

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

APPEAL FROM RICHLAND COUNTY
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Certiorari to the Court of Appeals

Opinion No. 5295 (Ct. App. filed Feb. 11, 2015)
Appellate Case No. 2010-177147

EDWARD FREIBURGER

RESPONDENT,

v.

STATE OF SOUTH CAROLINA

PETITIONER.

AMENDED APPENDIX
VOLUME III of V

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INDEX

INDEX	i
TRIAL TRANSCRIPT- JULY 29 – AUGUST 2, 2002	1
CLERK OF COURT RECORDS	1008
FINAL BRIEF OF APPELLANT	1011
FINAL BRIEF OF RESPONDENT	1065
FINAL REPLY BRIEF OF APPELLANT	1097
SUPPLEMENTAL RECORD ON APPEAL	1120
SOUTH CAROLINA SUPREME COURT OPINION	1151
APPELLANT’S PETITION FOR REHEARING	1160
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT	1176
RESPONDENT’S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT	1266
APPLICATION FOR POST-CONVICTION RELIEF	1303
RETURN.....	1311
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	1319
SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF	1326
NOTICE OF INTENT TO RELY UPON DEPOSITIONS, AFFIDAVITS, AND OTHER DOCUMENTARY EVIDENCE.....	1333
THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF	1341
OBJECTION TO USE OF AFFIDAVITS, DEPOSITIONS, AND OTHER DOCUMENTARY EVIDENCE IN LIEU OF LIVE TESTIMONY	1348

PRETRIAL BRIEF	1361
FOURTH AMENDED APPLICATION FOR POST-CONVICTION RELIEF	1506
POST-CONVICTION RELIEF HEARING TRANSCRIPT: AUGUST 13, 2009	1514
EXHIBITS FROM AUGUST 13, 2009 HEARING	1736
Applicant's #2: Résumé and CV of Adina Schwartz	1736
Applicant's #3: Affidavit of William Thompson	1746
Applicant's #4: Affidavit of William Thompson	1750
Applicant's #5: Affidavit of William Tobin	1753
Applicant's #6: Affidavit of Alicia Carriquiry	1776
POST-CONVICTION RELIEF HEARING TRANSCRIPT: OCTOBER 8, 2009	1782
EXHIBITS FROM OCTOBER 8, 2009 HEARING	1829
Respondent's #10: Pre-trial Motion and Memorandums	1829
Respondent's #11: Transcript dated July 25, 2002	1848
Applicant's #1: Affidavit of John Delgado	1908
Applicant's #2: Transcript of Kansas v. Denny	1911
ORDER OF DISMISSAL	2069
MOTION TO ALTER OR AMEND JUDGMENT	2110
REPLY TO APPLICANT'S RULE 59(e) MOTION	2119
59(e) MOTION HEARING TRANSCRIPT: JULY 8, 2010	2125
ORDER DENYING APPLICANT'S 59(e) MOTION	2150
NOTICE OF APPEAL OF PCR	2155
PETITION FOR A WRIT OF CERTIORARI	2157

MOTION TO HOLD TIME LIMITS FOR THE RETURN TO PETITION FOR WRIT OF CERTIORARI IN ABEYANCE WHILE THE PETITIONER REMOVES/SUPPLEMENTS THE APPENDIX WITH THE REQUIRED DOCUMENTS PER RULE 243(f), SCACR	2187
MOTION TO CORRECT THE APPENDIX AND TO FILE A SUPPLEMENTAL APPENDIX.....	2195
ORDER FILED APRIL 13, 2011	2199
2 ND MOTION TO HOLD TIME LIMITS FOR THE RETURN TO PETITION FOR WRIT OF CERTIORARI IN ABEYANCE WHILE THE PETITIONER REMOVES/SUPPLEMENTS THE APPENDIX WITH THE REQUIRED DOCUMENTS PER RULE 243(f), SCACR	2201
REPLY TO RESPONDENT’S MOTION TO HOLD TIME LIMITS FOR FILING THE RETURN IN ABEYANCE.....	2209
ORDER DENYING 2 ND MOTION DATED OCTOBER 19, 2011	2211
RETURN TO PETITION FOR WRIT OF CERTIORARI	2212
PETITIONER’S REPLY	2238
ORDER GRANTING CERT	2251
BRIEF OF PETITIONER.....	2252
BRIEF OF RESPONDENT	2286
PETITIONER’S REPLY BRIEF	2306
ORDER RELEASING APPLICANT’S EXHIBIT #11 (DATED OCTOBER 20, 2014)	2321
RESPONDENT’S LETTER DATED OCTOBER 22, 2014 WITH EXHIBITS	2323
PETITIONER’S LETTER DATED OCTOBER 24, 2014.....	2331
OPINION NO. 5295	2333
PETITION FOR REHEARING.....	2347

PETITIONER’S RESPONSE IN OPPOSITION TO RESPONDENT’S PETITION FOR REHEARING	2360
ORDER DENYING PETITION FOR REHEARING	2372

1 THE CLERK: AIMEE DEWHITT, WAS THIS YOUR
2 VERDICT?

3 JUROR: YES.

4 THE CLERK: IS IT STILL YOUR VERDICT?

5 JUROR: YES.

6 THE CLERK: JIMMY BOYD, WAS THIS YOUR VERDICT?

7 JUROR: YES, MA'AM.

8 THE CLERK: IS IT STILL YOUR VERDICT?

9 JUROR: YES, MA'AM.

10 THE CLERK: THE JURY HAS BEEN POLLED, YOUR
11 HONOR.

12 THE COURT: ALL RIGHT. LET ME REMIND THE PRESS
13 NOW THE POLLING OF THE JURY AND THE NAME CALLING IS NOT TO
14 BE PUBLISHED.

15 ALL RIGHT. MR. FOREMAN AND LADIES AND GENTLEMEN
16 OF THE JURY, THIS WILL CONCLUDE YOUR SERVICE IN THIS CASE.
17 LET ME THANK YOU FOR YOUR PARTICIPATION.

18 AS THE ATTORNEYS TOLD YOU DURING THE COURSE OF
19 THEIR CLOSING ARGUMENTS, I CERTAINLY CONCUR WITH, YOU ALL
20 PAID VERY CLOSE ATTENTION TO THE ENTIRE CASE. IT'S BEEN A
21 DIFFICULT CASE FOR BOTH SIDES BECAUSE OF A LOT OF ISSUES.

22 IT'S HARD ON THE TRIAL JUDGE, AS A MATTER OF
23 FACT, BECAUSE SOME OF THE LAW, OBVIOUSLY, HAS CHANGED
24 SINCE 1961

25 YOU ASKED THE QUESTION ABOUT CERTAIN RECORDS,

1 MILITARY RECORDS. WHILE THEY WERE NOT ALLOWED INTO
2 EVIDENCE, THAT WAS BASED ON A DECISION THAT MR. FRIEBURGER
3 WAS A.W.O.L. AT THE TIME, AND THAT -- I MADE A DECISION
4 THAT WOULD BE MORE PREJUDICIAL THAN PROBATIVE THAN JUST TO
5 OFFER IT IN AS EVIDENCE OF FLIGHT. FOR THAT REASON, THE
6 MILITARY RECORDS WERE NOT ALLOWED IN. FOR WHATEVER
7 REASON, THE STATE CHOSE NOT TO PUT THE OTHER RECORDS IN.

8 ALL RIGHT. THE CLERK WILL MEET YOU BACK IN THE
9 JURY ROOM AND GO OVER THE INFORMATION ABOUT YOUR
10 EXEMPTIONS AND ALSO APPRISE YOU OF HOW YOU ARE PAID AND
11 THAT SORT OF STUFF.

12 NOW, WITH REGARD TO YOUR NOTES, THOSE ARE YOUR
13 NOTES, YOU TAKE THEM HOME, THROW THEM AWAY OR GIVE THEM TO
14 THE CLERK. SHE'LL TEAR THEM UP OR WHATEVER YOU'D LIKE TO
15 DO. DON'T LEAVE THEM LAYING AROUND. THEY'RE YOURS.

16 IF YOU WISH, I'LL BE GLAD TO COME BACK AND
17 ANSWER ANY QUESTIONS, IF THAT'S THE CASE, OR YOU ARE
18 WELCOME TO STAY FOR SENTENCING. YOU CAN MAKE THAT CHOICE,
19 OKAY.

20 DO YOU WANT TO STAY AND WATCH THE SENTENCING, IS
21 THAT...

22 ALL RIGHT. IF YOU WANT TO, LET ME JUST LET THE
23 ONES OF YOU WHO DO NOT WANT TO, IF YOU WANT TO GO ON BACK
24 INTO THE ROOM, THE CLERK WILL MEET YOU BACK THERE IN A
25 MINUTE.

1 (WHEREUPON, THOSE MEMBERS OF THE JURY WHO WISHED
2 TO LEAVE LEFT THE COURTROOM).

3 THE COURT: MOTIONS?

4 MR. DELGADO: YOUR HONOR, WE'D RENEW ALL MOTIONS
5 WE MADE NOT ONLY IN LIMINE BUT DURING THE COURSE OF THE
6 TRIAL, SPECIFICALLY TWO MOTIONS FOR THE VERDICT OF
7 ACQUITTAL WERE MADE AT THE CONCLUSION OF THE STATE'S CASE
8 AND, OF COURSE, AT THE CONCLUSION OF ALL THE EVIDENCE.

9 THE COURT: ALL RIGHT. I THINK MS. EARLY AND I
10 HAVE GONE BACK OVER ALL OF THE PARTICULAR OBJECTIONS IN
11 THE CASE, AND I'M SATISFIED WITH REGARD TO, OBVIOUSLY, YOU
12 PREVAILED ON THE MIRANDA ISSUES WITH REGARD TO THE
13 STATEMENTS.

14 WITH REGARD TO THE SEARCH, I'M SATISFIED THAT
15 THEY'VE MET THE TERRY REQUIREMENTS.

16 WITH REGARD TO THE ANCIENT DOCUMENT RULES, I'M
17 CONFIDENT THAT ALL OF THE PAWNSHOP RECORDS, THE HOTEL
18 RECORDS, WILL CLEARLY MEET THAT TEST.

19 WITH REGARD TO THE OFFENSE REPORT, EVERYTHING
20 THAT WAS IN THE REPORT, EXCEPT FOR TWO THINGS, WERE
21 VERIFIED BY WITNESSES WHO TESTIFIED LIVE. SO EVEN IF THAT
22 WAS AN ERROR, IT WOULD BE HARMLESS.

23 THE ISSUE ABOUT THE AMOUNT OF THE FARE AND THE
24 AMOUNT OF THE MILEAGE, BASED UPON MY VIEW, THE RECORD ON
25 THAT DOCUMENT HAD INDICIA OF RELIABILITY. I ALLOWED THAT

1 IN.

2 IT WAS A RECORD PURELY TO RECORD THE KNOWLEDGE
3 AND IT WAS FAIR MR. FRIEBURGER WAS NOT A TARGET OF THE
4 INVESTIGATION AT THAT TIME. HE DIDN'T KNOW EXACTLY HOW
5 ANYTHING HAPPENED.

6 I'M CONFIDENT THE RECORD IS CLEAR, SO I WILL
7 DENY YOUR MOTIONS FOR A NEW TRIAL.

8 MR. DELGADO: YES, SIR. ARE YOU READY?

9 THE COURT: YES, SIR.

10 DOES THE STATE WISH TO BE HEARD?

11 SENTENCING:

12 MR. MCMAHON: YOUR HONOR, I HAVE, JUST FOR
13 PURPOSES OF THE RECORD, I HAVE TALKED WITH MR. JOYNER
14 SINCE THE RETURN OF THE VERDICT, WHO IS PRESENT IN THE
15 COURTROOM.

16 ON BEHALF OF THE FAMILY OF THE VICTIM, HE DOES
17 NOT WISH TO ADDRESS THE COURT AT THIS TIME. MR. STONE,
18 EARL STONE, JAMES STONE'S BROTHER, MR. ORNER'S OTHER
19 STEPSON, HAD TO LEAVE.

20 HE'S NOT IN THE BEST OF PHYSICAL HEALTH AND WAS
21 UNABLE TO STAY FOR THE RETURN OF THE VERDICT.

22 YOUR HONOR, YOU KNOW WHAT HIS PRIOR RECORD IS
23 FROM THE HEARINGS. HE WAS FOUND GUILTY OF THE CARRYING
24 ARMS IN TENNESSEE; THAT HE WAS TURNED OVER TO THE MILITARY
25 POLICE AUTHORITIES AND PLACED IN THE STOCKADE AT FORT

1 MCPHERSON, GEORGIA, THEREAFTER TRANSFERRED TO THE STOCKADE
2 AT FORT LEAVENWORTH, KANSAS AND WAS GIVEN A DISHONORABLE
3 OR BAD CONDUCT DISCHARGE FROM THE UNITED STATES ARMY
4 SOMETIME TOWARDS THE END OF 1961, I BELIEVE.

5 I REALIZE THAT YOU HAVE NO DISCRETION, AS I
6 UNDERSTAND, WHAT THE LAW WAS IN 1961, THAT YOU HAVE NO
7 DISCRETION IN YOUR SENTENCING, SO I SEE NO POINT IN
8 BELABORING THE FACT AS FAR AS ANY OTHER PRIOR RECORD OR
9 CHARACTER OR ANYTHING OF THAT NATURE.

10 THE COURT: ALL RIGHT.

11 MR. MCMAHON: THANK YOU, YOUR HONOR.

12 THE COURT: MR. DELGADO.

13 MR. DELGADO: YOUR HONOR, I THINK THE SOLICITOR
14 IS CORRECT. WE'RE NOT GOING TO BELABOR THIS. THIS IS THE
15 MOST DIFFICULT THING TO EVER HAPPEN TO THIS MAN AND HIS
16 FAMILY.

17 I WOULD LIKE TO SAY TO YOU, YOUR HONOR, THAT
18 WHAT I KNOW OF HIM AND WHAT I KNOW OF THIS FAMILY HAS NOT
19 CHANGED ONE BIT. I FIND HIM TO BE A MAN OF INTEGRITY AND
20 HONOR.

21 HE IS COMMITTED TO HIS FAMILY AND TO HIS
22 COMMUNITY. HE IS LOVED BY THEM. I WANT HIM TO HEAR THAT,
23 AND THEY WILL CONTINUE TO SUPPORT HIM NO MATTER WHAT.

24 I UNDERSTAND THE COURT HAS NO DISCRETION. WE
25 HAVE NOTHING FURTHER AT THIS TIME.

1 THANK YOU.

2 THE COURT: ALL RIGHT. ON INDICTMENT
3 2001-GS-40-2955, UNDER THE LAW IN PLACE IN 1961, THE
4 SENTENCE OF THE COURT IS THAT YOU, EDWARD FRIEBURGER, BE
5 CONFINED TO THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
6 FOR THE PERIOD OF YOUR NATURAL LIFE.

7 THAT IS UNDER THE TEN-YEAR PAROLE ELIGIBILITY
8 ISSUE AND NOT SUBJECT TO 85 PERCENT.

9 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)
10
11
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25

1
2 CERTIFICATE OF REPORTER:
3
4

5 STATE OF SCOUTH CAROLINA)
6 COUNTY OF RICHLAND)
7
8

9 I, KAPEN TRACY, OFFICIAL COURT REPORTER FOR THE 5TH
10 JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY
11 CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND
12 COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND
13 EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE,
14 RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR
15 RICHLAND COUNTY, SOUTH CAROLINA, ON THE 29TH DAY OF JULY
16 THROUGH THE 2ND DAY OF AUGUST, 2002.

17 I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL
18 NOR INTEREST TO ANY PARTY HERETO.
19

20 NOVEMBER 5, 2002
21

22 Karen Tracy
23 KAREN TRACY, COURT REPORTER
24

25 MY COMMISSION EXPIRES: 07/06/04

STATE OF SOUTH CAROLINA

COUNTY OF Richland

STATE VS.

AKA: Edward Freiburger

Race: W Sex: M Age: _____

DOB: / / SS#: _____

Address: _____

DL# _____ SID#: _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2001 -GS- 40 - 2955

A/W#: 6205559

Date of Offense: 2/28/01

S.C. Code §: 16/3/10

CDR Code #: 011116

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS TO: Murder

in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 011116

☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of LIFE days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for _____ days/months jail time. LIFE under the law in place in 1961

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:\$ _____

§14-1-206 (Assessments 100%)\$ _____

§14-1-211(A)(1) (Surcharge)\$ _____

§14-1-211(A)(2) (Surcharge)\$ _____

§56-5-2995 (DUI Assessment)\$ _____

3% to County (if paid in installments)\$ _____

TOTAL\$ _____

ATTEST

A TRUE COPY

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

PRESIDING JUDGE

Judge Code: _____

Sentence Date: 8/1/02

Court Reporter: Tracey

1008 Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT FOR MURDER

At a Court of General Sessions, convened on June 13, 2001,
the Grand Jurors of RICHLAND County present upon their oath:

COUNT ONE - MURDER
FRIEBURGER (HFF)
That EDWARD FRIEBURGER
did in Richland County on or about February 28, 1961,
feloniously, wilfully and with malice aforethought, kill one John Orner
by means of shooting him in the head
and that the said victim died as a proximate result thereof.

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

Walter B. Giesi
SOLICITOR

WITNESSES

Metz, RCSD

Det. Brian Metz

DOCKET NO. 01-65-40-02955

The State of South Carolina,

RICHLAND

County of _____

COURT OF GENERAL SESSIONS

#100

JUNE

TERM

2001

THE STATE

vs.

FRIEBURGER

EDWARD FRIEBURGER

ARREST WARRANT NO. G205559

ACTION OF GRAND JURY

TRUE BILL

Angela Thompson
Foreman of Grand Jury

VERDICT

GUILTY

Indictment for Murder

S. C. Code Section 16-3-10 Felony
0116

Scott D. [Signature]
Foreman of Panel

8/1/02
Date:

ATTEST
A TRUE COPY

Barbara L. Scott
Clerk of Court

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Henry F. Floyd, Circuit Court Judge

Case No. 01-GS-40-2955

The State **Respondent,**

v.

Edward Freiburger, ... **Appellant.**

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	2
Statement of the Facts	3
Arguments	
I. The trial court erred in denying Appellant's motion to suppress the gun which was allegedly confiscated as the result of the search by Trooper Meredith in 1961	29
II. The trial court erred in denying Appellant's motion to suppress the gun which was allegedly confiscated by Trooper Meredith because the State failed to establish an adequate chain of custody	35
III. The trial court erred in admitting into evidence certain pawn shop records under the "Ancient Documents" exception to the Hearsay Rule	37
IV. The trial court erred in admitting into evidence certain pawn shop records under the Business Records as Evidence Act	39
V. The trial court erred in admitting evidence that the Appellant was stationed at Fort Leavenworth, Kansas	41
VI. The trial court erred in denying Appellant's motion for mistrial or, alternatively, for a curative instruction as to improper comments made by the solicitor in opening statement	42
VII. The trial court erred in denying Appellant's motion for a directed verdict	43
Conclusion	49

TABLE OF AUTHORITIES

Cases

<i>DeBoard v. State</i> , 160 Tenn. 51, 22 S.W.2d 235 (1929)	31
<i>Gray v. State</i> , 207 Tenn. 39, 336 S.W.2d 22 (1960)	32
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	42, 43
<i>Johnson v. Pritchard</i> , 302 S.C. 437, 395 S.E.2d 191 (Ct. App. 1990)	38
<i>Knowles v. Iowa</i> , 525 U.S. 113 (1998)	32-34
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	34
<i>Minnesota v. Dickerson</i> , 508 U.S. 366 (1993)	30
<i>Maryland v. Buie</i> , 494 U.S. 325 (1990)	30
<i>Old Chief v. United States</i> , 519 U.S. 172 (1997)	41
<i>Robertson v. State</i> , 184 Tenn. 277, 198 S.W.2d 633 (1947)	31
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973)	29
<i>Sibron v. New York</i> , 392 U.S. 40 (1968)	30
<i>State v. Arnold</i> , 351 S.C. 302, 569 S.E.2d 379 (Ct. App. 2002)	44
<i>State v. Butler</i> , 353 S.C. 383, 577 S.E.2d 498 (Ct. App. 2003)	29, 30, 32
<i>State v. Dean</i> , 282 S.C. 136, 317 S.E.2d 744 (1984)	30
<i>State v. Glenn</i> , 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997)	36
<i>State v. Kahan</i> , 268 S.C. 240, 233 S.E.2d 293 (1977)	36
<i>State v. Martin</i> , 340 S.C. 597, 533 S.E.2d 572 (2000)	3, 44
<i>State v. Miller</i> , 287 S.C. 280, 337 S.E.2d 883 (1985)	45
<i>State v. Mitchell</i> , 341 S.C. 406, 535 S.E.2d 126 (2000)	44

<i>State v Moultrie</i> , 316 S.C. 547, 451 S.E.2d 34 (Ct. App. 1994)	30
<i>State v Mouzon</i> , 321 S.C. 27, 467 S.E.2d 122 (Ct. App. 1995)	45
<i>State v Owens</i> , 291 S.C. 116, 352 S.E.2d 474 (1987)	43, 44
<i>State v Peake</i> , 302 S.C. 378, 396 S.E.2d 362 (1990)	44
<i>State v Schrock</i> , 283 S.C. 129, 322 S.E.2d 450 (1984)	3, 45-46
<i>Stevens v Allen</i> , 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999)	40
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	29, 30, 31, 32, 33, 34
<i>Twelfth RMA Partners, L P. v. National Safe Corp.</i> , 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999)	40
<i>United States v. Moore</i> , 817 F.2d 1105 (4 th Cir. 1987)	30
<i>United States v Sharpe</i> , 470 U.S. 675 (1985)	31
<i>Warden v State</i> , 214 Tenn. 314, 379 S.W.2d 788 (1964)	31
<i>Ybarra v. Illinois</i> , 444 U.S. 85 (1979)	30

Statutes

U.S. Const. amend. IV	29
S.C. Code Ann. § 19-5-510 (1976 & Supp. 2002)	39, 40

Rules

Rule 403, SCRE	41
Rule 404(b), SCRE	41
Rule 803, SCRE	37
Rule 803(6), SCRE	40

Rule 803(16), SCRE	37
Rule 901, SCRE	38

STATEMENT OF ISSUES ON APPEAL

- (I) Did the trial court err in denying Appellant's motion to suppress the gun which was obtained as the result of the search by Trooper Meredith in 1961?
- (II) Did the trial court err in denying Appellant's motion to suppress the gun which was allegedly confiscated by Trooper Meredith because the State failed to establish an adequate chain of custody?
- (III) Did the trial court err in admitting into evidence certain pawn shop records under the "Ancient Documents" exception to the Hearsay Rule?
- (IV) Did the trial court err in admitting into evidence certain pawn shop records under the Business Records as Evidence Act?
- (V) Did the trial court err in admitting evidence that the Appellant was stationed at Fort Leavenworth, Kansas?
- (VI) Did the trial court err in denying Appellant's motion for mistrial or, alternatively, for a curative instruction as to improper comments made by the solicitor in opening statement?
- (VII) Did the trial court err in denying Appellant's motion for a directed verdict?

STATEMENT OF THE CASE

This is a murder case. The victim, John Orner, was a taxicab driver who was found shot to death on March 3, 1961. The exact time and place of Mr. Orner's death has never been established.

Appellant Edward Freiburger was indicted approximately 40 years later. A jury trial was held from July 29, 2002 through August 2, 2002. At the close of the State's case Appellant moved the court for a directed verdict of acquittal, which the trial court denied. The case was submitted to the jury, which returned a verdict of guilty.

This appeal follows.

FACTS

SCOPE OF REVIEW - CIRCUMSTANTIAL EVIDENCE

When a motion for a directed verdict is made in a criminal case, the trial judge is concerned with the existence or non-existence of evidence, not its weight. *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984). In a circumstantial evidence case, the trial judge should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. *State v. Schrock*. It is the judge's duty to submit the case to the jury where the evidence is circumstantial, if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced. *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000).

With this scope of appellate review in mind, the testimony reveals the following facts.

Thomas Joyner

Mr. Joyner's wife was the victim's step-daughter. (R. p. 17). The Joyners lived next door to Mr. Omer and were familiar with his habits. (R. p. 18). Mr. Omer, a veteran of World War I and World War II, owned a cab and was affiliated with State Cab Company. (R. p. 19). Mr. Omer mainly worked through the cab stand near the main gate at Ft. Jackson. (R. p. 20). He liked to work nights, and liked to work paydays at Ft. Jackson. (R. p. 25). His routine was to head out Percival Road, stop at a small Deli, and take the most direct route home through Ft. Jackson (R. pp. 25, 27-28).

Mr. Joyner was familiar with Mr. Omer's cab and the meter in his cab. (Tr. p. 232).

On March 1, 1961, Mr. Omer did not come home. (R. p. 21). This was unusual, since Mr.

Orner usually came home from his shift around 11:00 p m. (R. p. 21). The family reported him missing and his cab was found on March 1, 1961. Mr. Orner was not in the cab. (R. p. 22).

SLED analyzed sand found in the cab and looked in an area of the County where the particular type of sand was located. (R. p. 23). On March 3, 1961, Mr. Orner's body was found off Highway 601 near the Calhoun County line. (R. p. 24). Mr. Joyner and his brother identified Mr. Orner's body. (R. p. 24).

Frank Revetta

Mr. Revetta had been a traffic safety officer with the City of Columbia but was retired. (R. pp. 29-30). He was working the 11:00 p.m. shift on February 28, 1961, and patrolling south of Taylor Street. (R. p. 31). He received a call that evening that the Columbia Police Department was looking for a cab. (R. p. 32).

Sometime between 7:15 and 7:45 a.m. Mr. Revetta located a cab fitting the description in the [REDACTED] next to the DeSoto Hotel. (R. pp. 32, 35, 36). The cab was isolated and no one was around it (R. p. 36). Mr. Revetta notified headquarters and secured the area. (R. pp. 33, 34). Mr. Orner was not in the cab. (R. p. 34). As soon as an investigator arrived Mr. Revetta left the scene.

Charles Clark

Mr. Clark was an officer of the Columbia Police Department in February 1961. (R. p. 37). He worked "Beat 3," which was a warehouse district in what is now known as the Columbia Vista. (R. p. 38). In March 1961, he worked the midnight to 8 a.m. shift. (R. p. 39).

On February 28, 1961, he attended roll call at 11 30 p.m. and went out on the streets at midnight. (R. p. 40). He did not recall seeing a cab on Assembly Street. (R. p. 41).

At the March 1 and March 2, 1961, roll calls, Clark was advised of the discovery of the cab. (R. p. 41). The cab was found near Crown Loan and the DeSoto Hotel. (R. pp. 42-43). There were several pawnshops nearby, including Berry's Loan and Army Store, Freed's Jeweler's, and Capitol Loan and Pawn. (R. pp. 44, 45, 46). There were a number of bars and restaurants on Main Street in the same area. (R. pp. 46-47).

Mr. Clark testified the City had an ordinance requiring pawn shops to keep records of items taken in on pawn. (R. p. 48). The shop was required to give the person's name, description of the article, the amount of the loan, and serial numbers. (R. p. 48). The record included any items sold. (R. p. 49).

Mr. Clark identified the missing person report filed March 1, 1961, regarding Mr. Orner's disappearance. (R. pp. 50-51).

Mr. Clark testified the cab dispatcher reported that Mr. Orner received his last call at 11:15 p.m. on February 28, 1961, to go to the N.C.O. Club at Ft. Jackson. (R. pp. 53-54).

Sergeant Hartsell processed the cab, which was towed to a parking lot at police headquarters. (R. p. 54). Sgt. Hartsell found blood and items in the cab. (R. p. 54).

Lila Russ

Ms. Russ was 77 years old and her parents owned Capital Loan Office. (R. pp. 55-56). She worked for Capital Loan in 1961. (R. p. 57). Ms. Russ testified regarding how she recalled the pawn shop operating. A person would bring in collateral and borrowed money with it. The

person was given a ticket with a number that is identical to the ticket on the collateral. (R. p. 58).

When the person presented the ticket they could recover the item. (R. p. 58).

Ms. Russ stated that the pawn shop also sold items, including guns. (R. p. 58). Not all of the guns sold were taken in on pawn. (R. p. 58). The pawn shop bought guns from wholesalers and distributors, including H&R, and sold lots of new guns. (R. p. 59) A person could pawn a gun and recover it upon payment of money with charges, and if the item was not picked up by a certain period of time, the pawn shop had the right to sell it. (R. p. 59).

Ms. Russ stated she did not remember what the Federal Firearm requirements were, but the shop kept a book for the Federal Government. (R. p. 60). She stated the book was kept in the normal course of buying and selling firearms. (R. p. 60).

Ms. Russ stated the paperwork they used, a card, was courtesy the City of Columbia. (R. pp. 60, 62). It was a card containing the name of the gun, what the item was, the type, the serial number, and the manufacturer. (R. p. 60). The buyer had to sign his or her name and had to give identification (R. p. 60). Ms. Russ stated she did not know where the shop got the address since all the buyer had to do was sign the card. (R. p. 60).

Ms. Russ testified if the shop took a gun in pawn, it was reported on a log sheet. (R. p. 61). She stated they did not have to report guns purchased where the information went into the federal firearms book. (R. p. 61). The information on the cards was filled out at the time the gun was purchased or sold. (R. p. 61).

If the gun was pawned the shop reported it to the City. (R. p. 61). If the gun was a new gun, the transaction only had to go into a book when the shop purchased the guns (R. p. 61).

Ms. Russ identified State's Exhibits 22 and 23. (R. p. 62). She stated the writing looked

like the way her father did the computations on the sales. (R. p. 62). Ms. Russ recognized some of the writing on the front of Exhibit 23, but was not sure of the figures. (R. p. 62). She guessed them to be her father's figures. (R. p. 63) Ms. Russ identified the document as an authentic Verifax copy of a document that would have been kept at Capital Loan concerning the sale of a particular firearm. (R. p. 63).

Ms. Russ stated under "article" was writing which was apparently her father's. (R. p. 64). She stated the initials "L.H." meant "left-handed wheeler," which was an expression her father used to described a gun which was all in one piece. (R. p. 64). The serial number for the particular gun was "W 9428." (R. p. 65).

Ms. Russ noted two entries for H&R Model 732 guns which came to Capital Loans on July 30, 1960. (R. pp. 68-69). The document listed the sale of a .22 caliber blue H&R with serial number 9948 on February 28, 1961 to "Edward E. Freebuger." (R. pp. 68-73, 79). Ms. Russ stated that while the writing said the gun was a .22 caliber weapon, her father must have been in a hurry and the records show the gun was actually a .32 caliber. (R. p. 73). The address for the purchaser was listed as "[REDACTED], Ft. Wayne, Indiana" (R. pp. 70, 72), and the initials "W.M." also appeared. (R. p. 70). Bullets were sold along with the gun. (R. pp. 74-75, 78-79). Ms. Russ stated that the handwriting "appeared" to be that of her father. (R. p. 72). Ms. Russ testified the daily reports were kept in the normal course of the business. (R. p. 75).

On cross-examination, Ms. Russ stated the Verifax copy was a photocopy of the original document. (R. pp. 80-81). She stated that none of the handwriting on State's Exhibit 25 was hers, but was "apparently" her father's writing. (R. pp. 82-83, 84-85; 486). She did not recognize the signature on the card. (R. p. 82).

Ms. Russ had nothing to do with the sale of the gun on February 28, 1961. (R. p. 84). She stated she may have filled out the "material" part and stamped the date after the sale. (R. p. 84). She stated that although the size was listed as ".22" she thinks her father made a mistake. (R. pp. 85-86; 486).

Ms. Russ mentioned that the Verifax copy had to have been made at some time, but she did not know when. (R. p. 87). She stated she had the original in her possession. (R. p. 87). Counsel objected to the photocopy since the State had stated the original was not available. (R. pp. 87-91).

Ms. Russ thereafter stated that the entry listing the gun as a ".22" was an error, probably due to her father being in a hurry. (R. p. 92). She stated that she believes an H&R .32 and .22 look exactly alike unless "you open them and look at the cylinder and then look at the barrel." (R. p. 92).¹

Ms. Russ went back to the log book and checked the number corresponding to a .32, and found there were two .32 caliber pistols brought in and purchased at the same time. (R. pp. 92-93). She described 6 guns, all which say "622." (R. pp. 94-95). There was writing over portions where the numbers "622" were struck and "929" was added. (R. p. 95). These "scratch overs" were errors in the book. (R. p. 96). Ms. Russ identified the marks as a mixture of handwriting by her and her father. (R. p. 96).

On the line stating "Edward Freiburger," Ms. Russ stated "it would either be one of (sic) the other because nobody had access to this except us." (R. p. 96). She then speculated that it was

¹ The number "32" on Exhibit 25 has clearly been written over with something else. Furthermore, the serial number "W 9948" appears to have been changed.

hers. (R. pp. 96-97).

Ms. Russ again testified regarding the "daily sheets," State's Exhibit No. 29. (R. pp. 97-98). She stated that the handwriting was a combination of hers and her father's. (R. p. 98). She added that off and on they had several employees, but they were not involved in the paperwork. (R. pp. 98-99).

Ms. Russ stated that during the relevant time period she could not remember the number of soldiers who shopped at the pawn shop. (R. p. 100). Some were customers and others were simply curious. (R. pp. 100-101). She had no recollection about the details of February 28, 1961. (R. p. 101). She stated "I can identify handwritings...to a degree, but if you get in a hurry and write rapidly...then I might not could identify that." (R. p. 101).

On the card (R. p. 486), when the pawn shop sold items, buyers had to sign for them. (R. pp. 101-102). She is not sure where the address would have come from. (R. p. 102). She stated they always required identification, and "he may well have given his driver's license and address... They're supposed to, the other one could have been Fort Jackson." (R. p. 102). She could not recall whether I.D. cards or driver's licenses had photographs on them in 1961 (R. p. 102).

Curtis Boone

Curtis Boone testified *in camera* that he had not seen the original document from which State's Exhibit 25, the Verifax copy, was made. (R. pp. 103-110). Following this testimony the Court ruled Ms. Russ had authenticated the document, and "you don't have to worry about the ancient document rule or the business records exception." (R. p. 110). The Court added that even

if the document did exist, the "copy has been in existence for more than 20 years, been in the custody of the police, so it's obvious -- it probably was in their possession for 40 years so I don't know." (R. p. 110). The document was accordingly admitted.

L.B. Harmon

Mr. Harmon was 87 years old. From the 1940s through the 1960s he had been a law enforcement officer. (R. p. 111). In 1961 Mr. Harmon worked for SLED. (R. p. 112).

Mr. Harmon did not recall the details of the discovery of Mr. Orner's body, but he did go to the scene. (R. p. 115). He did not go to the location where the cab was found. (R. p. 116).

Mr. Harmon was present for a portion of the autopsy. (R. p. 117). Dr. Lindler recovered three (3) pieces of lead that looked like parts of a bullet. (R. p. 118).

SLED's ballistics expert, Millard Cate, examined the fragments and as a result the officers were looking for a Harrington & Richardson .32 revolver, "because Cate had one just like it." (R. p. 118).

Mr. Harmon described the scene on Highway 601 where Mr. Orner's body was recovered. (R. p. 119). The body was lying just off the highway on an embankment. (R. pp. 119-120).

Carl Stokes

Mr. Stokes had been employed with SLED and worked with Mr. Cate, the forensics examiner, in the firearms and fingerprint lab. (R. pp. 121-122). Mr. Stokes was Mr. Cate's first "understudy." (R. p. 123). Mr. Stokes was qualified as a firearms identification expert. (R. p. 124).

On March 3, 1961, Mr. Stokes and Mr. Cate went to Dunbar Funeral Home to assist in the recovery of the bullet from Mr. Orner's body. (R. p. 125). Stokes and Cate recovered the bullet, which was in three fragments. (R. pp. 126-127). Mr. Stokes took the fragments into his possession that date. (R. p. 128). The fragments remained in SLED custody, and Mr. Stokes identified the vials containing the fragments. (R. pp. 128-129). The fragments weighed about 93 grains in total. (R. p. 130).

Mr. Stokes determined the fragments were fired from an H&R .32 revolver. (R. p. 131). He testified about how he determined the bullet was fired from a revolver as opposed to an automatic pistol, and how he determined it was an H&R. (R. pp. 132-133). Mr. Stokes also testified the bullet had a "lupaloy" coating, which was a brand name for Remington. (R. p. 133). Mr. Stokes had a weapon to compare, and examined two H&R .32 caliber revolvers: one had serial number 9893 and the other was number 9948. (R. p. 134).

Mr. Stokes test fired both weapons and excluded the first one (#9893). (R. pp. 135-136). He was not able to exclude the other gun (9948), which came from a soldier. (R. p. 136). Mr. Stokes stated that he compared the identifying characteristics of 9948, and there was an insufficient number of striations for the individual type for SLED to conclude that 9948 fired the bullet, to the exclusion of all other weapons. (R. pp. 136-137). Mr. Stokes stated the gun could have fired the bullet, or could not; he was unable to exclude the gun based upon the examination done in 1961. (R. p. 137).

On cross-examination, Mr. Stokes stated that Mr. Cate was an excellent teacher, and was very demanding. (R. p. 138). Mr. Cate and Mr. Stokes trained Mr. DeFreese, and Mr. Cate trained Ira Parnell. (R. pp. 138-139). Mr. Cate worked for SLED for almost 30 years. (R. p. 139).

Mr. Cate often said "accentuate the positive, eliminate the negative, and never mess with Mr. In Between." (R. p. 140). Mr. Cate attempted to avoid an inconclusive diagnosis on a bullet. (R. p. 141). Mr. Cate would do everything possible to identify any weapon SLED obtained, and had very few "inconclusives." (R. p. 141). Mr. Cate felt a projectile would leave enough identifying characteristics for them to pick up on. (R. p. 141). Mr. Cate and Mr. Stokes worked a great number of hours on this particular case. (R. pp. 141-142).

Mr. Stokes outlined the methods for identifying a gun that fired a bullet. (R. pp. 142-145). He stated they worked "real hard" to try and identify the weapon, but the subject gun and the fragments were inconclusive. (R. p. 146). Mr. Stokes stated, "There were an insufficient number of identifying characteristics for us to conclude that it was." (R. p. 146).

Mr. Cate did not like to have inconclusive results. (R. p. 147). If they disagreed, they would sit down and work harder. (R. p. 147). If Mr. Cate was alive he would stand by his inconclusive report. (R. p. 148). Mr. Stokes stands by his inconclusive report, as an expert in ballistics. (R. p. 148). Inconclusive means you just cannot tell. (R. p. 149).

Dr. George Lippard

Dr. Lippard was raised at the Gresham Hotel in Columbia. (R. pp. 150-151). Dr. Lippard worked at the Hotel and maintained the guest registry. (R. pp. 151, 153).

Dr. Lippard identified a registry page of March 2, 1961. (R. pp. 155, 157). One of the entries was "Edward E. Freiburger." (R. p. 158). Mr. Freiburger's address was listed as Ft. Jackson. (R. pp. 160, 161).

Gary Watts

Mr. Watts is the Richland County Coroner. (R. p. 162). In 1961, the coroner was active in investigations. (R. p. 163). Mr Watts reviewed the handwritten report from Dr. Lindler, who performed the examination on the decedent, Mr. Orner. (R. pp. 165-167). The conclusion was that the manner of death was homicide. (R. p. 167).

Clay Nichols

Dr. Nichols was a forensic pathologist at Palmetto Richland Hospital. (R. p. 168). He has performed 3,000 to 4,000 autopsies. (R. p. 168). He qualified as an expert in forensic pathology. (R. p. 169). The defense stipulated to the cause of death (R. p. 169), and Dr. Nichols stated the cause of death was a bullet wound to the head. (R. p. 170).

Dr. Nichols described the wounds and stated the bullet broke into three pieces. (R. p. 172). He stated the damage to Mr. Orner's brain caused the death. There was no evidence of burning around the wound (R. p. 173) The minimum distance for the shot was several inches. (R. p. 174). The wound was consistent with being shot from the back seat by a fare Mr. Orner picked up. (R. p. 174).

Gary Abersold

Mr. Abersold was in the Army in 1960. (R. p. 175). He met Mr. Freiburger at Leonardwood, and was in the same basic training company. (R. p. 176).

Mr Abersold stated there are 80 men in a platoon, and a company is made up of four platoons. (R. p. 177). Mr. Freiburger was in the same company but not in the same platoon. (R. p.

177). He knew Mr. Freiburger, however. (R. p. 177).

Mr. Freiburger was a private and was assigned to the same supply school training as Abersold. (R. p. 178). They slept in a bunkbed, with Mr. Freiburger in the lower and Abersol in the upper. (R. p. 178). The men were not allowed to have an automobile or civilian clothes, and could not get passes during basic training. (R. p. 179). They could get a pass during supply school. (R. p. 179).

A pass authorized the soldier to go off the base and either spend the night (an overnight pass) or a weekend pass without having to report back. (R. p. 180). Soldiers usually took a bus or a cab, and would go downtown to the bars. (R. p. 180).

Abersold was shipped to Ft. Dix in early March 1961. (R. p. 180). Mr. Freiburger did not go to Ft. Dix, and did not leave with them when they shipped out. (R. p. 181). Abersold never saw Mr. Freiburger again after supply school. (R. p. 181).

Abersold went to Germany in July 1961 and in September 1961. (R. p. 182). On July 28, 1961, he was interviewed regarding Mr. Freiburger. (R. p. 182). He reviewed the statements he gave at the time. (R. p. 183). Mr. Abersold had no independent recollection of some of the information on the statements. (R. p. 184). Mr. Abersol knew Mr. Freiburger, and over objection the trial court permitted Mr. Abersold to read from his 1961 statements. (R. pp. 185-192).

In July 1961, Mr. Abersold stated he accompanied Mr. Freiburger from Columbia to Fort Jackson. (R. p. 192). He stated that on one occasion they went into town to pawn a radio, then to a bar, where they had a few drinks before returning to the post. (R. p. 192).

Mr. Abersold read about Mr. Orner's murder in the newspaper, but did not hear any conversations about it. (R. p. 192). When asked by the investigator at first if he knew anything

that would throw light on the case, Mr. Abersold stated, "I have a live .32 caliber western round which I got from someone during supply school. I do not remember who gave me the round of ammunition." (R. p. 193, emphasis added).

In a second statement he gave investigators in September 1961, Mr. Abersold stated that towards the end of February 1961, he went to town on a pass, accompanied by Mr. Freiburger and a Mr. Henson. (R. p. 194). They went to town so that Mr. Freiburger could pawn his radio. (R. pp. 194-195). When Mr. Freiburger could not get the price he wanted, they left, went to a bar, had a few beers, and then went back to the post. (R. p. 195). When asked where he obtained the round of .32 caliber ammunition, Mr. Abersold stated, "Freiburger gave it to me." (R. p. 195) In his September 1961 statement, Mr. Abersold added, "Well, it was probably in the barracks when I got this ammo from him. I can't recall when he gave it to me or under what circumstances I got it from him." (R. p. 195). Mr. Abersold also stated:

All I can remember is that one day when we were by our wall lockers in our barracks at Jackson, Freiburger gave me this round of .32 caliber ammo, to me, and I recall him giving me two decks of playing cards. Freiburger had in his possession a carton of new playing cards in his possession.

(R. p. 196)

On cross-examination, Mr. Abersold stated he was 18 years old when he was in the Army. (R. p. 197). He stated nothing in particular caused him to remember the difference from the first statement to the second. (R. p. 197).

Cheryl Horton

Ms. Horton was 44 years old at the time of trial. (R. p. 198). Her parents, Joe and Nell

Berry, owned and operated Crown Loan and Office, a pawnshop on Assembly Street in Columbia. (R. pp. 198-199). Her uncle, Jake Berry, also had a pawnshop called Berry's Loan and Army Supply. (R. p. 200). Ms. Horton stated even though she was a small child in 1961, she became familiar with the practices in her parent's and her uncle's pawn shop (R. pp. 201-202, 203). She also stated that to her knowledge the records were kept in the normal course of business. (R. p. 202). Over Appellant's objection the Court admitted State's Exhibits 41 and 42. (R. pp. 202-203).

Ms. Horton stated the person in the store would fill out the card with the information about the item that was pawned and the person pawning the item. (R. p. 204). The person pawning the item would then sign the card. (R. p. 204).

Ms. Horton identified an entry for "Edward E Freiburger" for pawning an electric razor on February 17, 1961. (R. p. 204, 206). The identification he used was entered at the bottom. (R. pp. 205-206). The number looked like a military identification number. (R. p. 206). The address was "Company B, Ft. Jackson." (R. pp. 208, 210, 212). The Court admitted the card subject to the bench conference following the objection. (R. p. 205).

Ms. Horton stated the form was given to them by the Columbia Police Department. (R. p. 210). The Department required the card to be used by pawn shops. (R. p. 210). The card had to be submitted by 10:00 a.m. every day. (R. p. 211).

Arthur Tilbury

Mr. Tilbury was 59 years old and was from Indiana. (R. p. 213). He knew Ed Freiburger prior to and while they were in the military. (R. p. 213). They were born the same day in the same

hospital and lived next door to each other. (R. p. 213). They went into the military on the "buddy" plan. (R. p. 214).

Mr. Tilbury was in the same company with Mr. Freiburger but not in the same platoon. (R. p. 216). He knew Mr. Freiburger better than anyone in the company or platoon. (R. p. 216).

In 1961, Mr. Tilbury had an extended pass to go home to Indiana before departing for Alaska. (R. p. 221). His parents sent him money (R. p. 223) and he traveled to Indiana with Mr. Freiburger (R. p. 221). They traveled around March 10 or 12, and were gone three to six days (R. p. 221).

Sam Freed

Mr. Freed was 63 years old at the time of trial. (R. p. 233). He has lived in New York since 1965. (R. p. 234). Mr. Freed grew up in Columbia and his parents owned a jewelry, luggage and pawnshop. (R. p. 234). Mr. Freed participated in the store's activities and was familiar with the business records. (R. p. 236). He identified the logs required by the police department. (R. pp. 236-237).

Mr. Freed stated the person completing the yellow 3 x 5 card would get an identification from the individual and would include information about the pawned item and the person pawning the item. (R. pp. 238, 245). The description of the particular person at the bottom of the card was "probably" his mother's handwriting. (R. p. 238). The particular card was dated February 25, 1961 and was for a radio which was pawned for \$8.00. (R. pp. 239, 244, 250). The description of the person pawning the item was male, age 19, 5'8" tall, and weight of 160 pounds. (R. p. 239). The address was Fort Jackson, and the initials "W.S." meant "white soldier." (R. pp.

240, 244). The date on the ledger was stamped. (R. p. 251).

The store prepared the log for the police department. (R. p. 241). The entries were in his mother's handwriting. (R. p. 241). Mr. Freed identified one entry for "Edward Freiburger" from Fort Jackson for the Philco radio. (R. p. 242).

The item was redeemed on February 28, 1961, for \$8.00 plus interest. (R. p. 245). The person who redeemed the item had to have the pawn ticket. (R. pp. 245, 250).

On cross examination, Mr. Freed stated the information was originally taken on a 3x5 yellow card (R. p. 246). Certain forms were filled out and a daily report given to the Columbia Police Department. (R. pp. 247-248) The form had to be given to the police by 10:00 a.m. the next day. (R. p. 248). An officer would stop by and pick it up. (R. p. 248).

Mr. Freed noted a pawn number of the ledger - 9214. (R. p. 248). The entry was for "Edward Freiburger" and listed the address as Fort Jackson. (R. p. 249) All other names on the log page were soldiers from Fort Jackson. (R. p. 249).

Charles Clark

Mr. Clark testified there existed a relationship between the pawnshops and the City of Columbia. (R. p. 252). A city ordinance required pawnshops and pawnbrokers to fill out a slip giving any information on items pawned and bought. (R. p. 252). The shops furnished the information to the Columbia Police Department on a daily basis. (R. p. 252). They usually sent a detective by the pawnshop and picked the slips up daily, or twice a week. (R. pp. 252-253).

Mr. Clark was familiar with the pawn slips. (R. p. 253). He stated he was aware that they would be kept as part of the business records of the Columbia Police Department. (R. p. 253).

The Department used them to check for stolen or lost items. (R. p. 253).

Mr. Clark identified a pawn ticket from February 17, 1961. (R. p. 254). The ticket contained the name "Edward Frieburger," which should correspond to the name on the numbered receipt. (R. p. 254).

Mr. Clark stated that he was familiar with the location of Mr. Orner's cab when discovered by Officer Revetta on March 1, 1961. (R. p. 255). He stated from downtown Columbia to the location near Calhoun County where the body was found was was a "good long drive," approximately 25 miles. (R. pp. 256-257).

The cab was found on Assembly Street in Columbia. (R. p. 258). The Columbia Police Department had the ability to take latent fingerprints at the time. (R. p. 258). Mr. Clark did not know if any investigators attempted to lift prints. (R. p. 259). Mr. Clark stated that Sargent Hartell processed the cab, and it was possible he could not get a fingerprint. (R. pp. 263-264; 485)

There were four platoons at Ft. Jackson, and there were more than 80 men in some of the platoons. (R. p. 259) A "company" was 300 to 350 men, and a company had four barracks. (R. p. 259). The barracks were two stories, and there were about 40 men on the top floor and 40 men on the bottom. (R. pp. 260-261). There were 22 barracks at the Fort, which means about 1,600 men. (R. p. 262).

David Wilson

Wilson was a deputy with the Richland County Sheriff's Department. (R. p. 284). He worked with volunteer and retired investigators on "Cold Case" files. (R. p. 285). In 1999,

Wilson became aware of the Orner case. (R. pp. 286, 294).

In August 2000, Wilson reopened the Orner file and asked a current ballistics examiner to "relook" at the ballistic evidence collected in 1961. (R. p. 287). Wilson was aware that the bullet fragments had been examined in 1961 and the results were inconclusive. (R. pp. 287, 293). Wilson felt with the changes in technology, abilities and training in the forty years since that current experts should look at the evidence. (R. p. 288).

In February 2001, Wilson was advised of the results from SLED's re-examination of the bullet fragments. (R. pp. 288, 296-296). The results indicated either gun, or even an unknown gun, could have fired the fragments, and the results were "inconclusive." (R. pp. 297, 299-300). This means they are not confident and have a reason to doubt the suspect weapon is a match. (R. p. 301). Wilson consulted with assistant solicitor Johnny Gasser and obtained the resume of another ballistics examiner, John Cayton. (R. p. 289). With Gasser's agreement, Wilson contacted Cayton and requested he review the evidence. (R. p. 289).

Wilson transmitted the bullet fragments and two weapons originally investigated to Mr. Cayton. (R. p. 290). SLED paid Mr. Cayton \$1,300 for his work, which was half of the original bill, and the other half was paid by the solicitor's office or the clerk of court. (R. p. 293). Assistant solicitor Knox McMahon and investigator Ira Parnell made a trip to see Mr. Cayton, which resulted in a second bill from Mr. Cayton. (R. p. 293). As of the trial date the State had paid Cayton \$2,700 and owed about \$1,600 more. (R. p. 298).

Ira Parnell

Mr. Parnell was the supervisor of SLED's firearms identification laboratory. (R. p. 303).

Mr. Parnell knew Mr. Cate and was under his supervision in the past. (R. pp. 302-303).

In August 2000, Carl Craig, the civilian volunteer, and Brian Metz of the Richland County Sheriff's Department contacted him about the Orner case. (R. pp. 304-305). Mr. Parnell advised them that "against all odds" he did have the physical evidence from the forty-year old investigation. (R. p. 305). Mr. Cate had retired in 1977 and passed his open or unsolved cases to one of the other examiners. (R. p. 306). That examiner moved to another assignment and passed the file on the Parnell, who "kind of inherited" the evidence. (R. p. 306).

Parnell stated the physical evidence was in a box in his evidence room secured with evidence tape and was initialed. (R. p. 306). Parnell had looked into the box one time in the last twenty-nine years. (R. p. 306). When he opened it in 2000 the contents were in "pristine" condition (R. p. 306). The box contained two firearms and the three bullet fragments from the 1961 investigation. (R. p. 306).

Parnell described the box as an "old cardboard cigar box" which was white. (R. p. 307). Parnell was familiar with the name "Orner," so he knew he had the box with that name on it. (R. p. 307). Parnell advised Metz and Craig that he had the evidence and they asked him to re-examine it. (R. p. 308). On April 11, 2000, Investigator Wilson wrote Parnell requesting the re-examination of the evidence. (R. pp. 308-309).

Parnell identified items he found in the box, including the bullet fragments and the gun with serial number "9948." (R. pp. 309-310). A second weapon with the serial number "9893" was also in the box marked "Orner." (R. p. 311). He also found a test bullet Mr. Cate had fired through the suspect gun. (R. p. 312).

Parnell examined the evidence and determined both firearms were consistent with

markings on the bullet fragments. (R. pp. 309, 312). Parnell could microscopically differentiate between the two guns, and following the examination was unable to reach a positive conclusion because of the damage to the bullet fragments and the small amount of striated markings that were left. (R. pp. 313-314, 320, 321, 322). In February 2001, Parnell passed the evidence to Dan DeFreese for a "blind re-examination." (R. pp. 323-324). DeFreese did not know anything about the prior tests before the re-examination and his findings agreed with Parnell that the suspect pistol was "inconclusive." (R. p. 324) Another examiner, Vello Paavel, looked at the evidence and did not see anything that basically said "this is the gun." (R. pp. 325-326). The other examiners, David Collins and Kenneth Whittler, also found the examination was "inconclusive." (R. pp. 326-327, 331, 332). Parnell stated, "the bottom line is I can't say that there could not have been another gun somewhere, some time, that marked similarly." (R. pp. 333-334).

Mr. Parnell testified about the weight of the fragments and rendered an opinion that the bullet was a .32 Smith & Wesson long caliber projectile that had a "lubaloy" coating (R. pp. 315-317). Mr. Parnell the class characteristics on the bullet fragments were consistent with an H&R revolver. (R. pp. 318-319).

Mr. Parnell went to Kansas City with Mr. McMahon to meet with Cayton. (R. p. 321). He met with Cayton for several hours and discussed the case. (R. pp. 328-329).

Carl Craig

Mr. Craig was a retired law enforcement officer. He has worked for the University of South Carolina police department, SLED, and CID. (R. pp. 335-336). He was part of the Richland County Sheriff's Department's "cold case" volunteer group. (R. p. 337).

In September 1999, Captain Bill Brown contacted Craig to look at the Orner file. (R. pp. 338, 340). On September 10, 1999, Craig received the entire file from the Sheriff's Department's archives and he reviewed the file. (R. pp. 340, 341). Craig contacted Mr. Parnell about the evidence. (R. p. 342). Parnell searched the vault and produced two weapons as well as the forensic examinations from 1961. (R. p. 342).

Craig also saw a reference to Appellant and took steps to locate him in Indiana. (R. pp. 341, 343-344). Craig went to Indiana and met with Appellant (R. pp. 345-354, 360-361). When Craig returned from Indiana he requested a ballistics report and was told it was "inconclusive." (R. p. 355). The investigators decided to get an "outside second opinion" and obtained Cayton's name from several sources. (R. pp. 356-357, 358, 362).²

Craig sent the evidence to Cayton by Federal Express courier on February 8, 2001. (R. p. 358). They received a report from Cayton on April 2, 2001 and arrested Appellant thereafter. (R. p. 359).

John Cayton

At the time Mr. Cayton testified he had been a "firearms and tool mark" examiner with the sheriff's department in Johnson County, Kansas, since August 2001. (R. pp. 363, 367). He was proffered as a firearms examination expert. (R. p. 366).

Cayton was contacted by the Richland County Sheriff's Department in January 2001. (R. pp. 369-370, 388-389). At the time Cayton had a private consulting practice. (R. pp. 368, 372).

² Of course, rather than a "second" opinion, the agents were actually seeking an opinion in addition to the two SLED opinions and seven additional blind opinions which found no match.

Cayton's office was in a mobile office trailer in his yard. (R. pp. 389-390). Cayton's son, who also does forensic ballistics work, worked there with him. (R. p. 390). His laboratory was not accredited by the Association of Crime Lab Directors. (R. pp. 391-393).

Cayton was unaware of SLED's findings or conclusions (R. p. 371), although he would have gotten his information from the Sheriff's Department. (R. p. 389). Cayton received the bullet fragments in three vials, two .32 caliber model 732 revolvers, and one .32 caliber Smith & Wesson Long Caliber bullet. (R. pp. 378-379). Cayton found tissue on the fragments and soaked them to remove the material by "washing" the fragments. (R. pp. 381, 385-386). He concluded the fragments came from one bullet. (R. p. 383).

Cayton discussed State's Exhibit 6, the subject .32 H&R pistol. (R. pp. 383-384). He test fired both pistols and found they consistently marked bullets for him to compare with the murder bullet. (R. pp. 384-385). Cayton concluded the gun with serial number 9893 did not fire the fragments, and totally excluded the weapon. (R. p. 385). Cayton also concluded the gun with serial number 9948 (R. p. 484) fired the murder bullet to the exclusion of any other and every other H&R .32 revolver. (R. pp. 385, 387, 400).

Cayton discussed a case in which he mistakenly identified a bullet. (R. pp. 373, 395-397). The case involved a 1983 killing of a police officer. (R. pp. 373-374). Cayton called in outside experts to review his cases, and ultimately put into place a quality control procedure. (R. pp. 375-378, 398). On cross-examination, Cayton stated he made the mistake because no one checked his work. (R. p. 394). He admitted no one checked his work in this case either. (R. pp. 394, 399-400).

Cayton was paid as a private consultant, but as of the trial date he had not been paid

everything he was owed. (R. pp. 372, 387). He initially billed Richland County \$2,700 and provided an additional invoice for \$1,600. (R. p. 373). Cayton stated the State has to pay his bill regardless of the outcome of his testing. (R. p. 387).

David McClure

McClure is a DNA expert. (R. pp. 401-403). He testified that he examined the tissue material Cayton sent to SLED from the bullet fragment but the sample did not match Appellant or any other known sample. (R. pp. 404-408).

Rocky Stotts

Stotts is a detective with the Indiana State Police (R. p. 409) In September 2000 Stotts was asked to contact Richland County deputies Metz and Craig regarding an investigation. (R. p. 410). Stotts was told they were looking for Appellant and Arthur Tilbury. (R. p. 410). Stotts verified Appellant's address, and then met with the investigators on October 21, 2001. (R. p. 411).

The next day Stotts went to Appellant's address and asked him to come in to be interviewed. (R. p. 412). Appellant cooperated and came in to meet with Metz and Craig. (R. pp. 413-414, 416). The investigators asked Appellant if he remembered his time in the Army in 1961 and he indicated he did not remember. (R. p. 414). Appellant also did not recall speaking with Sheriff Sligh in the 1960s. (R. p. 414).

Stotts stated that Appellant was not under arrest and was free to leave that day. (R. p. 415). Appellant left of his own free will. (R. pp. 415, 417. The next day Stotts set up an interview

with Tilbury, and that was the extent of Stotts's involvement. (R. p. 415).

Brian Metz

Metz is a cold case investigator with the Richland County Sheriff's Department. (R. p. 418). In late 1999, Craig asked Metz to read the Orner file because of a request from Captain Brown. (R. p. 418). Metz stated the file had been in the care and custody of the Richland County Sheriff's Department for forty years. (R. p. 418).

Metz checked with the evidence department and with SLED ballistics section and located the bullet fragments and both guns. (R. p. 419). Metz asked SLED to re-examine the ballistics in the case after he reviewed Cate's original findings. (R. p. 420).

Metz reviewed the material and determined he wanted to speak with Appellant and Tilbury. (R. p. 421). He contacted Detective Stotts in Indiana and went to Indiana in October 2000. R. pp. 421-422). On October 22, 2000, Metz met with Appellant at the Sheriff's Department. (R. p. 423)

Metz told Appellant they wanted to discuss an old homicide case. (R. p. 423). Appellant responded by asking them if he had been in Columbia, and they said "yes." (R. pp. 423-424). He then asked if he had been in the Army, and they showed him a photograph of him in uniform. (R. p. 424, 435). Appellant then began to recall having been in Columbia in the Army, although he had problems remembering some things. (R. pp. 424, 434).

Metz asked Appellant if he recalled being interviewed twice by the Richland County sheriff but Appellant did not recall. (R. pp. 424-425). Appellant did not recall purchasing a handgun in South Carolina and Metz showed him the pawn receipt. (R. p. 425). Metz stated the

interview lasted about two hours and although Appellant could recall details about his life up until his time in Columbia, Appellant could not recall anything while he was at Fort Jackson. (R. pp. 426-427). Metz stated he noticed a change in Appellant's demeanor when asked about his time at Ft. Jackson. (R. pp. 431-432).

The investigation continued and in January or February 2001, Metz received the SLED ballistics report. (R. p. 429). Metz and Craig discussed getting an outside expert to examine the gun and Metz forwarded the evidence to Cayton. (R. p. 429). In the spring 2001, Cayton sent Metz his report. (R. p. 429).

Metz described measuring the mileage in the Columbia area where he surmised the track taken from Ft. Jackson to where the body was located and then back to Assembly Street in Columbia. (R. pp. 430-431). Metz admitted he did not know if the routes he traced were the same ones Mr. Orner took. (R. pp. 435-437).

Metz stated Appellant's military service number was R A 16685305, and Appellant was the same person Trooper Meredith arrested (R. p. 433) Metz also identified Appellant's fingerprints. (R. p. 433).

Chuck Earles

Earles is a fingerprint expert (R. pp. 438-439). He identified a fingerprint chart he prepared. (R. p. 439). Earles concluded Appellant was the same individual who was in the Army with service number 16685305. (R. pp. 440-443).

Directed Verdict Motion

The State rested its case and Appellant moved for a directed verdict. (R. pp. 444-448). Appellant argued the case was circumstantial, and there was no direct evidence linking Appellant with the death of Mr. Orner. (R. pp. 445, 446, 447). Appellant also pointed out the State did not establish where the crime scene occurred. (R. pp. 445-446). The trial court noted cases focusing on the State's inability to put a Appellant at a scene of the crime (R. p. 449), and the State argued the evidence surrounding the gun placed Appellant at the scene of the crime. (R. p. 450). The court denied the Appellant's motion (R. p. 450).

Marvin Dawson

Appellant presented the testimony of Marvin Dawson, a forensic document examiner. (R. pp. 451, 452). Mr. Dawson examined several known exemplars of Appellant's signature as well as the verifax copy of the pawnshop ticket purportedly bearing Appellant's signature. (R. pp. 453-462, 466). Dawson concluded the signature on the pawnshop ticket was not Appellant's signature. (R. pp. 463-465, 467, 468, 469).

Renewed Directed Verdict

The defense thereafter rested its case. (R. p. 470). Thereafter, Appellant renewed the directed verdict motion which the court denied. (R. p. 471).

ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE GUN WHICH WAS OBTAINED AS THE RESULT OF THE SEARCH BY TROOPER MEREDITH IN 1961

The trial court denied Appellant's motion to suppress the pistol allegedly confiscated from Appellant by Tennessee State Trooper Don Meredith when he stopped Appellant along a roadway in 1961. (R. pp. 265-266). Appellant contends the search conducted by Trooper Meredith exceeded the "stop and frisk" permitted by the Fourth and Fourteenth Amendments of the United States Constitution and applicable Tennessee State law. Accordingly, any evidence allegedly seized as a result of this illegal search should have been suppressed.

A. FEDERAL SEARCH AND SEIZURE LAW

The Fourth Amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; *State v. Butler*, 353 S.C. 383, 577 S.E.2d 498 (Ct. App. 2003). Warrantless searches are *per se* unreasonable under the Fourth and Fourteenth Amendments, subject to several specifically established and well-delineated exceptions. *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973). One such exception is the "stop and frisk" set out in *Terry v. Ohio*, 392 U.S. 1 (1968). A law enforcement officer, after providing identification, may detain a person in public to inquire about behavior which the officer reasonably suspects of being criminal. *Terry v. Ohio*. See also *State v. Butler* (an officer may stop and briefly detain and question a person for investigative purposes, without treading upon the Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of

probable cause for arrest, that the person is involved in criminal activity). Although the suspicion must be grounded in specific and articulable facts, *State v. Dean*, 282 S.C. 136, 317 S.E.2d 744 (1984), the officer is not constitutionally required to be certain that a crime has occurred when the stop is made. *United States v. Moore*, 817 F.2d 1105 (4th Cir. 1987).

The narrow scope of a *Terry* stop does not permit a frisk for weapons unless there is a reasonable belief or suspicion that the person being frisked is armed and dangerous. *Ybarra v. Illinois*, 444 U.S. 85 (1979); *State v. Butler* (under the mandates of *Terry*, a police officer must have a reasonable suspicion that an individual is armed and dangerous before conducting a pat down or frisk of the person). The question is whether a reasonable person in the position of the officer would believe the frisk was necessary to preserve the safety of the officer or others. *Terry v. Ohio*; *State v. Butler*. See also *State v. Moultrie*, 316 S.C. 547, 451 S.E.2d 34 (Ct. App. 1994) (when an officer is justified in believing that the suspect whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, the officer may conduct a protective pat-down search of the suspect's outer clothing to determine if the suspect is carrying a weapon).

Before a self-protective search will be sanctioned, an officer must be able to disclose the particular facts from which it was reasonable to infer that the suspect was armed and dangerous. *Sibron v. New York*, 392 U.S. 40 (1968); *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (officer must be justified in believing individual whose suspicious behavior he is investigating is armed and presently dangerous to the officer or others before officer may conduct pat-down search to determine if the person is carrying a weapon); *Maryland v. Buie*, 494 U.S. 325 (1990) (limited pat-down for weapons is authorized where a reasonably prudent officer would be warranted in

the belief, based on specific and articulable facts, and not on a mere inchoate and unparticularized suspicion or hunch, that he is dealing with an armed and dangerous individual). The duration of such a *Terry* investigative stop helps to determine the degree of intrusion and whether the detention is justified. *United States v. Sharpe*, 470 U.S. 675 (1985).

B. TENNESSEE SEARCH AND SEIZURE LAW IN 1961

Tennessee State law applicable at the time of the search, was set forth in the case of *Robertson v. State*, 184 Tenn. 277, 198 S.W.2d 633 (1947), in which the Supreme Court of Tennessee stated:

In the case of misdemeanors,....an officer may, without a warrant, arrest a person for a public offense committed or a breach of the peace threatened in his presence *With this exception, an officer has no right to arrest for a misdemeanor without a warrant. He has no right to make a search without a warrant except where he has made a lawful arrest; then the search of the person of the offender may follow*

Robertson, 184 Tenn. at 282-283 (emphasis supplied). The Court added:

When there is an intent to make a search and a seizure, no officer may, under the provisions of our Constitution herinbefore set out, make any search of the person or effects or properties of a citizen except a search of the person *following a lawful arrest*, unless he have a valid search warrant.

Id., 184 Tenn. at 283 (emphasis added). *See also Warden v. State*, 214 Tenn. 314, 379 S.W.2d 788 (1964) (in Tennessee it is well settled that an officer may make a constitutional search of the person of the defendant, even without a search warrant, provided the person is lawfully arrested and the search is "incident to the arrest"). *See also DeBoard v. State*, 160 Tenn. 51, 22 S.W.2d 235 (1929) ("breach of the peace" means the act complained of must either itself be violent, or of such a nature as that its tendency is to provoke or incite or lead others to violence or turbulence

of some kind); *Gray v. State*, 207 Tenn. 39, 336 S.W.2d 22 (1960) (breach of peace is a generic term including all violations of the public peace or order).

C. The Facts of This Case

In this case, the evidence is undisputed that at the time Trooper Meredith searched Appellant, Trooper Meredith did not have a warrant to search Appellant. Furthermore, Trooper Meredith had not arrested Appellant on any charge, and was not likely to have arrested Appellant for hitchhiking. (R. pp. 269-270, 281-282; 482). Trooper Meredith agreed that Appellant did not try to run from him, Appellant was "courteous" and "pleasant," and Appellant "obey[ed] every command that [Trooper Meredith] gave him." (R. p. 282). Mr. Meredith had no problems with Appellant whatsoever. (R. p. 282).

Trooper Meredith did not arrest everyone he found hitchhiking (R. p. 281), and, in fact he never charged Appellant with hitchhiking. (R. p. 283). Hence, under Tennessee law applicable at the time Trooper Meredith's search of Appellant was illegal.

Regarding Federal Search and Seizure law, there is no evidence Trooper Meredith had the necessary apprehension of danger to himself or others to justify a pat-down search of Appellant. Indeed, the only evidence is that Trooper Meredith had no fear of Appellant, but was merely conducting what he termed a "safety check." (R. pp. 270, 282). As this Court stated in *Butler*, "[t]he law is clear that there must be a showing that the officer had a reasonable fear for himself or for the safety of others to justify the greater intrusion of a pat-down." *Butler*, 353 S.C. at 393. Hence, Trooper Meredith's search was not permitted by *Terry v. Ohio* or the Fourth Amendment.

This case is similar to *Knowles v. Iowa*, 525 U.S. 113 (1998), in which a police officer

pulled over a driver for speeding and issued him a citation rather than arresting him, even though under Iowa law the officer might have arrested Knowles. The officer then conducted a search of the car and found marijuana and a "pot pipe." The officer arrested Knowles and charged him with violation of controlled substances laws.

Knowles moved to suppress the evidence obtained from the search on the basis that the search could not be sustained under the "search incident to arrest" exception recognized in *United States v. Robinson*, 414 U.S. 218 (1973), because Knowles had not been placed under arrest. The Iowa courts upheld the search under Iowa law. The United States Supreme Court reversed. The Court stated that in *Robinson*, the Court noted two historical rationales for the "search incident to arrest" exception: (1) the need to disarm the suspect in order to take him into custody; and (2) the need to preserve evidence for later use at trial. *Knowles v. Iowa*, 525 U.S. at 117. The Court held neither of the rationales justified the search in this case.

The Supreme Court noted that a custodial arrest involves "danger to an officer" because of "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station." *Knowles*, 525 at 117. The Court added that the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest. *Id.* A routine traffic stop, on the other hand, is a relatively brief encounter and is more analogous to a so called "*Terry*" stop than to a formal arrest. *Id.* Furthermore, while concern for officer safety is not absent in the case of a routine traffic stop, such concern justifies minimal intrusion, but does not by itself justify the often considerably greater intrusion attending a full field-type search. *Id.* The Court noted other reasons which might justify a search for weapons to protect themselves from danger, noting among other things that

officers may perform a "patdown" search upon a reasonable suspicion that a defendant may be armed and dangerous *Id*, at 117-118

The Supreme Court also found the second rationale, the need to discover and preserve evidence, did not support the search in this case. Once Knowles was stopped for speeding and issued the citation, all the evidence necessary to prosecute that offense had been obtained. *Id*, at 118. Accordingly, the Court held the search could not be upheld.

Like Knowles, Appellant was not placed under arrest prior to the search by Trooper Meredith; instead, Mr. Meredith searched Appellant *prior* to placing him under arrest for anything. The record is clear that Mr. Meredith did not intend to arrest Appellant for hitchhiking, and in fact Appellant was not charged with that offense. Instead, Appellant was charged with "carrying arms" and was then taken into custody. Under the analysis in *Knowles*, Trooper Meredith's search is not justifiable as a "search incident to arrest," nor is it supportable under a need to discover and preserve evidence. Furthermore, Trooper Meredith had no suspicion, much less a reasonable suspicion, that Appellant was armed and dangerous so as to justify a "patdown" search.

Evidence which is obtained through an illegal search is not admissible pursuant to the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. *Mapp v. Ohio*, 367 U.S. 643 (1961). The trial court therefore should have excluded the .32 Harrington & Richardson pistol which Trooper Meredith asserts he confiscated from Appellant as a result of the pat-down search he conducted in 1961.

Accordingly, this Court should hold that the search by Trooper Meredith was not a permissible search under applicable Tennessee law or under *Terry v. Ohio*, and the evidence

allegedly seized through that search should have been suppressed. Furthermore, this Court should reverse the trial court's decision admitting the gun, and should remand the matter for proceedings consistent with this Court's ruling.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE GUN WHICH WAS ALLEGEDLY CONFISCATED BY TROOPER MEREDITH BECAUSE THE STATE FAILED TO ESTABLISH AN ADEQUATE CHAIN OF CUSTODY

Trooper Meredith testified he confiscated a gun from Appellant on March 29, 1961 and maintained the gun in his custody until some later date. (R. pp. 271-272). Meredith stated that in 1961, the manner of maintaining custody of evidence was different. (R. p. 272). He stated he kept the gun at his home or in his car. (R. p. 273).

