. 540 – 542). Inside the mobile home, Lt. Tisdale discovered a shuffled scene, including a toppled and blood-stained vacuum cleaner, an overturned chair in the kitchen, a blood-smeared bullet hole in the floor, and a bloody master bedroom in total disarray. (R. p. 109, line 18 – p. 114, line 5; R. pp. 538-39; R. p. 544). The case, however, went unsolved. (R. p. 166, lines 13-24).

It was not until July 25, 2011, that Kershaw County Lieutenant Justin Dill received word from a county inmate that law enforcement should talk to Jerome Lewis,

[2] The victim was diabetic, but diabetes alone would not have caused his death absent the organ failure resulting from the gunshots. (R. p. 134, line 19 – p. 135, line 4).

a/k/a Sticky, about the crimes at Robert Mackay's. (R. p. 409, lines 8-24). Following that initial tip, Lt. Dill made contact and conducted interviews with co-defendants Jerome Lewis a/k/a Sticky, Darrien Jackson a/k/a Diablo, Marcellus Juggins, and Will Smith a/k/a Ill Will, among other potential witnesses. (R. p. 410, lines 8-12; R. p. 412, lines 7-22; R. p. 415, lines 4-20; R. p. 416, line 6 – p. 417, line 23). Ill Will and Diablo in particular provided "very consistent" statements. (R. p. 419, lines 12-22).

Co-Defendants Talk

When Appellant's co-defendants spoke, they pointed at Appellant's heading up the attack. Jerome Lewis heard that Robert Mackay sold drugs, so he and Appellant and some others planned to rob him. (R. p. 186, line 6 – p. 187, line 7; R. p. 283, line 24 – p. 284, line 8). First, they drove past his house to locate it and scope it out. (R. p. 187, line 8 – p. 188, line 8; R. p. 284, lines 9-21). Next, they returned to Mackay's as a group one night, parked the car in the dark, and went through the woods up to the house. They left because the area was noisy with dogs and people. (R. p. 188, line 9 – p. 189, line 13; R. p. 285, lines 13-25).

Finally, on November 14, 2008, they made good on their plan. (R. p. 189, lines 22-25). It was raining that day, so the group decided to go forward with the robbery because "it was already loud because it was raining so a little noise, you know, wouldn't hurt to[o] much, if it got to[o] loud." (R. p. 288, line 18 – p. 289, line 3). Appellant, Randy Lewis, Roach, Diablo and Ill Will first went to the BP to buy gloves so they would not leave fingerprints at the crime scene. (R. p. 289, line 18 – p. 290, line 21). They all concealed their identity with masks in addition. (R. p. 218, lines 12-21; R. p. 291, lines 3-9). Appellant, Ill Will, and Diablo were armed. (R. p. 217, lines 16-25; R. p. 287, lines 1-

11). Appellant had a .45. (R. p. 291, lines 16-17). Diablo had a .22. (R. p. 291, lines 14-15). Ill Will had a 12-gauge shotgun. (R. p. 217, line 23; R. p. 291, lines 12-13).

Ill-Will parked the car on a dirt road some ways behind Robert Mackay's residence and lifted the hood up to make the car look broken-down "[b]ecause [they] didn't want the car to be seen near the house." Once parked, the group walked through the woods towards an abandoned trailer. (R. p. 216, line 4 – p. 217, line 13; R. p. 219, lines 1-3; R. p. 292, lines 18-24; R. p. 306, lines 18-19). On the way, they passed a deer stand and Appellant "went up there and checked to make sure nobody was in there." (R. p. 293, lines 17-23; R. p. 545). In the abandoned trailer, they sat and watched Mackay's mobile home, waiting for a good time to make their entrance. (R. p. 219, lines 7-25; R. p. 294, line 6 – p. 295, line 23). The others waited for Appellant "to tell [them] to come on." (R. p. 295, lines 7-8).

After the home invasion and resulting kerfuffle, Appellant admitted more details of the robbery to Jerome Lewis, a/k/a Sticky. (R. p. 193, lines 7-8). Appellant stated that he was in a trailer waiting "to make a move and as soon as [a] lady left [Mackay's trailer], they went . . . over there and . . . [he] kicked the door in." (R. p. 193, lines 9-24). Appellant further admitted that he hit Mackay in the head with his gun, that Darrien Jackson a/k/a Diablo shot Mackay in the leg, and that Appellant shot Mackay with his .45 when Mackay jumped on his back. (R. p. 194, line 6 – p. 195, line 12). Appellant also admitted to Sticky that he took the safe and a small. 22 from Mackay's mobile home. (R. p. 195, line 21 – p. 196, line 25).

