

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 16 2016

SC SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Robert E. Hood, Circuit Court Judge

Unpublished Opinion No. 2016-UP-068 (S.C. Ct. App. filed February 17, 2016)
Appellate Case No. 2013-001680

Marcus Bailey,.....Appellant,

v.

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

PETITION FOR A WRIT OF CERTIORARI

S. Jahue Moore
Stanley L. Myers
Moore Taylor Law Firm, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, South Carolina 29171
(803) 796-9160
Attorneys for Petitioner

Other Counsel of Record:

Alan Wilson
John W. McIntosh
Donald J. Zelenka
Melody J. Brown
Post Office Box 11549
Columbia, SC 29211-1549

Daniel E. Johnson
Post Office Box 192
Columbia, SC 29202

INDEX

Certificate of Counsel..... 1

Questions Presented..... 1

Statement of the Case..... 1

Arguments

1. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE 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..... 8

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.” 9

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*..... 11

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..... 13

D. The trial court’s errors of law were not harmless..... 14

2. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE 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..... 16

3. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY OF INMATE EDWARD WALKER AND NOT PERMITTING DEFENSE COUNSEL TO CROSS-EXAMINE HIM FULLY ON HIS PENDING CHARGES..... 18

4. 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..... 19

5. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE 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.....22

6. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE 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.....23

Conclusion.....25

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 24, 2016. This Court, in an Order dated April 22, 2016, granted an extension of time in which to file this Petition until May 16, 2016.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the trial court did not abuse its discretion in admitting the testimony of the cadaver dog handler?
2. Did the Court of Appeals err in holding that the trial court did not abuse its discretion in failing to direct a verdict in favor of the Petitioner when there was no valid evidence of homicide?
3. Did the Court of Appeals err in holding that the trial court did not abuse its discretion in admitting the testimony of inmate Edward Walker and not permitting defense counsel to cross-examine him fully on his pending crimes?
4. Did the Court of Appeals err in holding that the trial court did not abuse its discretion in admitting character evidence of the Petitioner when the Defense did not "open the door" regarding a pertinent character trait?
5. Did the Court of Appeals err in holding that the trial court did not abuse 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?
6. Did the Court of Appeals err in holding that the trial court did not abuse its discretion in admitting the statement of the Petitioner when a copy of the statement was not provided to the Petitioner in accordance with South Carolina law?

STATEMENT OF THE CASE

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, in a cul-de-sac in a newer neighborhood. (R. p. 243) The decedent's live-in boyfriend, Petitioner, Marcus Bailey, was asleep inside the house when the body was discovered. The decedent's body lay in her front yard, face down in the middle of her yard. (R. p. 176)

The first person to discover the body was Crystal Bailey (no relation to the Petitioner) 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, too emotional to talk. (R. p. 191) He held the decedent's body up to his chest and began rocking her and patting her head. (R. p. 210) 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, found a dark blanket, came back outside, and laid the blanket over the decedent. (R. p. 182)

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 to which he swore.

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) 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, no feces, no urine, nor 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, but none 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) After 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, a prescription medication. (R. p. 449, 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 that 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 and charged with the murder of Almanita Smith.

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) 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) 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 named Jamie Gunter. (R. p. 99) Mia is a single purpose cadaver dog. R. p. 70) She is only 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) 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 at the house, 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 only 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 then added an additional "new" alert in a third upstairs bedroom which he did not include in his report. (R. p. 84) In testimony before the jury, Deputy Pearrow added yet another number of alerts. This time, he recalled two additional alerts: an additional upstairs and another alert downstairs. (R. pp. 851, 852) At trial, in July of 2013, in Richland County, 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, law enforcement thoroughly searched the areas. Not a single piece of actual physical evidence was found anywhere the dog allegedly alerted. Whatever Mia was "alerting" to, it was not evidence of a dead body. (R. p. 863)

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 performed 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 from 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).