In April 1961, Sheriff Sligh contacted Meredith about the gun. (R. p. 272). Meredith still had the gun in his possession. (R. p. 273). Meredith was not certain of the exact date (R. p. 273), but Sheriff Sligh sent two deputies to Meredith's home to get the gun. (R. pp. 273-274).³

Three years later, in 1964, when testifying in an unrelated case, Meredith asked one of the lawyers about the gun. (R. p. 275). In 1964 Trooper Meredith received a letter regarding the weapon. (R. pp. 276, 278; 481, 488). The letter had identifying information about a gun, and mentioned the serial number "W 9948." (R. p. 279). This was the same number on the butt of State's Exhibit 6. (R. pp. 279, 280). At the trial of this case in 2001 Meredith agreed State's

³ Meredith stated "from what [he] understood" the officers were from the Richland County Sheriff's Department. (R. p. 274).

Exhibit 6 appeared to be the gun he took off of Appellant and gave to deputies in April 1961.⁴

While proof need not negate all possibility of tampering, the party offering a piece of physical evidence is required to establish, at least as far as practicable, a complete chain of the evidence, tracing possession from the time the evidence is acquired to the final custodian by whom it is analyzed. *State v. Kahan*, 268 S.C. 240, 233 S.E.2d 293 (1977) (victim's nightgown). Unless the item is fairly unique and readily identifiable, and the substance of which the item is composed is relatively impervious to change, tampering or alteration, the proponent of the evidence must establish an adequate chain of custody to provide a sufficient foundation. *State v. Glenn*, 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997)

In this case, Mr. Meredith testified he kept the firearm in his possession, took it to his home, and kept it in his car. (See also Court's Exh. 6; R. p. 482). Furthermore, he handed the gun over to unidentified sheriff's deputies in April 1961 without signing any kind of receipt or other documentation. In 1964, Richland County authorities suggested to Mr. Meredith in a letter that the gun with the serial number "W 9948" appeared to be the gun he confiscated from Appellant in March 1961. That gun was purportedly placed in a box at SLED.⁵ Later, in 2000, some 40 years later, Mr. Meredith agreed with the suggestion that State's Exhibit 6 appeared to be the gun he confiscated from Appellant in 1961.

Appellant contends that the State did not establish a chain of custody at all, much less as

⁴ This was the first time Trooper Meredith suggested State's Exhibit 6, the .32 H&R revolver with serial number "9948" was the same gun he took from Appellant in 1961.

⁵ Between 1961 and 2000, the gun was apparently removed several times and sent, without documentation, to various places for testing. The SLED possession was not completely documented during this time.

far as practicable under the circumstances of this case. Hence, the trial court should have granted Appellant's motion to suppress the gun. The 1964 letter suggested to Trooper Meredith that a gun with serial number "W 9948" was the weapon he confiscated three years earlier, but the State produced no evidence that prior to that date Trooper Meredith recorded that serial number prior to turning the weapon over to South Carolina authorities. (R. p. 488). That is, instead of Trooper Meredith stating the gun he turned over had the serial number "W 9948," he was told that number from authorities who had more than one H&R Model #732 revolvers they were inspecting.

Accordingly, this Court should reverse the trial court's decision admitting the gun as well as the 1964 correspondence into evidence.

III. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE CERTAIN PAWN SHOP RECORDS UNDER THE "ANCIENT DOCUMENTS" EXCEPTION TO THE HEARSAY RULE

The trial court erred in admitting into evidence pawn shop records under the "Ancient Documents" exception to the Hearsay Rule. (R. pp. 226-232). These documents were not properly authenticated and should not have been admitted pursuant to applicable Rules of Evidence.

Rule 803, SCRE, provides, in pertinent part:

The following are not excluded by the hearsay rule, even though the declarant is unavailable as a witness:

* * *

- (16) **Statements in Ancient Documents.** Statements in a document in existence twenty years or more *the authenticity of which is established.*

(Emphasis added). Authentication of evidence is governed by Rule 901, SCRE, which provides, in part:

(a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(8) *Ancient Documents or Data Compilation.* Evidence that a document or a data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

See also *Johnson v. Prichard*, 302 S.C. 437, 395 S.E.2d 191 (Ct. App. 1990) (under pre-SCRE case law, duly authenticated ancient documents of 30 years or more constitute an exception to the hearsay rule).

In this case, the State did not provide a sufficient basis for authentication of the documents in question. The documents involved included a "Verifax" copy of documents which had been kept at Capital Loan. The proponent of the documents, Ms. Russ, did not provide a sufficient foundation for admitting the documents. She testified about erroneous information and alterations on the documents and speculated that her father made the marks,⁶ made certain

⁶ See Tr. Pp. 308-309 ("That's probably my father's figures, I would probably say."); R. p. 64 ("Apparently, that was my father's [writing]."); R. p. 65 ("I believe it's W 9948; is that correct?"); R. p. 72 ("That seems to be ... my father's writing."); R. p. 78 ("That appears to be my father's [writing]."); R. p. 79 ("That appears to be my father's [writing]."); R. p. 82 (the handwriting on the document was "apparently" her father's); R. p. 83 ("That appears to be my father's [handwriting], because I don't think I used that expression."); R. p. 85 ("I think that my father made an error."); R. p. 94 (she believes the handwriting is her father's); R. p. 96-97

changes (R. p. 95), and made mistakes because he was in a hurry. (R. pp. 73-74, 86, 92, 96).⁷ In sum, the document was not an original document (R. pp. 81, 87, 97, 103-109), the "verifax copy" was not made in the Capital Loan office (R. pp. 82, 87), the salesperson did not testify (R. pp. 82, 83-84), the document did not match the daily sales records for the day (R. p. 86), the date stamp in the log book was added after the fact (R. . 84-85, 97), the police log for the particular gun was missing, the caliber of the gun was changed (R. p. 85), and the serial number on the ticket was altered.⁸

Without a proper foundation, the trial court should never have analyzed the admissibility of the evidence under the "Ancient Documents" rule. Accordingly, this Court should reverse Appellant's conviction and should remand the matter for proceedings consistent with this Court's decision.

IV. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE CERTAIN PAWN SHOP RECORDS UNDER THE "BUSINESS RECORDS AS EVIDENCE ACT"

The trial court erred in admitting into evidence the pawn shop records under the Business Records as Evidence Act.

Pursuant to S.C. Code Ann. § 19-5-510 (1976 & Supp. 2002):

A record of an act, condition or event shall, insofar as relevant, be

("And I don't know. That [handwriting] is probably mine.").

⁷ When asked about the change from ".22" to ".32," Ms. Russ stated, "But he went back and corrected it or I went – no, he went back and corrected it on the front " (R. p. 86).

⁸ See also R. p. 72, where Ms. Russ stated she did not recognize the handwriting on the card, but them speculated it was her father's handwriting. Furthermore, Ms. Russ agreed the documents "appear to be authentic." (R. p. 79).

competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.

Rule 803(6), SCRE, provides:

The following are not excluded by the hearsay rule, even though the declarant is unavailable as a witness:

* * *

- (6) **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however*, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Under both § 19-5-510 and Rule 803(6), the evidence must be given by a custodian or other qualified witness. *Twelfth RMA Partners, L.P. v. National Safe Corp*, 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999).

Even under Rule 803(6), a proper foundation must be laid for admittance of the evidence, and this includes a chain of custody. *Stevens v. Allen*, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999), *aff'd* 342 S.C. 47, 536 S.E.2d 63 (2000).

In this case, the State did not establish a sufficient foundation for admitting the evidence under § 19-5-510 or Rule 803(6). Accordingly, this Court should reverse the Appellant's conviction and should remand the matter for proceedings consistent with this Court's ruling.

V. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT THE DEFENDANT WAS STATIONED AT FORT LEAVENWORTH, KANSAS

The trial court admitted evidence that the Defendant was "stationed" at Ft. Leavenworth, Kansas. (R. pp. 5, 10, 353, 426). This was prejudicial error.

That Appellant was "stationed" at Ft. Leavenworth, Kansas, was completely irrelevant to any issue in the case. In view of the common knowledge that Ft. Leavenworth is a military prison, the prejudicial effect of this information far exceeded any probative value the information may have had. Rule 403, SCRE. *See Old Chief v. United States*, 519 U.S. 172 (1997) (the term "unfair prejudice" as to a criminal defendant speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged; the evidence has an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one, including generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged). This is particularly true where the State relied exclusively upon circumstantial evidence to obtain the conviction.

The trial court ruled the fact that Appellant had been arrested for "carrying arms" was not admissible under Rule 404(b), SCRE. (R. p. 7). However, the State was permitted to comment upon Appellant's detainment at Ft. Leavenworth for AWOL and achieve the very result Rule 404(b) seeks to prevent, that is, to try and establish Appellant had the character to commit a crime and therefore acted in conformity therewith.

In this circumstantial evidence case, this evidence was unduly prejudicial and should not have been admitted. It is clear that the jurors was interested in the records from Leavenworth, as they sent a note to the court inquiring about the military records the solicitor had in the

courtroom. (R. pp. 474-476, 477-478). The trial court could have prevented the jury from hearing about Appellant's presence at Ft. Leavenworth by permitting the State's witnesses to merely testify Appellant was stationed in Kansas, as Appellant's counsel suggested.

Accordingly, Appellant requests this Court find the trial court's ruling permitting the State's witnesses to testify that Appellant was "stationed" at Ft. Leavenworth was error and Appellant is entitled to a new trial.

VI. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL OR, ALTERNATIVELY, FOR A CURATIVE INSTRUCTION AS TO IMPROPER COMMENTS MADE BY THE SOLICITOR IN OPENING STATEMENT

The trial court erred in denying Appellant's motion for mistrial or, alternatively, for a curative instruction, due to improper statements made by the prosecutor during opening statements regarding Appellant's arrest for "carrying arms" in Tennessee.

In response to pre-trial motions, the trial judge ruled "*Gideon v Wainwright*, 372 U.S. 335 (1963) is retroactive and will apply to this conviction. You don't need the conviction. You only need the search issue to get the gun, so I would exclude any evidence of the conviction." (R. p. 7, lines 14-19).

During opening statements to the jury, the solicitor stated, "he had been arrested by the Tennessee Highway Patrol on March 29th of '61." (R. p. 11, lines 24-25). Appellant objected and, outside the jury's presence, moved for a mistrial or, alternatively, for a curative instruction. (R. p. 12, line 1 - p. 14, line 1). The trial judge then ruled that although evidence of the conviction was excluded, the State could bring forth the fact that Appellant was arrested for the offense of "carrying arms." (R. p. 13, lines 1-5). The judge denied the Appellant's motion. (R. p. 13, line

23; p. 15, line 2; p. 16, line 4). Appellant contends this was error.

Under *Gideon v. Wainwright*, the Sixth Amendment right to counsel under the United States Constitution applies to the States by operation of the Fourteenth Amendment. Thus, Appellant's arrest and plea to the charge of "carrying arms" should have been excluded since he was not represented, nor was he offered representation, at the time. The State was well aware of this and the trial judge's admonition the solicitor that *Gideon* applied retroactively to this case, yet the solicitor informed the jury of the arrest. The trial judge should have granted Appellant's motion for a mistrial or should have, in the least, sustained the objection and given a curative instruction to the jury.⁹

Accordingly, Appellant requests this Court review the matter and reverse the trial judge's ruling denying Appellant's motion for mistrial. The Court should remand the matter for a new trial consistent with this Court's ruling.

VII. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT

In this circumstantial evidence case, the trial court erred in denying Appellant's motion for a directed verdict of acquittal.

When the State undertakes to prove a crime by circumstantial evidence, the proof must point conclusively to the guilt of the accused and must be absolutely inconsistent with any other reasonable hypothesis. *State v. Owens*, 291 S.C. 116, 352 S.E.2d 474 (1987). That is, the evidence must produce a reasonable and moral certainty that the accused, and no one else,

⁹ In fact, the solicitor brought up the arrest for hitchhiking in the closing argument (R pp. 472-473).

committed the crime. *State v. Owens*. The trial court should grant a directed verdict motion where the evidence merely raises a suspicion that the accused is guilty. *State v. Martin* (possibility that car in defendant's possession on night of murder was parked at the victim's apartment complex the night the murder was committed, without any other evidence placing defendant at the scene, held not enough evidence to place defendant inside victim's apartment; trial court should have directed verdict of acquittal); *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000), *affirming* 332 S.C. 619, 506 S.E.2d 523 (Ct. App. 1998) (Court held defendant's fingerprint found on screen propped up against the victim's home was not sufficient to support conviction of first degree burglary where defendant had been in and around the victim's home three times prior to the burglary), *State v. Arnold*, 351 S.C. 302, 569 S.E.2d 379 (Ct. App. 2002), *cert granted* February 20, 2003 (Court of Appeals found evidence established only that the circumstances were strongly suspicious but fell short of providing a basis upon which the jury could have reasonably and logically determined defendant's guilt; the only evidence linking defendant with the crime was his fingerprint on a coffee cup lid in a vehicle which had been in the victim's possession at some time before he was killed). *See also State v. Owens* (finding evidence of a struggle at the victim's home, the fact the victim remained missing at the time of trial, the contents of a ransom note which stated victim was in author's custody and that provided correct driver's license number, in conjunction with defendant's taking of ransom money, sufficed to support conviction for kidnaping even though the victim was never found and there was no direct evidence linking defendant with the crime). *See also State v. Peake*, 302 S.C. 378, 396 S.E.2d 362 (1990) (finding trial court correctly denied defendant's directed verdict motion where there was evidence that witnesses saw defendant driving behind victim's car in the

direction of the murder scene, defendant's car was parked at the crime scene with victim's car, and fibers found at the scene were identical to carpet fibers found in defendant's car); *State v. Mouzon*, 321 S.C. 27, 467 S.E.2d 122 (Ct. App. 1995), *aff'd* 326 S.C. 199, 485 S.e.2d 918 (1997) (Court of Appeals reversed trial court's denial of defendant's directed verdict motion on conspiracy charges where the evidence merely raised a suspicion of the defendant's guilt).

The test for the sufficiency of circumstantial evidence is whether the evidence constitutes positive proof of facts and circumstances which reasonably tends to prove guilt, or from which guilt may be fairly and logically deduced, to the exclusion of any other reasonable hypothesis. *State v. Miller*, 287 S.C. 280, 337 S.E.2d 883 (1985).

In *State v. Schrock*, the Supreme Court of South Carolina noted that the evidence was exclusively circumstantial as nothing in evidence placed Schrock at the scene of the crime. The State presented witnesses who saw Schrock the day before the murders and the next morning, and described him as wearing tennis shoes. The closest any witness could place Schrock to the scene was approximately one mile "as the crow flies" or three to four miles by road. Investigators found Marlboro cigarette butts on the premises, and Schrock admitted to them he smoked that brand. Officers found footprints at the scene which were similar to footprints found in other areas where Schrock admitted he had been.

The Supreme Court stated that when the prosecution undertakes to prove the accused's guilt by circumstantial evidence, "not only must the circumstances be proven, but they must point conclusively – that is, to a moral certainty – to the guilt of the accused; they must be wholly and in every particular perfectly consistent with each other, and they must further be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused." *State v. Schrock*,

283 S.C. at 133. The Court also stated:

* * * By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act. [citations omitted]

Coming into Court, Schrock was clothed with the presumption of innocence. It was not incumbent upon him to prove that he was not guilty of these murders. On the other hand, the State, by issuing an indictment and bringing the case to trial, assumed the burden of proving that he was guilty beyond a reasonable doubt. If he was guilty, the State simply has not been able to muster circumstantial or direct evidence warranting that finding. The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict and a corresponding duty is imposed on this Court.

The evidence presented by the State in the instant case may raise a suspicion of Schrock's guilt, but it does not point conclusively, nor to a moral certainty, nor beyond a reasonable doubt, to his guilt. From the record before us, we can reach no other conclusion but that Schrock was entitled to a directed verdict of not guilty based on the lack of evidence.

Id., 283 S.C. at 133-134. Accordingly, the Court reversed and remanded for entry of a verdict of acquittal.

" In this case there is *no* direct evidence placing Appellant at the scene of the crime or showing Appellant had any part in the killing of Mr. Orner. First, there was *no* evidence Appellant was ever in Mr. Orner's cab or even in Mr. Orner's presence. The State did not produce any fingerprint evidence from Mr. Orner's cab, nor were there any witnesses produced who testified Appellant rode in any cab, much less Mr. Orner's cab, on the evening of February 28, 1961.

Second, there was *no* other forensic evidence to connect Appellant with Mr. Orner, the cab, or the murder scene. The officers thoroughly investigated both the location where Mr. Orner's body was found and the interior of Mr. Orner's cab, but nothing connected Appellant to either location. There were no fingerprints, palm prints, footprints, hair, blood, articles of

clothing, DNA, or any physical evidence which pointed to Appellant as Mr. Orner's killer. The State did not even produce evidence of the location of the crime.

The only piece of evidence which remotely ties Appellant to this crime is the gun Officer Meredith allegedly seized from Appellant in Tennessee on March 29, 1961, a full month following this crime. However, because that seizure was the result of an illegal search, that evidence should have been suppressed. Furthermore, the State did not present sufficient evidence of the continuity of the gun it produced at trial.

Furthermore, the evidence that this gun was the same gun used in the Orner murder was suspect at best. Two evaluations by SLED (one done at the time of the crime and another in March 2001) followed by seven blind evaluations by other forensic experts yielded results that were "inconclusive." It was not until the State, against its own policy, hired John Cayton from Kansas City, who was unaccredited, whose work was not verified, and who had a history of mistaken forensic identification, that a "positive" match between the gun and the bullet recovered from Mr. Orner was announced.¹⁰

The conviction in this case is based upon inferences drawn from tenuous circumstantial evidence. The State clearly did not remove the cloak of presumed innocence and did not meet its burden of proving, conclusively and beyond any reasonable doubt, that Appellant was guilty of the crime. The circumstantial evidence the State presented was not absolutely inconsistent with any other reasonable hypothesis and did not point, to a moral certainty, to Appellant's guilt.

Thus, the trial judge erred in refusing to grant Appellant's motion for directed verdict at

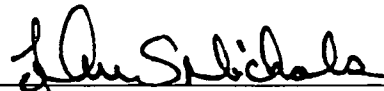
¹⁰ Cayton testified his son also did forensic ballistics work for his company. (R. p. 390). Cayton stated that despite his own procedures requiring verification, he did not have his son or anyone else verify the results in this case. (R. pp. 390-391, 394, 399-400).

the close of the State's case, and at the end of all of the evidence. This Court should reverse the conviction and remand the matter for the trial court to enter a judgment of acquittal.

CONCLUSION

For the reasons stated the Court should reverse Appellant's conviction of murder and remand the matter for entry of judgment of acquittal. Alternatively, the Court should rule that the trial court erroneously admitted several pieces of evidence causing undue prejudice to the Appellant and resulting in the denial of a fair trial, so that the Appellant is entitled to a new trial.

Respectfully submitted,



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December 3, 2004.

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

**Appeal from Richland County
Henry F. Floyd, Circuit Court Judge**

Case No. 01-GS-40-2955

THE STATE,

Respondent,

v.

EDWARD FREIBURGER,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
ARGUMENT	7
I. The trial court properly admitted the murder weapon into evidence because both the arrest and search of Frieburger were lawful	7
a. Trooper Meredith had probable cause to arrest Frieburger.....	7
b. Trooper Meredith's search of Frieburger was lawful, even though it immediately preceded the arrest	8
II. The trial court correctly admitted the murder weapon into evidence because it was properly authenticated	12
III. The trial court properly admitted the pawnshop records because Lila Russ appropriately authenticated them under Rule 901	13
IV. The trial court properly admitted the pawnshop records under Rule 803(6) because they were duly authenticated records of a regularly conducted activity	15
V. The trial court properly admitted evidence of Frieburger's sojourn at Fort Leavenworth because that evidence was not prejudicial	18
VI. The trial court properly denied Frieburger's mistrial motion because the solicitor did not mention Frieburger's conviction and because Frieburger did not object to the evidence upon which the remarks in the opening statement were based was properly admitted.....	20
VII. The trial court properly denied Frieburger's directed verdict motion because there was ample evidence of his guilt	22
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<u>Anderson v. State</u> , 354 S.C. 431, 581 S.E.2d 834 (2003).....	21
<u>Barna v. City of Perth Amboy</u> , 42 F.3d 809 (3d Cir.1994)	10
<u>Barry v. Fowler</u> , 902 F.2d 770 (9th Cir.1990)	10
<u>Doe v. Department of Health and Environmental Control</u> , 350 S.C. 243, 565 S.E.2d 293 (2002)	17
<u>Gassner v. City of Garland</u> , 864 F.2d 394 (5th Cir.1989)	10
<u>Gideon v. Wainwright</u> , 372 U.S. 335, 83 S. Ct. 792 (1963).....	20
<u>Jones v. State ex rel. Coffey</u> , 253 S.W.2d 740 (Tenn. 1952).....	7
<u>Louis Vuitton S.A. v. Spencer Handbags Corp.</u> , 765 F.2d 966 (2d Cir. 1985)	16
<u>Mutter v. Town of Salem</u> , 945 F.Supp. 402 (D.N.H.1996)	10
<u>Rawlings v. Kentucky</u> , 448 U.S. 98, 100 S. Ct. 2256 (1980)	8
<u>State v. Aragon</u> , 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003).....	14
<u>State v. Beam</u> , 336 S.C. 45, 518 S.E.2d 297 (Ct.App.1999)	21
<u>State v. Brisbon</u> , 323 S.C. 324, 474 S.E.2d 433 (1996).....	23
<u>State v. Duer</u> , 616 S.W.2d 614 (Tenn. Crim. App. 1981).....	11
<u>State v. Dunlap</u> , 346 S.C. 312, 550 S.E.2d 889 (Ct. App. 2001).....	21
<u>State v. Edwards</u> , 298 S.C. 272, 379 S.E.2d 888, <u>cert. denied</u> , 493 U.S. 895, 110 S. Ct. 246, 107 L.Ed.2d 196 (1989)	23
<u>State v. Gaster</u> , 349 S.C. 545, 564 S.E.2d 87 (2002)	14
<u>State v. Glenn</u> , 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997)	12
<u>State v. Grippon</u> , 327 S.C. 79, 489 S.E.2d 462 (1997)	23
<u>State v. Home</u> , 324 S.C. 372, 478 S.E.2d 289 (Ct. App. 1996).....	22, 23, 24

<u>State v. Hough</u> , 325 S.C. 88, 480 S.E.2d 77 (1996).....	21
<u>State v. Littlejohn</u> , 228 S.C. 324, 89 S.E.2d 924 (1955).....	23
<u>State v. Morgan</u> , 282 S.C. 409, 319 S.E.2d 335 (1984).....	22
<u>State v. Myers</u> , 359 S.C. 40, 596 S.E.2d 488 (2004).....	19
<u>State v. Owens</u> , 291 S.C. 116, 352 S.E.2d 474 (1987).....	22
<u>State v. Prince</u> , 316 S.C. 57, 447 S.E.2d 177 (1993).....	22
<u>State v. Schrock</u> , 283 S.C. 129, 322 S.E.2d 450 (1984).....	23
<u>State v. Simpson</u> , 325 S.C. 37, 479 S.E.2d 57 (1996).....	12, 18
<u>State v. Stokes</u> , 299 S.C. 483, 386 S.E.2d 241 (1989).....	23
<u>State v. Venters</u> , 300 S.C. 260, 387 S.E.2d 270 (1990).....	22
<u>State v. Wakefield</u> , 323 S.C. 189, 473 S.E.2d 831 (Ct.App.1996).....	23
<u>State v. Wilds</u> 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003).....	23
<u>State v. Williams</u> , 303 S.C. 274, 400 S.E.2d 131 (1991).....	22
<u>Stevens v. Allen</u> , 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999), <u>aff'd</u> 342 S.C. 47, 536 S.E.2d 63 (2000).....	16
<u>Terry v. Ohio</u> , 392 U.S. 1, 88. S. Ct. 1868 (1968).....	8
<u>United States v. Bizier</u> , 111 F.3d 214 (1st Cir. 1997).....	9, 10, 11
<u>United States v. Dhinsa</u> , 243 F.3d 635 (2d Cir. 2001).....	14
<u>United States v. Lee</u> , 317 F.3d 26 (1st Cir. 2003).....	11
<u>United States v. Lott</u> , 870 F.2d 778 (1st Cir.1989).....	10
<u>United States v. Ortiz</u> , 966 F.2d 707 (1st Cir. 1992).....	14
<u>United States v. Robinson</u> , 414 U.S. 218, 94 S. Ct. 467 (1973).....	10
<u>United States v. Thompson</u> , 409 F.2d 113 (6th Cir. 1969).....	8
<u>Warden v. State</u> , 379 S.W.2d 788 (Tenn. 1964).....	8

Statutes

S.C. Code Ann. § 19-5-510 (Law. Co-op. 1985).....	15
Tenn. Code Ann. § 40-7-103(a)(1)	7

Other Authorities

29A Am. Jur. 2d <u>Evidence</u> § 1037 (1994)	16
John W. Strong, 2 <u>McCormick on Evidence</u> (4th ed. 1992).....	12

Rules

Fed. R. Evid 901	14
S.C.R. Evid 803(16).....	14
S.C.R. Evid. 803(6).....	15
S.C.R. Evid. 901(a).....	14

STATEMENT OF ISSUES ON APPEAL

A. Appellant's Statement of Issues on Appeal.

- I. The trial court erred in denying Appellant's motion to suppress the gun which was allegedly confiscated as the result of the search by Trooper Meredith in 1961
- II. The trial court erred in denying Appellant's motion to suppress the gun which was allegedly confiscated by Trooper Meredith because the State failed to establish an adequate chain of custody
- III. The trial court erred in admitting into evidence certain pawn shop records under the "Ancient Documents" exception to the hearsay rule
- IV. The trial court erred in admitting into evidence certain pawn shop records under the Business Records as Evidence Act
- V. The trial court erred in admitting evidence that the Appellant was stationed at Fort Leavenworth, Kansas
- VI. The trial court erred in denying Appellant's motion for mistrial or, alternatively, for a curative instruction as to improper comments made by the solicitor in opening statement
- VII. The trial court erred in denying Appellant's motion for a directed verdict

B. Respondent's Statement of Issues on Appeal.

- I. Did the trial court properly admit the murder weapon into evidence when Trooper Meredith had probable cause to arrest Frieburger and when Trooper Meredith searched Frieburger immediately before arresting him?
- II. Did the trial court properly admit the murder weapon into evidence when that weapon was authenticated by showing its unique and identifiable characteristics, which rendered it relatively impervious to change?
- III. Did the trial court properly admit pawn shop records into evidence when those records were authenticated by a witness with knowledge of them?
- IV. Did the trial court properly admit pawn shop records into evidence

when the owner of the business that generated the records testified that they were kept in the normal course of her business?

- V. Did the trial court properly admit evidence that Frieburger was "stationed" at Fort Leavenworth when the court refused to admit evidence of his conviction for absence without leave and when Fort Leavenworth is home to many activities other than the military prison?
- VI. Did the trial court properly deny Frieburger's motion for a mistrial when evidence of his arrest was in fact admissible and adduced without objection?
- VII. Did the trial court properly deny Frieburger's directed verdict motion when there was substantial circumstantial evidence of his guilt?

STATEMENT OF THE CASE

Appellant Edward Frieburger was indicted by the Richland County grand jury on June 13, 2001 for the murder of John Orner. He was tried before the Honorable Henry F. Floyd and a jury from July 29 through August 2, 2002. The jury convicted Frieburger and Judge Floyd sentenced him to life in prison. Frieburger filed and served his notice of appeal on August 7, 2002.

STATEMENT OF FACTS

Edward Frieburger, then a young Army private in training at Fort Jackson, brutally murdered John Orner in cold blood, shooting him at close range in the back of the head on the night of February 28-March 1, 1961. Forty years after the killing, Frieburger was convicted of the crime.

John Orner was a retired Army master sergeant, a veteran of both World War I and World War II. (R. at 17, l. 13-17.) He drove a taxicab, frequenting a taxi stand outside the main gate of Fort Jackson on Jackson Boulevard, catering to soldiers from the post. (R. at 19, l. 7-10; 20, l. 2-19.)

Mr. Orner's stepson reported Mr. Orner missing on the morning of March 1, 1961, when Orner failed to return home after work the night before. (R. at 21, l. 14 through 22, l. 2; 52, l. 16-24.) Later that day, Columbia police officer Frank Revetta discovered Orner's abandoned and bloody cab near the DeSoto Hotel at the intersection of Lady and Assembly streets in downtown Columbia. (R. at 32, l. 19 through 33, l. 19; 54, l. 14.) Orner's identification papers were on the front seat. (R. at 54, l. 15.) On March 3, 1961, State Law Enforcement Division Agent L.B. Harmon discovered the lifeless body of John Orner on the side of Highway 601 in lower Richland County. (R. at 112, l. 23-24; 114, l. 2-4.)

An autopsy was performed on Mr. Orner's body. The pathologist removed three bullet fragments from Orner's brain and determined that those bullet fragments killed Mr. Orner. (R. at 118, l. 5-8.) Mr. Orner's wound was consistent with being shot in the back of the head by a passenger in his cab sitting in the back seat. (R. at 174, l. 9-11.)

S.L.E.D. forensic examiners tested the bullet fragments. They determined that the three fragments were from a single .32-caliber bullet fired from a Harrington & Richardson revolver. (R. at 131, l. 16-21.)

In 1961, the monthly salary for an Army private like Frieburger was sixty-eight dollars. (R. at 218, l. 21-22.) Frieburger was habitually broke before the Army's payday, which was the last day of the month. (R. at 218, 16-18; 222, l. 7-15.) On February 17, 1961, Frieburger pawned an electric razor at Berry's Pawn and Army Store, at the corner of Lady and Assembly Streets—on the first floor of the building housing the DeSoto Hotel—for four dollars. (R. at 205, l. 6-23; 208,

l. 22 through 209, l. 4.) On February 25, 1961, Frieburger pawned a Philco transistor radio at Freed's Jewelry, on Washington Street, for eight dollars. (R. at 238, l. 22 through 239, l. 6; 242, l. 2-10; 243, l. 17-24.) On February 28, 1961—payday—Frieburger redeemed the radio from Freed's for eight dollars plus interest. (R. at 245, l. 3-18.)

The police determined that one Edward Frieburger had purchased a .32-caliber Harrington & Richardson revolver, serial number W9948, along with .32-caliber ammunition that same payday, February 28, 1961, from Capital Loan and Pawn for \$50.42. (R. at 69, l. 6 through 70, l. 5; 73, l. 2-16; 74, l. 9 through 75, l. 3; 486.) Further investigation revealed that on the night of March 2, 1961, a man using the name and Army service number of Edward Frieburger registered at the Gresham Hotel at the intersection of Main and Wheat Streets, near the railroad station, in Columbia, giving his home address as Fort Jackson. (R. at 152, l. 12-20; 158, l. 19 through 160, l. 5.) Frieburger had stayed at the hotel previously. (R. at 218, l. 6-12.)

Some time after the murder, Frieburger gave a fellow soldier in the barracks a live round of .32-caliber ammunition. (R. at 195, l. 4-15.)

On March 29, 1961 at approximately 11:00 p.m., Tennessee Highway Patrolman Donald Meredith spotted Frieburger hitchhiking along state Highway 25 near Newport, Tennessee.¹ (R. at 268, l. 5 through 269, l. 1.) Hitchhiking was a misdemeanor under Tennessee law. (R. at 269, l. 2-4.) Trooper Meredith

¹ Although not in evidence, Frieburger was actually absent without leave from the Army when Trooper Meredith arrested him. Frieburger was turned over to military authorities, convicted of being absent without leave, and sentenced to confinement in the United States Disciplinary Barracks at Fort Leavenworth, Kansas. He was dishonorably discharged from the Army. (R. at 479, l. 22 through 480, l. 4.)

stopped, questioned Frieburger, and patted him down. (R. at 270, l. 14-17.)

During the pat down, Trooper Meredith discovered a loaded .32-caliber Harrington & Richardson revolver, serial number W9948. (R. at 271, l. 6-8; 274, l. 14-17; 279, l. 9-12; State's Ex. 6.) The patrolman arrested Frieburger for carrying the pistol and confiscated it. (R. at 271, l. 9-12.)

The next month, Richland County Sheriff S.S. Sligh contacted Trooper Meredith and asked whether he had the pistol. (R. at 272, l. 3-16.) Trooper Meredith turned the weapon over to the sheriff. (R. at 274, l. 6-13.)

S.L.E.D. Lieutenant Millard Cate and Agent Carl Stokes tested the pistol to determine if it had fired the bullet that killed John Orner. Cate carved his initials in the handle of the pistol for identification. (R. at 134, l. 12-24; State's Ex. 6.) The tests were inconclusive. The S.L.E.D. agents could not say that the bullet was fired from Frieburger's pistol, but neither could they say that it was not fired from that weapon. (R. at 137, l. 2-20.)

Forty years later, the Richland County Sheriff's Department reopened the Orner murder case. (R. at 339, l. 21 through 340, l. 4.) The Harrington & Richardson revolver and the bullet fragments were still "in pristine condition" at the S.L.E.D. forensics facility. (R. at 306, l. 13-14.) Lieutenant Ira Parnell retested the weapon. Although one of the fragments removed from John Orner's brain "bore a striking similarity" to bullets test fired from Frieburger's pistol, Lieutenant Parnell could not opine that the bullet that killed Mr. Orner was in fact fired from that weapon. (R. at 312, l. 1 through 314, l. 21.) The test, although "very nearly a positive," was still inconclusive. (R. at 330, l. 10-15.)

The Richland County Sheriff's Department then retained an independent ballistics expert, John Cayton. The sheriff's department sent Cayton the bullet fragments and the Harrington & Richardson pistol. (R. at 429, l. 11-17.) Cayton discovered that there were bone fragments, blood, and tissue on one of the bullet fragments. He soaked the bullet fragment and removed the tissue. In so doing, Cayton revealed more rifling marks on the bullet fragment, enabling him to examine it more closely. (R. at 381, l. 13-23; 385, l. 19 through 386, l. 12.)

Cayton opined that the bullet that ended John Orner's life was fired from the .32-caliber Harrington & Richardson revolver, serial number W9948, that Edward Frieburger purchased on February 28, 1961 and that Trooper Meredith confiscated from him on March 29, 1961. (R. at 385, l. 11-15; 386, l. 23 through 387, l. 6.)

In October of 2000, Richland County Sheriff's Department Investigators Brian Metz and Carl Craig traveled to Indiana to interview Frieburger. Frieburger agreed to the interview, and voluntarily traveled to the Whitley County Sheriff's Department to meet with Metz and Craig. (R. at 412, l. 16 through 413, l. 17; 423, l. 3-4.) Frieburger claimed to have no memory of being in the Army or in Columbia. (R. at 414, l. 7-14; 423, l. 8 through 424, l. 7.) Frieburger claimed to have no memory of being interviewed by Sheriff Sligh in 1961 in connection with the Orner murder. (R. at 414, l. 15-20; 424, l. 22 through 425, l. 2.) Frieburger claimed to have no memory of being at Fort Jackson; Fort McPherson, Georgia; or Fort Leavenworth, Kansas. (R. at 353, l. 4-11; 426, l. 1-11.)

When confronted with a picture of himself in uniform and of documentary records of his stay at Fort Leavenworth, Frieburger's memory of his military service returned. (R. at 353, l. 10-15; 424, l. 2-19; 426, l. 8-15.) Frieburger had no trouble remembering his life history before and after his Army service. (R. at 351, l. 3-23; 427, l. 3-9.) Investigator Metz noted a distinct change in Frieburger's demeanor when Metz told Frieburger that he was there to discuss the 1961 murder of John Orner. Frieburger's face flushed, he began to sweat, and he had problems speaking. (R. at 431, l. 19 through 432, 16.)

Frieburger was later arrested and indicted for the murder of John Orner.

ARGUMENT

- I. The trial court properly admitted the murder weapon into evidence because both the arrest and search of Frieburger were lawful.

- a. Trooper Meredith had probable cause to arrest Frieburger.

Frieburger argues that Trooper Meredith did not have probable cause to arrest Frieburger for hitchhiking. This argument fails.

Frieburger correctly states the law of Tennessee governing a warrantless arrest for a misdemeanor. As that law existed in 1961, and as it exists today, a law enforcement officer may make a misdemeanor arrest without a warrant "[f]or a public offense committed or a breach of the peace threatened in his presence." Tenn. Code Ann. § 40-7-103(a)(1).

Frieburger focuses his argument on defining a "breach of the peace." Frieburger fails to explain, however, that the Tennessee Supreme Court has always held that any misdemeanor constitutes a "public offense." See Jones v. State ex rel. Coffey, 253 S.W.2d 740, 742 (Tenn. 1952) (holding that a warrant is

not required for a misdemeanor arrest when the misdemeanor is committed in front of police); see also United States v. Thompson, 409 F.2d 113, 116 (6th Cir. 1969) (holding that Tennessee law permitting warrantless misdemeanor arrest for public offenses authorized arrest for moving an automobile inspection sticker from one car to another); Warden v. State, 379 S.W.2d 788, 790 (Tenn. 1964) (holding that possession of intoxicating liquors is a public offense or breach of the peace); 9 Tenn. Practice Series § 18.154 ("An officer may conduct a warrantless arrest for a felony or misdemeanor or a 'breach of peace' committed in his presence.")

Hitchhiking, therefore, is a "public offense" under Tennessee law. When Trooper Meredith observed that public offense being committed, he had the authority to arrest Frieburger without a warrant, and therefore had probable cause to arrest him.

b. **Trooper Meredith's search of Frieburger was lawful, even though it immediately preceded the arrest.**

Trooper Meredith's search of Frieburger was not a stop-and-frisk search pursuant to Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968); it was a valid search incident to a lawful arrest. That Trooper Meredith searched Frieburger immediately before he arrested him does not invalidate the search. Under Rawlings v. Kentucky, 448 U.S. 98, 100 S. Ct. 2256 (1980), when a formal arrest "follow[s] quickly on the heels of the challenged search" of the defendant's person, it is not "particularly important that the search preceded the arrest rather than vice versa." Id. at 111, 100 S. Ct. at 2564.

Frieburger argues that the search was illegal because Trooper Meredith arrested him for possession of the weapon, and not for hitchhiking. This argument also fails. The key to determining the legality of the search is whether Trooper Meredith had probable cause to arrest Frieburger when Meredith conducted the search, not whether Trooper Meredith had probable cause to arrest Frieburger for possession of the weapon when he conducted the search. Stated differently, the test is whether Trooper Meredith had probable cause to arrest Frieburger for any offense, not whether Trooper Meredith actually arrested Frieburger for the offense that created the probable cause.

To reach a contrary outcome elevates form over substance. Trooper Meredith undoubtedly had probable cause to arrest Frieburger for hitchhiking. Under Rawlings, therefore, the search was legal, even though it occurred before the arrest. Using Frieburger's reasoning, after Meredith discovered the revolver, he would have had to arrest Frieburger for hitchhiking. Only then could he subsequently have charged him with possession of the weapon, even though he lawfully discovered the weapon before the arrest and even if he then chose not to prosecute Frieburger for hitchhiking.

Such procedural machinations are not the law under the Fourth Amendment to the United States Constitution. In United States v. Bizier, 111 F.3d 214 (1st Cir. 1997), the United States Court of Appeals for the First Circuit confronted precisely this situation. A state trooper stopped the defendant for a traffic violation. The defendant consented to a search of his vehicle, which revealed marijuana. Subsequently, a police dog alerted to the presence of

narcotics in the front seat. The state trooper then searched the defendant's body and found two bags of cocaine in his underwear. The trooper arrested the defendant for possession of cocaine with intent to distribute. See id. at 216.

The defendant moved to suppress the two bags of cocaine, contending that although the trooper had probable cause to stop him for a traffic violation, he did not have probable cause to arrest him without considering the cocaine discovered during the body search. "In this connection, Bizier contends that probable cause for an arrest supporting a search incident thereto can exist only for the actual offense ultimately charged. He argues that because he was, in the end, charged with a cocaine offense relating to the drugs found during the search, there was no preexisting probable cause and therefore no justification for that arrest." Id. at 218.

The court of appeals disagreed:

As a legal proposition, the argument is without merit. The probable cause justifying a lawful custodial arrest, and therefore a search incident to that arrest, need not be for the charge eventually prosecuted. See e.g., Barna v. City of Perth Amboy, 42 F.3d 809, 819 (3d Cir.1994) ("Probable cause need only exist as to any offense that could be charged under the circumstances") (emphasis added); Barry v. Fowler, 902 F.2d 770, 773 n. 5 (9th Cir.1990); Gassner v. City of Garland, 864 F.2d 394, 398 (5th Cir.1989); Mutter v. Town of Salem, 945 F. Supp. 402, 407 n. 5. (D.N.H.1996). Consequently, a finding of probable cause for any offense justifying full custodial detention can validate the search in this case as incident to a lawful arrest.

We need not pause to consider the question whether a stop for speeding, an offense which does not ordinarily involve anything beyond a fine, would support a body search. Cf. [United States v.] Robinson, 414 U.S. at 236 n. 6, 94 S. Ct. at 477 n.6. (declining to reach question whether "a routine traffic stop," i.e., where the officer would simply issue a notice of violation and allow the offender to proceed" would justify a full body search of the person stopped); see also United States v. Lott, 870 F.2d 778, 781-82 (1st Cir.1989) (police making justified investigatory stop not authorized to make body search where there was no fear for their safety).

The information learned by the troopers here quickly escalated to probable cause for a full custody arrest. These developments at the roadside after the initial traffic stop, which were entirely separate from the cocaine discovery, provided probable cause for a full custody arrest for a serious traffic violation-- operating the truck under the influence of a drug. Both troopers who executed the stop testified at the suppression hearing that it took longer than usual for Bizier to pull over to the roadside. When Trooper Curran approached Bizier, he noted that Bizier's eyes were glassy, his eyelids were heavy, his pupils were pinpoints and he was swaying. Bizier and the passenger in the truck told the troopers inconsistent stories. These factors together created probable cause for a driving under the influence arrest following the otherwise justifiable traffic stop.

Id. at 218 (footnotes omitted); accord United States v. Lee, 317 F.3d 26, 33 n.2 (1st Cir. 2003).

Nor is this the law in Tennessee. The Tennessee appellate courts have held that an arrest for one offense is not made illegal because the probable cause for that arrest was based on a different offense:

Assuming arguendo that the officer had no right to arrest the defendant for driving on a revoked license, it does not make his initial arrest illegal, because under the evidence as we have set forth above, the officer could have arrested the defendant for public drunkenness. When the officer appeared at the scene and observed the defendant's state of intoxication, as such was described in this record, then unquestionably the offense of public drunkenness was committed in the officer's presence, and an arrest for that offense would have been proper. The fact that the officer did not articulate to the defendant that he was being arrested for public drunkenness, but rather advised the defendant that he was being arrested for the offense of driving on a revoked license does not carry with it the conclusion that the arrest was illegal.

State v. Duer, 616 S.W.2d 614, 615-16 (Tenn. Crim. App. 1981).

Frieburger's arrest was lawful and the search that discovered the murder weapon was lawful. The trial court properly admitted the weapon into evidence.

II. The trial court correctly admitted the murder weapon into evidence because it was properly authenticated.

Frieburger contends that the state did not establish the chain of custody for the murder weapon. Frieburger did not state this ground as a basis for his motion in limine to suppress the weapon; he argued only that the weapon was the fruit of an unlawful search. (R. at 1, l. 13 through 3, l. 2.) When Frieburger made his contemporaneous objection during the trial, he stated no grounds for his objection. (R. at 311, l. 1-4.) It is therefore not preserved for review. See State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) ("A ruling in limine is not a final ruling on the admissibility of evidence. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review." (citation omitted)).

In any event, the establishment of a strict chain of custody for the revolver is not required:

If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain of custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with.

State v. Glenn, 328 S.C. 300, 305-06, 492 S.E.2d 393, 395 (Ct. App. 1997)

(quoting John W. Strong, 2 McCormick on Evidence § 212 at 527 (4th ed. 1992)).

1

The murder weapon in this case is impervious to change and not susceptible to tampering. It is a serial-numbered pistol, identified, by serial number, by several witnesses as the one taken from Frieburger and tested by S.L.E.D. in 1961 and 2001. (R. at 134, l. 2-24; 310, l. 21-23; 488.) The S.L.E.D. officer who tested the weapon, Millard Cate, carved his initials in the grip in 1961, and those initials were identified at trial. (R. at 134, l. 21-23; State's Ex. 6.) Because the weapon possesses unique and easily identifiable characteristics and is relatively impervious to change, the trial court properly admitted it into evidence on the basis of testimony that it is the weapon taken from Frieburger in March of 1961.

III. The trial court properly admitted the pawn shop records because Lila Russ appropriately authenticated them under Rule 901.

Frieburger argues that the trial court wrongly allowed certain pawn shop records to be introduced into evidence as statements in ancient documents under Rule 803(16) because they were not properly authenticated. Again, this argument is not preserved.

It is not clear from his brief which documents Frieburger alleges were not properly authenticated. The defense, however, explicitly offered no objection whatsoever to the admission of Exhibits 22, 23, 25, 26, and 27. (R. at 63, l. 6-12; 67, 5-9.) The only objection Frieburger made to the pawn shop records authenticated by Ms. Russ were to Exhibit 27 and to Exhibit 28, which was an enlargement of Exhibit 27. (R. at 76, l. 13 through 77, l. 1.) That objection was made on the grounds that the exhibit was a copy and the original document existed. (R. at 87, l. 23 through 88, l. 5.) All of the testimony cited by Frieburger

in footnote 6 of his brief concerns exhibits that were admitted without objection at trial.

Nonetheless, Frieburger's Rule 901 argument fails. That argument relies upon the text of Rule 901, but Frieburger cites nary a case in support of his position.

The admission or exclusion of evidence is a matter within the sound discretion of the trial court, and this Court may not reverse absent an abuse of that discretion. See State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). The authentication requirement of Rule 901 is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." S.C.R. Evid. 901(a); see State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 627 (Ct. App. 2003) (holding that the trial court did not err in admitting evidence that "is what it claimed").

With the exception of subsection (b)(10), Rule 901 is identical to Federal Rule of Evidence 901. Federal Rule 901 "does not erect a particularly high hurdle." United States v. Dhinsa, 243 F.3d 635, 658 (2d Cir. 2001) (quoting United States v. Ortiz, 966 F.2d 707, 716 (1st Cir. 1992)). The standard for admissibility is "reasonable likelihood"; that is, whether the trial court finds it "reasonably probable" that the evidence is what it purports to be. See id.

Under this standard, the documents in question were properly authenticated and were thus admissible under Rule 803(16).² As to Exhibits 22 and 23 (Exhibit 23 was an enlargement of Exhibit 22), Lila Russ testified that she

² Frieburger does not argue that the documents were not per se inadmissible under Rule 803(16). He argues only that they were inadmissible because they were not properly authenticated under Rule 901.

recognized the document, that it was a card her father's pawn shop was required to fill out, that she recognized some of the writing on the card, and that it was an accurate copy of the original. As to Exhibits 26 and 27 (26 was an enlargement of 27), Ms. Russ testified that Exhibit 27 was in fact the original book from her father's pawn shop reflecting sales of guns in 1960-61 and that the book was kept in the normal course of business. (R. at 65, l. 22 through 67, l. 4.) Finally, as to Exhibits 28 and 29 (29 was an enlargement of 28), Ms. Russ identified the document as a form required by the city of Columbia, prepared by Capital Loan and Pawn, kept in the normal course of business, and containing her own handwriting. (R. at 77, l. 6 through 79, l. 8.)

All of the purported inconsistencies in Ms. Russ's testimony, therefore, bear on the weight of the documentary evidence, not on its admissibility. Ms. Russ's testimony clearly established that the documents were what the state claimed they were: records from Capital Loan and Pawn. The trial court, therefore, properly admitted them.

IV. The trial court properly admitted the pawn shop records under Rule 803(6) because they were duly authenticated records of a regularly conducted activity.

Frieburger claims that certain pawn shop records were inadmissible under Rule 803(6) of the South Carolina Rules of Evidence and the Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510 (Law. Co-op. 1985).

Again, it is unclear to which documents Frieburger refers; he does not specify exhibit numbers in his brief, which makes it difficult for the state to address his argument. If Frieburger refers to the documents authenticated by Lila Russ, then,

again, he overlooks the fact that he had no objection to their admission at trial.

He therefore failed to preserve this issue for review.

In this case, Ms. Russ adequately established the documents' authenticity; she testified that the documents were authentic copies of original records kept in the ordinary course of business. (R. at 63, l. 2-5; 75, l. 10-21.) The implication is clear that Capital Loan maintained the documents from 1961 until 2001.

More significant, though, is Frieburger's complete lack of any assertion that the documents are not what they purport to be. See Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 973 (2d Cir. 1985) ("Defendants' contention that the court erred in admitting the videotape into evidence is frivolous. They claim that the tape was not properly authenticated and that the chain of custody was not established. Significantly, they do not argue that the tape was inaccurate in any way or that it had been altered since the date of recording."). Frieburger's bare assertion that the business records lacked the requisite foundation for admission is insufficient. He must point to something that calls their authenticity into question. He has failed to do so. In any event, there is no requirement to establish a chain of custody for documentary evidence. See 29A Am. Jur. 2d Evidence § 1037 (1994) ("establishing the chain of custody of a document is not necessary under the Federal Rules of Evidence where there is prima facie evidence of its authenticity which satisfies the requirements of Rule 901(a).").

Frieburger's citation of Stevens v. Allen, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999), aff'd, 342 S.C. 47, 536 S.E.2d 63 (2000), is misplaced. In that

case, the issue was the admissibility of medical records. Although this Court stated that a chain of custody must be established for the introduction of a business record, that was not the issue in the case. The issue was the chain of custody for the results of the urinalysis specimen contained in the business record, and, indeed, the court's analysis focused on the chain of custody for the specimen, not for the documentary record of the specimen. See Doe v. Department of Health and Envtl. Control, 350 S.C. 243, 248, 565 S.E.2d 293, 296 (2002) ("Similarly, [in Stevens], the Court of Appeals required a chain of custody for the driver's urinalysis, taken for purposes of showing the defendant had marijuana and cocaine in his system at the time of the accident." (emphasis added)).

In Doe v. Department of Health and Environmental Control, 350 S.C. 243, 565 S.E.2d 293 (2002), the Supreme Court made clear that a chain of custody is not required to admit a business record under Rule 803(6). In that case, the Supreme Court reversed this Court's holding that a record of an HIV test could not be admitted as a business record. The Supreme Court held that "the procedure for admitting business records would afford sufficient indicia of reliability to admit HIV test results without a chain of custody." Id. at 249, 565 S.E.2d at 297.

Rule 803(6) allows the admission of business records as an exception to the hearsay rule if the trial court determines, in its abundant discretion, that the records are what they purport to be. The state established the authenticity of the pawn shop records, and Frieburger, for all his protestations, does not contest their authenticity. The trial court properly admitted the records.

V. The trial court properly admitted evidence of Frieburger's sojourn at Fort Leavenworth because that evidence was not prejudicial.

Frieburger argues that the trial court improperly allowed the state to elicit evidence that he was "stationed" at Fort Leavenworth. In actuality, Frieburger was not "stationed" at Fort Leavenworth at all. He was incarcerated in the United States Disciplinary Barracks. (R. at 479, l. 22 through 780, l. 4.) The trial judge, however, refused to permit the jury to learn this information, limiting the state to asking only about whether Frieburger was "stationed" at Fort Leavenworth. (R. at 4, l. 22 through 5, l. 9.)

Frieburger apparently contends that the admission only of evidence that he was "stationed" at Fort Leavenworth was both irrelevant and more prejudicial than probative, in contravention of Rules 402 and 403. His argument fails on both counts. Moreover, Frieburger failed to preserve this issue for review by failing to object contemporaneously to its admission, even though he moved in limine to exclude it. See State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) ("A ruling in limine is not a final ruling on the admissibility of evidence. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review." (citation omitted)).

That Frieburger was at Fort Leavenworth could not be more relevant to a key issue in the case. The state elicited testimony that, when he was interviewed in Indiana in 2001, Frieburger told investigators that he did not remember serving in the Army, buying the murder weapon in Columbia, or being interviewed by Sheriff Sligh in 1961. He also stated that he did not remember being at Fort

Jackson; Fort McPherson, Georgia; or Fort Leavenworth.³ After being shown photographs of himself in uniform, Frieburger's memory about serving in the Army returned. He also had no trouble remembering events that occurred before and after his Army service.

The state adduced evidence that, when questioned about John Orner's murder, Frieburger became flushed, began sweating, and had trouble speaking. Combined with his obvious unease about the murder, the fact that Frieburger could not remember the place he was living in 1961 is very relevant to the issue of whether or not Frieburger was lying to the investigators.

As to whether the evidence that he was "stationed" at Fort Leavenworth was more prejudicial than probative, Frieburger is wrong. Admission of evidence under Rule 403 is committed to the sound discretion of the trial judge, and this Court must give the trial judge's decision "great deference." State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004). Even under a more stringent standard, the evidence was not prejudicial.

At trial, Frieburger contended that evidence that he was "stationed" at Fort Leavenworth is "the equivalent of saying somebody was at San Quentin." (R. at 8, l. 5-6.) The trial court properly noted that he could have been at Fort Leavenworth in some capacity other than as a prisoner at the Disciplinary Barracks. (R. at 5, l. 8-9; 10; l. 23-24.) This Court may take judicial notice of the fact that Fort Leavenworth is an Army installation comprising many activities other than the Disciplinary Barracks; indeed, the Disciplinary Barracks are not

³ That Frieburger would not remember being incarcerated is, at best, dubious.

even the major activity at Fort Leavenworth.⁴ Frieburger's argument is akin to saying that one who lives in Pelzer is "the equivalent of saying somebody was at" Perry Correctional Institution.

The information connected to Fort Leavenworth that was prejudicial to Frieburger was that he was incarcerated for committing a crime. The trial judge refused to allow this information into evidence.⁵ That he did admit evidence that Frieburger was at Ft. Leavenworth was not an abuse of his discretion.

VI. The trial court properly denied Frieburger's mistrial motion because the solicitor did not mention Frieburger's conviction and because Frieburger the evidence upon which the remarks in the opening statement were based was properly admitted.

Frieburger's contention that the trial court improperly denied his motion for a mistrial or a curative instruction for the solicitor's remark in his opening statement concerning Frieburger's arrest misses the mark. Frieburger argues that because Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), applies to this case, "Appellant's arrest and plea to the charge of 'carrying arms' should have been excluded since he was not represented, nor was he offered representation, at the time."

The fact that Trooper Meredith arrested Frieburger bears no relation to any issue implicated by Gideon v. Wainwright. Gideon involves the right to representation at trial. See id. at 344, 83 S. Ct. at 796. There was no evidence or mention of Frieburger's conviction, either by plea or trial. Gideon has nothing to do with the admissibility of the arrest.

⁴ The major activity at Fort Leavenworth since 1881 has been the United States Army Command and General Staff College. See <http://www.leavenworth.army.mil/cac/history.htm>.

⁵ Frieburger's argument that the jury was "interested" in his military record is nonsensical. The fact remains that the jury did not see his record.

Moreover, Frieburger has no grounds to complain of the admission of evidence of his arrest. That evidence was adduced by the solicitor on redirect examination of Trooper Meredith, only to explain the issue raised by Frieburger himself on cross-examination: that Trooper Meredith did not habitually arrest hitchhikers. The state questioned Trooper Meredith about the arrest to show that Frieburger was not arrested for hitchhiking. (R. at 283, l. 10-23.) The defense did not object to the solicitor's questions or to Trooper Meredith's testimony.

“‘[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially.’” State v. Dunlap, 346 S.C. 312, 325, 550 S.E.2d 889, 895 (Ct. App. 2001) (quoting State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct.App.1999)). Because evidence of the arrest was properly admitted, Frieburger may not complain that the solicitor mentioned it in his opening statement. See State v. Hough, 325 S.C. 88, 93, 480 S.E.2d 77, 80 (1996) (stating that solicitor's opening statement must be confined to the facts presented and the reasonable inferences therefrom).

Finally, evidence of the arrest was admissible as part of the res gestae of the crime. “Evidence of other crimes is admissible under the res gestae theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case.” Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003). In this case, evidence of the arrest is intimately connected with the murder; it explains how authorities obtained the murder weapon.

The trial court did not err in admitting the evidence of the arrest.

VII. The trial court properly denied Frieburger's directed verdict motion because there was ample evidence of his guilt.

Frieburger argues that the trial court improperly denied his motion for a directed verdict. In support of his position, however, he cites the incorrect legal standard.

The standard the jury must use in deciding a circumstantial evidence case is different from the standard the court must use in determining whether that evidence warrants submission of the case to the jury. Frieburger cites State v. Owens, 291 S.C. 116, 352 S.E.2d 474 (1987), for the proposition that circumstantial evidence "must produce a reasonable and moral certainty that the accused, and no one else, committed the crime." (App. Br. At 44.) This is the jury's standard. The court's standard is set forth in State v. Home, 324 S.C. 372, 478 S.E.2d 289 (Ct. App. 1996):

In reviewing the trial judge's denial of a motion for a directed verdict, we must view the evidence in the light most favorable to the State, and if there is any direct or any substantial circumstantial evidence, reasonably tending to prove the guilt of the accused, we must find that such issues were properly to be decided by the jury. State v. Venters, 300 S.C. 260, 387 S.E.2d 270 (1990). See also State v. Prince, 316 S.C. 57, 64, 447 S.E.2d 177, 181-82 (1993) ("It is well-established that, in ruling on a motion for directed verdict, the trial court must view the evidence in the light most favorable to the State. The case should be submitted to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced.").

In ruling on a motion for a directed verdict, the trial judge is concerned with the existence or nonexistence of evidence, not its weight. State v. Williams, 303 S.C. 274, 400 S.E.2d 131 (1991); State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984). However, "[t]he trial judge should grant a directed verdict motion when the

evidence merely raises a suspicion that the accused is guilty." State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984).

We note that the trial judge's standard for submission of the case to the jury is distinguishable from the standard applied by the jury in evaluating circumstantial evidence. Where the evidence is circumstantial, it is the trial court's duty to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Brisbon, 474 S.E.2d 433 (S.C.Sup.Ct.1996) (Davis Adv. Sh. No. 23 at 9); State v. Stokes, 299 S.C. 483, 386 S.E.2d 241 (1989); State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955). In contrast, the standard for the jury's deliberation is that it may not convict the defendant unless every circumstance relied upon by the State has been proven beyond a reasonable doubt, and all of the circumstances so proven are consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. State v. Edwards, 298 S.C. 272, 379 S.E.2d 888, cert. denied, 493 U.S. 895, 110 S. Ct. 246, 107 L.Ed.2d 196 (1989); State v. Wakefield, 473 S.E.2d 831 (S.C.Ct.App.1996) (Davis Adv. Sh. No. 16 at 14).

Horne, 324 S.C. at 379-80, 478 S.E.2d at 292.

That, as Frieburger points out, there was no direct evidence placing him at the scene of the crime or that he had any part in Mr. Orner's murder is immaterial. South Carolina law does not distinguish between direct and circumstantial evidence. See State v. Grippon, 327 S.C. 79, 84, 489 S.E.2d 462, 464 (1997) ("The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence.").

In reviewing the trial court's denial of a motion for a directed verdict, this Court must view the evidence in the light most favorable to the state. See, e.g., State v. Wilds 355 S.C. 269, 274, 584 S.E.2d 138, 141 (Ct. App. 2003). The Court is not concerned with whether the evidence is circumstantial or direct, but only with whether there is any substantial evidence that reasonably tends to prove

the guilt of the accused, or from which guilt may be fairly and logically deduced.

See, e.g., Home, 324 S.C. at 379, 478 S.E.2d at 292.

In this case, the evidence tending to prove Frieburger's guilt was abundant. The state adduced evidence that Frieburger, as an Army private at Fort Jackson, was habitually broke. He pawned personal property before payday in February 1961, and redeemed them on payday, February 28. On February 28, the day of John Orner's murder, Frieburger purchased a Harrington & Richardson .32 caliber revolver, serial number 9948, along with ammunition for the weapon, from Capital Loan Office. Orner's cab was discovered at the intersection of Lady and Assembly Streets on March 1, outside the DeSoto Hotel. There is no evidence about where Frieburger stayed on the night of March 1, but he spent the next night, March 2, 1961, the day after Orner's murder—a weekday, when, inferentially, Frieburger should have been on duty at Fort Jackson—at another hotel down the street from the DeSoto, the Gresham. Trooper Meredith confiscated a .32-caliber Harrington & Richardson revolver, serial number W9948, from Frieburger at 11:00 p.m. on March 29, 1961, as Frieburger was hitchhiking in Tennessee. Regardless of Frieburger's insinuations concerning Mr. Cayton's credibility—clearly a question for the jury—the state adduced expert testimony positively identifying a Harrington & Richardson revolver, serial number W9948, as the weapon that killed John Orner.

There was ample evidence that Frieburger murdered John Orner. The trial court did not abuse its discretion by denying Frieburger's motion for a directed verdict.

CONCLUSION

Frieburger's arguments are without merit. This Court should affirm the judgment of the trial court.

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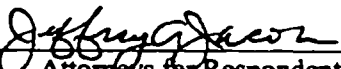
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December 7, 2004

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

**Appeal from Richland County
Henry F. Floyd, Circuit Court Judge**

Case No. 01-GS-40-2955

THE STATE,

Respondent,

v.

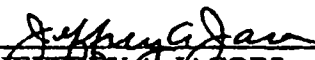
EDWARD FREIBURGER,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with SCACR
211(b).

This 7th day of December, 2004.



JEFFREY A. JACOBS

Assistant Attorney General

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

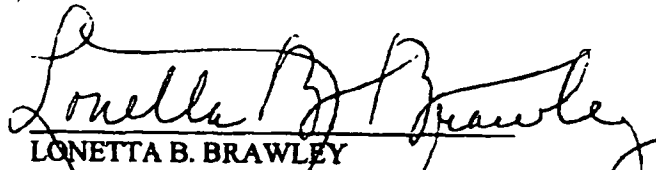
I, **Lonetta B. Brawley**, hereby certify that I have served the *Final Brief of Respondent*

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This 7th day of December, 2004.


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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Henry F. Floyd, Circuit Court Judge

Case No. 01-GS-40-2955

The State Respondent,

v.

Edward Freiburger, ... Appellant.

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TABLE OF CONTENTS

Table of Authorities	ii
Arguments	
I. The trial court erred in denying Appellant's motion to suppress the gun which was allegedly confiscated as the result of the search by Trooper Meredith in 1961	1
II. The trial court erred in denying Appellant's motion to suppress the gun which was allegedly confiscated by Trooper Meredith because the State failed to establish an adequate chain of custody	7
III. The trial court erred in admitting into evidence certain pawn shop records under the "Ancient Documents" exception to the Hearsay Rule	8
IV. The trial court erred in admitting into evidence certain pawn shop records under the Business Records as Evidence Act	9
V. The trial court erred in admitting evidence that the Appellant was stationed at Fort Leavenworth, Kansas	13
VI. The trial court erred in denying Appellant's motion for mistrial or, alternatively, for a curative instruction as to improper comments made by the solicitor in opening statement	15
VII. The trial court erred in denying Appellant's motion for a directed verdict	16
Conclusion	19

TABLE OF AUTHORITIES

Cases

<i>Anderson v State</i> , 354 S.C. 431, 581 S.E.2d 834 (2003)	15
<i>Ex Parte DHEC</i> , 350 S.C. 243, 565 S.E.2d 293 (2002)	11, 12, 13
<i>Gideon v Wainwright</i> , 372 U.S. 335 (1963)	15
<i>Jones v. State</i> , 194 Tenn. 534, 253 S.W.2d 740 (1952)	1
<i>Louis Vuitton S A v. Spencer Handbags Corp</i> , 765 F.2d 966 (2d Cir. 1985)	9, 10
<i>Rawlings v. Kentucky</i> , 448 U.S. 98 (1980)	4, 5
<i>State v. Arnold</i> , 351 S.C. 302, 569 S.E.2d 379 (Ct. App. 2002)	17
<i>State v. Brisbon</i> , 323 S.C. 324, 474 S.E.2d 433 (1996)	16
<i>State v. Cribb</i> , 310 S.C. 518, 426 S.E.2d 306 (1992)	12
<i>State v. Duer</i> , 616 S.W.2d 614 (Tenn. Crim. App. 1981)	5, 6
<i>State v. Glenn</i> , 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997)	7
<i>State ex rel. Thompson v. Reichman</i> , 135 Tenn. 685, 188 S.W. 597, 602 (1916)	4
<i>State v. Graham</i> , 3 Sneed (TN) 134, 35 Tenn. 134 (1855)	4
<i>State v Horne</i> , 324 S.C. 372, 478 S.E.2d 289 (Ct. App. 1996)	16
<i>State v. Martin</i> , 340 S.C. 597, 533 S.E.2d 572 (2000)	17
<i>State v Mitchell</i> , 341 S.C. 406, 535 S.E.2d 126 (2000)	17
<i>State v. Mouzon</i> , 321 S.C. 27, 467 S.E.2d 122 (Ct. App. 1995)	17
<i>State v. Owens</i> , 346 S.C. 637, 552 S.E.2d 745 (2001)	15
<i>State v. Schrock</i> , 283 S.C. 129, 322 S.E.2d 450 (1984)	16, 18
<i>State v. Smith</i> , 326 S.C. 39, 482 S.E.2d 777 (1997)	12

<i>State v Wilds</i> , 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003)	16
<i>Stevens v. Allen</i> , 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999)	11, 12
<i>United States v. Thompson</i> , 409 F 2d 113 (6 th Cir. 1969)	2
<i>Warden v. State</i> , 214 Tenn. 314, 379 S.W.2d 788 (1964)	3

Statutes

S.C. Code Ann. § 44-29-145 (2004)	12
T.C.A. § 40-803	3

Rules

Rule 201, SCRE	14
Rule 404, SCRE	13, 14
Rule 803(6), SCRE	9, 11, 12, 13
Rule 901, SCRE	10, 11

Other Authorities

29A Am. Jur. 2d <i>Evidence</i> § 1037 (1994)	10

ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE GUN WHICH WAS OBTAINED AS THE RESULT OF THE SEARCH BY TROOPER MEREDITH IN 1961

A. Trooper Meredith's search of Appellant without a warrant was not valid under Tennessee law

In its Brief, the State cites to *Jones v. State*, 194 Tenn. 534, 253 S.W.2d 740 (1952) for the proposition that Trooper Meredith could have arrested Appellant without a warrant for hitchhiking committed in his presence, and therefore the warrantless search of Appellant prior to his arrest for "carrying arms" was not invalid. (Respondent's Brief, pp. 7-8). The State is overreading the holding of *Jones*.

In *Jones*, the issue was the individual liability of a sheriff for the actions of two deputies during an attempted traffic stop (plaintiff's son was killed when deputies shot out a tire and the car crashed). The sheriff defended, claiming the deputies in the case had no warrant to arrest the decedent and his companions and the plaintiff failed to show the deputies' conduct was connected with the discharge of their official duties at the time. The Supreme Court of Tennessee agreed that the deputies were acting within their official capacity, and noted that while they did not have a warrant to arrest the suspects, there was material evidence that the suspects were guilty of a misdemeanor in the presence of the deputies and no warrant was necessary. Hence, the issue was not the validity of a search without a warrant, but whether two deputies who pursued suspects without an arrest warrant were acting in an official capacity so as to bind the sheriff. Clearly, officers who witness a crime, whether it is a misdemeanor or a felony, may perform a warrantless arrest of the person they believe is committing the crime.

The issue in the case *sub judice*, however, is the validity of the warrantless search Trooper Meredith performed prior to arresting Appellant. Under Tennessee law at the time, Trooper Meredith's search was not valid since he had not placed Appellant under arrest prior to doing the search, and did not intend to arrest Appellant for anything until he found the gun. It was the evidence he found that led to the only charge he made, that is, "carrying arms."

The State also cites *United States v. Thompson*, 409 F.2d 113 (6th Cir. 1969) in support of its assertion that the warrantless search in this case was valid. (Respondent's Brief, p. 8). In *Thompson*, the court held "the decision to stop [defendant's car] under the authority of the siren, uniforms, and flashing lights we deem to be an arrest. It is certainly, in our opinion, an interference with liberty in a significant way." 409 F.2d at 116. Hence, the court found the officers were authorized to make the arrest for the illegal inspection sticker and, in fact, had made a pre-search arrest. Importantly, after stopping the defendant, the officers realized they knew defendant to be someone who had transported illegal liquor in the past, the car was weighted down in the rear, the officers smelled alcohol near the trunk, and upon questioning by the officers, the defendant admitted he had liquor in the trunk. All of these facts occurred prior to the search of the trunk. These facts, according to the Sixth Circuit Court of Appeals, represented reasonable grounds for believing defendant was using the car to transport non-taxpaid liquor in violation of state and federal law. Hence, the subsequent search of the trunk was upheld as valid.

In this case, Trooper Meredith had *no* facts to believe Appellant was carrying anything in violation of Tennessee law. While Trooper Meredith stopped Appellant for hitchhiking, the evidence is clear that he was not going to arrest Appellant or charge him with hitchhiking, and, in fact, Trooper Meredith did not arrest Appellant for hitchhiking. *United States v. Thompson* is

clearly distinguishable from the case before this Court.

The State also points the Court to *Warden v State*, 214 Tenn. 314, 379 S.W.2d 788 (1964) for the rule that possession of intoxicating liquors is a public offense of breach of the peace. (Respondent's Brief p. 8). In that case, officers were at a third-party's home, executing a search warrant, when the defendant came to the front door. The officers saw, in plain sight, a liquor bottle partially visible under defendant's belt. They searched him and found two pints of whiskey and one pint of vodka. The Supreme Court of Tennessee noted that "an officer may make a constitutional search of the person of the defendant, even without a search warrant, provided the person is lawfully arrested and the search is incident to the arrest." *Warden*, 214 Tenn. at 316, 379 S.W.2d at 789. The court noted the "well stated" rule in Tennessee that "an officer acting without a warrant for an arrest and without attempting to make an arrest is not justified in making a search of a person upon mere suspicion that he has committed a crime." *Id.* 214 Tenn. At 317, 379 S.W.2d at 789. Thus, the search in the case could stand only if authorized by T.C.A. § 40-803, which permitted an officer to conduct a warrantless arrest for, in part, a public offense committed or a breach of the peace threatened in his presence. The Court noted that prior case law had held "breach of the peace" to mean "all violations of the public peace or order and includes unlawful sale, actual or threatened, of intoxicating liquors." *Warden*, 214 Tenn. at 318, 379 S.W.2d at 790.

The Court in *Warden* also noted that although the search in the case preceded the arrest, under the facts the two were at the same time and were to be regarded as the same transaction. That is, where the officers observed sufficient evidence of the crime (i.e., possession of unlawful liquors) prior to the search, then at the time of the search, officers already had sufficient

information to place the defendant under arrest for the very charge for which he was subsequently arrested. That was not true, however, in the case *sub judice*.

The State also asserts, without citation to authority, that hitchhiking is a "public offense" under Tennessee law. (Respondent's Brief, p. 8). There is no case holding such. In fact, under Tennessee law, "those offenses described as an annoyance to the public at large include those which are 'a gross violation of decency and good order,' 'acts which tend to corrupt the morals and debase the moral sense of the community,' and those which furnish an 'evil example of a defiance of the law.'" *State ex rel. Thompson v. Reichman*, 135 Tenn. 685, 188 S.W. 597, 602 (1916) (citations omitted). *See also State v. Graham*, 3 Sneed (TN) 134, 35 Tenn. 134 (1855) (generally, any practices tending to disturb the peace and quiet of communities, or corrupt the morals of the people, are indictable as "public offenses" by the common law). There is no evidence that Appellant engaged in any behavior which can be described as a "public offense" under Tennessee law as it existed at the time of his arrest. The State cites to no case in which the courts of Tennessee have held that hitchhiking is "a violation of decency and good order," "disturbs the peace and quiet of the community," or "corrupts the morals of the people." The offense simply does not involve a "breach of the peace," nor is it a "public offense" as contemplated by Tennessee law. Trooper Meredith, therefore, had no authority to conduct a warrantless search of Appellant under Tennessee law, and this Court should reverse the trial court's failure to exclude the evidence Trooper Meredith seized during that search.

