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SC SUPREME COURT

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

**Appeal from Richland County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2016-000524
Opinion No. 2015-UP-574 (S.C. Ct. App. filed Dec. 30,2015)**

THE STATE,

Respondent,

vs.

BRETT D. PARKER,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err in holding the trial judge's refusal to charge the jury concerning circumstantial evidence pursuant to *State v. Logan*, 405 S.C. 83,747 S.E.2d 444 (2013) was harmless?
2. Did the Court of Appeals err in affirming the trial court's failure to restrict the state's main expert from offering an opinion outside of his qualifications and expertise?

COUNTER STATEMENT OF ISSUES ON APPEAL

- I. Whether the Court of Appeals correctly found that the trial judge properly denied Parker's request to charge the disapproved *State v. Edwards*, 298 S.C. 272, 275-76, 379 S.E.2d 888, 889 (1989) "reasonable hypothesis" language in the circumstantial evidence charge, where this Court has found that this language is confusing and has directed that it should not be used; the trial judge properly gave the then-current and instruction approved of in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), which this Court had found is the sole appropriate charge in *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004); and at worst, any error in not giving the requested charge was harmless beyond a reasonable doubt?
- II. Whether the Court of Appeals correctly ruled that the trial judge did not abuse her discretion by allowing Dr. Marcus, the forensic pathologist who performed the autopsy on Bryan Capnerhurst, to opine that "[b]ased on ... the injuries sustained to his left arm and the way he fell back ... [Bryan could not] have held onto anything that was in his hand" because (1) the science was forensic pathology (2) Dr. Marcus was properly qualified, without objection, as an expert in forensic pathology; (3) his duties as a forensic pathologist include determining the cause of death, the manner of death and the circumstances surrounding it; (4) his training as a forensic pathologist included training as to what could or could not have occurred at a suspected crime scene; (5) his training as a medical doctor included specific training as to how certain wounds could affect a person's ability to move and to handle things; (6) the probative value of his opinion was not substantially outweighed by its prejudicial value; and (7) Parker could not have been prejudiced by its introduction because it was merely cumulative to Dr. Marcus' earlier opinion that was admitted without objection on R. 1535, 11. 13-25?

STATEMENT OF THE CASE

Respondent adopts the "Procedural History of the Petition."

STATEMENT OF FACTS

The present case underscores the truth to the old adage that no one knows you like your mother. When Brett Parker's father told his mother, Linda, that Tammy was dead, her immediate response was, "Did Brett kill her? Did Brett kill Tammy?" **R. 415, ll. 7-10; p. 1102, ll. 15-23.** The answer to her questions is an unqualified, "Yes, and it was just one step in a maliciously diabolical plan in which he attempted to frame his second victim, Bryan Capnerhurst, for her murder so that he could (1) prevent Tammy from discovering that he was \$176,000.00 in debt because of online gambling, since she had threatened to leave him if he incurred another huge gambling debt as he had several years earlier; (2) get out of a marriage that he no longer wanted to be in but from which he could not afford a divorce; (3) get the proceeds of the life insurance policy on Tammy's life and her other assets which exceeded \$1,000,000.00, in order to pay his debts which were almost that high; (4) avoid having to pay Cap \$21,300.00 that he did not have; (5) end a cycle of constantly borrowing significant amounts of money to pay portions of his debt; and (6) spend more time in the company of his paramours."¹

Viewed in the light most favorable to the State, the direct and circumstantial evidence presented at trial reasonably was that members of the Richland County Sheriff's Department were dispatched to the Parkers' Richland County residence at 12:41 p.m. on Friday, April 13, 2012. The dispatch was based on Parker's 911 call (St.'s Ex. 399) reporting that shots had been fired, and that his wife, Tammy, and Bryan Capnerhurst had been struck. When responding officers arrived, beginning around 1:00 p.m., they found Parker in the driveway outside the

¹ While this Statement of Facts highlights most of the evidence presented against Parker, the evidence is discussed in much greater detail in the closing arguments by the prosecutors. *See R. 2998-3031; 3079-3144.*

residence and holding a cordless phone. He was detained briefly for security reasons and he was advised of his *Miranda* rights.² He was not crying and neither his hands nor his face were bloody. EMS arrived shortly thereafter and provided care for him. **R. 265-74.** Inside the residence, officers found Tammy Parker and Bryan Capnerhurst dead upstairs. Tammy's body was lying face-down "halfway into a bathroom," with her feet in a room used for an office. Officers saw 9 mm shell casings in an entertainment area adjacent to the office, immediately around Tammy's body and in the office. Bryan's body was lying on the attic floor and he had a 9 mm semi-automatic pistol in his left hand. An officer had to tug three times on Bryan's shoulder before the weapon fell out of his hand.³ The officers then saw that Bryan had a head wound and was obviously dead. The 9 mm pistol was seized at that point. **R. 304-18; 320-22; 331-32; 335-45; 363-65; 372-75.**

Outside of the residence, Parker spoke to Maj. James Smith, as officers and family members began to arrive. Several other individuals also heard portions of their conversation, in which he unconsciously and inadvertently began alerting others to the fact that he murdered both victims. Upon being told that his father, Jack Parker, had arrived, Parker asked, "What does my dad think happened?" **R. 402; 428-29; 2149.** Parker gave a non-custodial statement to Maj. Smith at the scene after again receiving his *Miranda* rights.⁴ Parker admitted that he was a bookie, said that Bryan was an employee, and indicated that earlier in the week they had planned to meet on Friday because he owed Bryan some money and Bryan wanted to borrow money from him. They had also spoken earlier Friday and arranged to meet in the middle of the day because Parker and Tammy were going to have lunch at home. He had stopped at Firehouse Subs in Irmo

² See *Miranda v. Arizona*, 384 U.S. 436 (1966).

³ The gun was dislodged from Bryan's hand without photographing it first for the officers' safety, which was the chief concern.

⁴ Parker was seated on a cooler, he was not handcuffed and EMS had finished attending to him.

and bought subs, which he brought home for them to eat. After lunch, they went into the office and Tammy called her doctor. While she was on the phone, he went downstairs and eventually took a bowel movement.⁵ He heard Bryan enter the house⁶ as he was finishing up in the bathroom and yelled for Bryan to go upstairs to the office where Tammy was because he would be there soon. **R. 382-385; 2407-11.**

Parker heard gunshots within “a short period of time.” He immediately ran to the top of the stairs, where Bryan met him. Bryan held a gun on him and told him to “open the M.F. safe.” Parker claimed that he could not understand what was happening and asked Bryan what he was doing. After Parker led Bryan to the safe, he recalled that he had a pistol of his own secreted in there. He was able to get that pistol, and he turned and shot Bryan. He jumped over Bryan and ran back to Tammy. He heard her making a noise. He realized she was dead or dying and he checked her neck for a pulse. However, he did not engage in any life-saving efforts. He then ran downstairs, got the cordless headset, and called 911. **R. 385-86; 2411-12.**

When Maj. Smith questioned him about the facts, Parker was upset, but he was angry and not crying. Also, he did not have blood on him. He kept saying, “I guess it is my fault because I gave him the gun. He repeatedly acted as if he was going to throw up, but he would only spit.” At Maj. Smith’s request, Parker agreed to give a written statement. **R. 2075; 2412-15.** At some point after this oral statement, he also lamented, “[M]y God, I have killed my best friend.” Coroner Gary Watts and Lt. Scott McDonald overheard this comment, and they thought it was odd both because he did not express concern for the death of his wife and because if Bryan had killed Tammy, as Parker claimed, then Bryan was not a “friend.” **R. 1103; 1281-82.**

Parker was subsequently taken to a nearby Richland County Sheriff’s Department

⁵ He used a common and more vulgar expression.

⁶ The door has a bell, and when door opens you can hear it. Also, Bryan knew the security code for the house.

substation. After being advised of and making a written waiver of his *Miranda* rights, he gave a written statement, St.'s Ex. 2. In this statement, he described the events leading up to the shootings and the shootings, in the same manner as he had orally. He also claimed that he had gotten home at 11:45 a.m. and Tammy got there at 12:00 p.m.; that the shots upstairs occurred about a minute after he heard Bryan arrive; that Bryan had "a glazed look in his eyes" when Parker saw him; and that the pistol he had used to shoot Bryan was a Taurus .38 "Judge" that he kept behind a headboard and on top of the safe.⁷ Further, he stated that when he led Bryan to the safe, "Bryan was standing behind me" in the closet. I knelt down, grabbed my pistol. I turned as quick as I could, and I shot him. I'm not sure how many times I fired, but I think three or four." Moreover, he claimed that he had asked Tammy if she could hear him when he checked on her but she did not respond. And, he claimed that he ran back upstairs to check on Bryan because the dispatcher had asked him if Bryan was alive. So, he put his finger under Bryan's nose to check for breathing and did not feel any. **R. 2077; 2083-88; 2098-99; 2416-17; St.'s Ex. 2.**

Parker said that he had thrown down the Taurus .38 Judge he used on a rug by the front door, when the dispatcher told him to put the gun down; that he met Bryan as the result of Bryan betting with him; that Bryan had worked for him for five years; that Bryan had never threatened him before; that Tammy got along with Bryan and "[s]he would actually cook for us if we worked on Sundays;" that he had given Bryan the 9 mm because it was dangerous and Parker did not want it in the house; that he, nevertheless, kept the Judge on the safe because "[i]t was a good place to hide in case something ever happened and I could get to it there;" that he also kept another gun in the downstairs bathroom; and that he purchased the Judge at the suggestion of his preacher. **R. 2088-91; St.'s Ex. 2.** Parker eagerly explained that the Capnerhursts had financial