However, 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 in 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) Dr. Durso further, clearly admitted that the reason that homicide was listed was simply because foul play was “suspected” and nothing wrong was actually found. (R. pp. 709-710) Dr. Durso further agreed that “we don't convict people in this county on suspicion” and that a jury shouldn't be expected to do so. Dr. Durso also admitted that her findings were not based on the evidence, but rather a lack of evidence. (R. p. 732-733)

During the jury trial, Edward Walker, an inmate from Kershaw County Detention Center was called to testify against Mr. Bailey. (R. p. 552) He was a cellmate of the Petitioner 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 that Mr. Bailey gave him a jailhouse confession. (R. pp. 554-555) According to Mr. Walker, Mr. Bailey admitted to killing the decedent. (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 told Mr. Walker that 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)

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 testified Mr. Bailey was separated by a

general discharge under honorable conditions for a pattern of misconduct. (R. p. 899)

The jury returned a guilty verdict against the Petitioner. The Petitioner was sentenced to 50 years in Jail. The Petitioner then filed an appeal which was heard by the South Carolina Court of Appeals. The Court of Appeals denied the Petitioner's appeal. The Petitioner then filed a Petition for Rehearing. The Court of Appeals denied the Petition. The Petitioner now files this Petition for a Writ of Certiorari.

ARGUMENT

1. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE 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.

On this issue, the Court of Appeals found no reversible error because, according to the Court, the cadaver dog evidence "did not contribute to the verdict," was "merely cumulative," was not prejudicial, and was "harmless." The Court also found no error because "the overall strength of the prosecution's case was very high." This analysis and these conclusion were in error.

In so ruling, the Court of Appeals, generally, underestimated and overlooked the impression and strength which testimony and evidence concerning police K-9 units has upon the general public and jury members. While the testimony of police officers could be perceived as biased by jurors, the impact and trust assigned to K-9 units by jurors is heightened due to television, movies, and other media depictions and coverage. These units are always depicted as "faithful," "lovable," highly trained, infallible, and unbiased in their reactions. As such, a jury is likely to assign an inordinately high level of weight and trust to such testimony and evidence. In this case, the K-9 testimony was neither simply cumulative nor inconsequential amongst other prosecution evidence. Also, as discussed below, the

evidence was completely without any scientific or investigative foundation, and was given outside of the requirements of South Carolina law and the Rules of Evidence

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. As discussed more fully in the Statement of the Case, above, Deputy Pearrow conducted a search of the house with a dog named Mia. Deputy Pearrow was not Mia's owner and he was not her handler. Mia was trained only to find dead people. She was not trained to find where a dead body previously had been.

As discussed more fully in the Statement of the Case, above, Deputy Pearrow changed his testimony about the dog's "alerts" several times. Not a single piece of actual physical evidence was found anywhere the dog allegedly alerted. The dog's "alerts" themselves – without any corroborating evidence – were admitted before the jury on the issue of whether the body had been inside the residence. 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.

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.

Pursuant to Rule 702, SCRE, before expert testimony may be admitted, the trial judge must find that: (1) the testimony will assist the trier of fact; (2) the witness is qualified, and; (3) the underlying science is reliable. *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 that 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 semblance 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 that 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.

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 the day in question was only 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, in this 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 that 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.

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*.

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 dog evidence should apply, this dog and handler combination was simply too unreliable to be put before the jury. Mia is not a tracking dog: she is a cadaver dog.

In *State v. White*, the South Carolina Supreme Court addressed the foundational requirements of tracking dog testimony:

“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 trail 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.

The State also failed to admit any evidence of reliability in the relationship between the 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 another 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 a 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 that Mia herself may have inadvertently contaminated the inside of the house. Despite this overwhelming evidence that the residence was contaminated by law enforcement, the Court admitted the testimony of Deputy Pearrow over defense counsel's objection.

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.

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's search of the residence. Although Deputy Pearrow testified to a number of "alert" type behaviors of the dog, 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, no DNA, nor 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, yet 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. A false positive has no probative evidentiary value. A false positive has no scientific or non-scientific value.