B. The timing of the search and the arrest are significant in this case

The State cites to *Rawlings v. Kentucky*, 448 U.S. 98 (1980) for its assertion that the sequence of events in this case did not invalidate the search. *Rawlings* is not that broad.

In *Rawlings*, the defendant was at a home which was raided by officers looking to arrest another person on drug distribution charges. When other officers went to get a warrant to search for marijuana after they smelled smoke and saw marijuana seeds, the officers who remained behind agreed to permit any of the occupants of the home to leave if they submitted to a search. When the officers returned with the search warrant, one read *Miranda* warnings and another officer approached a woman and asked her to empty her purse onto a coffee table. Among the contents were jars containing various drugs. The officer then turned to Rawlings and told him to "take what was his." Rawlings claimed ownership of the controlled substances. An officer then searched him and found \$4,500 in cash and a knife in a sheath. The officer then placed Rawlings under arrest. He was indicted for possession of controlled substances with intent to sell them.

On appeal, Rawlings argued the search that uncovered the money and the knife was illegal. The Supreme Court upheld the search, stating.

Once petitioner admitted ownership of the sizable quantity of drugs found in Cox's purse, the police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.

Rawlings, 448 U.S. at 111. Hence, at the time the officers searched Rawlings, he had admitted to serious drug offenses for which he was most assuredly going to be placed under arrest. Unlike the defendant in *Rawlings*, however, it is clear Trooper Meredith was not planning to arrest Appellant at the time he performed the search.

The State next argues that under *State v. Duer*, 616 S.W.2d 614 (Tenn. Crim. App. 1981), an arrest for one offense is not made illegal because the probable cause for arrest was based on a

different offense. (Respondent's Brief, p. 11). In fact, the *Duer* court relied upon the rule that "when an officer makes an arrest which is supported by probable cause for an arrest for an offense, then neither his subjective reliance on an offense for which probable cause does not exist nor his statement of the wrong offense to the person arrested will transform the arrest into an illegal arrest." *Duer*, 616 S.W.2d at 616. The court held:

[I]f sufficient facts and circumstances are present to support a defendant's legal arrest for one offense, it is totally without significance that the officer's subjective interpretation of the facts caused him to articulate to the defendant the name of some other offense for which the facts would not have authorized an arrest. In other words, the test does not rest on the officer's subjective conclusion as to what offense has been committed. Rather, the test is whether the facts and circumstances present are sufficient to enable the court to see that some offense has been committed that would have justified a legal arrest.

616 S.W.2d at 616. In that case, it was clear that the officer was going to place *Duer* under arrest based upon his observations at the scene of the crime (the officer observed *Duer* to be "publicly drunk" at the scene of a car accident; *Duer* also admitted to the officer that he was driving on a revoked driver's license). The officer arrested *Duer* for driving on a revoked license and, following a sobriety test, charged him with DUI.

In this case, however, Trooper Meredith stopped Appellant, whom he observed hitchhiking. He did not intend to place Appellant under arrest for the offense, and in fact did not charge Appellant with hitchhiking. Trooper Meredith did not make the decision to place Appellant under arrest until after he conducted the search, which revealed the gun. *Duer* simply does not apply.

Hence, this Court should find that the search in this case was invalid under Tennessee law at the time, and that the trial court should have excluded the evidence Trooper Meredith seized.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE GUN WHICH WAS ALLEGEDLY CONFISCATED BY TROOPER MEREDITH BECAUSE THE STATE FAILED TO ESTABLISH AN ADEQUATE CHAIN OF CUSTODY

In the Respondent's Brief, the State asserts that under *State v. Glenn*, 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997), a strict chain of custody is not required for the pistol in this case. (Respondent's Brief, p. 12). The State claims the pistol is not a fungible item and, therefore, no chain of custody is required. (Respondent's Brief, pp. 12-13). This claim is without merit.

In *State v. Glenn*, this Court held that a porcelain fragment was unique and readily identifiable so that the State was not required to establish a strict chain of custody in order to admit the fragment. The Court added that the State, in fact, submitted sufficient evidence to support admission of the fragment.

In this case, the pistol Trooper Meredith took from the Appellant in 1961 does not meet the "non-fungible" test outlined in *Glenn*. The evidence is that Trooper Meredith took the pistol to his home where he kept it in his home or his car. (R. p. 273). In April 1961, Sheriff Sligh contacted Meredith about a gun and Trooper Meredith gave the gun to two persons he believed were deputies. (R. p. 274). In 1964, Trooper Meredith asked about the gun, and Sheriff Sligh wrote to Trooper Meredith describing the gun as having the serial number "9948." (R. p. 279; State's Exhibit 48; R. p. 488). At the time, however, Richland County authorities were in possession of two identical pistols that were kept in a box at SLED. As outlined in the Appellant's brief, between 1961 and 2001 the gun was removed from the box several times without documentation, and it was the Richland County authorities that suggested to Trooper Meredith that the serial number of the gun taken from Appellant was "9948," not the other way around. (App. Br. P. 35-37).

Although Mr. Cate may have placed his initials on the gun that had serial number "9948" on it, because of the gaps in the chain of custody the State failed to establish that the pistol Mr. Cate so marked was the same pistol Trooper Meredith took from Appellant in Tennessee.

Not only was the pistol in this case "fungible," the State in fact was in possession of two identical pistols at the time Sheriff Sligh contacted Trooper Meredith. Ballistics test SLED performed on both pistols in 1961 and again in 2001 ruled out one pistol, and were inconclusive on the other. The gaps in the chain of custody from the moment Trooper Meredith confiscated a gun in Tennessee in 1961 until the date the gun was offered into evidence at the trial in 2002 were numerous: Trooper Meredith did not record the serial numbers, he took the gun home, he kept the gun in his car, he gave the gun to two unidentified persons whom he believed were deputies, the gun was kept in a box at SLED with an identical gun, the gun was removed and replaced in the box several times without proper record keeping. This is not a case of an unusual chip from a porcelain toilet thrown off of an overpass onto a vehicle. This was a pistol so common that SLED was in possession of two identical H&R-Model 929 .32 calibre revolvers throughout its investigation of Mr. Orner's death.

This Court should review the record and hold that the trial court should have excluded the pistol from evidence due to the State's failure to establish a sufficient chain of custody for its admission.

III. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE CERTAIN PAWN SHOP RECORDS UNDER THE "ANCIENT DOCUMENTS" EXCEPTION TO THE HEARSAY RULE

The State argues that the deficiencies in the foundation that Appellant pointed out "bear

on the weight of the documentary evidence, not its admissibility." (Respondent's Brief, p. 15). However, as Appellant argued in the Appellant's Brief, before the document may be admitted under Rule 803(16), SCRE (ancient documents), the proponent must "establish" the "authenticity."

Appellant reiterates his assertion that the State failed to establish an appropriate foundation for admission of the pawn shop records, even under the minimal hurdle the State describes in its brief. As set forth in the Appellant's Brief, the trial court should have held that the State failed to establish authenticity to admit the documents, and should have excluded them under Rule 803(16), SCRE. This is particularly true in light of the changes made on the verifax copy from "22" to "32," indicating the caliber. (State's Exh. No. 25; R. p. 486).

IV. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE CERTAIN PAWN SHOP RECORDS UNDER THE "BUSINESS RECORDS AS EVIDENCE ACT"

The State argues that the trial court properly admitted the pawn shop records under Rule 803(6), SCRE, and the Uniform Business Records as Evidence Act.

The State cites to *Louis Vuitton S A. v. Spencer Handbags Corp.*, 765 F.2d 966 (2d Cir. 1985) for the proposition that Appellant must call into question the authenticity of the documents to succeed in a claim that the documents should not have been admitted. (Respondent's Br. P. 16). The State maintains that the Appellant did not call the documents, the pawn shop receipts, into question, so that this "failure" renders the issue unavailable. (Respondent's Br. P. 16).

First, this argument ignores that under Subpart III of the Brief, Appellant in fact called into question the accuracy of the pawn shop receipts. (Appellant's Brief, p. 38-39). Hence, this argument by the State is without merit.

Furthermore, in *Louis Vuitton S.A. v. Spencer Handbags Corp.* (the case involved trademark infringement and counterfeiting of merchandise), the evidence at issue was a videotape of a conversation between Weinberg, an investigator posing as a buyer, and the defendants. Weinberg created the videotape, and testified it accurately depicted what he recalled occurring at the time. Appellants raised the issue of the propriety of a trial court allowing the videotape to be played after hearing testimony by Weinberg that the tape accurately depicted the events in a hotel room. The Court noted the requirements of Rule 901, Fed.R.Evid., and held "Where, as here, no well-founded accusation of impropriety or inaccuracy is made, testimony as to authentication is sufficient." 765 F.Supp. at 973-974

Weinberg's testimony in *Louis Vuitton S.A. v. Spencer Handbags Corp.* is vastly different from the testimony the State presented in this case in support of the admission of the pawn shop records. The evidence in the case *sub judice* was not original but involved "Verifax" copies. The sponsoring witness, Ms. Russ, did not create the documents and testified in an equivocal fashion about certain marks contained thereon (Outlined at Appellant's Br. P. 38, footnote 6). The salesperson from the pawn shop did not testify, and there were several alterations to the document that went unexplained except for speculation by Ms. Russ. (Appellant's Brief p. 39). Hence, the rationale of *Louis Vuitton S.A. v. Spencer Handbags Corp.* simply does not apply to this case.

Next, the State asserts "there is no requirement to establish a chain of custody for documentary evidence," citing to 29A Am. Jur. 2d *Evidence* § 1037 (1994). (Respondent's Brief, p. 16-17). The citation provided by the State, however, is incomplete. That section provides:

It has been said that establishing the chain of custody of a document is not necessary under the Federal Rules of Evidence where there is *prima facie*

evidence of its authenticity which satisfies the requirements of Rule 901(a). Thus, where a litigant sought the admission into evidence of seven completed job application forms, the fact that their chain of custody could not be established did not preclude their admission where other applications were identified by the applicants, and where it could reasonably be concluded that since all the applications appeared to come from the same source and were on the same form, and since the majority were conceded to be authentic applications for employment, a prima facie case for the authenticity of the seven disputed applications under the Federal Rules had been made.

However, under the substantially similar Uniform Rules of Evidence, the courts' discussion of the admission of documents has in some cases included an observation that a suitable chain of custody was established.

(Emphasis added). The section of Am Jur notes several cases where the courts discussed whether an adequate chain of custody was established, and noted that so long as identification evidence was otherwise sufficient, no chain of custody was required. This is a far cry from setting forth a bright line rule that "establishing a chain of custody of a document is not necessary" under Rule 901. In this case, where the original documents are missing, and the sponsoring witness was not the person who created the document, nor was she the custodian or some other qualified witness as to its validity, the court should have required the State to establish a sufficient chain of custody of those documents before admitting them at trial.

The State takes issue with Appellant's citation of *Stevens v. Allen*, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999), contending there is some difference between admission of a urinalysis specimen and the resulting medical reports. (Respondent's Brief, p. 17). The urinalysis, however, is the documentary report generated by testing a urine sample. The distinction the State attempts to draw simply makes no sense.

The State cites to *Ex Parte DHEC*, 350 S.C. 243, 565 S.E.2d 293 (2002) for the proposition that "a chain of custody is not required to admit a business record under Rule

803(6)." (Respondent's Br. P. 17). This is a gross overreading of this case.

In *Ex Parte DHEC*, the Supreme Court held that HIV test results and other relevant medical information in DHEC's custody was admissible as business records without a chain of custody under Rule 803(6), SCRE, for purposes of S.C. Code Ann. § 44-29-145 (statute imposing criminal sanctions for knowingly exposing another to HIV). The Court noted that ordinarily when the State attempts to admit blood alcohol test results, the State must prove a chain of custody of the blood sample from the time it is drawn until it is tested, citing *State v Smith*, 326 S.C. 39, 482 S.E.2d 777 (1997) and *State v. Cribb*, 310 S.C. 518, 426 S.E.2d 306 (1992). The Court also cited to *Stevens v. Allen*, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999), which held a sufficient chain of custody was necessary in a civil case to admit records of urinalysis results showing the defendant had marijuana and cocaine in his system at the time of the accident. The Supreme Court added:

Although our precedent requires a chain of custody for blood and urine samples taken at the time of an accident or other crime for purposes of prosecution, HIV test results present a different set of circumstances. The DUI cases cited above involve time-sensitive tests taken at the time of an arrest or an accident that cannot be replicated outside of that time frame. *See Cribb; Stevens*. Although the blood drawn from Cribb was not drawn initially for prosecutorial purposes, it was used for those purposes ultimately, and, therefore, requires a chain of custody because Cribb could not re-test his blood alcohol level later and get an accurate result. HIV test results, on the other hand, can be confirmed or proved false by re-testing at a later date, as HIV is a permanent condition, unlike the level of alcohol or drugs in the bloodstream. Based on this distinction, we find the admission of HIV test results is not controlled by the line of cases discussed above dealing with drug and alcohol tests.

Ex Parte DHEC, 350 S.C. at 248-249, 565 S.E.2d at 296. Hence, the narrow issue in the case was whether the cases requiring a sufficient chain of custody for blood or urine analysis for the presence of alcohol or drugs required the same proof of a chain of custody for test results for

HIV, and because of the permanent nature of the presence of the HIV antibody in the blood, the same rules did not apply in a prosecution under § 44-29-145.

In discussing Rule 803(6), SCRE, the business records exception to the hearsay rule, the Court noted its agreement that the procedure for admitting business records would afford sufficient indicia of reliability to admit HIV test results without a chain of custody. DHEC cited to cases from several jurisdictions that admitted laboratory test results as business records based upon the rationale that "if it is sufficiently trustworthy to be relied upon for medical treatment, it is sufficiently trustworthy to be admitted as a business record." *Ex Parte DHEC*, 350 S.C. at 250, 565 S.E.2d at 297. The Supreme Court agreed with this rationale and held the "HIV tests taken for purposes of medical diagnosis before any charges are pending are trustworthy and should be admitted as business records without a chain of custody." *Ex Parte DHEC*, 350 S.C. at 251, 565 S.E.2d at 296. This is the narrow holding of this case.

Finally, the State once again contends Appellant "for all his protestations" does not contest the authenticity of the pawn shop records. (Respondent's Brief, p. 18). Appellant would point this Court to the discussion of Issue III in the Appellant's Brief, in which Appellant contested the authenticity of these records at length.

This Court should review the evidence and the testimony and should find that the trial court erred in admitting the pawn shop records, and this error unduly prejudiced Appellant in this case.

V. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT THE DEFENDANT WAS STATIONED AT FORT LEAVENWORTH, KANSAS

The State argues that the fact that Appellant was "stationed" at Fort Leavenworth,

Kansas, was relevant to some issue in the case. The State ignores, however, that the trial court ruled the fact of Appellant's arrest for "carrying arms" was inadmissible under Rule 404(b), SCRE. The solicitor then used the fact of Appellant's presence at Fort Leavenworth to achieve the result Rule 404(b) is in place to prevent.

It is widely known that Fort Leavenworth, Kansas, is the home of the Disciplinary Barracks, otherwise known as the military's prison. The testimony the State outlines in its brief (Respondent's Brief p. 19) has no bearing on this issue, that is, that Appellant was at Fort Leavenworth because he was in prison. The inference sought by the introduction of this evidence was that Appellant had the character to commit the crime charged in this case.

The State argues that this Court may take judicial notice that housing the Disciplinary Barracks at Fort Leavenworth, Kansas, is not even the major activity at the Fort. (Respondent's Brief, p. 20) This is not an appropriate matter for judicial notice, however. *See* Rule 201, SCRE (providing the court may take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

The State attempts to minimize the evidence by analogizing it to an argument that saying one who lives in Pelzer is the equivalent of saying somebody was at Perry Correctional Institution. (Respondent's Brief, p. 20). This analogy is far from perfect, since Perry Correctional Institution cannot possibly be viewed as having the notoriety of Fort Leavenworth, Kansas. This argument by the State is preposterous. The State's argument is even more preposterous when the Court considers that the jury sent a note to the trial judge asking if it could review "--Military records • AWOL." (Court's Exhibit 9; R. p. 483).

The evidence in this case was exclusively circumstantial. The record does not contain

overwhelming evidence that Appellant is guilty. Admission of this type of inflammatory evidence results in clear prejudice to the Appellant under these circumstances. Accordingly, this Court should reverse the conviction and remand the matter for a new trial under instructions that the court not permit any reference to Fort Leavenworth, Kansas.

VI. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL OR, ALTERNATIVELY, FOR A CURATIVE INSTRUCTION AS TO IMPROPER COMMENTS MADE BY THE SOLICITOR IN OPENING STATEMENT

The State argues that Appellant has no grounds for complaint regarding comments by the solicitor about Appellant's arrest on the charge of "carrying arms" under *Gideon v. Wainwright*, 372 U.S. 335 (1963). The State contends that it introduced evidence only after the Appellant questioned Trooper Meredith. (Respondent's Brief, pp. 20-21).

This argument misses the point of Appellant's motion below. The motion was not made at the time the evidence was introduced, but far earlier, when the solicitor made the remarks in opening statements. The State simply does not address this point in its Brief to this Court.

The State also contends the evidence of the arrest was admissible as part of the *res gestae* of the crime. To be admissible under this theory, the evidence of other crimes must be so intimately connected with the crime charged that their admission is necessary for a full presentation of the case. *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003). In this case, the evidence that Trooper Meredith arrested Appellant and charged him with "carrying arms" was clearly not necessary to a full presentation of the State's case. The charges were not "intimately connected" with the murder charges in South Carolina, and the trial court did not permit the argument and evidence on that basis.

Furthermore, even if the evidence was admissible as part of the *res gestae* of the crime, it should be excluded where its prejudicial effect outweighs any probative value it may have. *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001).

This Court should find that the trial court should have granted Appellant's motion for mistrial, and should remand the matter with instructions consistent with this Court's opinion.

VII. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT

The State erroneously asserts that Appellant has cited the incorrect legal standard for the trial court, and this Court, to apply when reviewing a motion for directed verdict in a circumstantial evidence case. (Respondent's Brief, p. 22). The State cites to *State v. Horne*, 324 S.C. 372, 478 S.E.2d 289 (Ct. App. 1996), for what it asserts is "the court's standard" as opposed to the standard to be used by the jury. (App. Br. p. 22).

In *State v. Horne*, the Court of Appeals noted the trial judge's standard for submitting a case to the jury is distinguishable from the standard applied by the jury in evaluating circumstantial evidence. "Where the evidence is circumstantial, it is the trial court's duty to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." This Court cited to *State v. Brisbon*, 323 S.C. 324, 474 S.E.2d 433 (1996) in support of this proposition. In *Brisbon*, however, the Supreme Court of South Carolina added that a trial judge "should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty...." *Brisbon*, 323 S.C. at 330, 474 S.E.2d 436. See also *State v. Wilds*, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003) (citing *Horne* this Court stated the trial judge should grant a direct

verdict motion when the evidence merely raises a suspicion that the accused is guilty).

The State argues that Appellant has confused the two standards. However, in *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984), the Supreme Court reviewed the record before it and held the evidence the State presented "may raise a suspicion of Schrock's guilt, but it does not point conclusively, nor to a moral certainty, nor beyond a reasonable doubt, to his guilt." *State v. Schrock*, 283 S.C. at 133-134. The Supreme Court held that the trial court should have directed a verdict of not guilty based on the lack of evidence, and remanded the matter for entry of a verdict of acquittal.

The Supreme Court and this Court have applied this same standard in reviewing, and reversing, other convictions that were based entirely upon circumstantial evidence. *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000) (possibility that car in defendant's possession on night of murder was parked at the victim's apartment complex the night the murder was committed, without any other evidence placing defendant at the scene, held not enough evidence to place defendant inside victim's apartment; trial court should have directed verdict of acquittal); *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000), *affirming* 332 S.C. 619, 506 S.E.2d 523 (Ct. App. 1998) (Court held defendant's fingerprint found on screen propped up against the victim's home was not sufficient to support conviction of first degree burglary where defendant had been in and around the victim's home three times prior to the burglary); *State v. Arnold*, 351 S.C. 302, 569 S.E.2d 379 (Ct. App. 2002), *cert. granted* February 20, 2003 (Court of Appeals found evidence established only that the circumstances were strongly suspicious but fell short of providing a basis upon which the jury could have reasonably and logically determined defendant's guilt; the only evidence linking defendant with the crime was his fingerprint on a

coffee cup lid in a vehicle which had been in the victim's possession at some time before he was killed); *State v. Mouzon*, 321 S.C. 27, 467 S.E.2d 122 (Ct. App. 1995), *aff'd* 326 S.C. 199, 485 S.E.2d 918 (1997) (Court of Appeals reversed trial court's denial of defendant's directed verdict motion on conspiracy charges where the evidence merely raised a suspicion of the defendant's guilt).

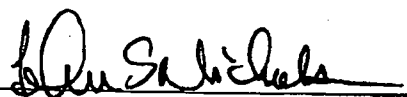
As pointed out in the Appellant's Brief, there was no direct evidence placing Appellant at the scene of the crime or showing Appellant had any part in the killing of Mr. Orner (Appellant's Brief, pp. 46-47). The only piece of evidence that remotely ties Appellant to the murder is the gun Trooper Meredith allegedly confiscated from Appellant. However, as pointed out above, the trial court should have suppressed the gun for the reasons argued.

The conviction in this case is based upon evidence which, at best, raises merely a suspicion that Appellant may be guilty; however, under *Schrock*, the evidence does not point conclusively, nor to a moral certainty, nor beyond a reasonable doubt, to Appellant's guilt. Hence, the trial judge should have directed a verdict of not guilty, and this Court should reverse, remand, and order the entry of a judgment of acquittal.

CONCLUSION

For the reasons stated, the conviction in this matter should be reversed, and the matter remanded to the circuit court for entry of judgment of acquittal. Alternatively, this Court should rule that the Appellant is entitled to a new trial based upon the erroneously admitted evidence as discussed herein.

Respectfully submitted,



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December 3, 2004.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLANDCOUNTY
Court of General Sessions
The Honorable Henry F. Floyd, Circuit Court Judge

Case No. 2001-GS-40-2955

State of South Carolina, ... Respondent,

vs.

Edward Freiburger, ... Appellant.

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INDEX

Transcript of Proceedings of July 25, 2002	1
Transcript of Proceedings of July 29, 2002 to August 2, 2002:	
Testimony of Donald Meredith	
(direct)	2
(cross)	12
Court Discussion	21
Testimony of Charles Clark	
(direct)	25
Certificate of Counsel	29

1 CERTAINLY BRING THAT TO THE COURT'S ATTENTION BEFORE I
2 ATTEMPTED TO OFFER IT, BUT I DON'T THINK -- I MEAN, AS AN
3 OFFICER OF THE COURT, I DON'T THINK I CAN GET AN INCIDENT
4 REPORT IN JUST BECAUSE IT'S 40 YEARS OLD NO MORE THAN I
5 COULD TODAY. IF I COULD, I WOULD TRY TO GET OFFICERS TO
6 WRITE BETTER INCIDENT REPORTS.

7 I MEAN, I UNDERSTAND THAT, BUT I DON'T WANT TO
8 FORECLOSE THAT CONCLUSION EITHER. I'LL BRING IT TO THE
9 COURT'S ATTENTION IF SOMETHING COMES UP THAT I WANT TO
10 OFFER AT A LATER TIME.

11 THE COURT: ALL RIGHT. TO ANSWER ISSUES FIVE
12 AND SEVEN, THAT'S GOING TO REQUIRE SOME TESTIMONY, I
13 THINK, THAT IS THE EVIDENCE OBTAINED DURING THE SEARCH OF
14 THE DEFENDANT'S PERSON AND THE CHAIN OF CUSTODY. WE CAN'T
15 DO THAT TODAY.

16 MR. DELGADO: YES, SIR.

17 THE COURT: WHAT'S YOUR ISSUE ABOUT NUMBER SIX?

18 MR. DELGADO: WELL, FIVE --

19 THE COURT: FIVE AND SEVEN WILL REQUIRE
20 TESTIMONY.

21 MR. DELGADO: YES, SIR, I AGREE.

22 YOUR HONOR, MS. HUDGINS IS TASKED WITH THE
23 RESPONSIBILITY OF NUMBER SIX, AND IF THE COURT WISHES TO
24 HEAR THE -- MAYBE JUST LET HER OUTLINE THAT PROBLEM, AND
25 THEN MAYBE ARGUMENT ON IT UNLESS YOU WANT TO --

1 TO THE JURY.

2 THE COURT: I'M NOT LETTING THEM GO TO THE JURY.

3 MR. MCMAHON: NO, SIR. I MEAN, I JUST OFFERED
4 THEM IN CAMERA BECAUSE HE USED THEM AS PART OF HIS
5 ARGUMENT.

6 THE COURT: ALL RIGHT. WE'LL LEAVE THEM MARKED,
7 AND I'LL DEAL WITH THAT ISSUE FURTHER DOWN. LET ME HAVE
8 THE CASE YOUR RELYING ON.

9 ALL RIGHT. WHAT'S YOUR NEXT ISSUE, SOLICITOR?

10 MR. MCMAHON: THE STATE CALLS DON MEREDITH.

11 THE COURT: WHAT'S THE ISSUE?

12 MR. MCMAHON: THE SEARCH, THE WEAPON.

13 THE BAILIFF: RAISE YOUR RIGHT HAND, PLACE YOUR
14 LEFT HAND ON THE BIBLE, FACE THE CLERK.

15 DONALD MEREDITH (IN CAMERA), AFTER BEING DULY
16 SWORN, TESTIFIED AS FOLLOWS:

17 THE CLERK: PLEASE HAVE A SEAT. STATE YOUR FULL
18 NAME FOR THE RECORD.

19 THE WITNESS: MY NAME IS DONALD L. MEREDITH.

20 DIRECT EXAMINATION:

21 BY MR. MCMAHON

22 Q OKAY. MR. MEREDITH, WHERE DO YOU LIVE?

23 A NEWPORT, TENNESSEE.

24 Q AND HOW OLD ARE YOU, SIR?

25 A SEVENTY-SIX.

1 OBJECTION TO THE PREVIOUSLY FILED MOTIONS ABOUT GIDEON AND
2 THE RIGHT TO COUNSEL. REMEMBER, WE ARGUED THAT ON
3 THURSDAY? WE WERE GOING TO WORK ON IT OVER THE WEEKEND?

4 THE COURT: SUBJECT TO THAT OBJECTION.

5 (WHEREUPON, COURT'S EXHIBIT NO. 4 WAS MARKED FOR
6 IDENTIFICATION ONLY.)

7 BY MR. MCMAHON

8 Q NOW, MR. MEREDITH, I BELIEVE I UNDERSTOOD YOU TO SAY
9 THAT YOU DETERMINED FRIEBURGER WAS A.W.O.L.?

10 A YES.

11 Q AND YOU UNDERSTOOD WHAT THAT MEANT BEING IN THE
12 MILITARY?

13 A YES, SIR.

14 Q AND YOU NOTIFIED THE MILITARY AUTHORITIES?

15 A I DID.

16 Q NOW, DID YOU MAINTAIN POSSESSION OF THE GUN?

17 A YES, SIR, I DID.

18 Q BACK IN '61, WHAT OCCURRED AS FAR AS THAT 32
19 HARRINGTON AND RICHARDSON THAT YOU REMOVED FROM
20 MR. FRIEBURGER? WHAT HAPPENED TO THAT GUN?

21 A WELL, AT THAT TIME WE DIDN'T HAVE ANY MEANS OF
22 LOCKING IT UP IN THE COURT. THE JUDGE HAD US KEEP IT
23 IN OUR POSSESSION.

24 AFTER THE TRIAL -- WELL, PROBABLY BEFORE THAT,
25 SHERIFF S. S. SLY HERE IN COLUMBIA CALLED ME AND

1 WANTED TO KNOW IF I HAD SUCH GUN IN MY POSSESSION. I
2 TOLD HIM I DID.

3 HE WANTED TO KNOW IF I WOULD TURN IT OVER TO
4 THEM FOR INVESTIGATION IN A MURDER TRIAL. I TOLD HIM
5 I WOULD. HE SENT TWO OFFICER TO MY HOUSE IN NEWPORT
6 TO PICK IT UP.

7 Q AND THIS WAS BACK IN 1961 THAT YOU TURNED THIS GUN
8 OVER TO THESE OFFICERS?

9 A YES, SIR.

10 Q AND YOU UNDERSTOOD THEM TO BE RICHLAND COUNTY
11 SHERIFF'S DEPUTIES?

12 A YES, SIR.

13 Q DID YOU EVER, I GUESS WHAT YOU'D SAY, CHECK UP ON
14 THAT GUN LATER ON?

15 A YES, SIR. AROUND '64, I GUESS IT WAS, I BELIEVE IT
16 WAS A TRUCKER I WAS INVOLVED IN INVESTIGATING. HE
17 WAS TRIED HERE IN FEDERAL COURT.

18 I TALKED TO THE ATTORNEY WINEBURGER OR
19 WHIBURGER. HE SAID, "I'LL CHECK ON IT." THEN HE
20 DID. HE WROTE ME A LETTER STATING THAT -- THAT WAS
21 ABOUT '64 I GUESS. HE WROTE A LETTER TELLING ME THAT
22 THE CASE HAD NOT COME TO TRIAL, PROBABLY BE ANOTHER
23 YEAR OR SO BEFORE IT CAME TO TRIAL.

24 Q AND THAT WOULD HAVE BEEN IN ABOUT '64; IS THAT
25 CORRECT?

1 A SIXTY-FOUR, YES, SIR.

2 Q NOW, BACK IN APRIL OF 2001, DID YOU HAVE AN OCCASION

3 TO TALK TO RICHLAND COUNTY SHERIFF'S OFFICERS AGAIN?

4 A YES, SIR, I DID.

5 Q AND DID YOU PROVIDE THEM WITH A STATEMENT AT THAT

6 TIME?

7 A YES, SIR.

8 Q ADDITIONALLY, DID YOU STILL HAVE A COPY OF THAT 1964

9 LETTER?

10 A YES, SIR.

11 Q WHAT DID YOU DO WITH THAT?

12 A I GAVE IT TO THEM, AND THEY MADE COPIES OF IT. I HAD

13 A COPY IN MY POSSESSION.

14 Q I WANT TO SHOW YOU A DOCUMENT AND ASK IF YOU CAN

15 IDENTIFY THIS DOCUMENT FOR US, PLEASE?

16 A YES, SIR. THAT IS THE ONE THAT THIS -- OH...

17 LET ME LOOK HERE. YEAH, THAT WAS LIEUTENANT

18 CATE, I BELIEVE.

19 Q AND WHO IS THIS LETTER ADDRESSED TO?

20 A ADDRESSED TO ME.

21 Q AND WAS THAT YOUR ADDRESS? IS THAT STILL YOUR

22 ADDRESS, [REDACTED] [REDACTED] [REDACTED], NEWPORT, TENNESSEE?

23 A YES, IT IS.

24 Q IN OTHER WORDS, IN '64 I COULD MAIL YOU A LETTER, AND

25 IT WOULD GET TO YOU THERE. I COULD MAIL YOU ONE

1 TONIGHT AND IT WOULD GET TO YOU.

2 A YES, SIR.

3 Q AND THIS LETTER, WHAT IS IT IN REFERENCE TO?

4 A HARRINGTON AND RICHARDSON REVOLVER, A 32.

5 Q DOES IT HAVE A MODEL NUMBER THERE?

6 A MODEL AND SERIAL NUMBER.

7 Q AND SERIAL NUMBER?

8 A IT'S W-9948.

9 MR. MCMAHON: YOUR HONOR, I WOULD OFFER THIS
10 LETTER AS A COURT'S EXHIBIT.

11 THE COURT: ANY OBJECTION?

12 MR. DELGADO: YES, SIR. THE OBJECTION, YOUR
13 HONOR, IS THAT IS NOT QUALIFIED UNDER THE ANCIENT
14 DOCUMENTS RULE AS -- UNDER 803(60) SUBJECT TO HEARSAY IN
15 THAT WHILE IT IS MORE THAN 20 YEARS OLD, THAT IS FOR SURE.
16 THE PROBLEM WITH THAT, YOUR HONOR, IS THAT IS NOT WHAT THE
17 ANCIENT DOCUMENT RULE CONTEMPLATES.

18 IN OTHER WORDS, I THINK WE MAY HAVE DONE THIS
19 WITH OUR MOTIONS PREVIOUSLY, NEVER BEFORE IN THE HISTORY
20 OF JURISPRUDENCE AS FAR AS THE EVIDENCE IS CONCERNED HAVE
21 WE HAD ANCIENT DOCUMENTS USED IN A CRIMINAL CASE.

22 NOT ONLY THAT, THAT LETTER WAS PREPARED IN
23 ADVANCE IN ANTICIPATION OF LITIGATION. NUMBER, WE'RE
24 DENIED THE RIGHT TO CONFRONT MR. CATE WHO IS NO LONGER A
25 WITNESS AS A RESULT.

1 THE COURT: LET ME SEE THE LETTER.

2 (WHEREUPON, COURT'S EXHIBIT NO. 5 WAS MARKED FOR
3 IDENTIFICATION ONLY.)

4 MR. DELGADO: YOUR HONOR THE MEMORANDUM OF THE
5 DOCUMENTS, I THINK WE DID THIS.

6 THE COURT: YES, SIR?

7 MR. DELGADO: WELL --

8 THE COURT: IT CONTAINS NO INFORMATION OR CAUSES
9 YOUR CLIENT ANY PROBLEM.

10 MR. DELGADO: YES, IT DOES, BECAUSE IT LINKS HIM
11 TO THE GUN AS A RESULT OF THE SERIAL NUMBER.

12 THE COURT: WELL, HIS TESTIMONY DOES THAT.

13 MR. DELGADO: WELL, THEN THE TESTIMONY DOES
14 THAT. THE REASON I CAN'T DO THAT IS I CAN'T CROSS-EXAMINE
15 MR. CATE.

16 THE COURT: WELL, THIS CAN COME IN AS A BUSINESS
17 RECORD AS TO -- IN THAT IT WAS MAINTAINED IN THE S.L.E.D.
18 FILE TRACKING THE CUSTODY OF THAT GUN.

19 THIS GENTLEMAN WHO GOT THE GUN TO START WITH
20 WANTED IT BACK. HE WROTE THEM AND ASKED WHY CAN'T I GET
21 IT BACK?

22 MR. DELGADO: I UNDERSTAND, JUDGE, BUT NOT ONLY
23 DO I BELIEVE IT'S AN ANCIENT DOCUMENT, THEREFORE, IT'S
24 NOT -- I MEAN, IT'S NOT AN ANCIENT DOCUMENT, I REALLY
25 THINK THE BUSINESS RECORD EXCEPTION HERE -- IN OTHER

1 WORDS, WE DON'T KNOW WHETHER MR. CATE DID THIS ON A
2 ROUTINE PRACTICE.

3 WE DON'T KNOW IF HE EVER HAD AN OPPORTUNITY TO
4 WRITE AN INDIVIDUAL OUT OF STATE AND EXPLAIN WHY HE CAN'T
5 GIVE A GUN BACK, NO, SIR.

6 I UNDERSTAND THE PARTICULAR EVIDENTIARY PROBLEM,
7 YOUR HONOR. IT'S JUST THAT MR. CATE IS NOT HERE, AND
8 WE'RE DENIED THE RIGHT TO CONFRONT HIM WITH THAT.

9 THE COURT: MR. DELGADO, I DON'T QUITE FOLLOW
10 YOU.

11 THE ANCIENT DOCUMENT QUESTION IS ONE, CAN THE
12 DOCUMENT BE AUTHENTICATED; TWO, YOU KNOW, IS IT A
13 DOCUMENT; THREE, HAS IT BEEN IN THE POSSESSION -- IN
14 EXISTENCE 20 YEARS UNDER THE RULES?

15 THIS IS MERELY A DOCUMENT THAT TRACKS THE
16 CUSTODY OF THE WEAPON, NO MORE, NO LESS. THE SOLICITOR
17 CAN -- IS THERE ANY CHALLENGE TO THE AUTHENTICITY OF THIS?

18 MR. DELGADO: YES, SIR. I MEAN, I WOULDN'T KNOW
19 MR. MILLARD CATE FROM ANYBODY ELSE. I'M NOT TRYING TO SAY
20 THAT ISN'T HIS SIGNATURE, BUT PURELY FOR THE SAKE OF THIS
21 RECORD, HAS ANYBODY BEEN ABLE TO DOCUMENT THAT AS HIS
22 SIGNATURE?

23 THE COURT: I KNOW.

24 MR. DELGADO: WHAT I'M SAYING IS IT'S
25 PREMATURETY ADMITTED AT THIS TIME.

1 THE COURT: IT'S ONLY A COURT'S EXHIBIT AT THIS
2 TIME.

3 MR. DELGADO: I UNDERSTAND.

4 THE COURT: OBJECTION PREMATURE AT THIS TIME,
5 OVERRULED.

6 YOU MAY PROCEED.

7 MR. MCMAHON: YES, SIR.

8 THE COURT: SOLICITOR, LET ME ASK YOU THIS, WHY
9 DO YOU NEED IT IN THE FIRST PLACE, BECAUSE YOU HAVE THE
10 S.L.E.D. -- ASSUMING THEY KEPT IT IN THEIR POSSESSION, HE
11 GAVE IT TO THEM. WHY DO YOU NEED IT?

12 MR. MCMAHON: WELL, SIR, AS HIS HONOR POINTED
13 OUT, I'M TRACKING 9948. I'M TRACKING 9948, AND I'M
14 TRACKING BACK TO 1961.

15 9948 APPEARS ON THE CAPITAL LOAN RECORD. THEN
16 9948 WILL APPEAR ON THAT.

17 I HAVE MR. CATE'S SON ON THE WITNESS LIST, IF I
18 NEED TO, TO AUTHENTICATE HIS SIGNATURE, IF THAT'S A
19 QUESTION. BUT GIVEN THE FACT ALSO, JUST LIKE HE
20 CROSS-EXAMINED LAST WITNESS, DID YOU KEEP ANY NOTES ABOUT
21 THIS.

22 WELL, THIS WITNESS IS 76 YEARS OLD, HAS KEPT THE
23 LETTER FOR 37 YEARS ABOUT THIS PARTICULAR WEAPON. THEN I
24 HAVE A WEAPON, 9948. I THINK ON ANY CASE, PARTICULARLY A
25 41-YEAR-OLD MURDER CASE, I SHOULD DOT THE "I'S" AND CROSS

1 THE "T'S".

2 I MEAN, THAT'S MY POINT IN THAT PARTICULAR --

3 THE COURT: WELL, I'M NOT DEBATING IT, BUT I'M
4 NOT SO SURE YOU HAVE TO OVERTRY EVERY ISSUE. FOR EXAMPLE,
5 JUST LIKE THE GENTLEMAN THERE THAT MADE THE ARREST. THERE
6 WAS A PAT DOWN. WE DON'T NEED THE CONVICTION. WE DON'T
7 NEED TO GUM IT UP. YOU DON'T HAVE TO EXPLAIN TO THE JURY
8 YOU TOOK THE GUN OFF. THEN WE DON'T HAVE THAT APPELLATE
9 ISSUE.

10 MR. MCMAHON: JUDGE, I UNDERSTAND --

11 THE COURT: THAT'S WHAT I'M --

12 MR. MCMAHON: JUDGE, I WILL TAKE THAT AS A
13 COMPLIMENT WHEN YOU TELL ME I'M OVERTRYING MY CASE AS
14 OPPOSED TO CRITICISM.

15 I'M NOT SAYING ALL THIS IS GOING TO GO BEFORE
16 THE JURY, BUT WHEN HIS HONOR IS RULING ON THESE VARIOUS
17 THINGS, I WANT THAT SCALE AS WEIGHTED DOWN AS POSSIBLE, IS
18 WHAT I'M SAYING.

19 THE COURT: I UNDERSTAND.

20 MR. MCMAHON: RESPECTIVELY, IS WHAT I'M SAYING.

21 THE COURT: ALL RIGHT. YOU MAY PROCEED.

22 MR. MCMAHON: YES, SIR.

23 BY MR. MCMAHON

24 Q IF I SHOWED YOU THIS DOCUMENT, AND I'M NOT SAYING YOU
25 NEED A MAGNIFYING GLASS, MR. MEREDITH, I DO, BUT IF

1 I'M SHOWING YOU THIS ITEM HERE AND YOU LOOK AT THE
2 BOTTOM PLATE, ARE YOU ABLE TO READ THAT SERIAL
3 NUMBER?

4 A THAT IS W 9948.

5 Q W 9948. WITHOUT ME WALKING BACK OVER THERE, THAT'S
6 THE SAME SERIAL NUMBER THAT'S ON YOUR LETTER FROM
7 BACK IN MARCH OF 196--- WELL, YOUR LETTER FROM 1964?

8 A YES, SIR.

9 MR. MCMAHON: AND, YOUR HONOR, I WOULD OFFER
10 THIS FOR IDENTIFICATION PURPOSES ONLY AT THIS TIME.

11 (WHEREUPON, STATE'S EXHIBIT NO. 6 WAS MARKED FOR
12 IDENTIFICATION ONLY.)

13 BY MR. MCMAHON

14 Q IF THAT'S THE WEAPON, MR. MEREDITH, AND I APOLOGIZE.
15 YOU WERE A LIEUTENANT WITH THE HIGHWAY PATROL WHEN
16 YOU RETIRED?

17 A WHEN I RETIRED, YES, SIR.

18 Q LIEUTENANT MEREDITH, THAT'S THE WEAPON, W 9948, THAT
19 YOU TURNED OVER TO THE RICHLAND COUNTY OFFICERS BACK
20 IN 1961; IS THAT-CORRECT?

21 A THAT IS CORRECT, YES, SIR.

22 MR. MCMAHON: I DON'T HAVE ANY FURTHER
23 QUESTIONS, YOUR HONOR.

24 THE COURT: CROSS-EXAMINATION?

25 CROSS-EXAMINATION:

1 BY MR. DELGADO

2 Q GOOD AFTERNOON, MR. MEREDITH. MY NAME IS JOHN
3 DELGADO. I'M AN ATTORNEY, AND I REPRESENT MR. ED
4 FRIEBURGER.

5 MR. MEREDITH, WHEN THE RICHLAND COUNTY SHERIFF'S
6 DEPARTMENT CONTACTED YOU AGAIN ABOUT THE LETTER THAT
7 HAS BEEN MARKED AS A COURT'S EXHIBIT, AND YOU TURNED
8 THAT OVER TO THEM, THAT IS MY FRIEND EITHER MR. METZ
9 OR MR. CRAIG; IS THAT RIGHT, SIR?

10 A YES, SIR.

11 Q THEY CAME UP TO NEWPORT TO SEE YOU?

12 A YES, SIR, THEY DID.

13 Q AND RECEIVED THAT LETTER FROM YOU?

14 A THAT'S RIGHT.

15 Q DID YOU TELL THEM, SIR, ABOUT THE FACTS ABOUT --
16 FIRST OF ALL, DO YOU KNOW MR. ED FRIEBURGER, THE
17 GENTLEMAN SEATED, WOULD YOU RECOGNIZE HIM?

18 A NO, SIR. I WOULDN'T RECOGNIZE HIM.

19 Q THAT IS HIM.

20 A ALL RIGHT, SIR.

21 Q IF I SAY TO YOU, SIR, YOU ARRESTED HIM ON THE LATE
22 EVENING OF MARCH 29TH, YOUR REMEMBRANCE OF THAT, SIR,
23 WAS THAT YOU ALL HAD HAD -- YOU ALL WOULD BE LAW
24 ENFORCEMENT OR HIGHWAY PATROL -- YOU HAD FOLKS THAT
25 WERE EITHER HITCHHIKING OR WALKING ALONG THE ROAD AND

1 AT LEAST ONE PERSON HAD BEEN HIT, STRUCK, AND
2 POSSIBLY KILLED?

3 A YES, SIR.

4 Q WHEN YOU SAW HIM, YOU STOPPED AND WENT UP TO HIM,
5 CORRECT, SIR?

6 A YES, SIR.

7 Q DID HE IN ANY WAY ATTEMPT TO ASSAULT YOU, ATTEMPT TO
8 BATTER YOU, OR ATTEMPT TO RUN FROM YOU IN ANY WAY,
9 SIR?

10 A NO, SIR.

11 Q DID HE COOPERATE WITH YOU?

12 A HE SURE DID.

13 Q WAS HE PLEASANT AND COURTEOUS?

14 A YES.

15 Q WHEN YOU -- DID HE GIVE YOU HIS NAME AT THAT TIME?
16 IN OTHER WORDS, WAS THE FIRST THING THAT YOU AND I --
17 "I'M MR. FRIEBURGER" ON THE SIDE OF THAT ROAD THAT
18 EVENING? WHEN YOU CAME UP TO HIM THAT EVENING, DID
19 YOU SAY TO HIM, "HOW ARE YOU DOING? WHAT'S YOUR
20 NAME?" DO YOU RECALL?

21 A I DON'T RECALL.

22 Q I UNDERSTAND. THIS ISN'T A QUIZ. IT'S A LONG TIME
23 AGO. YOU SAY, SIR, THAT YOU PADDED HIM DOWN --

24 A YES, SIR.

25 Q -- BUT AT THAT TIME HE WAS NOT UNDER ARREST, WAS HE?

- 1 A NO. HE WASN'T, BUT HE WAS GOING TO BE FOR
2 HITCHHIKING, OR I WAS GOING TO TAKE HIM BACK TO THE
3 JAIL.
- 4 Q ALL RIGHT, SIR.
- 5 A BUT WE DID A SAFETY SEARCH BEFORE WE PUT SOMEBODY IN
6 THE CAR. YOU CHECK THEM TO SEE IF THEY HAVE ANY
7 WEAPONS.
- 8 Q SO YOU PUT HIM IN THE CAR BEFORE YOU PATTED HIM DOWN?
- 9 A NO. I SAID I PATTED HIM DOWN BEFORE I PUT HIM IN THE
10 CAR.
- 11 Q I GOT YOU. NOW, AT THE TIME THAT YOU PATTED HIM
12 DOWN, SOMETIMES IN THE WAY LAW ENFORCEMENT DOES, DID
13 YOU PUT HIS HANDS ABOVE HIS HEAD, DID YOU ASK HIM TO
14 SPREAD HIS FEET, IF YOU RECALL.
- 15 A NO, SIR, I DON'T RECALL THAT.
- 16 Q ALL RIGHT, SIR. YOU DID THAT, SIR, AS A SAFETY
17 PRECAUTION FOR YOURSELF?
- 18 A RIGHT.
- 19 Q BUT BEFORE YOU DID THAT, YOU DIDN'T SUSPECT HIM OF
20 DOING ANYTHING WRONG OR IMPROPER, DID YOU?
- 21 A I'D RATHER HIM NOT BE HITCHHIKING ON THE HIGHWAY.
- 22 Q ALL RIGHT, SIR. SO HE HADN'T CONSTITUTED A THREAT TO
23 YOU OR TO ANYBODY ELSE OUT THERE ON THE SIDE OF THE
24 ROAD THAT EVENING?
- 25 A TO HIMSELF OUT THERE HITCHHIKING.

1 Q WAS THERE ANYTHING, SIR, THE WAY YOU PERCEIVED THAT
2 EVENING, THAT WOULD HAVE GIVEN YOU SUSPICION THAT HE
3 WAS ENGAGED IN SOME SORT OF ACTIVITY THAT WAS A CRIME
4 EXCEPT FOR POSSIBLY HITCHHIKING?

5 A NO.

6 Q ALL RIGHT, SIR. MR. MEREDITH, I HAVE HAD A PRIVATE
7 INVESTIGATOR CONTACT YOU, IN FACT, EVEN WENT UP TO
8 NEWPORT.

9 A YES, SIR.

10 Q THE NAME IS MR. DAVID MCDUGAL.

11 A YES, SIR.

12 Q I THINK HE MET YOU AT YOUR HOUSE, IF I'M NOT
13 MISTAKEN.

14 A THAT'S RIGHT.

15 Q HE ASKED YOU SOME QUESTIONS ABOUT THAT EVENING SO HE
16 COULD REPORT THAT BACK TO ME. DO YOU RECALL THAT,
17 SIR?

18 A UH-HUH.

19 Q DO YOU RECALL SOMETIME AFTER THAT, MR. MEREDITH, THAT
20 HE EITHER CONTACTED YOU BY PHONE AND ASKED IF HE
21 COULD RECOUNT WHAT YOU HAD TOLD HIM, AND IF THAT MET
22 WITH YOUR APPROVAL, SEND IT BACK TO YOU, AND IF YOU
23 COULD, IF YOU'D SIGN IT AND RETURN IT BACK TO HIM.
24 DO YOU RECALL THAT, SIR?

25 A YES, SIR.

1 Q AND YOU GOT THAT STATEMENT, SIGNED IT AND RETURNED IT
2 TO MR. MCDOUGAL.

3 A YES, SIR.

4 Q OKAY. AND KEPT ONE FOR YOURSELF?

5 A YES, SIR.

6 Q HAVE YOU SHARED THAT WITH THE SOLICITOR'S OFFICE?

7 A YES, SIR.

8 Q ALL RIGHT, SIR. NOW, DURING THAT TIME -- LET ME JUST
9 SHOW THIS TO YOU, MR. MEREDITH. SEE IF YOU CAN
10 IDENTIFY THAT MR. MEREDITH AND SEE IF THAT IS THE --

11 A THAT'S IT.

12 MR. DELGADO: THAT'S IT.

13 YOUR HONOR, IF THE STATE -- DO YOU HAVE A COPY?

14 MR. MCMAHON: YES, SIR.

15 MR. DELGADO: YOUR HONOR, WE'D LIKE TO BE ABLE
16 TO MAKE THIS A PART OF THE COURT'S EXHIBIT, IF WE COULD.

17 MR. MCMAHON: NO OBJECTION.

18 (WHEREUPON, COURT'S EXHIBIT NO. 6 WAS MARKED FOR
19 IDENTIFICATION ONLY.)

20 BY MR. DELGADO

21 Q MR. MEREDITH, LET ME JUST GIVE THIS BACK TO YOU, SIR.
22 I'M GOING TO SHOW HIS HONOR A COPY OF THIS.

23 YOUR HONOR, THIS IS A COPY OF IT. YOU MAY WANT
24 TO JUST LOOK AT IT WITH US.

25 MR. MEREDITH, IN THE SECOND -- WELL, I GUESS IN

1 THE THIRD PARAGRAPH IN THAT STATEMENT, AND FIRST
2 MR. MEREDITH, THAT STATEMENT WAS SIGNED THE TENTH DAY
3 OF JUNE, 2002; IS THAT CORRECT, SIR?

4 A YES, SIR.

5 Q ALL RIGHT, SIR. THE SECOND OR THE THIRD PARAGRAPH
6 THAT STARTS WITH THE WORDS, "I FOUND ED FRIEBURGER",
7 WOULD YOU JUST READ MAYBE THE FIRST FOUR OR FIVE
8 SENTENCES OF THAT PARAGRAPH OUT LOUD, SIR?

9 A "I FOUND ED FRIEBURGER HITCHHIKING ALONG 25 AND 70 IN
10 THE VICINITY OF NEWPORT, TENNESSEE. OUT OF POLICY
11 AND PROCEDURE AT THAT TIME, I STOPPED TO CHECK HIM
12 PRIMARILY FOR SAFETY REASONS.

13 WE HAD HAD HITCHHIKERS STRUCK BY VEHICLES. AT
14 THAT TIME, WE DIDN'T ALWAYS ARREST HITCHHIKERS UNLESS
15 THEY HAD COMMITTED ANOTHER VIOLATION.

16 I DOUBT I WOULD HAVE ARRESTED ED FRIEBURGER IF I
17 HAD NOT FOUND THE GUN HE WAS CARRYING.

18 Q HOW ABOUT READ THE VERY NEXT ONE.

19 A "I DO NOT RECALL HOW I FOUND THE GUN, BUT IT MAY BE
20 THAT I -- IT MAY HAVE BEEN DURING A PAT DOWN. AFTER
21 I ARRESTED HIM, I TRANSPORTED HIM TO JAIL."

22 Q ALL RIGHT, SIR. NOW, LET ME SEE IF I CAN GET THAT
23 CORRECTLY.

24 IN OTHER WORDS, YOU SAY IN YOUR STATEMENT TO
25 MR. MCDUGAL THAT YOU DOUBT YOU WOULD HAVE ARRESTED

1 HIM IF YOU HADN'T FOUND THE GUN HE WAS CARRYING,
2 CORRECT, SIR?

3 A CORRECT.

4 Q THAT'S RIGHT. AND HE HAD DONE NOTHING AT THE TIME
5 THAT YOU FIRST MET HIM TO INDICATE TO YOU THAT HE WAS
6 IN VIOLATION -- THAT HE WAS A THREAT OR A DANGER TO
7 YOU OR TO ANYONE ELSE IN THE WAY OF ACTIVITY OR WAS
8 ENGAGED IN CRIMINAL ACTIVITY, CORRECT, SIR?

9 A THAT'S TRUE.

10 Q ALL RIGHT, SIR. IF YOU LOOK DOWN TO THE FOURTH
11 PARAGRAPH THAT STARTS WITH THE WORD "AT THE TIME."
12 READ DOWN INTO THAT PARAGRAPH.

13 A "AT THE TIME I ARRESTED ED FRIEBURGER, HE GAVE ME NO
14 INDICATION HE WAS INVOLVED OR WANTED FOR ANY OTHER
15 CRIME. HE MADE NO STATEMENTS TO ME ABOUT ANY OTHER
16 CRIME.

17 I HAVE NO RECOLLECTION IF HE STATED WHERE HE WAS
18 GOING. SOMETIME AFTER I ARRESTED HIM, I FOUND HE WAS
19 A.W.O.L. FROM THE ARMY. I CONTACTED THE M.P.'S TO
20 INFORM THEM WHERE ED FRIEBURGER WAS SO THEY COULD
21 PICK HIM UP."

22 Q ALL RIGHT.

23 A TO THE BEST OF MY KNOWLEDGE, THEY DID.

24 Q ALL RIGHT, SIR. AND THEY DID AFTER HE WENT TO -- I
25 THINK YOU CALL IT YOUR "SESSIONS" COURT?

1 A GENERAL SESSIONS COURT.

2 Q THAT'S WHAT WE CALL IT HERE, TOO, GOOD. SO YOU WENT
3 TO YOUR GENERAL COURT -- MR. MEREDITH, IF I TELL YOU
4 I HAD AN INVESTIGATOR GO UP THERE, SOMEBODY OTHER
5 THAN MR. MCDUGAL, AND THERE WAS SOMETHING IN THAT
6 SESSIONS BOOK THAT HAS THE INITIALS "C.A." DOES THAT
7 STAND FOR CARRYING ARMS?

8 A CARRYING ARMS.

9 Q I KNOW HOW WE DO THIS. I MEAN, SOMETIMES YOU ARREST
10 THEM, AND YOU CALL IT UNLAWFUL CARRYING OF A WEAPON,
11 BUT SOMETIMES WE PUT IT ON THE DOCKET SHEET OR
12 SOMETHING ELSE, WE CALL IT C.A., CARRYING -- THE SAME
13 OFFENSE, CORRECT, SIR?

14 A YES, SIR.

15 Q AND THAT'S WHAT HE WAS SENTENCED TO BY YOUR JUDGE,
16 FOR 30 DAYS SUSPENDED AS SOON AS THE MILITARY GUYS
17 CAME TO GET HIM?

18 A SIX DAYS.

19 Q SIX DAYS LATER. ALL RIGHT. SO IN OTHER WORDS, YOU
20 DID NOT ARREST HIM FOR BEING A.W.O.L. BECAUSE YOU
21 DIDN'T KNOW THAT UNTIL YOU GOT DOWN TO THE POLICE
22 DEPARTMENT?

23 A THAT'S CORRECT.

24 Q ALL RIGHT. YOU CONDUCTED A SAFETY SEARCH. YOU JUST
25 PATTED HIM DOWN FOR WEAPONS?

1 A THAT'S RIGHT.

2 MR. DELGADO: ALL RIGHT. JUST ONE SECOND
3 PLEASE, YOUR HONOR.

4 (PAUSE).

5 THAT'S ALL THE QUESTIONS I HAVE.

6 THE COURT: ANY REDIRECT?

7 MR. MCMAHON: NOTHING ON REDIRECT.

8 THE COURT: YOU MAY STEP DOWN.

9 ANYTHING FURTHER FROM THE STATE ON THAT?

10 MR. MCMAHON: NO, YOUR HONOR.

11 THE COURT: MR. DELGADO?

12 MR. DELGADO: YOUR HONOR, THIS HAS BEEN A LAW
13 SCHOOL EXAMINATION FOR ALL OF US IN A LOT OF WAYS. IT HAS
14 FOR ME, LET ME PUT IT THAT WAY.

15 TERRY VS. OHIO IS NOT PROMULGATED BY THE UNITED
16 STATES SUPREME COURT UNTIL SOMETIME LONG AFTER THIS
17 INCIDENT. HOWEVER, IT, ALONG WITH THE OTHER
18 CONSTITUTIONAL RIGHTS, BECAUSE THIS CASE WAS NOT FINALLY
19 DECIDED PRIOR TO THE TIME THAT TERRY WAS PROMULGATED,
20 APPLIES RETROACTIVELY.

21 IN OTHER WORDS, WHILE MAPP VS. OHIO, MAKING THE
22 FOURTH AMENDMENT APPLICABLE TO THE STATES, AND IMPOSING AN
23 EXCLUSIONARY RULE ON THE STATES, IS NOT PROMULGATED BY THE
24 SUPREME COURT UNTIL JUNE OF 1961, SOME THREE MONTHS LATER,
25 TWO-AND-A-HALF MONTHS LATER.

1 CIRCUMSTANCES OF OUR CASE LAW, AND STATE CASES, HAVE HELD
2 IN RELYING ON TERRY IN THE LAST SEVEN YEARS, AND I THINK
3 THIS SEARCH IN PARTICULAR PASSES UPON TWO DIFFERENT
4 LEVELS, YOUR HONOR.

5 IN TAKING THE TERRY CASES FIRST, I WOULD JUST
6 HAND UP A COPY OF STATE VS. CALVIN SMITH, WHICH IS A 1998
7 CASE, THE COURT OF APPEALS OF SOUTH CAROLINA. IN THAT
8 CASE, IT ACTUALLY JUST INVOLVED A TRAFFIC STOP. THERE'S
9 JUST A MERE TRAFFIC VIOLATION, BUT THEY NOTE IN THAT CASE
10 YOU LOOK AT ALL OF THE CIRCUMSTANCES. SOME OF THE
11 CIRCUMSTANCES THEY LOOKED AT PARALLELED THE ONES HERE,
12 YOUR HONOR.

13 IN THAT CASE, THERE WAS A TRAFFIC STOP. THE GUY
14 WAS SITTING IN HIS CAR, BUT THEY NOTE IT WAS A DESERTED
15 AREA. IT WAS AT NIGHT, AND THIS WAS ACTUALLY AFTER A
16 SECOND OFFICER HAD COME ON THE SCENE.

17 SO HE EVEN HAS THE -- AND THEY ALLOWED THIS
18 SEARCH. THIS IS EVEN AFTER THIS SECOND OFFICER IS THERE
19 SO THE SAFETY OF THE OFFICER HIMSELF IS A LITTLE MORE
20 SECURE THAN WHEN IT'S JUST A LONE OFFICER, AS WE HAVE IN
21 THIS CASE.

22 THERE'S NO DISPUTE IN THIS CASE, IT'S IN THE
23 MIDDLE OF THE NIGHT, AT 11 O'CLOCK AT NIGHT. IT'S 10
24 MILES OUT OF TOWN ON A ROAD, YOUR HONOR, IN 1961.

25 YEAH, IT WAS A HIGHWAY, BUT THAT WAS A TWO-LANE

1 ROAD BACK THEN, AND IT WAS DESERTED. THIS OFFICER IS BY
2 HIMSELF, AND I THINK THAT'S IMPORTANT IN THIS CASE, YOUR
3 HONOR.

4 AS HE SAID, IT'S A SAFETY SEARCH. AS HE
5 TESTIFIED, IT'S UNDISPUTED WHETHER HE PLACED HIM UNDER
6 ARREST, WHICH HE TESTIFIED ON DIRECT HE WAS GOING TO,
7 WHICH HE HAD A RIGHT TO BECAUSE HE OBSERVED HIM
8 HITCHHIKING. HE HAD A RIGHT TO PAT HIM DOWN.

9 HE ALSO TESTIFIED TO KIND OF SEARCH HE DID IN
10 THIS CASE, THAT HE WAS ALONE. HE WAS OUT IN THE MIDDLE OF
11 NOWHERE IN THE MIDDLE OF THE NIGHT WITH THIS MAN WHO HE
12 KNEW WAS VIOLATING THE LAW. HE WAS HITCHHIKING.

13 AT THAT POINT, YOUR HONOR, HE HAD THE RIGHT TO
14 PLACE HIM UNDER ARREST. WE CAN ARGUE ABOUT CHRONOLOGY.
15 LASTLY, YOUR HONOR, I WOULD JUST ARGUE THAT IT WOULD BE
16 ABSOLUTELY UNREASONABLE FOR ANYONE TO PLACE ANYONE IN HIS
17 CAR, WHETHER HE WAS ARRESTED OR NOT, AND ASSUME FOR HIS
18 ARGUMENT HE'S NOT UNDER ARREST. HE'S GOING TO JUST
19 TRANSPORT HIM.

20 NO OFFICER IN THEIR RIGHT MIND WOULD PLACE A MAN
21 HE'S NEVER SEEN BEFORE IN HIS CAR WITHOUT PATTING HIM
22 DOWN. UNFORTUNATELY IN YOUR HONOR'S EXPERIENCE WITH LAW
23 ENFORCEMENT, WE KNOW IT'S A NECESSARY SEARCH.

24 YOUR HONOR, HE ALSO TESTIFIED IN THIS CASE ON
25 DIRECT EXAMINATION THAT HE WAS GOING TO ARREST HIM.

1 AS SUCH, THIS CAN BE JUST A SEARCH INCIDENT TO
2 ARREST, BUT, OF COURSE, HE WOULD SEARCH HIM BEFORE
3 THAT.

4 SO I THINK ON TWO DIFFERENT LEVELS THIS SEARCH
5 EXCEEDS, ASSUMING -- AND EVEN THOUGH THIS ALL
6 PREDATES TERRY, ASSUMING IT IS THE LAW, YOUR HONOR, I
7 THINK WE HAVE MORE THAN MET OUR BURDEN AS FAR AS WHAT
8 A REASONABLY PRUDENT MAN, AND THAT'S THE SATURDAY,
9 ACCORDING TO THE CASES I LOOKED AT, YOUR HONOR; THAT
10 A REASONABLY PRUDENT MAN AND AN OFFICER IN LIEUTENANT
11 MEREDITH'S POSITION ON THAT NIGHT, WHERE HE WAS, WHO
12 HE WAS WITH, WHAT HE OBSERVED, AND WHAT HE FOUND.

13 FOR HIM TO HAVE DONE ANYTHING ELSE, YOUR HONOR,
14 SIMPLY WOULDN'T HAVE BEEN PRUDENT.

15 I THINK UNDER THE TOTALITY OF THE CIRCUMSTANCES,
16 AND IT'S ALWAYS A CASE-BY-CASE. IN THIS CASE, THE
17 SEARCH WAS REASONABLE.

18 IN ADDITION TO THAT, YOUR HONOR, I THINK IT CAN
19 MERELY GO BY AS A SEARCH INCIDENT TO ARREST.
20 WHICHEVER WAY YOU WISH TO ADDRESS THAT, I THINK IT
21 MEETS BOTH OF THOSE.

22 MR. DELGADO: WELL, I'M NOT CERTAIN THE SEARCH
23 INCIDENT TO THE ARREST. THE ARREST OCCURS, THE GUN. THE
24 SEARCH IS PRIOR TO HIS FINDING THE GUN. IT CAN'T BE THE
25 SEARCH INCIDENT TO ARREST.

1 THE KEY IS DID MR. MEREDITH HAVE ARTICULABLE,
2 REASONABLY ARTICULABLE SUSPICION, NOT JUST A HUNCH, THAT
3 MR. FRIEBURGER WAS ENGAGED IN CRIMINAL ACTIVITIES SUCH
4 THAT WOULD WARRANT HIM BEING IN FEAR OF HIS LIFE OR IN
5 FEAR OF AN ACTION BY MR. FRIEBURGER, NOT BY WHAT
6 MR. MEREDITH SAID HERE TODAY.

7 THE COURT: MR. DELGADO, WE ALL KNOW WHAT
8 HAPPENED. HE WAS STOPPED FOR HITCHHIKING, WHICH WAS IN
9 VIOLATION OF TENNESSEE LAW. HE PATTED HIM DOWN. THEN HE
10 FOUND THE GUN. INSTEAD OF CHARGING HIM WITH BOTH
11 OFFENSES, HE CHARGED HIM WITH THE GREATER OFFENSE.

12 I THINK UNDER THE TOTALITY OF THE CIRCUMSTANCES,
13 THE SEARCH WAS APPROPRIATE AND REASONABLE, WHETHER YOU
14 WANT TO APPLY THE TERRY STANDARD OR NOT. YOU KNOW,
15 CLEARLY HE HAD SUSPICION WHEN HE SAW HIM VIOLATING THE
16 HITCHHIKING STATUTE. HE HAD OTHER REASONS TO STOP HIM,
17 PRACTICALLY THAT'S WHAT HAPPENED, SO I'LL DENY YOUR MOTION
18 TO SUPPRESS.

19 MR. DELGADO: ALL RIGHT.

20 THE COURT: NEXT MOTION.

21 MR. MCMAHON: YOUR HONOR, COULD I HAVE A FEW
22 MINUTES BEFORE I DO MY NEXT WITNESS?

23 THE COURT: YES. WE'LL TAKE ABOUT TEN MINUTES.

24 MR. MCMAHON: THANK YOU, YOUR HONOR.

25 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

1 OF THE JURY, I APOLOGIZE.

2 THE COURT: THAT'S ALL RIGHT. I WAS TRYING TO
3 FIGURE OUT A WAY TO DO THAT WITHOUT SENDING THEM OUT, BUT
4 I DON'T THINK I CAN.

5 LET ME LET YOU GO TO YOUR JURY ROOM JUST FOR A
6 MOMENT.

7 (WHEREUPON, THE JURY LEFT OPEN COURT AT
8 APPROXIMATELY 11:23 A.M.)

9 MR. DELGADO: YOUR HONOR, MAY THE DEFENDANT TAKE
10 A SHORT BREAK?

11 MR. MCMAHON: MAY SERGEANT REVETTA BE EXCUSED?

12 THE COURT: YES, WITHOUT OBJECTION.

13 ALL RIGHT. MR. DELGADO, MR. HUDGINS, TELL ME
14 WHAT YOU --

15 MS. HUDGINS: YOUR HONOR, IF I MAY, I KNOW THE
16 SOLICITOR IS ATTEMPTING TO INTRODUCE THESE AS BUSINESS
17 RECORDS.

18 MY UNDERSTANDING IS THEY STILL HAVE TO BE
19 AUTHENTICATED AS BUSINESS RECORDS, AS SOMEBODY THAT HAS
20 KNOWLEDGE OF THOSE BUSINESS RECORDS.

21 I THINK THEY'RE PREPARED TO DO THAT ANYWAY. I
22 DON'T THINK THAT'S A PROBLEM.

23 THE COURT: WELL, ALL HE'S ATTEMPTING TO DO NOW
24 THROUGH THE CHIEF IS THAT THESE WERE RECORDS THAT WERE
25 KEPT IN THE ORDINARY COURSE OF BUSINESS BY THE CITY OF

1 COLUMBIA, AT OR NEAR THE TIME OF THE ACT, OMISSION, OR
2 EVENT, IF HE CAN IDENTIFY WHAT THE RECORDS ARE AND HE'S A
3 QUALIFIED WITNESS.

4 MR. SOLICITOR, I THINK WHAT MS. HUDGINS IS
5 SAYING IS THAT YOU CAN MARK THEM FOR IDENTIFICATION FOR
6 PURPOSES OF ESTABLISHING IDENTITY.

7 THEN YOU COULD GO BACK THROUGH AND WHO -- AS I
8 UNDERSTAND, YOU HAVE PEOPLE HERE WHO CAN THEN AUTHENTICATE
9 THE DOCUMENTS EITHER BY THEY KNOW THE SIGNATURE, OR
10 THEY'RE KEPT BY THEM OR THEY MIGHT COME IN UNDER THE
11 ANCIENT DOCUMENT RULE.

12 SO OTHER THAN HIS IDENTIFYING THESE DOCUMENTS,
13 WHAT OTHER INFORMATION DO YOU NEED TO GET OUT OF HIM ABOUT
14 THAT?

15 MR. MCMAHON: WELL, I'M GOING TO GET OUT OF THE
16 LOCATIONS OF BERRY'S LOAN, FOR EXAMPLE, AND GO BACK TO THE
17 DIAGRAM OF WHERE BERRY'S LOAN IS.

18 THE COURT: ALL RIGHT.

19 MR. MCMAHON: IN OTHER WORDS, I DON'T MIND
20 MARKING THEM FOR IDENTIFICATION PURPOSES ONLY; HOWEVER, IT
21 KIND OF HARKENS BACK TO A MEMORY OF JUDGE GEORGE BELL
22 TIMMERMAN. HE USED TO SAY, YOU KNOW, YOU CAN'T PROVE
23 EVERYTHING ON A PINPOINT IN A CHAIN OF WITNESSES.

24 THE COURT: I UNDERSTAND.

25 MR. MCMAHON: AND I DON'T WANT TO HAVE TO RECALL

1 CHIEF CLARK. THAT'S WHY I'M BRINGING HIM UP NOW, AND I
2 WANT TO BE ABLE TO PUBLISH THEM TO THE JURY AND LET HIM
3 EXPLAIN WHAT THEY ARE NOW.

4 I REPRESENT TO THE COURT THAT I HAVE WITNESSES
5 THAT WILL AUTHENTICATE, ADDITIONALLY, EACH AND EVERY ONE
6 OF THOSE ITEMS.

7 IN FACT, MY NEXT WITNESS IS IN THE COURTROOM,
8 MS. RUSS, WHO IS THE LADY THAT WAS WITH CAPITAL LOAN,
9 WHOSE PARENTS OWNED CAPITAL LOAN, THAT INVOLVES THE
10 PURCHASE OF THE WEAPON.

11 NOW, IF I HAVE TO RECALL CHIEF CLARK --

12 THE COURT: NOW, LET ME JUST TELL YOU THIS:
13 WHAT IF YOU GOOF? THEN I HAVE A PROBLEM. I'M NOT SAYING
14 YOU WILL, BUT IT HAPPENED TO US EARLIER THIS YEAR ON SOME
15 D.N.A.

16 I CONDITIONALLY ALLOWED THE D.N.A. IN, AND THE
17 ATTORNEY COULDN'T CLOSE THE LOOP, MISTRIAL.

18 MR. MCMAHON: SO I'LL HAVE TO RECALL --

19 THE COURT: I THINK IT'S A SAFE THING.

20 MR. MCMAHON: I'M ASSUMING IT'S GOING TO CUT
21 BOTH WAYS NOW.

22 THE COURT: ABSOLUTELY.

23 MR. MCMAHON: JUST LIKE WITH THE GUN, NOW, IF
24 THE WHOLE CHAIN IS NOT PROVED WITH THE GUN, I'VE ALWAYS,
25 YOU KNOW, USED THE GUN WITH THE BALLISTICS EXPERT.

1 ALTHOUGH, IT'S GONE BACK TO THE COUNTY.

2 I'M NOT ARGUING WITH HIS HONOR. I MEAN, I'LL
3 JUST BE PREPARED TO RECALL CHIEF CLARK IF THAT'S WHAT THEY
4 WANT.

5 THE COURT: WELL, IN TERMS OF THE GUN, THAT'S
6 DIFFERENT FROM DRUGS, AND THE CHAIN DOESN'T HAVE TO BE
7 QUITE AS TIGHT. I'VE GOT A RULING READY FOR THAT WHEN WE
8 GET TO IT.

9 MR. MCMAHON: ALL RIGHT, SIR.

10 MS. CAMPBELL: THANK YOU, YOUR HONOR.

11 THE COURT: ALL RIGHT. WE'LL MARK THEM FOR
12 IDENTIFICATION, AND THEN I THINK YOU'RE GOING TO HAVE TO
13 LET HIM STAND DOWN.