⁷ This weapon also fires .410 shells.

problems because Ms. Capnerhurst had “maxed out” their credit cards and was not paying bills, which she had done in the past. Also, their daughter attended the Governor’s School and this was a big financial burden. Parker stated that he owed Bryan between \$13,000.00 and \$14,000.00 for past work, that he had planned to pay Bryan \$5,000.00 that day, and that he would have paid the rest when - and only if - he had collected from the people that owed him money. Parker also claimed that in a conversation the previous Monday, Bryan had said that “he was tired of living off of a credit card.” Bryan had supposedly borrowed money from Parker in the past and Parker assumed he would ask to borrow money when they met. Further, Parker claimed that “I know he has borrowed money from her parents. And he tried to refinance his house, but her credit was so bad ... [t]hey couldn't even refinance their house.”⁸ **R. 2091-94; 2101-02; 2417-18; St.’s Ex. 2.**

Parker claimed that he kept \$20,000.00 in the safe for his booking operation. Bryan knew the location of the safe but did not know the combination or how much money was in it. Parker stated that he only had roughly \$4,500.00 in his pocket⁹ and that he would have to get the rest of the money he owed Bryan from the safe. Parker denied that he and Tammy had any financial or marital problems, he denied having a gambling debt, he denied even using the computers, and he denied suspecting her of infidelity. **R. 2094-97; 2100-01; 2104-06; St.’s Ex. 2.** Maj. Smith and Parker had a discussion after he completed his formal statement. When asked if there was any infidelity, Parker “indicated that he had not had any affairs.” However, “Tammy had found some text messages of kind of a flirtatious nature” that he received in late December of 2011. They were from a woman he had met through work named Natasha. He claimed that the issue had been resolved and that Natasha would verify that this was “harmless flirtation.” Also, he

⁸ Parker claimed that he was so concerned about Bryan’s financial problems, he spoke to his own father about the matter and asked for advice as to he should do if Bryan asked to borrow money. His father asked if he thought that Bryan could repay him but he was unsure. As a result, he “wasn't sure what my answer was going to be.” **R. 2093.**

⁹ He showed the officers the money that was in his pocket. It was \$4,511.00. **R. 2517.**

described the noise he heard Tammy make shortly before he called 911 as “gurgling” and he admitted, for the first time, that he had shot Bryan in the face. He likewise said that he kept a loaded .38 “in the towel area on the top shelf in the master bathroom.” **R. 2419-20; 2422.** By this time, officers at the scene had learned about Parker’s prior suicide attempt several years earlier in Las Vegas. When asked, he denied that it was a suicide attempt. Instead, he claimed that he had taken “sort of a getaway trip to get away from it all in Vegas. He ... called Tammy while he was there and said he wasn't coming home, but he was on a plane the next day.” He did not reveal how much debt he incurred before going to Las Vegas. Major Smith asked Parker for the combination to the safe and he provided the alleged combination. **R. 2422-23.**

Following the discussion, Parker was transported to his parents’ residence, as were his fourteen year old daughter and five year old son.¹⁰ Parker was told that he needed to tell his children what had happened because they still did not know. He then went into the house and informed his children of their mother’s death in the presence of Sgt. Maria Yturria, the supervisor of the Department’s victim services unit, another officer, and Parker’s parents. Instead of showing compassion, Parker “blurt[ed] out, [‘]Your mom is dead.[’]” he briefly hugged his daughter, at his mother’s insistence, when put her hands in her face and started crying. Then, he quickly ordered her to “Stop crying,” and he became very agitated. **R. 415-23; 2424.** He did not respond to Sgt. Yturria’s comment that his daughter should be allowed to react in any manner she wanted because she had just learned that her mother was dead. Neither he nor his parents made any immediate effort to further comfort the children. Instead, they began talking about hiring an attorney for Parker. They left the room at Sgt. Yturria’s request. Sgt. Yturria stayed in

¹⁰ The Sheriff’s Department had gotten them at their respective schools, so that they would not learn of the murders at the Parkers’ home through some source other than their father. No one from the Sheriff’s Department broke the news to them. **R. 416-19; 2423.**

the room to console the Parker's daughter and told her that her mother had been shot. Only after Sgt. Yturria had informed the Parkers about available counseling services for the children did Mrs. Linda Parker try to comfort her grandchildren. **R. 423-25.**

As the investigation unfolded, officers learned that much of what Parker had claimed happened was untrue and did not fit with the facts revealed in the investigation. They also learned that he had omitted many details that proved that he murdered both Tammy and Bryan:

- The sequence of events described by Parker did not make any sense: if robbery was a motive, then why would Bryan go upstairs and shoot Tammy? Why would he not first account for Parker, who was more of a threat? **R. 2448.**
- Why would Bryan kill her when Parker was the person who owed him money, he got along well with Tammy, and she did not owe him anything?
- Parker did not claim that he had heard an argument and, if Bryan had a dispute, it was with Parker about money. It was not with Tammy. **R. 2448-49.**
- Before running upstairs, Parker made no effort to arm himself with the loaded .38 caliber pistol that was in the linen closet in the master bathroom (**R. 518-19; 612**), even though he could easily have done so. Why?
- Why go downstairs to get the phone to call 911 when he had a cellphone in his pocket and there were two landlines in the upstairs office that he used for his gambling enterprise?
- Why would Bryan be robbing Parker if, in fact, Parker was going to pay Bryan \$5,000.00?
- He claimed that he gave Bryan the 9 mm because it was supposedly too dangerous to keep around the house; but he kept two weapons in the house. Also, he supposedly left the .38 Judge where his five year old son could gain access to it, sitting on top of the safe and only 2' off the floor. This did not make sense. *See* **R. 2384-85.**
- The prosecution's investigation showed that 7 shots were fired at Tammy by the 9 mm.
- Dr. Bradley Marcus, the pathologist who performed both autopsies explained that, while he found a number of wounds on Tammy's body, she had only been shot five times. (He was able to differentiate between entrance wounds, exit wounds

and re-entry wounds). The first four shots were not fatal. However, she may have tripped and fell when a bullet struck her hipbone and pelvis. Also, Dr. Marcus found a bruise on her upper forehead and one beneath her right eye, as well as an abrasion on her forehead that supported this conclusion. Only the final shot, the wound to her head was fatal and a bullet fragment was removed from her brain. Dr. Marcus opined that she was seated when the shooting began and that she was shot as she attempted to flee the office. **R. 1469-74; 1482-1511.** On the autopsy of Bryan's body Dr. Marcus found four wounds that were consistent with the weapon Taurus .38 Judge, firing .410 shells, such as found at the scene. A shot to Bryan's left chest went through the upper lung lobe and the right ventricle before it severed the abdominal aorta and came to rest in his spine. This wound caused a great deal of bleeding into both the right chest cavity and the abdominal area. It would have been fatal. There was a second wound that went through the bottom of Bryan's left foot that was consistent with being inflicted as Bryan was falling and had his leg in the air. This shot went through the top of his foot and struck his left leg slightly below the knee. It was not a fatal wound. **R. 1511-14; 1517-32.**

- Contrary to Parker's assertion that he shot Bryan in self-defense, Dr. Marcus found a wound that one witness likened to the size of a golf ball in his left forearm. The shot fractured his left ulna, left "a hole that looked like disks [from the .410 shell] were coming through and then where the BB-type shot went through," and severed "soft tissue and so forth." The gunshot then continued and caused a grazing wound to Bryan's thigh and a grazing wound to the chest. Dr. Marcus recovered "numerous ... BB-type shots" and a fragmented disk from the arm. **R. 1532-35.** Dr. Marcus opined that "Based on ... the injuries sustained to his left arm and the way he fell back, I don't believe he could have held onto anything that was in his hand." **R. 1565, II. 5-15.** The palm of Bryan's left hand also had blood on it that was not associated with a wound to his hand. "If the gun was pressed against that palm, there should have been a void where that gun was, but there was no void, there was blood in that area." **R. 998; 2450-51.**
- A reasonable inference from this evidence is Parker planted the 9 mm in Bryan's hand after his death, to implicate him in Tammy's murder and support Parker's story.
- A second fatal shot was one that was between Bryan's eyes and it occurred as his head was lying on a plastic box. The autopsy finding was corroborated by the firearms examiner's testimony. **R. 1540-42; 1543-46; 1736-37.**
- Gunshot residue (GSR) testing on Parker, Tammy and Bryan revealed that all three had GSR on their hands. The GSR found on Bryan's hands *could* have come from firing the 9 mm *but was most consistent* with being on the receiving end of a fired weapon. The levels present on Parker's hands were consistent with either firing a weapon or being in the vicinity of a weapon when it was fired. **R. 1058-78; 2953-55.**