Conversely, the testimony of Deputy Pearrow had an enormous prejudicial effect. 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 had not been allowed to testify as to how he interpreted his dog's behavior as an "alert" to a dead body, the State would have had no evidence whatsoever that 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.

The trial court should not have admitted the cadaver dog evidence because the false positive "alerts" have no probative value and unduly prejudiced Mr. Bailey. The admission of such testimony was an error of law.

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. Deputy Pearrow's testimony was, ultimately, allowed.

In addition to the importance the State placed upon Deputy Pearrow's testimony, there were a number of allegations for which the State had no evidence 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. Without Deputy Pearrow's testimony about his interpretations of his dog's body language while inside the house, the State had no evidence whatsoever about a body being in the house. Deputy Pearrow's testimony was not cumulative because no other witness was able to testify that a dead body had ever previously been inside the house.

The testimony of Deputy Pearrow should have been suppressed because it was completely unfounded and very damaging. The error in admitting his testimony was not harmless. As discussed above, it is likely that this testimony concerning the police dog resonated strongly with the jury.

2. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE 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 Petitioner because the State failed to admit evidence the decedent died by means of homicide.

The case for homicide turns upon the testimony of forensic pathologists Amy Durso and Bradley Marcus. At trial, the doctors gave the opinion that 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. As put forth in the Statement of the Case, above, Dr. Durso clearly admitted that the reason that homicide was listed was simply because foul play was "suspected" and nothing wrong was actually found. (R. pp. 709-710). Dr. Durso further agreed that "we don't convict people in this county on suspicion" and that a jury shouldn't be expected to do so. Dr. Durso also admitted that her findings were not based on the evidence, but rather a lack of evidence. (R. p. 732-733) When questioned about 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. (R. pp. 975-977)

The State's key witnesses to the decedent's cause of death were not able to testify to a single objective medical fact to support their opinions. Rather, the opinions were based upon mere suspicion. (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 does not 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 could show only that the decedent did not die by a number of other means of death.

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

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.

In its opinion in this case, the Court of Appeals indicated that circumstantial evidence is only sufficient to establish *corpus delicti* when it is "the best evidence obtainable." *citing, Brown v. State*, 307 S.C. 465, 415 S.E.2d 811 (1992). In this case, however, the "best evidence" was that there really was no physical or forensic evidence of murder at all. This was fully set forth in the Petitioner's brief and argued before the Court of Appeals. These individuals admitted that there were no physical findings proving strangulation, no physical findings proving the crushing of the windpipe or adjacent blood vessels, and that their original opinion of "probable homicidal asphyxiation" was simply a suspicion of foul play based upon the lack of any real evidence. This was "the best evidence obtainable." Circumstantial evidence alone is insufficient to defeat a directed verdict motion on this important and foundational issue concerning the charges against the Petitioner.

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.

3. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY 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 that 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 strong. The Petitioner has a Constitutional right for the jury to hear this.

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.

In its analysis of this issue, the Court of Appeals essentially upheld the trial court's ruling based upon the fact that the cross examination would only be useful to the Petitioner to question the witness's general credibility. The Court, however, overlooked the fact that the cross examination could also have brought to light the witness's specific motive to lie in order to receive more favorable terms on the other charges he was facing. As more fully presented in the Petitioner's Brief and oral arguments, this is a much more specific motive to lie than the broad question about the witness's general credibility. When weighed in the balance against the Petitioner's Sixth Amendment right to fully and adequately confront witnesses against him, in a murder trial, and the resulting prejudicial effect upon the Petitioner if unable to do so, the witness's desire to protect himself is insufficient. If the rights of both individuals could not be adequately protected, the witness's testimony should not have been allowed at all.

The trial court's admission of Mr. Walker's testimony without allowing a full cross-examination in the presence of the jury was an error of law.

4. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE 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 in this case 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 that the defendant was kicked out of the military on a bad conduct discharge.

The second incident was when Army Captain Jason 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 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. That door was never opened by the defense.