Firearm and Toolmark Examination—It's a Match

Darrien Jackson a/k/a Diablo additionally gave specific information about the

semi-automatic .45 caliber handgun used by Appellant during the crimes' commission. He recalled that the .45 "had a long nose on it." (R. p. 311, lines 3-10). Jackson's description matched a firearm Lt. Dill recalled recovering from an unrelated narcotics case in 2011. (R. p. 441, line 19 – p. 443, line 1). Lieutenant Dill recalled that gun because it was unusual. It bore the word "Grizzly" on its side and it had a barrel which extended about "an inch [past] the actual . . . frame of the gun." (R. p. 443, lines 2-7; R. p. 446, lines 12-21; R. p. 543). That firearm was retrieved from the evidence locker at the Sheriff's Department and sent to SLED to be compared with the ballistics evidence collected from the crime scene. (R. p. 442, lines 9-16).

At SLED, Agent Suzann Cromer received the recovered fired .45 auto caliber cartridge case and bullet jacket, along with the other fired casings collected in relation to the crimes at the same time in 2008. (R. p. 360, line 8 – p. 361, line 5). She was qualified at trial as an expert in firearm and toolmark examination without objection. (R. p. 354, line 21 – p. 355, line 12). Before the jury, Agent Cromer testified about her initial examination of the .45: she weighed the casing, measured it, determined it to be consistent with a .45 automatic, and then conducted "a microscopic examination to see if [it had] the markings that [she] need[ed] to identity it to a firearm." (R. p. 361, lines 11-16). She determined the .45 casing "was identifiable with a specific firearm meaning it did have markings that [she] needed for identification purposes and that the .45 was the cartridge case that was not fired by the same firearm that fired [other] .9 millimeters" collected into evidence and provided for her examination.[3] (R. p. 362, lines 5-12).

[3] The 9 millimeter cartridge casings were recovered from the side of Quarry Road during the initial crime scene investigation. At that time, they were collected out of an

Agent Cromer also received for comparison the bullet jacket removed directly from the victim during surgery, and determined that it, like the casing, derived from a .45 auto caliber projectile. (R. p. 363, lines 1-9). Once provided with the .45 firearm with the "Grizzly" emblem and extended nose, Agent Cromer test fired the gun to begin the firearm and toolmark comparison process. (R. p. 365, line 7 – p. 367, line 25). When comparing the LAR Grizzly .45 Win Mag semi-automatic pistol with which she was provided "to the fired .45 bullet jacket and the fired .45 cartridge case that [she] received," Agent Cromer "determined that there w[ere] enough individual identifying characteristics for [her] to say that those were fired . . . by this gun." (R. p. 368, lines 1-9; R. p. 370, lines 10-21). She determined "that the projectile was fired by this firearm." (R. p. 368, line 20; R. p. 370, line 18-23).

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abundance of caution and were not immediately apparent as being connected to the crimes occurring at the Mackay residence. These casings did not become significant to the instant case at any time. (R. p. 168, line 17 – p. 169, line 14; R. p. 361, lines 1-5).

ARGUMENT

I. Although unpreserved for appellate review, the trial court properly allowed Agent Cromer to opine that the recovered .45 shell casing and bullet jacket were fired from a particular firearm because Appellant raised no objection to Agent Cromer's training and expertise and because the field of firearm and toolmark examination carries significant indicia of reliability so as to render an expert opinion admissible under Rule 702, SCRE and the test prescribed within *State v. Council, infra.*

Appellant initially moved to limit SLED Agent Cromer to opine only in certain terms that she "cannot exclude" the .45 caliber weapon as one which could have fired the projectile. (R. p. 38, lines 6-10; R. pp. 550 – 566). In so moving, Appellant stated that Agent Cromer was "certainly qualified to give her opinion," but sought to restrict her from testifying that in her training and expertise, the .45 casing undoubtedly matched the Grizzly firearm with the extended nose. (R. p. 40, lines 4-25). Appellant stated that "there is no scientific bases for these conclusions" and relied upon a National Research Council report which questioned the comparison techniques used in the practice of firearm and toolmark examination. (R. p. 38, line 10 – p. 41, line 2; R. pp. 550 – 566). Outside of his written motion, Appellant offered no additional evidence that SLED's firearm and toolmark examination process and the related methodology exists as unreliable. (R. p. 44, lines 1-20).

The trial court acknowledged that the field of firearm and toolmark identification is "widely accepted, based upon the testimony that was elicited from this stand, the method, manner, and procedure in which she performed the testing in the conclusions that she came to based upon her testimony is accepted within the scientific community of this particular expert area." (R. p. 43, lines 18-22). The trial court considered the State's proffer of Agent Cromer's testimony and the parties' arguments on this issue and ruled:

> [T]he testimony of Ms. Cromer is outside of the ordinary lay knowledge of individuals. Even Defense counsel has acknowledged that she is an expert entitled to testify with regards to the firearms and toolmarkings. Ms. Cromer testified that her study[,] whether it be through schooling; through intern; through three . . . to four years of study at SLED; as well as subsequent continuing education; as such method[,] manner and procedure is relied upon within scientific community [and] accepted within the field that it goes through a micro technical administrative review[,] all of which were done in this case[,] of which they are entitled or they can through their studies come to one of four conclusions[.] [O]ne of which is the projectile was fired from this firearm and it was not fired from a firearm that's unsuitable I believe she said unsuitable conclusion or inconclusive. **Her testimony here has been elicited from this stand is that it came from the firearm in question in this case and I do not believe that it would be proper for the Court to order that she change her conclusion to fit within the other three categories for which she testified were viable conclusions had such been warranted.**
>
> Therefore, I am respectively denying Defense counsel's motion. I do find that she is qualified to render such opinion.