- Officers reviewing the video surveillance footage from the Parker's house (St.'s Ex.s 435, 437) discovered that Parker came home at 11:45 and Tammy arrived at 11:57 a.m. Bryan arrived at the residence at 12:30 and entered the house at 12:31:55 p.m. The State then played the video as synced to the 911 call. This revealed that roughly 10 minutes passed between the moment Cap entered the house and the time Parker called 911. Also, and contrary to what he told officers, 911 only comes on the line 40 seconds after Parker comes outside at 12:43:10. **R. 1148-55**. He has never adequately explained either the lengthy delay in calling 911 or the discrepancy in his story. And, the video showed that Bryan slung a gym bag over his shoulder before he walked into the house.¹¹ Parker did not mention that he had told Bryan to bring the gym bag in St.'s Ex. 2. **R. 947-48; 1142; 1151-52**.
- Inv. Stan Richards retrieved the bag from the attic area where Bryan had been killed. Sitting on top of clothes and other items in the bag were a 9 mm cartridge box with 35 unfired cartridges in it, and for some strange reason, an empty 9 mm magazine or clip. The cartridge box had Parker's left thumbprint on it. **R. 687-89; 692-94; 709; 823-27; 1030-36**.
- A reasonable inference is that Parker planted these items. Otherwise, Bryan's slinging of the bag would have caused them to move and not be sitting on top of the bag's other contents, and Parker's print would not have been identifiable.
- Again, contrary to Parker's story in St.'s Ex. 2, the video depicts someone peeking out of the blinds in the laundry room at 12:24:58 p.m., and this window allows a view of the driveway. Moreover, officers found round lead particles most consistent with GSR on the blinds, and Parker admitted both in a subsequent statement and at trial (**R. 2854**) that he was the person who had looked out of the blinds. The video also shows Parker walk to the edge of the garage and look down the driveway at 12:29:45 p.m. **R. 513-14; 722; 728; 731-32; 1078-81; 1093-95; 1155-56; 2503-04; 2955-57**. A clear and very reasonable inference from this evidence is that Parker had already killed Tammy at this point and was nervously lying in wait for Cap to arrive.
- Parker's claim was that he was finishing up taking a bowel movement when Bryan supposedly shot Tammy and immediately ran upstairs, but investigators who processed the scene found that he left the seat up on the toilet he had supposedly used. **R. 506-09; 781; 824; 926; 2128**.
- Another huge problem with Parker's claim that he gave the 9 mm pistol to Bryan a month before the murders was that a number of Bryan's family members and friends, those who knew him best - James Morgan, Jim Headley, Alvin Kelley,

¹¹ Several witnesses testified that he usually took the bag with him to work and other places.

Cindy Capnerhurst, Heyward Barnes (Bryan's stepson) and Liz Myers (Bryan's stepdaughter) - testified that Bryan was not confrontational; that he did not own a gun; that he was afraid of guns; and that he did not have one when he was murdered. Also, Jim Headley and Heyward Barnes testified that they would have known if Bryan had been given the 9 mm. **R. 1607-10; 1825-26; 1840-42; 1866; 1950-51; 1976-78; 1994.** At least two of these witnesses testified that he was very punctual and dependable. **R. 1608-10; 1822-26; 1833; 1843.** Parker testified to this as well. **R. 2851.**

- Still another problem with the misinformation that Parker provided in St.'s Ex. 2 is that he actually owed Bryan \$21,300.00. **R. 1253; 1973; 1985-86.** Of this amount, Parker had owed him \$6,100.00 for over a year. In the days leading up to and including April 13th, Bryan had told James Morgan, Jim Headley, his wife Cindy, Alvin Kelley and even Jack Parker¹² - either in person or in phone calls - that he was going to meet with Parker to collect the money that Parker owed him.
- Bryan was initially so worried that Parker would not pay him what he was owed and that there could be problem that he told his wife he would call her when he was in the Parkers' driveway and that she should call 911 if she did not hear from him within the hour. He told Mr. Morgan to call within an hour of his arrival, so that Bryan would have an excuse to leave if an argument developed.
- However, Bryan was happy and thought that he would finally get paid after he received a call from Parker changing the meeting time from 2:30 to 12:30 p.m. and telling him to bring the gym bag to carry the money so neighbors would not see it. He believed this because Tammy did not know that Parker had not paid him the \$6,100.00, and he expected to get a lot of the money that he was owed. So, he told Mr. Morgan that he would not call on arriving at the Parkers' house. **R. 1593-1611; 1619-20; 1922-28; 1828-1834; 1946-48.**
- When Bryan informed Jack Parker of the money that Parker owed him, Jack Parker said, "Bryan, don't worry about any money that Brett owes you. I will hire you and I will make good on the amount of money that Brett has not paid you and refuses to pay you for whatever reason." **R. 1830.**
- An investigator with the Coroner's Office removed Bryan's cellphone from his left shirt pocket at the scene on April 13th. **R. 435-37.** Investigators later learned that Cap attempted to make a call within a minute of entering the residence but that the call was dropped after 14 seconds because the number dialed (7*4401*5) was an incomplete number. **R. 1179-80.** Bryan's attempt to call a telephone number at roughly the same time that Tammy was shot is inconsistent with him killing her, as Parker claimed. A much more reasonable inference is that Bryan realized that something was very wrong and he was calling for help (either 911 or

¹² Bryan and Parker had helped take care of some of Jack Parker's business when he became ill. **R. 1603-04.**

a friend) very shortly after he entered the house.

- Officers were unable to open the safe using the “combination” provided by Parker and they did not gain access to its contents until Parker opened it for them on April 14th. Instead of \$ 20,000.00, they found \$383.00. The money was deceptively arranged in two stacks of cash in \$10,000.00 wrappers. However, only the bills on the top of each stack were \$100.00. The remaining bills were all \$1.00. **R. 637-41; 685; 928-30; 2496**. Therefore, he did not have enough cash to pay Bryan the \$5,000.00 he claimed in St.’s Ex. 2 that he intended to pay.
- Tammy’s family initially believed Parker and supported him. Betty Anne Webb, the first cousin of Tammy’s mother, Libby Carswell, testified that Parker told family members on April 20th that Bryan had asked him and Jack Parker if he could borrow money from them. **R. 1412-13**. During the course of describing how he shot Bryan, he claimed that after he grabbed his gun, he shot it from under his left arm, while squatted in front of the safe. He gave a similar demonstration at the viewing for Tammy. Mrs. Webb’s daughter said that he “had to be like Maverick to think that fast.” **R. 1366-67; 1371-72**.
- When Ms. Webb, Mrs. Carswell, Tammy’s sister, Kim, and Jackie Warren (Mrs. Carswell’s close friend and business partner), went to Parker’s residence in July, he gave a completely different demonstration of how he had shot Bryan. This change “just started changing our whole perspective of everything.” **R. 1368-71**.
- Jackie Warren testified that Parker told her, at the home of his parents on the afternoon of April 13th, that he had had shot Bryan with the weapon under his left arm; yet, he later indicated, when she was at his residence with Tammy’s family, that he had shot Bryan while squarely aiming in Bryan’s direction. This change also caused her to believe that “something ... was not right. **R. 1392-1406**.
- Terri Gleason, a firearms expert from the Sheriff’s Department, testified that if a weapon had been fired while under a person’s arm, she “would expect to find burning and tearing to the material [that a person was wearing] from the gap ... between the cylinder and the barrel of the firearm.” **R. 1711**. There was no burning or tearing of Parker’s clothing.
- The supposed phone call that Tammy was making shortly before her death was not corroborated by the phone records for the three land lines in the house, or Tammy’s cellphone records, and Dr. Theresa Mills Floyd, a cosmetic doctor with whom Tammy had a scheduled appointment on the afternoon of April 13th, did not receive any call. **R. 1170; 1342-45; 1353-54; 2102**. Also, Dr. Floyd was present at the visitation and the funeral. She had never met Parker. While he told her that “I might need to come see you after all of this is over to do something about this redness on my face from all of this crying,” Dr. Floyd never saw him crying. **R. 1347-51**.

- Contrary to Parker's representations that he did not use the computers and that he did not gamble, officers found information on the hard drive of one of his computers seized from the home that he had used at least two accounts for online betting. One account was in the fictitious name of "Hal." **R. 1897-1911.**
- Parker was in debt \$100,000.00 on his own account and \$76,000.00 on his Hal account, to bookies Lanny Gunter¹³ and Harry Benenhaley. Parker had been making irregularly-timed payments of \$5,000.00-\$10,000.00 to them; but he had been putting off making an installment for several weeks and his bookies were expecting his next payment to be much larger. **R. 1765-86; 2029-43.**
- Gunter had a conversation with Parker after giving a statement to law enforcement. Parker asked him if he had told law enforcement the whole amount that Parker owed him. When Gunter said "yes, the whole amount," Parker "looked like he had seen a ghost." **R. 1787-88.**
- Another possible motive for Parker to kill Bryan and attempt to frame him for Tammy's murder is that Tammy had gotten very upset when Parker had accrued \$100,000.00 in debt, as a result of gambling, several years earlier; and though his father paid his debt, she had threatened to leave him if he ever did that again. Bryan was aware that Parker had amassed the recent gambling debt and had even spoken to Jack Parker about it. **R. 2143-45; 2367; 2822.**
- Also, Tammy made in excess of \$100,000.00 a year while Parker only made \$45,000.00 in legitimate income. **R. 2195-96.** He would have lost her income if they divorced.
- Another lie in St.'s Ex. 2 was Parker's representation that he did not have any financial problems. In addition to his \$176,000.00 of gambling debt and the \$21,300 that he owed Cap, the Parkers had roughly \$937,000.00 between their mortgage, their credit cards and a \$5,000.00 TitleMax loan Parker took out in December 2011. He was paying 119% interest on that loan, so he would have to pay TitleMax \$13,000.00. **R. 2163-64; 2190-97.** In addition, he had recently borrowed \$5,000.00 from his mother and another \$5,000.00 from his father, without informing either parent of the other's loan, before taking his family on a cruise. **R. 1301-02.** And, on April 12th, the day before the murders, he had borrowed still another \$5,000.00 from his friend, Britt Jordan, on the pretense that a friend needed the money. He had promised to repay \$7,000.00, but did not repay anything. **R. 1854-58.**
- Ben Staples, a CPA who had previously had an affair with Tammy, prepared the