14 MR. MCMAHON: I HAVE A FEW OTHER QUESTIONS IN
15 ANOTHER AREA.

16 THE COURT: ALL RIGHT.

17 MR. MCMAHON: BUT THAT'S FINE.

18 THE COURT: MS. HUDGINS, SINCE YOU MADE THE
19 OBJECTION, I ASSUME YOU'RE HANDLING THE WITNESS?

20 MR. DELGADO: NO, YOUR HONOR, I MADE THE
21 OBJECTION. SHE IS GOING TO MAKE THE ARGUMENT.

22 THE COURT: I WANT YOU TO ELIMINATE THAT. I CAN
23 ONLY HANDLE ONE OF YOU AT A TIME. THAT KEEPS ME STRAIGHT.

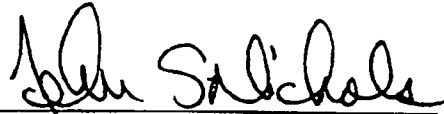
24 MR. DELGADO: YES, SIR.

25 MS. HUDGINS: I APOLOGIZE, YOUR HONOR. I'M

Certificate of Counsel

The undersigned hereby certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 29, 2005



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ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Edward Freiburger,

Appellant.

Appeal From Richland County
Henry F. Floyd, Circuit Court Judge

Opinion No. 26042
Heard May 18, 2005 - Filed September 26, 2005

AFFIRMED

John Dennis Delgado, John S. Nichols, of Bluestein & Nicholas, LLC, and Kathrine Haggard Hudgins, all of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Jeffrey A. Jacobs, and Solicitor Warren Blair Giese, all of Columbia, for Respondent.

JUSTICE WALLER: This matter was certified to this Court from the Court of Appeals pursuant to Rule 204, SCACR. Freiburger was convicted of the 1961 murder of a Columbia taxi-cab driver. He was sentenced to life imprisonment. We affirm.

FACTS

The victim in this case, John Orner, was a taxi-cab driver who regularly serviced soldiers at Fort Jackson in Columbia. Orner received his last dispatch call at 11:15 p.m. on the evening of February 28, 1961 to go to the NCO club at the fort. When he did not return home from his shift the next morning, his family reported him missing. Orner's bloody cab was found around 7:30 a.m. on March 1, 1961, in the [REDACTED]. Orner was not in the cab. His body was found on March 3, 1961, on the side of the road of Highway 601 in lower Richland County. He had died from a gunshot wound to the brain, consistent with having been shot in the head by a passenger sitting in the back seat of the cab. Forensics examinations revealed Orner had been killed by a gunshot wound from a .32 caliber bullet fired from a Harrington and Richardson (H & R) revolver.

Freiburger was a private in the army stationed at Fort Jackson in 1961. Pawn shop records revealed that on February 28, 1961, Freiburger purchased a .32 caliber H&R revolver, serial number 9948, from Capital Loan and Pawn Shop at [REDACTED]. A month later, on March 29, 1961, Freiburger was stopped by a Tennessee Highway patrolman, Donald Meredith, at approximately 11:00 p.m. for hitchhiking in Newport, Tennessee. Meredith testified he stopped Freiburger because it was dangerous to be out walking or hitchhiking on the road as people had been struck by cars in the vicinity. Patrolman Meredith questioned Freiburger, then patted him down, discovering a .32 caliber loaded H&R revolver, serial number W9948. Meredith testified that, although Freiburger was not under arrest at the time of the pat down search, "he was going to be for hitchhiking, or I was going to take him back to the jail." Upon finding the weapon, Meredith arrested Freiburger for "carrying arms," and the gun was confiscated.

After Freiburger's arrest, Richland County authorities (investigating Orner's murder) requested and were given the H&R revolver seized by Patrolman Meredith. Testing on the weapon was inconclusive as to whether it was the weapon used in Orner's death. No charges were filed at that time. Forty years later, in August 2000, the Richland County Sheriff's Department reopened the Orner file. Re-testing of the gun and bullet fragments was initially inconclusive. However, SLED retained an independent expert, John

Cayton, who concluded the weapon retrieved from Freiburger in 1961 was the murder weapon. Freiburger was arrested and charged with murder. The jury convicted him, and he was sentenced to life imprisonment.

ISSUES

1. Did the trial court properly admit the gun taken from Freiburger during the 1961 search in Tennessee?
2. Did the trial court err in denying Freiburger's motion to suppress the gun due to the State's failure to prove a sufficient chain of custody?
3. Did the trial court err in admitting certain pawnshop records under the Ancient Documents and Business Records as Evidence Act?
4. Did the trial court err in admitting evidence that Freiburger was at one time stationed at Fort Leavenworth, Kansas?
5. Did the court err in denying Freiburger's motion for a mistrial and/or for curative instructions as a result of the solicitor's improper comments during opening argument?
6. Did the court err in denying Freiburger's motion for a directed verdict?

1. 1961 SEARCH AND SEIZURE

Freiburger asserts the 1961 search and seizure of the H&R weapon was illegal, having exceeded the permissible scope of a Terry¹ search. The State contends the search was a lawful "search incident to arrest," such that the seizure was permissible. We agree with the State that the 1961 search of Freiburger was a lawful search incident to arrest.

Evidence seized in violation of the Fourth Amendment must be excluded from trial. State v. Khinggratasiphon, 352 S.C. 62, 572 S.E.2d 456 (2002), citing Mapp v. Ohio, 367 U.S. 643 (1961). Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). However, a warrantless search will withstand

¹ Terry v. Ohio, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968).

constitutional scrutiny where the search falls within one of several well recognized exceptions to the warrant requirement. Id. One such exception is in cases of a search incident to arrest. State v. Ferrell, 274 S.C. 401, 409, 266 S.E.2d 869, 873 (1980) (in the case of a lawful custodial arrest, the full search of a person does not require a search warrant and is considered reasonable under the Fourth Amendment). The burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution. Dupree, supra; State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct.App.1995) (burden is upon State to justify warrantless search).

There are two historical rationales for the "search incident to arrest" exception to the warrant requirement: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. Knowles v. Ohio, 525 U.S. 113, 116 (1998). A search may be conducted incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986). A warrantless search which precedes a formal arrest is valid if the arrest quickly follows. State v. Moultrie, 316 S.C. 547, 551, 451 S.E.2d 34, 37 (Ct. App. 1994). See also Rawlings v. Kentucky, 448 U.S. 98, 111, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 633 (1980)(search may precede a formal arrest if the officer has probable cause to arrest at the time of the search and the fruits of the search were not necessary to support probable cause to arrest).

As noted above, there are situations in which a warrantless search which immediately precedes an arrest is held lawful, in cases where the police officer is held to have had probable cause from the outset. Moultrie, supra; Rawlings v. Kentucky. The rationale for such a warrantless search is that it is permissible incident to a lawful arrest because of legitimate concerns for the safety of the officer and to prevent the destruction of evidence by the arrestee. Chimel v. California, 395 U.S. 752 (1969) (when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape). See also United States v. Robinson, 414 U.S. 218 (1973).

At the *in camera* hearing, Trooper Meredith testified that, although Freiburger had not been arrested at the time of the pat down search, he was going to be arrested for hitchhiking, or taken back to the jail. Trooper Meredith went on to testify that "we did a safety search before we put somebody in the car. You check them to see if they have any weapons."

Freiburger maintains that because he was not under arrest at the time of the search, and because he was ultimately arrested only for carrying arms, the search was illegal and the gun seized in 1961 should have been suppressed at trial. We disagree. As noted above, one of the rationales for the exception to the warrant requirement in the case of a search incident to arrest is the need to disarm the suspect in order to take him into custody. Here, Trooper Meredith's testimony that Freiburger was going to be arrested for hitchhiking and/or transported to the jail provides a sufficient basis upon which to conduct a limited pat-down search. It would simply be unreasonable to expect a police officer, out on a deserted road at 11:00 p.m., to transport a suspect to the jail without first conducting a pat down search for weapons.

Moreover, the fact that Freiburger was not ultimately arrested for hitchhiking is not dispositive. As recently stated by the United States Supreme Court, an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. . . 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" Devenpeck v. Alford, 125 S.Ct. 588, 94 (2004), *citing Whren, supra*, at 813, 116 S.Ct. 1769. Accordingly, the mere fact that Trooper Meredith did not arrest Freiburger for hitchhiking but, instead, arrested him for carrying arms upon finding the weapon does not vitiate the reasonableness of the underlying search. We find the search conducted by Trooper Meredith was a legitimate search incident to arrest, necessary to ensure his safety in order to transport Freiburger to the jail. As such, there was no fourth amendment violation and the trial court properly denied Freiburger's motion to suppress.

2. CHAIN OF CUSTODY

Freiburger next asserts the state failed to prove a sufficient chain of custody of the gun, such that it should have been excluded from evidence on this basis. Initially, we agree with the state that Freiburger has failed to preserve this issue for review.

During the motion in limine hearing, Freiburger objected to the weapon only on the ground that there had been an impermissible pat-down search. He renewed the same objection when the gun was introduced into evidence. Accordingly, as the argument he now advances was not raised and ruled on below, it is not preserved. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (issue not preserved for appeal where one ground is raised below and another ground is raised on appeal). In any event, the trial court properly admitted the weapon.

While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence - that is, evidence that is unique and identifiable - the establishment of a strict chain of custody is not required: If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. State v. Glenn, 328 S.C. 300, 305-306, 492 S.E.2d 393, 395 (Ct. App. 1997).

Given the serial number and markings on the gun, and the fact that a gun is a non-fungible item, we find the chain of custody established by the state in this case was sufficient.

3. ANCIENT DOCUMENTS/BUSINESS RECORDS EXCEPTION

Freiburger next contends the trial court erred in admitting certain pawn shop records pursuant to the Ancient Documents rule and the Business Records Exception, claiming they were not properly authenticated by the state. We find this issue is not adequately preserved for review, and the

record is, in any event, insufficient to enable this Court to make an intelligent review.

It appears Freiburger primarily objects to admission of the Capital Loan and Pawn receipt and records which indicate Freiburger purchased the H&R revolver on February 28, 1961. However, there is no objection to their admission during the testimony of Ms. Russ, the then 77 year old daughter of the pawn shop owner. In fact, certain exhibits were specifically entered without objection. To the extent that Freiburger did object, the objections came long after the documents had been received into evidence, most of which had been introduced into evidence without objection.

The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal. State v. Bellue, 259 S.C. 487, 193 S.E.2d 121 (1972). Further, Freiburger has failed to present a sufficient record for review. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 645 (1998) (the burden is on the appellant to provide a sufficient record for review).

Moreover, we find the testimony of Ms. Russ sufficiently authenticated the pawn shop records. The alleged deficiencies in Ms. Russ' testimony go to the weight of the pawn shop records, rather than their admissibility.

4. FORT LEAVENWORTH

Freiburger asserts reversible error in references to his being "stationed" at Fort Leavenworth, Kansas.² He asserts it is well-known Leavenworth is a military prison, and that, as such, this evidence was prejudicial. We disagree.

Contrary to Freiburger's contention, there was no mention of the fact that he was **incarcerated** at Leavenworth. Mere questioning as to whether he was **stationed** there simply does not equate with advising the jury he was confined in a military prison. Even assuming, *arguendo*, jurors were aware Leavenworth is a military prison, there is no reason to suspect they automatically believed he was imprisoned there, as opposed to having been

² Freiburger was sent to Fort Leavenworth in 1961 after his arrest by Trooper Meredith for carrying arms when it was learned he was AWOL from the army.

being stationed there during his military career. We see no prejudice from admission of this testimony. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (error without prejudice does not warrant reversal).

5. SOLICITOR'S OPENING COMMENTS

Freiburger next asserts the trial court erred in denying his motion for a mistrial, or curative instructions, after the solicitor improperly commented, during opening arguments, that Freiburger had been arrested by the Tennessee Highway Patrol on March 29, 1961. We find no reversible error.

The jury in this case was well aware, both from the solicitor's opening argument and the testimony of Trooper Meredith, that Freiburger had been stopped in Tennessee on March 29, 1961 for hitchhiking, and that he was patted down by Meredith and a weapon retrieved and confiscated. The jury also learned that the weapon was subsequently turned over to the Richland County sheriff's department and became the focus of the investigation.

Given the jury's knowledge that Freiburger had been stopped and frisked, and the weapon retrieved from him, the fact that the jury also heard he was arrested for carrying arms was simply not prejudicial in his trial for murder. State v. Locklair, *supra* (error without prejudice does not warrant reversal).

6. DIRECTED VERDICT

Finally, Freiburger asserts the trial court erred in denying his motion for a directed verdict. We disagree.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. *Id.* On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *Id.* If there is any direct evidence or substantial

circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. Id.

The evidence adduced at trial which tended to implicate Freiburger was as follows: 1) he was a soldier stationed at Fort Jackson on February 28, 1961, 2) he had a habit of pawning his personal property at downtown Columbia pawn shops, 3) he purchased a .32 caliber H&R revolver, serial number W9948, and bullets from the Capital Loan and Pawn shop on February 28, 1961; 4) the victim was shot on February 28, 1961 with a .32 caliber H&R revolver, 5) two days after the victim's cab was found, Freiburger stayed at a downtown motel in close proximity to where Victim's bloody cab was found, 6) Freiburger was arrested in Tennessee on March 29, 1961 carrying a .32 caliber H&R revolver, 7) a ballistics test conducted in 2001 indicated that the H&R revolver confiscated from Freiburger in 1961 was the same weapon which fired the shot killing the victim, and 8) Freiburger was evasive when talking to Richland County police investigators in Indiana in September 2000, claiming he did not recall having been in the army, or having been stationed at Fort Jackson.

Although circumstantial, we find the above-cited evidence sufficient to withstand Freiburger's motion for a directed verdict.

The judgment below is affirmed.

AFFIRMED.

MOORE, A.C.J., BURNETT, PLEICONES, JJ., and Acting Justice James W. Johnson, Jr., concur.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Henry F. Floyd, Circuit Court Judge

Case No. 01-GS-40-2955
Op. No. 26042 (S.C. Sup. Ct. filed Sept. 26, 2005)
(Shearouse Adv. Sh. No. 37 at 26)

The State Respondent,

v.

Edward Freiburger, ... Appellant.

APPELLANT'S PETITION FOR REHEARING

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Pursuant to Rules 221 and 224, SCACR, Appellant Edward Freiburger petitions this Court to rehear and reconsider its ruling in *State v. Freiburger*, Op. No. 26042 (S.C. Sup. Ct. filed Sept. 26, 2005) (Shearouse Adv. Sh. No. 37 at 26). Mr. Freiburger asserts this Court overlooked or misapprehended a number of points in affirming his conviction.

**I.
1961 SEARCH AND SEIZURE**

1. In finding the 1961 search was valid, the Court focused on one statement by Trooper Don Meredith in the *in camera* hearing. When defense counsel noted that "at that time [Mr. Freiburger] was not under arrest, was he?" Trooper Meredith responded, "No. He wasn't, but he was going to be for hitchhiking, or I was going to take him back to the jail." (Supp. R. p. 13, line 25 - p. 14, line 3). This Court held that this one statement "provides a sufficient basis upon which to conduct a limited pat-down search." In focusing on this one statement, the Court overlooked the following points:

A. At the *in camera* hearing:

- i. In reading a statement he had previously given to an investigator, Trooper Meredith stated, "At that time, we didn't always arrest hitchhikers unless they had committed another violation. I doubt I would have arrested Ed Freiburger if I had not found the gun he was carrying." (Supp. R. p. 17, lines 13-17);
- ii. Trooper Meredith agreed with the statement that he doubted he would have arrested him if he had not found the gun Mr. Freiburger was carrying.

(Supp. R. p. 17, line 24 - p. 18, line 9).

B. At the trial of the case:

- i. On direct examination Trooper Meredith testified he stopped Mr. Freiburger because he was hitchhiking (R. p. 562, lines 21-23) and agreed that sometimes he would transport hitchhikers "to someplace safe...maybe take them to the bus station....". (R. p. 577, lines 2-20). Trooper Meredith also agreed that he "didn't arrest everybody for hitchhiking." (R. p. 577, lines 21-24).
- ii. On cross examination, defense counsel asked, "So when you first saw Ed Freiburger out with his hand, you didn't necessarily think you were going to have to arrest him for hitchhiking, did you?" and Trooper Meredith answered "No, sir." (R. p. 577, line 25 - p. 578, line 3).

C. The State did not argue at trial or on appeal that Trooper Meredith intended to arrest Mr. Freiburger for anything at the time Trooper Meredith stopped Mr. Freiburger.

D. The trial court did not base its refusal to suppress the gun on the court's perception that Trooper Meredith intended to arrest Mr. Freiburger for hitchhiking and take him to jail.

2. In upholding the trial court's finding that the 1961 search was valid and thereby the refusal to suppress the gun Trooper Meredith allegedly recovered from Mr. Freiburger in 1961 was proper, the Court overlooked the fact that the search was illegal under applicable Tennessee law at the time. *E.g., Robertson v. State*, 184 Tenn 277, 198

S.W.2d 633 (1947) (an officer has no right to make a search without a warrant except where he has made a lawful arrest). The Court did not address this argument in upholding the search in this case.

3. In upholding the trial court's failure to suppress the gun, this Court inappropriately relied upon *Devenpeck v. Alford*, 543 U.S. 146 (2004), because the *Devenpeck* case is inapposite to the case before this Court. In *Devenpeck*, the plaintiff, Mr. Alford, stopped his motor vehicle to help a disabled motorist. When Trooper Haner pulled up, Mr. Alford left quickly. Trooper Haner suspected Mr. Alford was an impersonator or "wannabe cop." Trooper Haner pulled Mr. Alford over and saw evidence of impersonation of a law enforcement officer. Sergeant Devenpeck thereafter arrived. While investigating the stop, Sergeant Devenpeck noticed a tape recorder recording the conversation sitting on the seat of Mr. Alford's car. Sergeant Devenpeck listened to the tape, then arrested Mr. Alford for violating Washington's Privacy Act. Mr. Alford told Sergeant Devenpeck that a Washington Court of Appeals decision permitted the recording, and a copy of the decision was in the car's glove box. Sergeant Devenpeck arrested Alford after trying to confirm the Privacy Act applied. Shortly thereafter, Sergeant Devenpeck reached a deputy prosecutor, and the two discussed possible criminal offenses (violation of the Privacy Act, impersonating a police officer, making a false representation to a police officer). The prosecutor advised Sergeant Devenpeck that there was "clearly probable cause" and suggested charging Mr. Alford also with "obstructing a public servant" for giving the officers the runaround. Sergeant Devenpeck rejected the idea, saying his officers did not "stack charges." Trooper Haner thereafter charged Mr. Alford with violating the Privacy

Act and issued a ticket for the flashing lights on the car in violation of Washington's Automobile Code, for which Alford could be detained for the period of time "reasonably necessary" to issue the citation.

The Washington State trial court subsequently dismissed both charges. Mr. Alford thereafter sued the officers in Federal Court for violation of 42 U.S.C. § 1983, and for State claims for unlawful arrest and imprisonment. Mr. Alford claimed he was **arrested** without probable cause in violation of Fourth and Fourteenth Amendments to the United States Constitution.

The United States Supreme Court held "In conformity with the rule at common law, a warrantless **arrest** by a law enforcement officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." (Emphasis added). The Court added, "Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. * * * That is to say, his subjective reason for making the **arrest** need not be the criminal offense as to which the known facts provide probable cause." (Emphasis added). The Court also stated, "Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating *an arrest*. **Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.**" (Emphasis added).

The sole focus in *Devenpeck* was on the validity of a warrantless **arrest**. That is, if the officer stated he stopped the defendant because he had probable cause that the

defendant had committed crime X, then arrested the defendant for crime Y, a crime "not closely related to" crime X (the offense stated by the arresting officer), the arrest for crime Y is not rendered invalid. So long as the circumstances, viewed objectively, justify the officer's action in stopping the defendant for crime X, the arrest for crime Y is not invalidated.

Mr. Freiburger did not challenge the lawfulness of his *arrest* for carrying arms upon a stop for the crime of hitchhiking (such an argument would have raised the *Devenpeck* concerns). Rather, Mr. Freiburger challenged Trooper Meredith's pre-arrest warrantless *search* in violation of applicable Tennessee law and under the "stop and frisk" rules permitted by the Fourth and Fourteenth Amendments of the United States Constitution. (App. Br. pp. 29-35; Reply Br. pp. 1-6).

In this case, Trooper Meredith observed Mr. Freiburger committing the offense of hitchhiking, for which Trooper Meredith clearly stated he doubted he was going to arrest Mr. Freiburger. He had not placed Mr. Freiburger under arrest at the time he searched Mr. Freiburger, in violation of Tennessee State law adhering at the time. The fact that Trooper Meredith discovered a gun and arrested Mr. Freiburger for "carrying arms" does not save the fruit of the prior unlawful search. Trooper Meredith had no suspicion, much less a reasonable suspicion, that Mr. Freiburger was armed and dangerous so as to justify a "pat down" search, and he had not arrested Mr. Freiburger at the time of the search, nor was he likely to arrest Mr. Freiburger for hitchhiking. (R. pp. 281, line 25 - p. 282, line 19; Supp. Record, p. 13, lines 4-14; p. 14, line 19 - p. 15, line 5; p. 18, lines 4-16). *See, e.g., Knowles v. Iowa*, 525 U.S. 113 (1998) (custodial arrest involves "danger to an officer")

because of "the extended exposure which follows the taking of a suspect into custody and transporting him to a police station; an officer may conduct a "pat down" search upon a reasonable suspicion that a defendant may be armed and dangerous).

For the reasons stated, this Court should reconsider its rulings, in light of these additional points, and should grant rehearing, withdraw its prior opinion, issue a new decision reversing the trial court's failure to suppress the gun, and remand the matter for further proceedings.

II. CHAIN OF CUSTODY

This Court stated that the issue of defects in the chain of custody of the gun was not preserved for appellate review. In reaching this conclusion, the Court overlooked or misapprehended the fact that the trial court clearly indicated to all parties that it had "a ruling ready" for the chain of custody "when we get to it," adding "the chain doesn't have to be quite as tight." (Supp. R. p. 281, lines 5-8). Hence, because the trial judge already advised the parties how he intended to rule on the challenge based upon a defective chain of custody, making an additional challenge would have been a futile act, and this Court does not require that counsel engage in a futile act to preserve an issue for appellate review. *E.g., State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994) (Supreme Court addressed issue regarding trial judge's inappropriate comments to the jury about counsel despite counsel's failure to make any objection to the comments at the time, since the tone and tenor of the trial judge's remarks concerning counsel's gender were such that any objection would have been futile); *Staubes v City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000) (Supreme Court stated it does not require parties to engage in

futile actions in order to preserve issues for appellate review). Mr. Freiburger submits that in light of the trial judge's expressions regarding the chain of custody, any further objection would have been a futile act, so that the issue was, indeed, preserved for appeal.

This Court held further that, in any event, the gun was properly admitted under *State v. Glenn*, 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997) because "a gun is a non-fungible item." This ruling, however, overlooks the fact that the pistol Trooper Meredith took from the Appellant in 1961 did not meet the "non-fungible" test outlined in *Glenn*. The evidence is that Trooper Meredith took a pistol from Mr. Freiburger, and then took the pistol and kept it in his home or his car. (Tr. p. 566). In April 1961, Sheriff Sligh contacted Meredith about a gun, and Trooper Meredith gave the gun to two persons he believed were deputies. (Tr. P. 567). In 1964, Trooper Meredith asked about the gun, and Sheriff Sligh wrote to Trooper Meredith describing the gun as having the serial number "9948." (Tr. P. 572; State's Exhibit 48). At the time, however, Richland County authorities were in possession of two (2) identical pistols that were kept in the same box at SLED. As outlined in the Appellant's brief, between 1961 and 2001 the guns were removed from the box several times without documentation, and it was the Richland County authorities who suggested to Trooper Meredith that the serial number of the gun taken from Appellant was "9948," not the other way around. (App. Br. P. 35-37). There was no evidence Trooper Meredith recorded the serial number of the gun he took from Mr. Freiburger and the number "9948" did not appear until suggested by Richland County authorities.

Although Mr. Cate may have placed his initials on the gun that had serial number "9948" on it, because of the gaps in the chain of custody the State failed to establish that the pistol Mr. Cate so marked was the same pistol Trooper Meredith took from Appellant in Tennessee.

Not only was the pistol in this case "fungible," as noted the State in fact was in possession of two identical pistols at the time Sheriff Sligh contacted Trooper Meredith. Ballistic tests SLED performed on both pistols in 1961 and again in 2001 ruled out one pistol, and were inconclusive on the other. The gaps in the chain of custody from the moment Trooper Meredith confiscated a gun in Tennessee in 1961 until the date the gun was offered into evidence at the trial in 2002 were numerous: Trooper Meredith did not record the serial numbers, he took the gun home, he kept the gun in his car, he gave the gun to two unidentified persons whom he believed were deputies, the gun was kept in a box at SLED with an identical gun, and the gun was removed and replaced in the box several times without proper record keeping. This is not a case of an unusual and unique chip from a porcelain toilet thrown off of an overpass onto a vehicle. This was a pistol so common that SLED was in possession of two (2) identical H&R Model 929 .32 calibre revolvers throughout its investigation of Mr. Orner's death.

For the reasons stated, this Court should reconsider its rulings regarding the chain of custody of the pistol in light of these additional points, and should grant rehearing, withdraw its prior opinion, issue a new decision reversing the trial court's failure to suppress the gun, and remand the matter for further proceedings

III. ANCIENT DOCUMENTS/BUSINESS RECORDS EXCEPTION

The Court held any issue regarding the admission of the pawn shop records was not adequately preserved for appellate review, since the documents came in without objection or any objection made was too late. In making this ruling, the Court overlooked the fact that the

objection that came late into Ms. Russ's testimony was the result of testimony she revealed on cross-examination, that is, that she was in possession of the original documents. (R. p. 87, line 1-91, line 25). Thereafter an employee, Curtis Boone, denied the originals existed. (R. p. 103, line 19 - 106, line 18). Ms. Russ interrupted and repeatedly insisted that the originals in fact existed. (R. p. 106, line 19 - p. 109, line 9). Counsel for Mr. Freiburger specifically argued this "took it out of the Business Records exception." (R. 109, line 14 - p. 110, line 1).

The Court held further that the record was insufficient to enable to Court to make an intelligent review of the issue. In making this finding, the Court overlooked the discussion in Appellant's Brief outlining the places in the Record which undermined Ms. Russ's ability to provide a sufficient foundation for the document, so that the Record was, in fact, sufficient for this Court to review the issue. (App. Br. p. 38, footnote 6; p. 38-39, carryover paragraph; see also App. Br. pp. 6-9, summarizing her testimony).

The Court alternatively ruled that Ms. Russ's testimony sufficiently authenticated the pawn shop records. The Court overlooked the precise nature of Ms. Russ's testimony, which was full of guesswork and surmise about corrections made on the Verifax copies of the documents offered into evidence. The Court also overlooked the fact that prior to admitting the contents of documents under the Ancient Documents Rule found in Rule 803(16), SCRE, the proponent must first establish the authenticity of the document pursuant to Rule 901, SCRE. The State did not meet the requirements of Rule 901(b)(8), SCRE, that (A) the Verifax copies of the documents be in such condition as to create no suspicion concerning its authenticity, (B) that these Verifax copies were in a place that, if authentic, they would likely be, and (C) that they were in existence for 20 years or more at the time offered. Although the State questionably

established the existence of the Verifax copies for over 20 years, the State clearly did not meet the first two prongs of Rule 901(b)(8).

The same is true of the Business Records as Evidence Act and Rule 803(6), SCRE. The State did not provide a sufficient foundation under Rule 901, SCRE, for admitting the Verifax copies under S.C. Code Ann. § 19-5-510. Although the Court found Ms. Russ's testimony sufficiently authenticated the Verifax copies, the Court overlooked the fact that those copies were not made in the Capital Loan office (R. pp. 82, 87), the salesperson who created the original documents did not testify (R. pp. 82, 83-84), the Verifax copies did not match the daily sales records for the day (R. p. 86), the date stamp in the log book was added after the fact of the entry (R. pp. 84-85, 97), the calibre of the gun was changed by someone (R. p. 85), the serial number on the ticket was altered by someone, and the document proffered was not an original, but a Verifax copy not created by Ms. Russ, Capital Pawn, or anyone in their employ.

For the reasons stated, this Court should reconsider its rulings regarding the admission of these Verifax copies of old records in light of these additional points, and should grant rehearing, withdraw its prior opinion, issue a new decision reversing the trial court's failure to suppress these records, and remand the matter for further proceedings.

IV. FORT LEAVENWORTH

The Court held there was no prejudice from the admission of testimony that Mr. Freiburger was "stationed" at Ft. Leavenworth, Kansas, because "contrary to Freiburger's contention, there was no mention of the fact that he was incarcerated at Leavenworth. Mere

questioning as to whether he was **stationed** there simply does not equate with advising the jury he was confined in a military prison." (Emphasis by the Court). The Court overlooked or misapprehended Mr. Freiburger's argument that the only reason the State sought to elicit this evidence was to place in the minds of some, if not all, of the jurors the improper inference that Mr. Freiburger was an inmate at the prison at Ft. Leavenworth. This is particularly true where Officers Craig and Metz emphasized that Mr. Freiburger at first denied being "stationed" at Ft. Leavenworth, but admitted it once shown documentation. (R. p. 353, lines 1-15; p. 426, lines 9-15). Although the witnesses did not use the term "incarcerated," their description of Mr. Freiburger's initial denial of being "stationed" at Leavenworth followed by his admission once "confronted" with documents regarding his stay there was intended solely to create such a spurious inference regarding his character. The State was permitted to achieve the very result Rule 404(b), SCRE, seeks to avoid, that is, an establishment of guilt of this crime by establishing Mr. Freiburger had the character to commit a crime and acted in conformity with that character.

Mr. Freiburger requested that the witnesses refer only to "Kansas" and not "Ft. Leavenworth," which would have permitted the witnesses to testify about Mr. Freiburger's memory without using the term "Ft. Leavenworth." Although the jurors may not have automatically believed Mr. Freiburger was imprisoned at Ft. Leavenworth, that was the only impression the State sought to convey, since the evidence was not relevant to any issue in the case.

For the reasons stated, this Court should reconsider its rulings regarding the trial court's permission for the State's witnesses to refer to "Ft. Leavenworth," a well-known military prison, in light of these additional points, and should grant rehearing, withdraw its prior opinion, issue a

new decision reversing the trial court's failure to suppress any evidence of Mr. Freiburger being "stationed" at Ft. Leavenworth, and remand the matter for further proceedings

**V.
SOLICITOR'S OPENING COMMENTS**

The Court held there was no prejudicial error from the trial court's refusal of a mistrial or curative instruction when the solicitor improperly mentioned, in opening statements, that Mr. Freiburger had been arrested by Trooper Meredith in March 1961. The Court overlooked the fact that the solicitor had been specifically warned not to mention the charge because the guilty plea was uncounseled and *Gideon v. Wainwright*, 372 U.S. 335 (1963) applied.

This Court's held that because the jury knew Mr. Freiburger had been stopped and frisked and a weapon retrieved, the jury was not prejudiced by hearing testimony of his arrest. This holding undermines *Gideon* and tacitly approves of the jury relying upon the fact of the arrest and conviction in determining Mr. Freiburger's guilt of the crime before it.

For the reasons stated, this Court should reconsider its rulings regarding the improper argument made by the solicitor in this case, and should grant rehearing, withdraw its prior opinion, issue a new decision reversing the trial court's failure to grant a mistrial or give a curative instruction, and remand the matter for further proceedings

**VI.
DIRECTED VERDICT**

The Court held the circumstantial evidence in this case was sufficient to withstand Mr. Freiburger's direct verdict motion. The Court overlooked or misapprehended the fact that there

was no direct evidence placing Mr. Freiburger at the scene of the crime or showing Mr. Freiburger had any part in the death of Mr. Orner. The State produced no evidence that Mr. Freiburger was ever in Mr. Orner's cab, or even encountered Mr. Orner. There was no forensic evidence connecting Mr. Freiburger with the cab, the murder scene or Mr. Orner.

As this Court noted, the principal evidence connecting Mr. Freiburger with the crime is the .32 caliber H&R revolver, serial number W 9948. Every piece of evidence related to this weapon was tainted, from the purported pawn shop records (lacking proper authenticity), to the lack of a coherent chain of custody of the gun confiscated from Mr. Freiburger in 1961, to the gun itself (which should have been excluded under Tennessee law and under Fourth and Fourteenth Amendment jurisprudence) The Court noted that a ballistics test performed in 2001 "indicated" that the gun allegedly taken from Mr. Freiburger in 1961 was the same weapon that killed Mr. Orner, but several other ballistics tests performed between 1961 and 1999 were not conclusive. The Court also noted that Mr. Freiburger's memory of events occurring 40 years prior indicated he was being "evasive," but such an inference is no more likely than that his memory simply faded after 40 years.

Mr. Freiburger asserts that the items of evidence that "tend to implicate" him in the crime do not rise to the level required to permit a conviction to stand under *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984) and its progeny *See, e.g., State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000) (possibility that car in defendant's possession on night of murder was parked at the victim's apartment complex the night the murder was committed, without any other evidence placing defendant at the scene, held not enough evidence to place defendant inside victim's apartment; trial court should have directed verdict of acquittal); *State v. Mitchell*, 341 S.C. 406,

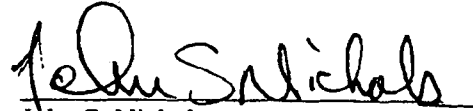
535 S.E.2d 126 (2000), *affirming* 332 S.C. 619, 506 S.E.2d 523 (Ct. App. 1998) (Court held defendant's fingerprint found on screen propped up against the victim's home was not sufficient to support conviction of first degree burglary where defendant had been in and around the victim's home three times prior to the burglary); *State v. Arnold*, 351 S.C. 302, 569 S.E.2d 379 (Ct. App. 2002), *cert. granted* February 20, 2003 (Court of Appeals found evidence established only that the circumstances were strongly suspicious but fell short of providing a basis upon which the jury could have reasonably and logically determined defendant's guilt, the only evidence linking defendant with the crime was his fingerprint on a coffee cup lid in a vehicle which had been in the victim's possession at some time before he was killed); *State v. Mouzon*, 321 S.C. 27, 467 S.E.2d 122 (Ct. App. 1995), *aff'd* 326 S.C. 199, 485 S.E.2d 918 (1997) (Court of Appeals reversed trial court's denial of defendant's directed verdict motion on conspiracy charges where the evidence merely raised a suspicion of the defendant's guilt).

For the reasons stated, this Court should reconsider its review of the denial of Mr Freiburger's motion for a directed verdict, and should grant rehearing, withdraw its prior opinion, issue a new decision reversing the trial court's failure to grant a directed verdict, and remand the matter for entry of judgment of acquittal.

CONCLUSION

For the reasons stated the Court should grant the petition for rehearing, withdraw its previous opinion, reverse Mr. Freiburger's conviction of murder and remand the matter for entry of judgment of acquittal. Alternatively, the Court should rule that the trial court erroneously admitted several pieces of evidence and permitted improper argument, causing undue prejudice to Mr. Freiburger and resulting in the denial of a fair trial, so that Mr. Freiburger is entitled to a new trial.

Respectfully submitted,



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October 11, 2005.

No. _____

**In The
Supreme Court of the United States**

EDWARD FREIBURGER,

Petitioner,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of South Carolina**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. Does the decision of the Supreme Court of South Carolina upholding the 1961 search and seizure in this matter conflict with this Court's decisions interpreting and applying the Fourth Amendment of the United States Constitution?
 - A. Should evidence obtained from the Petitioner during a pre-arrest warrantless search of his person in 1961 by a Tennessee State Trooper have been suppressed at his trial in 2002 as having been obtained in violation of Petitioner's Fourth Amendment right against unreasonable searches and seizures?
 - B. Should evidence obtained from Petitioner during a pre-arrest warrantless search of his person in 1961 by a Tennessee State Trooper have been suppressed where the evidence was obtained in violation of Tennessee State Search and Seizure Law adhering at the time?
- II. Was Petitioner denied his right to a fair trial under the Fifth and Fourteenth Amendments of the United States Constitution where the trial court permitted the prosecutor to mention repeatedly that Petitioner was "stationed" at Ft. Leavenworth, Kansas, a known military prison?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the Parties to the Proceeding are:

EDWARD FREIBURGER, an individual;

THE STATE OF SOUTH CAROLINA, a sovereign State of the United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATION OF REPORT OF OPINION ENTERED IN THE CASE	1
BASIS FOR SUPREME COURT JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	2
ARGUMENT	5
I. Does the decision of the Supreme Court of South Carolina upholding the 1961 search and seizure in this matter conflict with this Court's decisions interpreting and applying the Fourth Amendment of the United States Constitution?	5
A. Should evidence obtained from the Peti- tioner during a pre-arrest warrantless search of his person in 1961 by a Tennes- see State Trooper have been suppressed at his trial in 2002 as having been obtained in violation of Petitioner's Fourth Amend- ment right against unreasonable searches and seizures?	5

TABLE OF CONTENTS - Continued

	Page
B. Should evidence obtained from Petitioner during a pre-arrest warrantless search of his person in 1961 by a Tennessee State Trooper have been suppressed where the evidence was obtained in violation of Tennessee State Search and Seizure Law adhering at the time?.....	14
II. Was Petitioner denied his right to a fair trial under the Fifth and Fourteenth Amendments of the United States Constitution where the trial court permitted the prosecutor to mention repeatedly that Petitioner was "stationed" at Ft. Leavenworth, Kansas, a known military prison?.....	17
CONCLUSION	19
APPENDICES	
Supreme Court of South Carolina Opinion: <i>State v. Edward Freiburger</i> , 366 S.C. 125, 620 S.E.2d 737 (2005)	App. 1
Transcript of Proceedings of July 29, 2002 to August 2, 2002	App. 18
Court's Exhibit 6	App. 45
Court's Exhibit 9	App. 47
Transcript of Proceedings of July 29, 2002 to August 2, 2002	App. 48

TABLE OF AUTHORITIES

	Page
STATE CASES	
<i>DeBoard v. State</i> , 160 Tenn. 51, 22 S.W.2d 235 (1929).....	16
<i>Gray v. State</i> , 207 Tenn. 39, 336 S.W.2d 22 (1960).....	16
<i>Robertson v. State</i> , 184 Tenn. 277, 198 S.W.2d 633 (1947).....	15
<i>State v. Dean</i> , 282 S.C. 136, 317 S.E.2d 744 (1984)	6
<i>Warden v. State</i> , 214 Tenn. 314, 379 S.W.2d 788 (1964).....	15
FEDERAL CASES	
<i>Chimel v. California</i> , 395 U.S. 752 (1969).....	5
<i>Devenpeck v. Alford</i> , 543 U.S. 146 (2004).....	<i>passim</i>
<i>Knowles v. Iowa</i> , 525 U.S. 113 (1998).....	8, 9, 10, 13
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961).....	14
<i>Maryland v. Buie</i> , 494 U.S. 325 (1990).....	7
<i>Minnesota v. Dickerson</i> , 508 U.S. 366 (1993)	6
<i>Old Chief v. United States</i> , 519 U.S. 172 (1997).....	17
<i>Rawlings v. Kentucky</i> , 448 U.S. 98 (1980).....	5, 7, 8, 19
<i>Schneekloth v. Bustamonte</i> , 412 U.S. 218 (1973)	6
<i>Sibron v. New York</i> , 392 U.S. 40 (1968).....	6
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	6, 7, 9
<i>United States v. Moore</i> , 817 F.2d 1105 (4th Cir. 1987).....	6
<i>United States v. Robinson</i> , 414 U.S. 218 (1973).....	9

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Sharpe</i> , 470 U.S. 675 (1985).....	7
<i>Ybarra v. Illinois</i> , 444 U.S. 85 (1979)	6
 UNITED STATES CONSTITUTION	
Amendment IV, Search and Seizure Clause	1, 5, 6, 14, 19
Amendment V, Due Process Clause	1, 14, 17
Amendment XIV, Due Process Clause	1, 6, 14, 17
 FEDERAL STATUTES	
28 U.S.C. § 1257(a).....	1
28 U.S.C. § 2101(d).....	1
42 U.S.C. § 1983	12
 RULES OF THE SUPREME COURT OF THE UNITED STATES	
Rule 13.1.....	1
Rule 13.3.....	1
 STATE RULES	
Rule 204, SCACR	4
Rule 403, SCRE.....	17
Rule 404(b), SCRE.....	18

**CITATION OF REPORT OF
OPINION ENTERED IN THE CASE**

The State of South Carolina v. Edward Freiburger,
366 S.C. 125, 620 S.E.2d 737 (2005).

BASIS FOR SUPREME COURT JURISDICTION

The Petitioner Edward Freiburger was convicted of the crime of murder on August 2, 2002. The Supreme Court of South Carolina affirmed that conviction on September 26, 2005, and subsequently denied a timely Petition for Rehearing on November 2, 2005. The Court remitted the case to the trial court on November 2, 2005. Appendix 16. The present Petition is timely filed under 28 U.S.C. § 2101(d) and under Rules 13.1 and 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on writ of certiorari the final judgment rendered by the highest court of a State in which the decision could be had, where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

**CONSTITUTIONAL PROVISIONS
INVOLVED IN THE CASE**

Constitution of the United States, Amendment IV, Unreasonable Search and Seizure Clause; Amendment V, Due Process Clause; and Amendment XIV, Due Process Clause.

STATEMENT OF THE CASE

This is a murder case. The victim, John Orner, was a taxicab driver in Columbia, South Carolina, and was found shot to death on March 3, 1961. The exact time and place of Mr. Orner's death has never been established, but he received his last dispatch call late on the evening of February 28, 1961, and his cab was discovered the next morning, March 1, 1961. Forensic examination of bullet fragments recovered from Mr. Orner's body revealed that the murder weapon was most likely a .32 caliber Harrington & Richardson (H&R) revolver.

Petitioner was a private in the United States Army stationed at Ft. Jackson in Columbia, South Carolina, in 1961. On March 29, 1961, Petitioner was hitchhiking near Newport, Tennessee, and was stopped by a Tennessee Highway Patrolman, Donald Meredith, at about 11:00 p.m. Trooper Meredith stopped Petitioner out of concern that Petitioner might get struck while walking down the roadway. Trooper Meredith did not intend to arrest Petitioner for hitchhiking (a misdemeanor in Tennessee at the time), but instead intended to transport Petitioner to a safer location. Before placing Petitioner in the patrol car, Trooper Meredith patted Petitioner down and discovered a loaded .32 caliber H&R revolver. Trooper Meredith confiscated the pistol, placed Petitioner under arrest for "carrying arms," and transported him to jail. Petitioner was never charged with hitchhiking.

Tennessee authorities discovered that Petitioner was wanted by military authorities for being absent without official leave (AWOL) from Ft. Jackson, South Carolina. Petitioner entered an un-counseled plea to "carrying arms," was sentenced to time served, and was turned over

to military authorities. Petitioner was subjected to a court martial and was sentenced to one year incarceration at the detention facility at Ft. Leavenworth, Kansas.

In April 1961, South Carolina authorities contacted Trooper Meredith to inquire about the pistol Trooper Meredith confiscated from Petitioner. Trooper Meredith still had the pistol in his personal possession, and sometime later he turned the pistol over to two individuals who identified themselves as Richland County, South Carolina deputies. Trooper Meredith did not record any identifying information about the gun and did not get a receipt or other document identifying the gun when he handed it over to those individuals. Testing on the weapon by South Carolina forensic examiners in 1961 was inconclusive as to its involvement in Mr. Orner's death. The gun was kept in a box with another identical H&R .32 caliber pistol. Testing on the second gun ruled it out as the potential murder weapon.

In 1964, Trooper Meredith inquired about recovering the gun, and was told by South Carolina authorities that the gun was still needed in the Orner murder investigation. In correspondence to Trooper Meredith, South Carolina authorities suggested the subject gun had serial number "W 9948."

In August 2000, about forty years after the crime, South Carolina authorities re-opened the Orner murder investigation. They interviewed Petitioner at his home in Indiana and re-tested the bullet fragments and the H&R .32 caliber pistol. The additional ballistics testing done by South Carolina authorities in 2001 again ruled out one of the H&R .32 caliber pistols but was inconclusive as to the second gun. Seven subsequent blind evaluations by other

forensic experts yielded results that were "inconclusive" as to the one gun. It was not until South Carolina prosecutors hired an independent examiner, John Cayton from Kansas City, Missouri, that a "positive" match between the gun and the bullet recovered from Mr. Orner was announced.

Authorities arrested Petitioner at his home in Indiana. Petitioner was indicted and a jury trial was held from July 29, 2002 through August 2, 2002. Petitioner sought suppression of the gun on the grounds that Trooper Meredith's search and seizure in 1961 was unreasonable, but the trial court denied the motion. Petitioner further objected to any reference to his plea to "carrying arms" since it was un-counseled, and the trial court granted that motion. Petitioner further objected to any reference to Ft. Leavenworth, Kansas, because of its notoriety as a military prison and such a reference would create a spurious inference in the minds of the jurors. The trial court agreed, but permitted the prosecutor to refer to Petitioner being "stationed" at Ft. Leavenworth.

At the close of the State's case Petitioner moved the court for a directed verdict of acquittal because the evidence was wholly circumstantial and there was no evidence placing Petitioner in Mr. Orner's cab, there was no evidence Petitioner even encountered Mr. Orner at all, and there was no evidence Petitioner was at the scene of the murder. The trial court denied the motion and the case was submitted to the jury, which returned a verdict of guilty.

Petitioner appealed his conviction, and the Supreme Court of South Carolina certified the case for its review pursuant to Rule 204, SCACR. Following briefing and oral

arguments the Supreme Court of South Carolina affirmed the conviction on September 26, 2005.

Petitioner petitioned the Supreme Court of South Carolina for rehearing and on November 2, 2005, the Court issued its order denying rehearing.

ARGUMENT

- I. Does the decision of the Supreme Court of South Carolina upholding the 1961 search and seizure in this matter conflict with this Court's decisions interpreting and applying the Fourth Amendment of the United States Constitution?**

The Supreme Court of South Carolina upheld the search of Petitioner and the seizure of the gun as a "lawful search incident to arrest." In so holding, the Court misapplied the Fourth Amendment of the United States Constitution and relevant precedent of this Court.

- A. Should evidence obtained from the Petitioner during a pre-arrest warrantless search of his person in 1961 by a Tennessee State Trooper have been suppressed at his trial in 2002 as having been obtained in violation of Petitioner's Fourth Amendment right against unreasonable searches and seizures?**

The Supreme Court of South Carolina upheld the 1961 search and seizure of Petitioner, finding the warrantless search which preceded Petitioner's arrest was lawful pursuant to *Rawlings v. Kentucky*, 448 U.S. 98 (1980), *Chimel v. California*, 395 U.S. 752 (1969) and

Devenpeck v. Alford, 543 U.S. 146 (2004). The South Carolina Court misread and misapplied the holdings of these cases.

The Fourth Amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. Warrantless searches are *per se* unreasonable under the Fourth and Fourteenth Amendments, subject to several specifically established and well-delineated exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). One such exception is the "stop and frisk" exception set out in *Terry v. Ohio*, 392 U.S. 1 (1968). A law enforcement officer, after providing identification, may detain a person in public to inquire about behavior which the officer reasonably suspects of being criminal. *Terry v. Ohio*. Although the suspicion must be grounded in specific and articulable facts, *State v. Dean*, 282 S.C. 136, 317 S.E.2d 744 (1984), the officer is not constitutionally required to be certain that a crime has occurred when the stop is made. *United States v. Moore*, 817 F.2d 1105 (4th Cir. 1987).

The narrow scope of a *Terry* stop does not permit a frisk for weapons unless there is a reasonable belief or suspicion that the person being frisked is armed and dangerous. *Ybarra v. Illinois*, 444 U.S. 85 (1979). The question is whether a reasonable person in the position of the officer would believe the frisk was necessary to preserve the safety of the officer or others. *Terry v. Ohio*. Before a self-protective search will be sanctioned, an officer must be able to disclose the particular facts from which it was reasonable to infer that the suspect was armed and dangerous. *Sibron v. New York*, 392 U.S. 40 (1968). See also *Minnesota v. Dickerson*, 508 U.S. 366

(1993) (officer must be justified in believing individual whose suspicious behavior he is investigating is armed and presently dangerous to the officer or others before officer may conduct pat-down search to determine if the person is carrying a weapon); *Maryland v. Buie*, 494 U.S. 325 (1990) (limited pat-down for weapons is authorized where a reasonably prudent officer would be warranted in the belief, based on specific and articulable facts, and not on a mere inchoate and unparticularized suspicion or hunch, that he is dealing with an armed and dangerous individual). The duration of such a *Terry* investigative stop helps to determine the degree of intrusion and whether the detention is justified. *United States v. Sharpe*, 470 U.S. 675 (1985).

Recognizing the warrantless search in this case was not valid under *Terry*, the Supreme Court of South Carolina inappropriately relied upon *Rawlings v. Kentucky*, 448 U.S. 98 (1980) to uphold the validity of the search. In *Rawlings*, the defendant was at a home which was raided by officers looking to arrest another person on drug distribution charges. When other officers went to obtain a warrant to search for marijuana after they smelled smoke and saw marijuana seeds, the officers who remained behind agreed to permit any of the occupants of the home to leave if they submitted to a search. When the officers returned with the search warrant, one officer read *Miranda* warnings and another officer approached a woman and asked her to empty her purse onto a coffee table. Among the contents were jars containing various drugs. The officer then turned to Rawlings and told him to "take what was his." Rawlings claimed ownership of the controlled substances. An officer then searched him and found \$4,500 in cash and a knife in a sheath. The officer

then placed Rawlings under arrest. He was indicted for possession of controlled substances with intent to sell them.

On appeal, Rawlings argued the search that uncovered the money and the knife was illegal. This Court upheld the search, stating:

Once petitioner admitted ownership of the sizable quantity of drugs found in Cox's purse, the police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.

Rawlings, 448 U.S. at 111. Hence, at the time the officers searched Rawlings, he had admitted to serious drug offenses for which he was most assuredly going to be placed under arrest. Unlike the defendant in *Rawlings*, however, it is clear Trooper Meredith was not planning to arrest Petitioner Freiburger at the time he performed the search.

The Supreme Court of South Carolina noted the two historical rationales for the "search incident to arrest" exception to the warrant requirement are: (1) the need to disarm the suspect in order to take him into custody; and (2) the need to preserve evidence for later use at the trial. *Knowles v. Iowa*, 525 U.S. 113 (1998). In fact, this case is similar to *Knowles v. Iowa*, in which a police officer pulled over a driver for speeding and issued him a citation rather than arresting him, even though under Iowa law the officer might have arrested Mr. Knowles. The officer then conducted a search of the car and found marijuana and a

"pot pipe." The officer arrested Mr. Knowles and charged him with violation of controlled substances laws.

Mr. Knowles moved to suppress the evidence obtained from the search on the basis that the search could not be sustained under the "search incident to arrest" exception recognized in *United States v. Robinson*, 414 U.S. 218 (1973), because Mr. Knowles had not been placed under arrest. The Iowa courts upheld the search under Iowa law. The United States Supreme Court reversed. The Court stated that in *Robinson*, the Court noted two historical rationales for the "search incident to arrest" exception: (1) the need to disarm the suspect in order to take him into custody; and (2) the need to preserve evidence for later use at trial. *Knowles v. Iowa*, 525 U.S. at 117. The Court held neither of the rationales justified the search in this case.

This Court noted that a custodial arrest involves "danger to an officer" because of "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station." *Knowles*, 525 at 117. The Court added that the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest. *Id.* A routine traffic stop, on the other hand, is a relatively brief encounter and is more analogous to a so called "*Terry*" stop than to a formal arrest. *Id.* Furthermore, while concern for officer safety is not absent in the case of a routine traffic stop, such concern justifies minimal intrusion, but does not by itself justify the often considerably greater intrusion attending a full field-type search. *Id.* The Court noted other reasons which might justify a search for weapons to protect themselves from danger, noting among other things that officers may perform a "patdown" search upon a reasonable suspicion

that a defendant may be armed and dangerous. *Id.*, at 117-118.

This Court also found the second rationale, the need to discover and preserve evidence, did not support the search in *Knowles*. Once Mr. Knowles was stopped for speeding and issued the citation, all the evidence necessary to prosecute that offense had been obtained. *Id.*, at 118. Accordingly, the Court held the search could not be upheld.

Neither of the rationales set out in *Knowles v. Iowa* applied in this case, however, since: (1) Trooper Meredith had not arrested Petitioner at the time of the search, and was not likely to arrest Petitioner, but was merely transporting Petitioner from the highway to a place of safety (hence, he was not a "suspect" to be "disarmed"; and (2) Trooper Meredith was not seeking evidence he needed to preserve for later use at trial, since (a) there were to be no charges filed, and (b) even if Petitioner was to be arrested for hitchhiking (which he clearly was not), there was no evidence to be discovered and preserved for trial of that offense. Like Mr. Knowles, Petitioner was not placed under arrest prior to the search by Trooper Meredith; instead, Mr. Meredith searched Petitioner *prior* to placing him under arrest for anything. The record is clear that Mr. Meredith did not intend to arrest Petitioner for hitchhiking, and in fact Petitioner was not charged with that offense. Instead, Petitioner was charged with "carrying arms" and was then taken into custody. Under the analysis in *Knowles*, Trooper Meredith's search is not justifiable as a "search incident to arrest," nor is it supportable under a need to discover and preserve evidence. Furthermore, Trooper Meredith had *no* suspicion, much less

a reasonable suspicion, that Petitioner was armed and dangerous so as to justify a "patdown" search.

In upholding the trial court's failure to suppress the gun, the Supreme Court of South Carolina also inappropriately relied upon *Devenpeck v. Alford*, 543 U.S. 146 (2004), because *Devenpeck* is inapposite to the case *sub judice*. In *Devenpeck*, the plaintiff, Mr. Alford, stopped his motor vehicle to help a disabled motorist. When Trooper Haner pulled up, Mr. Alford left quickly. Trooper Haner suspected Mr. Alford was an impersonator or "wannabe cop." Trooper Haner pulled Mr. Alford over and saw evidence of impersonation of a law enforcement officer. Sergeant Devenpeck thereafter arrived. While investigating the stop, Sergeant Devenpeck noticed on the seat of Mr. Alford's car a tape recorder that was recording the conversation. Sergeant Devenpeck listened to the tape, then arrested Mr. Alford for violating Washington's Privacy Act. Mr. Alford told Sergeant Devenpeck that a Washington Court of Appeals decision permitted the recording, and a copy of the decision was in the car's glove box. Sergeant Devenpeck arrested Alford after trying to confirm the Privacy Act applied. Shortly thereafter, Sergeant Devenpeck reached a deputy prosecutor, and the two discussed possible criminal offenses (violation of the Privacy Act, impersonating a police officer, making a false representation to a police officer). The prosecutor advised Sergeant Devenpeck that there was "clearly probable cause" and suggested charging Mr. Alford also with "obstructing a public servant" for giving the officers the runaround. Sergeant Devenpeck rejected the idea, saying his officers did not "stack charges." Trooper Haner thereafter charged Mr. Alford with violating the Privacy Act and issued a ticket for the flashing lights on the car in

violation of Washington's Automobile Code, for which Alford could be detained for the period of time "reasonably necessary" to issue the citation.

The Washington State trial court subsequently dismissed both charges. Mr. Alford thereafter sued the officers in Federal Court for violation of 42 U.S.C. § 1983, and for State claims for unlawful arrest and imprisonment. Mr. Alford claimed he was arrested without probable cause in violation of Fourth and Fourteenth Amendments to the United States Constitution.

The United States Supreme Court held "[i]n conformity with the rule at common law, a warrantless arrest by a law enforcement officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." (Emphasis added). The Court added, "[o]ur cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. * * * That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." (Emphasis added). The Court also stated, "Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating *an arrest*. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest." (Emphasis added).

The sole focus in *Devenpeck* was on the validity of a warrantless arrest. That is, if the officer stated he stopped the defendant because he had probable cause that the defendant had committed crime "X," then arrested the

defendant for crime "Y," a crime "not closely related to" crime "X" (the offense stated by the arresting officer), the arrest for crime "Y" is not rendered invalid. So long as the circumstances, viewed objectively, justify the officer's action in stopping the defendant for crime "X," the arrest for crime "Y" is not invalidated.

Petitioner, Mr. Freiburger, did not challenge the lawfulness of his *arrest* for carrying arms upon a stop for the crime of hitchhiking (such an argument would have raised the *Devenpeck* concerns). Rather, Mr. Freiburger challenged Trooper Meredith's pre-arrest warrantless *search* in violation of applicable Tennessee law (discussed below) and under the "stop and frisk" rules permitted by the Fourth and Fourteenth Amendments of the United States Constitution.

In this case, Trooper Meredith observed Mr. Freiburger committing the offense of hitchhiking, for which Trooper Meredith clearly stated he doubted he was going to arrest Mr. Freiburger. He had not placed Mr. Freiburger under arrest at the time he searched Mr. Freiburger, in violation of Tennessee State law adhering at the time. The fact that Trooper Meredith discovered a gun and arrested Mr. Freiburger for "carrying arms" does not save the fruit of the prior unlawful search. Trooper Meredith had *no* suspicion, much less a reasonable suspicion, that Mr. Freiburger was armed and dangerous so as to justify a "pat down" search, and he had not arrested Mr. Freiburger at the time of the search, nor was he likely to arrest Mr. Freiburger for hitchhiking. (Appendix pages 30-32, 45-46, 52-55, 57-58). *See, e.g., Knowles v. Iowa*, 525 U.S. 113 (1998) (custodial arrest involves "danger to an officer" because of "the extended exposure which follows

the taking of a suspect into custody and transporting him to a police station; an officer may conduct a "pat down" search upon a reasonable suspicion that a defendant may be armed and dangerous). The Supreme Court of South Carolina has misapplied this Court's precedent in *Devenpeck v. Alford*, and refused to apply appropriate precedent governing Fourth Amendment Search and Seizure standards.

Evidence which is obtained through an illegal search is not admissible pursuant to the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. *Mapp v. Ohio*, 367 U.S. 643 (1961). The trial court therefore should have excluded the .32 Harrington & Richardson pistol which Trooper Meredith asserts he confiscated from Petitioner as a result of the pat-down search he conducted in 1961, and the Supreme Court of South Carolina should have reversed the conviction and remanded for a new trial without the pistol.

This Court should grant this Petition, issue a Writ of Certiorari to the Supreme Court of South Carolina, review the decision in *State v. Freiburger*, and reverse the decisions of the lower courts upholding the 1961 search by Trooper Meredith and subsequent seizure of the gun.

B. Should evidence obtained from Petitioner during a pre-arrest warrantless search of his person in 1961 by a Tennessee State Trooper have been suppressed where the evidence was obtained in violation of Tennessee State Search and Seizure Law adhering at the time?

The second argument Petitioner made to the Supreme Court of South Carolina is that the evidence Trooper

Meredith seized in 1961 should have been suppressed as obtained in violation of Tennessee State search and seizure law adhering at the time. The Supreme Court of South Carolina failed to address this argument in its initial opinion or upon Petitioner's Petition for Rehearing to that Court. This Court should issue a writ of certiorari and address the issue.

Tennessee State law applicable at the time of the search in this case was set forth in the case of *Robertson v. State*, 184 Tenn. 277, 198 S.W.2d 633 (1947), in which the Supreme Court of Tennessee stated:

In the case of misdemeanors, . . . an officer may, without a warrant, arrest a person for a public offense committed or a *breach of the peace* threatened in his presence. With this exception, an officer has no right to arrest for a misdemeanor without a warrant. *He has no right to make a search without a warrant except where he has made a lawful arrest; then the search of the person of the offender may follow.*

Robertson, 184 Tenn. at 282-283 (emphasis supplied). The Court added:

When there is an intent to make a search and a seizure, no officer may, under the provisions of our Constitution hereinbefore set out, make any search of the person or effects or properties of a citizen except a search of the person *following a lawful arrest*, unless he have a valid search warrant.

Id., 184 Tenn. at 283 (emphasis added). *See also Warden v. State*, 214 Tenn. 314, 379 S.W.2d 788 (1964) (in Tennessee it is well settled that an officer may make a constitutional search of the person of the defendant, even without a

search warrant, provided the person is lawfully arrested and the search is "incident to the arrest"). *See also De-Board v. State*, 160 Tenn. 51, 22 S.W.2d 235 (1929) ("breach of the peace" means the act complained of must either itself be violent, or of such a nature as that its tendency is to provoke or incite or lead others to violence or turbulence of some kind); *Gray v. State*, 207 Tenn. 39, 336 S.W.2d 22 (1960) ("breach of peace" is a generic term including all violations of the public peace or order).

In this case, the evidence is undisputed that at the time Trooper Meredith searched Petitioner, Trooper Meredith did not have a warrant to search Petitioner. Furthermore, Trooper Meredith had not arrested Petitioner on any charge, and was not likely to have arrested Petitioner for hitchhiking. (Appendix pages 26-28, 30-32). Trooper Meredith stated that Petitioner did not try to run from him, was courteous and pleasant, and obeyed every command Trooper Meredith gave him. (Appendix pages 31-33). Mr. Meredith had no problems with Petitioner whatsoever. (Appendix pages 31-33).

Trooper Meredith did not arrest everyone he found hitchhiking (Appendix pages 30-31), and, in fact he never charged Petitioner with hitchhiking. (Appendix pages 33-34). Hence, under Tennessee law applicable at the time Trooper Meredith's search of Petitioner was illegal.

This Court should issue a writ of certiorari to the Supreme Court of South Carolina to review its decision in this matter, and should address the arguments made by Petitioner that the 1961 search violated applicable Tennessee search and seizure law. The Court should grant review, reverse the conviction, and remand the matter

to the State Court for proceedings consistent with this Court's rulings.

II. Was Petitioner denied his right to a fair trial under the Fifth and Fourteenth Amendments of the United States Constitution where the trial court permitted the prosecutor to mention repeatedly that Petitioner was "stationed" at Ft. Leavenworth, Kansas, a known military prison?

The trial court admitted evidence that the Defendant was "stationed" at Ft. Leavenworth, Kansas. (Appendix pages 21-23, 36-38). The Supreme Court of South Carolina upheld the conviction in the face of the trial court's ruling, finding there was no prejudicial error. However, by permitting the testimony and arguments in this case, the court allowed the jury to speculate about Petitioner's reason for being at Ft. Leavenworth, and to conclude he was incarcerated. This ruling violated Petitioner's right to a fair and impartial trial and his right to due process under the Fifth and Fourteenth Amendments of the United States Constitution.

The fact that Petitioner was "stationed" at Ft. Leavenworth, Kansas, was completely irrelevant to any issue in the case. In view of the common knowledge that Ft. Leavenworth is a military prison, the prejudicial effect of this information far exceeded any probative value the information may have had. Rule 403, SCRE. See *Old Chief v. United States*, 519 U.S. 172 (1997) (the term "unfair prejudice" as to a criminal defendant speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged; the evidence has an

undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one, including generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged). This is particularly true where the State relied exclusively upon circumstantial evidence to obtain the conviction.

The trial court ruled the fact that Petitioner had been arrested for "carrying arms" was not admissible under Rule 404(b), SCRE. However, the State was permitted to comment upon Petitioner's detainment at Ft. Leavenworth for AWOL and achieve the very result Rule 404(b) seeks to prevent, that is, to try and establish Petitioner had the character to commit a crime and therefore acted in conformity therewith.

In this circumstantial evidence case, this evidence was unduly prejudicial and should not have been admitted. It is clear that the jurors were interested in the records from Leavenworth, as they sent a note to the court inquiring about the military records the solicitor had in the courtroom and the Petitioner's AWOL status. (Appendix pages 38-44, 47). The trial court could have prevented the jury from hearing about Petitioner's presence at Ft. Leavenworth by permitting the State's witnesses to merely testify Petitioner was stationed in Kansas, as Petitioner's counsel suggested.

Accordingly, Petitioner requests this Court issue its writ of certiorari to the Supreme Court of South Carolina, find the trial court's ruling permitting the State's witnesses to testify that Petitioner was "stationed" at Ft. Leavenworth was error and denied Petitioner due process

and a fair trial, and hold Petitioner is entitled to a new trial.

CONCLUSION

Review of the decision of the Supreme Court of South Carolina by way of a writ of certiorari will permit this Court to further explain the decisions in *Rawlings v. Kentucky* and *Devenpeck v. Alford*. Granting the writ will further prevent the lifetime incarceration of a person based upon evidence obtained in violation of the Fourth Amendment of the United States Constitution, and a conviction based upon spurious inferences the jury was permitted to draw from hearing that Petitioner was "stationed" at Ft. Leavenworth, Kansas, following his arrest in Tennessee.

Respectfully submitted,

JOHN S. NICHOLS
BLUESTEIN & NICHOLS, LLC
Attorney for Petitioner
Edward Freiburger

App. 1

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Edward Freiburger,

Appellant.

Appeal from Richland County
Henry F. Floyd, Circuit Court Judge

Opinion No. 26042
Heard May 18, 2005 – Filed September 26, 2005

AFFIRMED

John Dennis Delgado and Kathrine Haggard
Hudgins, of Office of John D. Delgado, and John
S. Nichols, of Bluestein & Nicholas, LLC, all of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster,
Chief Deputy Attorney General John W.
McIntosh, Assistant Deputy Attorney General
Donald J. Zelenka, Assistant Attorney General
Jeffrey A. Jacobs, and Solicitor Warren Blair
Giese, all of Columbia, for Respondent.

JUSTICE WALLER: This matter was certified to this
Court from the Court of Appeals pursuant to Rule 204,
SCACR. Freiburger was convicted of the 1961 murder of a
Columbia taxi-cab driver. He was sentenced to life impris-
onment. We affirm.

App. 2

FACTS

The victim in this case, John Orner, was a taxi-cab driver who regularly serviced soldiers at Fort Jackson in Columbia. Orner received his last dispatch call at 11:15 p.m. on the evening of February 28, 1961 to go to the NCO club at the fort. When he did not return home from his shift the next morning, his family reported him missing. Orner's bloody cab was found around 7:30 a.m. on March 1, 1961, in the [REDACTED]. Orner was not in the cab. His body was found on March 3, 1961, on the side of the road of Highway 601 in lower Richland County. He had died from a gunshot wound to the brain, consistent with having been shot in the head by a passenger sitting in the back seat of the cab. Forensics examinations revealed Orner had been killed by a gunshot wound from a .32 caliber bullet fired from a Harrington and Richardson (H & R) revolver.

Freiburger was a private in the army stationed at Fort Jackson in 1961. Pawn shop records revealed that on February 28, 1961, Freiburger purchased a .32 caliber H&R revolver, serial number 9948, from Capital Loan and Pawn Shop at [REDACTED]. A month later, on March 29, 1961, Freiburger was stopped by a Tennessee Highway patrolman, Donald Meredith, at approximately 11:00 p.m. for hitchhiking in Newport, Tennessee. Meredith testified he stopped Freiburger because it was dangerous to be out walking or hitchhiking on the road as people had been struck by cars in the vicinity. Patrolman Meredith questioned Freiburger, then patted him down, discovering a .32 caliber loaded H&R revolver, serial number W9948. Meredith testified that, although Freiburger was not under arrest at the time of the pat down search, "he was going to be for hitchhiking, or I was going to take him back

App. 3

to the jail." Upon finding the weapon, Meredith arrested Freiburger for "carrying arms," and the gun was confiscated.

After Freiburger's arrest, Richland County authorities (investigating Orner's murder) requested and were given the H&R revolver seized by Patrolman Meredith. Testing on the weapon was inconclusive as to whether it was the weapon used in Orner's death. No charges were filed at that time. Forty years later, in August 2000, the Richland County Sheriff's Department reopened the Orner file. Retesting of the gun and bullet fragments was initially inconclusive. However, SLED retained an independent expert, John Cayton, who concluded the weapon retrieved from Freiburger in 1961 was the murder weapon. Freiburger was arrested and charged with murder. The jury convicted him, and he was sentenced to life imprisonment.

ISSUES

1. Did the trial court properly admit the gun taken from Freiburger during the 1961 search in Tennessee?
2. Did the trial court err in denying Freiburger's motion to suppress the gun due to the State's failure to prove a sufficient chain of custody?
3. Did the trial court err in admitting certain pawnshop records under the Ancient Documents and Business Records as Evidence Act?
4. Did the trial court err in admitting evidence that Freiburger was at one time stationed at Fort Leavenworth, Kansas?

App. 4

5. Did the court err in denying Freiburger's motion for a mistrial and/or for curative instructions as a result of the solicitor's improper comments during opening argument?
6. Did the court err in denying Freiburger's motion for a directed verdict?

1. 1961 SEARCH AND SEIZURE

Freiburger asserts the 1961 search and seizure of the H&R weapon was illegal, having exceeded the permissible scope of a *Terry*¹ search. The State contends the search was a lawful "search incident to arrest," such that the seizure was permissible. We agree with the State that the 1961 search of Freiburger was a lawful search incident to arrest.

Evidence seized in violation of the Fourth Amendment must be excluded from trial. *State v. Khinggratasiphon*, 352 S.C. 62, 572 S.E.2d 456 (2002), citing *Mapp v. Ohio*, 367 U.S. 643 (1961). Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. *State v. Dupree*, 319 S.C. 454, 462 S.E.2d 279 (1995). However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well recognized exceptions to the warrant requirement. *Id.* One such exception is in cases of a search incident to arrest. *State v. Ferrell*, 274 S.C. 401, 409, 266 S.E.2d 869, 873 (1980) (in the case of a lawful custodial arrest, the full search of a person does not require a search warrant and

¹ *Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879, 20 L.Ed 2d 889 (1968).

App. 5

is considered reasonable under the Fourth Amendment). The burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the prosecution. *Dupree, supra*; *State v. Bultron*, 318 S.C. 323, 457 S.E.2d 616 (Ct.App.1995) (burden is upon State to justify warrantless search).

There are two historical rationales for the "search incident to arrest" exception to the warrant requirement: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. *Knowles v. Ohio*, 525 U.S. 113, 116 (1998). A search may be conducted incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882 (1986). A warrantless search which precedes a formal arrest is valid if the arrest quickly follows. *State v. Moultrie*, 316 S.C. 547, 551, 451 S.E.2d 34, 37 (Ct. App. 1994). See also *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 633 (1980) (search may precede a formal arrest if the officer has probable cause to arrest at the time of the search and the fruits of the search were not necessary to support probable cause to arrest).

As noted above, there are situations in which a warrantless search which immediately precedes an arrest is held lawful, in cases where the police officer is held to have had probable cause from the outset. *Moultrie, supra*; *Rawlings v. Kentucky*. The rationale for such a warrantless search is that it is permissible incident to a lawful arrest because of legitimate concerns for the safety of the officer and to prevent the destruction of evidence by the arrestee. *Chimel v. California*, 395 U.S. 752 (1969) (when

App. 6

an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape). See also *United States v. Robinson*, 414 U.S. 218 (1973).

At the *in camera* hearing, Trooper Meredith testified that, although Freiburger had not been arrested at the time of the pat down search, he was going to be arrested for hitchhiking, or taken back to the jail. Trooper Meredith went on to testify that "we did a safety search before we put somebody in the car. You check them to see if they have any weapons."

Freiburger maintains that because he was not under arrest at the time of the search, and because he was ultimately arrested only for carrying arms, the search was illegal and the gun seized in 1961 should have been suppressed at trial. We disagree. As noted above, one of the rationales for the exception to the warrant requirement in the case of a search incident to arrest is the need to disarm the suspect in order to take him into custody. Here, Trooper Meredith's testimony that Freiburger was going to be arrested for hitchhiking and/or transported to the jail provides a sufficient basis upon which to conduct a limited pat-down search. It would simply be unreasonable to expect a police officer, out on a deserted road at 11:00 p.m., to transport a suspect to the jail without first conducting a pat down search for weapons.

Moreover, the fact that Freiburger was not ultimately arrested for hitchhiking is not dispositive. As recently stated by the United States Supreme Court, an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide

App. 7

probable cause. . . . 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" *Devenpeck v. Alford*, 125 S.Ct. 588, [5]94 (2004), citing *Whren, supra*, at 813, 116 S.Ct. 1769. Accordingly, the mere fact that Trooper Meredith did not arrest Freiburger for hitchhiking but, instead, arrested him for carrying arms upon finding the weapon does not vitiate the reasonableness of the underlying search. We find the search conducted by Trooper Meredith was a legitimate search incident to arrest, necessary to ensure his safety in order to transport Freiburger to the jail. As such, there was no fourth amendment violation and the trial court properly denied Freiburger's motion to suppress.