In its analysis of this issue, the Court of Appeals relied heavily upon the assumption that the trial court's attempt to give a curative instruction to the jury on this matter was sufficient to prevent undue prejudice to the Petitioner. As discussed in the Petitioner's Brief and oral arguments, however, this is exactly the type of prejudicial character evidence which Rule 404, SCRE is meant to prevent. It is not, in any way, relevant to the question of whether or not a crime was committed and, as argued by the Petitioner, its prejudicial effect is devastating, easily outweighing any alleged or perceived probative value. This is especially true in these days when there seems to be so much honor and respect being given to members of the military. Any assertion or implication which casts dispersions upon the Petitioner's military service in this regard is likely to be especially prejudicial and damaging. It is not likely to be cured by a curative instruction.

In addition, the Court of Appeals ruled that this issue was not properly preserved by objections at trial. This is a misinterpretation and misapprehension of the record. As discussed in the Petitioner's Brief and oral arguments, and above, counsel for the Petitioner did object to this testimony at trial and did move for a mistrial. Also, as admitted by the Court of Appeals, counsel for the Appellant clearly stated that he had not waived his objection to the testimony. The ruling by the Court of Appeals that the objections were not specific enough or exactly contemporaneous, reflects a misapprehension and misreading of the record. With the acknowledgment that motions and objections were, in fact, made, the benefit of the doubt should be given to a defendant in a murder trial and the unduly prejudicial value of the testimony should be recognized and disallowed under the rules of evidence.

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. 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. Its admission was an error of law.

5. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE 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 that Deputy Mauldin swore to a search warrant about 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. When he swore out the search warrant Deputy Maulden had never been at the residence and had no personal knowledge to support the search warrant.

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, the *Dunbar* court, as well as the trial judge in the trial of this case, 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), this 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 and had no personal knowledge of the information to which he swore.

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. This error allowed the admission of so much evidence and testimony that it must be deemed to have heavily contributed to the verdict. The undue prejudice to the Petitioner is obvious. By denying the Appellant’s motion to suppress and strike, the court committed an error of law that was not harmless.

6. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE 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.

During this 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. (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.

Unlike the case in *State v. Butler*, Deputy Clarke testified that, in this case, 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.

With regard to this issue, the Court of Appeals, once again, reasoned that the prosecution's case was, otherwise, so strong that the improper admission of this testimony did not contribute to the verdict. As stated above, even with other related testimony, the Petitioner's statement was used very heavily in the case against the Petitioner. This is especially true regarding the State's constant attacks on the timeline established by the Petitioner's statement. As also stated above, this was of prime importance in establishing malice aforethought.

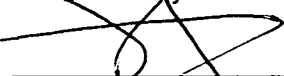
Therefore, the admission of the statement taken in violation of S.C. Code §§ 19-1-90 and 8-15-50 was an error of law.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court to grant a Writ of Certiorari.

May 16, 2016

Respectfully submitted,



S. Jahue Moore
Stanley L. Myers
Moore Taylor Law Firm, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, South Carolina 29171
(803) 796-9160
Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

MAY 16 2016

SC SUPREME COURT

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

Robert E. Hood, Circuit Court Judge

Unpublished Opinion No. 2016-UP-068 (S.C. Ct. App. filed February 17, 2016)

Appellate Case No. 2013-001680

Marcus Bailey,.....Appellant,

v.

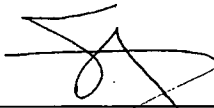
The State of South Carolina,.....Respondent.

CERTIFICATE OF MAILING

I certify that I have served the Petitioner's Petition for a Writ of Certiorari on the Respondent by depositing a copy if it in the United States Mail, postage prepaid, on May, 16, 2016, addressed to the attorneys of record for the Respondent, as follows:

Alan Wilson
John W. McIntosh
Donald J. Zelenka
Melody J. Brown
Post Office Box 11549
Columbia, SC 29211-1549

Daniel E. Johnson
Post Office Box 192
Columbia, SC 29202


S. Jahue Moore
Stanley L. Myers
Moore Taylor Law Firm, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, South Carolina 29171
(803) 796-9160
Attorneys for Petitioner