(R. p. 44, line 21 – p. 45, line 21 (emphasis added)).

Then, the trial court reminded the jury as it had with previous experts that testified that "she's being qualified to give an opinion testimony in that area but that does not mean that you [the jury] must accept the opinion. It is evidence for you [the jury] to use as you see fit and give it the weight and credibility that you believe is appropriate." (R. p. 355, lines 1-12).

As ruled by the trial court and as Respondent will show, Agent Cromer's expert training and certification in firearm and toolmark examination falls within a field supported by sufficient indicia of reliability so as to render it admissible. As a result, Agent Cromer was allowed to opine in the manner exemplified at trial pursuant to Rule 702, SCRE. As stated by Assistant Solicitor Campbell, "to ask the Court to change her opinion [is not] within the balance of the law." (R. p. 43, lines 6-7).

A. This issue is not preserved for appellate review because Appellant made no contemporaneous objection to SLED Agent Cromer's trial testimony.

A contemporaneous objection and a ruling by the trial court are required to preserve an issue for direct appellate review. *State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996). "[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). Absent a contemporaneous objection on the record, there can be no basis for appellate review, for "[a] party cannot complain of an error which his own conduct has induced." *State v. Carlson,* 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (citing *State v. Stroman,* 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984)). Thus, where "a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson, supra.*

Pre-trial, Appellant raised the present issue as a motion *in limine* to limit conclusions testified to by the State's firearms examiner, and testimony was taken. (R. p. 11, line 16 – p. 43, line 10; R. p. 550 – 566). The trial court denied the motion. (R. p. 43, line 11 – p. 45, line 21). But, at no time during SLED Agent Suzann Cromer's jury trial testimony did Appellant make any contemporaneous objection to the firearm and toolmark examination evidence. (R. p. 351, line 15 – p. 381, line 18). The motion was not specifically renewed at the close of evidence or as a post-trial motion. (R. p. 462, lines 22-25; R. p. 529, line 11 – p. 530, line 16). The issue presently before this Court is therefore wholly unpreserved for review.

B. Requiring a duly qualified expert to limit her opinion to certain terms is improper given the trial court's correct application of the standard for admitting technical evidence.

"[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify . . . in the form of an opinion" so long as that witness' "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, SCRE.

> When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. The trial judge should apply the *Jones* factors to determine reliability. Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect. Rule 403, SCRE. Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate.

State v. Council, 335 S.C. 1, 20-21, 515 S.E.2d 508, 518 (1999) (citing *State v. Jones,* 273 S.C. 723, 259 S.E.2d 120 (1979)). Reliability need not equate with whether the expert evidence sought to be admitted is specifically "scientific." The reliability standard applies to technical and specialized matters as well. *State v. White,* 382 S.C. 265, 676 S.E.2d 684 (2009) (citing *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 1174 (1999)).

The *Jones* factors contemplated by the *Council* court include: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Id.* at 19, 515 S.E.2d at 517 (citing *State v. Ford,* 301 S.C. 485, 392 S.E.2d 781 (1990)).

An appellate court will not disturb the lower court's decision to admit or exclude expert testimony absent an abuse of discretion. *State v. Council, supra* at 21, 515 S.E.2d at 518 (citing *State v. Von Dohlen,* 322 S.C. 234, 248, 471 S.E.2d 689, 697 (1996)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings,* 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

At issue we find the trial court's failure to *limit* the State's expert on firearms and toolmark examination because the exactness of her conclusion is allegedly unreliable. Appellant does not dispute that SLED Agent Suzann Cromer is an expert in her field, but rather that her opinion as a duly qualified expert should be constrained to language: "not that [the collected projectile] wasn't fired from the weapon *but that you cannot exclude the weapon* as something which fired [the tested] objects." (R. p. 38, lines 6-10 (emphasis added)). However, the State extensively proffered a milieu of Agent Cromer's training, expertise, and practice in firearm and toolmark examination which exemplify that the methodology employed meet the *Jones* factors and therefore the standard for admissibility.

The following is a comprehensive summary of the foundation laid by Agent Cromer:

1. Firearm and tool mark examination began in the 19th Century and, since then, has consistently been conducted with the use of a comparison microscope to examine bullets and cartridge casings. Courtroom testimony was taken on this subject as early as 1917. (R. p. 20, lines 14-25).