2. CHAIN OF CUSTODY

Freiburger next asserts the state failed to prove a sufficient chain of custody of the gun, such that it should have been excluded from evidence on this basis. Initially, we agree with the state that Freiburger has failed to preserve this issue for review.

During the motion in limine hearing, Freiburger objected to the weapon only on the ground that there had been an impermissible pat-down search. He renewed the same objection when the gun was introduced into evidence. Accordingly, as the argument he now advances was not raised and ruled on below, it is not preserved. *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989) (issue not preserved for appeal where one ground is raised below and

App. 8

another ground is raised on appeal). In any event, the trial court properly admitted the weapon.

While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is, evidence that is unique and identifiable – the establishment of a strict chain of custody is not required. If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. *State v. Glenn*, 328 S.C. 300, 305-306, 492 S.E.2d 393, 395 (Ct. App. 1997).

Given the serial number and markings on the gun, and the fact that a gun is a non-fungible item, we find the chain of custody established by the state in this case was sufficient.

3. ANCIENT DOCUMENTS/BUSINESS RECORDS EXCEPTION

Freiburger next contends the trial court erred in admitting certain pawn shop records pursuant to the Ancient Documents rule and the Business Records Exception, claiming they were not properly authenticated by the state. We find this issue is not adequately preserved for review, and the record is, in any event, insufficient to enable this Court to make an intelligent review.

It appears Freiburger primarily objects to admission of the Capital Loan and Pawn receipt and records which

App. 9

indicate Freiburger purchased the H&R revolver on February 28, 1961. However, there is no objection to their admission during the testimony of Ms. Russ, the then 77 year old daughter of the pawn shop owner. In fact, certain exhibits were specifically entered without objection. To the extent that Freiburger did object, the objections came long after the documents had been received into evidence, most of which had been introduced into evidence without objection.

The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal. *State v. Bellue*, 259 S.C. 487, 193 S.E.2d 121 (1972). Further, Freiburger has failed to present a sufficient record for review. *State v. Mitchell*, 330 S.C. 189, 194, 498 S.E.2d 642, 645 (1998) (the burden is on the appellant to provide a sufficient record for review).

Moreover, we find the testimony of Ms. Russ sufficiently authenticated the pawn shop records. The alleged deficiencies in Ms. Russ' testimony go to the weight of the pawn shop records, rather than their admissibility.

4. FORT LEAVENWORTH

Freiburger asserts reversible error in references to his being "stationed" at Fort Leavenworth, Kansas.² He asserts it is well-known Leavenworth is a military prison,

² Freiburger was sent to Fort Leavenworth in 1961 after his arrest by Trooper Meredith for carrying arms when it was learned he was AWOL from the army.

and that, as such, this evidence was prejudicial. We disagree.

Contrary to Freiburger's contention, there was no mention of the fact that he was incarcerated at Leavenworth. Mere questioning as to whether he was stationed there simply does not equate with advising the jury he was confined in a military prison. Even assuming, *arguendo*, jurors were aware Leavenworth is a military prison, there is no reason to suspect they automatically believed he was imprisoned there, as opposed to having been being stationed there during his military career. We see no prejudice from admission of this testimony. *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000) (error without prejudice does not warrant reversal).

5. SOLICITOR'S OPENING COMMENTS

Freiburger next asserts the trial court erred in denying his motion for a mistrial, or curative instructions, after the solicitor improperly commented, during opening arguments, that Freiburger had been arrested by the Tennessee Highway Patrol on March 29, 1961. We find no reversible error.

The jury in this case was well aware, both from the solicitor's opening argument and the testimony of Trooper Meredith, that Freiburger had been stopped in Tennessee on March 29, 1961 for hitchhiking, and that he was patted down by Meredith and a weapon retrieved and confiscated. The jury also learned that the weapon was subsequently turned over to the Richland County sheriff's department and became the focus of the investigation.

App. 11

Given the jury's knowledge that Freiburger had been stopped and frisked, and the weapon retrieved from him, the fact that the jury also heard he was arrested for carrying arms was simply not prejudicial in his trial for murder. *State v. Locklair, supra* (error without prejudice does not warrant reversal).

6. DIRECTED VERDICT

Finally, Freiburger asserts the trial court erred in denying his motion for a directed verdict. We disagree.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. Curtis*, 356 S.C. 622, 591 S.E.2d 600 (2004). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. *Id.* On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *Id.* If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. *Id.*

The evidence adduced at trial which tended to implicate Freiburger was as follows: 1) he was a soldier stationed at Fort Jackson on February 28, 1961, 2) he had a habit of pawning his personal property at downtown Columbia pawn shops, 3) he purchased a .32 caliber H&R revolver, serial number W9948, and bullets from the Capital Loan and Pawn shop on February 28, 1961, 4) the victim was shot on February 28, 1961 with a .32 caliber H&R revolver, 5) two days after the victim's cab was found, Freiburger stayed at a downtown motel in close

App. 12

proximity to where Victim's bloody cab was found, 6) Freiburger was arrested in Tennessee on March 29, 1961 carrying a .32 caliber H&R revolver, 7) a ballistics test conducted in 2001 indicated that the H&R revolver confiscated from Freiburger in 1961 was the same weapon which fired the shot killing the victim, and 8) Freiburger was evasive when talking to Richland County police investigators in Indiana in September 2000, claiming he did not recall having been in the army, or having been stationed at Fort Jackson.

Although circumstantial, we find the above-cited evidence sufficient to withstand Freiburger's motion for a directed verdict.

The judgment below is affirmed.

AFFIRMED.

**MOORE, A.C.J., BURNETT, PLEICONES, JJ.,
and Acting Justice James W. Johnson, Jr., concur.**

App. 13

STATE OF) IN THE COURT OF
SOUTH CAROLINA) GENERAL SESSIONS
COUNTY OF Richland) INDICTMENT/CASE #:
STATE VS.) 2001 -GS- 40-2955
Edward Freiburger) A/W: G205559
AKA:)
Race: W Sex: M Age:) Date of Offense: 2/28/61
DOB: / / / SS#:) S.C. Code §: 16/3/10
Address:) CDR Code #: 0 / 1 / 1 / 6
) ☐ CASE RESTORED
DL# SID#:) SENTENCE
) ☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the
Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Murder
in violation of § 16-3-10 of the S.C. Code of Laws, bearing
CDR Code # 0 / 1 / 1 / 6

☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS
☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense,
☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ Without Negotiations or Recommendation,
☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State
Department of Corrections, ☐ County Detention Center,
for a ~~determinate term of~~ LIFE days/months/years or ☐ under
the Youthful Offender Act not to exceed years and/or to pay

App. 14

a fine of \$____; provided that upon the service of _____ days/months/years and/or payment of \$____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference. [Life under the law in place in 1961]

☐ The Defendant is to be given credit for _____ days/months jail time.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, PTUP _____
☐ Waived, ☐ Ordered _____ days/hours Public Service
Total: \$____ plus 20% fee: \$____ Employment
Payment Terms _____ Obtain GED _____
☐ set by SCDPPPS _____ Attend Voc Rehab. or Job
Corps. _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Recipient: _____
*Fine: \$____
§14-1-206 (Assess-
ments 100%) \$____ Fine may be pd. in equal, con-
secutive weekly/monthly pmts.
§14-1-211(A)(1) \$____ of \$____ beginning _____
(Surcharge) \$____ \$____ paid to the Public De-
§14-1-211(A)(2) \$____ fender Fund.
(Surcharge) \$____ Other: _____
§56-5-2995 (DUI
Assessment) \$____
3% to County (if paid
in installments) \$____
TOTAL \$____

PRESIDING JUDGE:
/s/ Henry F. Floyd
Judge code: / 0 / 5 / 6
Sentence Date: 8/1/02

App. 15

/s/ Barbara A. Scott
Clerk of Court/Deputy Clerk
Court Reporter: /s/ Tracey

[SEAL]

App. 16

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

(803) 734-1080
FAX (803) 734-1499

November 2, 2005

John S. Nichols, Esquire
Bluestein & Nichols, LLC
P.O. Box 7965
Columbia, SC 29202

RE: The State v. Freiburger, Edward

Dear Mr. Nichols:

The Court has issued the following order on your Petition
for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

Chief Justice Jean H. Toal and
Justice James E. Moore, not participating.

November 2, 2005."

The remittitur is today being forwarded to the lower
court.

App. 17

Very truly yours,
/s/ Daniel E. Shearouse
CLERK

DES/jjp

cc: John Dennis Delgado, Esquire
Kathrine Haggard Hudgins, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General Jeffrey A. Jacobs
Solicitor Warren Blair Giese

App. 18

STATE OF SOUTH	)	IN THE COURT OF
CAROLINA COUNTY OF	)	GENERAL SESSIONS
RICHLAND State of	)	CRIMINAL NO.:
South Carolina,	)	01-GS-40-02955
Plaintiff	)	
vs.	)	
Edward Freiburger,	)	
Defendant.	)	

**TRANSCRIPT OF PROCEEDINGS OF
JULY 29, 2002 TO AUGUST 2, 2002**

[105] THE UNITED STATES SUPREME COURT HAS A VARIETY OF CASES, *STONER VS. CALIFORNIA*, *FAHY VS. CONNECTICUT*, APPLIED THE *MAPP* DECISION RETROACTIVELY.

SO IN OTHER WORDS, JUNE 1961 WHEN *MAPP VS. OHIO* BECOMES APPLICABLE IS NOT THE DECIDING TIME. THE DECIDING TIME IS WHETHER OR NOT IT APPLIES AND WHETHER OR NOT THERE IS AN EXCLUSIONARY RULE THAT'S IN EFFECT.

I THINK THE CONSTITUTIONAL LAW ON THAT IS CLEAR. I CAN GIVE YOU A MEMORANDUM OF LAW ABOUT THAT, BUT THE KEY IS EVEN MORE IMPORTANTLY, YOUR HONOR, IN THAT, WHILE *TERRY VS. OHIO* WAS NOT PROMULGATED IN JUNE - EXCUSE ME, IN APRIL, MARCH 1961 WHEN MR. MEREDITH APPLIES A GENERAL PAT DOWN. AND WE ARE NOW IN THE PROCESS OF MOVING TO SUPPRESS THE H&R 32, WE THEN HAVE THE RIGHT TO APPLY THE FACTS AND CIRCUMSTANCES OF THIS CASE, VIS A VIS, *TERRY*.

App. 19

THERE IS NO ARTICULABLE SUSPICION. THE POLICE OFFICER MUST BE ABLE TO POINT TO SPECIFIC AND ARTICULABLE FACTS, WHICH TAKEN TOGETHER WITH THE INFERENCES FROM THOSE FACTS, REASONABLY WARRANT THE INTRUSION.

THE FACTS MUST BE JUDGED AGAINST THE OBJECTIVE STANDARD, WHETHER THE FACTS AVAILABLE TO THE OFFICER AT THE MOMENT OF SEIZURE OR SEARCH WOULD WARRANT A MAN REASONABLE CAUTION, BELIEF THAT AN ACTION WAS TAKEN APPROPRIATELY.

INTRUSIONS MUST BE BASED ON MORE THAN [106] INARTICULABLE HUNCHES AND SIMPLE GOOD FAITH ON THE PART OF THE OFFICER, THAT NOT BEING ENOUGH.

POLICE OFFICERS WHO HAVE REASON TO BELIEVE HE'S DEALING WITH AN ARMED AND DANGEROUS INDIVIDUAL, REGARDLESS OF WHETHER HE HAS PROBABLE CAUSE TO ARREST MAY MAKE A REASONABLE SEARCH FOR WEAPONS, EVEN THOUGH HE'S NOT ABSOLUTELY CERTAIN THAT THE INDIVIDUAL WAS ARMED.

REASONABLE IS THE ACTION, HAS - NOT ONLY IS THE COAGENT UNDER A PARTICULARIZED SUSPICION OR HUNCH, BUT ON SPECIFIC REASONABLE INFERENCES WHICH HE'S ENTITLED TO DRAW FROM THE FACTS IN LIGHT OF HIS EXPERIENCE.

THE STATEMENT THAT HE GIVES MR. MCDUGAL, YOUR HONOR, THAT "I DOUBT I WOULD HAVE ARRESTED ED FRIEBURGER IF I HAD NOT FOUND THE GUN HE WAS CARRYING."

WITH ALL THE SINCERITY THAT I MUST MUSTER HERE, IT SEEMS TO ME, YOUR HONOR, THAT THE STATE CANNOT MEET ITS BURDEN OF PERSUASION OR BURDEN OF PROOF IN THIS MATTER BASED ON THE STATEMENTS OF MR. MEREDITH.

I SPECIFICALLY ASKED HIM HOW DID MR. FRIEBURGER TREAT HIM? WAS HE ANYTHING BUT POLITE AND COURTEOUS? WAS HE VIOLENT? DID HE ATTEMPT TO ASSAULT HIM? DID HE TRY TO RUN AWAY FROM HIM? WAS HE ENGAGED IN ANY CRIMINAL ACTIVITY? NOTHING.

IT SEEMS TO ME, YOUR HONOR, THAT THIS FOURTH AMENDMENT SEARCH IS UNCONSTITUTIONAL BASED ON *TERRY VS. [107] OHIO*, EVEN THOUGH IT IS ARTICULATED BY OUR SUPREME COURT FIVE YEARS LATER.

THE COURT: MR. SOLICITOR?

MS. CAMPBELL: YOUR HONOR, IF I MAY.

DEFENSE COUNSEL DOES CORRECTLY POINT OUT *TERRY VS. OHIO* DID COME INTO EFFECT, I BELIEVE, IN JUNE OF 1968. I BELIEVE SOME OF MR. DELGADO'S RECITATION IS CORRECT, YOUR HONOR.

AT THIS TIME I WOULD HAND UP A COPY OF THE LAW AS IT WAS IN 19 - I BELIEVE IT WAS PASSED IN 1955 WHERE IT DID MAKE HITCHHIKING A VIOLATION OF THE LAW IN TENNESSEE, YOUR HONOR.

AS THE WITNESS IN THIS CASE TESTIFIED, HE OBSERVED HIMSELF, THIS DEFENDANT, VIOLATING

App. 21

THE LAW. YOUR HONOR, AT THAT POINT HE HAS PROBABLE CAUSE, NOT JUST MERE SUSPICION, AS YOU MUST HAVE, BUT PROBABLE CAUSE IN THIS CASE TO ARREST THIS MAN.

I WOULD ALSO NOTE THE CASE, CLAUDE WILLIAMS, WHICH WAS FROM NOVEMBER 7TH, 1960 WHERE A HIGHWAY PATROLMAN IS EMPOWERED TO ARREST, WITHOUT A WARRANT, ANY PERSON WHO COMMITS A MISDEMEANOR IN HIS PRESENCE.

I DON'T THINK ANYBODY IS GOING TO ARGUE THIS IS ANYTHING BUT A MISDEMEANOR; HOWEVER, AND THIS DID HAPPEN IN HIS PRESENCE.

YOUR HONOR, IN LOOKING AT THE TOTALITY OF THE

* * *

[155] SANITIZE THAT AND SAY - SHOW HIM THE RECORDS ABOUT HIS STAY AT FORT LEAVENWORTH OR HIS ASSIGNMENT AT FORT LEAVENWORTH. THAT WOULD PASS THE MUSTER, BUT HIS STATEMENT OF CRIMINAL HISTORY, THAT'S AN ATTACK ON CHARACTER.

MR. DELGADO: JUDGE, THAT'S KIND OF LIKE SAYING YOUR ASSIGNMENT AT SING SING.

THE COURT: HE COULD HAVE BEEN A GUARD. HE COULD HAVE BEEN A GUARD.

MR. DELGADO: WELL,

THE COURT: IT'S GOING TO COME OUT, I ASSUME, HE WAS A.W.O.L. AT SOME POINT.

MS. HUDGINS: I'LL BE ADDRESSING THAT ISSUE A LITTLE BIT LATER. I HAVE A MOTION.

MR. DELGADO: COULD WE JUST - I THOUGHT THE SAME THING ABOUT THAT, BUT HOW ABOUT RECORDS WHILE HE WAS IN THE MILITARY? IT'S AT ARMY DISCIPLINARY BARRACKS.

THE COURT: AS LONG AS THEY DON'T SAY CRIMINAL HISTORY. YOU KNOW, I WAS SURPRISED, THERE WEREN'T BUT ABOUT NINE OR TEN MILITARY PEOPLE ON THAT WHOLE PANEL. THERE ARE VERY FEW MILITARY PEOPLE ON THAT JURY. THEY'RE NOT GOING TO KNOW WHAT FORT LEAVENWORTH IS.

MR. DELGADO: YOUR HONOR, I SIMPLY SAY THAT I THINK THE STATEMENT IS MORE PREJUDICIAL THAN PROBATIVE ON ANY ISSUE. I UNDERSTAND THE COURT'S POSITION. I SIMPLY

* * *

[188] KNOW, KIND OF I DID IT BUT I REALLY DIDN'T DO IT.

MR. MCMAHON: YES, SIR, I UNDERSTAND.

THE COURT: I THINK IN THIS CASE - AND THAT HAPPENS, AS YOU KNOW. IN THIS CASE, YOU'RE TALKING ABOUT A PROFESSIONAL, AND HE'S GOT A REPUTATION.

I TEND TO LET PEOPLE - GIVE YOU THE ROOM TO EXPLAIN IT, LET THEM PROTEST IT.

MR. MCMAHON: I JUST DIDN'T WANT TO - OKAY. THANK YOU, JUDGE.

App. 23

THE CLERK: STILL MISSING ONE.

THE COURT: WE'RE STILL MISSING ONE?

THE CLERK: YES, SIR.

THE COURT: ARE THERE A BUNCH OF EXHIBITS THAT WE COULD GO AHEAD AND PRE-MARK WHILE WE'RE HERE? IS THERE ANYTHING WE CAN PREMARK?

MS. HUDGINS: JUDGE, COULD I JUST REQUEST A CLARIFICATION? I'M NOT SURE IF YOUR RULING ON A.W.O.L. REFERENCE ENCOMPASSES THE FORT LEAVENWORTH. I CAN'T PERCEIVE HOW THAT MAKES THEM UP BASED ON THAT RULING BUT I DON'T -

THE COURT: WELL, THERE ARE OTHER MILITARY BASES. THAT'S HOW IT WAS. I'M NOT GOING TO JUST SANITIZE IT. HE MAY HAVE BEEN THERE AS AN OFFICER. HE MAY HAVE BEEN THERE AS A GUARD. HE WAS AT LEAVENWORTH.

MS. HUDGINS: THANK YOU, YOUR HONOR.

* * *

[550] (WHEREUPON, THE JURY LEFT OPEN COURT AT APPROXIMATELY 9:57.)

THE COURT: ALL RIGHT. ON THE ISSUE OF -

MR. MCMAHON: YOUR HONOR, MAY THE CHIEF BE EXCUSED?

THE COURT: SURE.

MR. MCMAHON: THANK YOU.

THE COURT: ON THE ISSUE OF TROOPER MEREDITH, I DON'T SEE ANY SENSE IN CONTAMINATING THIS RECORD BEYOND - WITH THE CONCEPT OF WE TURNED HIM OVER TO MILITARY AUTHORITIES OR THEY TOOK HIM TO JAIL.

THE ISSUE, THE RELEVANT EVIDENCE, IS I SAW A GUY HITCHHIKING, WHICH WAS A VIOLATION OF TENNESSEE LAW, PULLED HIM, CHECKED HIM OUT, PADDED HIM DOWN FOR HIS OWN SECURITY, FOUND A GUN. THAT KEEPS THE RECORD REAL CLEAN. IT ALSO GETS THE NECESSARY EVIDENCE THE STATE WOULD LIKE TO ELICIT FROM THAT WITNESS. SO I WILL GRANT A MOTION IN LIMINE TO THE DEFENSE TO THAT EXTENT.

MR. DELGADO: THANK YOU, YOUR HONOR.

THE COURT: YOU MOVED UP HERE A WHILE AGO.

MR. DELGADO: YES, I GUESS I DID.

MR. MCMAHON: JUDGE, I JUST WANT TO MAKE REAL CLEAR, I WANT TO BE CLEAR.

THE COURT: YES, SIR.

MR. MCMAHON: NOT THAT YOUR RULING IS NOT CLEAR. [551] I WANT TO BE CLEAR WITH YOUR RULINGS. I CAN'T BRING OUT THAT HE WAS ARRESTED OR TAKEN INTO CUSTODY?

App. 25

THE COURT: I JUST DONT SEE THE NECESSITY OF THAT. I MEAN, HE HAD THE RIGHT TO PAT HIM DOWN. I RULED AS A MATTER OF LAW THAT HE HAD A RIGHT TO PAT HIM DOWN AND HE FOUND THE GUN.

MR. MCMAHON: I CANT BRING OUT HE WAS PLACED INTO JAIL.

THE COURT: THAT'S RIGHT.

MR. MCMAHON: AND I CANNOT BRING OUT THAT HE WAS RELEASED TO MILITARY AUTHORITIES?

THE COURT: AT THIS POINT.

MR. MCMAHON: THANK YOU.

MR. DELGADO: YOUR HONOR, JUST SO WE DONT WAIVE ANYTHING. I WANT THE COURT - IT ALWAYS SEEMS TO ME THAT TRYING TO PRESERVE THE RECORD IS LIKE HIDING A PEA. I DONT KNOW IF WE'VE DONE OR IF WE HAVENT DONE IT WELL ENOUGH.

I'D RENEW THE MOTION ON THAT EVIDENCE, AND I'D ASK THE COURT TO SUPPRESS THAT EVIDENCE. I BELIEVE WE DO HAVE TO PRESERVE IT BECAUSE WHILE WE MOVED IN LIMINE, WE KNOW NOW IT'S IN TRIAL. THANK YOU.

THE COURT: ALL RIGHT. I'LL OVERRULE YOUR REQUEST.

* * *

[562] A HE WAS HITCHHIKING.

Q NOW, IN MARCH, SPECIFICALLY MARCH 29TH OF '61, WAS HITCHHIKING A VIOLATION OF THE TENNESSEE LAW?

A YES, SIR, IT WAS.

Q WHAT DID YOU DO - DID HE ACTUALLY HAVE HIS THUMB OUT THUMBING A RIDE WHEN YOU SAY HITCHHIKING?

A YES, SIR.

Q WHAT EXACTLY DID YOU DO WHEN YOU SAW THIS INDIVIDUAL YOU LATER IDENTIFIED AS FRIEBURGER HITCHHIKING, LIEUTENANT?

A I STOPPED AND TALKED TO HIM.

Q NOW, WHY DID YOU DO THAT? WHY WOULD YOU STOP TO CHECK A HITCHHIKER?

A WELL, WE HAD - AT THAT AREA AND THAT PARTICULAR TIME WE HAD SOME PEOPLE STRUCK BY CARS AND HAD ONE FATALITY. IT WAS A NARROW ROAD. IT WAS QUITE A BIT MORE NARROW THAN IT IS NOW.

IT WAS DANGEROUS JUST TO BE OUT WALKING OR OUT HITCHHIKING ON THE ROAD, SO WE KIND OF WATCHED - WE HAD SOME PROBLEMS ANYWAY.

Q SO YOU STOPPED TO CHECK HIM BECAUSE HE'S HITCHHIKING; IS THAT RIGHT?

A YES.

App. 27

Q. WERE YOU ABLE TO - DID YOU IDENTIFY HIM AS EDWARD E. FRIEBURGER AFTER YOU GOT OUT AND TALKED WITH HIM?

[563] A I BELIEVE HE TOLD ME THAT WAS HIS NAME AT THE TIME. I'M NOT SURE JUST WHEN HE DID TELL ME, BUT I BELIEVE IT WAS WHILE I WAS ON THE ROADSIDE.

Q AND COULD YOU DESCRIBE IF YOU RECALL WHETHER HE WAS IN A MILITARY UNIFORM OR CIVILIAN CLOTHES?

A CIVILIAN CLOTHES.

Q NOW, WHEN YOU GOT OUT TO CHECK HIM, WHAT WAS THE NORMAL PROCEDURE THAT A TENNESSEE STATE TROOPER WOULD TAKE AT THAT TIME TALKING TO AN INDIVIDUAL THAT TIME OF NIGHT, VIOLATING THE HITCHHIKING LAW?

A WELL, I ASKED HIM WHERE HE WAS GOING OR WHERE HE WAS HEADED, WHERE HE WAS COMING FROM MAYBE, JUST QUESTIONS SUCH AS THAT NATURE.

Q WOULD YOU PAT HIM DOWN IN ANY WAY?

A YES, SIR. I DID BECAUSE OF SAFETY PRECAUTIONS.

Q AND WHAT'S THE PURPOSE OF PATTING HIM DOWN?

A FOR SAFETY REASONS.

App. 28.

Q NOW, WHEN WE SAY PAT HIM DOWN, LIEUTENANT, ARE YOU TALKING ABOUT AN EXTENSIVE, INTRUSIVE SEARCH ONTO A PERSON?

A NO, SIR.

Q WHAT ARE YOU PATTING A PERSON DOWN FOR?

A JUST TO SEE IF HE HAD ANY WEAPONS.

Q AND WHAT, IF ANYTHING, DID YOU DISCOVER AS A RESULT OF THAT SEARCH?

[564] MR. DELGADO: YOUR HONOR, AT THIS TIME I THINK I'M REQUIRED UNDER THE RULES ...

THE COURT: OVERRULED.

MR. DELGADO: YES, THANK YOU.

BY MR. MCMAHON

Q WHAT, IF ANYTHING, DID YOU DISCOVER AS A RESULT OF THAT SEARCH, LIEUTENANT?

A I DISCOVERED HE HAD A PISTOL IN HIS POCKET.

Q AND WHAT, IF ANYTHING, DID YOU DO WITH THAT PISTOL?

A I CONFISCATED IT.

Q YOU TOOK IT INTO YOUR CUSTODY?

A YES, SIR.

Q DO YOU RECALL WHAT KIND OF PISTOL IT WAS, LIEUTENANT MEREDITH?

App. 29

A IT WAS A 32 HARRINGTON AND RICHARDSON.

Q NOW, DID HE SAY ANYTHING ABOUT A GUN?

A YES, SIR. HE ADVISED ME THAT HE BOUGHT IT IN A PAWNSHOP IN KNOXVILLE, TENNESSEE.

Q AT A PAWNSHOP IN KNOXVILLE, TENNESSEE?

A YES, SIR.

Q NOW, LIEUTENANT, DID YOU MAINTAIN CUSTODY OF THAT GUN - ONCE YOU TOOK IT INTO YOUR CUSTODY FROM 3/29/61 UNTIL A DATE LATER ON; IS THAT CORRECT?

A YES, SIR, I DID.

Q DID YOU EVER TURN IT BACK OVER TO EDWARD E. [565] FRIEBURGER?

A NO.

Q NOW, I WANT TO ASK YOU, GOING ON UP INTO, I GUESS APRIL OF '61, WERE YOU CONTACTED IN ANY MANNER BY ANY OTHER LAW ENFORCEMENT OFFICER OR AGENCY ABOUT THAT WEAPON?

A YES, SIR, I WAS.

Q AND WHO CONTACTED YOU?

A SHERIFF S.S. SLY OF THE RICHLAND COUNTY -

Q AND DID YOU HAVE A CONVERSATION WITH SHERIFF SLY?

A YES, SIR, I DID.

Q AND AS A RESULT - WHAT WAS THAT CONVERSATION?

A HE WANTED TO KNOW IF I HAD THAT PISTOL IN MY POSSESSION. I TOLD HIM I DID. HE WANTED TO KNOW IF I WOULD LET HIM HAVE IT. IT WAS FOR A MURDER CASE THAT HE WAS INVESTIGATING.

Q NOW, LIEUTENANT, IS IT FAIR TO SAY, I BELIEVE YOU SAID YOU RETIRED IN '83 -

A YES, SIR.

Q - IS THAT RIGHT?

A YES, SIR.

Q IS IT FAIR TO SAY THE MANNER IN WHICH YOU MAINTAINED CUSTODY OF EVIDENCE IN '61 CHANGED FROM THE MANNER IN WHICH YOU MAINTAINED CUSTODY OF EVIDENCE IN '83?

A YES, SIR, VERY MUCH.

* * *

[577] THIS INDIVIDUAL - FIRST LET ME TALK TO YOU ABOUT HITCHHIKING FOR JUST A SECOND. THERE WERE OCCASIONS AS A HIGHWAY PATROLMAN, THAT I KNOW YOU WOULD HAVE SAFETY REQUIREMENTS OF - YOU WOULDN'T TRY TO PROTECT EVERYBODY, WHETHER THEY'RE IN CARS OR NOT, WHERE YOU HAD FATALITIES FROM FOLKS WHO WERE HITCHHIKING?

A YES, SIR.

App. 31

Q ALL RIGHT, SIR.

A THAT'S RIGHT.

Q AND IT WOULD BE YOUR RESPONSIBILITY TO MAKE CERTAIN THAT NOBODY GOT HURT, AS BEST YOU COULD?

A RIGHT.

Q SOMETIMES WHAT YOU'D DO IS YOU EITHER TRANSPORT THEM YOURSELF TO SOMEPLACE SAFE, WOULD THAT BE FAIR?

A I'D DO THAT, YES.

Q SOMETIMES YOU'D MAYBE TAKE THEM TO THE BUS STATION, CORRECT?

A WE HAD A LITTLE BUS STOP THERE IN TOWN. YOU KNOW, AT TIMES I'D TAKE THEM BACK DOWN THERE AND LEAVE THEM THERE, LET THEM RIDE THE BUS.

Q ALL RIGHT. SO YOU DIDN'T ARREST EVERYBODY FOR HITCHHIKING. IT JUST DEPENDED ON HOW IT LOOKED TO YOU, RIGHT?

A THAT'S RIGHT.

Q ALL RIGHT. SO WHEN YOU FIRST SAW ED FRIEBURGER OUT [578] WITH HIS HAND, YOU DIDN'T NECESSARILY THINK YOU WERE GOING TO HAVE TO ARREST HIM FOR HITCHHIKING, DID YOU?

A NO, SIR.

Q ALL RIGHT. NOW, TALK WITH OUR JURY, SIR, ABOUT THE DEMEANOR THAT MR. FRIEBURGER

App. 32

SHOWED TO YOU WHEN YOU FIRST CAME UP TO TALK TO HIM.

TELL THEM ABOUT DID HE TRY TO RUN AWAY FROM YOU, SIR?

A NO, SIR.

Q WAS HE COURTEOUS TO YOU?

A YES, SIR, HE WAS.

Q PLEASANT?

A YES, SIR.

Q DID HE OBEY ANY COMMAND THAT YOU GAVE HIM?

A YES, SIR.

Q DID YOU HAVE ANY PROBLEMS WITH HIM WHATSOEVER?

A NO, SIR.

Q NONE AT ALL?

A NO, SIR.

MR. DELGADO: ALL RIGHT. THANK YOU, MR. MEREDITH. THANK YOU FOR BEING HERE.

THE COURT: ANYTHING ELSE OF THIS WITNESS?

MR. MCMAHON: YES, SIR, I HAVE A MOTION.

THE COURT: LET ME GUESS.

App. 33

MR. MCMAHON: SIR?

[579] THE COURT: COME ON UP.

(WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE JURY.)

MR. MCMAHON: THANK YOU. MAY IT PLEASE THE COURT.

THE COURT: YES, SIR.

REDIRECT EXAMINATION:

BY MR. MCMAHON

Q MR. DELGADO, ASKED YOU DIFFERENT QUESTIONS ABOUT PROCEDURES YOU MAY TAKE WITH HITCHHIKING; IS THAT CORRECT?

A YES, SIR.

Q DID YOU TAKE MR. FRIEBURGER TO THE BUS STATION?

A NO, SIR.

Q WHAT DID YOU DO WITH MR. FRIEBURGER?

A I PUT HIM IN JAIL.

Q YOU ARRESTED HIM?

A I ARRESTED HIM, PUT HIM IN JAIL.

Q WHAT DID YOU CHARGE HIM WITH?

A CARRYING ARMS.

Q AND HE WAS PLACED IN JAIL THAT NIGHT?

App. 34

A THAT'S CORRECT, YES, SIR.

MR. MCMAHON: THANK YOU. I DON'T HAVE ANYTHING FURTHER.

* * *

[618] A (PAUSE). YES, SIR. THESE ARE THE SAME FRAGMENTS THAT I RE-EXAMINED.

Q AND WHEN YOU WERE LOOKING THEN, TELL THE JURY, EXPLAIN TO THE JURY WHAT YOU WERE DOING THEN, LIEUTENANT.

A I WAS USING A MAGNIFIER TO ENLARGE MY SMALL HANDWRITING ON THE OUTSIDE OF THE EVIDENCE PACKAGES.

Q AND YOU WOULD NORMALLY MARK THE EVIDENCE PACKAGE OF ANY EVIDENCE THAT YOU EXAMINED, CORRECT?

A YES, SIR, ALL THE TIME.

Q AND AMONG THOSE WEAPONS THAT YOU EXAMINED, I WANT TO SHOW YOU WHAT'S BEEN PREVIOUSLY MARKED AS STATE'S EXHIBIT NO. 6 FOR IDENTIFICATION AND ASK YOU IF YOU CAN IDENTIFY THAT ITEM.

A YES, SIR, I CAN.

Q IS THAT ONE OF THE TWO FIREARMS THAT YOU EXAMINED?

A IT IS, SIR.

Q. AND FOUND IN THE BOX MARKED ORNER IN REGARDS TO THIS CASE?

App. 35

A THAT'S CORRECT.

Q AND WHAT IS THE SERIAL NUMBER ON THAT PARTICULAR ITEM?

A THE SERIAL NUMBER ON THIS GUN IS W, WILLIAM, 9948.

MS. CAMPBELL: YOUR HONOR, I WOULD OFFER ITEM 6 INTO EVIDENCE.

[619] THE COURT: ANY FURTHER OBJECTION?

MR. DELGADO: SUBJECT TO THE PREVIOUS OBJECTION.

(WHEREUPON, STATE'S EXHIBIT NO. 6 WAS ADMITTED INTO EVIDENCE.)

BY MR. MCMAHON

Q AND THERE WAS ANOTHER WEAPON?

A THAT'S CORRECT, YES, SIR.

Q CAN YOU IDENTIFY THIS ITEM FOR US, PLEASE?

A YES, SIR, I CAN.

Q AND WHAT'S THE SERIAL NUMBER ON THAT ITEM?

A W, WILLIAM, 9893.

Q AND WAS THAT ONE OF THE TWO REVOLVERS THAT WAS IN THE BOX MARKED "ORNER" THAT YOU LOCATED IN AUGUST OF 2000?

A YES, SIR, IT WAS.

Q AND YOU SAY THAT SERIAL NUMBER WAS W 9893?

A THAT'S CORRECT.

MR. MCMAHON: YOUR HONOR, I WOULD OFFER THAT ITEM INTO EVIDENCE ALSO.

THE COURT: ALL RIGHT. ANY OBJECTION TO THAT?

MR. DELGADO: JUST RELEVANCE.

MR. MCMAHON: SURE, IF THEY DON'T WANT IT IN.

THE COURT: OKAY. WITHDRAWN.

MR. MCMAHON: THAT'S THE W 9893.

BY MR. MCMAHON

* * *

[678] Q DID YOU ASK HIM ANY SPECIFICS ABOUT OTHER LOCATIONS IN THE MILITARY HE MAY HAVE BEEN STATIONED?

A YES.

Q SPECIFICALLY, DID YOU ASK HIM ABOUT BEING STATIONED AT FORT LEAVENWORTH?

A I DID.

Q AND WHAT, IF ANYTHING, WAS HIS RESPONSE TO THAT, LIEUTENANT?

A HE FIRST DENIED IT.

App. 37

Q DID YOU THEREAFTER SHOW HIM ANY DOCUMENTATION? JUST YES OR NO.

A YES.

Q AND AFTER YOU SHOWED HIM THE DOCUMENTATION, WHAT WAS HIS RESPONSE?

A HE LATER ADMITTED THAT HE WAS.

Q NOW, LIEUTENANT, ABOUT HOW LONG, TELL THE JURY, WAS IT, THAT YOU AND SERGEANT METZ WERE IN MR. FREIBURGER'S PRESENCE ON THE AFTERNOON OF 22 OCTOBER, 2000.

A MY RECORDED TIME IS 1:45 P.M. THAT AFTERNOON, AND THE INTERVIEW TERMINATED ABOUT TWO HOURS FROM THAT. AROUND, I DON'T KNOW THE EXACT TIME, ABOUT TWO HOURS.

Q WAS LIEUTENANT - OR WAS DETECTIVE STOTTS IN THERE ALL OF THAT PERIOD OF TIME?

A NO, HE WAS NOT. HE WAS OUT LOCATING ANOTHER WITNESS.

* * *

[785] A WE ASKED HIM ABOUT WHEN HE HAD BEEN AT DIFFERENT INSTITUTIONS IN THE MILITARY.

Q SPECIFICALLY?

A HE HAD BEEN AT FORT MCPHEARSON, GEORGIA AND AT FORT LEAVENWORTH, KANSAS WHICH WAS THE TWO LOCATIONS HE HAD BEEN INTERVIEWED BY SHERIFF SLY.

Q DID HE RECALL EITHER ONE OF THOSE?

A HE STATED HE DID NOT. HE DID NOT RECALL THE INTERVIEWS. AT FIRST HE DID NOT RECALL BEING AT FORT LEAVENWORTH. THEN LATER HE REMEMBERED THAT HE HAD BEEN AT FORT LEAVENWORTH.

Q THAT'S WHEN YOU CONFRONTED HIM WITH OTHER DOCUMENTATIONS?

A WE SHOWED HIM DOCUMENTATION OF HIS STAY THERE AND HE REMEMBERED.

Q DID YOU CONTINUE TO HAVE A CONVERSATION WITH HIM?

A WE DID.

Q AND WHAT KIND OF QUESTIONS DID YOU FOLLOW UP WITH?

A WELL, I BEGAN TO ASK HIM QUESTIONS ABOUT HIS GOING TO SCHOOL, WHERE HE HAD GONE TO SCHOOL, WHERE HE HAD WORKED OVER THE YEARS TRYING TO - I ASKED HIM IF HE HAD ANY ACCIDENTS OR ANYTHING SUCH AS THAT, INDUSTRIAL ACCIDENTS, ANY CAR ACCIDENTS OR ANYTHING THAT WOULD CAUSE HIM TO HAVE MEMORY LOSS.

I ALSO WENT INTO ASKING HIM ABOUT IF HE HUNTED

* * *

[994] JUST TO SEE, AND WE'LL DISCUSS OPTIONS AT THAT POINT IN TIME DEPENDING ON HOW YOU'RE

DOING. LET ME LET YOU GO WITH THE BAILIFF AT THIS POINT.

(WHEREUPON, THE JURY LEFT OPEN COURT AT APPROXIMATELY 3:37 P.M.)

THE COURT: ALL RIGHT. EXCEPTION OR REJECTION OF THE CHARGE BY THE STATE?

MR. MCMAHON: NO, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MS. HUDGINS: NONE, YOUR HONOR.

THE COURT: ALL RIGHT. PLEASE MAKE SURE YOU HAVE ALL YOUR EVIDENCE ACCOUNTED FOR AND YOU AGREE ON WHAT GOES BACK THERE.

I'M GOING TO KEEP THE ALTERNATES SEGREGATED AND IN ANOTHER JURY ROOM, JUST IN CASE THEY DON'T REACH A VERDICT TONIGHT OR SOMETHING HAPPENS.

(WHEREUPON, THE JURY BEGAN THEIR DELIBERATIONS AT 3:43 P.M. AND THE COURT STOOD AT EASE.)

(WHEREUPON, AT 4:37 P.M., THE JURY SENT OUT A NOTE.)

THE COURT: WHAT DO YOU WANT ME TO DO, BRING THEM?

MR. MCMAHON: WHAT ARE MY CHOICES?

THE COURT: I WILL WRITE THEM AND SAY NO., THAT EVIDENCE IS NOT IN THE RECORD,

THOSE REASONS ARE OF NO CONCERN TO YOU.
THIS IS NOT IN THE RECORD.

[995] MR. MCMAHON: THIS BEING THE
DRAWINGS?

THE COURT: BOTH.

MR. MCMAHON: WELL -

THE COURT: I'M NOT COMMENTING ON
THAT. I'M JUST SAYING - THEY'RE ASKING - NO.

MR. MCMAHON: ARE YOU GOING TO SAY
THESE DOCUMENTS ARE NOT IN THE RECORD?

THE COURT: RIGHT.

MR. MCMAHON: I DON'T HAVE A PROBLEM
WITH THAT.

THE COURT: DO YOU WANT ME TO BRING
THEM OUT TO DO THAT? I PROBABLY SHOULD.

MR. MCMAHON: I'LL LEAVE IT UP TO YOU.

THE COURT: THE FIRST TIME OUT, I
PROBABLY SHOULD.

MR. DELGADO: YOU'RE PROBABLY RIGHT.

THE COURT: ALL RIGHT. LET'S SEE. WE
NEED THE DEFENDANT.

MR. DELGADO: HE'S COMING.

(WHEREUPON, THE DEFENDANT ENTERED THE
COURTROOM.)

THE COURT: ALL RIGHT. BRING THE JURY
IN, MR. BAILIFF.

App. 41

THE BAILIFF: YES, SIR.

(WHEREUPON, THE JURY CAME INTO OPEN COURT AT APPROXIMATELY 4:40 P.M.)

[996] THE BAILIFF: YOUR HONOR, THE JURY IS PRESENT.

THE COURT: ALL RIGHT. MR. FOREMAN, LADIES AND GENTLEMEN OF THE JURY, LET ME - THE REASON I BROUGHT YOU OUT HERE, I COULD ORDINARILY JUST PUT A NO, NOT IN THE RECORD, AND THAT WILL BE THE ULTIMATE ANSWER, BUT LET ME TELL YOU, WITH REGARD YOUR REQUEST ABOUT CERTAIN DOCUMENTS OR RECORDS, THERE ARE REASONS, EITHER BY RULES OF EVIDENCE OR DECISIONS BY THE COURT, DECISIONS BY THE PARTIES AS TO WHY EVIDENCE IS IN OR NOT IN.

THESE DOCUMENTS OR RECORDS THAT YOU ARE ASKING FOR ARE NOT A PART OF THE TRIAL RECORD; THEREFORE, THEY'RE NOT THERE FOR YOUR CONSIDERATION. YOU SHOULD NOT SPECULATE OR CONCERN YOURSELF WITH WHY THAT IS. THAT'S JUST THOSE ARE DECISIONS THAT ARE EITHER MADE BY THE COURT OR MADE BY THE PARTIES.

SO BASE YOUR DECISION ON WHAT WAS ALLOWED INTO THE RECORD, OKAY. SO I'D ASK YOU TO RESUME YOUR DELIBERATIONS.

(WHEREUPON, THE JURY LEFT OPEN COURT AT APPROXIMATELY 4.42 P.M.)

App. 42

THE COURT: EXCEPTION OR REJECTION OF THE PROCEDURE FROM THE STATE? MR. MCMAHON, ANY EXCEPTION OR REJECTION?

MR. MCMAHON: NO, SIR. I DON'T HAVE ANY OBJECTIONS.

* * *

[1001] THE CLERK: AIMEE DEWHITT, WAS THIS YOUR VERDICT?

JUROR: YES.

THE CLERK: IS IT STILL YOUR VERDICT?

JUROR: YES.

THE CLERK: JIMMY BOYD, WAS THIS YOUR VERDICT?

JUROR: YES, MA'AM.

THE CLERK: IS IT STILL YOUR VERDICT?

JUROR: YES, MA'AM.

THE CLERK: THE JURY HAS BEEN POLLED, YOUR HONOR.

THE COURT: ALL RIGHT. LET ME REMIND THE PRESS NOW THE POLLING OF THE JURY AND THE NAME CALLING IS NOT TO BE PUBLISHED.

ALL RIGHT. MR. FOREMAN AND LADIES AND GENTLEMEN OF THE JURY, THIS WILL CONCLUDE YOUR SERVICE IN THIS CASE. LET ME THANK YOU FOR YOUR PARTICIPATION.

AS THE ATTORNEYS TOLD YOU DURING THE COURSE OF THEIR CLOSING ARGUMENTS, I CERTAINLY CONCUR WITH, YOU ALL PAID VERY CLOSE ATTENTION TO THE ENTIRE CASE. IT'S BEEN A DIFFICULT CASE FOR BOTH SIDES BECAUSE OF A LOT OF ISSUES.

IT'S HARD ON THE TRIAL JUDGE, AS A MATTER OF FACT, BECAUSE SOME OF THE LAW, OBVIOUSLY, HAS CHANGED SINCE 1961.

YOU ASKED THE QUESTION ABOUT CERTAIN RECORDS, [1002] MILITARY RECORDS. WHILE THEY WERE NOT ALLOWED INTO EVIDENCE, THAT WAS BASED ON A DECISION THAT MR. FRIEBURGER WAS A.W.O.L. AT THE TIME, AND THAT - I MADE A DECISION THAT WOULD BE MORE PREJUDICIAL THAN PROBATIVE THAN JUST TO OFFER IT IN AS EVIDENCE OF FLIGHT. FOR THAT REASON, THE MILITARY RECORDS WERE NOT ALLOWED IN. FOR WHATEVER REASON, THE STATE CHOSE NOT TO PUT THE OTHER RECORDS IN.

ALL RIGHT. THE CLERK WILL MEET YOU BACK IN THE JURY ROOM AND GO OVER THE INFORMATION ABOUT YOUR EXEMPTIONS AND ALSO APPRISE YOU OF HOW YOU ARE PAID AND THAT SORT OF STUFF.

NOW, WITH REGARD TO YOUR NOTES, THOSE ARE YOUR NOTES, YOU TAKE THEM HOME, THROW THEM AWAY OR GIVE THEM TO THE CLERK. SHE'LL TEAR THEM UP OR WHATEVER YOU'D LIKE TO DO. DON'T LEAVE THEM LAYING AROUND. THEY'RE YOURS.

App. 44

IF YOU WISH, I'LL BE GLAD TO COME BACK AND ANSWER ANY QUESTIONS, IF THAT'S THE CASE, OR YOU ARE WELCOME TO STAY FOR SENTENCING. YOU CAN MAKE THAT CHOICE, OKAY.

DO YOU WANT TO STAY AND WATCH THE SENTENCING, IS THAT ...

ALL RIGHT. IF YOU WANT TO, LET ME JUST LET THE ONES OF YOU WHO DO NOT WANT TO, IF YOU WANT TO GO ON BACK INTO THE ROOM, THE CLERK WILL MEET YOU BACK THERE IN A MINUTE.

* * *

App. 45

COURT'S EXHIBIT 6

State of Tennessee	)	
County of Cocke	)	
	)	Statement of
The State of South Carolina	)	Donald L. Meredith
v.	)	
Edward Freiburger	)	

I, Donald L. Meredith, make the following statement regarding the above captioned case.

I am the former Tennessee Highway Patrol Trooper who arrested Edward Freiburger in Newport, Tennessee in 1961. My recollection of this incident is vague since it was forty years ago and insignificant at the time.

I found Ed Freiburger hitchhiking along Highway 25 & 70 in the vicinity of Newport, Tennessee. As was policy and procedure at the time I stopped to check him primarily for safety reasons. We'd had hitchhikers struck by vehicles. At the time we did not always arrest hitchhikers unless they had committed another violation of law. I doubt I would have arrested Ed Freiburger if I had not found the gun he was carrying. I do not recall how I found the gun but it may have been during a "pat down". After arresting him I transported him to jail. As was procedure I retained the gun for evidence. At the time we had no evidence lockers or property room. I kept the gun in my possession until I got a call from then Richland County, South Carolina Sheriff S.S. Sligh. He asked if I still had the gun. I told him I did. He informed me he needed this gun as part of a murder investigation. This was the first time I had my indication this gun was involved in a crime. Sometime thereafter Sheriff Sligh sent of his detectives to pick up

App. 46

the gun. I turned it over to them and have not seen it since.

At the time I arrested Ed Freiburger he gave me no indication he was involved or wanted for any other crime. He made no statements to me about any other crimes. I have no recollection if he stated where he was going. Sometime after arresting him I found out he was AWOL from the Army. I contacted the MP's to inform them where Freiburger was so they could pick him up. To the best of my knowledge they did.

David B. Mac Dougall prepared this statement based on my conversation with him. Mr. Mac Dougall identified himself as a Private Investigator working for Ed Freiburger's Attorney. This statement is honest and truthful to best of my recollections. I have retained a copy of this one (1) page statement.

/s/ Donald L. Meredith Signed this 10 day of June 2002
Donald L. Meredith

App. 47

**COURT'S
EXHIBIT
9**

Can we review:

- Military Records
 - AWOL
- Mr. Cayton's drawings
comparing W9948
bullets to fragments

/s/ Scott M. Sylvester

STATE OF SOUTH	)	IN THE COURT OF
CAROLINA COUNTY	)	GENERAL SESSIONS
OF RICHLAND	)	
	)	CRIMINAL NO.:
State of South Carolina,	)	01-GS-40-02955
Plaintiff	)	
vs.	)	
Edward Freiburger,	)	
Defendant.	)	

**TRANSCRIPT OF PROCEEDINGS OF
JULY 29, 2002 TO AUGUST 2, 2002**

[80] TO THE JURY

THE COURT: I'M NOT LETTING THEM GO
TO THE JURY.

MR. MCMAHON: NO, SIR. I MEAN, I JUST
OFFERED THEM IN CAMERA BECAUSE HE USED
THEM AS PART OF HIS ARGUMENT.

THE COURT: ALL RIGHT. WE'LL LEAVE
THEM MARKED, AND I'LL DEAL WITH THAT ISSUE
FURTHER DOWN. LET ME HAVE THE CASE YOUR
RELYING ON.

ALL RIGHT. WHAT'S YOUR NEXT ISSUE, SOLICI-
TOR?

MR. MCMAHON: THE STATE CALLS DON
MEREDITH.

THE COURT: WHAT'S THE ISSUE?

MR. MCMAHON: THE SEARCH, THE WEAPON.

App. 49

THE BAILIFF: RAISE YOUR RIGHT HAND, PLACE YOUR LEFT HAND ON THE BIBLE, FACE THE CLERK.

DONALD MEREDITH (IN CAMERA), AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE HAVE A SEAT. STATE YOUR FULL NAME FOR THE RECORD.

THE WITNESS: MY NAME IS DONALD L. MEREDITH.

DIRECT EXAMINATION:

BY MR. MCMAHON

Q OKAY. MR. MEREDITH, WHERE DO YOU LIVE?

A NEWPORT, TENNESSEE.

Q AND HOW OLD ARE YOU, SIR?

A SEVENTY-SIX.

* * *

[87] OBJECTION TO THE PREVIOUSLY FILED MOTIONS ABOUT GIDEON AND THE RIGHT TO COUNSEL. REMEMBER, WE ARGUED THAT ON THURSDAY? WE WERE GOING TO WORK ON IT OVER THE WEEKEND?

THE COURT: SUBJECT TO THAT OBJECTION.

(WHEREUPON, COURT'S EXHIBIT NO. 4 WAS MARKED FOR IDENTIFICATION ONLY.)

App. 50

BY MR. MCMAHON

Q NOW, MR. MEREDITH, I BELIEVE I UNDERSTOOD YOU TO SAY THAT YOU DETERMINED FRIEBURGER WAS A.W.O.L.?

A YES.

Q AND YOU UNDERSTOOD WHAT THAT MEANT BEING IN THE MILITARY?

A YES, SIR.

Q AND YOU NOTIFIED THE MILITARY AUTHORITIES?

A I DID.

Q NOW, DID YOU MAINTAIN POSSESSION OF THE GUN?

A YES, SIR, I DID.

Q BACK IN '61, WHAT OCCURRED AS FAR AS THAT 32 HARRINGTON AND RICHARDSON THAT YOU REMOVED FROM MR. FRIEBURGER? WHAT HAPPENED TO THAT GUN?

A WELL, AT THAT TIME WE DIDN'T HAVE ANY MEANS OF LOCKING IT UP IN THE COURT. THE JUDGE HAD US KEEP IT IN OUR POSSESSION.

AFTER THE TRIAL - WELL, PROBABLY BEFORE THAT, SHERIFF S. S. SLY HERE IN COLUMBIA CALLED ME AND

* * *

[96] BY MR. DELGADO

Q GOOD AFTERNOON, MR. MEREDITH. MY NAME IS JOHN DELGADO. I'M AN ATTORNEY, AND I REPRESENT MR. ED FRIEBURGER.

MR. MEREDITH, WHEN THE RICHLAND COUNTY SHERIFF'S DEPARTMENT CONTACTED YOU AGAIN ABOUT THE LETTER THAT HAS BEEN MARKED AS A COURT'S EXHIBIT, AND YOU TURNED THAT OVER TO THEM, THAT IS MY FRIEND EITHER MR. METZ OR MR. CRAIG; IS THAT RIGHT, SIR?

A YES, SIR.

Q THEY CAME UP TO NEWPORT TO SEE YOU?

A YES, SIR, THEY DID.

Q AND RECEIVED THAT LETTER FROM YOU?

A THAT'S RIGHT.

Q DID YOU TELL THEM, SIR, ABOUT THE FACTS ABOUT - FIRST OF ALL, DO YOU KNOW MR. ED FRIEBURGER, THE GENTLEMAN SEATED, WOULD YOU RECOGNIZE HIM?

A NO, SIR. I WOULDN'T RECOGNIZE HIM.

Q THAT IS HIM.

A ALL RIGHT, SIR.

Q IF I SAY TO YOU, SIR, YOU ARRESTED HIM ON THE LATE EVENING OF MARCH 29TH, YOUR REMEMBRANCE OF THAT, SIR, WAS THAT YOU ALL HAD HAD - YOU ALL WOULD BE LAW ENFORCEMENT OR HIGHWAY PATROL - YOU HAD FOLKS

THAT WERE EITHER HITCHHIKING OR WALKING ALONG THE ROAD AND [97] AT LEAST ONE PERSON HAD BEEN HIT, STRUCK, AND POSSIBLY KILLED?

A YES, SIR.

Q WHEN YOU SAW HIM, YOU STOPPED AND WENT UP TO HIM, CORRECT, SIR?

A YES, SIR.

Q DID HE IN ANY WAY ATTEMPT TO ASSAULT YOU, ATTEMPT TO BATTER YOU, OR ATTEMPT TO RUN FROM YOU IN ANY WAY, SIR?

A NO, SIR.

Q DID HE COOPERATE WITH YOU?

A HE SURE DID.

Q WAS HE PLEASANT AND COURTEOUS?

A YES.

Q WHEN YOU - DID HE GIVE YOU HIS NAME AT THAT TIME? IN OTHER WORDS, WAS THE FIRST THING THAT YOU AND I - "I'M MR. FRIEBURGER" ON THE SIDE OF THAT ROAD THAT EVENING? WHEN YOU CAME UP TO HIM THAT EVENING, DID YOU SAY TO HIM, "HOW ARE YOU DOING? WHAT'S YOUR NAME?" DO YOU RECALL?

A I DON'T RECALL.

Q I UNDERSTAND. THIS ISN'T A QUIZ. IT'S A LONG TIME AGO. YOU SAY, SIR, THAT YOU PADDED HIM DOWN -

A YES, SIR.

App. 53

Q - BUT AT THAT TIME HE WAS NOT UNDER ARREST, WAS HE?

[98] A NO. HE WASN'T, BUT HE WAS GOING TO BE FOR HITCHHIKING, OR I WAS GOING TO TAKE HIM BACK TO THE JAIL.

Q ALL RIGHT, SIR.

A BUT WE DID A SAFETY SEARCH BEFORE WE PUT SOMEBODY IN THE CAR. YOU CHECK THEM TO SEE IF THEY HAVE ANY WEAPONS.

Q SO YOU PUT HIM IN THE CAR BEFORE YOU PATTED HIM DOWN?

A NO. I SAID I PATTED HIM DOWN BEFORE I PUT HIM IN THE CAR.

Q I GOT YOU. NOW, AT THE TIME THAT YOU PATTED HIM DOWN, SOMETIMES IN THE WAY LAW ENFORCEMENT DOES, DID YOU PUT HIS HANDS ABOVE HIS HEAD, DID YOU ASK HIM TO SPREAD HIS FEET, IF YOU RECALL.

A NO, SIR, I DON'T RECALL THAT.

Q ALL RIGHT, SIR. YOU DID THAT, SIR, AS A SAFETY PRECAUTION FOR YOURSELF?

A RIGHT.

Q BUT BEFORE YOU DID THAT, YOU DIDN'T SUSPECT HIM OF DOING ANYTHING WRONG OR IMPROPER, DID YOU?

A I'D RATHER HIM NOT BE HITCHHIKING ON THE HIGHWAY.

Q ALL RIGHT, SIR. SO HE HADN'T CONSTITUTED A THREAT TO YOU OR TO ANYBODY ELSE OUT THERE ON THE SIDE OF THE ROAD THAT EVENING?

A TO HIMSELF OUT THERE HITCHHIKING.

[99] Q WAS THERE ANYTHING, SIR, THE WAY YOU PERCEIVED THAT EVENING, THAT WOULD HAVE GIVEN YOU SUSPICION THAT HE WAS ENGAGED IN SOME SORT OF ACTIVITY THAT WAS A CRIME EXCEPT FOR POSSIBLY HITCHHIKING?

A NO.

Q ALL RIGHT, SIR. MR. MEREDITH, I HAVE HAD A PRIVATE INVESTIGATOR CONTACT YOU, IN FACT, EVEN WENT UP TO NEWPORT.

A YES, SIR.

Q THE NAME IS MR. DAVID MCDOUGAL.

A YES, SIR.

Q I THINK HE MET YOU AT YOUR HOUSE, IF I'M NOT MISTAKEN.

A THAT'S RIGHT.

Q HE ASKED YOU SOME QUESTIONS ABOUT THAT EVENING SO HE COULD REPORT THAT BACK TO ME. DO YOU RECALL THAT, SIR?

A UH-HUH.

Q DO YOU RECALL SOMETIME AFTER THAT, MR. MEREDITH, THAT HE EITHER CONTACTED YOU BY PHONE AND ASKED IF HE COULD RECOUNT

WHAT YOU HAD TOLD HIM, AND IF THAT MET WITH YOUR APPROVAL, SEND IT BACK TO YOU, AND IF YOU COULD, IF YOU'D SIGN IT AND RETURN IT BACK TO HIM. DO YOU RECALL THAT, SIR?

A YES, SIR.

[100]. Q AND YOU GOT THAT STATEMENT, SIGNED IT AND RETURNED IT TO MR. MCDOUGAL.

A YES, SIR.

Q OKAY. AND KEPT ONE FOR YOURSELF?

A YES, SIR.

Q HAVE YOU SHARED THAT WITH THE SOLICITOR'S OFFICE?

A YES, SIR.

Q ALL RIGHT, SIR. NOW, DURING THAT TIME - LET ME JUST SHOW THIS TO YOU, MR. MEREDITH. SEE IF YOU CAN IDENTIFY THAT MR. MEREDITH AND SEE IF THAT IS THE -

A THAT'S IT.

MR. DELGADO: THAT'S IT.

YOUR HONOR, IF THE STATE - DO YOU HAVE A COPY?

MR. MCMAHON: YES, SIR.

MR. DELGADO: YOUR HONOR, WE'D LIKE TO BE ABLE TO MAKE THIS A PART OF THE COURT'S EXHIBIT, IF WE COULD.

MR. MCMAHON: NO OBJECTION.

App. 56

(WHEREUPON, COURT'S EXHIBIT NO. 6 WAS MARKED FOR IDENTIFICATION ONLY.)

BY MR. DELGADO

Q MR. MEREDITH, LET ME JUST GIVE THIS BACK TO YOU, SIR. I'M GOING TO SHOW HIS HONOR A COPY OF THIS.

YOUR HONOR, THIS IS A COPY OF IT. YOU MAY WANT TO JUST LOOK AT IT WITH US.

MR. MEREDITH, IN THE SECOND - WELL, I GUESS IN [101] THE THIRD PARAGRAPH IN THAT STATEMENT, AND FIRST MR. MEREDITH, THAT STATEMENT WAS SIGNED THE TENTH DAY OF JUNE, 2002; IS THAT CORRECT, SIR?

A YES, SIR.

Q ALL RIGHT, SIR. THE SECOND OR THE THIRD PARAGRAPH THAT STARTS WITH THE WORDS, "I FOUND ED FRIEBURGER", WOULD YOU JUST READ MAYBE THE FIRST FOUR OR FIVE SENTENCES OF THAT PARAGRAPH OUT LOUD, SIR?

A "I FOUND ED FRIEBURGER HITCHHIKING ALONG 25 AND 70 IN THE VICINITY OF NEWPORT, TENNESSEE. OUT OF POLICY AND PROCEDURE AT THAT TIME, I STOPPED TO CHECK HIM PRIMARILY FOR SAFETY REASONS.

WE HAD HAD HITCHHIKERS STRUCK BY VEHICLES. AT THAT TIME, WE DIDN'T ALWAYS ARREST HITCHHIKERS UNLESS THEY HAD COMMITTED ANOTHER VIOLATION.

App. 57

I DOUBT I WOULD HAVE ARRESTED ED FRIEBURGER IF I HAD NOT FOUND THE GUN HE WAS CARRYING.

Q HOW ABOUT READ THE VERY NEXT ONE.

A "I DO NOT RECALL HOW I FOUND THE GUN, BUT IT MAY BE THAT I - IT MAY HAVE BEEN DURING A PAT DOWN. AFTER I ARRESTED HIM, I TRANSPORTED HIM TO JAIL."

Q ALL RIGHT, SIR. NOW, LET ME SEE IF I CAN GET THAT CORRECTLY.

IN OTHER WORDS, YOU SAY IN YOUR STATEMENT TO MR. MCDUGAL THAT YOU DOUBT YOU WOULD HAVE ARRESTED [102] HIM IF YOU HADN'T FOUND THE GUN HE WAS CARRYING, CORRECT, SIR?

A CORRECT.

Q THAT'S RIGHT. AND HE HAD DONE NOTHING AT THE TIME THAT YOU FIRST MET HIM TO INDICATE TO YOU THAT HE WAS IN VIOLATION - THAT HE WAS A THREAT OR A DANGER TO YOU OR TO ANYONE ELSE IN THE WAY OF ACTIVITY OR WAS ENGAGED IN CRIMINAL ACTIVITY, CORRECT, SIR?

A THAT'S TRUE.

Q ALL RIGHT, SIR. IF YOU LOOK DOWN TO THE FOURTH PARAGRAPH THAT STARTS WITH THE WORD "AT THE TIME." READ DOWN INTO THAT PARAGRAPH.

A "AT THE TIME I ARRESTED ED FRIEBURGER, HE GAVE ME NO INDICATION HE WAS INVOLVED OR

WANTED FOR ANY OTHER CRIME. HE MADE NO STATEMENTS TO ME ABOUT ANY OTHER CRIME.

I HAVE NO RECOLLECTION IF HE STATED WHERE HE WAS GOING. SOMETIME AFTER I ARRESTED HIM, I FOUND HE WAS A.W.O.L. FROM THE ARMY. I CONTACTED THE M.P.'S TO INFORM THEM WHERE ED FRIEBURGER WAS SO THEY COULD PICK HIM UP."

Q ALL RIGHT.

A TO THE BEST OF MY KNOWLEDGE, THEY DID.

Q ALL RIGHT, SIR. AND THEY DID AFTER HE WENT TO - I THINK YOU CALL IT YOUR "SESSIONS" COURT?

[103] A GENERAL SESSIONS COURT.

Q THAT'S WHAT WE CALL IT HERE, TOO, GOOD. SO YOU WENT TO YOUR GENERAL COURT - MR. MEREDITH, IF I TELL YOU I HAD AN INVESTIGATOR GO UP THERE, SOMEBODY OTHER THAN MR. MCDOUGAL, AND THERE WAS SOMETHING IN THAT SESSIONS BOOK THAT HAS THE INITIALS "C.A." DOES THAT STAND FOR CARRYING ARMS?

A CARRYING ARMS.

Q I KNOW HOW WE DO THIS. I MEAN, SOMETIMES YOU ARREST THEM, AND YOU CALL IT UNLAWFUL CARRYING OF A WEAPON, BUT SOMETIMES WE PUT IT ON THE DOCKET SHEET OR SOMETHING ELSE, WE CALL IT C.A., CARRYING - THE SAME OFFENSE, CORRECT, SIR?

A YES, SIR.

Q AND THAT'S WHAT HE WAS SENTENCED TO BY YOUR JUDGE, FOR 30 DAYS SUSPENDED AS SOON AS THE MILITARY GUYS CAME TO GET HIM?

A SIX DAYS.

Q SIX DAYS LATER. ALL RIGHT. SO IN OTHER WORDS, YOU DID NOT ARREST HIM FOR BEING A.W.O.L. BECAUSE YOU DIDN'T KNOW THAT UNTIL YOU GOT DOWN TO THE POLICE DEPARTMENT?

A THAT'S CORRECT.

Q ALL RIGHT. YOU CONDUCTED A SAFETY SEARCH. YOU JUST PATTED HIM DOWN FOR WEAPONS?

[104] A THAT'S RIGHT.

MR. DELGADO: ALL RIGHT. JUST ONE SECOND PLEASE, YOUR HONOR.

(PAUSE).

THAT'S ALL THE QUESTIONS I HAVE.

THE COURT: ANY REDIRECT?

MR. MCMAHON: NOTHING ON REDIRECT.

THE COURT: YOU MAY STEP DOWN.

ANYTHING FURTHER FROM THE STATE ON THAT?

MR. MCMAHON: NO, YOUR HONOR.

THE COURT: MR. DELGADO?

MR. DELGADO: YOUR HONOR, THIS HAS BEEN A LAW SCHOOL EXAMINATION FOR ALL OF US IN A LOT OF WAYS. IT HAS FOR ME, LET ME PUT IT THAT WAY.

TERRY VS. OHIO IS NOT PROMULGATED BY THE UNITED STATES SUPREME COURT UNTIL SOMETIME LONG AFTER THIS INCIDENT. HOWEVER, IT, ALONG WITH THE OTHER CONSTITUTIONAL RIGHTS, BECAUSE THIS CASE WAS NOT FINALLY DECIDED PRIOR TO THE TIME THAT *TERRY* WAS PROMULGATED, APPLIES RETROACTIVELY.

IN OTHER WORDS, WHILE *MAPP VS. OHIO*, MAKING THE FOURTH AMENDMENT APPLICABLE TO THE STATES, AND IMPOSING AN EXCLUSIONARY RULE ON THE STATES, IS NOT PROMULGATED BY THE SUPREME COURT UNTIL JUNE OF 1961, SOME THREE MONTHS LATER, TWO-AND-A-HALF MONTHS LATER.

* * *

[108] CIRCUMSTANCES OF OUR CASE LAW, AND STATE CASES, HAVE HELD IN RELYING ON *TERRY* IN THE LAST SEVEN YEARS, AND I THINK THIS SEARCH IN PARTICULAR PASSES UPON TWO DIFFERENT LEVELS, YOUR HONOR.

IN TAKING THE *TERRY* CASES FIRST, I WOULD JUST HAND UP A COPY OF *STATE VS. CALVIN SMITH*, WHICH IS A 1998 CASE, THE COURT OF APPEALS OF SOUTH CAROLINA. IN THAT CASE, IT ACTUALLY JUST INVOLVED A TRAFFIC STOP. THERE'S JUST A MERE TRAFFIC VIOLATION, BUT THEY NOTE IN THAT CASE YOU LOOK AT ALL OF

App. 61

THE CIRCUMSTANCES. SOME OF THE CIRCUMSTANCES THEY LOOKED AT PARALLELED THE ONES HERE, YOUR HONOR.

IN THAT CASE, THERE WAS A TRAFFIC STOP. THE GUY WAS SITTING IN HIS CAR, BUT THEY NOTE IT WAS A DESERTED AREA. IT WAS AT NIGHT, AND THIS WAS ACTUALLY AFTER A SECOND OFFICER HAD COME ON THE SCENE.

SO HE EVEN HAS THE - AND THEY ALLOWED THIS SEARCH. THIS IS EVEN AFTER THIS SECOND OFFICER IS THERE SO THE SAFETY OF THE OFFICER HIMSELF IS A LITTLE MORE SECURE THAN WHEN IT'S JUST A LONE OFFICER, AS WE HAVE IN THIS CASE.

THERE'S NO DISPUTE IN THIS CASE, IT'S IN THE MIDDLE OF THE NIGHT, AT 11 O'CLOCK AT NIGHT. IT'S 10 MILES OUT OF TOWN ON A ROAD, YOUR HONOR, IN 1961.

YEAH, IT WAS A HIGHWAY, BUT THAT WAS A TWO-LANE [109] ROAD BACK THEN, AND IT WAS DESERTED. THIS OFFICER IS BY HIMSELF, AND I THINK THAT'S IMPORTANT IN THIS CASE, YOUR HONOR.

AS HE SAID, IT'S A SAFETY SEARCH. AS HE TESTIFIED, IT'S UNDISPUTED WHETHER HE PLACED HIM UNDER ARREST, WHICH HE TESTIFIED ON DIRECT HE WAS GOING TO, WHICH HE HAD A RIGHT TO BECAUSE HE OBSERVED HIM HITCHHIKING. HE HAD A RIGHT TO PAT HIM DOWN.

HE ALSO TESTIFIED TO KIND OF SEARCH HE DID IN THIS CASE, THAT HE WAS ALONE. HE WAS

OUT IN THE MIDDLE OF NOWHERE IN THE MIDDLE OF THE NIGHT WITH THIS MAN WHO HE KNEW WAS VIOLATING THE LAW. HE WAS HITCHHIKING.

AT THAT POINT, YOUR HONOR, HE HAD THE RIGHT TO PLACE HIM UNDER ARREST. WE CAN ARGUE ABOUT CHRONOLOGY. LASTLY, YOUR HONOR, I WOULD JUST ARGUE THAT IT WOULD BE ABSOLUTELY UNREASONABLE FOR ANYONE TO PLACE ANYONE IN HIS CAR, WHETHER HE WAS ARRESTED OR NOT, AND ASSUME FOR HIS ARGUMENT HE'S NOT UNDER ARREST. HE'S GOING TO JUST TRANSPORT HIM.

NO OFFICER IN THEIR RIGHT MIND WOULD PLACE A MAN HE'S NEVER SEEN BEFORE IN HIS CAR WITHOUT PATTING HIM DOWN. UNFORTUNATELY IN YOUR HONOR'S EXPERIENCE WITH LAW ENFORCEMENT, WE KNOW IT'S A NECESSARY SEARCH.

YOUR HONOR, HE ALSO TESTIFIED IN THIS CASE ON DIRECT EXAMINATION THAT HE WAS GOING TO ARREST HIM. [110] AS SUCH, THIS CAN BE JUST A SEARCH INCIDENT TO ARREST, BUT, OF COURSE, HE WOULD SEARCH HIM BEFORE THAT.

SO I THINK ON TWO DIFFERENT LEVELS THIS SEARCH EXCEEDS, ASSUMING - AND EVEN THOUGH THIS ALL PREDATES *TERRY*, ASSUMING IT IS THE LAW, YOUR HONOR, I THINK WE HAVE MORE THAN MET OUR BURDEN AS FAR AS WHAT A REASONABLY PRUDENT MAN, AND THAT'S THE SATURDAY, ACCORDING TO THE CASES I LOOKED AT, YOUR HONOR; THAT A REASONABLY PRUDENT MAN AND AN OFFICER IN LIEUTENANT MEREDITH'S

POSITION ON THAT NIGHT, WHERE HE WAS, WHO HE WAS WITH, WHAT HE OBSERVED, AND WHAT HE FOUND.

FOR HIM TO HAVE DONE ANYTHING ELSE, YOUR HONOR, SIMPLY WOULDN'T HAVE BEEN PRUDENT.

I THINK UNDER THE TOTALITY OF THE CIRCUMSTANCES, AND IT'S ALWAYS A CASE-BY-CASE. IN THIS CASE, THE SEARCH WAS REASONABLE.

IN ADDITION TO THAT, YOUR HONOR, I THINK IT CAN MERELY GO BY AS A SEARCH INCIDENT TO ARREST. WHICHEVER WAY YOU WISH TO ADDRESS THAT, I THINK IT MEETS BOTH OF THOSE.