¹³ Gunter was also aware that Parker was not happy with his marriage and that he and Tammy slept in different bedrooms. **R. 1833.**

Parkers' taxes each year. He also provided financial advice to her and occasionally to Parker. Tammy would report so much of Parker's income as he made known to her, on her taxes. **R. 2360-2366.**

- As time went by, Tammy became unhappy with her marriage because Parker did not believe in God and she was a religious person who wanted her children in church. She only stayed in the marriage for the sake of her children because they were the most important things in her life. **R. 2365-66.**
- After Mr. Staples learned of Tammy's murder on the afternoon of April 13th, he repeatedly called Parker until Parker finally returned his call. In their conversation about what had occurred, Parker said that he had heard "loud noises" before he ran upstairs and was met by Bryan. Bryan told him "take me to the safe, or, I want my money;" but did not use the profanity that Parker had attributed to him in his statement. After he shot Bryan, he ran and checked Tammy's neck for a pulse. Then, he returned to the attic and *checked one of Bryan's arms for a pulse before running outside and calling 911.* **R. 2369-71.**
- Thus, within hours of giving St.'s Ex. 2, Parker was already changing details of what supposedly occurred. In other conversations over the following weeks, he began changing the details that he had relayed to Mr. Staples. **R. 2371-72; 2382-85.**
- Mr. Staples later became involved with Tammy's estate and assisted Parker in becoming the personal representative of her estate. **R. 2372-73.** "Ultimately she had \$868,000 of life insurance with MetLife. She had a 401(k), which was ... \$199,728 and some change. She had [...] \$51,924 ...in a retirement account. Her checking account had approximately \$10,000 in it. She had a stock option plan that had at that point about \$20,000." **R. 2373.** Parker was the sole beneficiary of the life insurance policy. There was some discrepancy as to whether their daughter was the beneficiary of the retirement account. Although their daughter was also listed as a co-beneficiary on the 401(k), Parker was the sole beneficiary of that as well. **R. 2374-75.**
- When Parker's attorney told the press that he expected Parker to be arrested, *Mr. Staples suggested* that Parker disclaim his interest in these assets, so as to avoid the IRS collecting monies from the estate for tax fraud because Tammy had prepared the taxes. Ultimately, this course of action was followed and a conservator account was set up for each child with one-half of the life insurance proceeds in each account. **R. 2376-81.**
- Although Parker called Mr. Staples hortly before trial, and asked him to change his statement and testify that Parker was unaware of the life insurance proceeds, he was aware of them. **R. 2385.**

- It was likewise clear from Jerry Carswell's testimony that Parker knew about the amount of Tammy's life insurance policy before the murder. **R. 2051-52**. Also, Mr. Carswell testified that Bryan usually parked where he had on April 13, 2012. **R. 2052-53**.
- Normally, Parker did not work Friday afternoons. Instead, like many of the men who worked at Palmetto Home Medical, he played golf on most Friday afternoons. On April 13, 2012, however he worked that morning and claimed he had to make a delivery to a client by 2:00 p.m. **R. 1998-2001; 2017-2020**.
- Parker went to work early on Monday April 16th and emptied items out of his desk. **R. 2002-04**.
- That day, he described his co-worker, Al Muncey, how he had killed Bryan. Unlike the stories that he had told to law enforcement and Tammy's family, this time he claimed that Bryan gave him a stunned look after the first shot and Parker "shot him a couple more times. And he said the last shot [Bryan] was [lying] on the ground and he got directly over [Bryan] and shot him right between the eyes." **R. 2020-21**.
- Still another problem with St.'s Ex. 2 is that Parker did not reveal that he had three paramours, whose identities investigators uncovered: Lindsay Mullins, Dana Allpress and Natasha Nadkarni. **R. 1315-33; 2319**. While the affairs with Allpress and Nadkarni had ended by the time of the murders, Parker was actively involved with Ms. Mullins, a bank teller whom Parker met at the bank.
- Mullins was separated from her husband in 2012 and was divorced by the time of trial. She had sex with Parker in February and again towards the end of March. On that occasion, they had sex in the bedroom of Parker's five year old son. **R. 1319-21; 2499-2500**. While they were in the Parker residence, Parker showed Ms. Mullins the upstairs office. He told her he kept a gun in it and pointed to the desk. **R. 1321-22**.
- They had sex at a local motel on April 10th, and they were exchanging text messages about their next rendezvous on the day of the murders. **R. 948; 957-59; 1322-28**. Parker had deleted these text messages from his phone but investigators were able to obtain copies of them from Verizon Wireless' records for his phone **R. 1145-47**.
- Natasha Nadkarni testified that Parker told her that he and Tammy did not sleep together. He was looking at getting a divorce but said that getting a divorce "would be complicated just because of the salary on paper versus the other business and how they would work that out." **R. 1799-1800**. He also told her that balancing his two jobs "was taking a toll on him." **R. 1801-02**.

- Nadkarni confirmed that she and Parker had exchanged flirtatious text messages in December 2011. Although she denied that they had a sexual relationship, she admitted calling and leaving him three voicemails (St.'s Ex. 509) in the span of 2 minutes on June 20, 2012. In these voicemails, she told him that he owed her an explanation. His response was that the evidence does not match my story. He gave her a similar explanation in a face-to-face conversation. **R. 1807-08; 1817-18.**
- Parker also misled officers about the Capnerhursts' financial problems in St.'s Ex. 2. It is true that Cindy Capnerhurst had stolen \$35,000.00 from the bank where she worked in the past and that she thereafter pled guilty to embezzlement. **R. 1952; 1956.** She received probation and ultimately repaid the money that she had taken. **R. 1953-54.** She had also run up \$25,000.00 of credit card debt within a year and one-half of the murder, much of which was paying for remodeling the family's kitchen; and they had borrowed \$3,000.00 from Cindy's father. **R. 1622-23; 1847; 1867-68; 1970-73.**
- However, the embezzlement plea was in 2000 and, contrary to the representations of her attorney at the time, the now-disbarred Richard Breibart, she had not taken the money to pay off Bryan's gambling debt. Rather, Bryan had stopped gambling when his daughter was born, in 1995. **R. 1844; 1866; 1953-54; 1956-58; 1960.**
- Unknown to Parker, Bryan had a "walk away plan," so that he could pay off this debt even if Parker did not pay him. In addition to working for Parker, Bryan worked for Alvin Kelley, at the Lexington County Recreation Commission, and he cleaned the office there as well. **R. 1626-1630; 1826-27; 1861.** And, Jack Parker had promised to pay Bryan whatever Parker failed to pay and he promised to hire Bryan to work for him. **R. 1830.**
- Bryan was "pretty open" about his financial problems and discussed them with Jim Headley, and (apparently) Parker. Moreover, Bryan was very meticulous about timely paying bills, and he could have and would have paid off this debt without the \$20,300.00 that Parker owed him. *See* **R. 1838-1840; 1971-74.**
- Instead of lying and trying to deceive law enforcement as Parker had done, Cindy Capnerhurst and her family were completely honest when questioned by investigators about Cindy's prior conviction and the family's current financial problems. **R. 1952-53; 2155.** When asked about the credit card debt, Cindy immediately produced the Visa bill, and Mr. Barnes provided credit reports for both Bryan and Cindy. **R. 1980-82; 2155; 2159-60.**
- The amount owed on the card was 20,000.00 and they were over \$4,000.00 below the credit limit. **R. 2159-60.**
- Moreover, on April 19, 2012, both of Parker's children participated in an ARC

interview.¹⁴ Lt. Scott McDonald and another officer observed this interview, in which Parker's fourteen year old daughter "indicated that her father had shown her a gun that he kept in the office area, [he] also told her about a gun he kept in the master bedroom closet, ... [and] she indicated to the woman that was interviewing her that she had never seen Mr. Capnerhurst with a gun." **R. 1170-71; 2924.**

- Terri Gleason, the firearms expert, testified that she determined that Bryan was most likely shot from a distance of three to four feet, but she put the range at two to five feet to give Parker the benefit of the doubt. Also, Bryan did not have gunpowder residue on him, which should have been present if he had shot the 9 mm. **R. 1713-35; 1743-49.** This was still another discrepancy between St.'s Ex. 2 and the evidence.
- Parker gave a number of other statements to investigators and he spoke to Sheriff Leon Lott at least five times before his arrest,¹⁵ in an effort to explain away many of the problems with his original statement and to try and provide an account that was consistent with the facts uncovered in the investigation. Respondent will not discuss each statement, but would note that on every occasion, he was unable to make his story fit the facts. **R. 2124-32; 2140-41; 2318-35; 2430-39; 2466-53; 2493-98; 2504-08; 2514-22.**
- For instance, officers spoke to him when he went back to his residence on April 14th to open the safe. Officers asked him about a gun case that they had found in the office. Parker stated that the 9 mm pistol had come in the case. When asked why he had not given the case to Bryan when he gave Bryan the gun, he said, "[W]ell, I just didn't¹⁶." **R. 2128.** He was also asked about why he had left the toilet seat up after he finished his bowel movement and "he said sometimes he just does that." **R. 2128-29.**
- He told another lie on the 14th when he said that he knew nothing about Tammy's life insurance policy. Further, he could not articulate a motive for Bryan to kill Tammy. **R. 2131-32.**
- Also, Parker was asked about his bookie on April 14th, and he refused to give a name. When asked why there was not \$20,000.00 in the safe, Parker "explained" that "I have got the booking sheets in my car. And he goes out to the car and he shows us these booking sheets. He says, well, this is really roughly \$20,000

¹⁴ This is The Assessment and Resource Center, which is a child advocacy center that is not affiliated with the Richland County Sheriff's Department. The purpose of the interview is not simply to gather information about the crime, but to try and provide referrals for counseling and otherwise assist children who are either victims or may be traumatized by crime. **R. 2160-61; 1916-18.**

¹⁵ Investigators spoke to him on April 14, April 17, April 18, and April 25, 2012. Parker met with Sheriff Leon Lott on May 21, June 6, July 6, July 11, and July 19, 2012.