2. Agent Cromer completed SLED's three-to-five-year in-house training program for firearm and toolmark examiners where she conducted practical exercises, written and oral tests, and casework under qualified firearm examiners. She completed a comprehensive final exam for that program. (R. p. 14, line 18 – p. 15,

line 2). She has been with SLED for 16 years. (R. p. 15, lines 16-17).

3. She attended and trained at numerous seminars held by the Association of Firearm and Toolmark Examiners (AFTE). (R. p. 15, lines 3-12). She also attended conferences held by the South Carolina Chapter of the International Association of Identification, the Bureau of Alcohol, Tobacco and Firearms, *inter alia*. (R. p. 15, lines 5-15).

4. Agent Cromer has testified approximately 77 times as an expert in firearm and toolmark examination. (R. p. 15, lines 18-23).

5. SLED participates in and relies upon a number of published studies to help validate the reliability of their toolmark identification practices. These studies undergo the peer review process and are widely accepted by the scientific community. These studies include but are not limited to Fadul's Glock Ebis Barrell Test, the "Hamby Ten Consecutively made Ruger barrel," and the Glock Cartridge Case Test.[4] (R. p. 21, line 6 – p. 22, line 22).

6. SLED's examination process and theory of identification follows that of the AFTE. The standard is whether there exists a "sufficient agreement of those individuals identifying markings to conclude that this was fired by that firearm?" A sufficient agreement is "better than any known non-matched."[5] (R. p. 15, line

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[4] *See e.g.*, J.E. Hamby, D.J. Brundage, and J.W. Thorpe, *The identification of bullets fired from 10 consecutively rifled 9mm Ruger pistol barrels—A research project involving 468 participants from 19 countries*, 41 AFTE J. 2, 99-110 (2009); R.G. Nichols, *Defending the scientific foundations of the firearms and tool mark identification discipline: responding to recent challenges,* 52 J. FORENSIC SCI. 3, 586-94 (May 2007); R. Skolrood, *Comparison of Bullets Fired From Consecutively Rifled Cooey .22 Calibre Barrels*, 8 CAN. SOC'Y OF FORENSIC SCI. J. 2, 49-52 (1975); Thomas G. Fadul, Jr., Ph. D., *et al.*, *An Empirical Study To Improve the Scientific Foundation of Forensic Firearm and Tool Mark Identification Utilizing Consecutively Manufactured Glock EBIS Barrels with the same EBIS Pattern* (2013).

[5] The AFTE defines "sufficient agreement" as being

> related to the significant duplication of random toolmarks as evidenced by a pattern or combination of patterns of surface contours. Significance is determined by the comparative examination of two or more sets of surface contour patterns comprised of individual peaks, ridges and furrows. Specifically, the relative height or depth, width, curvature and spatial relationship of the individual peaks, ridges and furrows within one set of surface contours are defined and compared to the corresponding features in the second set of surface contours. Agreement is significant when it exceeds the best agreement demonstrated between toolmarks known to have been produced by different tools and is consistent with agreement demonstrated by toolmarks known to have been produced by the same tool. The statement that "sufficient agreement" exists between two toolmarks means that

22 – p. 18, line 22).

7. Agent Cromer is not aware of any study or scientific experiment which concludes that SLED's practices are unreliable, non-scientific, or otherwise insufficiently grounded in methodology. (R. p. 24, lines 8-18).

8. The firearm and toolmark examination process begins by looking at the firearm or ballistics' individual markings, individual identification characteristics, weight, measurements, composition and makeup. (R. p. 15, lines 6-11).

9. Then, Agent Cromer examines the firearm itself to determine its caliber, rifling, and how it operates. Test fires are conducted. (R. p. 16, lines 12-15). The caliber, rifling, dimension, number of lands and grooves, and number of twists and raves, are considered "class characteristics." These characteristics are unique to a particular brand, make and caliber of firearm. (R. p. 32, lines 1-6). More minor variations from the production process are considered "sub-class characteristics" and may be particular to a certain type of weapon, but not necessarily the exact firearm being tested. For that reason, Agent Cromer is "very careful not to make an identification based on sub-class characteristics." Individual characteristics are those which are unique to the particular firearm being tested. (R. p. 32, line 15 – p. 33, line 22).

10. Next, a microscopic comparison is conducted of only the knowingly test-fired specimens. In that step, Agent Cromer examines "consistency of those markings to see how [the test-fired gun] marks the bullets and the cartridge cases." (R. p. 16, lines 17-19).