MR. DELGADO: WELL, I'M NOT CERTAIN THE SEARCH INCIDENT TO THE ARREST. THE ARREST OCCURS, THE GUN. THE SEARCH IS PRIOR TO HIS FINDING THE GUN. IT CAN'T BE THE SEARCH INCIDENT TO ARREST.

[111] THE KEY IS DID MR. MEREDITH HAVE ARTICULABLE, REASONABLY ARTICULABLE SUSPICION, NOT JUST A HUNCH, THAT MR. FRIEBURGER WAS ENGAGED IN CRIMINAL ACTIVITIES SUCH THAT WOULD WARRANT HIM BEING IN FEAR OF HIS LIFE OR IN FEAR OF AN ACTION BY MR. FRIEBURGER, NOT BY WHAT MR. MEREDITH SAID HERE TODAY.

THE COURT: MR. DELGADO, WE ALL KNOW WHAT HAPPENED. HE WAS STOPPED FOR HITCHHIKING, WHICH WAS IN VIOLATION OF TENNESSEE LAW. HE PATTED HIM DOWN. THEN HE FOUND THE GUN. INSTEAD OF CHARGING HIM WITH BOTH

App. 64

OFFENSES, HE CHARGED HIM WITH THE GREATER OFFENSE.

I THINK UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE SEARCH WAS APPROPRIATE AND REASONABLE, WHETHER YOU WANT TO APPLY THE TERRY STANDARD OR NOT. YOU KNOW, CLEARLY HE HAD SUSPICION WHEN HE SAW HIM VIOLATING THE HITCHHIKING STATUTE. HE HAD OTHER REASONS TO STOP HIM, PRACTICALLY THAT'S WHAT HAPPENED, SO I'LL DENY YOUR MOTION TO SUPPRESS.

MR. DELGADO: ALL RIGHT.

THE COURT: NEXT MOTION.

MR. MCMAHON: YOUR HONOR, COULD I HAVE A FEW MINUTES BEFORE I DO MY NEXT WITNESS?

THE COURT: YES. WE'LL TAKE ABOUT TEN MINUTES. MR. MCMAHON: THANK YOU, YOUR HONOR.

(WHEREUPON, A SHORT BREAK WAS TAKEN.)

* * *

No. 05-979

In The
Supreme Court of the United States

EDWARD FREIBURGER,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court of South Carolina**

Respondent's Brief In Opposition

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PETITIONER'S QUESTIONS PRESENTED

I. Does the decision for the Supreme Court of South Carolina upholding the 1961 search and seizure in this matter conflict with this Court's decisions interpreting and applying the Fourth Amendment of the United States Constitution?

A. Should evidence obtained from the Petitioner during a pre-arrest warrantless search of his person in 1961 by a Tennessee State have been suppressed at his trial in 2002 as having been obtained in violation of Petitioner's Fourth Amendment right against unreasonable searches and seizures?

B. Should evidence obtained from Petitioner during a pre-arrest warrantless search of his person in 1961 by a Tennessee State Trooper have been suppressed where the evidence was obtained in violation of Tennessee State Search and Seizure Law adhering at the time?

II. Was Petitioner denied his right to a fair trial under the Fifth And Fourteenth Amendments of the United States Constitution where the trial court permitted the prosecutor to mention repeatedly that Petitioner was "stationed" at Ft. Leavenworth, Kansas, a known military prison?

RESPONDENTS COUNTER QUESTIONS

Is Certiorari Permitted Under 28 U.S.C. Section 1257, When The Federal Constitutional Claim Raised In The Petition On the Admission of Evidence of Freiburger Being Stationed at Fort Leavenworth Was Never Presented To The South Carolina Supreme Court Which Was Solely Based Upon State Evidentiary Law.

TABLE OF CONTENTS

	Page
PETITIONER'S QUESTIONS PRESENTED	i
RESPONDENTS COUNTER QUESTIONS ON CERTIORARI	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
REASONS WHY CERTIORARI SHOULD BE DENIED ...	8
I. The Decision of the South Carolina Supreme Court affirming the use of the gun evidence seized as a search incident to an arrest was a reasonable interpretation of this Court's prior precedent where there was probable cause to arrest Freiburger for hitchhiking and the pat down for weapons was done for safety purposes prior to placing Freiburger in the police vehicle and where it would be unreasonable to expect a police officer, out on a deserted road at 11:00 p.m., to transport a suspect to the jail without first conducting a pat down search for weapons.	8

1.	How the Supreme Court of South Carolina Decided the Issue.	9
2.	Trooper Meredith had probable cause to arrest Freiburger for Hitchhiking.	11
3.	Trooper Meredith's search of Freiburger was lawful, even though it immediately preceded the arrest.	13
II.	The trial court properly admitted relevant evidence of Freiburger's being stationed at Fort Leavenworth because that evidence was not prejudicial. Further, Since the Petitioner only raised this issue before the South Carolina Supreme Court as a State Evidentiary Issue Under South Carolina Rules of Evidence Rule 404(b) and 403, Certiorari Is Inappropriate Where No Federal Constitutional Claim Was Raised Below. ...	24
1.	Certiorari Is Not Authorized Where No Federal Question Was Presented To The State Supreme Court.	27
	CONCLUSION	29

TABLE OF AUTHORITIES

FEDERAL CASES

Adams v. Robertson, 520 U.S. 83 (1997) (per curiam)	28
Atwater v. City of Lago Vista, 532 U.S. 318 (2001)	13, 21, 22
Barna v. City of Perth Amboy, 42 F.3d 809, 819 (3d Cir.1994)	6
Barry v. Fowler, 902 F.2d 770, 773 n. 5 (9th Cir.1990)	16
Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973)	19
Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1968)	19
Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)	19
Devenpeck v. Alford, 543 U.S. 146 (2004)	9, 10, 14, 22
Gassner v. City of Garland, 864 F.2d 394, 398 (5th Cir.1989)	16
Howell v. Mississippi, 125 S.Ct. 856 (2005) (per curiam) . .	28
Knowles v. Iowa, 525 U.S. 113 (1998)	9, 15, 21
Michigan v. Long, 463 U.S. 1032 (1983)	19
Mutter v. Town of Salem, 945 F. Supp. 402 (D.N.H.1996) .	16
New York Central R. Co. v. New York, 186 U.S. 269 (1902)	28

<i>Oxley Stave Co. v. Butler County</i> , 166 U.S. 648 (1897)	28
<i>Pennsylvania v. Mimms</i> , 434 U.S. 106 (1977)	18, 19
<i>Rawlings v. Kentucky</i> , 448 U.S. 98 (1980)	9, 13, 14, 20
<i>Sibron v. New York</i> , 392 U.S. 40 (1968)	20
<i>Smith v. Ohio</i> , 494 U.S. 541 (1990)	15
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	13, 18, 19
<i>United States v. Bizier</i> , 111 F.3d 214 (1st Cir. 1997)	16
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873 (1975) . .	18, 19
<i>United States v. Green</i> , 178 F.3d 1099 (10th Cir.1999)	22
<i>United States v. Herbin</i> , 343 F.3d 807 (6th Cir.2003)	23
<i>United States v. Jenkins</i> , 496 F.2d 57 (2d Cir.1974)	18
<i>United States v. Morgan</i> , 799 F.2d 467 (9th Cir.1986)	20
<i>United States v. Potter</i> , 895 F.2d 1231 (9th Cir.1990)	20
<i>United States v. Pratt</i> , 355 F.3d 1119 (8th Cir.2004)	23
<i>United States v. Ricard</i> , 563 F.2d 45 (2d Cir. 1977)	18
<i>United States v. Robinson</i> , 414 U.S. 218 (1973)	14
<i>United States v. Salazar</i> , 805 F.2d 1394 (9th Cir.1986)	20
<i>United States v. Thompson</i> , 409 F.2d 113 (6th Cir. 1969) . .	12

Webb v. Webb, 451 U.S. 493, 496 (1981)	28
Whren v. U.S., 517 U.S. 806 (1996)	10, 14
Williams v. Jaglowski, 269 F.3d 778 (7th Cir.2001)	21

STATE CASES

Boal v. State, 368 So.2d 71 (Fla.2d DCA 1979)	18
Commonwealth v. Rehmeier, 502 A.2d 1332 (Pa. 1985) ..	17, 20
Jefferson v. United States, 776 A.2d 576, 580 (D.C.2001) ..	14
Jones v. State ex rel. Coffey, 253 S.W.2d 740, 742 (Tenn. 1952)	12
McGee v. State, 105 S.W.3d 609, 614	13
People v. Otto, 91 Mich.App. 444, 284 N.W.2d 273, 276 (1979)	17
Robertson v. State, 184 Tenn. 277, 284, 198 S.W.2d 633, 635-36 (1947)	23
State v. Ballard, 987 S.W.2d 889, 892 (Tex.Cr.App.1999) ..	14
State v. Crutcher, 989 S.W.2d 195 (Tenn. 1999)	23
State v. Duer, 616 S.W.2d 614, 615-16 (Tenn. Crim. App. 1981)	17
State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) ..	3, 25
State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000)	25

viii

State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004)	26
State v. Williams, 914 S.W.2d 940, 947 (Tenn.Crim.App.1995).	23
Warden v. State, 379 S.W.2d 788, 790 (Tenn. 1964)	13
West v. State, 221 Tenn. 178, 184, 425 S.W.2d 602, 605 (1968)	23

FEDERAL STATUTES

28 U.S.C. § 1257	28
28 U.S.C. § 1257(a)	1

STATE STATUTES

Tenn. Code Ann. § 40-7-103(a)(1)	12

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005). Petition, App.1-12.

JURISDICTION

The South Carolina Supreme Court's judgment was entered on September 26, 2005. A timely petition for rehearing was denied on November 2, 2005. The jurisdiction of this Court is allegedly invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner contends this petitions involves the following provisions of the United States Constitution:

- A. Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
- B. Amendment V: "No person . . . shall be . . . be deprived of life, liberty, or property, without due process of law . . . "
- C. Amendment IV: "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Appellant Edward Freiburger was indicted by the Richland County grand jury on June 13, 2001 for the murder of John Orner. He was tried before the Honorable Henry F. Floyd and a jury from July 29 through August 2, 2002. The jury convicted Freiburger and Judge Floyd sentenced him to life in prison.

Freiburger filed and served his notice of appeal on August 7, 2002. The Petitioner was represented in the appeal by current counsel. In the appeal before the South Carolina Supreme Court, the following pertinent issues were presented:

A. Appellant's Statement of Issues on Appeal.

- I. The trial court erred in denying Appellant's motion to suppress the gun which was allegedly confiscated as the result of the search by Trooper Meredith in 1961. ...
- V. The trial court erred in admitting evidence that the Appellant was stationed at Fort Leavenworth, Kansas.

B. Respondent's Statement of Issues on Appeal.

- I. Did the trial court properly admit the murder weapon into evidence when Trooper Meredith had probable cause to arrest Freiburger and when

Trooper Meredith searched Freiburger immediately before arresting him? ...

- V. Did the trial court properly admit evidence that Freiburger was "stationed" at Fort Leavenworth when the court refused to admit evidence of his conviction for absence without leave and when Fort Leavenworth is home to many activities other than the military prison?

Final Brief of Respondent, p. 1-2. The Supreme Court of South Carolina affirmed the conviction by published opinion on September 26, 2005. State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005). Petition, App.1-12. A timely petition for rehearing was denied on November 2, 2005.

A petition for writ of certiorari was filed January 31, 2006. This Brief in Opposition follows after request by the Clerk.

STATEMENT OF FACTS

Edward Freiburger, then a young Army private in training at Fort Jackson, brutally murdered John Orner in cold blood, shooting him at close range in the back of the head on the night of February 28-March 1, 1961. Forty years after the killing, Freiburger was convicted of the crime.

John Orner was a retired Army master sergeant, a veteran of both World War I and World War II. R. at 17, l. 13-17.) He drove a taxicab, frequenting a taxi stand outside the main gate of Fort Jackson on Jackson Boulevard, catering to soldiers from the post. R. at 19, l. 7-10; 20, l. 2-19.)

Mr. Orner's stepson reported Mr. Orner missing on the morning of March 1, 1961, when Orner failed to return home after work the night before. R. at 21, l. 14 through 22, l. 2; 52, l. 16-24.) Later that day, Columbia police officer Frank Revetta discovered Orner's abandoned and bloody cab near the DeSoto Hotel in downtown Columbia. R. at 32, l. 19 through 33, l. 19; 54, l. 14.) Orner's identification papers were on the front seat. R. at 54, l. 15.) On March 3, 1961, State Law Enforcement Division (S.L.E.D.) Agent L.B. Harmon discovered the lifeless body of John Orner on the side of Highway 601 in lower Richland County. R. at 112, l. 23-24; 114, l. 2-4.)

An autopsy was performed on Mr. Orner's body. The pathologist removed three bullet fragments from Orner's brain and determined that those bullet fragments killed Mr. Orner. R. at 118, l. 5-8.) Mr. Orner's wound was consistent with being shot in the back of the head by a passenger in his cab sitting in the back seat. R. at 174, l. 9-11.)

S.L.E.D. forensic examiners tested the bullet fragments. They determined that the three fragments were from a single .32-caliber bullet fired from a Harrington & Richardson revolver. R. at 131, l. 16-21.)

In 1961, the monthly salary for an Army private like Freiburger was sixty-eight dollars. R. at 218, l. 21-22.) Freiburger was habitually broke before the Army's payday, which was the last day of the month. R. at 218, l. 16-18; 222, l. 7-15.) On February 17, 1961, Freiburger pawned an electric razor at Berry's Pawn and Army Store, at the corner of Lady and Assembly Streets—on the first floor of the building housing the DeSoto Hotel—for four dollars. R. at 205, l. 6-23; 208, l. 22 through 209, l. 4.) On February 25, 1961, Freiburger pawned a Philco transistor radio at Freed's Jewelry, on Washington Street, for eight dollars. R. at 238, l. 22 through

239, l. 6; 242, l. 2-10; 243, l. 17-24.) On February 28, 1961—payday—Freiburger redeemed the radio from Freed's for eight dollars plus interest. R. at 245, l. 3-18.)

The police determined that one Edward Freiburger had purchased a .32-caliber Harrington & Richardson revolver, serial number W9948, along with .32-caliber ammunition that same payday, February 28, 1961, from Capital Loan and Pawn for \$50.42. R. at 69, l. 6 through 70, l. 5; 73, l. 2-16; 74, l. 9 through 75, l. 3; 486.) Further investigation revealed that on the night of March 2, 1961, a man using the name and Army service number of Edward Freiburger registered at the Gresham Hotel at the intersection of Main and Wheat Streets, near the railroad station, in Columbia, giving his home address as Fort Jackson. R. at 152, l. 12-20; 158, l. 19 through 160, l. 5.) Freiburger had stayed at the hotel previously. R. at 218, l. 6-12.)

Some time after the murder, Freiburger gave a fellow soldier in the barracks a live round of .32-caliber ammunition. R. at 195, l. 4-15.)

On March 29, 1961 at approximately 11:00 p.m., Tennessee Highway Patrolman Donald Meredith spotted Freiburger hitchhiking along state Highway 25 near Newport, Tennessee.¹ R. at 268, l. 5 through 269, l. 1.) Hitchhiking was a misdemeanor under Tennessee law. R. at 269, l. 2-4.) Trooper Meredith stopped, questioned Freiburger, and patted him down for safety reasons to see if he had any weapons

¹ Although not in evidence, Freiburger was actually absent without leave from the Army when Trooper Meredith arrested him. Freiburger was turned over to military authorities, convicted of being absent without leave, and sentenced to confinement in the United States Disciplinary Barracks at Fort Leavenworth, Kansas. He was dishonorably discharged from the Army. R. at 479, l. 22 through 480, l. 4.)

before he put him in his vehicle. R. at 270, l. 14-17.)² During the pat down, Trooper Meredith discovered a loaded .32-caliber Harrington & Richardson revolver, serial number W9948. R. at 271, l. 6-8; 274, l. 14-17; 279, l. 9-12; State's Ex. 6.) The patrolman arrested Freiburger for carrying the pistol and confiscated it. R. at 271, l. 9-12.)

The next month, Richland County Sheriff S.S. Sligh contacted Trooper Meredith and asked whether he had the pistol. R. at 272, l. 3-16.) Trooper Meredith turned the weapon over to the sheriff. R. at 274, l. 6-13.)

S.L.E.D. Lieutenant Millard Cate and Agent Carl Stokes tested the pistol to determine if it had fired the bullet that killed John Orner. Cate carved his initials in the handle of the pistol for identification. R. at 134, l. 12-24; State's Ex. 6.) The tests were inconclusive. The S.L.E.D. agents could not say that the bullet was fired from Freiburger's pistol, but neither could they say that it was not fired from that weapon. R. at 137, l. 2-20.)

Forty years later, the Richland County Sheriff's Department reopened the Orner murder case. R. at 339, l. 21 through 340, l. 4.) The Harrington & Richardson revolver and the bullet fragments were still "in pristine condition" at the S.L.E.D. forensics facility. R. at 306, l. 13-14. Lieutenant Ira Parnell retested the weapon. Although one of the fragments

² During the *in camera* proceeding on the motion to suppress, former Trooper Meredith testified that when he stopped for hitchhiking that Freiburger was not immediately under arrest, and stated: "but he was going to be for hitchhiking, or I was going to take him back to the jail." Pet. App. p 53, Supp. ROA, p. 14, ll. 1-3. He stated that he then did a safety search and patted him down before he put him in his vehicle. Pet. App. p 53-54. Prior to the discovery of the weapon, Meredith stated that he was not suspicious of him committing any crime other than hitchhiking. Pet. App. p. 54.

removed from John Orner's brain "bore a striking similarity" to bullets test fired from Freiburger's pistol, Lieutenant Parnell could not opine that the bullet that killed Mr. Orner was in fact fired from that weapon. R. at 312, l. 1 through 314, l. 21. The test, although "very nearly a positive," was still inconclusive. R. at 330, l. 10-15.

The Richland County Sheriff's Department then retained an independent ballistics expert, John Cayton. The sheriff's department sent Cayton the bullet fragments and the Harrington & Richardson pistol. R. at 429, l. 11-17. Cayton discovered that there were bone fragments, blood, and tissue on one of the bullet fragments. He soaked the bullet fragment and removed the tissue. In so doing, Cayton revealed more rifling marks on the bullet fragment, enabling him to examine it more closely. R. at 381, l. 13-23; 385, l. 19 through 386, l. 12.

Cayton opined that the bullet that ended John Orner's life was fired from the .32-caliber Harrington & Richardson revolver, serial number W9948, that Edward Freiburger purchased on February 28, 1961 and that Trooper Meredith confiscated from him on March 29, 1961. R. at 385, l. 11-15; 386, l. 23 through 387, l. 6.

In October of 2000, Richland County Sheriff's Department Investigators Brian Metz and Carl Craig traveled to Indiana to interview Freiburger. Freiburger agreed to the interview, and voluntarily traveled to the Whitley County Sheriff's Department to meet with Metz and Craig. R. at 412, l. 16 through 413, l. 17; 423, l. 3-4. Freiburger claimed to have no memory of being in the Army or in Columbia. R. at 414, l. 7-14; 423, l. 8 through 424, l. 7. Freiburger claimed to have no memory of being interviewed by Sheriff Sligh in 1961 in connection with the Orner murder. R. at 414, l. 15-20; 424, l. 22 through 425, l. 2. Freiburger claimed to have no memory of

being at Fort Jackson; Fort McPherson, Georgia; or Fort Leavenworth, Kansas. R. at 353, l. 4-11; 426, l. 1-11.

When confronted with a picture of himself in uniform and of documentary records of his stay at Fort Leavenworth, Freiburger's memory of his military service returned. R. at 353, l. 10-15; 424, l. 2-19; 426, l. 8-15. Freiburger had no trouble remembering his life history before and after his Army service. R. at 351, l. 3-23; 427, l. 3-9. Investigator Metz noted a distinct change in Freiburger's demeanor when Metz told Freiburger that he was there to discuss the 1961 murder of John Orner. Freiburger's face flushed, he began to sweat, and he had problems speaking. R. at 431, l. 19 through 432, 16. Freiburger was later arrested and indicted for the murder of John Orner.

REASONS WHY CERTIORARI SHOULD BE DENIED.

- I. The Decision of the South Carolina Supreme Court affirming the use of the gun evidence seized as a search incident to an arrest was a reasonable interpretation of this Court's prior precedent where there was probable cause to arrest Freiburger for hitchhiking and the pat down for weapons was done for safety purposes prior to placing Freiburger in the police vehicle and where it would be unreasonable to expect a police officer, out on a deserted road at 11:00 p.m., to transport a suspect to the jail without first conducting a pat down search for weapons.**

In his petition before this Court, the Petitioner asserts that the search was not permitted because it was a warrantless search and the Tennessee trooper who stop the Petitioner had

no intent to arrest him before the pat-down. He contends that the South Carolina Supreme Court misinterpreted Devenpeck v. Alford, 543 U.S. 146 (2004), Knowles v. Iowa, 525 U.S. 113 (1998) and Rawlings v. Kentucky, 448 U.S. 98 (1980) in concluding the evidence was admissible as a search incident to an arrest. Respondents submit that the state court interpretation was correct and that certiorari is not warranted.

1. How the Supreme Court of South Carolina Decided the Issue.

In its recent decision in addressing admission of the gun evidence from the search, the South Carolina Supreme Court concluded that search was permissible as a search incident to an arrest. In particular, the Court concluded:

Freiburger maintains that because he was not under arrest at the time of the search, and because he was ultimately arrested only for carrying arms, the search was illegal and the gun seized in 1961 should have been suppressed at trial. We disagree. As noted above, one of the rationales for the exception to the warrant requirement in the case of a search incident to arrest is the need to disarm the suspect in order to take him into custody. Here, Trooper Meredith's testimony that Freiburger was going to be arrested for hitchhiking and/or transported to the jail provides a sufficient basis upon which to conduct a limited pat-down search. It would simply be unreasonable to expect a police officer, out on a deserted road at 11:00 p.m., to transport a suspect to the jail without first conducting a pat down search for weapons.

Moreover, the fact that Freiburger was not ultimately arrested for hitchhiking is not dispositive. As recently stated by the United States Supreme Court, an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' " Devenpeck v. Alford, 543 U.S. 146, —, 125 S.Ct. 588, 594, 160 L.Ed.2d 537, — (2004), citing Whren v. U.S., 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89. Accordingly, the mere fact that Trooper Meredith did not arrest Freiburger for hitchhiking but, instead, arrested him for carrying arms upon finding the weapon does not vitiate the reasonableness of the underlying search. We find the search conducted by Trooper Meredith was a legitimate search incident to arrest, necessary to ensure his safety in order to transport Freiburger to the jail. As such, there was no fourth amendment violation and the trial court properly denied Freiburger's motion to suppress.

Pet. App.p. 6-7³.

³ The Court also made the following findings concerning the evidence at the in camera proceeding:

At the in camera hearing, Trooper Meredith testified that, although Freiburger had not been arrested at the time of

Under the lower court's analysis, certain salient factors were determined: 1) that Freiburger was in violation of the law and subject to arrest for hitchhiking, 2) that as a result of this criminal activity, he was going to be transported in the police vehicle to either remove him from the continuing crime of hitchhiking and arrest him or transport him to the jail, and 3) the limited pat-down by the solitary officer at the scene was solely for safety purposes before placing him in the vehicle.

2. Trooper Meredith had probable cause to arrest Freiburger for Hitchhiking.

In his current petition, Freiburger argues that he is not challenging the lawfulness of the arrest for carrying arms upon a stop for hitchhiking, but is asserting that the search was in violation of Tennessee law and under the stop and frisk rules of the Fourth and Fourteenth Amendments. He claims the seizure of the gun was a fruit of an unlawful search because Trooper Meredith had no suspicion that Freiburger was armed and dangerous to support any pat-down search and was neither arrested nor likely to be arrested for hitchhiking. Petition, p. 13. At no time in his petition, does Freiburger address the reason underlying the limited pat down search - the fact that the solitary officer was placing Freiburger in his vehicle. As the

the pat down search, he was going to be arrested for hitchhiking, or taken back to the jail. Trooper Meredith went on to testify that "we did a safety search before we put somebody in the car. You check them to see if they have any weapons."

Pet. App.p. 6. Respondent acknowledge that there was conflicting evidence on this matter. See, Pet. App.p. 45. (at the time we did not always arrest hitchhikers unless they had committed another violation of law. I doubt I would have arrested Ed Freiburger if I had not found the gun he was carrying...") (Affidavit June 10, 2002. However, the state court findings were supported by Trooper Meredith's in camera testimony.

Supreme Court stated : "It would simply be unreasonable to expect a police officer, out on a deserted road at 11:00 p.m., to transport a suspect to the jail without first conducting a pat down search for weapons."

Freiburger argues that Trooper Meredith did not intend to arrest Freiburger for hitchhiking at the time the pat-down was conducted. The Petitioner, however, ignores or concedes the critical question - he had probable cause to arrest Freiburger for hitchhiking and remove him from the highway that evening. It was never Trooper Meredith's intent to leave on the roadway that evening. As Trooper Meredith testified in the in camera hearing, although Freiburger had not been formally arrested prior to the time of the pat down search, he was going to be arrested for hitchhiking, or taken back to the jail. *Pet. App.p. 53*. Trooper Meredith went on to testify that "we did a safety search before we put somebody in the car. You check them to see if they have any weapons." *Pet. App.p. 53*.

The law of Tennessee governing a warrantless arrest for a misdemeanor, as it existed in 1961, and as it exists today, authorizes that a law enforcement officer may make a misdemeanor arrest without a warrant "[f]or a public offense committed or a breach of the peace threatened in his presence." Tenn. Code Ann. § 40-7-103(a)(1). In the lower court, Freiburger focused his argument on defining a "breach of the peace." Freiburger fails to explain, however, that the Tennessee Supreme Court has always held that any misdemeanor constitutes a "public offense." See Jones v. State ex rel. Coffey, 253 S.W.2d 740, 742 (Tenn. 1952) (holding that a warrant is not required for a misdemeanor arrest when the misdemeanor is committed in front of police); see also United States v. Thompson, 409 F.2d 113, 116 (6th Cir. 1969) (holding that Tennessee law permitting warrantless misdemeanor arrest for public offenses authorized arrest for moving an automobile inspection sticker from one car to

another); Warden v. State, 379 S.W.2d 788, 790 (Tenn. 1964) (holding that possession of intoxicating liquors is a public offense or breach of the peace); 9 Tenn. Practice Series § 18.154 ("An officer may conduct a warrantless arrest for a felony or misdemeanor or a 'breach of peace' committed in his presence.")

Hitchhiking, therefore, is a "public offense" under Tennessee law. When Trooper Meredith observed that public offense being committed, he had the authority to arrest Freiburger without a warrant, and therefore had probable cause to arrest him. See Atwater v. City of Lago Vista, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) ("[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

3. Trooper Meredith's search of Freiburger was lawful, even though it immediately preceded the arrest.

Trooper Meredith's pat-down search of Freiburger was not a stop-and-frisk search pursuant to Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968); it was a valid search incident to a lawful arrest. That Trooper Meredith searched Freiburger immediately before he arrested him does not invalidate the search. Under Rawlings v. Kentucky, 448 U.S. 98, 100 S. Ct. 2256 (1980), when a formal arrest "follow[s] quickly on the heels of the challenged search" of the defendant's person, it is not "particularly important that the search preceded the arrest rather than vice versa." Id. at 111, 100 S. Ct. at 2564. Once an officer has probable cause to arrest, he may search the accused incident to the arrest. McGee v. State, 105 S.W.3d 609, 614 (Tex.Cr.App.), cert. den'd, 540 U.S. 1004, 124 S.Ct. 536, 157 L.Ed.2d 410 (2003). It is irrelevant that the arrest occurs immediately before or after the search as long as sufficient

probable cause exists for the officer to arrest before the search. State v. Ballard, 987 S.W.2d 889, 892 (Tex.Cr.App.1999); see Rawlings v. Kentucky, 448 U.S. 98, 111, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa"). the test of a lawful arrest is an objective one. "[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause," and thus his "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." Devenpeck v. Alford, 543 U.S. 146 (2004); see also Whren v. United States, 517 U.S. 806, 812-13, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); Jefferson v. United States, 776 A.2d 576, 580 (D.C.2001). In short, the "[s]ubjective intent of the arresting officer ... is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest." Devenpeck, 125 S.Ct. at 594.

Under the "search-incident-to-a-lawful-arrest" exception to the warrant requirement, a law enforcement officer may conduct a full search of an arrestee's person incident to a lawful custodial arrest. United States v. Robinson, 414 U.S. 218, 234-35, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (explaining that the reasoning behind this exception is the "need to disarm the suspect in order to take him into custody [and] ... the need to preserve evidence on his person for later use at trial"). Moreover, as the Supreme Court held in Rawlings v. Kentucky, 448 U.S. 98, 110-11 n. 6, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), the search-incident-to-a-lawful-arrest rule also permits an officer to conduct a full search of an arrestee's person before he is placed under lawful custodial arrest as long as "the formal arrest follow[s] quickly on the heels of the challenged search of ... [his person]" and the fruits of that search are not necessary to sustain probable cause to arrest him.

Cf. Knowles v. Iowa, 525 U.S. 113, 116-19, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (holding that the search incident to a lawful arrest rule does not apply to an officer's search of the defendant's vehicle where the officer, while subsequently arresting the defendant for drug-law violations based upon that search, never actually arrested the defendant for the speeding violation, which gave the officer the probable cause to arrest the defendant before the search, but, rather, only issued a citation, and reasoning that the rule's underlying twin rationales of officer safety and evidence preservation were only minimally present and not present at all, respectively, in the context of a traffic citation); Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990) (holding that the search-incident-to-a-lawful-arrest rule does not apply to a warrantless search that provides the probable cause for the subsequent arrest because one cannot justify the arrest by the search and then simultaneously justify the search by the arrest).

As Trooper Meredith had probable cause to believe that Freiburger was committing a misdemeanor offense in his presence, the custodial detention and transportation from the scene was lawful, and the pat down search of his person was reasonable within the meaning of the Fourth Amendment.

Freiburger argues that the search was illegal because Trooper Meredith arrested him for a different crime of possession of the weapon, and not for the initiating crime of hitchhiking. This argument also fails. The key to determining the legality of the search is whether Trooper Meredith had probable cause to arrest Freiburger when Meredith conducted the search, not whether Trooper Meredith had probable cause to arrest Freiburger for possession of the weapon when he conducted the search. Stated differently, the test is whether Trooper Meredith had probable cause to arrest Freiburger for any offense, not whether Trooper Meredith actually arrested

Freiburger for the offense that initially created the probable cause.

To reach a contrary outcome elevates form over substance. Trooper Meredith undoubtedly had probable cause to arrest Freiburger for hitchhiking. Under Rawlings, therefore, the search was legal, even though it occurred before the arrest. Using Freiburger's reasoning, after Meredith discovered the revolver, he would have had to arrest Freiburger for hitchhiking. Only then could he subsequently have charged him with possession of the weapon, even though he lawfully discovered the weapon before the arrest and even if he then chose not to prosecute Freiburger for hitchhiking.

Such procedural machinations are not the law under the Fourth Amendment to the United States Constitution. See, United States v. Bizier, 111 F.3d 214 (1st Cir. 1997) ("probable cause justifying a lawful custodial arrest, and therefore a search incident to that arrest, need not be for the charge eventually prosecuted"). See e.g., Barna v. City of Perth Amboy, 42 F.3d 809, 819 (3d Cir.1994) ("Probable cause need only exist as to any offense that could be charged under the circumstances") (emphasis added); Barry v. Fowler, 902 F.2d 770, 773 n. 5 (9th Cir.1990); Gassner v. City of Garland, 864 F.2d 394, 398 (5th Cir.1989); Mutter v. Town of Salem, 945 F. Supp. 402, 407 n. 5 (D.N.H.1996). Consequently, a finding of probable cause for any offense justifying full custodial detention can validate the search in this case as incident to a lawful arrest.

Nor was this the law in Tennessee. The Tennessee appellate courts have held that an arrest for one offense is not made illegal because the probable cause for that arrest was based on a different offense:

Assuming arguendo that the officer had no right to arrest the defendant for driving on a

revoked license, it does not make his initial arrest illegal, because under the evidence as we have set forth above, the officer could have arrested the defendant for public drunkenness. When the officer appeared at the scene and observed the defendant's state of intoxication, as such was described in this record, then unquestionably the offense of public drunkenness was committed in the officer's presence, and an arrest for that offense would have been proper. The fact that the officer did not articulate to the defendant that he was being arrested for public drunkenness, but rather advised the defendant that he was being arrested for the offense of driving on a revoked license does not carry with it the conclusion that the arrest was illegal.

State v. Duer, 616 S.W.2d 614, 615-16 (Tenn. Crim. App. 1981). In similar settings, other states have authorized the searches. In People v. Otto, 91 Mich.App. 444, 284 N.W.2d 273, 276 (1979), the Michigan Court of Appeals upheld an officer's decision to frisk a hitchhiker prior to transporting him off the freeway. The court focused on the reasonableness of the squad car transport as well as the reasonableness of the frisk, concluding that ticketing the hitchhiker and his companion but leaving them to continue walking on the freeway would have been dangerous and irresponsible, and that the officer's interest in protecting himself from assault while transporting the hitchhikers was legitimate and substantial.

In Commonwealth v. Rehmeier, 502 A.2d 1332 (Pa. 1985) the court authorized a pat down where there was probable cause to arrest prior to entry into the patrol car to take

the person home. Though Rehmeier had not shown any signs of violence, the court determined that the officer acted reasonably in assuming that appellee could possibly enter the patrol car with a deadly weapon. "Once behind the wheel of the patrol car, Perelman would be an easy mark. A reasonably prudent man in the same situation would believe that his safety was in jeopardy. "It [is] unreasonable to require that police officers take unnecessary risks in the performance of their duties," citing Terry v. Ohio, 392 U.S. 1, 23 (1968). See Boal v. State, 368 So.2d 71 (Fla.2d DCA 1979) (pat-down search for weapons before placing defendant into police vehicle held valid to insure personal safety of officer while transporting defendant who was under investigation but not arrested; conviction of carrying concealed weapon affirmed). In United States v. Ricard, 563 F.2d 45, 49 (2d Cir. 1977), the court held that "the fact that [the officer] had cause to arrest appellant for speeding, even if he initially determined not to do so, was a sufficient predicate for a full search." Similarly, in United States v. Jenkins, 496 F.2d 57, 72-73 (2d Cir.1974), the court held that the mere fact that "the trooper reversed the procedure, conducting the search before the arrest, did not render it illegal as long as probable cause to arrest existed at the time of search ... Any other holding would, without rational basis, exalt form over substance." Jenkins, 496 F.2d at 73.

Here, there was more than a reasonable suspicion of criminal activity, there was actual knowledge by the trooper of criminal activity in the hitchhiking. Determination of whether the pat-down search of appellee was proper necessarily involves the issue of the reasonableness of the search. As the Court stated in Pennsylvania v. Mimms, 434 U.S. 106 (1977), "the touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security'." Mimms, 434 U.S. at 108, 98 S.Ct. at 332. This Court set forth the standard of reasonableness in United States v.

Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). The Court stated that reasonableness depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." Brignoni-Ponce, supra at 878, 95 S.Ct. at 2579. Accord Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

The Supreme Court has expressly acknowledged that the officer's safety is a legitimate and weighty justification for the search of a properly detained individual. See e.g., Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); Pennsylvania v. Mimms, supra; Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1968); Terry v. Ohio, supra.

The Rehmeier court stated in recognizing that in today's complex society, police are "charged with the protection of constitutional rights, the maintenance of order, the control of pedestrian and vehicular traffic, the mediation of domestic and other non-criminal conflicts, and supplying emergency help and assistance." citing La Fave, *Street Encounters and the Constitution*; Terry, Sibron, Peters and Beyond, 67 Michigan L.Rev. 40, 61-62 (1968) and Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) (police engage in community caretaking functions). Particularly, it stated :

If during the execution of these tasks an officer determines that "[a] reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger," the officer may conduct a protective pat-down search. Terry, 392 U.S. at 27, 88 S.Ct. at 1883. The officer is empowered to neutralize the danger posed by the party with whom he is dealing. The search

must be limited to the accomplishment of the goal which justified its commencement, namely, protection of the action must be confined to a pat-down search for the discovery of weapons. Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

Rehmeier, 502 A.2d at 1336.

The Petitioner criticizes the analysis of the state court's reliance on Rawlings v. Kentucky, 448 U.S. 98 (1980). Rawlings stands for the proposition that a warrantless search that precedes an arrest may be constitutionally valid as long as (1) a legitimate basis for the arrest existed before the search, and (2) the arrest followed "quickly on the heels search of the challenged search." See Rawlings v. Kentucky, 448 U.S. 98, at 111. He asserts that since the defendants in Rawlings were "most assuredly going to be arrested" for drug violations, the state courts reliance upon it was inappropriate because "it is clear that Trooper Meredith was not planning to arrest Freiburger. First, this analysis ignores the testimony of Trooper Meredith and findings by the South Carolina Supreme Court that either he was going to be arrested for hitchhiking, or taken back to the jail. *Pet. App.p. 6, 53*. So long as an arrest that follows a search is supported by probable cause independent of the fruits of the search, the precise timing of the search is not critical. *Id.*; United States v. Morgan, 799 F.2d 467, 469 (9th Cir.1986); see also United States v. Potter, 895 F.2d 1231, 1234 (9th Cir.1990) (finding no Fourth Amendment violation for pre-arrest "pat down" search of suspect based on probable cause to arrest, and noting that "[a] search incident to an arrest is valid whether it occurs immediately before or after the arrest."); United States v. Salazar, 805 F.2d 1394, 1399 (9th Cir.1986) (stating, in dicta, "it is not particularly important in this case that the formal arrest followed rather than preceded the search, for the search is still valid as incident to the lawful arrest if it did not exceed the scope of the exception.").

The Petitioner also contends that the routine traffic stop situation in Knowles v. Iowa, 525 U.S. 113 (1998) has applicability to his situation. The decision does not preclude an arrest of Freiburger for hitchhiking, but involved a search based on his commission of a traffic offense. Knowles rejected the State's contention that a search could be justified based on the mere *potential* that an officer could have arrested a traffic offender for a traffic offense, even though the search in Knowles was preceded only by a citation. 525 U.S. at 115-16, 119 S.Ct. 484. The Court held that the search incident-to-arrest exception to the probable cause requirement was a "bright-line rule" that should not be extended to situations in which an arrest is not effected. *Id.* at 118-19, 119 S.Ct. 484. Freiburger was either going to be placed under arrest or transported from the scene in the police vehicle without consent to the jail where there was probable cause to arrest. Knowles does not speak to that point. Knowles limits Robinson to custodial arrests; it instantiates the principle that the reasonableness of a search depends on what the officers actually do, not what they might have done. The police did not detain Knowles before conducting the search. When Knowles was issued, the Court had yet to decide whether a full custodial arrest for an offense punishable only by a fine is permissible; three years later the Justices held that this step is proper. See Atwater v. Lago Vista, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). See also Williams v. Jaglowski, 269 F.3d 778, 783 (7th Cir.2001). Knowles itself observed that the driver's failure to produce a valid license or other proper identification could support custody. 525 U.S. at 118, 119 S.Ct. 484. And as Knowles explained it is *custody*, and not a stop itself, that makes a full search reasonable: officers' needs to protect themselves and preserve evidence are what justify the rule allowing searches of arrested persons. Thus, the custodial situation for Freiburger made the search reasonable.

Finally, he contends that the state court reliance upon Devenpeck v. Alford, 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004) was also misplaced. The constitutionality of an arrest does not depend on the arresting officer's state of mind. All that matters is whether he possessed knowledge of evidence that would provide probable cause to arrest her on some ground. Devenpeck held that a police officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." *Id.* at 153. An arrest is not invalid under the Fourth Amendment simply because the police officer subjectively intended to base the arrest on an offense for which probable cause is lacking, so long as "the circumstances, viewed objectively, justify" the arrest. *Id.* (internal quotation marks omitted). "Subjective intent of the arresting officer, however it is determined (and of course subjective intent is always determined by objective means), is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest." *Id.* at 154-55. Here, it is without question that Freiburger was in violation of the law by hitchhiking and subject to arrest.

The petitioner also claims that the search was improper under Tennessee law because he had not been arrested before the search. As noted above, Respondent submits that the search was proper based upon the custodial detention for the crime of hitchhiking. The Supreme Court has stated that a police officer may effect an arrest if the officer "has probable cause to believe that an individual has committed even a very minor criminal offense in his presence." Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001). And even if Tennessee law prohibited such an arrest, that would be irrelevant to Freiburger's constitutional claim. See, United States v. Green, 178 F.3d 1099, 1105 (10th Cir.1999) ("[T]he fact that the arrest, search, or seizure may have violated state law is irrelevant [to whether evidence should be suppressed] as long as the standards

developed under the Federal Constitution were not offended." (internal quotation marks omitted)); United States v. Pratt, 355 F.3d 1119, 1123 n. 3 (8th Cir.2004) (declining to overrule the circuit's precedent that "limitations on officers' arrest power imposed by state law were irrelevant to the constitutionality of a search incident to an arrest"); United States v. Herbin, 343 F.3d 807, 810 (6th Cir.2003) (interpreting Atwater to say that the Fourth Amendment "does not prohibit an officer from making a custodial arrest for a misdemeanor traffic violation even though it is not an arrestable offense under state law"). ⁴

Further, an analysis of Tennessee law would support that Freiburger was actually arrested prior to the search under Tennessee law. State v. Crutcher, 989 S.W.2d 195 (Tenn. 1999). In Crutcher, in contrast, the warrantless search of backpack and jacket on his motorcycle at accident scene could not be justified as search incident to arrest, even if officer had probable cause to arrest but did not place him under arrest due to his injuries, where officers did not discuss criminal charges or arrest procedures with defendant at accident scene, and did not take him into custody until after he was released from medical center days later. Here Freiburger, was seized to be arrested and removed from the area to prevent further criminal activity - hitchhiking -which satisfied " the taking, seizing, or

⁴In Tennessee, an arrest is more specifically defined as "the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest." West v. State, 221 Tenn. 178, 184, 425 S.W.2d 602, 605 (1968) (citations omitted); Robertson v. State, 184 Tenn. 277, 284, 198 S.W.2d 633, 635-36 (1947) (citations omitted); State v. Williams, 914 S.W.2d 940, 947 (Tenn.Crim.App.1995). [FN10] An arrest may be affected without formal words or a station house booking. 5 Am.Jur.2d Arrest § 2 (1995). However, there must be actual restraint on the arrestee's freedom of movement under legal authority of the arresting officer. See, State v. Crutcher, 989 S.W.2d 195 (Tenn. 1999). Thus, under Tennessee law, Freiburger was in fact arrested for purposes of the Robertson analysis.

detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest. " Thus, any search was lawful under that setting.

Freiburger's arrest was lawful and the search that discovered the murder weapon was lawful. The trial court properly admitted the weapon into evidence. Certiorari is not warranted.

- II. The trial court properly admitted relevant evidence of Freiburger's being stationed at Fort Leavenworth because that evidence was not prejudicial. Further, Since the Petitioner only raised this issue before the South Carolina Supreme Court as a State Evidentiary Issue Under South Carolina Rules of Evidence Rule 404(b) and 403, Certiorari Is Inappropriate Where No Federal Constitutional Claim Was raised Below.**

Freiburger argues that the trial court improperly allowed the state to elicit evidence that he was "stationed" at Fort Leavenworth. In actuality, Freiburger was not "stationed" at Fort Leavenworth at all. He was incarcerated in the United States Disciplinary Barracks. R. at 479, l. 22 through 780, l. 4. The trial judge, however, refused to permit the jury to learn this information, limiting the state to asking only about whether Freiburger was "stationed" at Fort Leavenworth. R. at 4, l. 22 through 5, l. 9.). Pet. App.p. 21-23, 36-38.

In denying relief on this evidentiary issue, the South Carolina Supreme Court stated:

Freiburger asserts reversible error in references to his being "stationed" at Fort Leavenworth, Kansas. [FN2] He asserts it is well-known Leavenworth is a military prison, and that, as such, this evidence was prejudicial. We disagree.

[FN2. Freiburger was sent to Fort Leavenworth in 1961 after his arrest by Trooper Meredith for carrying arms when it was learned he was AWOL from the army.]

Contrary to Freiburger's contention, there was no mention of the fact that he was incarcerated at Leavenworth. Mere questioning as to whether he was stationed there simply does not equate with advising the jury he was confined in a military prison. Even assuming, *arguendo*, jurors were aware Leavenworth is a military prison, there is no reason to suspect they automatically believed he was imprisoned there, as opposed to having been being stationed there during his military career. We see no prejudice from admission of this testimony. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (error without prejudice does not warrant reversal).

State v. Freiburger, supra at 135. Pet. App.p. 9-10.

Freiburger apparently contends that the admission only of evidence that he was "stationed" at Fort Leavenworth was both irrelevant to the case and more prejudicial than probative,

in contravention of Rules 402 and 403. That Freiburger was at Fort Leavenworth could not be more relevant to a key issue in the case. The state elicited testimony that, when he was interviewed in Indiana in 2001, Freiburger told investigators that he did not remember serving in the Army, buying the murder weapon in Columbia, or being interviewed by Sheriff Sligh in 1961. He also stated that he did not remember being at Fort Jackson; Fort McPherson, Georgia; or Fort Leavenworth.⁵ After being shown photographs of himself in uniform, Freiburger's memory about serving in the Army returned. He also had no trouble remembering events that occurred before and after his Army service.

The state adduced evidence that, when questioned about John Orner's murder, Freiburger became flushed, began sweating, and had trouble speaking. Combined with his obvious unease about the murder, the fact that Freiburger could not remember the place he was living in 1961 is very relevant to the issue of whether or not Freiburger was lying to the investigators.

As to whether the evidence that he was "stationed" at Fort Leavenworth was more prejudicial than probative, Freiburger is wrong. Admission of evidence under Rule 403 is committed to the sound discretion of the trial judge, and this Court must give the trial judge's decision "great deference." State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004) Even under a more stringent standard, the evidence was not prejudicial.

At trial, Freiburger contended that evidence that he was "stationed" at Fort Leavenworth is "the equivalent of saying somebody was at San Quentin." R.at 8, l. 5-6. The trial court

⁵ That Freiburger would not remember being incarcerated is, at best, dubious.

properly noted that he could have been at Fort Leavenworth in some capacity other than as a prisoner at the Disciplinary Barracks. R. at 5, l. 8-9; 10, l. 23-24. This Court may take judicial notice of the fact that Fort Leavenworth is an Army installation comprising many activities other than the Disciplinary Barracks; indeed, the Disciplinary Barracks are not even the major activity at Fort Leavenworth.⁶ Freiburger's argument is akin to saying that one who lives in Pelzer is "the equivalent of saying somebody was at" Perry Correctional Institution.

The information connected to Fort Leavenworth that was prejudicial to Freiburger was that he was incarcerated for committing a crime. The trial judge refused to allow this information into evidence.⁷ That he did admit evidence that Freiburger was at Ft. Leavenworth was not an abuse of his discretion. The South Carolina Supreme Court's analysis that there was no prejudice because no evidence was presented that Freiburger was "imprisoned" at Fort Leavenworth is correct.

1. Certiorari Is Not Authorized Where No Federal Question Was Presented To The State Supreme Court.

Alternately, Respondent submit that this matter is outside of this Court's jurisdiction since no federal constitutional claim was raised below in the brief before the Court. At no time did Petitioner assert or articulate either a Fifth Amendment or Fourteenth Amendment claim in either the issue presented or within either brief; the Final Brief of

⁶ The major activity at Fort Leavenworth since 1881 has been the United States Army Command and General Staff College. See <http://www.leavenworth.army.mil/cac/history.htm>.

⁷ Freiburger's argument that the jury was "interested" in his military record is nonsensical. The fact remains that the jury did not see his record.

Appellant or Final Reply Brief of Appellant. To the contrary. The assertions were solely based upon his articulation of an error under Rule 404(b), 403 or lack of relevance.

In Howell v. Mississippi, — U.S. —, 125 S.Ct. 856, 160 L.Ed.2d 873 (2005) (per curiam), the Court concluded that petitioner's federal constitutional claim was not properly raised before the Mississippi Supreme Court for purposes of 28 U.S.C. § 1257 because "he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." Id. at 858. 28 U.S.C. Section 1257 requires that federal law challenges to state law decisions be "addressed by or properly presented" to the state court before the Supreme Court may hear the case. Id. at 860. See, e.g., Adams v. Robertson, 520 U.S. 83, 89, n. 3, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (per curiam) (concluding that "passing invocations of 'due process' " that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a federal claim was presented"); Webb v. Webb, 451 U.S. 493, 496, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) (finding a reference to "full faith and credit" insufficient to raise a federal claim without a reference to the U.S. Constitution or to any cases relying on it); New York Central R. Co. v. New York, 186 U.S. 269, 273, 22 S.Ct. 916, 46 L.Ed. 1158 (1902) ("[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth"); Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 17 S.Ct. 709, 41 L.Ed. 1149 (1897) (a party's intent to invoke the Federal Constitution must be "unmistakably" declared, and the statutory requirement is not met if "the purpose of the party to assert a Federal right is left to mere inference"). The similar failure to meet these minimum standards by Freiburger in the South Carolina Supreme Court bars consideration of his question presented here.

Further, this is purely a matter of the admission of evidence in a state court trial. Certiorari is not warranted.

CONCLUSION

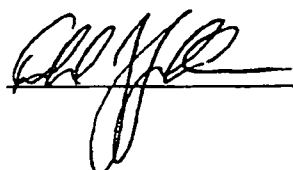
For all the foregoing reasons, certiorari must be denied.

Respectfully submitted,
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April 21, 2006

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

EDWARD FREIBURGER # 286115,)
Applicant,)

v.)

STATE OF SOUTH CAROLINA,)
Respondent.)

2006-CP-400-3866
IN THE COURT OF COMMON PLEAS
CA No.

APPLICATION FOR
POST-CONVICTION RELIEF

RICHLAND COUNTY
FILED
2006 JUL -5 PM 1:46
BARBARA A. SCOTT
C.C. & G.S.

- 1 Place of Detention. Kirkland Correctional Institution, 4344 Broad River Road Columbia, S.C. 29210
- 2 Name and location of Court which imposed sentence: Court of General Sessions, Richland County.
- 3 Name(s) of co-defendant(s) (if any) Not applicable.
- 4 The indictment number or numbers upon which and the offense or offenses for which sentence was imposed.
 - (a) Murder: 01-GS-40-2955.
- 5 The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on August 2, 2002; Life
- 6 A jury returned a verdict of guilty after a plea of not guilty
- 7 The applicant did appeal from judgment of conviction and sentence
- 8
 - (a) The Courts to which the applicant appealed
 - (i) South Carolina Court of Appeals, which certified the appeal to the South Carolina Supreme Court pursuant to SCACR 402.
 - (b) The result in each Court to which applicant appealed

linking applicant to the crime was expert ballistics testimony. Trial counsel failed to present expert testimony rebutting the state's evidence that the bullet, which killed the victim, was discharged from the gun allegedly in applicant's possession. Rebutting this evidence was critical to mounting a defense to the state's allegations and evidence. Counsel's failure to present expert testimony was deficient performance prejudicing applicant.

- (c) *Applicant's right to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of juror misconduct*
- (c) During the trial, several jurors engaged in various acts of misconduct. The jury plays an important and integral role in the criminal justice system. The criminal justice system entrusts jurors to decide the guilt or innocence of those accused. When a juror fails to abide by his or her oath, as several jurors did during applicant's trial, a defendant's right to a fair trial is violated. *Williams v. Taylor*, 529 U.S. 362 (2000).
- (d) *Applicant's right to a fair trial guaranteed by the United States Constitution and South Carolina law was violated as a result of the prosecutor's improper opening statement*
- (d) During opening statements, the prosecutor made improper statements. The prosecutor emphasized irrelevant victim impact evidence, including that the victim was a veteran of World Wars I and II. These statements inappropriately appealed to and inflamed the jurors' passions. *Payne v. Tennessee*, 501 U.S. 808 (1991), *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004).
- (e) *Applicant's federal and state right to the effective assistance of counsel was violated as a result of trial counsel's failure to object to the prosecutor's improper opening statement*
- (e) Despite the prosecutor's repeated violations of applicant's right to a fair trial resulting from the prosecution's improper comments during opening statement, applicant's trial counsel failed to object. Trial counsel's failure to object to the prosecutor's gross violations was deficient performance that prejudiced applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).
- (f) *Applicant's right to the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of appellate counsel's failure to assert on appeal that the prosecutor violated applicant's right to a fair trial during opening statement*

- 7
- (f) Appellate counsel failed to raise on appeal the prosecutor's repeated and gross violations of applicant's right to a fair trial due to the prosecutor's improper opening statement. Appellate counsel's failure was deficient performance that prejudiced applicant. *Strickland v Washington*, 466 U.S. 668 (1984)
 - (g) *Applicant's right to a fair trial as guaranteed by the United States Constitution and South Carolina law was violated as a result of the prosecutor's improper argument during closing argument*
 - (g) The prosecutor violated applicant's right to a fair trial by asserting improper argument during his closing argument. Specifically, the prosecutor flagrantly disobeyed the trial court's order that informing the jury that allegedly applicant was absent without leave (AWOL) after the time of the alleged murder was inadmissible evidence because it was more prejudicial than probative, when the prosecutor made multiple references and implications that applicant was AWOL. In addition, the prosecutor told the jury that the blood found in the front seat of the cab was the victim's blood; however, the state presented no evidence that the blood belonged to the victim. Furthermore, the prosecutor improperly compared the alleged murder of the victim to the treatment of a dog. Specifically, the prosecutor stated that the victim's body was "thrown on the side of the road with less dignity than most people would show to the burial of their dog." Prosecutors have a duty to do justice at all times. Every action taken by a prosecutor is to further their duty of doing justice. When a prosecutor engages in improper argument during closing, the prosecutor violates his duty to do justice. Further, the prosecutor violates a defendant's right to a fair trial by presenting improper argument to a jury. *Payne v Tennessee*, 501 U.S. 808 (1991); *Hall v Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004); *State v Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997); *State v Robinson*, 305 S.C. 469, 409 S.E.2d 404 (1991).
 - (h) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as result of trial counsel's failure to object to the prosecutor's improper closing argument*
 - (h) Applicant's trial counsel failed to object to the prosecution's improper closing argument. This failure constituted deficient performance that prejudiced applicant. *Strickland v Washington*, 466 U.S. 668 (1984).
 - (i) *Applicant's right to the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of appellate counsel's failure to assert on appeal that the prosecutor violated applicant's fair trial rights during closing argument*

- (i) Appellate counsel failed to raise on appeal the prosecutor's repeated and gross violations of applicant's right to a fair trial due to the prosecutor's improper closing argument. Appellate counsel's failure was deficient performance that prejudiced applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).
 - (j) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated, and continues to be violated, because he is actually innocent of the charges.*
 - (j) Substantial evidence exists establishing applicant's innocence of the offense for which he was convicted and sentenced. Evidence of applicant's innocence has been revealed through post-trial investigations. Applicant's continued incarceration for a crime he did not commit is a miscarriage of justice and should be remedied immediately.
12. Applicant has not filed any petitions or applications in the state or federal courts seeking post-conviction or habeas corpus relief, nor has he sought a writ of certiorari from the United States Supreme Court.
- 13(a) through (e). Not applicable.
14. No ground set forth in (10) has been previously presented to this or any other court, state or federal.
15. Not Applicable.
16. If any ground for relief set forth in (1) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Ground (10)(a) has not previously been presented to any court, state or federal, because the allegations contained therein rely upon facts which are not contained within the trial record, and must therefore be developed in post-conviction relief proceedings.

17 & 18. Applicant was represented before the Circuit Court John D. Delgado, Esquire and Katherine Hudgins, Esquire, Office of John Delgado, Post Office Box 1359, Columbia, South Carolina 29202

Applicant was represented on direct appeal by John S. Nichols, Esquire, Bluestein & Nichols, LLC, 1634 Taylor Street, Post Office Box 7965, Columbia, South Carolina 29202; and John D. Delgado, Esquire and Katherine Hudgins, Esquire, Office of John Delgado, Post Office Box 1359, Columbia, South Carolina 29202.

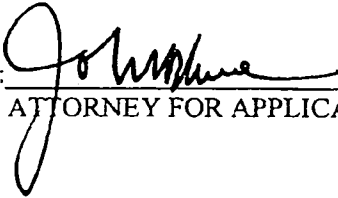
19. Applicant seeks relief from his conviction and sentence.

20. Applicant is not under sentence from any other court

Respectfully submitted,

JOHN H. BLUME
SUSAN B. HACKETT
Blume, Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

BY:



ATTORNEY FOR APPLICANT-

June 30, 2006.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

)
)
)

VERIFICATION

I, Edward Freiburger, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in the this application, and that the matters and allegations therein set forth are true.

Edward Freiburger
EDWARD FREIBURGER

SWORN to and subscribed before me this 4th
day of January, 2006
LA Halliday (L S)
Notary Public

My Commission Expires: 8-29-08

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF
COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Edward Freiburger, hereby apply for leave to proceed in this action without prepayment of fees or costs or security thereof. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor :

Edward Freiburger
EDWARD FREIBURGER
APPLICANT

SWORN to and subscribed before me this

9th day of Jan., 2006

Notary Public

My Commission Expires January 3, 2013

My Commission Expires _____

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2006-CP-40-3866
	)	
Edward Frieburger, 286115,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the Application for Post-Conviction Relief filed July 5, 2006, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was indicted at the June 2001 term of the Court of General Sessions for Richland County for murder (01-GS-40-2955). Applicant was represented by John Delgado, Esquire, and Katherine Hudgins, Esquire. On July 25, 2002, the Applicant proceeded to trial after which he was found guilty of murder. Applicant was sentenced on August 1, 2002, by the Honorable Henry F. Floyd to confinement for a period of life imprisonment under 1961 law.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by John S. Nichols. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. Frieburger, Op. No. 26042 (S.C. Ct. App. filed

September 26, 2005). Applicant perfected a Petition for Writ of Certiorari to the United States Supreme Court which was denied on May 22, 2006.

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, the Applicant's trial transcript, and the Applicant's appellate records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons (not presented in the order as presented in the Application):

1. Ineffective Assistance of Counsel in that:
 - a. Trial counsel failed to conduct a proper investigation
 - b. Trial counsel failed to present necessary expert testimony regarding applicant's mental and physical condition and ballistic evidence.
 - c. Trial counsel failed to object to the prosecutor's improper opening statement.
 - d. Trial counsel failed to object to the prosecutor's improper closing argument.
2. Ineffective Assistance of Appellate Counsel in that:
 - a. Appellate counsel failed to assert on appeal that the prosecutor violated applicant's right to a fair trial during opening statement.
 - b. Appellate counsel failed to assert on appeal that the prosecutor violated applicant's right to a fair trial during closing argument.
3. Juror Misconduct
4. Prosecutorial Misconduct in that:
 - a. Prosecutor rendered an improper statement during opening statement.
 - b. Prosecutor rendered an improper argument during closing argument.
5. Actual Innocence.

III.

The Applicant's first four allegations are claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that

"there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant's fifth and sixth allegations, as presented above, concern allegations of ineffective assistance of appellate counsel. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, Op. No. 25973, 2005 WL 949285 (S.C. Sup. Ct. filed April 25, 2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record

to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent contends that the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this allegation. Sharper, Id.

V.

Applicant's claims of juror misconduct and two allegations of prosecutorial misconduct should be summarily dismissed. This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

VI.

Respondent submits that Applicant's allegation of actual innocence is not a proper claim under the Uniform Post-Conviction Relief Act. S.C. Code § 17-27-20(a)(6) specifically provides that, "this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction." Applicant's claim that he is entitled to relief based on actual innocence is a charge that the evidence

was insufficient to support a conviction and is therefore barred under this Act. Accordingly, this allegation should be denied and dismissed.

VII.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel and ineffective assistance of appellate counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VIII.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

IX

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing be held.

Respectfully Submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

[signatures continued on next page]

ROBERT L. BROWN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

February 6, 2007

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

)
) IN THE COURT OF COMMON PLEAS

2006-CP-40-3866

Edward Frieburger, 286115

Applicant,

vs

State of South Carolina,

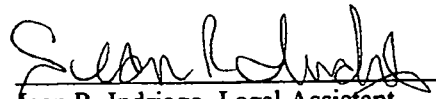
Respondent.

)
)
)
) AFFIDAVIT OF SERVICE BY MAIL
)
)
)
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)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

John H. Blume, III, Esquire
Post Office Box 11744
Columbia, South Carolina 29211

DATED this 7th day of February, 2007.


Jean R. Indriago, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

EDWARD FREIBURGER # 286115,)

Applicant,)

v)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

CA No. CA No 06-CP-40-3866

AMENDED
APPLICATION FOR
POST-CONVICTION RELIEF

FILED
2008 NOV 13 AM 10:50
C.C.C.P. & G.S.

1. Place of Detention: Kirkland Correctional Institution, 4344 Broad River Road Columbia, S C 29210
2. Name and location of Court which imposed sentence. Court of General Sessions, Richland County
3. Name(s) of co-defendant(s) (if any) Not applicable
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) Murder. 01-GS-40-2955.
5. The date upon which sentence was imposed and the terms of the sentence.
 - (a) Sentenced on August 2, 2002; Life
6. A jury returned a verdict of guilty after a plea of not guilty
7. The applicant did appeal from judgment of conviction and sentence.
8.
 - (a) The Courts to which the applicant appealed.
 - (i) South Carolina Court of Appeals, which certified the appeal to the South Carolina Supreme Court pursuant to SCACR 402.
 - (b) The result in each Court to which applicant appealed.

- 9 If you answered "no" to (7), state your reasons for not so appealing: Not applicable.

10(a) *Applicant was deprived of his right guaranteed by the Sixth Amendment and Fourteenth Amendments, as well as the corresponding provisions of the South Carolina Constitution, when he was not permitted to cross-examine and confront the witnesses against him when the trial court permitted the prosecution to introduce testimonial hearsay contained in police reports, witness statements prepared by law enforcement, and other documents*

- 10(b) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec. 14 of the South Carolina Constitution, as a result of trial counsel's failure to adequately preserve the Confrontation Clause and Due Process Clause violations for appellate review*

- 10 (c) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec. 14 of the South Carolina Constitution, as a result of appellate counsel's failure to raise the Confrontation Clause and Due Process Clause violations on direct appeal to the South Carolina Supreme Court*

- 11(c) The allegation states the relevant facts. *Strickland v Washington*, 466 U.S. 668 (1984)
- 10(d) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to present evidence that another individual committed the crime*
- 11(d) Evidence existed that another soldier stationed at Fort Jackson, John Morgan, was observed by witnesses covered in blood the evening of the murder. Furthermore, evidence existed indicating that this individual disappeared shortly thereafter and was never seen again. This evidence, if presented, would have created a reasonable doubt as to Applicant's guilt. *Holmes v South Carolina*, 547 U.S. ___ (2006).
- 10(e) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to adequately challenge the state's ballistic evidence and to present expert testimony regarding Applicant's cognitive and mental deficits and ballistics evidence during Applicant's case-in-chief*
- 11(e) Trial counsel failed to adequately challenge the state's ballistics evidence and to garner and present critical expert testimony regarding Applicant's mental and physical condition and ballistics evidence. At trial, the state relied heavily upon applicant's mental and physical condition when questioned by the investigators. Expert testimony rebutting such testimony would have undercut the state's evidence and theory of the case. In addition, the state's only evidence linking applicant to the crime was expert ballistics testimony. Trial counsel failed to challenge the unscientific evidence presented by state's witness Cayton and failed to present expert testimony rebutting the state's evidence that the bullet, which killed the victim, was discharged from the gun allegedly in applicant's possession. Attacking and rebutting this evidence was critical to mounting a defense to the state's allegations and evidence. Counsel's failure to present expert testimony was deficient performance prejudicing applicant. *Strickland v Washington*, 466 U.S. 668 (1984)
- 10(f) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to present character evidence during Applicant's case-in-chief.*
- 11(f) Applicant had lived a law abiding and productive life as a business man, member of his community and as a husband, father and grandfather. Numerous witnesses were able, willing and ready to provide character evidence on Applicant's behalf. Counsel's failure to call these witnesses was unreasonable and prejudicial. *Strickland v Washington*, 466 U.S. 668 (1984).

- 10(g) *Applicant's right to a fair trial as guaranteed by the United States Constitution and South Carolina law was violated as a result of the prosecutor's improper argument during closing argument*
- 11(g) The prosecutor violated applicant's right to a fair trial by asserting improper argument during his closing argument. Specifically, the prosecutor flagrantly disobeyed the trial court's order that informing the jury that allegedly applicant was absent without leave (AWOL) after the time of the alleged murder was inadmissible evidence because it was more prejudicial than probative, when the prosecutor made multiple references and implications that applicant was AWOL. In addition, the prosecutor told the jury that the blood found in the front seat of the cab was the victim's blood, however, the state presented no evidence that the blood belonged to the victim. Furthermore, the prosecutor improperly compared the alleged murder of the victim to the treatment of a dog. Specifically, the prosecutor stated that the victim's body was "thrown on the side of the road with less dignity than most people would show to the burial of their dog." Prosecutors have a duty to do justice at all times. Every action taken by a prosecutor is to further their duty of doing justice. When a prosecutor engages in improper argument during closing, the prosecutor violates his duty to do justice. *Darden v. Wainwright*, 477 U.S. 168 (1985). Further, the prosecutor violates a defendant's right to a fair trial by presenting improper argument to a jury. *Payne v. Tennessee*, 501 U.S. 808 (1991) *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004), *State v. Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997), *State v. Robinson*, 305 S.C. 469, 409 S.E.2d 404 (1991).
- 10(h) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as result of trial counsel's failure to object to the prosecutor's improper closing argument*
- 11(h) Applicant's trial counsel failed to object to the prosecution's improper closing argument. This failure constituted deficient performance that prejudiced applicant. *Strickland v. Washington*, 466 U.S. 668 (1984)
- 10(i) *Applicant's right to the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of appellate counsel's failure to assert on appeal that the prosecutor violated applicant's fair trial rights during closing argument*
- 11(i) Appellate counsel failed to raise on appeal the prosecutor's repeated and gross violations of applicant's right to a fair trial due to the prosecutor's improper closing argument. Appellate counsel's failure was deficient performance that prejudiced applicant. *Strickland v. Washington*, 466 U.S. 668 (1984)
- 10(j) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated, and*

continues to be violated, because he is actually innocent of the charges

- 11(j) Substantial evidence exists establishing applicant's innocence of the offense for which he was convicted and sentenced. Evidence of applicant's innocence has been revealed through post-trial investigations. Applicant's continued incarceration for a crime he did not commit is a miscarriage of justice and should be remedied immediately
- 12 Applicant has not filed any petitions or applications in the state or federal courts seeking post-conviction or habeas corpus relief, nor has he sought a writ of certiorari from the United States Supreme Court
- 13(a) through (e): Not applicable
- 14 No ground set forth in (10) has been previously presented to this or any other court, state or federal
- 15 Not Applicable
- 16 If any ground for relief set forth in (1) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented
- (a) Ground (10)(a) has not previously been presented to any court, state or federal, because the allegations contained therein rely upon facts which are not contained within the trial record, and must therefore be developed in post-conviction relief proceedings.
- 17 & 18 Applicant was represented before the Circuit Court John D. Delgado, Esquire and Katherine Hudgins, Esquire, Office of John Delgado, Post Office Box 1359, Columbia, South Carolina 29202
- Applicant was represented on direct appeal by John S. Nichols, Esquire, Bluestein

& Nichols, LLC, 1634 Taylor Street, Post Office Box 7965, Columbia, South
Carolina 29202, and John D Delgado, Esquire and Katherine Hudgins, Esquire,
Office of John Delgado, Post Office Box 1359, Columbia, South Carolina 29202

- 19 Applicant seeks relief from his conviction and sentence.
- 20 Applicant is not under sentence from any other court

Respectfully submitted,

JOHN H. BLUME
Cornell Law School
110 Myron Taylor Hall
Ithaca, NY, 14853
(607 255-1030)

BY John A. Blume
ATTORNEY FOR APPLICANT 

November 12, 2008

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EDWARD FREIBURGER # 286115,
Applicant,

v.

STATE OF SOUTH CAROLINA,
Respondent.

IN THE COURT OF COMMON PLEAS
CA No

CERTIFICATE OF SERVICE

FILED
2008 NOV 13 AM 10:50
C.C.C. & G.S.

I, Jill A Rider, hereby certify that I have served upon the attorney for the respondent one (1) copy of APPLICANT'S AMENDED APPLICATION FOR POST CONVICTION RELIEF in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows

Brian Petrano, Esq. Assistant Attorney General
S C Attorney General's Office
P.O Box 11549
Columbia, S C. 29211

This the 12th day of November, 2008, in Columbia, South Carolina.


JILL A. RIDER

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EDWARD FREIBURGER # 286115,
Applicant,

v

STATE OF SOUTH CAROLINA,
Respondent

IN THE COURT OF COMMON PLEAS
CA No. CA No 06-CP-40-3866

SECOND AMENDED
APPLICATION FOR
POST-CONVICTION REVIEW

JEANETTE W. McBRIDE
C.C.P. & G.S.