¹⁶ He also did not give Bryan the holster for it.

worth. I'm just waiting to get it collected.” **R. 2133-34.**

- However, “he was supposed to have a meeting with Mr. Capnerhurst where they are going over all this, yet he has got [the sheets] in his car.” **R. 2134.**
- Officers also asked him on the 14th if he had told Bryan to bring a bag. He said that he had “so the neighbors wouldn't see the money, even though the money he was going to give [Bryan] fit quite easily in Brett's own pocket.” Parker did not have an answer for why the bag was necessary to carry the money. **R. 2140-41.**

Indeed, the State’s case against Parker was so compelling that he persuaded his daughter to testify at trial that she was present in the office area of the Parkers’ home one day before April 13, 2012 and overheard her father and Bryan talking about how it would be good for Bryan to get a gun for his protection. **R. 2686-88.** Her testimony is inconsistent with Lt. McDonald’s testimony concerning the information provided in the ARC interview (**R. 1170-71; 2924**) and Parker’s failure to mention this in St.’s Ex. 2. Moreover, the State impeached her testimony with Def.’s Ex. 4, the transcript of audiotaped recordings between Parker and others while he was in jail awaiting trial. The transcript reflected a conversation between Parker and his daughter, in which they discussed what she was supposed to say because she could not remember it correctly. **R. 2693; Def.’s Ex. 4.**

ARGUMENTS

I. The Court of Appeals properly found that the trial judge did not err in refusing Parker’s request to charge the disapproved *Edwards* “reasonable hypothesis” language in the circumstantial evidence charge because this Court has found that the requested language is confusing and has directed that it should not be used. Instead, the trial judge properly gave the then-current and correct instruction approved of in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), which this Court had found is the sole appropriate charge in *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). At worst, any error in not giving the requested charge was harmless beyond a reasonable doubt.

Contrary to Parker’s argument before this Court, he did not request a jury instruction pursuant to this Court’s opinion in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013), or

misread how the Court would decide *Logan*. Instead, he expressly requested a jury instruction in accordance with *State v. Edwards*, 298 S.C. 272, 275-76, 379 S.E.2d 888, 889 (1989), including the outdated and disapproved “reasonable hypothesis” language: “[W]e are going to need a *State v. Edwards* [charge], we will be making a request. ... I think we are entitled to it.” **R. 2964**.

In the charge conference on the following day, Parker’s Request-to-Charge Number 1 contained the “reasonable hypothesis” language from *Edwards*. Counsel acknowledged that *Edwards* had been “tinkered with, no doubt about that, but we would request it.” Counsel stated that this instruction “is fair and it is accurate. And ... it is a correct statement of the law as it should be or going to be.” **R. 7; 2987**. *See also* **R. 2989**. The State opposed the instruction in light of *State v. Cherry*, 361 S.C. 588, 601-02, 606 S.E.2d 475, 482 (2004), which expressly stated that the “reasonable hypothesis” language in *Edwards* should not be used and that the correct instruction was that set forth in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997). **R. 2988-89**. The trial judge rejected Parker’s request because she was bound by the current law. Counsel then noted his “procedural exception.” **R. 2989–90**. Ultimately, the trial judge gave a jury instruction consistent with *Cherry* and *Grippon*. **R. 3153-54**.¹⁷

Initially, Respondent submits that much of what Parker argues before this Court is not properly before it on appeal because he failed to present the same arguments to the trial judge.¹⁸

¹⁷ Parker took exception to the failure to charge *Edwards*. **R. 3171**. He renewed his exception in a post-trial motion. The trial judge denied his motion because she found that *Cherry* had overruled *Edwards* and that her charge had accurately stated the law. **R. 3183-84**.

¹⁸ For instance, he did not argue in the trial court or in the Court of Appeals that the State’s case required jurors to accept the State’s theory of motive, which is not an element of murder; that the State’s “misleading and inaccurate statements regarding circumstantial evidence” in closing argument required a different circumstantial evidence charge from the one given; he did not rely upon Justice Toal’s concurring opinion in *Grippon*, 327 S.C. at 84, 489 S.E.2d at 464 (Toal, CJ, concurring), in which she found that “reasonable hypothesis” language did not shift the burden of proof; and he admittedly did not object to other portions of the jury instructions which he now relies upon in attacking the harmless error analysis below. As a result, these arguments are not preserved for appellate review. If this Court addresses these arguments on appeal, Parker would effectively be allowed to end-run the contemporaneous objection requirement. *Contra State v. Mayfield*, 235 S.C. 11, 23-24, 109 S.E.2d 716, 724 (1959)

State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one ground at trial and then an alternative ground on appeal); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996); *Linda Mc Co. v. Shore*, 390 S.C. 543, 558, 703 S.E.2d 499, 506-07 (2010) (“Because this issue was not presented to the court of appeals, it is not preserved for our review”). Further, Petitioner’s claim of error is not meritorious.

In reviewing jury charges for error, an appellate court considers the charge as a whole, in light of the evidence and issues presented at trial. “A jury charge is correct if when read as a whole, the charge adequately covers the law.” *State v. Drayton*, 411 S.C. 533, 544, 769 S.E.2d 254, 260 (Ct.App. 2015), *aff’d in part and vac’d in part on other grds.*, 415 S.C. 43, 780 S.E.2d 902 (2015). A trial judge generally “is required to charge only the current and correct law of South Carolina.” *State v. Jenkins*, 408 S.C. 560, 569, 759 S.E.2d 759, 764 (Ct.App. 2014), *cert. denied*, Feb 4, 2015. Applying this standard, certiorari is not warranted. Indeed, the Court of Appeals rejected identical arguments to Parker’s in both *Drayton* and *Jenkins*, and this Court denied certiorari to review the issue in both cases.

In *Cherry*, this Court found that the traditional circumstantial evidence charge served to confuse juries by leading them to erroneously believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence. As a result, the Court held “that the recommended language in *Grippon* is the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction.” *Cherry* also expressly eliminated the confusing “reasonable hypothesis” language found in the *Edwards* instruction, and which Parker **adamantly** requested. *Cherry*, 361 S.C. at 601, 606

(“One may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered”).

S.E.2d at 482. This Court again approved that charge *Logan, supra*.¹⁹ Also, relevant precedent at the time of trial dictated that only the *Grippon* charge be used. *Cherry, supra*. That charge does not include the “reasonable hypothesis language” requested here. (See **R. p. 7**).²⁰ This Court in *Logan* did state that trial courts may not exclusively rely on [the *Grippon*] charge over a defendant's objection,” *Logan*, 405 S.C. at 100, 747 S.E.2d at 453, but the Court reaffirmed both the correctness of the *Grippon* charge and the impropriety of the “reasonable hypothesis” language in rejecting the claim that *Cherry* had been implicitly overruled. *Id.* at 94, 747 S.E.2d at 449. Thus, the requested language remains disapproved. *Id.* at 98, 747 S.E.2d at 451-52. *See also Jenkins*, 408 S.C. at 572-73, 759 S.E.2d at 766; *Drayton*, 411 S.C. at 544, 769 S.E.2d at 260. Accordingly, Parker’s requested charge was properly rejected because it did not and still does not accurately state the applicable law. *Id.*

Finally, *Logan* recognized that “erroneous jury instructions are subject to a harmless error analysis,” and it found that any error in the failure to give the requested circumstantial evidence instruction was harmless because “[t]he trial court's jury instruction, as a whole, properly conveyed the applicable law” in light of the instruction on “reasonable doubt burden of proof.” 405 S.C. at 94, 747 S.E.2d at 449. In both *Jenkins* and *Drayton*, the Court Appeals likewise concluded that the failure to give an instruction such as that requested by Parker “was harmless beyond a reasonable doubt because the trial court's instruction, as a whole, properly conveyed

¹⁹ Indeed, the Court in *Logan* addressed the argument that Parker raised in the Court of Appeals but has now abandoned, *i.e.* that their recent cases referencing the *Edwards* charge signaled disapproval of the *Grippon* charge. This Court found that its recent cases referencing the *Edwards* language did not address the jury instructions given. Rather, those cases – including *Hernandez*, and *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) - the cases upon which Parker relies - as well as *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011), had only made reference to the *Edwards* language in the context of the trial judge’s ruling on a directed verdict motion.