11. Only at that stage are the test-fires compared to the "unknown" that is the evidence in a case. (R. p. 16, line 20).

12. After testing the evidence, one of four conclusions is rendered:
    a. Positive: this cartridge case or bullet was fired by the tested gun
    b. Negative: this cartridge case or bullet was not fired by the tested gun
    c. Unsuitable: the piece of evidence did not bear enough markings or was otherwise too damaged for Agent Cromer to render a conclusion
    d. Inconclusive: not enough corresponding markings to conclude that it was or was not fired by the tested gun.[6]

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the agreement is of a quantity and quality that the likelihood another tool could have made the mark is so remote as to be considered a practical impossibility. Richard Grzybowski, *et al.*, *Firearm/Toolmark Identification: Passing the Reliability Test Under Federal and State Evidentiary Standards*, 35 AFTE J. 209-21 (2003).

[6] The error rate testified to by Agent Cromer on cross-examination relates to a published study by Collaborative Testing Services which reported that for the previous year,

(R. p. 15, lines 1-11).

13. After reaching one of four possible conclusions, Agent Cromer is required to have another qualified firearms examiner microscopically look at the evidence and agree with her conclusion. This is referred to as a micro verification and is accompanied by a technical and administrative review of the case file at issue. Only then can a report be issued. This protocol was followed in Appellant's case.[7] (R. p. 18, line 23 – p.195, line 14).

14. Because of the above-stated protocol, firearm and toolmark examination has objective and subjective components. The examination is subjective insofar as the examiner must select a classification of the evidence into one of the four possible categories delineated above. The examination process is objective because a second examiner must reach the same conclusion before a report is issued. (R. p. 24, line 22 – p. 25, line 11).

15. Using the entirety of her training and expertise in this field, Agent Cromer reached a "professional opinion based on [her] education; [ ] training; [ ] background; [and] participation in research studies; that sufficient agreement was found between the tested fires of that .45 semi-automatic and the evidence in this case such so that [she] believe[s] another firearm having that much of [an] agreement would be a practical impossibility." (R. p. 25, line 24 – p. 26, line 5).

The proffer makes it apparent that firearm and toolmark examination practices employed by SLED meet the *Jones* factors and, thus, under *Council*, significant indicia of reliability exist to support the trial court's admitting it. As is required by *Council* for consideration, the court had before it ample evidence of (1) published peer review of the techniques employed by the methodology, (2) application of the science to testimony dating back as far as 1917, (3) a standardized quality-control procedure in the form of micro verification, technical, and administrative reviews, all of which are required before the expert issued her report, as well as a minimal 1% error rate, (4) and evidence of a

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firearm and toolmark examination conclusions exhibited a 1% error rate for false positives. That study did not take into account the micro verification process required by SLED. (R. p. 35, line 19 – p. 36, line 24).

[7] The micro verification process in Appellant's case was conducted by former Lieutenant Ira Byrd Parnell, a 42-year veteran of SLED. (R. p. 19, line 15 – p. 20, line 9).

consistent microscopic examination practice and procedure dating back to the late 1880s. *Cf. State v. Council, supra* at 20-21, 515 S.E.2d at 517 (mitochondrial DNA analysis admissible where subjected to peer review and publication, known potential error rate existed, standards controlled technique, FBI lab validated the process, the underlying science was accepted by the scientific community, and the technology was accepted and used for other purposes); *compare with State v. Jones,* 383 S.C. 535, 556-57, 681 S.E.2d 580, 591 (2009) (barefoot sole impression evidence inadmissible as scientifically unreliable where peer review discounted the technique and where SLED lacked any established testing protocol); *but cf. State v. White,* 382 S.C. 265, 676 S.E.2d 684 (2009) (though nonscientific, dog tracking evidence found reliable and admissible pursuant to Rule 702, SCRE).

Appellant offers a solitary study by the National Research Council in rebuttal of these numerous indicia of reliability. (R. pp. 550 – 566). "The NRC Report relied upon by defendant to challenge the discipline of firearm/toolmark identification was authorized by Congress and summarizes the state of forensic science in the United States." *People v. Jones,* 393 Ill. Dec. 537, 552, 34 N.E.3d 1065, 1080 (Ill. App. 2015) ("Questioning whether the discipline of firearm/toolmark examination is deemed a strict 'science' or not does not diminish its value, nor does it overturn Illinois's long-standing acceptance of the facts relied upon by such experts as facts that are reasonably relied upon in this discipline."); National Research Council Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science in the United States: A Path Forward,* 150-55 (2009). The report simply concludes that because of an unknown amount of variabilities among individual tools and guns, there is not a specific number

assigned to "how many points of similarity are necessary for a given level of confidence in the result" of an examination. *Id.* at 154. As a result,

> [t]he committee agrees that class characteristics are helpful in narrowing the pool of tools that may have left a distinctive mark. Individual patterns from manufacture or from wear might, in some cases, be distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable.

Id. At its conclusion, the National Research Council's critique of this topic stresses that this field of forensic study "lacks the specificity of the protocols of, say, 13 STR DNA analysis. This is not to say that toolmark analysis needs to be as objective as DNA analysis in order to provide value." *Id.* at 155. Indeed, a comparison between leaden ballistics inherently lacks the same individualized organic components which provide the confidence underlining DNA analyses' admissibility. For that reason alone, the two are not comparable when determining the reliability, and therefore the admissibility, of firearm and toolmark examination results.