2009 JUL 15 PM12:24

RICHLAND COUNTY
FILED

- 1 Place of Detention Kirkland Correctional Institution, 4344 Broad River Road Columbia, S C. 29210
- 2 Name and location of Court which imposed sentence: Court of General Sessions, Richland County
- 3 Name(s) of co-defendant(s) (if any): Not applicable
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed
 - (a) Murder 01-GS-40-2955
- 5 The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on August 2, 2002, Life
6. A jury returned a verdict of guilty after a plea of not guilty
- 7 The applicant did appeal from judgment of conviction and sentence
- 8 (a) The Courts to which the applicant appealed:
 - (1) South Carolina Court of Appeals, which certified the appeal to the South Carolina Supreme Court pursuant to SCACR 402.
- (b) The result in each Court to which applicant appealed

- (i) Conviction and sentence were affirmed
- (c) The date of each result
 - (i) September 26, 2005
- (d) Citations of written opinions or orders entered pursuant to such results:
 - (i) The decision of the South Carolina Supreme Court is published at *State v Freiburger*, 366 S C 125, 620 S E 2d 737 (2005)

9 If you answered "no" to (7), state your reasons for not so appealing Not applicable

10 & 11

GROUND FOR RELIEF WITH SUPPORTING FACTS

- 10(a) *Applicant was deprived of his right guaranteed by the Sixth Amendment and Fourteenth Amendments, as well as the corresponding provisions of the South Carolina Constitution, when he was not permitted to cross-examine and confront the witnesses against him when the trial court permitted the prosecution to introduce testimonial hearsay contained in police reports, witness statements prepared by law enforcement, and other documents*
- 11(a) At trial, the prosecution was permitted to introduce testimonial hearsay contained in police reports, witness statements and other documents. Applicant's trial counsel objected to the admission of the evidence but the trial court determined that the evidence was admissible under state exceptions to the hearsay rule. Because the hearsay was testimonial, and because Applicant was thus deprived of the right to cross-examine the witnesses, the admission of the evidence violated the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment and the corresponding provisions of the South Carolina Constitution. *Crawford v Washington*, 541 U S 36 (2004)
- 10(b) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec 14 of the South Carolina Constitution, as a result of trial counsel's failure to adequately preserve the Confrontation Clause and Due Process Clause violations for appellate review*
- 11(b) The allegation states the relevant facts. *Strickland v Washington*, 466 U S. 668 (1984)
- 10(c) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec 14 of the South Carolina Constitution, as a result of appellate counsel's failure to raise the Confrontation Clause and Due Process Clause violations on direct appeal to the South Carolina Supreme Court*

- 11(c) The allegation states the relevant facts *Strickland v Washington*, 466 U S. 668 (1984)
- 10(d) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to present evidence that another individual committed the crime*
- 11(d) Evidence existed that another soldier stationed at Fort Jackson, John Morgan, was observed by witnesses covered in blood the evening of the murder. Furthermore, evidence existed indicating that this individual disappeared shortly thereafter and was never seen again. Evidence also existed indicating that a gun seized from another location inhabited and frequented by known criminals, not applicant's gun, was in fact the murder weapon. This evidence, if presented, would have created a reasonable doubt as to Applicant's guilt. *Holmes v South Carolina*, 547 U S __ (2006).
- 10(e) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to adequately challenge the state's ballistic evidence and to present expert testimony regarding Applicant's cognitive and mental deficits and ballistics evidence during Applicant's case-in-chief*
- 11(c) Trial counsel failed to adequately challenge the state's ballistics evidence and to garner and present critical expert testimony regarding Applicant's mental and physical condition and ballistics evidence. At trial, the state relied heavily upon applicant's mental and physical condition when questioned by the investigators. Expert testimony rebutting such testimony would have undercut the state's evidence and theory of the case. In addition, the state's only evidence linking applicant to the crime was expert ballistics testimony. Trial counsel failed to challenge the unscientific evidence presented by state's witness Cayton and failed to present expert testimony rebutting the state's evidence that the bullet, which killed the victim, was discharged from the gun allegedly in applicant's possession. Attacking and rebutting this evidence was critical to mounting a defense to the state's allegations and evidence. Counsel's failure to present expert testimony was deficient performance prejudicing applicant. *Strickland v Washington*, 466 U S 668 (1984)
- 10(f) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to present character evidence during Applicant's case-in-chief*
- 11(f) Applicant had lived a law abiding and productive life as a business man, member of his community and as a husband, father and grandfather. Numerous witnesses were able, willing and ready to provide character evidence on Applicant's behalf. Counsel's failure to call these witnesses was unreasonable and prejudicial. *Strickland v Washington*, 466 U S 668 (1984)

- 10(g) *Applicant's right to a fair trial as guaranteed by the United States Constitution and South Carolina law was violated as a result of the prosecutor's improper argument during closing argument*
- 11(g) The prosecutor violated applicant's right to a fair trial by asserting improper argument during his closing argument. Specifically, the prosecutor flagrantly disobeyed the trial court's order that informing the jury that allegedly applicant was absent without leave (AWOL) after the time of the alleged murder was inadmissible evidence because it was more prejudicial than probative, when the prosecutor made multiple references and implications that applicant was AWOL. In addition, the prosecutor told the jury that the blood found in the front seat of the cab was the victim's blood, however, the state presented no evidence that the blood belonged to the victim. Furthermore, the prosecutor improperly compared the alleged murder of the victim to the treatment of a dog. Specifically, the prosecutor stated that the victim's body was "thrown on the side of the road with less dignity than most people would show to the burial of their dog." Finally, the prosecutor made other arguments which were not supported by any record evidence including that applicant's friend, Abersold and Tilbury, did not know where applicant was the night of the murder despite the fact they were in the same barracks. Prosecutors have a duty to do justice at all times. Every action taken by a prosecutor is to further their duty of doing justice. When a prosecutor engages in improper argument during closing, the prosecutor violates his duty to do justice. *Darden v Wainwright*, 477 U.S. 168 (1985). Further, the prosecutor violates a defendant's right to a fair trial by presenting improper argument to a jury. *Payne v Tennessee*, 501 U.S. 808 (1991); *Hall v Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004); *State v Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997); *State v Robinson*, 305 S.C. 469, 409 S.E.2d 404 (1991).
- 10(h) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as result of trial counsel's failure to object to the prosecutor's improper closing argument*
- 11(h) Applicant's trial counsel failed to object to the prosecution's improper closing argument. This failure constituted deficient performance that prejudiced applicant. *Strickland v Washington*, 466 U.S. 668 (1984).
- 10(i) *Applicant's right to the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of appellate counsel's failure to assert on appeal that the prosecutor violated applicant's fair trial rights during closing argument*
- 11(i) Appellate counsel failed to raise on appeal the prosecutor's repeated and gross violations of applicant's right to a fair trial due to the prosecutor's improper closing argument. Appellate counsel's failure was deficient performance that prejudiced applicant. *Strickland v*

Washington, 466 U.S. 668 (1984)

- 10(j) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated, and continues to be violated, because newly discovered and obtained evidence reveals that he is actually innocent of the charges*
- 11(j) Substantial evidence exists establishing applicant's innocence of the offense for which he was convicted and sentenced. Evidence of applicant's innocence has been revealed through post-trial investigations and other newly discovered evidence. Applicant's continued incarceration for a crime he did not commit is a miscarriage of justice and should be remedied immediately.
- 12 Applicant has not filed any petitions or applications in the state or federal courts seeking post-conviction or habeas corpus relief, nor has he sought a writ of certiorari from the United States Supreme Court.
- 13(a) through (e) Not applicable
- 14 No ground set forth in (10) has been previously presented to this or any other court, state or federal
- 15 Not Applicable
- 16 If any ground for relief set forth in (1) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Ground (10)(a) has not previously been presented to any court, state or federal, because the allegations contained therein rely upon facts which are not contained within the trial record, and must therefore be developed in post-conviction relief proceedings.
- 17 & 18 Applicant was represented before the Circuit Court John D. Delgado, Esquire and

Katherine Hudgins, Esquire, Office of John Delgado, Post Office Box 1359,
Columbia, South Carolina 29202

Applicant was represented on direct appeal by John S. Nichols, Esquire, Bluestein
& Nichols, LLC, 1634 Taylor Street, Post Office Box 7965, Columbia, South
Carolina 29202; and John D Delgado, Esquire and Katherine Hudgins, Esquire,
Office of John Delgado, Post Office Box 1359, Columbia, South Carolina 29202

- 19 Applicant seeks relief from his conviction and sentence.
- 20 Applicant is not under sentence from any other court

Respectfully submitted,

JOHN H. BLUME
Cornell Law School
110 Myron Taylor Hall
Ithaca, NY, 14853
(607 255-1030)

BY 
ATTORNEY FOR APPLICANT

July 14, 2009

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

EDWARD FREIBURGER # 286115,
Applicant,)

v)

STATE OF SOUTH CAROLINA,
Respondent.)

IN THE COURT OF COMMON PLEAS
CA No.)

CERTIFICATE OF SERVICE)

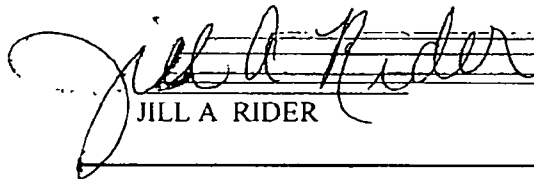
2009 JUL 15 PM 12:24
JEANETTE W. McBRIDE
C.C.P. & G.S.

RICHLAND COURT
FILED

I, Jill A. Rider, hereby certify that I have served upon the attorney for the respondent one (1) copy of APPLICANT'S SECOND AMENDED APPLICATION FOR POST CONVICTION RELIEF in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Brian Petrano, Esq. Assistant Attorney General
S C Attorney General's Office
P O. Box 11549
Columbia, S C. 29211

This the 14th day of July, 2009, in Columbia, South Carolina


JILL A RIDER

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CA No. CA No. 06-CP-40-3866
	)	
EDWARD FREIBURGER # 286115,	)	
<i>Applicant,</i>	)	NOTICE OF INTENT TO RELY UPON
	)	DEPOSITIONS, AFFIDAVITS AND
	)	OTHER DOCUMENTARY EVIDENCE
	)	
v	)	
	)	
STATE OF SOUTH CAROLINA,	)	
<i>Respondent.</i>	)	
	)	
	)	

Applicant, Edward Freiburger, by and through undersigned counsel, hereby informs the Court and counsel for respondent that he intends to offer proof in support of his claims for post-conviction relief through affidavits and other documentary evidence in lieu of live direct examination of selected witnesses at trial. In support of this notification, applicant apprizes this Court of the following relevant facts and legal principles:

1. Applicant, Edward Freiburger, was convicted of murder and sentenced to life imprisonment on August 2, 2002 in Richland County, South Carolina. Applicant filed his initial application for post-conviction relief on July 6, 2006, and an amended application for post-conviction relief on November 12, 2008, and a second amended application on July 15, 2009.

2. In support of his application for post-conviction relief, applicant intends to rely upon depositions, affidavits, and other documentary evidence provided by certain witnesses in lieu of conducting a direct examination of those witnesses at trial. This procedure is expressly authorized by S.C. Code § 17-27-80, which provides that, in a hearing on an application for post-conviction relief, "[a]ll rules and statutes applicable in civil proceedings are available to the parties. The court

may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing" (emphasis added) In *Simpson v. Moore*, 627 S.E.2d 701, 712 (S.C. 2006), the South Carolina Supreme Court explicitly recognized that depositions and affidavits were admissible in capital post-conviction proceedings.

3 By employing this procedure, applicant seeks to expedite the hearing and eliminate the need for live testimony from a number of witnesses, most of whom reside outside the State of South Carolina. In addition to expediting the hearing, utilization of this procedure will result in a significant savings of state resources by obviating the need to expend funds to facilitate the travel of out-of-state witnesses

4 Clearly contemplated by §17-27-80, this procedure is in no way prejudicial to the respondent. On the contrary, respondent will in fact have greater opportunity to see and analyze the witnesses' direct testimony and make an informed decision whether to cross-examine than if the witnesses were simply called for direct examination at the evidentiary hearing

5 With the filing of this Notice, applicant's counsel has provided respondent with photocopies of the following affidavits he intends to admit: Pamela Jordan, Edward Habrowski, Alicia L. Carriquiry, Connie Hosier, Russell P. York, William A. Tobin, and William C. Thompson. It is likely that additional affidavits will be provided as they become available

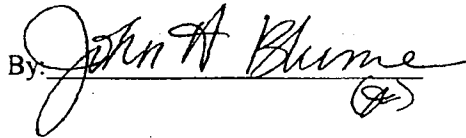
6 Applicant fully acknowledges that respondent has the prerogative to call any or all witnesses deposed by applicant, or those providing affidavits or other documentary evidence, for purposes of cross-examination. Whether to do so, of course, is completely within respondent's discretion. In the event respondent elects to call any or all of the affiants residing outside the State of South Carolina, applicant will cooperate fully with respondent in securing their presence at the

evidentiary hearing.

WHEREFORE, applicant requests that the Court accept the affidavits, and other documentary evidence provided by certain defense witnesses in lieu of a direct examination of those witnesses at trial, as authorized by S.C. Code §17-27-80.

Respectfully submitted,

JOHN H. BLUME
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
(607) 255-1030

By:  

July 28, 2009

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EDWARD FREIBURGER # 286115,

Applicant,

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

CA No CA No 06-CP-40-3866

AFFIDAVIT OF PAMELA JORDAN

Pamela Jordan, who appeared personally before me, affirms and states the following

- 1 I have known Edward Freiburger since we attended kindergarten together at Most Precious Blood Catholic School in Fort Wayne, Indiana I knew Ed in 1961
- 2 We lived in the same neighborhood and attended the same church.
- 3 Ed has a reputation in Fort Wayne, Indiana for peacefulness He had a reputation for peacefulness in 1961 and has continued to have a reputation for peacefulness throughout the entire time I have known him He has never had a reputation for violence
- 4 Ed has a reputation in Fort Wayne, Indiana for being a law-abiding man He had a reputation for being a law-abiding man in 1961 and has continued to have a reputation for being a law-abiding man throughout the entire time I have known him
- 5 Ed was actively involved with the city "Catholic Youth Organization" sports program for many years, utilizing his gifts and talents with children
- 6 Ed set up a lawn care business and had his children work there to teach them responsibility. He expected them to save a percentage of their profits for college.
- 7 Ed has always been a caring, loving, mild mannered person His character and attitude can best be reflected by his day to day living within the prison walls His

letters are always positive and speak of others rather than himself

Pamela R. Jordan
PAMELA R. JORDAN

Sworn to and subscribed before me
this 7th day of may, 2009.

Dynola M. Cripe Dynola M. Cripe
Notary Public for the State of Indiana Allen Co

My commission expires January 30, 2014

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EDWARD FREIBURGER # 286115,
Applicant,

v

STATE OF SOUTH CAROLINA,
Respondent

IN THE COURT OF COMMON PLEAS
CA No. CA No. 06-CP-40-3866

AFFIDAVIT OF
EDWARD P. HABROWSKI

Edward P. Habrowski, who appeared personally before me, affirms and states the following

1. In 1971, I began teaching fifth and sixth grade at Most Precious Blood Parish in Fort Wayne, Indiana. In 1977, I was named principal of the school.
2. I am currently the Assistant Superintendent of the Rensselaer Central Schools Corporation.
3. The Freiburger family has a long association with Most Precious Blood Catholic Parish. I knew Ed's parents, Louis and Hazel Freiburger, as they were stalwart members of the parish and could always be counted on.
4. I taught Ed's two older children, John and Lorrie, in the sixth grade and was later the principal for all three of the Freiburger children. Through the families involvement with Most Precious Blood School and parish our relationship deepened into a lasting friendship.
5. Ed has a reputation in Fort Wayne, Indiana for peacefulness. He has always had a reputation for peacefulness throughout the entire time I have known him. He has never had a reputation for violence.
6. Ed has a reputation in Fort Wayne, Indiana for being a law-abiding man. He has always had a reputation for being a law-abiding man throughout the entire time I have known him.

5 | Ed is a deeply spiritual person and at the request of the priests at Most Precious
| Blood Parish and with a vote of confidence from the parishioners Ed trained as
| Eucharist Minister

6 | Since Ed's incarceration, I have corresponded with him on a weekly basis

Edward P. Habrowski
EDWARD P. HABROWSKI

Sworn to and subscribed before me
this 1 day of June, 2009

Dorothy A. Baiter
Notary Public for the State of Indiana

My commission expires. 6-3-2016

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
EDWARD FREIBURGER # 286115,
Applicant,
v
STATE OF SOUTH CAROLINA,
Respondent.

IN THE COURT OF COMMON PLEAS
CA No. CA No. 06-CP-40-3866

THIRD AMENDED
APPLICATION FOR
POST-CONVICTION RELIEF

JEANETTE
C.C.P. # 1
G.S. # 1
McBRIDE

2009 JUL 31 AM 8:40

RICHLAND COUNTY
FILED

1. Place of Detention. Kirkland Correctional Institution, 4344 Broad River Road Columbia, S.C 29210
2. Name and location of Court which imposed sentence: Court of General Sessions, Richland County
3. Name(s) of co-defendant(s) (if any). Not applicable
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) Murder 01-GS-40-2955.
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on August 2, 2002; Life
6. A jury returned a verdict of guilty after a plea of not guilty
7. The applicant did appeal from judgment of conviction and sentence.
8. (a) The Courts to which the applicant appealed
 - (i) South Carolina Court of Appeals, which certified the appeal to the South Carolina Supreme Court pursuant to SCACR 402
- (b) The result in each Court to which applicant appealed

- 9 If you answered "no" to (7), state your reasons for not so appealing: Not applicable

10(a) *Applicant was deprived of his right of confrontation guaranteed by the Sixth Amendment and Fourteenth Amendments, as well as the corresponding provisions of the South Carolina Constitution, when he was not permitted to cross-examine and confront the witnesses against him when the trial court permitted the prosecution to introduce testimonial hearsay contained in police reports, witness statements prepared by law enforcement, and other documents.*

11(a) At trial, the prosecution was permitted to introduce testimonial hearsay contained in police reports, witness statements and other documents. Applicant's trial counsel objected to the admission of the evidence but the trial court determined that the evidence was admissible under state exceptions to the hearsay rule. Because the hearsay was testimonial, and because Applicant was thus deprived of the right to cross-examine the witnesses, the admission of the evidence violated the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment and the corresponding provisions of the South Carolina Constitution. *Crawford v. Washington*, 541 U.S. 36 (2004).

10(b) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec. 14 of the South Carolina Constitution, as a result of trial counsel's failure to adequately preserve the Confrontation Clause and Due Process Clause violations for appellate review*

11(b) The allegation states the relevant facts. *Strickland v. Washington*, 466 U.S. 668 (1984)

10 (c) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec. 14 of the South Carolina Constitution, as a result of appellate counsel's failure to raise the Confrontation Clause and Due Process Clause violations on direct appeal to the South Carolina Supreme Court*

- 11(c) The allegation states the relevant facts *Strickland v Washington*, 466 U.S. 668 (1984)
- 10(d) *Applicant was denied a) the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution and b) his right to Due Process of Law as a result both of counsel's failure to present evidence that another individual committed the crime and the prosecution's failure to disclose to counsel additional evidence implicating known third parties*
- 11(d) Evidence existed that another soldier stationed at Fort Jackson, John Morgan, was observed by witnesses covered in blood the evening of the murder. Furthermore, evidence existed indicating that this individual disappeared shortly thereafter and went AWOL. Applicant's trial counsel did not present this evidence at trial. Also, Morgan was interviewed by law enforcement in South Carolina after he was found and admitted that he had called a cab to pick him up at Fort Jackson the evening of the murder. The contents of this interview were not disclosed to applicant's trial counsel. Evidence also existed indicating that a gun seized from another location inhabited and frequented by known criminals, not applicant's gun, was in fact the murder weapon. This evidence, if presented, would have created a reasonable doubt as to Applicant's guilt. *Holmes v South Carolina*, 547 U.S. __ (2006).
- 10(e) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to adequately challenge the state's ballistic evidence and to present expert testimony regarding Applicant's cognitive and mental deficits and ballistics evidence during Applicant's case-in-chief*
- 11(e) Trial counsel failed to adequately challenge the state's ballistics evidence and to garner and present critical expert testimony regarding Applicant's mental and physical condition and ballistics evidence. At trial, the state relied heavily upon applicant's mental and physical condition when questioned by the investigators. Expert testimony rebutting such testimony would have undercut the state's evidence and theory of the case. In addition, the state's only evidence linking applicant to the crime was expert ballistics testimony. Trial counsel failed to challenge the unscientific evidence presented by state's witness Cayton, and failed to present expert testimony rebutting the state's evidence that the bullet, which killed the victim, was discharged from the gun allegedly in applicant's possession. Attacking and rebutting this evidence was critical to mounting a defense to the state's allegations and evidence. Furthermore, additional evidence of Cayton's incompetence was available and could have been used to impeach his conclusions. Counsel's failure to present expert testimony was deficient performance prejudicing applicant. *Strickland v Washington*, 466 U.S. 668 (1984)
- 10(f) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South*

Carolina Constitution as a result of counsel's failure to present character evidence during Applicant's case-in-chief

- 11(f) Applicant had lived a law abiding and productive life as a business man, member of his community and as a husband, father and grandfather. Numerous witnesses were able, willing and ready to provide character evidence on Applicant's behalf. Counsel's failure to call these witnesses was unreasonable and prejudicial *Strickland v Washington*, 466 U.S. 668 (1984).
- 10(g) *Applicant's right to a fair trial as guaranteed by the United States Constitution and South Carolina law was violated as a result of the prosecutor's improper argument during closing argument*
- 11(g) The prosecutor violated applicant's right to a fair trial by asserting improper argument during his closing argument. Specifically, the prosecutor flagrantly disobeyed the trial court's order that informing the jury that allegedly applicant was absent without leave (AWOL) after the time of the alleged murder was inadmissible evidence because it was more prejudicial than probative, when the prosecutor made multiple references and implications that applicant was AWOL. In addition, the prosecutor told the jury that the blood found in the front seat of the cab was the victim's blood, however, the state presented no evidence that the blood belonged to the victim. Furthermore, the prosecutor improperly compared the alleged murder of the victim to the treatment of a dog. Specifically, the prosecutor stated that the victim's body was "thrown on the side of the road with less dignity than most people would show to the burial of their dog." Finally, the prosecutor made other arguments which were not supported by any record evidence including that applicant's friend, Abersold and Tilbury, did not know where applicant was the night of the murder despite the fact they were in the same barracks. Prosecutors have a duty to do justice at all times. Every action taken by a prosecutor is to further their duty of doing justice. When a prosecutor engages in improper argument during closing, the prosecutor violates his duty to do justice. *Darden v Wainwright*, 477 U.S. 168 (1985). Further, the prosecutor violates a defendant's right to a fair trial by presenting improper argument to a jury. *Payne v. Tennessee*, 501 U.S. 808 (1991); *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004); *State v. Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997); *State v. Robinson*, 305 S.C. 469, 409 S.E.2d 404 (1991).
- 10(h) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as result of trial counsel's failure to object to the prosecutor's improper closing argument*
- 11(h) Applicant's trial counsel failed to object to the prosecution's improper closing argument. This failure constituted deficient performance that prejudiced applicant. *Strickland v Washington*, 466 U.S. 668 (1984).
- 10(i) *Applicant's right to the effective assistance of appellate counsel as guaranteed by the Sixth*

and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of appellate counsel's failure to assert on appeal that the prosecutor violated applicant's fair trial rights during closing argument

- 11(i) Appellate counsel failed to raise on appeal the prosecutor's repeated and gross violations of applicant's right to a fair trial due to the prosecutor's improper closing argument. Appellate counsel's failure was deficient performance that prejudiced applicant. *Strickland v Washington*, 466 U.S. 668 (1984).
- 10(j) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated, and continues to be violated, because newly discovered and obtained evidence reveals that he is actually innocent of the charges*
- 11(j) Substantial evidence exists establishing applicant's innocence of the offense for which he was convicted and sentenced. Evidence of applicant's innocence has been revealed through post-trial investigations and other newly discovered evidence. Applicant's continued incarceration for a crime he did not commit is a miscarriage of justice and should be remedied immediately.
- 12 Applicant has not filed any petitions or applications in the state or federal courts seeking post-conviction or habeas corpus relief, nor has he sought a writ of certiorari from the United States Supreme Court.
- 13(a) through (c) Not applicable.
- 14 No ground set forth in (10) has been previously presented to this or any other court, state or federal.
- 15 Not Applicable
- 16 If any ground for relief set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented.
 - (a) The grounds for relief in this application have not previously been presented to any court, state or federal, because the allegations contained therein rely upon facts which

are not contained within the trial record, and must therefore be developed in post-conviction relief proceedings

17 & 18. Applicant was represented before the Circuit Court John D Delgado, Esquire and Katherine Hudgins, Esquire, Office of John Delgado, Post Office Box 1359, Columbia, South Carolina 29202.

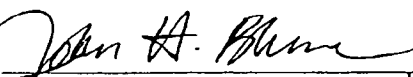
Applicant was represented on direct appeal by John S. Nichols, Esquire, Bluestein & Nichols, LLC, 1634 Taylor Street, Post Office Box 7965, Columbia, South Carolina 29202; and John D Delgado, Esquire and Katherine Hudgins, Esquire, Office of John Delgado, Post Office Box 1359, Columbia, South Carolina 29202

19 Applicant seeks relief from his conviction and sentence.

20. Applicant is not under sentence from any other court.

Respectfully submitted,

JOHN H. BLUME
Cornell Law School
110 Myron Taylor Hall
Ithaca, NY, 14853
(607 255-1030)

BY: 
ATTORNEY FOR APPLICANT 

July 29, 2009

STATE OF SOUTH CAROLINA,
Respondent.

IN THE COURT OF COMMON PLEAS
CA No.

CERTIFICATE OF SERVICE

I, Jill A. Rider, hereby certify that I have served upon the attorney for the respondent one (1) copy of APPLICANT'S THIRD AMENDED APPLICATION FOR POST CONVICTION RELIEF in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows

Brian Petrano, Esq. Assistant Attorney General
S.C. Attorney General's Office
P.O. Box 11549
Columbia, S C 29211

This the 30th day of July, 2009, in Columbia, South Carolina.

Jill A. Rider
JILL A RIDER

JEANETTE W. McBRIDE
C.C.P. & G.S.

2009 JUL 34 AM 8:40

RICHLAND COUNTY
FILED

STATE OF SOUTH CAROLINA)	
COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS
	2006CP4003866
Edward Freiburger, 286115,)	
Applicant,)	
v.)	OBJECTION TO USE OF AFFIDAVITS,
State of South Carolina,)	DEPOSITIONS, AND OTHER
Respondent.)	DOCUMENTARY EVIDENCE IN LIEU
	OF LIVE TESTIMONY

This matters comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed July 5, 2006. The Respondent made its return on February 9, 2007. An Amended Application for PCR was filed on November 13, 2008.¹ Another amendment, captioned "Second Amended Application for Post-Conviction Relief," was filed on July 15, 2009. The Applicant filed a "Third Amended Application for Post-Conviction Relief" on August 3, 2009. This motion is in response to the Applicant's July 30, 2009 "Notice of Intent to Rely on Depositions, Affidavits, and Other Documentary Evidence."

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was indicted by the June 2001 term of the Richland County

¹ The Applicant also made requests for transport to undergo medical procedures (an MRI) regarding investigation in connection with his application for post-conviction relief that may yield evidence relevant to one or more of the grounds for relief in the application for post-conviction relief

Grand Jury for murder (01-GS-40-2955) The Applicant was represented by John Delgado, Esquire, and Katherine Hudgins, Esquire. On July 25, 2002, the Applicant proceeded to trial after which he was found guilty of murder. Applicant was sentenced on August 1, 2002, by the Honorable Henry F. Floyd to confinement for a period of life imprisonment under 1961 law.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by John S Nichols. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. Frieburger, Op. No. 26042 (S.C. Ct. App filed September 26, 2005). Applicant perfected a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on May 22, 2006.

II.

According to the latest version of the Applicant's PCR application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

10 & 11.

GROUND FOR RELIEF WITH SUPPORTING FACTS

- 10(a) *Applicant was deprived of his right of confrontation guaranteed by the Sixth Amendment and Fourteenth Amendments, as well as the corresponding provisions of the South Carolina Constitution, when he was not permitted to cross-examine and confront the witnesses against him when the trial court permitted the prosecution to introduce testimonial hearsay contained in police reports, witness statements prepared by law enforcement, and other documents*
- 11(a) *At trial, the prosecution was permitted to introduce testimonial hearsay contained in police reports, witness statements and other documents. Applicant's trial counsel objected to the admission of the evidence but the trial court determined that the evidence was admissible under state exceptions to the hearsay rule. Because the hearsay was testimonial, and because Applicant was thus deprived of the right to cross-examine the witnesses, the admission of the evidence violated the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment and the corresponding provisions of the South Carolina Constitution. *Crawford v. Washington*, 541 U.S. 36 (2004).*
- 10(b) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec. 14 of the South Carolina Constitution, as a result of trial counsel's failure to adequately preserve the Confrontation Clause and Due Process Clause violations for appellate review*
- 11(b) *The allegation states the relevant facts. *Strickland v. Washington*, 466 U.S. 668 (1984).*
- 10(c) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec. 14 of the South Carolina Constitution, as a result of appellate counsel's failure to raise the Confrontation Clause and Due Process Clause violations on direct appeal to the South Carolina Supreme Court.*

- 11(c) The allegation states the relevant facts *Strickland v. Washington*, 466 U.S. 668 (1984).
- 10(d) *Applicant was denied a) the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I §14 of the South Carolina Constitution and b) his right to Due Process of Law as a result both of counsel's failure to present evidence that another individual committed the crime and the prosecution's failure to disclose to counsel additional evidence implicating known third parties*
- 11(d) Evidence existed that another soldier stationed at Fort Jackson, John Morgan, was observed by witnesses covered in blood the evening of the murder. Furthermore, evidence existed indicating that this individual disappeared shortly thereafter and went AWOL. Applicant's trial counsel did not present this evidence at trial. Also, Morgan was interviewed by law enforcement in South Carolina after he was found and admitted that he had called a cab to pick him up at Fort Jackson the evening of the murder. The contents of this interview were not disclosed to applicant's trial counsel. Evidence also existed indicating that a gun seized from another location inhabited and frequented by known criminals, not applicant's gun, was in fact the murder weapon. This evidence, if presented, would have created a reasonable doubt as to Applicant's guilt. *Holmes v. South Carolina*, 547 U.S. ___ (2006).
- 10(c) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to adequately challenge the state's ballistic evidence and to present expert testimony regarding Applicant's cognitive and mental deficits and ballistics evidence during Applicant's case-in-chief*
- 11(e) Trial counsel failed to adequately challenge the state's ballistics evidence and to garner and present critical expert testimony regarding Applicant's mental and physical condition and ballistics evidence. At trial, the state relied heavily upon applicant's mental and physical condition when questioned by the investigators. Expert testimony rebutting such testimony would have undercut the state's evidence and theory of the case. In addition, the state's only evidence linking applicant to the crime was expert ballistics testimony. Trial counsel failed to challenge the unscientific evidence presented by state's witness Cayton, and failed to present expert testimony rebutting the state's evidence that the bullet, which killed the victim, was discharged from the gun allegedly in applicant's possession. Attacking and rebutting this evidence was critical to mounting a defense to the state's allegations and evidence. Furthermore, additional evidence of Cayton's incompetence was available and could have been used to impeach his conclusions. Counsel's failure to present expert testimony was deficient performance prejudicing applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).
- 10(f) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I §14 of the South*

Carolina Constitution as a result of counsel's failure to present character evidence during Applicant's case-in-chief

- 11(f) Applicant had lived a law abiding and productive life as a business man, member of his community and as a husband, father and grandfather. Numerous witnesses were able, willing and ready to provide character evidence on Applicant's behalf. Counsel's failure to call these witnesses was unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984).
- 10(g) Applicant's right to a fair trial as guaranteed by the United States Constitution and South Carolina law was violated as a result of the prosecutor's improper argument during closing argument.
- 11(g) The prosecutor violated applicant's right to a fair trial by asserting improper argument during his closing argument. Specifically, the prosecutor flagrantly disobeyed the trial court's order that informing the jury that allegedly applicant was absent without leave (AWOL) after the time of the alleged murder was inadmissible evidence because it was more prejudicial than probative, when the prosecutor made multiple references and implications that applicant was AWOL. In addition, the prosecutor told the jury that the blood found in the front seat of the cab was the victim's blood, however, the state presented no evidence that the blood belonged to the victim. Furthermore, the prosecutor improperly compared the alleged murder of the victim to the treatment of a dog. Specifically, the prosecutor stated that the victim's body was "thrown on the side of the road with less dignity than most people would show to the burial of their dog." Finally, the prosecutor made other arguments which were not supported by any record evidence including that applicant's friend, Abersold and Tilbury, did not know where applicant was the night of the murder despite the fact they were in the same barracks. Prosecutors have a duty to do justice at all times. Every action taken by a prosecutor is to further their duty of doing justice. When a prosecutor engages in improper argument during closing, the prosecutor violates his duty to do justice. *Darden v. Wainwright*, 477 U.S. 168 (1985). Further, the prosecutor violates a defendant's right to a fair trial by presenting improper argument to a jury. *Payne v. Tennessee*, 501 U.S. 808 (1991); *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004); *State v. Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997); *State v. Robinson*, 305 S.C. 469, 409 S.E.2d 404 (1991).
- 10(h) Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as result of trial counsel's failure to object to the prosecutor's improper closing argument.
- 11(h) Applicant's trial counsel failed to object to the prosecution's improper closing argument. This failure constituted deficient performance that prejudiced applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).
- 10(i) Applicant's right to the effective assistance of appellate counsel as guaranteed by the Sixth

and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of appellate counsel's failure to assert on appeal that the prosecutor violated applicant's fair trial rights during closing argument

- 11(i) Appellate counsel failed to raise on appeal the prosecutor's repeated and gross violations of applicant's right to a fair trial due to the prosecutor's improper closing argument. Appellate counsel's failure was deficient performance that prejudiced applicant. *Strickland v. Washington*, 466 U.S. 668 (1984)
- 10(j) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated, and continues to be violated because newly discovered and obtained evidence reveals that he is actually innocent of the charges*
- 11(j) Substantial evidence exists establishing applicant's innocence of the offense for which he was convicted and sentenced. Evidence of applicant's innocence has been revealed through post-trial investigations and other newly discovered evidence. Applicant's continued incarceration for a crime he did not commit is a miscarriage of justice and should be remedied immediately.

- 19 Applicant seeks relief from his conviction and sentence.

III.

OBJECTION TO THE APPLICANT'S "NOTICE OF INTENT TO RELY ON DEPOSITIONS, AFFIDAVITS, AND OTHER DOCUMENTARY EVIDENCE"

The Respondent respectfully objects to the Applicant's attempt to prevent this Court from hearing live testimony. The opportunity for the PCR court to "directly observe witnesses" is paramount. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993).

It is in fact true that our PCR act generally provides: "The court may receive proof by affidavits, depositions, oral testimony, or other evidence and may order the applicant brought before it for hearing". S.C. Code Ann. § 17-27-80 (1985). And, our State Supreme Court has held it was not an abuse of discretion for a PCR judge to admit an affidavit of a guilty plea judge in a non-capital PCR. Beckett v. State, 278 S.C. 223, 294 S.E.2d 46 (1982). However, this general provision in section 17-27-80 is an aspect of the Uniform Post-Conviction Act that contemplates quick, summary resolution of all but the most complex PCR actions. That the provision is only supposed to address summary resolution of the easiest cases is confirmed by the second half of the sentence, which notes that "the court may order the applicant brought before it for hearing" S.C. Code Ann. § 17-27-80 (1985). In contrast, South Carolina, unlike many other states, has full hearings on virtually every PCR, whether from the most routine guilty plea to the most complex conspiracy trial.

S.C. Code of Laws § 17-27-150 provides:

A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise....

The Respondent is concerned regarding several statements in the Applicant's motion that refer to depositions in the past-tense, i.e. implying that depositions have been conducted absent a granting of discovery by showing of good cause and absent notice to the Respondent allowing an opportunity to be present and/or cross-examine. The Respondent submits that the use of depositions and/or subpoenas in non-capital PCR matters, when no discovery has been ordered, is improper.²

Since the Rules of Civil Procedure are applicable to PCR, then those rules should properly govern the admissibility of depositions and affidavits. Even assuming that the Applicant demonstrated good cause and the PCR court granted a limited use of discovery, the Rules of Civil Procedure provide the proper method for a party to freely use a deposition for any purpose at trial. See Rule 32(a)(3), SCRCP. Rule 32(a)(3) sets forth upon the party wishing to use the depositions a burden to show unavailability by one of various ways. The Applicant is required to make this showing of unavailability by affidavit, sworn testimony, or other evidence. The bare assertion of counsel is insufficient. Archie Bell Construction Co. v Norman, 311 S.C. 84, 427 S.E 2d 689 (Ct App 1993) (citing Stone v. Guaranty

² The Respondent notes that this is not a motion to quash any potential subpoena that may have or may be issued (without good cause shown), as it is the Respondent's position that construing this motion as a motion to quash could potentially constrain any arguments per the limited protection afforded by Rule 45(c)(3)(a), SCRCP. Instead, the Respondent, via this motion, takes the position that the use of subpoenas/discovery/depositions in non-capital PCR matters is improper, unless the judge in the exercise of discretion, and for good cause shown, grants leave to do so. If good cause is demonstrated and the judge grants leave to invoke limited discovery, the Respondent reserves its right to move to quash, per Rule 45(c)(3)(a), SCRCP, if applicable.

Bank and Trust Co., 270 S.C 331, 242 S.E.2d 404 (1978)). No showing of unavailability has been made in this case.

Even without regard to the preceding argument, the admission of the depositions and affidavits is simply an unfair way to litigate a case. The Rules of Civil Procedure incorporate "the long-established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person". Wright, Miller, and Marcus, Federal Practice and Procedure § 2142 (2nd ed. 1994).

The principles of the discovery procedure, as already pointed out, are designed to permit great freedom in the taking of depositions for discovery. The use of depositions as evidence at trial is another matter. At the discovery stage, the scope of relevance is very broad. The same scope that is permitted in the taking of testimony by deposition might be prejudicial at trial. Wright, Miller, and Marcus, Federal Practice and Procedure § 2142 (2nd ed. 1994). In any event, discovery has not been authorized in the case at hand per S.C. Code § 17-27-150. Here, the mere desire to expedite is insufficient to override the fundamental principle of litigation: that cases are decided on the basis of evidence presented in the courtroom.

Further, at the time these depositions were taken, the Applicant had only filed its first amendment (of three), which was extraordinarily general regarding the ballistics issue(s) and did not adequately give notice of specific issues that appear to be those ultimately raised. The Applicant did not send Respondents his 2nd or 3rd Amended Application until after procuring affidavits. To this date, the

Applicant has not even bothered to include affiant contact information amongst the affidavits submitted in his recent motion.

In his recent motion the Applicant notices this Court and the State that he intends to rely on depositions at the PCR hearing. Once again, the Respondent submits that discovery has NOT been granted and conducting depositions is a flagrant violation of S.C Code of Laws § 17-27-150(A) and any depositions should not be permitted to be introduced at the PCR hearing. In his recent motion/notice the Applicant suggests that if the Respondent (or this Court) desires to examine any of the Applicant's affiants then it is up to the Respondent to produce them, i.e. the Respondent is responsible for procuring the Applicant's witnesses. This is a direct contradiction of Rule 71 1(e), SCRPC (the Applicant has the burden of proof in PCR). He cannot meet his burden in such a cavalier manner, by merely designating depositions and affidavits and transferring the burden to produce his witnesses to Respondent if the Respondent (or this Court) wish to have a fair and effective opportunity to cross-examine the witnesses with all the necessary information ³

Regarding the affidavits included in the Applicant's recent notice, the Respondent of course did not have any chance to cross-examine these affiants or participate in the depositions. See Rule 32(a), SCRPC. To place upon Respondent the burden of locating and subpoenaing the affiants because the Applicant sends along copies of the affidavits days before trial would turn the entire normal course of litigation on its head in a grossly unfair manner. It is absurd for the Applicant to

³ Once again, there is no contact information provided in the proposed affidavits. There is not a single address, phone number, or even email address, presumably the Respondent or this Court is expected to Google search and hope the correct person is located

merely designate affidavits and simply suggest to Respondents, 'Well, if you want to examine them, you produce them'.

It is simply unfair for a plaintiff to file a general complaint (later amended), conduct depositions without notice to the Respondent, procure some affidavits from all sorts of people, and then place all of the burden, both monetary and logistical, on the opposing party to call the witnesses if to exercise its right to fair cross-examination. Further, any contention that this is OK because the State is a party is not only irrelevant but also incorrect: the State is entitled to fair reliance on the rules and a fair day in court just like any other party, and especially in these budgetary times the State does not possess overwhelming resources or manpower -- especially in a non-capital PCR when no discovery has been authorized.

IV.

WHEREFORE, having made its Return to the Applicant's "Notice of Intent to Rely on Depositions, Affidavits, and Other Documentary Evidence", the Respondent requests that the use of affidavits not be allowed, particularly for purported experts. In addition, if the Applicant's recent motion is correct and depositions have been conducted absent the granting of discovery, and without notice to the Respondent, then those depositions or any other discovery results in any form should be stricken from the record for failing to comply with S.C. Code of Laws § 17-27-150(A) and for failing to demonstrate that the Applicant's witnesses are indeed unavailable.

Respectfully Submitted,

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August 4, 2009

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

)
) IN THE COURT OF COMMON PLEAS

2006-CP-400-3866

Edward Freiburger, 286115

Applicant,

vs

State of South Carolina,

Respondent.

)
)
)
) AFFIDAVIT OF SERVICE BY MAIL
)
)
)
)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
- 3 I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

John H. Blume, III, Esquire
Post Office Box 11744
Columbia, South Carolina 29211

DATED this 4th day of August, 2009.


Jean R. Indriago, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

EDWARD FREIBURGER # 286115,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent)

IN THE COURT OF COMMON PLEAS
CA No. CA No 06-CP-40-3866

PRETRIAL BRIEF

FILED
2009 AUG -4 PM 3:46
JEANETTE H. MCBRIDE
C.C.P. & G.S.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

Edward Freiburger, who is currently sixty-five years old, was convicted on August 2, 2002, of the 1961 murder of Columbia, South Carolina cabdriver, John Orner. Freiburger was a private in the army stationed at Fort Jackson in 1961. After being discharged from the military following a court-martial for an unrelated offense, Mr. Freiburger moved back to his home just outside Fort Wayne, Indiana, where he married and raised three children while working as a manager for Sears. Between his discharge from the army, and his arrest in April of 2001, Mr. Freiburger led a completely law-abiding life. He was gainfully employed, a loving father and then grandfather, and he was active in his church and in his community. As the affidavits, and other testimony that will be presented at the hearing reveal, Edward Freiburger was in all respects a wonderful person and a model citizen. After he was indicted for the 1961 murder, Mr. Freiburger drove down from Indiana to South Carolina to turn himself in. Tr. 212.

As noted above, Mr. Freiburger was charged in 2001 with the 1961 murder of John Orner. Tr. 294-98. Several days after Orner was killed, Freiburger was stopped by a Tennessee Highway patrolman, Donald Meredith, for hitchhiking. Tr. 561. Meredith testified he stopped Freiburger because it was dangerous to be out walking or hitchhiking on the road as people had

been struck by cars in the vicinity. Tr. 562. While patting Freiburger down, before putting him in the patrol car, Meredith discovered a gun on Freiburger's person and seized it Tr. 563-64

After Freiburger's Tennessee arrest, Richland County authorities investigating Orner's murder requested and were given the revolver that had been seized from Freiburger by Patrolman Meredith. Tr. 565. After extensive testing on the weapon, the results were inconclusive as to whether it was the weapon used in Orner's death Tr. 584 In fact, one SLED examiner initially determined that another similar gun, seized from the home of a known local thief, fired the bullet that killed Orner. As a result of the lack of evidence, no charges were filed at that time. Forty years later, however, in August of 2000, the Richland County Sheriff's Department's new "cold case" unit reopened the Orner case. Numerous Richland County and SLED examiners again did ballistics tests, but the results were still inconclusive. The Richland County Sheriff's Department then retained a Firearms and Tool Mark Examiner from Missouri, John Cayton, who concluded, contrary to all previous examiners, that the weapon retrieved from Freiburger in 1961 was the murder weapon, to the exclusion of any other weapon ever made Tr. 725.¹

Based on Mr. Cayton's conclusions, and other weak circumstantial evidence, Edward Freiburger was charged with Orner's murder. As will be discussed below, the trial was permeated with evidence the jury should not have heard, e.g., Cayton's scientifically unsound ballistics evidence, prejudicial testimonial hearsay and improper statements during the prosecutor's closing argument. Furthermore, the jury was deprived of evidence it should have heard including, for example, the possibility that known third parties may have committed the murder and testimony regarding applicant's non-violent character traits. As a result of the

¹ Applicant will present evidence at the post-conviction relief hearing demonstrating that there is a) no scientific basis for Cayton's conclusions and mistakes Cayton made in other cases and b) evidence of his incompetence.

combination of prosecutorial misconduct and ineffective assistance of counsel, the jury convicted Edward Freiburger, and he was sentenced to life imprisonment on August 2, 2002. The Supreme Court of South Carolina affirmed that conviction on September 26, 2005, and subsequently denied a timely petition for rehearing on November 2, 2005. *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005). The Supreme Court of the United States denied certiorari on May 22, 2006. Applicant then filed an application for post-conviction relief, which has been amended on several occasions.

As will be set forth in detail below, Mr. Freiburger was denied a fair adjudication of his guilt-or-innocence because of the improper admission of evidence, improper argument, and trial counsel's failure to present relevant evidence which would have undermined the prosecution's case. Furthermore, newly discovered evidence of Mr. Freiburger's innocence, a f-MRI examination revealing he did not kill John Orner, will also be presented.

GROUND FOR RELIEF WITH SUPPORTING FACTS AND ARGUMENT

A. Mr. Freiburger's right to confront the witnesses against him as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of the admission of testimonial statements by witnesses who did not testify and who Mr. Freiburger had no opportunity to cross-examine. (Ground 10(a)).

I. Relevant Facts.

At applicant's trial, the prosecution was permitted, over objection, to prove its case with testimonial hearsay that should have been barred by the Confrontation Clause. The hearsay came primarily through two witnesses. Former City of Columbia Police Department Officer Charles Clark was allowed to publish verbatim much of the contents of a Columbia Police Department 1961 missing person report (state's exhibit No. 24).² Clark was not responsible for

² This evidence was admitted over defense counsel's objection that the report did not fall within

preparing the report, but instead merely read the contents and authenticated the report as a document prepared by the Columbia Police Department Tr. 294-98 The report contained information obtained during interviews conducted by law enforcement officers in the course of their investigation of the victim's disappearance and subsequently relayed by a police dispatcher to the victim's stepson. *Id* at 296. The dispatcher informed the stepson that his stepfather's cab had been seen parked at 4:00 a.m. *Id* at 296 The dispatcher also reported that the taxi had received its last phone call at 11:15 p m., and then proceeded to the N.C.O. Club at Fort Jackson *Id* at 296.

Additionally, the report also contained information obtained by Detective Rollinson, Sergeant Hartell, and F.J. Revetta after locating the victim's abandoned cab *Id* The officers reported that the meter read \$17.55. *Id* at 296 Additionally, the officers noted in the report that, after towing the vehicle, blood was found on the seat of the taxi, as well as identification papers, and a small amount of change. *Id* at 297 None of these individuals (the dispatcher, Detective Rollinson, Sergeant Hartell, or F.J. Revetta) were called as witnesses at applicant's trial, and therefore, applicant had no opportunity for cross-examination

During the testimony of Gary Abersold, who had been stationed at Fort Jackson with Mr. Freiburger, the prosecution asked him to recount two statements he made to Captain Nichols more than 40 years earlier when Abersold was interviewed by Nichols during the course of the investigation. The statements were signed by Mr. Sudano, Captain Nichols, and Lex Price, all of whom were unavailable to testify. *Id* at 453. Defense counsel objected, arguing that he could not, "cross-examine Mr. Sudano (phonetic) or Captain Nichols ..We can't cross-examine Deputy

South Carolina Rules of Evidence 803(6) dealing with business records, or 803(16) pertaining to ancient documents. Tr. 294. There was no specific mention of the Confrontation Clause by any of the parties at this point in the trial

Sheriff Lex Price” *Id* Mr Abersold acknowledged that he had no independent recollection of some of the information in these statements, *Id* at 450-51,³ yet the court still allowed the statements to be published to the jury. The record is clear that the prosecution did not use the statements to refresh Abersold’s recollection, but instead had Abersold present his testimonial hearsay statements as substantive evidence.

The prosecution made significant use of both Clark and Abersold’s testimony during summation, reminding the jury of specific answers Abersold gave during his testimony, including Abersold’s response that he accompanied applicant to Columbia to pawn a radio, and that he had received a round of 32-caliber ammunition from Freiburger Tr. 954-55. The prosecution continued by reminding the jury about the details found in the police report testified to by Clark. The prosecution noted the deceased’s stepson’s call to the police dispatcher as well as the loose change and blood found in the deceased’s cab, belonging to Mr. Orner. *Id* at 957. This evidence was used to support its contention that Mr. Orner was most likely killed by a soldier from Fort Jackson.

II. Relevant Legal Principles and Argument.

The Confrontation Clause provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. In South Carolina, the right is guaranteed not only by the Sixth and Fourteenth Amendments, but by the corresponding State Constitution. *State v. Green*, 239 S.E.2d 485, 487 (S.C. 1977) (citing S.C. Const. art. I, § 14).

³ Q: “Is it a fair statement to say that there’s answers to certain questions, factual information in those statements, that you have no independent recollection of?” A: “Yes”

In *Crawford v. Washington*, 541 U.S. 36, 68 (2004),⁴ the Supreme Court held that even well established exceptions to the hearsay rule do not trump the Confrontation Clause. The Supreme Court reversed Crawford's assault and battery conviction, holding that the trial court should not have admitted a statement provided to law enforcement by the defendant's wife even though state privilege law prevented the prosecution from forcing Crawford's wife to testify. The state trial court concluded that the statement was admissible because it fell within a state hearsay exception for statements against penal interest. Wash. Rule Evid. 804(b)(3) (2003). The Supreme Court, however, held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

Since *Crawford*, the Supreme Court of the United States and the South Carolina Supreme Court have consistently recognized that witness unavailability and a prior opportunity for cross-examination are required whenever the prosecution seeks to admit testimonial hearsay evidence. See, e.g., *State v. Mitchell*, 662 S.E.2d 493 (S.C. 2008) (holding that the admission of an accomplice's prior statement to police under the hearsay exception violated the Confrontation Clause).⁵ The Supreme Court has clarified the requirement that statements be testimonial in recent years as well. In *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court held that statements taken by law enforcement as part of a criminal investigation squarely fall in the

⁴ *Crawford* applies retroactively to applicant's case because applicant's conviction was not final on direct review at the time *Crawford* was decided. *Crawford* was decided on March 8, 2004. The South Carolina Supreme Court affirmed applicant's conviction on September 26, 2005, and the United States Supreme Court denied certiorari on May 22, 2006.

⁵ Indeed the only current exception to this rule is when a defendant acts with the clear and explicit intention to prevent a witness from testifying. See *Giles v. California*, 128 S.Ct. 2678 (2008).

category of testimonial hearsay. See also *Melendez-Diaz v. Massachusetts*, 2009 WL 1789468 (U.S., June 25, 2009)

The hearsay evidence admitted at Mr. Freiburger's trial was clearly testimonial, there was no prior opportunity for cross-examination and thus its admission deprived applicant of the right to confront the witnesses against him. Retired police officer Clark's testimony, and the report he published was replete with information obtained by law enforcement during the investigation of the case, and which was presented for its truth. The numerous hearsay statements contained in the police report were precisely the type of testimonial hearsay which the Confrontation Clause forbids. *Davis v. Washington*, 547 U.S. at 822 (statements, "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."), see also *Cuyuch v. State*, 667 S.E.2d 85, 89 (Ga. 2008) (witnesses identification of the defendant at the crime scene was made for the purpose of establishing past facts with a view to a future prosecution making the statement testimonial in nature), *State ex rel. J.A.*, 949 A.2d 790, 791 (N.J. 2008) (holding that statements describing a robbery committed ten minutes earlier were testimonial). Nor does the fact that the report may have satisfied a business records or other hearsay rule exception exempt the records from the rigors of the Confrontation Clause. The Court recently noted in *Melendez-Diaz, supra*, that it has been clear for decades that if the regularly conducted business activity is the production of evidence for use at trial, the evidence is subject to the right of Confrontation. 2009 WL 1789468 at *10.

The trial court also violated applicant's Confrontation Clause rights when it admitted statements made to law enforcement by Gary Abersold. Again, the evidence was hearsay, i.e. out of court statements by Abersold offered for the truth of the matter. And again, the statements

were clearly testimonial, as the police obtained them as part of their criminal investigation. While it is true that Mr. Abersold was physically present in court, his complete and total inability to recall the information contained in the statements meant that Mr. Freiburger had no opportunity for cross-examination. The statements were not simply provided to Abersold to refresh his recollection, *U.S. v. Riccardi*, 174 F.2d 883 (3rd Cir. 1949) (holding that in order for the recollection, not the writing, to come in as evidence, the witness must have an independent recollection aside from the writing); indeed, Abersold made clear that he had no recollection of the events even after he reviewed the statements. Rather, Abersold's prior testimonial hearsay statements were admitted as substantive evidence of applicant's guilt.

The improper admission of testimonial hearsay was extremely prejudicial. The State's case was entirely circumstantial consisting of hotly contested ballistics evidence, evidence tending to suggest that the victim may have been by a soldier at Fort Jackson, and evidence that Freiburger had the type of gun and bullets likely used in the victim's murder. The improperly admitted hearsay provided important links in the prosecution's chain of circumstantial evidence. The improperly admitted hearsay's prejudicial effect was emphasized by the prosecution during summation. See *Arizona v. Fulminante*, 499 U.S. 279, 298 (1991) (emphasizing that the prosecution's use of evidence during summation can demonstrate the absence of harmless error), *Hofman v. Weber*, 639 N.W.2d 523 (S.D. 2002) (finding that prejudice was demonstrated by the state's use of tainted evidence during closing). After the prosecutor acknowledged that circumstantial evidence was key to the case, Tr. 947, he reiterated specific answers Abersold gave during his testimony, including Abersold's response that he accompanied the applicant to Columbia to pawn a radio, and that he had received a round of 32-caliber ammunition from Freiburger. Tr. 954-55. The prosecution also used details found in the police report published

by Clark. The prosecution noted the deceased's stepson's call to the police dispatcher as well as the blood found in the deceased's cab *Id* at 957. This evidence was used to argue that Mr Orner was most likely killed by a soldier. However, because Mr. Freiburger had no opportunity to cross-examine these witnesses and test the reliability of the statements, the jury was allowed to consider these statements as un rebutted evidence *Melendez-Diaz*, 2009 WL 1789468 at *7 (recognizing the importance of the ability to cross-examine hearsay testimony recounting historical events because it is very prone to distortion and manipulation)

In sum, testimonial hearsay admitted during the testimony of Mr. Clark and Mr Abersold violated Mr. Freiburger's right to confront the witnesses against him as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law, and Mr. Freiburger is therefore entitled to post-conviction relief. *See State v Mitchell*, 378 S.C. 305 (2008) (granting a new trial after the trial judge committed error in admitting an unavailable witnesses statement to the police)

B. Mr. Freiburger was denied the right to the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution, by failing to properly object to Mr. Clark's testimony. (Ground 10 (b)).

I. Relevant Facts.

Many of the facts relevant to this Ground are set forth in detail in the discussion of Ground A, *supra* at 1-2. To recap, the trial court allowed Mr. Clark to testify to the contents of a law enforcement investigative report marked as state's exhibit No. 24. Tr. 294. Mr. Clark was not responsible for preparing the missing person report, but instead merely read the contents and verified the report as something prepared by the Columbia Police Department Tr 294-98. The report contained testimonial hearsay that violated Mr Freiburger's constitutional right to confront the witnesses against him. Defense counsel failed to object on this ground however,

instead objecting under South Carolina Rule of Evidence 803(6), regarding business records Tr 291. The court allowed the prosecution to present the statements to the jury

II. Relevant Legal Principles and Argument.

The Sixth Amendment guarantees all criminal defendants the right to the effective assistance of counsel *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Williams v. Taylor*, 529 U.S. 362 (2000). In order to establish that one is entitled to relief on an ineffective assistance of counsel claim, one must demonstrate that: (1) his attorney's representation "fell below and objective standard of reasonableness," and, (2) he was prejudiced as a result thereof *Strickland*, 466 U.S. at 687-88; *see also Martinez v. State*, 304 S.C. 39 (1991) (describing standard). Counsel's performance falls below *Strickland's* "objective standard of reasonableness" if it is outside "the wide range of reasonable professional assistance." *Id.* at 690. Ineffective assistance of counsel occurs when trial counsel fails to object to excludable or other improper evidence *Mitchell v. State*, 379 S.E.2d 12 (1989), *see also Girts v. Yandel*, 501 F.3d 743 (6th Cir. 2007) (finding counsel ineffective as the failure to object exacerbated the prejudicial effect of the prosecutor's statements), *Mason v. Scully*, 16 F.3d 38 (2nd Cir. 1994) (finding counsel ineffective for failure to object to testimony by police detective about hearsay statement of non-testifying co-defendant)

In this case, counsel failed to object on Confrontation Clause grounds to Mr. Clark's testimony that included testimonial hearsay. There were objections made, as Mr. Clark's testimony was admitted over defense counsel's objection that the missing person report should not be included as an exception to the hearsay rule under South Carolina Rules of Evidence 803(6) dealing with business records, or 803(16) pertaining to ancient documents, Tr. 294, but there was no specific reference to the Confrontation Clause. Later in the trial, defense counsel

did state outside the presence of the jury that "there's no way for me to be able to cross-examine anyone about that narrative," Tr. 503, when referring to Clark's testimony. While the judge noted "there's always a bit of tension between the Confrontation Clause and the hearsay rule," he quickly disposed of this by finding that a number of cases say that 803 exceptions 5-17 are deemed reliable *Id*

Counsel also failed to specifically object on Confrontation Clause grounds during Mr. Abersold's testimony. Counsel here argued that they could not, "cross-examine Mr. Sudano (phonetic) or Captain Nichols. We can't cross-examine Deputy Sheriff Lex Price." Tr. 453. These objections were not explicitly grounded on Confrontation Clause grounds

It is clear that counsel had no strategic reason to fail to specifically raise the Confrontation Clause as a basis for the objection. Counsel was clearly trying to bar the admission of the evidence. Therefore, if the objections were not sufficient to preserve the Confrontation Clause issue, it is apparent that counsel's performance was unreasonable and prejudicial. In a criminal case, the State cannot present testimonial statements by witnesses who are unavailable to testify and who defense counsel has no opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. at 68. Counsel's failure to object to the testimonial statements at issue here constituted deficient performance.

The question then becomes whether "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The State's case was based entirely on circumstantial evidence. There was no direct evidence linking Mr. Freiburger to the crime. Therefore, the statements introduced impermissible circumstantial evidence that the defense had no opportunity to rebut. The

prosecution clearly found the testimonial hearsay beneficial to their case as they made significant use of the testimony during summation. The prosecution acknowledged that circumstantial evidence was key to the case, Tr. 947, and proceeded to remind the jury of the testimony from Clark and Abersold in detail. It follows that there was a reasonable probability that if the prosecution had not placed the improper testimonial statements into evidence, the outcome of the case would almost certainly have been different. It is clear that defense counsel's failure to object on Confrontation Clause grounds to Mr. Clark's testimony meets both prongs of the *Strickland* test.⁶

C. Mr. Freiburger was denied the right to the effective assistance of appellate counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. (Ground 10(c)).

In the event the State argues that trial counsel did adequately object to the admission of testimonial hearsay on Confrontation Clause grounds, applicant asserts he was denied the effective assistance of counsel on appeal due to appellate counsel's failure to raise the Confrontation Clause issues on appeal. *Southerland v. State*, 524 S.E.2d 833 (1999) (holding

⁶ Counsel's failure to object to the testimonial statements constitutes deficient performance even if it is argued that the trial occurred prior to *Crawford*. Prior to *Crawford*, the United States Supreme Court had consistently held that the Confrontation Clause strongly preferred face-to-face confrontation at trial, *California v. Green*, 399 U.S. 149, 157 (1970) ("it is this literal right to 'confront' the witness at the time of the trial that forms the core of the values furthered by the Confrontation Clause"), and that "a primary interest secured by [the provision] is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). In *Ohio v. Roberts*, 448 U.S. 56 (1980), the United States Supreme Court held that, when a hearsay declarant is not present for cross-examination at trial, "the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). In *Lilly v. Virginia*, 527 U.S. 116 (1999), the Supreme Court of the United States made it clear that even prior to *Crawford*, that statements, "obviously obtained for the purpose of creating evidence that would be useful at a future trial . . . brings the Confrontation Clause into play no matter how narrowly its gateway might be read." *Lilly v. Virginia*, 527 U.S. 116, 125 (1999). In sum, defense counsel's failure to object on Confrontation Clause grounds cannot be excused solely because applicant's trial occurred prior to *Crawford*.

that appellate counsel's failure to raise an issue on appeal that was previously raised at trial amounted to ineffective assistance of counsel). Failure of appellate counsel to raise an issue in an appeal as of right ineffective assistance of appellate counsel if, *inter alia*, it deprives the defendant of the opportunity to raise the matter in a later discretionary appeal *United States ex rel Barnard v Lane*, 819 F.2d 798, 805 (7th Cir.1987); *see also Freeman v Lane*, 962 F.2d 1252 (7th Cir 1991) (holding that appellate defense counsel's deficient performance in failing to raise issues on direct appeal was objectively unreasonable and deficient)

On direct appeal to the South Carolina Supreme Court, appellate counsel failed to raise the Confrontation Clause issues. If the issue was properly preserved at trial, the failure to do so constituted a clear violation of both prongs of the *Strickland* test. To succeed on this claim the defendant must demonstrate that (1) his attorney's representation "fell below and objective standard of reasonableness," and, (2) he was prejudiced as a result thereof. *Strickland*, 466 U S at 687-88; *see also Martinez v State*, 304 S C 39 (1991) (describing standard). Counsel's performance falls below *Strickland's* "objective standard of reasonableness" if it is outside "the wide range of reasonable professional assistance." *Id.* at 690.

The prosecution's use of testimonial hearsay was a clear violation of the Confrontation Clause, and appellate counsel's failure to raise this issue was objectively unreasonable, as it is clear that appellate counsel had no strategic reason for failing to raise the Confrontation Clause issue in their brief. The standard for evaluating prejudice under *Strickland* is whether, but for counsel's errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U S. at 687-88. The failure of appellate counsel to raise the Confrontation Clause issue in an appeal as of right amounted to ineffective assistance of appellate counsel, as it has deprived the applicant the opportunity to raise the Confrontation

Clause issue in later discretionary appeals. *United States ex rel Barnard v Lane*, 819 F.2d 798, 805 (7th Cir.1987); *see also Freeman v Lane*, 962 F.2d 1252 (7th Cir. 1991).

D. Mr. Freiburger was denied both a) the right to the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution, and b) the right to a fair trial guaranteed by the Due Process Clause as a result by the Defense counsel's failure to investigate or present evidence of third party guilt and the state's failure to disclose additional evidence of third party guilt. (Ground 10 (d)).

Trial counsel's failure to investigate or present evidence involving the possibility that other individuals committed the crimes, constitutes ineffective assistance of counsel. John Morgan was a soldier in the same unit as Mr Freiburger. Morgan went AWOL shortly after the murder of Mr. Orner on March 1, 1961. A witness interviewed by law enforcement, Kay Beaver, reported that Morgan went AWOL after he showed up, covered in blood, at the barracks. Morgan and Freiburger were in the same unit, so Morgan would have plausibly had access to the same equipment and information held by Freiburger, including his gun. Another witness, Art Tillbury, stated he believed the Orner murder had been solved after the arrest of Morgan.⁷

Lieutenant Cate, a Firearms Identification Technician employed by the South Carolina Law Enforcement Division concluded that a different weapon fired the projectile that killed Mr. Orner. A letter written by J.P. Strom, then chief of the South Carolina Law Enforcement Division, to FBI Director J. Edgar Hoover, revealed that Cate was of the opinion that a different weapon killed the taxi driver. The weapon was recovered from the home of Aleena Dreher, who admitted that a number of known thieves and robbers, including members of his own family, would have had access to the gun, which was identical in make and model to the weapon applicant owned.

Evidence that John Morgan left town the day following the murder of Orner after being seen

⁷ Copies of Beaver's and Tillbury's statements are attached as exhibits to this pleading.

covered in blood, as well as Lt. Cate's conclusion that another gun fired the projectile is clear evidence of third party guilt. *Holmes v South Carolina*, 547 U.S. 319 (2006). Defense counsel had this information and it was unreasonable not to present it. This failure represents a clear violation of both prongs of the *Strickland* test. As noted previously to succeed on this claim the defendant must demonstrate that (1) his attorney's representation "fell below and objective standard of reasonableness," and, (2) he was prejudiced as a result thereof. *Strickland*, 466 U.S. at 687-88, *see also Martinez v. State*, 304 S.C. 39 (1991) (describing standard). Counsel's performance falls below *Strickland's* "objective standard of reasonableness" if it is outside "the wide range of reasonable professional assistance." *Id.* at 690

Failure to investigate and present evidence of third party guilt can constitute ineffective assistance of counsel. *See In re Hardy*, 163 P.3d 853 (Cal. 2007) (finding counsel ineffective for failing to adequately investigate and present evidence of a third party's culpability that would have undermined the state's theory that the defendant was the actual killer). Counsel's conduct was unreasonable, as they had access to this information and no strategic reason not to present it. Similarly, prejudice here is clear. This evidence would have presented the jury with plausible third-party guilt, and because the evidence implicating Mr. Freiburger was entirely circumstantial, this would have proved an alternate explanation, creating reasonable doubt. The failure of defense counsel to investigate or present evidence involving John Morgan or Lt. Cate's conclusion regarding the other gun amounted to ineffective assistance of counsel.

Furthermore, applicant recently discovered that Morgan was apprehended after going AWOL and returned to South Carolina. While in the brig at Fort Jackson, he was interviewed by law enforcement. During this interview, Morgan informed the authorities that the night of the murder he summoned a cab to pick him up at Fort Jackson and take him to Columbia. Given the

state's theory that Orner was likely killed by a soldier at Fort Jackson, the fact that Morgan admitted calling for a cab is highly exculpatory, especially when combined with his subsequent disappearance and Beaver's statement indicating Morgan had blood on him before he disappeared. This information, however, was not disclosed to trial counsel. The failure to do so violated applicant's rights under the Due Process Clause. *See Brady v. Maryland*, 373 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995).

E. Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to adequately challenge the state's ballistic evidence. (Ground 10(c)).

I. Relevant Facts

In this prosecution based on forty-year-old evidence and many witnesses with no independent recollection of the events in question, the alleged link between the gun recovered from Mr. Freiburger and the bullet fragments recovered from Mr. Orner became the focal point of the case. The prosecution attempted to establish this link primarily through the testimony of John Cayton, a private firearms identification expert. Tr. 708. Although two SLED firearms examiners also testified, tr. 379-411, 609-647, these examiners did not and could not positively identify the weapon recovered from Mr. Freiburger as having fired the bullet recovered from Mr. Orner. Tr. 395-96, 629. Because of the small size and poor condition of the bullet fragments, *neither these examiners nor the five other SLED toolmark examiners that evaluated the evidence*, tr. 637-41, could discern a sufficient number of identifying characteristics to reach a conclusion regarding Mr. Freiburger's weapon. Tr. 395, 406, 622, 627.

John Cayton felt otherwise. Not only did Mr. Cayton positively identify the gun recovered from Mr. Freiburger as having fired the fatal bullet, tr. 725, but he expressed his results to the jury in terms of absolute certainty. Despite having evaluated only one other weapon in the

course of his investigation, tr. 724-25, Mr. Cayton positively identified the gun recovered from Mr. Freiburger as the murder weapon “to the exclusion of any other and every other” weapon in the world. Tr. 725.

Having access to Mr. Cayton’s report prior to trial, counsel should have anticipated both the contents of this testimony and the damage it would do to Mr. Freiburger’s defense. But trial counsel never attempted to exclude or object to this testimony. Having failed to investigate the basis of Mr. Cayton’s testimony, trial counsel challenged neither the scientific foundation of firearms identification technology nor Mr. Cayton’s extreme probability statement identifying Mr. Freiburger’s weapon to the exclusion of all others in the world.

II. Relevant Legal Principles and Argument.

- a. *Because the science underlying firearm identification technology is unreliable, Mr. Cayton’s testimony was inadmissible under South Carolina Rule of Evidence 702.*

1. **An Introduction to the Firearm Identification Discipline.**

Firearm and toolmark examination generally involves an attempt to identify a particular tool as the unique source of a set of markings left on an object. DAVID L. FAIGMAN, 4 MODERN SCIENTIFIC EVIDENCE. THE LAW AND SCIENCE OF EXPERT TESTIMONY 592 (2008) (“MODERN SCIENTIFIC EVIDENCE”). Frequently, the goal is to determine whether a particular firearm component (e.g., the barrel of a gun or the breech face) produced the markings found on a bullet or cartridge casing associated with a crime. *Id.* Firearms examiners claim, if there are sufficient markings for comparison, to be able to identify a bullet as having been fired from a particular gun to the exclusion of every other gun in the world. *Id.* at 421.

The markings used for comparison are thought to be the result of random variations in the surfaces of a gun created during the manufacturing process. *Id.* at 415. For example, most firearms are “rifled,” meaning that parallel spiral grooves are cut into the inner surface of the

barrel. See STUART H. JAMES & JON J. NORDBY, FORENSIC SCIENCE: AN INTRODUCTION TO SCIENTIFIC AND INVESTIGATIVE TECHNIQUES INTRODUCTION TO FORENSIC SCIENCE 402-03 (2nd ed. 2005) ("INTRODUCTION TO FORENSIC SCIENCE"). The surfaces between the grooves are known as "lands." *Id.* As a bullet travels down the barrel, the lands and grooves leave markings, called "striations," on the surface of the bullet itself. *Id.* Firearms examiners believe certain markings left on bullets during the firing process are unique to the weapon that fired them and that those markings are reproduced on the bullets fired from that weapon. See MODERN SCIENTIFIC EVIDENCE at 415-16.

Firearms examiners classify the toolmarks that guns leave on objects into three categories: "class," "sub-class" and "individual." *Id.* at 416. Class characteristics result from relatively uniform, intentionally designed features of the firearm, such as caliber, number and width of lands and grooves, and direction and degree of rifling ("twist"), and should be consistent among all bullets fired from handguns of the same make and model. See INTRODUCTION TO FORENSIC SCIENCE at 403. Sub-class characteristics are sometimes produced during a manufacturing process by a tool that leaves identical marks on a number of firearms in a single production run. See MODERN SCIENTIFIC EVIDENCE at 416-17. This "sub-class" of firearms will, in turn, impart relatively consistent markings to bullets. *Id.* Individual characteristics are markings that are believed to result from some combination of irregularities in the machining process and imperfections that emerge during the subsequent use of a particular firearm. *Id.* These markings are assumed to have been produced randomly, and firearms examiners treat these markings as an individualized signature. See *id.* at 416-22. While class characteristics are visible to the naked eye, both the subclass and individual characteristics of bullet toolmarks are microscopic striations within the land or groove impressions.

11. General legal principles governing the admission of scientific evidence.

Under South Carolina Rule of Evidence 702, scientific evidence is admissible only if the trial judge finds “the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). Placing the trial judge as the gatekeeper for determining reliability serves an important function. Because of the “aura of infallibility” associated with scientific evidence, this threshold requirement prevents unproven scientific methods from misleading the fact finders. See *State v. White*, 372 S.C. 364, 376, 642 S.E.2d 607, 613 (S.C. App. 2007) (citing *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979)). To determine the reliability of a forensic method, the trial judge considers the *State v. Jones* factors, which include “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case, (3) the quality control procedures used to ensure reliability, and (4) the consistency of the method with recognized scientific laws and procedures.” *Council*, 335 S.C. at 19, 515 S.E.2d at 518. If the evidence is admissible under this standard, the “trial judge should determine if its probative value is outweighed by its prejudicial effect.” *Id.* at 20, 518.

Courts have recognized the lack of reliability of the firearms and toolmark identification discipline and have limited the introduction of expert testimony accordingly. Cf. *United States v. Glynn*, 578 F.Supp. 2d 569 (S.D.N.Y. 2008) (“[W]hatever else ballistics identification analysis could be called, it [can] not fairly be called ‘science’”); *United States v. Green*, 405 F.Supp. 2d 104, 109 (2005) (“The more courts that admit . . . toolmark evidence without requiring . . . evidence of reliability, the more sloppy practices will endure; we should require more.”) To prevent the “aura of infallibility” associated with this discipline from misleading the jury, these courts have either excluded firearms identification testimony completely, see *United States v.*

Monteiro, 407 F Supp. 2d 351 (D Mass. 2006), or prevented firearms examiners from expressing their opinions in terms of an absolute certainty that the science does not allow. See *Glynn*, 578 F.Supp.2d at 575 (limiting firearms examiners to testifying that their identifications were more likely than not); *State of Ohio v Eashawn Anderson*, Case No. 50953 (Court of Common Pleas Cuyahoga Co. March 24, 2009) (same), *Green*, 405 F Supp 2d at 109 (preventing experts from testifying to identification conclusions and only allowing them to testify about similarities between cartridge case toolmarks); *United States v Diaz*, No. 05-CR-167, 2007 WL 485967, at *14 (N.D. Cal. Feb. 12, 2007) (preventing experts from testifying to their conclusions to the exclusion of all other firearms in the world) In fact, the United States Supreme Court recently noted that ballistics evidence is prone to subjectivity, bias and unreliability *Melendez-Diaz*, *supra*, 2009 WL 1789468 at *9.

Although many courts have admitted firearms identification testimony, they have done so without any critical analysis of the subject. See National Research Council Committee on Identifying the Needs of the Forensic Science Committee, *Strengthening Forensic Science in the United States: A Path Forward*, Pre-publication Report at 3-18 (2009) ("Much forensic evidence—including, for example, bite marks and firearm and toolmark identifications—is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline" (footnotes omitted)) As discussed below, research demonstrates that firearms identification evidence does not satisfy the remaining *State v. Jones* factors. The conclusions of individual examiners are not amenable to scientifically-defensible quality control procedures. See *Council*, 335 S.C. at 19, 515 S.E. 2d at 518 More fundamentally, the general methodology supporting these conclusions has not received meaningful peer review See *id*. The limited scientific scrutiny devoted to this forensic

technique reveals that its methodology relies on subjective and untested identification criteria and unsubstantiated assumptions. Because such methods have no basis in science, formulating identification conclusions suggesting otherwise is inconsistent with recognized scientific laws and procedures. *See id*

- iii. Firearms identification evidence is not reliable because firearms identification methodology has not received scientifically meaningful peer review.