²⁰ Consistent with *Holland v. United States*, 348 U.S. 121 (1954), the Court in *Cherry* found that the “reasonable hypothesis” instruction merely served to confuse juries. *Cherry*, 361 S.C. at 601-602, 606 S.E.2d at 482. *See also Grippon*, 327 S.C. at 85, 489 S.E.2d at 465 (Toal, J., concurring); *State v. Manning*, 305 S.C. 413, 417, 409 S.E.2d 372, 374 (1991).

the applicable law,” in light of the trial judge’s correct “reasonable doubt” charge. *Jenkins*, 408 S.C. at 573-74, 759 S.E.2d at 766; *see also Drayton*, 411 S.C. at 546, 769 S.E.2d at 261. Here, the trial judge gave the same reasonable doubt instruction (R. 3153-54) as the trial court in *Logan*. As a result, any error was harmless beyond a reasonable doubt.²¹

II. The trial judge did not abuse her discretion by allowing Dr. Bradley Marcus, the forensic pathologist who performed the autopsy on Bryan Capnerhurst, to opine that “[b]ased on ... the injuries sustained to his left arm and the way he fell back ... [Bryan could not] have held onto anything that was in his hand” because (1) the science was forensic pathology (2) Dr. Marcus was properly qualified, without objection, as an expert in forensic pathology; (3) his duties as a forensic pathologist include determining the cause of death, the manner of death and the circumstances surrounding it; (4) his training as a forensic pathologist included training as to what could or could not have occurred at a suspected crime scene; (5) his training as a medical doctor included specific training as to how certain wounds could affect a person's ability to move and to handle things; (6) the probative value of his opinion was not substantially outweighed by its prejudicial value; and (7) he could not have been prejudiced by its introduction because it was merely cumulative to Dr. Marcus’ earlier opinion that was admitted without objection, R. 1535, II. 13-25.

Nor is there merit to Parker’s claim that the trial judge erroneously allowed Dr. Bradley Marcus, the forensic pathologist who performed the autopsy, to opine that “[b]ased on ... the injuries sustained to his left arm and the way he fell back ... [Bryan Capnerhurst could not] have held onto anything that was in his hand.”²² At the worst, he could not have been prejudiced by its introduction because it was merely cumulative to Dr. Marcus’ earlier opinion that was admitted without objection. *See R. 1534, I. 12 – p. 1535, I. 17.*

Dr. Marcus, who performed both autopsies in this case, testified that he is a forensic pathologist and the Chief Medical Examiner in Richland County. He and a colleague perform all

²¹ The charge in question is taken almost *verbatim* from that endorsed by the Federal Judicial Center, *see* Federal Judicial Center, Pattern Criminal Jury Instructions 17-18 (1987) (Instruction 21); and it has been approved by the Court’s decision in *State v. Darby*, 324 S.C. 114, 115-16, 477 S.E.2d 710, 710-11 (1996), and in Justice Ginsburg’s concurring opinion in *Victor v. Nebraska*, 511 U.S. 1, 26-27 (1994) (Ginsburg, J., concurring in part and in judgment). And, because jury instructions are viewed as a whole, Petitioner’s procedurally barred contention that the location of this charge in the instruction prevents any error from being harmless, is frivolous.

²² This alleged error does not relate to or impact Parker’s conviction for murdering Tammy Parker, only his conviction for murdering Bryan Capnerhurst.

of the forensic autopsies in Richland County, and he performs medical autopsies of individuals who die in hospitals when asked to do so. He earned his medical degree in 2001. Following his residency, he spent six years at the Medical University of South Carolina specializing in “all aspects of anatomic pathology, clinical pathology, forensic pathology, and ... cytopathology [or] the study of cells.” **R. 1455-62**. He explained that “[f]orensic pathology is the study of pathology in relation to the autopsy. So I do an autopsy to determine the cause of death,” and a pathologist “determine[s] the manner of death,” which is either natural; suicide; accidental; homicide; or undetermined. Dr. Marcus is board certified in forensic pathology, anatomic pathology, clinical pathology, and cytopathology, and he had previously been qualified to testify as an expert in forensic pathology over twenty times. The State then moved to have him qualified as an expert in forensic pathology. **R. 1459-63**.²³ On Parker’s voir dire of him, Dr. Marcus testified that he found no other cause of death in this case other than gunshots, and that he expected that this would be his testimony. Parker did not object to his qualification and the trial judge qualified him as an expert in forensic pathology. **R. 1463-64**.

After Dr. Marcus had explained his autopsy findings and conclusions for Tammy (**R. p. 1464, l. 22 – p. 1473, l. 1; p. 1482, l. 1 – p. 1509, l. 11**), he explained his autopsy findings and conclusions for Bryan. Parker did not challenge admission of most of Dr. Marcus’ testimony about the autopsy of Bryan Capnerhurst. *See* **R. 1509-14; 1517-51**. His objection was to the State’s query, “Based on the multiple gunshots and the areas that were shot and everything, in your expert opinion, would Mr. Capnerhurst have been able to maintain a grip on anything[?]” Parker thereafter argued *in camera* that Dr. Marcus was not qualified to give an opinion in

²³ There are ten possible board certifications in pathology, but practitioners are limited to four certifications. Parker’s voir dire of Dr. Marcus established that he began medical school at the American University of the Caribbean. After two years there, he attended school in Ireland for a year and his fourth year was in a school in Chicago. Because of his high scores on his board exams, he “was able to get my choice of MUSC.”

response to this question because “[h]e is not an orthopedic doctor ... [or] an orthopedic surgeon.” Parker also claimed that Dr. Marcus did not base this opinion on “any study or science or anything that has been peer reviewed ... that would support ... what they are trying to get him to say;” that the opinion would be contrary to the eyewitness testimony, and that his opinion went to “the ultimate issue in the case.” Although the State had an orthopedic doctor who might be qualified to testify to this issue, he claimed Dr. Marcus was not qualified. **R. 1552-53.**

The State argued that Dr. Marcus was qualified to give this opinion because as a forensic pathologist, he was “trained ... to determine the cause and manner of death and what did happen and what didn't happen at crime scenes.”²⁴ Also, he had reviewed the crime scene photos and “consulted with doctors. He did everything.” The State further noted that any doctor may express an opinion “if it is within [his] training” and asserted that this was within Dr. Marcus’ training. *See* Rule 702, SCRE. **R. 1553.**²⁵ The trial judge then heard the State’s proffer that, as a forensic pathologist, Dr. Marcus was trained to determine the cause of death and the manner of death; that he also had training as to “what could or couldn't have happened in a [purported] crime scene;” that he had training, as a medical doctor, on “how certain wounds could affect a person's ability to move, to handle things, or to do anything of that sort;” and that Dr. Marcus had an opinion as to whether Bryan would he have been able to keep a grip on any object in his hand. Based upon Dr. Marcus’ findings as to the cause and manner of Bryan’s death and the injuries Bryan suffered, Dr. Marcus’ opinion was that “Mr. Capnerhurst, due to the injuries sustained to his left arm ... was unable to have carried a weapon based on the injuries to his left arm, based on the

²⁴ The State also noted that he was the chief medical examiner.

²⁵ The State explained that its theory was, after Parker shot Bryan “in the head with the final head shot, [Parker] then went and got the gun that he had used to kill his wife and placed it in [Bryan’s] hand.” However, Parker did not know that Bryan’s “arm was broken, and [that] he could not hold that gun in the manner in which it was placed so the police would find it to show guilt.” **R. 1553-54.**

circumstances of falling backward and downward.” **R. 1554-56.**

Parker stated that he did not object to Dr. Marcus’ qualifications to testify to the cause of death. The trial judge stated that “I think he testified when she asked him that he has to determine cause of death, manner of death, and something else. There were three different things [to which] he testified.” While Parker did not object to those matters, Parker objected to this opinion because Marcus was “telling the jury in his opinion something that flies in the face of the facts found here by the first two officers ... [who] said the gun was in his hand with his fingers wrapped around it.” Thus, the objection did not merely go to the weight that the jury should give the opinion. **R. 1556-57.** The trial judge stated that she would charge the jury they could give opinion testimony any weight they wish to or no weight and that if Parker presented his own expert with a different opinion, then the jury would have to decide which expert was more credible. She also thought that the objection went to the weight of Dr. Marcus’ opinion and not its admissibility because he is a forensic pathologist and “[t]his is the kind of work they do.” **R. 1557.** On voir dire of Dr. Marcus’ qualifications, Parker established that he was neither “board certified in orthopedic medicine,” nor “a board certified orthopedic surgeon.” Also, the only support for his conclusion listed in the autopsy report was that Bryan had a broken ulna; he did not have “a study” upon which he based his conclusion; and he had never encountered a similar factual situation. **R. 1557-58.**