And, even by the terms of the study put forward by Appellant, the methodology employed by firearm and toolmark examiners proves reliable. The National Research Council report breaks down the field of study in the same manner testified to by Agent Cromer. *Id.* at 152-54 ("Bullets and cartridge casings are first examined to determine which class characteristics are present . . . ."). It references an identical peer review study as cited by Agent Cromer. *Id.* at 155 (citing J.E. Hamby, D.J. Brundage, and J.W. Thorpe, *The identification of bullets fired from 10 consecutively rifled 9mm Ruger pistol barrels—A research project involving 468 participants from 19 countries*, 41 AFTE J. 2, 99-110 (2009)). As such, the National Research Council report upon which Appellant

relies lends credence to the dependability of Agent Cromer's proffer.

Our own courts also consistently admit conclusive expert opinions on the topic of firearm and toolmark examination where both gun and projectile are available for comparison. *See e.g.*, *State v. Winkler*, 388 S.C. 574, 581, 698 S.E.2d 596, 600 (2010) ("A firearms and toolmark examiner for SLED testified that the Jennings pistol found on Appellant when apprehended fired the bullet recovered from Victim's baseboard."); *State v. Brockmeyer*, 406 S.C. 324, 349, 751 S.E.2d 645, 648 (2013) (SLED firearms analyst "testified that through laboratory testing, she was able to determine that the projectile recovered during the autopsy and the shell casing found near the victim's body were both fired by the pistol."); *State v. Miller*, No. 2015-UP-310, 2015 WL 3885675, at *1 (S.C. Ct. App. June 24, 2015) (firearm and toolmark examiner "verified the bullet that killed the dog was fired from a different handgun than the one that fired the bullets into the victim's body").[8]

[8] In fact, a number of courts accept firearm and toolmark identification testimony as reliable. *E.g. State v. Romero*, 236 Ariz. 451, 454-58, 341 P.3d 493, 496-500 (Ariz. Ct. App. 2014) (holding methodology governing firearms identification sufficiently reliable to permit a qualified expert to provide in-court technical testimony) (finding *Willock, infra,* persuasive and *Monteiro, infra,* distinguishable); *United States v. Hicks*, 389 F.3d 514, 526 (5th Cir. 2004) ("We have not been pointed to a single case in this or any other circuit suggesting that the methodology employed . . . is unreliable."); *United States v. Monteiro*, 407 F.Supp.2d 351 (D. Mass. 2006) ("There has also been no credible challenge to the underlying physical theory of how marks are transferred from the firearm to the cartridge case. The government has met its burden . . . under Rule 702.") (but restricting identification where examiner failed to document conclusion or have them confirmed by another qualified examiner); *United States v. Santiago*, 199 F. Supp. 2d 101, 111 (S.D.N.Y. 2002) ("The Court has not found a single case in this Circuit that would suggest that the entire field of ballistics identification is unreliable."); *see also State v. Phillips*, 2015 WL 5168253 (Del. Sup. Ct. 2015) (*unpublished*) (holding motion to exclude examiner's testimony properly denied where forensic study deemed reliable). But, jurisdictions have limited the certainty with which the expert may report results, especially where a firearm is unavailable for comparison. *E.g. United States v. Taylor*,

Where, as here, the trial court finds the proffered technical evidence reliable, the expert's opinion testimony is admissible. *Council, supra*; Rule 702, SCRE. Thus, Agent Cromer was allowed to opine before the jury that "the projectile was fired from this firearm." (R. p. 368, line 20); Rule 702, SCRE. Appellant instead asks the court to order a duly qualified expert to change her opinion. For Agent Cromer to opine that the Grizzly firearm "could not be excluded" as the one which fired the .45 projectiles ignores the fact that Agent Cromer was bound by her own methodology to come to one of four conclusions concerning whether the firearm matched the projectiles: positive, negative, unsuitable, or inconclusive. (R. p. 15, lines 1-11). The certain terminology which

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663 F. Supp. 2d 1170, 1180 (D.N.M. 2009) (Examiner "may only testify that, in his opinion, the bullet came from the suspect rifle to within a reasonable degree of certainty in the firearms examination field."); *United States v. Glynn,* 578 F.Supp.2d 567 (S.D.N.Y. 2008) (applying "more likely than not" limitation to opinion testimony); *United States v. Monteiro, supra* at 373 ("an expert may not assert any degree of statistical certainty, 100 percent or otherwise, as to a match"); *Sexton v. State,* 93 S.W.3d 96 (Tex. Crim. App. 2002) (rejecting matching cartridge cases to weapon based only upon magazine marks where the underlying magazine unrecovered); *Ramierez v. State*, 810 So.2d 836 (Fla. 2001) (rejecting toolmark analysis matching knife to fatal stab wounds).

After conducting a thorough review of the underlying practice, National Research Council critique, and trends in the admissibility of firearm and toolmark examination, a Maryland District Court found "no meaningful distinction between a firearms examiner saying that 'the likelihood of another firearm having fired these cartridges is so remote as to be considered a practical impossibility' and saying that his identification is 'an absolute certainty.'" *United States v. Willock,* 696 F. Supp. 2d 536, 550-73 (D. Md. 2010) (quoting Mark Twain's 1883 essay *Life on the Mississippi*, "There is something fascinating about science. One gets such wholesome returns of conjecture out of such a trifling investment of fact."). That court, however, did limit the firearms examiner to opining in "more likely than not" terms because that examiner's opinion piggybacked upon that of an unknown city examiner's. *Id.* at 574. In affirming, the Fourth Circuit held that any degree of certainty exemplified during the firearm examiner's testimony constituted harmless error because it only "potentially connected the firearm to both murders," but fell short of proving either defendant "was responsible for the casings at either murder." *United States v. Mouzone,* 687 F.3d 207, 215-17 (4th Cir. 2012).

Appellant desired Agent Cromer to use effectively asked her to alter her professional opinion from one of "positive," that "this cartridge case or bullet was fired by the tested gun," to something else.[9] If the court bound Agent Cromer to testify that the Grizzly "could not be excluded" as a firearm that possibly fired the .45 projectiles, the court would have altered the scientific framework within which she must base all findings.[10] By the very nature of being admitted as an expert witness in her field, the rules of evidence provide Agent Cromer the freedom to opine in the certain terms provided by her practice—Rule 702 does not and should not require an expert to re-frame his or her professional opinion.

Instead, Appellant's "cannot be excluded" contention is more appropriately addressed through cross-examination, and Appellant amply critiqued the reliability of Agent Cromer's conclusion at trial. When given the opportunity to present the jury with reasons to question the weight it may afford Agent Cromer's testimony, Appellant's counsel pointed out that her determination ultimately results from a "pattern matching"—

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[9] Though an exact interpretation calls for speculation, "cannot be excluded" is arguably more near "inconclusive," as in there were "not enough corresponding markings to conclude that it was or was not fired by the tested gun." Or perhaps "cannot be excluded" is more near in meaning to "these specimens are 'unsuitable' for reaching a conclusion based upon their condition." In any event, "cannot be excluded" does not match one of the four possible outcomes that Agent Cromer's methodology led her to conclude in the instant case. (*See* R. p. 380, lines 7-21).

[10] The reliability of that same scientific framework is the same basis upon which the court deemed the expert's testimony admissible at trial. It would be counterintuitive for the court to admit the science as reliable and then alter the manner in which the expert in that field must present its methodology to the jury. Likewise, the proposed "cannot exclude" nomenclature is counterintuitive to firearm and toolmark examination. The science is premised upon the fact that no two firearms leave the exact same composition of markings on their respectively fired projectiles. It follows that an expert in this field would be undermining their practice by having to opine only that a gun "cannot be excluded" as having fired a projectile.

a visual comparison of test fires and the projectiles in evidence, and that there is no threshold number of identifying characteristics necessary for her to find a sufficient agreement among the evidence. (R. p. 373, line 9 – p. 383, line 2).

In sum, Appellant fails now and at trial to counter the reliability of firearm and toolmark examination so as to render the field inadmissible. Appellant was provided an opportunity to cross-examine Agent Cromer regarding reported weaknesses in the examination process. The jury was instructed to give Agent Cromer's expert testimony only the weight it saw fit. Otherwise, Agent Cromer's proffer provided ample indicia that the practice of firearm and toolmark examination is a reliable and technical area of study upon which she may opine at trial, and the court did not abuse its discretion in allowing Agent Cromer to present her educated, unfiltered opinion before the jury.

C. Any error in the failure to limit Agent Cromer's opinion that the projectiles in evidence were fired from the .45 Grizzly proves harmless given the remainder of the testimony implicating Appellant.

Even if wrongly admitted by the trial judge, Agent Cromer's "positive" opinion constitutes harmless error where it did not affect the outcome of the trial. *State v. Langley*, 334 S.C. 643, 647-48, 515 S.E.2d 98, 100 (1999). In this case, "'beyond a reasonable doubt, the error complained of did not contribute to the verdict obtained.'" *Arnold v. State,* 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (quoting *Chapman v. California,* 386 U.S. 18, 23, 87 S.Ct. 824, 827 (1967)). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question." *Yates v. Evatt,* 500 U.S. 391, 403-04, 111 S.Ct. 1884, 1892-93 (1991).