Based upon these responses, Parker renewed the objection because Dr. Marcus’ opinion was not based “on any type of science;” he had never encountered a similar scenario in another case; it went to “the ultimate issue in this case;” and [h]e is not an orthopedic surgeon.” Parker again argued that the State had an orthopedic doctor through whom it could attempt to introduce this opinion, but he would also object to that. **R. 1558-59.** In response, the State asserted that this

argument went to the weight of Dr. Marcus' opinion and not the admissibility; that Parker could fully cross-examine Dr. Marcus; and that the defense could present its own expert. However, Dr. Marcus was qualified, he had testified that he had the necessary training to render this opinion; and his opinion was based upon both his training, his review of the crime scene evidence, and his findings as to the gunshot wounds and Bryan's broken arm. **R. 1559-60.**

When Parker indicated that Dr. Marcus had to be qualified to render an opinion under *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), the trial judge found that he had already been qualified as a forensic pathologist, without objection. She also found that his testimony was part of his job "is to decide the cause of death and the manner of death and the circumstances surrounding the death." She then found that Dr. Marcus was qualified to give his opinion and that Parker's objection went to the weight that he felt the jury should give the opinion and not to its admissibility. Again, the trial judge stated that she would instruct the jury it was "up to the jury to determine whether or not they want to believe that opinion." In response to further argument by Parker, she overruled the objection and reiterated her reasons for doing so. **R. 1560-62.** Following a break, Parker noted that he also objected to Dr. Marcus' opinion under Rule 403, SCRE, because the probative value of his conclusion was substantially outweighed by its prejudicial effect. **R. 1563.** The trial judge explained that while she had not placed it on the record, she had considered "the probative value as to the manner of death and circumstances of the death outweigh the prejudicial effect in terms of his testimony or him giving his opinion" when she made her ruling, **R. 1563-64.**

Dr. Marcus then testified before Parker's jury that based upon his review of the crime scene evidence, his autopsy findings "and everything," he had opinion that as to whether or not Bryan would have been able to hang on to anything in his left hand when he was shot. Dr.

Marcus opined, “Based on ... the injuries sustained to his left arm and the way he fell back, I don't believe he could have held onto anything that was in his hand.” **R. 1565.**

There was no abuse of discretion. “The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion.” *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997) (citation omitted). An appellate court will not disturb the trial judge's determination regarding a witness's qualifications to testify as an expert absent a showing of an abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). The admission or exclusion of evidence is also left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. *State v. Tucker*, 319 S.C. 425, 462 S.E.2d 263 (1995). Generally, all relevant evidence is admissible, Rule 402, SCRE; and an appellate court is “obligated to give great deference to the trial court's judgment” regarding its Rule 403 analysis. *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App. 2003).

This Court's decision in *White* requires “[a]ll expert testimony [to] satisfy the Rule 702[, SCRE,] criteria, ... [including] the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration.” *White*, 382 S.C. at 270, 676 S.E.2d at 686. Forensic pathology is a science that has been defined as the “branch of medicine that applies the principles and knowledge of the medical sciences to problems in the field of law.” Dominick J. DiMaio & Vincent J.M. DiMaio, *Forensic pathology* 1 (2d ed., CRC Press 2001). Contrary to Parker's claim that Dr. Marcus' testimony met none of the [*State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979)] factors,” his testimony involved forensic pathology and this is such a well-accepted science in South Carolina jurisprudence that it is unnecessary for testimony relating thereto to “be vetted for its reliability

prior to its admission at trial,” except in the most unusual circumstances that do not apply in this case. Indeed, Parker stated that he did not object to the qualification of Marcus as a forensic pathologist, and he does not attack the trial judge’s admission of Dr. Marcus’ opinion testimony generally, only that he was supposedly not qualified to render the opinion on whether it was possible for Bryan to hold the 9 mm pistol in his left hand in light of the crime scene evidence and his findings at autopsy.

Yet, Dr. Marcus fully provided the trial judge with his educational and other experience in the field of forensic pathology, and Parker did not object to his qualifications as an expert in the field of forensic pathology. **R. 1455-64.**²⁶ Consistent with Dr. Marcus’ description of his duties, learned treatises explain that the “[d]uties of a forensic pathologist include determining the time, cause, and manner of injury or death, documenting injuries and deducing how they occurred, determining or excluding other contributory or causative factors of death, collecting evidence from the body that can be used to prove or disprove an individual's guilt or innocence and *to confirm or deny the account of how the death occurred*, and providing expert testimony if the case goes to trial.” DiMaio & DiMaio, *Forensic pathology*,1 (emphasis added). *See also* 40 Am.Jur. *Trials* 501 § 46 (“**Bases for pathologist's opinion**”).²⁷ Also, there was further voir dire

²⁶ Parker seems to make the absurd assertion that no one could render this opinion, since he stated he would object if an orthopedic surgeon rendered the same opinion. Th speciousness of his attack on Marcus’ opinion as to Bryan’s ability to use his hand is belied by the faisure to contest findings about Tammy’s position when the wounds were inflicted, and that the shot to her hip may have caused her to stumble and fall. **R. 1469-74; 1482-1511.**

²⁷ This treatise states that:

There are four main steps that a forensic pathologist takes in all cases in forming an opinion about a homicide:

1. *Gathers evidence.* The forensic pathologist first gathers all available information concerning the physical evidence, such as that relating to bullets, hair, fingerprints, dirt, fibers, paint chips, and glass fragments.
2. *Considers theories.* The forensic pathologist then considers the various theories that have been advanced, systematically accepting or rejecting them based on the autopsy findings and the results of laboratory and other tests.
3. *Develops theory of crime.* It is not outside the forensic pathologist's duties to develop a crime scene scenario if an acceptable theory has not already been advanced. It is possible that none of

of Dr. Marcus regarding this specific line of testimony, including Parker's *in camera* cross-examination of him, before the jury heard the challenged opinion. **R. 1554-56; 1557-58.** Notwithstanding Parker's contrary argument, the State's voir dire clearly provided a sufficient foundation for the introduction of this opinion because it was relevant to the cause and manner of Bryan's death, which is unquestionably within the realm of forensic pathology: as a forensic pathologist, Dr. Marcus was trained to determine the cause of death and the manner of death; he also had training as to "what could or couldn't have happened in a [purported] crime scene;" and he had training, as a medical doctor on "how certain wounds could affect a person's ability to move, to handle things, or to do anything of that sort." The State also established that Dr. Marcus had an opinion as to whether Bryan would he have been able to keep a grip on any object in his hand, based upon Dr. Marcus' findings as to the cause and manner of Bryan's death and the injuries that Bryan suffered. **R. 1554-55.** On redirect in front of the jury, the State established that he had consulted with the other colleagues in his group who are board certified in forensic pathology, as well as an orthopedic surgeon in arriving at his opinion. **R. 1586.** Thus, Parker's objection was not meritorious. *See State v. Tyner*, 273 S.C. 646, 652, 258 S.E.2d 559, 562 (1979) (the trial court acted within its discretion in allowing a forensic pathologist to give his opinion concerning the distance of the shotgun blast and the absence of powder burns on the clothing of victim over objection that only a ballistics expert could testify about distance and lack of powder

the advanced theories explain the evidence, in which case a new theory is needed. There also may be so little evidence that it is impossible to make any statements as to the circumstances of the death.

4. *Forms final opinion.* In working with the physical evidence and the theories proposed, a fairly clear sequence of events usually becomes obvious. If the physical evidence and autopsy findings support the sequence of events, it becomes the opinion of the forensic pathologist. The pathologist's opinion seldom changes, however, unless new evidence turns up that was kept from the forensic pathologist.

burns).²⁸

Parker cites *White* for the proposition that the concept of reliability of the expert's testimony, prior to the allowance and acceptance of consideration of this specialized evidence by the jury is at the core of Rule 702, SCRE. However, his argument is inconsistent with this Court's explanation in *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012), that "the reliability of a witness's testimony is not a pre-requisite to determining whether or not the witness is an expert. The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined prior to determining the reliability of the testimony." *Id.* at 388, 728 S.E.2d at 474-75 (footnote omitted). In addition to *Tyner*, appellate courts in this State and other jurisdictions have upheld the introduction of similar opinion testimony from properly qualified pathologists in a variety of contexts.²⁹ Therefore, Marcus' qualification as a

²⁸ For the very first time in these proceedings, Parker cites to *State v. Vining*, 645 A.2d 20 (Me. 1994), a non-binding case that is readily distinguishable. The pathologist's opinion in *Vining* was based entirely on hearsay, unlike Dr. Marcus' application of his specialized training to the autopsy findings and facts from the crime scene that were already in evidence, concerning how the victim fell and the position of the body. **R. 1602-03** (*in camera*). See also **R. 1612; 1629-30**.