Here, a number of co-defendants consistently testified against Appellant. Rasheed Halley testified that he let Will Smith a/k/a Ill Will use his gray Mercury Grand Marquis on November 14, and that when the car was returned there was a safe in the trunk. (R. p. 63, line 16 – p. 64, line 24). Marcellus Juggins testified that he initially went with Appellant, Sticky, Diablo, and Randy Lewis to rob Robert Mackay the first time, the time when they turned around and came home because they thought it was too noisy. (R. p. 70, line 4 – p. 71, line 6). Juggins also testified that he led Appellant, Diablo, Randy Lewis, and Sticky out to a man in the country that he knew could open the safe for them. (R. p. 72, line 9 – p. 73, line 23).

Sticky testified that Appellant admitted to lying in wait in a nearby abandoned trailer until he deemed the time to be ripe, then kicked in the door at the victim's home, hit him in the head with a pistol, and eventually shot the victim with a .45. Sticky also

went along with other co-defendants to have the safe opened by the man in the country. Sticky also testified that Appellant admitted taking a small .22 from the victim's home during the robbery. (R. p. 193, line 9 – p. 196, line 25).

Regarding the actual events of the burglary-gone-wrong, Randy Lewis testified to them in detail. Appellant, Lewis, Roach, Diablo and Ill Will set off on the robbery, parked a Mercury on a dirt road behind the victim's residence, walked through the woods armed and concealed by masks and gloves, sat in an abandoned trailer until the time was right, and then made forcible entry to the victim's mobile home when Appellant kicked in the front door. Lewis recalled Diablo threatening the victim's daughter, shooting the victim in the leg, hearing the victim get hit in the head, and hearing the knock on the front door that threw the robbery off-kilter. Lewis further testified as to the scuffle and gunshots that ensued, and that he ran back to the car where he saw Appellant return with a safe he had taken from the victim's residence. (R. p. 215, line 13 – p. 232, line 25).

Diablo testified nearly precisely the same as Lewis, adding that Appellant had scoped out the victim's residence on at least two prior occasions. Diablo also testified that Appellant shot the victim in the chest, that the victim took off running, that Ill Will fired his gun, and that the victim then fell to the ground. (R. p. 283, line 24 – p. 309, line 24). Ill Will made a corroborating statement to law enforcement, but recanted it at trial and was impeached through the testimony of SLED Agent Lee Blackmon. (R. p. 255, line 7 – p. 266, line 5; R. p. 330, line 23 – p. 338, line 10; R. pp. 547 – 549). At trial, Ill Will did testify that he drove Appellant, Richard Roach, Sticky and Diablo in a Grand Marquis to a dirt road on November 14, 2008, where they got out and ran into the woods. Ill Will testified that he stayed in the car and "dozed off" until his cohorts returned and asked him

to pop the trunk so they could put something in the back of the car before leaving. (R. p. 251, line 2 – p. 254, line 24).

The victim's autopsy showed that he had in fact previously suffered gunshot wounds to the chest, abdomen and right leg. (R. p. 131, lines 5-7). One of the victim's friends also testified that he recalled seeing a "silver or white four door Mercury" parked on the side of a dirt road that day as if it were broken down. (R. p. 243, lines 3-12).

Because of the detailed manner in which each co-defendant's testimony dovetailed at trial, the jury received a conclusive picture upon which to convict Appellant of each crime charged. The firearm and toolmark examination evidence was merely additional corroborating evidence and any error in its admission proves harmless.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should find the issue raised by Appellant unpreserved for review. In the alternative, Respondent reiterates that this Court should find Agent Cromer's opinion in the field of firearm and toolmark identification properly admitted under *State v. Council, supra* and Rule 702, SCRE, and affirm the Appellant's convictions for murder, first degree burglary, armed robbery, and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

December 8, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
DEC 08 2015
SC Court of Appeals

Appeal from Kershaw County
Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

Respondent,

v.

FRANK TERRANCE SINGLETON, III,

Appellant

Appellate Case No. 2014-002004.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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Appellant

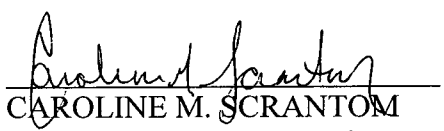
Appellate Case No. 2014-002004.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appeal by depositing two (2) copies of the same in the United States mail, addressed to his attorneys of record at:

Lara M. Caudy
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served. This 8th Day of December, 2015.



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December 8, 2015

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Frank Terrance Singleton, III
Appeal from Kershaw County
Appellate Case No. 2014-002004

Dear Ms. Kitchings,

Enclosed please find the original and nine (9) copies of the ***Final Brief of Respondent and Certificate of Compliance***, dated December 8, 2015, along with proof of service, in the above-referenced case.

By copy of this letter, I am serving opposing counsel with same. Thank you for your consideration in this matter.

Sincerely,

Caroline M. Scrantom
Assistant Attorney General

CMS/pcm
Enclosure

cc: Lara M. Caudy, Esquire, Appellate Defender
The Honorable Daniel Edward Johnson, Solicitor, 5th Circuit
Trisha Allen, Victim Services