²⁹ See, e.g., *State v. Lopez*, 306 S.C. 362, 367, 412 S.E.2d 390, 393 (1991) (treating physician and pathologist properly allowed to testify regarding "battered child syndrome" and "shaken baby syndrome"); *State v. Von Dohlen*, 322 S.C. 234, 471 S.E.2d 689 (1996) (upholding trial court's decision to allow forensic pathologist to testify, during sentencing, about the amount of pain victim suffered); *Tyner*, 273 S.C. at 652, 258 S.E.2d at 562; *State v. Allen*, 2013 WL 5926964, 11 (Hawai'i App., Oct. 31, 2013) ("because defensive wounds relate to discovering the cause and manner of death, which is within the realm of forensic pathology, the matter falls within the scope of Dr. Goodhue's expertise. The Circuit Court did not abuse its discretion in allowing Dr. Goodhue to testify as a forensic pathologist and to address the topic of 'defensive wounds'"); *United States v. Ebron*, 683 F.3d 105 (5th Cir. 2012) (expert's testimony, in defendant's murder trial, opining that the wounds found on murder victim's body were consistent with a victim being restrained from behind while being stabbed from the front, was reliable, for purposes of the expert witness rule where expert witness used his many years of experience as a forensic pathologist in providing his opinion regarding the cause and manner of victim's death, and, in arriving at his opinion, the witness relied on a couple of articulable facts: the cluster of stab wounds and the quantity and placement of defensive wounds); *McGowen v. State*, 859 So.2d 320, 335-36 (Miss. 2003) ("a forensic pathologist may testify as to what produced [a victim's] injuries ... and what trauma such an injury would produce ... A forensic pathologist may also testify about 'wounds, suffering, and the means of infliction of injury,' since it falls within his or her area of expertise. Furthermore, a forensic pathologist may testify as to whether a particular instrument or weapon in evidence was consistent with particular injuries to a victim"); *Government of V.I. v. Sampson*, 94 F. Supp. 2d 639 (D.V.I. 2000) (once forensic pathologist was determined to be competent to testify as expert, he could testify as to

forensic pathologist was sufficient to permit him to render the challenged opinion, which related to the manner of death (*i.e.*, the death was a homicide), and Parker's complaint goes to the weight that he thinks jurors should have assigned to that opinion as opposed to its admissibility.

Also, the probative value of Dr. Marcus' testimony was not substantially outweighed by its prejudicial effect under Rule 403, SCRE. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *State v. Fripp*, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct.App.2012) (quoting Rule 704, SCRE). The claim he was not the "best" qualified doctor to provide such testimony is a matter of weight for the jurors. *Holbrook v. Lykes Bros. Steamship Co., Inc.*, 80 F.3d 777, 782 (3rd Cir. 1996). Moreover, whether or not Parker killed Bryan in self-defense or murdered him in an effort to frame him for Tammy's murder, as the prosecution theorized, was a central issue in the case; and the State bore the burden of disproving self-defense by proof beyond a reasonable doubt. *See State v. Burkhardt*, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002). Also, Dr. Marcus' opinion was extremely probative on this issue because it helped to circumstantially establish that Bryan was murdered and was not killed in self-defense, despite the testimony from the first two officers who saw Bryan's body that he was holding the .9 mm in his left hand, since he would not have been able to grip the weapon in his left hand.

reasonableness of medical care given to victim before her death from complications of stab wound, even though pathologist was not a surgeon; any doubts about qualifications went to weight, not admissibility) *See also Pagan v. State*, 830 So.2d 792 (Fla. 2002), *cert. denied*, 539 U.S. 919 (2003) (in murder trial, medical examiner was properly allowed to give expert testimony concerning likelihood that breaking through tempered glass would cause injuries, where his qualifications were explored prior to his testimony, testimony was connected to facts already introduced, and his scientific knowledge was useful to assist jurors in understanding whether perpetrators would have been injured by breaking through sliding glass doors of victims' home; medical examiner testified to his years of experience with glass and with injuries caused by it, and opinion was based in scientific principle and explained testimony indicating that neither perpetrator was injured during break-in); *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 (1997) (pathologist's opinion concerning direction from which bullets were fired and possible position of victim was admissible in murder prosecution, as pathologist was in best position to assist jury in understanding angles of wounds and determining whether angles of wounds were consistent with circumstances at crime scene).

Nor was this opinion prejudicial in the evidentiary sense of the term. To the contrary, although an x-ray depicting the fractured ulna was introduced, Parker had successfully moved to exclude autopsy photographs of Tammy's injuries. **R. 1471-81**. As a result, the State did not offer the autopsy photographs of Bryan's injuries (St.'s Ex.s 465-82) into evidence. **R. 1512**. Also, this portion of Dr. Marcus' direct examination was very brief. Moreover, Parker cross-examined Dr. Marcus at length and exposed every perceived weakness in his opinion. Parker established that Dr. Marcus prepared a six page written report, but he did not include the opinion that Bryan could not have held a gun; he heard that Parker was a bookie when he went to the scene on April 13th; he was aware that some of the investigators felt that there were "suspicious circumstances" surrounding the two deaths; there was "a full-fledged" investigation" ongoing at the time that he prepared his report; he had never met Parker before; he did not go in the attic when he went to the Parkers' house on the 13th; Dr. Marcus was aware that Bryan was found with a gun in his hand but Dr. Marcus had not spoken to the first two officers who found Bryan's body; although Dr. Marcus opined that Bryan had flexor and extensor muscles in the left arm, he could not name all of the muscles that were injured and would have to refer to a book on anatomy to name them; he had never heard of the term "cataleptic rigidity," but he had heard of "cadaveric spasm" or "death grip;" the investigators in this case had consulted with him and had mentioned the term death grip; he had searched relevant literature for articles related to holding a weapon but did not find any; the description of Bryan's killing as provided to him was consistent with a "highly emotional circumstance," which is also present in cases involving cadaveric spasm, as explained by a Wikipedia article utilized by Parker on cross-examination;³⁰ he agreed that a cadaveric spasm could result in a person grasping a gun, but in his "medical

³⁰ The article that counsel utilized is found at http://en.wikipedia.org/wiki/Cadaveric_spasm.

opinion, based on the shots to ... the forearm, and falling over,” he opined that “the gun fell out of [Bryan’s] hand;” and he probably first expressed his opinion in this regard at the time he performed the autopsy, but he was never asked to prepare diagrams supporting it. **R. 1569-75; 1578-85.** Further, the trial judge instructed jurors that simply they were not bound to accept an expert’s opinion simply because the opinion was admissible. Rather, she explained that “it is evidence for you to use in any way you see fit and give it the weight and credibility you believe is appropriate.” **R. 3158.**

Parker was not prejudiced by the introduction of Dr. Marcus’ opinion, even assuming *arguendo* that was wrongly admitted, because admission of his opinion could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991); *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584. There was overwhelming evidence of Parker’s guilt for both crimes, and the introduction of this opinion does not have any effect on his guilt for murdering Tammy Parker. Also, the judge instructed jurors on consideration of expert opinions. At worst, his opinion was cumulative to his other opinion testimony that established the same point and to which Parker did not object. *See State v. Kirton*, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct.App. 2008) (“The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence”); *State v. Haselden*, 353 S.C. 190, 196-97, 577 S.E.2d 445, 448-49 (2003). Of greatest importance, he did not object to the following questions and answers:

- Q And what would [a fractured ulna] have done to his ability to use his arm?
- A Well, it would have been very, very difficult, if not impossible. He has got a broken arm. A broken arm is a painful thing.
- Q There was also other damage, other than just the break in the bone?
- A Well, you get soft tissue. Any time you have a projectile going through tissues, soft tissues, you're going to get some, you know, hemorrhage,

destruction of the tissues, and so forth, that are also in that vicinity because of the energy and the disruption that occurs.

R. 1535, II. 13-25.³¹ Because the challenged opinion was merely cumulative to other evidence that was admitted without objection, including an almost identical opinion by Dr. Marcus, there could not be any prejudice from the trial judge's ruling and her ruling must be affirmed.

CONCLUSION

Therefore, this Court should deny certiorari.

Respectfully submitted,

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June 3, 2015.

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³¹ Further, Parker did not object to Dr. Marcus' opinion that a gunshot wound that went through Bryan's forearm fractured his left ulna, left "a hole that looked like disks [from the .410 shell] were coming through and then where the BB-type shot went through." The gunshot then continued and caused a grazing wound to Bryan's thigh and a grazing wound to the chest. Dr. Marcus recovered "numerous ... BB-type shots" and a fragmented disk from the arm. Parker likewise did not object to testimony that this wound "severed soft tissue and so forth." **R. pp. 1532-35.**

Inv. Travis Holdorf explained on cross-examination that "[i]n defensive tactics they teach you that the way you can disarm someone is by punching right there (indicating). Just a punch. Not making a golf ball size hole in someone's arm. It will dislodge it." **R. 2264.** Maj. James Smith testified, without objection, that he had seen the wound and described it as "substantial," stating that "you could literally put a golf ball through the hole in [Bryan's] foreman." **R. 2448.** Likewise, Parker did not object when Maj. Smith repeated Dr. Marcus' opinion. **R. 2447.** Also, on cross-examination, Lt. Scott McDonald described the wound as the size of a "ping pong ball" and testified that "[m]edical experts said that "there is no way a person could have held that gun at that point." **R. 1249.** Finally, Maj. Smith testified that investigators found blood on Bryan's left palm that was not associated with a wound to his hand. "There should have been a void there. If the gun was pressed against that palm, there should have been a void where that gun was, but there was no void, there was blood in that area. ... [T]hat was one of these forensic details that was problematic to us." **R. 2450-51.**

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2016-000524
Opinion No. 2015-UP-574 (S.C. Ct. App. filed Dec. 30,2015)

THE STATE,

Respondent,

vs.

BRETT D. PARKER,

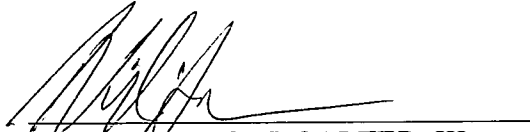
Petitioner.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert M. Dudek, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589 Columbia, S. C. 29211-1589.

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

This 3rd day of June, 2016.



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