Peer review serves as an important mechanism for ensuring the reliability of forensic investigation methods. The National Research Council Committee on Identifying the Needs of the Forensic Science Community (“Forensic Science Committee”), an interdisciplinary team of experts authorized by Congress to evaluate the use of forensic techniques in law enforcement, recently confirmed that peer review represents a “critical step” in developing a scientifically-defensible forensic tool. National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, Prepublication Report 4-3 (2009) (“*NRC Strengthening Forensic Science Report*”) ⁸ Subjecting forensic techniques to this process allows experts an opportunity to “review, question, and check the repeatability of the results.” *Id*

Despite the importance of peer review, the firearms identification discipline remains largely insulated from the scientific community. Unlike forensic methods such as DNA analysis, methods “such as those used to infer the source of toolmarks . . . have never been exposed to scientific scrutiny.” *NRC Strengthening Forensic Science Report* at 1-6; *see also id.* at 5-21

⁸ The report was recently cited with approval by the Supreme Court of the United States. In *Melendez-Diaz, supra*, the Court noted the importance of full confrontation of forensic experts because the examiners are “driven in their work by the need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” 2009 WL 1789468 at *8. The Court also cited reports documenting that the criminal justice system produce erroneous convictions based on forensic evidence. *Id*

("[T]he scientific knowledge base for toolmark and firearms analysis is fairly limited."). Instead, the minimal peer review received has generally been confined to a biased community of firearms examiners that excludes experts in other relevant disciplines. Affidavit of William A. Tobin at ¶ 26 ("Tobin") As discussed below, the limited interdisciplinary scrutiny devoted to firearms identification technology reveals that its scientific foundation remains unproven.

- iv. Firearms identification evidence is not reliable because neither the existing information regarding the firearms identification discipline nor the protocols employed by individual examiners permit firearms examiners to develop quality control procedures

Like peer review, quality control procedures play a crucial role in determining the reliability of a general forensic method or its application. *See Council*, 335 S. C. at 19, 515 S.E. 2d at 518. The legitimacy of these procedures in forensic disciplines depends upon "the extent to which practitioners . . . adopt procedures and performance standards that guard against bias and error." *NRC Strengthening Forensic Science Report* at 4-1. The firearms identification discipline fails to guard against either of these dangers. Existing reference information and proficiency tests cannot establish error rates, let alone provide a basis for minimizing error. Affidavit of Alicia L. Carriquiry at ¶ 10 ("Carriquiry"); Tobin at ¶ 33. Review mechanisms employed to examine the conclusions of individual firearms examiners retain a high risk of examiner bias. Tobin at ¶ 27; Affidavit of William C. Thompson at ¶ 3, 6 ("Thompson")⁹ Because current procedures and performance standards do not permit examiners to independently assess the conclusions reached by other examiners, the discipline has not developed the quality control procedures necessary to ensure reliability. *See Council*, 335 S. C. at 19, 515 S.E. 2d at 518.

⁹ Copies of the affidavits of Mr. Tobin, Mr. Thompson and Ms. Carriquiry are attached as exhibits to this pleading.

- v Firearms identification evidence is not reliable because the unproven scientific assumptions underlying the discipline prevent examiners from formulating conclusions in a manner consistent with recognized scientific laws and procedures.

Firearm examiners base conclusions of identity on entirely subjective identification criteria that rely on scientifically-unsubstantiated assumptions. The limited scientific knowledge underlying the firearms identification discipline does not currently support the assumption that firearms actually leave unique and reproducible "individual" markings on bullets. Even assuming that firearms leave unique and reproducible individual markings on bullets, scientific research has not established that firearm examiners can reliably identify those markings on a bullet that are "individual" to a particular firearm. Because firearm examiners rely on scientifically-unsubstantiated procedures and assumptions in evaluating firearms, the conclusions derived from this process have no basis in science. Presenting these conclusions in a manner that suggests otherwise is inconsistent with recognized scientific laws and procedures. *See Council*, 335 S.C. at 19, 515 S.E. 2d at 518.

1. The ability of firearm identification examiners to formulate scientifically-defensible conclusions rests on the unsubstantiated assumption that firearms leave unique and reproducible markings on bullets.

Firearms examiners believe that "individual" characteristics will never randomly match on bullets fired from different guns and that these individual characteristics are reproduced on bullets fired from the same gun. These fundamental assumptions of "uniqueness" and "reproducibility" are unproven and largely untested. Because of the absence of empirical data underlying claims of firearms identification, the discipline lacks an adequate scientific foundation to permit examiners to formulate reliable scientific conclusions.

The National Research Council Ballistics Imaging Committee ("Ballistics Imaging

Committee”), a group of scientists appointed at the request of the National Institute of Justice of the Department of Justice, recently convened a committee to study the feasibility of using the computerized identification system, IBIS, to create a national “ballistics imaging” database of digital images of cartridge cases. The Ballistics Imaging Committee included scientists with training and experience in areas of materials science, metallurgy, statistics, laboratory procedures and protocols, and computer science, in consultation with firearms examiners themselves. While the committee was not charged with examining the reliability of firearms identification as a discipline, it had to examine the discipline in order to determine whether it would be feasible to construct a national ballistics imaging database. The committee’s conclusions reject the fundamental assumptions of the firearms identification discipline as insufficient to support conclusions of identity.

In its “prepublication” report, released on March 8, 2008, the Ballistics Imaging Committee found that “[t]he validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated,” and “[a] significant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to quantitatively characterize the probability of uniqueness.” National Research Council, *Ballistics Imaging* at 3-22 (2008) (hereinafter “*NRC Ballistics Imaging Report*”), see also *id.* at 3-23 (“*Additional general research on the uniqueness and reproducibility of firearm-related toolmarks would have to be done if the basic premises of firearms identification are to be put on a more solid scientific footing.*”) (emphasis in original)

The problem had been previously acknowledged by practicing firearm examiners. As production methods have become increasingly automated and standardized, making gun barrels more uniform, the individual characteristics that are allegedly unique to the toolmarks created by

a particular tool have been increasingly replaced by subclass characteristics of toolmarks that are produced by all tools in a batch . *Id* at ¶ 7-16 Additional doubts as to the uniqueness of toolmarks have arisen as the federal computerized database, IBIS, has been expanded to include increasing numbers of bullets and cartridge cases from guns of a particular caliber As the database has grown, a "number of known non-matched test fires from different firearms" have been observed to appear "near the top of the candidate list" for matches. Tobin at ¶ 19. When viewed on the comparison screen, "there were numerous two-dimensional similarities," and even under a comparison microscope, "these similarities are still present and it is difficult to eliminate comparisons even though we know they are from different firearms " *Id* In other words, as more samples from a particular caliber of firearm are compared, more functionally identical matches have been found.

Because the fundamental assumptions of firearms identification have not been proven, the firearms identification discipline is not sufficiently developed to permit an expert to declare a "match" between a bullet and a particular gun The few studies of these assumptions relied upon by firearms examiners were recognized as inadequate by the Ballistics Imaging Committee because they depend on scientifically-indefensible sampling and review procedures. Tobin at ¶ 16, Carriquiry at ¶ 10. These deficiencies prevent firearms examiners from estimating "the probability that two bullets or casings will match if they were fired by different guns." Carriquiry at ¶ 7. The ability of firearm identification examiners to formulate scientifically-defensible conclusions rests on the unsubstantiated assumption that examiners can employ subjective criteria to accurately identify "individual characteristics."

Firearm examiners base conclusions of identity on concededly and entirely subjective criteria. The nature of these criteria provide no statistical foundation for the estimation of error

rates and preclude meaningful review of an examiner's conclusion. To date, no scientific studies demonstrate that firearms examiners can employ these criteria to consistently distinguish unique individual markings from sub-class markings solely on the basis of a side-by-side comparison of bullets under a microscope. Nor is there proof that eye balling ammunition components under a comparison microscope enables firearms examiners to reliably determine whether differences in toolmarks are the result of their having been produced by different guns or the results of changes in the same gun over time and/or different conditions of firing the same gun.

Central to the assertion that firearms examiners can determine whether the markings on a bullet match a particular gun is the claim that they can reliably distinguish between markings that are "individual," as opposed to those that are sub-class markings or variations resulting from wear and tear on the barrel, variations in pressure and velocity of firing from shot to shot or the use of different brands of ammunition. This is because sub-class characteristics will be transferred to bullets fired from any firearm in the same sub-class, while even bullets fired from the same gun will have random variations among the markings.

Firearms examiners and their proponents readily admit that the determination of a "match" is subjective because it depends on the experience of the particular examiner. *See, e.g.,* Ronald G. Nichols, *Defending the Scientific Foundations of the Firearms and Tool Mark Identification Discipline: Responding to Recent Challenges*, 52(3) J. Forensic Sci. 586, 590 (2007) (admitting that, with respect to the threshold that determines whether a "match" is called, "the actual definition of that will be different between examiners because they have different experiences"). The Ballistics Imaging Committee commented on the subjective nature of firearms examinations: "Ultimately, as firearms identification is currently practiced, an examiner's assessment of the quality and quantity of resulting toolmarks and the decision of

what does or does not constitute a match comes down to a subjective determination based on intuition and experience.” *NRC Ballistics Imaging Report* at 3-3.

While firearms examiners have attempted to establish some guidelines for making a statement of identification, those guidelines do not offer any guidance about how to determine a “match.” For example, the Scientific Working Group for Firearms and Toolmarks (“SWGgun”) has produced draft guidelines. See Scientific Working Group for Firearms and Toolmarks, *Guidelines. Criteria for Identification* (2008), available at <http://www.swggun.org> (last visited April 18, 2009) (adopting the Association of Firearms and Tool Mark Examiners (“AFTE”) “Theory of Identification” as the “generally accepted Criteria for Identification”). The guidelines assert that an identification may be declared only when the individual markings on a known and question specimen are in “sufficient agreement.” *Id.* at § 2.2.1. Examiners are told that “agreement is significant when it exceeds the best agreement demonstrated between toolmarks known to have been produced by different tools and is consistent with agreement demonstrated by toolmarks known to have been produced by the same tool.” *Id.* at § 2.2.2. “Currently” the guidelines state “the interpretation of individualization/identification is subjective in nature, founded on scientific principles and based on the examiner’s training and experience.” *Id.* at § 2.2.3

The NRC Forensic Science Committee characterized this subjective process as the “fundamental problem with toolmark and firearm analysis” *NRC Strengthening Forensic Science Report* at 5-21. Although forming crucial components in the identification determination, the

meaning of “exceeds the best agreement” and “consistent with” are not specified, and the examiner is expected to draw on his or her own experience. This AFTE document, which is the best guidance available for the field of toolmark identification, does not even consider, let alone address, questions regarding

variability, reliability, repeatability, or the number of correlations needed to achieve a given degree of confidence.

Id Even given a highly experienced examiner, his or her conclusion “remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates.” *Id* at 5-20.

This completely subjective methodology has not been proven to produce reliable results. To date, there are no meaningful studies showing that firearms examiners are in fact able to differentiate between individual and sub-class characteristics of toolmarks based on inspection under a comparison microscope or to determine whether differences between markings are or are not consistent with their having been produced by the same gun.

The guidelines of the firearm identification discipline do not even purport to explain how to make such an identification. Materials scientists hold that such an assessment could not be made without access to control samples acquired contemporaneously to fabrication – or at least a detailed personal knowledge of the individual and sub-class characteristics produced by a particular production run. Tobin at ¶ 13. Statisticians dispute the reliability of a subjective methodology without any verifiable error rate. Carniquiry at ¶ 10, 11. As a result, conclusions that a particular firearm fired a bullet relying on these subjective and unsubstantiated standards have no basis in science.

b Even if Mr. Cayton's general firearms identification testimony was not per se unreliable and thus admissible, his conclusion that the weapon recovered from Mr. Freiburger fired the bullet recovered from Mr. Orner to the exclusion of all other weapons in the world was unscientific, unreliable, and inadmissible.

Although Mr. Cayton evaluated only one other weapon in his investigation of Mr. Orner's death, tr 724-25, he positively identified the weapon recovered from Mr. Freiburger as the murder weapon to the exclusion of any other and every other weapon in the world. Tr. 725.

The dubious science underlying the firearms identification discipline renders such extreme probability statements inadmissible, where even conclusions established pursuant to the scientifically-superior technique of DNA analysis acknowledge the potential for error. Even if the trial court had found this testimony sufficiently reliable for purposes of Rule 702, the unfair prejudice resulting from this statement substantially outweighed its probative value and should have been excluded pursuant to South Carolina Rule of Evidence 403.

1. Because the shaky science underlying the firearms identification discipline does not support extreme probability statements, Mr. Cayton's identification of Mr. Freiburger's weapon to the exclusion of all other guns in the world was inadmissible under South Carolina Rule of Evidence 702.

A claim of identification is, in reality, a probability statement. The firearm examiner who states that a bullet or cartridge casing was fired from a particular gun, to the exclusion of all other guns in the world, claims 100% accuracy, with a 0% chance of a coincidental match. See *NRC Ballistics Imaging Report* at 302 ("Firearms identification ultimately comes down to a subjective assessment – specifically, a subjective probability statement (although practitioners often render these as absolute statements)"). Notwithstanding their certainty, firearm examiners using the traditional subjective methodology have absolutely no statistical basis for such a claim.

As noted by the NRC Ballistics Imaging Committee, "examiners tend to cast their assessments in bold absolutes, commonly asserting that a match can be made 'to the exclusion of all other firearms in the world.'" *Id.* at 3-23. Cautioning that "such comments cloak an inherently subjective assessment of a match with an extreme probability statement that has no firm grounding and unrealistically implies an error rate of zero," the committee wrote, "[c]onclusions drawn in firearms identification should not be made to imply the presence of a firm statistical basis when none has been demonstrated." *Id.* at 3-23. The NRC Committee agreed with "recent court decisions . . . [that] have refused to accept 'exclusion of all firearms'"

testimony; noting that "individual examiners . . . should not overreach to make extreme probability statements." *Id.* at 3-23-24.

Extreme probability statements implicate all of the scientific inadequacies discussed above in the context of general firearm identification evidence and more. The claim that examiners can make reliable and statistically meaningful exclusive source attributions is undermined by

the lack of research into firearm retail density and distribution patterns, the lack of an objective methodology for declaring a match, the lack of statistical research on the probability of finding coincidentally matching marks, the lack of independent peer review in the field, the demonstrated occurrence of observer bias among forensic examiners, and the lack of meaningful error rates in the field.

Tobin at 20; *see also id.* at 21-34 (describing these deficiencies in greater detail).

These extreme probability statements express an even greater aura of infallibility than do probability statements introduced pursuant to DNA matching technology even though firearms and toolmark identification lacks any of the indicia of reliability of DNA technology "With the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." *NRC Strengthening Forensic Science Report* at S-5. As opposed to the subjective and scientifically unsubstantiated identification criteria used by firearms examiners, the "protocols for DNA analysis . . . represent a precisely specified, and scientifically justified, series of steps that lead to results with well-characterized confidence limits" *Id.* at 5-21.

Allowing firearms examiners to express their conclusions in terms of absolute certainty cannot be justified. Even evidence offered pursuant to the paradigm DNA method recognizes the potential for error. *See State v. McFadden*, 318 S.C. 404, 412, 458 S.E.2d 61, 66 (1995)

(holding DNA evidence was admissible where “the trial court heard detailed testimony from [the expert] about the . . . database SLED uses to determine the probability of two unrelated individuals having the same DNA profile”). Instead of identifying an individual to the exclusion of all others in the world, DNA analysts express results in terms of the probability of finding the individual’s particular DNA pattern in an unrelated individual. *E.g., State v Dinkins*, 319 S.C. 415, 416-17 462 S.E.2d 59, 59 (S.C. 1995) *McFadden*, 318 S.C. at 411-12, 458 S.E.2d at 65-66

Mr. Cayton’s testimony did not recognize the potential for a coincidental match. Unlike DNA analysts, who formulate conclusions only after comparing recovered DNA to a large database of reference samples, Mr. Cayton evaluated only one other weapon in the course of his investigation. Tr. 724-25. And despite this miniscule sample size, Mr. Cayton excluded all other weapons in the world as the source of the fatal bullet without acknowledging the potential for error. Tr. 725. Because Mr. Cayton employed a shaky forensic technique to reach a conclusion of absolute certainty not available to DNA analysts using scientifically-superior techniques, this statement did not meet the standards of reliability required for admission under the South Carolina Rules of Evidence.

- 11 Because the prejudicial value of extreme probability statements outweighs the probative value of these scientifically unsubstantiated statements, Mr. Cayton’s identification of Mr. Freiburger’s weapon to the exclusion of all others in the world was inadmissible under South Carolina Rule of Evidence 403.

Even if the trial court had found Mr. Cayton’s testimony admissible under Rule 702, the probative value of that evidence was substantially outweighed by the danger of unfair prejudice to Mr. Freiburger. *See* S.C. R. Evid. 403. Safeguarding the courtroom from applications of theories that are not generally accepted or are of dubious probity is especially crucial when dealing with forensic evidence, which has an aura of infallibility from its longstanding use in

popular media. See *White*, 372 S.C. at 376, 642 S.E.2d at 614. The potential for undue prejudice is particularly great when, as here, an expert purports to identify with 100% accuracy the “source” of the evidence, using much more certain language than used with more probative types of forensic evidence such as DNA.

As discussed above, there is no empirical data to support the claimed ability of a firearms examiner to reliably and absolutely identify a bullet as coming from a particular firearm. An absolute firearm “match,” to the exclusion of all other guns in the world, made pursuant to a dubious standard and methodology, should have been excluded because the potential prejudice from such testimony substantially outweighed any probative value

c Mr Freiburger was denied constitutionally effective assistance of counsel by trial counsel's failure to exclude John Cayton's inadmissible firearms identification testimony

“To establish a claim of ineffective assistance of counsel, a PCR applicant must establish both that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different.” *James v State*, 372 S.C. 287, 290, 641 S.E.2d 899, 901 (2007) (citing *Strickland v Washington*, 466 U.S. 668, 687 (1984))

Counsel is charged with the basic responsibility of conducting a criminal trial in a manner that protects the interests of the accused. To protect these interests, trial counsel must necessarily stay apprised of both the adverse evidence presented against the accused and the avenues available to challenge this evidence. In seeking to enforce these obligations, the South Carolina Supreme Court has held that trial counsel's performance falls below an objective standard of reasonableness where counsel fails to conduct the investigation necessary to effectively rebut expert testimony. See *McKnight v State*, 378 S.C. 33, 46 661 S.E.2d 354, 360

(2008) (holding that counsel performed unreasonably in failing to conduct an investigation that would have revealed that an adverse expert witness relied on outdated medical studies). The Court has also deemed counsel's failure to exclude inadmissible adverse evidence constitutionally deficient. *E.g., Gant v State*, 254 S.C. 183, 188, 580 S.E.2d 144, 146 (2003); *Dawkins v State*, 346 S.C. 151, 156, 551 S.E.2d 260, 163 (2001).

These decisions establish that trial counsel has a constitutional duty to both challenge inadmissible adverse evidence and to conduct the initial investigation required to develop the basis for this challenge. As evidence to be presented at the evidentiary hearing will demonstrate, Mr. Freiburger's trial counsel failed adequately review the available scientific literature pertaining to firearms identification testimony. Due to this failure, trial counsel never discovered the lack of scientific support for the firearms identification discipline and, accordingly, never attempted to exclude John Cayton's testimony. Because that testimony clearly failed to satisfy the threshold standards for admissibility required by the South Carolina Rules of Evidence, trial counsel's failure to develop this challenge fell below an objective standard of reasonableness.

Introduction of this scientifically unfounded, yet unequivocal identification of the gun found in Mr. Freiburger's possession as the murder weapon doubtlessly prejudiced Mr. Freiburger. Witnesses called in the State's case-in-chief testified that numerous examiners, both in 1961 and 2001, failed to attribute the bullet fragments recovered from Mr. Orner to the weapon found in Mr. Freiburger's possession. *See* Tr. 395-96, 629. Mr. Cayton's testimony represented the only positive identification. *See* Tr. 725. And this identification represented the only forensic evidence connecting Mr. Freiburger to the crime. The cold-case investigators even alerted the jury to the importance of this identification by informing it that Mr. Cayton's identification represented the sole new piece of evidence prompting Mr. Freiburger's arrest. *See* Tr. 684, 799.

Without this testimony, the jury knew the State's case consisted only of the evidence that had proved insufficient to support an arrest for forty years. Unfortunately, the jury did not learn that there were no objective standards for reaching a match, that forensic examiners themselves disagree fairly often as to whether an identification can be made and that there is no standard when there is a dispute for determining who is right.

Even if trial counsel had only succeeded in excluding Mr. Cayton's extreme probability statement identifying the weapon found in Mr. Freiburger's possession to the exclusion of all other weapons in the world, there is a reasonable probability the result at trial would have been different. See *Strickland*, 466 U.S. at 687. Such an extreme probability statement cloaked in the legitimacy of science carries a strong "aura of infallibility." See *State v. White*, 372 S.C. 364, 376, 642 S.E.2d 607, 613 (S.C. App. 2007) (citing *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979)). Although Mr. Cayton may still have communicated similarities between Mr. Freiburger's weapon and the bullet recovered from Mr. Orner, this description would have acknowledged the unavoidable potential for error. This small alteration significantly diminishes the impact of Mr. Cayton's testimony, especially given the conflicting evidence presented by other firearms identification examiners. In light of the evidence indicating that seven other examiners had been unable to identify the gun found in Mr. Freiburger's possession as the murder weapon, an acknowledgement of the fallibility of the one positive identification presented raises a reasonable probability that the result of the trial would have been different. See *Strickland*, 466 U.S. at 687, see also *State of Ohio v. Eashawn Anderson*, Case No. 50953 (Court of Common Pleas Cuyahoga Co. 2009) (defendant acquitted when state's forensic examiner was prevented from testifying that the weapon taken from the defendant was the murder weapon to the exclusion of all other weapons).

F. Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to adequately challenge the state's ballistic evidence. (Ground 10(e)).

I. Additional Facts Relevant to Ground this subground.

As discussed above, the issue of whether the weapon recovered from Mr. Freiburger fired the bullets recovered from Mr. Orner represented a crucial point of contention at trial. Without establishing that link, the prosecution could not place Mr. Freiburger at the scene of the crime. Despite the importance of firearms identification in refuting this link, trial counsel did not call any firearms identification experts for the defense. Instead, counsel attempted to maintain a reasonable doubt in the face of Mr. Cayton's positive identification by relying solely on the cross-examination of prosecution experts. See Tr. 928-29.

Trial counsel attempted to cast doubt on Mr. Cayton's positive identification by focusing on the results obtained by SLED examiners. Where seven SLED examiners had been unable to match the bullet fragments recovered from Mr. Orner to the gun recovered from Mr. Freiburger, counsel argued, Mr. Cayton's testimony alone could not establish identity beyond a reasonable doubt. Tr. 928-929, 941.¹⁰ And the documentary evidence trial counsel possessed supported that conclusion. Trial counsel possessed a forensic laboratory report prepared by Ira Parnell, supervisor of the SLED firearms identification laboratory in 2001, tr. 610, concluding that the bullet fragments recovered from Mr. Orner "could have been fired by [the weapon recovered from Mr. Freiburger, a weapon recovered from another suspect] or by another similarly rifled firearm of the same caliber."¹¹ Trial counsel also possessed a letter written in 1961 by SLED

¹⁰ "He reported inconclusive not by one, not two, not three, but seven different SLED agents." Tr. 928. "Can we counter with the testimony of just one man, Mr. Cayton, can we? Does it leave you firmly convinced ladies and gentlemen." Tr. 929.

¹¹ A copy of Mr. Parnell's report is attached as an exhibit to this pleading.

Chief J.F. Strom, indicating that Lt Millard Cate had previously identified the gun confiscated from another suspect, who lived in a home where "[a] number of known thieves and robbers" resided, as the weapon that killed Mr. Orner. Letter From S.L.E.D. Chief J.F. Strom to F.B.I. Director J. Edgar Hoover ("Letter to J. Edgar Hoover"), attached ¹² As testimony presented at trial revealed, Lt. Millard Cate developed the SLED firearms identification division and was well respected by his students and colleagues. Tr. 396.

But trial counsel did not present this evidence to the jury. Although Ira Parnell testified for the prosecution, tr. 609, trial counsel never questioned him about his conclusion that the other weapon in SLED custody or any other similarly rifled firearm of the same caliber could have fired the fatal bullet. And although both Ira Parnell and Carl Stokes, another SLED firearms examiner called by the prosecution, had worked with Lt. Millard Cate, tr. 398, 610, trial counsel asked neither witness about Lt. Cate's positive identification of the weapon recovered from a house full of "known thieves and robbers." See Letter to J. Edgar Hoover.

Instead, trial counsel allowed the prosecution to paint a much different picture of the conclusions reached by SLED examiners. Despite having evidence to the contrary, trial counsel did not contest Mr. Stokes's testimony that he and Lt. Cate had excluded the weapon recovered from another suspect. Tr. 394-95. Likewise, trial counsel allowed Mr. Parnell to testify that he did not disagree with Mr. Cayton's positive identification, tr. 644, 651-52, despite the report indicating that Mr. Parnell had not distinguished Mr. Freiburger's weapon from the weapon recovered from another suspect or any other "similarly rifled firearm of the same caliber."

In his summation, the solicitor relied heavily on this testimony to reinforce Mr. Cayton's positive identification:

¹²A copy of this letter is attached as an exhibit to this pleading.

If one person put their hand on this Bible, swore to tell the truth and said "this is not the gun that murdered John Orner" find him not guilty, but if six people say "oh man . . . its so close, so close . . . Every other 32 they looked at was excluded. One and only one [was] so close, so close. Freiburger's

Tr. 964-65.

Mr. Parnell tells them that, that it's not excluded . . . It's so close, remarkable individual similarities, excluded all other 32s

Tr. 967.

Mr. Parnell says I don't disagree with Mr. Cayton. It's a matter of degree. I don't exclude it. It was so close

Tr. 968

II. Relevant Legal Principles and Argument.

"To establish a claim of ineffective assistance of counsel, a PCR applicant must establish both that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different." *James v State*, 372 S.C. 287, 290, 641 S.E.2d 899, 901 (2007) (citing *Strickland v Washington*, 466 U.S. 668, 687 (1984)).

Trial counsel has basic obligations to present favorable evidence and to subject unfavorable evidence to a meaningful adversarial challenge. This obligation is paramount where "[v]igorous cross-examination [and] presentation of contrary evidence . . . are the traditional and appropriate means of attacking shaky but admissible evidence" like firearm identification testimony. See *State v Dinkins*, 319 S.C. 415, 462 S.E.2d 59 (S.C. 1995). Recognizing this obligation, the South Carolina Supreme Court has held that counsel's performance falls below an objective standard of reasonableness where counsel fails to elicit favorable information during cross examination, see e.g., *Miller v State*, 379 S.C. 108, 117, 665 S.E.2d 596, 600 (2008) (holding trial counsel deficient in failing to elicit information supporting the defendant's theory of third-

party guilt), or expose inconsistencies in an adverse witness's testimony *See Roberts v. State*, 361 S.C 1, 602 S.E.2d 768 (2004) (holding that counsel performed unreasonably in failing to present evidence indicating that the distance between the witness's and respondent's cells was dramatically larger than the witness had alleged)

In failing to challenge the testimony of the SLED firearm examiners with available documentary evidence, trial counsel's performance fell below an objective standard of reasonableness. Trial counsel constructed Mr. Freiburger's defense around the theory that Mr. Cayton's positive identification could not eliminate reasonable doubt where seven SLED examiners had reached a different conclusion *See Tr 928-29, 941*. But trial counsel did not present the evidence establishing that these examiners had, in fact, reached a different conclusion. As a result, the jury heard testimony that SLED examiners had excluded the weapon recovered from another suspect, tr. 394-95, and essentially agreed with Mr. Cayton's positive identification of Mr. Freiburger's gun as the murder weapon. Tr. 644, 651-52. The jury never heard that Mr. Parnell had been unable to formally distinguish Mr. Freiburger's weapon from a gun recovered from another suspect or any other "similarly rifled gun of the same caliber." Nor did it hear that the revered founder of the SLED firearms identification division had positively identified the weapon recovered from a house full of "known thieves and robbers" as the murder weapon. In failing to expose these inconsistencies and evidence that so clearly supported Mr. Freiburger's case, trial counsel performed unreasonably.

This unreasonable performance severely undermined Mr. Freiburger's defense. In this case built entirely on circumstantial evidence and the testimony of witnesses with little or no memory of the events in question, the prosecution's only means of connecting Mr. Freiburger to the crime consisted of identifying his weapon as the source of the fatal bullet. And the

prosecution successfully evaded trial counsel's defense by characterizing the inconclusive results reached by SLED examiners as the product of an overly-restrictive identification protocol rather than an expression of scientific uncertainty. See Tr 965 ("[S]ix people [said], 'oh man, man, it's like this, it's like this. It's so close, so close' . . . There are matter of degrees . . . matter of degrees, can't exclude it.") Based on the unrefuted testimony of SLED examiners, the solicitor portrayed the inconclusive results as essentially reflecting positive identifications that failed to meet SLED's rigorous criteria for formal identification by the thinnest of margins. *Id.*

The evidence defense counsel chose to ignore clearly refutes this suggestion. Mr. Parnell's report indicated that either the gun recovered from Mr. Freiburger, the gun recovered from another suspect, or any other "similarly rifled firearm of the same caliber" could have fired the bullet recovered from Mr. Omer. Far from indicating that SLED had singled out Mr. Freiburger's gun, this report confirms that SLED had not actually distinguished it from an unidentified number of similarly situated firearms. Chief Strom's letter indicates that the gun confiscated from another suspect's home, where "[a] number of known thieves and robbers" resided, and *not* the gun recovered from Mr. Freiburger fired the fatal bullet. Far from indicating that SLED had nearly identified Mr. Freiburger's gun as the murder weapon, this report indicates that the revered founder of the SLED firearms identification division had positively identified *another* gun as the murder weapon.

By failing to present this evidence to the jury, trial counsel's unreasonable performance clearly prejudiced Mr. Freiburger. Because this evidence transforms the consensus between firearms examiners advanced by the prosecution into a substantial conflict among experts, its introduction creates a substantial probability that the jury would have discredited the lone positive identification made by Mr. Cayton. Because this positive identification represented the

sole evidence connecting Mr. Freiburger to the crime, discrediting it raises a "reasonable probability that the result of the trial would have been different " *James v State*, 372 S C. 287, 290, 641 S.E.2d 899, 901 (2007) (citing *Strickland v Washington*, 466 U S. 668, 687 (1984)).

G. Applicant's right to a fair trial as guaranteed by the United States Constitution and South Carolina law was violated as a result of the prosecutor's improper argument during closing argument. (Ground 10(g)).

I. Relevant Facts.

The forty years intervening between John Omer's murder and Ed Freiburger's trial rendered the details of February 28, 1961 necessarily blurry. Although the prosecution presented evidence that Mr. Freiburger had traveled to downtown Columbia during the day, Tr 300-01, 316, his whereabouts after that trip remained unknown. The prosecution did not present evidence that Mr. Freiburger returned to Fort Jackson that afternoon. It did not present evidence concerning Mr. Freiburger's location when Mr. Omer disappeared. And it did not present evidence regarding Mr. Freiburger's whereabouts on the morning of March 1.

Throughout the trial, only two witnesses testified that could have shed any light on the situation, but neither did. Mr. Tilbury, who was stationed at Fort Jackson with Mr. Freiburger in 1961, tr. 486, testified that he could not have known of Mr. Freiburger's whereabouts on February 28 due to the distance between their respective training programs. Tr. 489. Neither the solicitor nor trial counsel questioned Mr. Tilbury about Mr. Freiburger's whereabouts on the morning of March 1. Mr. Abersold, who shared a bunk with Mr. Freiburger at Fort Jackson, tr. 445, could offer no further information. Although he testified that Mr. Freiburger gave him a round of ammunition, Mr. Abersold explained that he could not recall when that transaction occurred. Tr. 463. Neither the solicitor nor trial counsel asked Mr. Abersold any questions about Mr. Freiburger's whereabouts on February 28 or March 1, 1961.

Despite the absence of evidence pertaining to Mr. Freiburger's whereabouts, the solicitor's closing argument presented a chronology of the night Mr. Orner disappeared allegedly based on the testimony of Mr. Abersold and Mr. Tilbury. In asking the jury to infer that Mr. Orner picked up Mr. Freiburger as his last fare, *see* tr. 960-61, the solicitor attempted to use Mr. Abersold's testimony to establish that Mr. Freiburger disappeared from Fort Jackson on the night of February 28. Tr. 961. Although Mr. Abersold had specifically stated he did not remember when Mr. Freiburger had given him the ammunition, the solicitor argued that "[Mr. Freiburger] had to be in the barracks after he bought the gun for a period of time, because of Mr. Abersold giving him the bullet, giving him the bullet. Then nobody knows where he is . . .". Tr. 961.

The solicitor similarly constructed his argument pertaining to the morning of March 1 out of the testimony of Mr. Abersold and Mr. Tilbury. Although neither witness offered any information about the events of that date, the solicitor argued that

The morning of March 1st, [Mr. Orner's] cab is found. Mr. Abersold who sleeps in the bunk . . . he doesn't know where Ed Freiburger (sic) was. Mr. Tilbury, his best friend, born on the same day at the same hospital raised on the same street, same school, same time going in the army, he doesn't know where he is. He doesn't know where he is.

Tr. 957. Although these arguments had absolutely no basis in the record, trial counsel did not object. As a result, the last words the jury heard before deliberating consisted of this unsubstantiated chronology of the night Mr. Orner disappeared.

II. Relevant Legal Principles and Argument.

The duty of a solicitor "is not to convict a defendant, but to see that justice is done" *State v. Rayfield*, 369 S.C. 106, 115, 631 S.E.2d 244, 249 (2006). To fulfill this duty, the solicitor must "conduct the trial in such a manner as will be fair and impartial to the rights of the accused, and not say or do anything which might improperly affect or influence the jury." *Id.* (quoting

State v King, 222 S.C. 108, 119, 71 S.E.2d 793, 798 (1952) A solicitor engaging in improper closing arguments violates this duty. *E.g., Darden v Wainwright*, 477 U.S. 168, 179-81 (1986); *State v Cannon*, 229 S.C. 614, 614, 93 S.E.2d 889, 891 (1956) These improper arguments entitle a criminal defendant to a new trial where they "so infect the trial with unfairness as to make the resulting conviction a denial of due process" *State v Huggins*, 325 S.C. 103, 107, 482 S.E.2d 114, 116 (1997)

a The Solicitor's Closing Argument was Clearly Improper, where it Blatantly Incorporated Facts not in Evidence

It is a fundamental rule that "[a] solicitor may not rely on statements not in evidence during closing argument." *Huggins*, 325 S.C. at 107, 481 S.E.2d at 116; *State v Coleman*, 301 S.C. 57, 61, 389 S.E.2d 659, 661 (1990) Rather, a solicitor must confine his or her argument to evidence in the record and the inferences reasonably drawn therefrom. *Huggins*, 325 S.C. at 107, 481 S.E.2d at 116, *Mincey v. State*, 314 S.C. 355, 358, 444 S.E.2d 510, 511 (1994) To hold otherwise, and allow the solicitor to present the jury with testimony from the solicitor as if he had taken the stand himself would represent a "prostitution of justice" *Mincey v State*, 314 S.C. at 358, 511; *Coleman*, 301 S.C. at 61, 389 S.E.2d at 661.

The Solicitor clearly violated this fundamental rule by fabricating a chronology of the night Mr Orner disappeared based on nonexistent evidence Although both Mr. Abersold and Mr Tilbury disclaimed any knowledge of the events of February 28 and March 1, *see tr.* 463, 489, the solicitor argued that their testimony established that Mr Freiburger suspiciously disappeared on from Fort Jackson on the night of the murder and remained missing the following morning *Tr* 957. By manipulating witness testimony in order to present the jury with a highly inculpatory and completely unsubstantiated theory of the night of the murder, the solicitor violated the "elementary proposition . . . that counsel in a criminal case must confine themselves

to the record in addressing the jury ” *Coleman*, 301 S C at 61, 389 S.E.2d at 661

b The solicitor’s unsupported argument entitled Mr. Freiburger to a new trial, where these arguments so infected the trial with unfairness as to make the resulting conviction a denial of due process

The rule that counsel in a criminal case must confine themselves to the record in addressing the jury “is essential, and must be enforced ” *Cannon*, 229 S.C. at 614, 93 S E.2d at 891. Recognizing the influence of closing arguments on the jury, the South Carolina Supreme Court has repeatedly held that a solicitor’s unsupported argument so infected a trial with unfairness as to make the resulting conviction a denial of due process. *See Huggins*, 325 S.C. at 107-08, 481 S.E 2d at 116, *Mincey*, 314 S C at 358, 444S.E.2d at 511-12, *Coleman*, 301 S C. at 61, 389 S.E.2d at 661, *State v Games*, 271 S.C. 65, 66, 244 S.E.2d 539, 540 (1978), *Cannon*, 229 S.C at 614, 93 S E 2d at 891. In assessing whether an unsupported argument results in a violation of the defendant’s due process rights, the Fourth Circuit has outlined some valuable considerations, including

- 1) the degree to which the prosecutor’s remarks have a tendency to mislead the jury and to prejudice the accused, 2) whether the remarks were isolated or extensive; 3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused, . . . 4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters . . . 5) whether the prosecutor’s remarks were invited by improper conduct of defense counsel [and]
- 6) whether curative instructions were given to the jury

United States v Wilson, 135 F 3d 291, 299 (4th Cir. 1998), *see also Huggins*, 325 S.C. at 108, 481 S E 2d at 116 (finding an unsupported argument “fundamentally unfair,” where “the evidence showing Appellant’s guilt was far from overwhelming, it was based entirely on circumstantial evidence”)

The fabricated chronology the solicitor presented to the jury clearly supported the prosecution’s case The Solicitor presented evidence suggesting that Mr Freiburger traveled to

downtown Columbia on the day of February 28, tr. 300-01, 316, but also presented evidence that Mr. Orner received his last dispatch from Fort Jackson later that night. Tr. 296-97. To support his theory that Mr. Orner picked up Mr. Freiburger as that last fare, the Solicitor had to establish that Mr. Freiburger returned to Fort Jackson on February 28 and later left. Although the Solicitor offered no evidence supporting this theory, he presented it to the jury nonetheless. He argued that Mr. Abersold's testimony established that Mr. Freiburger returned to base on February 28 and then mysteriously disappeared. Tr. 961. And he argued that both Mr. Abersold and Mr. Tilbury noticed that Mr. Freiburger remained missing the following morning Tr. 957. By fabricating evidence that Mr. Freiburger mysteriously disappeared from the location where Mr. Orner went missing, at a time substantially coinciding with Mr. Orner's disappearance, the solicitor misled the jury into accepting a highly prejudicial and completely unsubstantiated chronology of the night of the murder. See *Wilson*, 135 F.3d at 299.

This unsupported argument painted an especially misleading picture in light of the circumstances of this case. At several points in his closing argument, the Solicitor referenced the irregularity of soldiers spending nights away from Fort Jackson. Tr. 958, 959. Common sense suggests that underpaid soldiers have little reason to do so given the expense of a hotel room, the availability of a free bed on base and the expectation that soldiers report for duty in the morning. These considerations rendered any overnight absence inherently suspicious. By concocting a story of Mr. Freiburger's activities including such an absence, the solicitor misled the jury into attributing to Mr. Freiburger a degree of suspicion not warranted by the record.

The absence of competent proof introduced to establish Mr. Freiburger's guilt made the jury especially vulnerable to the solicitor's unsupported argument. See *Wilson*, 135 F.3d at 299. In *State v. Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997), the South Carolina Supreme Court

held that an unsupported closing argument entitled the defendant to a new trial where "[t]he evidence showing Appellant's guilt was far from overwhelming, it was based entirely on circumstantial evidence" *Id* at 108, 116. Similar to the case built against Ms. Huggins, the case against Mr. Freiburger consisted entirely of circumstantial evidence. The solicitor's case revolved around conflicting ballistics evidence and witnesses with no independent memory of the events in question. In light of the weak evidence presented against Mr. Freiburger, the suspicious chronology concocted by the solicitor likely had a significant impact on the jury's determination of guilt.

The prejudice resulting from the solicitor's unsupported argument exceeds the prejudice the South Carolina Supreme Court has previously recognized as sufficient to entitle the defendant to a new trial. In *State v Cannon*, 229 S.C. 614, 93 S.E.2d 889 (1956), the Court reversed the defendant's conviction based on the solicitor's argument that the defendant had killed his mother-in-law to collect an insurance policy. *Id* at 614, 891. Although testimony established that the victim had a \$1,000 insurance policy, the solicitor's closing argument mischaracterized this policy as worth \$4,000. *Id*

Like the solicitor's argument in Mr. Freiburger's case, the solicitor in *Cannon* presented inculpatory and unsubstantiated evidence to the jury. Unlike the jury in Mr. Freiburger's case, the *Cannon* jury heard competent evidence supporting the suggested inference beyond the solicitor's improper closing argument. *See id*. While the *Cannon* jury did not hear evidence establishing that the victim had an insurance policy worth the amount suggested by the solicitor's argument, even the lesser-valued policy established by competent evidence supported the solicitor's allegation of motive. *See id*. In contrast, Mr. Freiburger's jury heard nothing beyond the solicitor's argument suggesting that Mr. Freiburger had mysteriously disappeared from Fort

Jackson on the night of the murder. In presenting the jury with this unsubstantiated and prejudicial rendition of the evening Mr. Orner disappeared as the last words it heard prior to deliberation, the solicitor's argument so infected the trial with unfairness as to make Mr. Freiburger's conviction a denial of due process. See *Huggins*, 325 S.C. at 107-08, 481 S.E.2d at 116.

H. Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as result of trial counsel's failure to object to the prosecutor's improper closing argument. (Ground 10(h)).

The prejudicial errors described above in the discussion of Ground 10(g) could have been avoided had Mr. Freiburger's trial counsel objected to the solicitor's improper closing argument. Because the details and impact of the improper closing argument have already been discussed at length in the preceding section, Mr. Freiburger will not repeat them here. Instead he will confine this portion of his trial memorandum to a brief discussion of the law governing his claim of ineffective assistance of counsel.

"To establish a claim of ineffective assistance of counsel, a PCR applicant must establish both that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different." *James v. State*, 372 S.C. 287, 290, 641 S.E.2d 899, 901 (2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Among other obligations, effective trial counsel is expected to be aware of the law governing his client's interests and to use available legal tools to protect those interests. In keeping with this basic principle, the South Carolina Supreme Court has held that trial counsel performs ineffectively when he fails to object to a solicitor's improper closing argument. See, e.g., *Hall v. Catoe*, 360 S.C. 353, 364-601 S.E.2d 335, 341 (2004) (holding counsel performed

ineffectively by failing to object to the solicitor's improper use of victim impact testimony in his closing argument), *Simmons v State*, 308 S.C. 481, 485, 419 S.E.2d 225, 227 (1992) (holding that counsel provided ineffective assistance in failing to object to the solicitor's improper argument regarding the PCR petitioner's refusal to permit a warrantless search of his car)

In *State v Mincey*, 314 S.C. 355, 444 S.E.2d 510 (1994), the South Carolina Supreme Court granted post-conviction relief after finding trial counsel ineffective for failing to object to the solicitor's unsupported closing argument. In *Mincey*, the solicitor's closing argument suggested that several defense witnesses gave false testimony due to intimidation or threats by the PCR petitioner. *Id.* at 357-58, 511. Because the solicitor had not presented evidence that the petitioner intimidated any of the witnesses, the court held that "counsel was ineffective in failing to object to the Solicitor's comments." *Id.* at 358, 511-12.

In light of the legal principles set forth above – especially *Mincey*, which addresses a substantially identical situation – trial counsel's failure to object to the solicitor's unsupported argument must be deemed constitutionally deficient. Mr. Freiburger was entitled to a jury verdict based on a deliberation of facts supported by competent evidence and testimony subject to cross examination, but he was deprived of that critical right as a result of trial counsel's failure to safeguard it. Counsel could have objected and requested a mistrial. At the very least, he could have requested a curative instruction. His failure to do so compel the conclusion that Mr. Freiburger's trial counsel performed deficiently.

As discussed in the preceding section, trial counsel's failure to object to the solicitor's unsupported argument doubtlessly prejudiced Mr. Freiburger. The last words the jury heard prior to deliberation consisted of the solicitor's forceful yet unsupported argument that Mr. Freiburger left Fort Jackson under suspicious circumstances at a time and place substantially

coinciding with Mr Orner's disappearance. Because this argument so infected the trial with unfairness as to make Mr. Freiburger's conviction a denial of due process, Mr. Freiburger was entitled to a new trial. *See Huggins*, 325 S.C. at 107-08, 481 S.E.2d at 116. Trial counsel's failure to object deprived Mr. Freiburger of this opportunity.

I. Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to present character evidence during Applicant's case-in-chief. (Ground 10(f)).

I. Relevant Facts.

Mr. Freiburger spent the vast majority of his life in Fort Wayne, Indiana. He grew up there, met his wife there, and raised his family there. Throughout this time, Mr. Freiburger met many individuals who describe him as a kind, peaceful, and gracious soul. Affidavit of Edward P. Habrowski at ¶ 5 ("Habrowski"); Affidavit of Pamela Jordan at ¶ 3, 6 ("Jordan"); Affidavit of Julie Renninger at ¶ 3 ("Renninger"); Affidavit of Carole Bowers Tenbarger at ¶ 3 ("Tenbarger"). Although the Solicitor characterized Mr. Freiburger as a liar and thief, *see* tr. 951-958, 967-98, these individuals stood ready and willing to testify that Mr. Freiburger had lived a law-abiding and productive life as a business man, member of his community and as a husband, father and grandfather. Habrowski at ¶ 6, Jordan at ¶ 4; Renninger at ¶ 4; Tenbarger at ¶ 4.¹³

Mr. Freiburger made many contributions to his community during the years he spent in Fort Wayne. He started and maintained a successful landscaping business, where he employed his three children to teach them responsibility and help them save money for college. Renninger at ¶ 5; Jordan at ¶ 6. Mr. Freiburger also maintained an active role in his local church, serving as a Eucharist Minister and the director of Fort Wayne's Catholic Youth Organization program for ten years. Habrowski at ¶ 5, Jordan at ¶ 5; Renninger at ¶ 6, 8, Tenbarger at ¶ 7. In his spare

¹³ Copies of these and other affidavits are attached as exhibits to this pleading.

time, Mr. Freiburger coached youth sports and offered his assistance to elderly women in his neighborhood Jordan at ¶ 5; Renninger at ¶ 6, 7.

Despite the many individuals available to attest to Mr. Freiburger's impeccable character, trial counsel did not call any of them to testify. Instead, trial counsel allowed the jury to hear the Solicitor's uncontested characterization of Mr. Freiburger as a liar and thief. In failing to call witnesses capable of rebutting this characterization and demonstrating Mr. Freiburger's peaceful, law-abiding character, trial counsel violated Mr. Freiburger's constitutional right to effective assistance of counsel.

II. Relevant Legal Principles and Argument.

"To establish a claim of ineffective assistance of counsel, a PCR applicant must establish both that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different." *James v. State*, 372 S.C. 287, 290, 641 S.E.2d 899, 901 (2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

South Carolina Rule of Evidence 404(a) prohibits the admission of "[e]vidence of a person's character or a trait of character . . . for the purpose of proving action in conformity therewith on a particular occasion, except . . . [e]vidence of a pertinent trait of character offered by an accused." S.C. R. Evid. 404(a)(1). The South Carolina Supreme Court has acknowledged that trial counsel's misuse of this influential evidence can provide a basis for post-conviction relief. See *Mitchell v. State*, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989) (holding counsel ineffective for failing to object to the admission of bad character evidence elicited from witnesses for the prosecution), see also *Com v. Weiss*, 606 A.2d 439, 443 (Pa. 1992) (holding counsel provided ineffective assistance for failing to call character witnesses on behalf of the

accused).

The evidence counsel chose to ignore was clearly relevant to disproving the charge levied against Mr. Freiburger. Evidence of Mr. Freiburger's peacefulness refutes the prosecution's characterization of Mr. Freiburger as a violent murderer. Evidence of his law-abiding nature undermines the Solicitor's suggestion that Mr. Freiburger killed Mr. Orner as one phase in his spree of lawlessness. *See* tr. 951-58. Trial counsel had access to many individuals who were not only willing but eager to dispute the prosecution's inaccurate depiction of Mr. Freiburger. By ensuring that the jury never heard these accounts of Mr. Freiburger as an individual that lived his life as a pillar of his community rather than a habitual offender, counsel performed unreasonably. *See Strickland*, 466 U.S. at 687.

Although trial counsel contends that strategy motivated the decision to forego character evidence, the prosecution's case-in-chief rendered this strategy futile. While trial counsel sought to prevent testimony that Mr. Freiburger had gone AWOL from reaching the jury, the prosecution presented alternative forms of evidence suggesting this same conclusion. The prosecution referenced Mr. Freiburger's absences from Fort Jackson, and emphasized the irregularity of these absences given his appearance in civilian clothing. Tr. 446, 563; *see also* tr. 958, 963 (emphasizing this point in summation). The prosecution presented evidence that police had questioned Mr. Freiburger at Fort Leavenworth, a known military prison. Tr. 678, 785. And the prosecution made Mr. Freiburger's military files, which were color-coded to reflect his time spent at the Fort Leavenworth prison, visible to a jury comprised of military personnel.

Given the negligible impact of this redundant evidence, trial counsel had no reason to forego the use of character evidence. On the contrary, trial counsel had every reason to call the many individuals willing and available to attest to Mr. Freiburger's character in order to alter the

negative picture painted by the prosecution. The prosecution painted this picture with evidence that Mr. Freiburger lied to investigators that questioned him in 2001, tr. 674-78, 768, 783-86, and was arrested for carrying arms in 1961. Tr. 579. Good character evidence would have prevented the Solicitor from effectively employing this evidence to depict Mr. Freiburger as a lawless and morally-bereft individual that would kill Mr. Orner to steal an insignificant amount of money. See tr. 951-58. In light of the multiple benefits the defense would have derived from a strategy including character evidence, trial counsel acted unreasonably in rejecting this evidence in favor of a strategy that offered none. See *McKnight v. State*, 378 S.C. at 44, 661 S.E.2d at 359 (holding trial counsel ineffective, where her decision not to call a favorable witness was not a valid trial strategy).

If trial counsel had introduced favorable character evidence, there is a reasonable probability that the jury would have acquitted Mr. Freiburger. See *James*, 372 S.C. at 290, 641 S.E.2d at 901. South Carolina jury instructions reflect that "evidence of good character and good reputation may in and of itself create a doubt as to guilt." *State v. Green*, 278 S.C. 239, 240, 294 S.E.2d 335, 335 (1982)(citing *State v. Lyles*, 210 S.C. 87, 41 S.E.2d, 625 (1947)). The individuals available to testify on Mr. Freiburger's behalf would have done so by enthusiastically undermining the prosecution's suggestion that Mr. Freiburger lived a life infected with violence and lawlessness. Contrary to these suggestions, the witnesses would have told the jury that Mr. Freiburger lived an admirable and productive life; founded on a deep devotion to religion and his family and as evident through his commitment to charity and his community. See Habrowski at ¶ 5; Jordan at ¶ 5; Renninger at ¶ 6, 8; Tenbarger at ¶ 7. In light of the antiquated and minimal evidence offered against Mr. Freiburger, a challenge to the negative image created by the prosecution would have sustained a reasonable doubt as to his guilt. See *Strickland*, 466 U.S. at

J. Newly Discovered Evidence Demonstrates that Applicant is Not Guilty of the Murder of John Orner. (Ground 10(j)).

On March 23, 2009, applicant was administered an f-MRI lie detection test. The test was administered at the Medical University of South Carolina and the test results were analyzed and interpreted by Dr. Steve Laken, the Founder, President and Chief Executive Officer of the Cephus Group, a competent and world-class leader in the use of f-MRI to determine deception. The test results demonstrated that Mr. Freiburger was being truthful when he denied during the testing that he killed the victim in this case, Columbia cab driver John Orner.¹⁴ Dr. Laken concluded, after reviewing the brain images, that "I am of the scientific opinion that Mr. Freiburger is telling the truth about not murdering John Orner." Laken affidavit at p. 5. As will be discussed in more detail below, and as the testimony at the PCR hearing will reveal, the results of the f-MRI indicating that applicant is not guilty of the murder he was convicted of committing constitutes "evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(a)(4) (2008).

The f-MRI test is not a typical polygraph examination, but rather involves a new, more sophisticated and accurate method of determining whether an individual is being truthful. This technology uses f-MRI, i.e., functional magnetic resonance imaging. Unlike more common magnetic resonance imaging (MRI):

f-MRI uncovers the different parts of the brain people use when performing simple tasks. This tool has had an enormous impact for cognitive neuroscientists, psychiatrists, and psychologists as it provides a non-invasive glimpse into the brain's inner workings. Over the last ten years, researchers have published thousands of papers using this technology. *fMRI*

¹⁴ Dr. Laken's affidavit, which describes the testing procedure and the results, is attached as an appendix to this pleading.

Background Information, <http://www.cephoscorp.com/fMRI-background.htm>

Peer review studies of the test show very high accuracy rates, and the newly discovered evidence should be admissible in South Carolina.

The Rules of Evidence permit "a witness qualified as an expert by knowledge, skill, experience, training, or education" to testify to "scientific, technical, or other specialized knowledge" if that knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." S.C. R. Evid. 702. In *State v Council*, 515 S.E.2d 508 (S.C. 1999), the South Carolina Supreme Court set forth four factors to guide the court's discretion "(1) scientific methodology, (2) peer review; (3) consideration of general acceptance; and (4) the rate of error of a particular technique" *Id* at 518. As Dr Laken will establish at the PCR hearing, the f-MRI test he administered to applicant meets these standards. The technology is used in various universities, by commercial groups and by the U.S. Government in determining deception. Furthermore, the technology has been subjected to peer review and publication, and the peer review results indicate that the procedure is very accurate. *See, e.g., Karim et al, The Truth About Lying. Inhibition of the Anterior Prefrontal Cortex Improves Deceptive Behavior, CEREBRAL CORTEX* (May 14, 2009), Davitzkos et al, *Classifying Spatial Patterns of Brain Activity with Machine Learning Methods. Application to Lie Detection, NEUROIMAGE* (2005) (f-MRI detects deception accurately 90+% of the time); Greene & Paxton, *Patterns of Neural Activity Associated with Honest and Dishonest Moral Decisions*, 106 PNAS 12506, July 28, 2009. Additionally, standard operating procedures are maintained, as a computer performs the analysis, and the technique has been accepted in the scientific community

South Carolina law also requires judges to determine if the probative value of the evidence is outweighed by its prejudicial effect. It is true that since *Daubert*, courts have

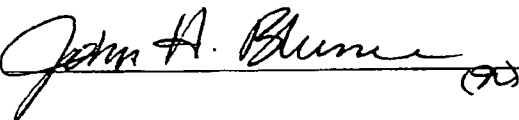
generally employed Federal Rule of Evidence 403 to exclude polygraph evidence independently of rule 702. See *United States v. Waters* 194 F.3d 926 (8th Cir. 1999), but as the testimony will reveal, brain imaging as a method of lie detection is far superior to the polygraph method. See Brain Fingerprinting Laboratories, *Frequently Asked Questions*, <http://www.brainwavescience.com/FreqAskedQuestions.php> (last visited Jan. 20, 2007) (describing the differences between polygraph and BF technology, and claiming as high as 100% accuracy for BF). In light of the accuracy of f-MRI testing, and its success under the *Council* factors, Mr. Freiburger's f-MRI test results indicating he is not guilty of the murder for which he currently serving a life sentence should be admissible as newly discovered evidence.

CONCLUSION

As the testimony to be presented through live witnesses, affidavit and documentary evidence at the PCR hearing will reveal, applicant is entitled to post-conviction relief due to trial error and newly discovered evidence.

Respectfully submitted,

JOHN H. BLUME
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
(607) 255-1030

By:  (90)

August 3, 2009

EXHIBIT 1

INFORMATION LISTED UNDER THE FOLLOWING QUESTIONS IS REQUESTED REGARDING EDWARD E. FRIEBURGER, WHOSE PHOTO IS ATTACHED WITH A PHOTO OF THE WEAPON OWNED BY HIM ON FEBRUARY 28, 1961.

What was your home address prior to your entry to the Service?

~~Fort Wayne, Indiana~~

Did you know Edward E. Frieburger prior to your assignment to Fort Jackson, S. C. (Yes) ~~(No)~~.

Frieburger was not a member of your Company? How did you meet him?
We live next door to each other in Fort Wayne, Indiana.

How many times did you accompany him to Columbia from Fort Jackson?
Two or three times.

Please give me the addresses and names of acquaintances of Frieburger in Columbia.
None To my knowledge

Did you go with him to a friend's address on Gervais Street in Columbia? ~~(Yes)~~ (No).

Did you go with him to a friend's address on Senate Street in Columbia? ~~(Yes)~~ (No).

If your answer is in the affirmative, give the names and addresses of these persons.

Did Frieburger drink intoxicants while in your company and if so, to what extent? *We had a few bottles of beer together one evening in January. There was no excess drinking*

Have you visited night spots with Frieburger? (Yes) ~~(No)~~. If yes, name the places. *Several of the bars on the main street. What they call combat alley*

Did you visit Jimmie's Drive Inn just outside of the Fort near Post 1, on Jackson Boulevard? ~~(Yes)~~ (No).

Did you know the taxi driver John Orner who operated a State Cab, whose can stand was located at Jimmie's Drive Inn? ~~(Yes)~~ (No).

Have you ridden in a taxi cab with Frieburger while stationed at Fort Jackson? (Yes) ~~(No)~~.

Do you know whether Frieburger used a taxi cab for transportation while at Fort Jackson? (Yes) ~~(No)~~.

Do you remember seeing the face of the man whose photo is attached while at Fort Jackson? ~~(Yes)~~ (No) (Marked John Orner)

Were you with Edward E. Frieburger on pay day February 28, 1961? ~~(Yes)~~ (No).

000108

Did you accompany Frieburger when he went to Columbia 2-28-61?
~~Yes~~ (No). If yes, what time did you return and how?

Were you with him when he purchased a 32 calibre Harrington and Richardson revolver from a Pawn Shop on the late afternoon of February 28, 1961? ~~Yes~~ (No).

Were you with him any time on the night of February 28, and the early morning of March 1, 1961, and if so, give me a detail account of your activities. *No*

Did you see him on March 1, 1961, and if so, under what circumstances? *Not to my knowledge*

How many times have you seen him with a revolver (photo attached) and did you see him with it on March 1, 1961? *I did not know he owned it until I saw the picture*

The taxicab driver, John Orner was murdered on the night of February 28th. or early morning of March 1, 1961. Did you hear Frieburger talk about this or discuss the case with him at any time, before or after, it was being publicized? ~~Yes~~ (No).

Have you at any time seen him with a revolver (photo of gun) as described, while he was stationed at the Fort? *No*

After February 28, 1961, did you see him with a TIMEX wrist watch (gold plated with a leather band). ~~Yes~~ (No).

Did you know that Frieburger was arrested for the theft of a typewriter and adding machine on March 2, 1961? (Yes) ~~No~~.

Signed *Arthur M. Tilbury*

Address

Seattle, Washington

Information Obtained by:

Charles F. Gardner

CHARLES F. GARDNER

CAPT ORD CORPS

COMMANDING

Date: *14 JUNE 1961*

000107

Q U E S T I O N A I R E

Were you at Fort Jackson, South Carolina on February 28, 1961 ?

Yes.

Did you ^{see} Edward E. Freiburger at any time on this date - day or night ?

No.

Did you know that Freiburger purchased a revolver on this date ?

No.

Did you at any time hear Freiburger talk about the murder of JOHN ORNER, taxi cab driver ?

No.

How many times have you loaned Freiburger money ?

The only time I loaned FREIBURGER any money was when I paid for his bus ticket from Columbia, S.C to Fort Wayne, Indiana in the amount of about \$23.95.

What do you know about this revolver ? (See Photo attached).

Nothing.

How much money did he have when you and Freiburger left Fort Jackson for Fort Wayne on March 16, 1961 ?

FREIBURGER did not have any money at all to the best of my knowledge

How much money did he have when you and he left Fort Wayne Indiana on March 19th. when you were returning to Fort Jackson?

I don't know,

Did Freiburger have the revolver with him on this trip ?

Not to my knowledge

How much money did he have when he returned to Fort Jackson on March 20, 1961 ?

I don't know.

000127

Did he borrow any money from you when he returned to the Fort ?

No.

Do you know anyone that he borrowed money from at Fort Jackson ?

No

How did you know that Freiburger had left Fort Jackson on March 22, 1961, and had gone to Fort Wayne ?

Well either the 22d or 23d of March 61, I was on a detail in the company and I was told that the CID and a Sgt from FREIBURGER's company was looking for me and I went to FREIBURGER's company and I was told by a Sgt that FREIBURGER was AWOL. Who did you talk to when you called Fort Wayne about Freiburger being AWOL from the Fprt. ?

I talked to my Father, Herbert A TILBURY on the phone and told him that FREIBURGER was AWOL and to inform FREIBURGER's parents that he was AWOL so they could get him to come back to Fort Jackson, S.C.

Did you buy a round trip ticket for yourself and one for Freiburger on March 16, 1961 to Fort Wayne and return to Fort Jackson ?

No. Not a round trip ticket, just one way from Columbia, S.C to Fort Wayne, Ind.

Did you have the revolver in question in your possession during this trip ?

No.

Did you visit the DeSoto Hotel with Freiburger ?

No.

Do you know Rolf Kleinecker ?

No.

How many times were you with Kleinecker and Freiburger ?

None that I recall, I don't know KLEINECKER by name, maybe I know him by sight.

Did you come in town with Freiburger on pay day, February 28, 1961 and visit the Polka Dot Club, Hawaiian Club and the Circle Bar ?

No.

Give the names of the girls that you and Freiburger were with at the DeSoto Hotel and the Gresham Hotel, Columbia South Carolina ?

I don't remember their names, but it was the Gresham Hotel that we stayed at overnight.

What time did you leave Columbia to return to the Fort on February 28, 1961?

I wasn't in town on 28 Feb 61, with FREIBURGER, I may have been in town by myself, but if the 28th was a day during the week I wasn't in town.

What mode of transportation did you use ?

None. I wasn't in town.

Did Freiburger return to the Fort on this night with you ?

I wasn't in town and I don't know where FREIBURGER was on this date.

How well did you know John Morgan, Freiburger's friend ?

I don't know MORGAN personally, I do remember that he tried to sell me a Brownie FL Camera for \$6.00 while I was in his barracks, the camera was broken and I wouldn't use it. I was in the barracks either ~~xxx~~ to see FREIBURGER or a soldier named PETERS. Did you know where Freiburger had his civilian clothes hid in the boiler room ?

No. But I heard rumors in the company that the clothes were found by some Army Major named BOBITE (Phonetic) and they were hidden in the motor housing that controls the furnace in the boiler room.

Why did Freiburger say he was going home on March 22, 1961 ?

He didn't say anything to me about going AWOL on this date.

Did you let Freiburger have money to go home on March 22nd ?

No.

Why did Freiburger decide to go home on March 22, 1961 ?

I don't know.

How many times did you ride with Freiburger in a taxi cab while at Fort Jackson ?

I think twice.

At what point on the Fort did you and Freiburger catch a taxi cab ?

In front of PX nearest to my company. I was in Co C, 16th Specialist Battalion, 1st Training Regiment.

Give the names of the soldiers that accompanied you and Freiburger to Columbia ?

The only time I went to town in a taxi with FREIBURGER, we went alone.

What is the name of Freiburger's friend that lives in Columbia ?

I didn't know he had one in Columbia.

How many times have you been to his house with Freiburger ?

I never went to anyones house in Columbia, S.C. with FREIBURGER.

What street and address did you go ?

N/A

What night spots did you and Freiburger visit other than those on Main Street ?

I have been to the "WHIP" about a block from the Capitol Building; Hawaiian Club and thats all.

Did Freiburger get drunk on February 28, 1961 ?

I don't know, I wasn't with him.

What reason did Freiburger give for purchasing the pistol that he carried home with him @

I never knew he had a gun and he never discussed it with me if he had one.

Where did Freiburger say he got the typewriter and adding machine?

I never saw the machines but he told me that "He bought it from some kid that rotated and the kid was billeted near Co C, 4th Training Reg't.

What was the soldier's name that frequently went into town with Freiburger when you were not with him ?

I don't know.

Was Freiburger in civilian or military clothes when he went into town on February 28, 1961?

I don't know, I didn't see him.

Were you wearing military or civilian clothes on that date ?

I never had any civilian clothes while I was assigned to Fort Jackson, S. C.

Were you wearing civilian or military clothes when you went to the DeSoto Hotel ?

I never went to the DeSoto Hotel and when I went to the Gresham Hotel, I was wearing my Army Green uniform.

What names did you or Freiburger register under?

Our own names, but I don't remember who signed the register.

This is the photo of a weapon (photo attached). Does this look like the pistol that Freiburger had?

Rifle I never saw FREIBURGER with a pistol or revolver, outside the times we were on the ~~XXXXX~~ Range, and then we only had rifles no hand guns.

000027

Did you go in town with Freiburger when he pawned the adding machine and typewriter?

No.

Has Freiburger corresponded with you since he left Fort Jackson on March 22, 1961? If so when did you receive the last letter ?

No. I have never written to him. I just received a letter today from his Mother and she had his address written down in the body of the letter.

Name the kind of cabs that you and Freiburger rode in while at Fort Jackson ?

The only one I ~~remember~~ remember riding in was a 1951, Red and Black, Chevrolet. I don't remember the cabs I rode in with FREIBURGER or Don UNGLESBEE.

I show you the photo of a cab driver (photo of JOHN ORNER enclosed). Have you seen this man before or have you rode in his cab?

No. to both questions.

Do you know directly or indirectly anything that would throw light on this murder ?

No.

Signed Arthur M. Tilbury

Address [REDACTED]

Information obtained by:

Paul C. Thorp
PAUL C. THORP

Criminal Investigator

[REDACTED]
Date 20 June 1961.

000120

STATEMENT
(SR 190-45.1)

Explain the nature of the investigation. If deponent is accused or suspected of an offense he must be so informed and this fact affirmatively shown

PLACE Fort Richardson, Alaska	DATE 20 June 1961	FILE NO.
DEPONENT (Last Name - First Name - Middle Initial) TILBURY, Arthur, M (M-CAU-13 Nov 1942)	SERVICE NO. RA 16 685 306	GRADE Pvt
ORGANIZATION (If deponent is a civilian, give address) [REDACTED]		

I HAVE BEEN INFORMED BY Paul C. Thorp, WHO STATED HE IS (a) ~~PRO~~
Criminal Investigator, OF THE UNITED STATES (Army) ~~(XXXXX XXXXXXXXX)~~,
THAT HE IS CONDUCTING AN INVESTIGATION OF a Murder,
[OF WHICH I AM ~~(XXXXXX XXXXXXXXX)~~ (Strike out words between brackets, if inapplicable)]
a witness

"THE UNIFORM CODE OF MILITARY JUSTICE, ARTICLE 31, ~~(XXXXXX XXXXXXXXX)~~
~~XXXXXX XXXXXXXXX~~ (Strike out only if person making statement IS a mem-
ber of the Armed Forces) (has) ~~(XXXX)~~ BEEN READ TO ME BY Paul C. Thorp
I UNDERSTAND THAT I DO NOT HAVE TO MAKE ANY STATEMENT WHATSOEVER AND ANY STATEMENT I MAKE
MAY BE USED AS EVIDENCE AGAINST ME."

- Q. Pvt TILBURY will you tell me what date you entered the United States Army and where you entered the U.S. Army?
A. At Fort Benjamin Harrison, Indiana on 29 October 1960.
- Q. Where were you assigned to from there?
A. Fort Leonard Wood, Missouri.
- Q. Did Recruit FREIBURGER enter the U. S. Army the same date as you and did he accompany you throughout your basic training?
A. Yes. He and I joined the U.S. Army together and went from Fort Benjamin Harrison to Fort Leonard Wood, Missouri and we left Leonard Wood on 13 Nov 60 and arrived at Fort Jackson, S. C. the same day. We traveled by air.
- Q. What Basic Training Company were you and he assigned to upon your arrival at Fort Jackson, S. C.?
A. Co B, 2d Battalion, 1st Training Regiment. We were there from 13 Nov 60 until 30 Jan 61, at this time I was assigned to Co C, 2d Specialist Battalion, 4th Training Regiment, he was assigned to Co A, same Battalion, same Regiment.
- Q. How many times did you go to Columbia, S.C. with him during your assignment at Fort Jackson, S. C.?
A. Twice. The first time was by bus and this was the second weekend of Dec 60. This was when we stayed overnight at the Gresham Hotel. The second time I went to town with him is when I bought his bus ticket for him and we went to town in a taxi cab.
- Q. What room did you stay in at the Gresham Hotel?
A. I don't remember the room number, I think we paid \$2.35 each.
- Q. Did you have any girls come up to your room while at the Gresham Hotel?
A. Yes. Two of them, I think they had Auburn or Black hair, about 5'7" tall, I can't remember their names, they only stayed about 15 minutes, the girl I was with stayed

EXHIBIT	DEPONENT'S INITIALS <u>A.M.T.</u>	PAGE 1 OF _____ PAGES

Additional pages must contain the heading "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED" The bottom of each additional page must bear the initials of the person making the statement and be identified as "PAGE _____ OF _____ PAGES"

DA FORM 19-24 1 JUN 59 *Jul 51* PREVIOUS EDITION OF THIS FORM IS OBSOLETE.

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235-6

STATEMENT (Continued)

with me and the other girl took FREIBURGER to another room, I gave the girl I was with 10.00 and I had sexual intercourse with her.

Q. Who paid for this other room that FREIBURGER went to and was it in the same hotel?

A. I don't know about the room, but it was in the same hotel.

Q. Who signed for the room that you and FREIBURGER occupied at the CRESHAM Hotel?

A. We each paid our share, I don't recall who signed for the room but we did use our own names, at least I used my own name if I signed for the room, I'm not sure about FREIBURGER.

Q. Who obtained the girls for you?

A. The Bell Toy, he was a young colored man about 22-23 years old.

Q. When you went home with FREIBURGER on 17 thru 20 March 61 did FREIBURGER purchase a pistol or revolver and take it home with him?

A. No.

Q. Is the Cresham Hotel the only place that you stayed overnight with FREIBURGER while you were at Fort Jackson, S. C.?

A. Yes.

Q. When you returned with FREIBURGER from pass-on-20 March 1961, how did you get back to Fort Jackson, S. C.?

A. We took a taxi from the bus depot in Columbia and I think it was a 55-56 Chevrolet and there was an elderly woman who rode about half way to the Fort with us and she got out near a children's home or hospital. I don't know the name of the place.

AFFIDAVIT BY DEPONENT

I, Arthur M. TILBURY HAVE READ AND DO BE (HAVE READ) THIS STATEMENT WHICH BEGINS ON PAGE ONE (1) AND ENDS ON PAGE 3. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE WHICH CONTAINS STATEMENT MATTER. THIS STATEMENT WAS MADE BY ME FREELY WITHOUT HOPE OF BENEFIT OR REWARD WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE OR UNLAWFUL INDUCEMENT.

Arthur M. Tilbury
(SIGNATURE OF DEPONENT)

SWORN TO AND SUBSCRIBED BEFORE ME THIS 20 DAY OF June 19 61 AT Fort Richardson, Alaska

WITNESSED BY

Paul C. Thorp

Investigator

Par 136 (b) (4)

NO. 1, 1057

(AUTHORITY TO ADMINISTER OATHS)

RIGHTS UNDER UCMJ, ARTICLE 31, AND THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him. No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial. No person subject to this code shall compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him. No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial.

The fifth amendment to the Constitution of the United States provides that no person shall be compelled in any criminal case to be a witness against himself.

DEPONENT'S INITIALS

A. M. T.

Page 2 of 3 Pages

- Q. Have you ever ridden in a taxi cab while at Fort Jackson, S. C. that did not have a two way radio in it?
A. Not that I remember.
- Q. Did you go to Columbia, S. C. on 28 Feb 61 or on 1 March 1961?
A. No.
- Q. Did FREIBURGER even ^{Q.M.T.} indicate in any manner that he had killed anyone?
A. No. Not to me.
- Q. You say you grew up with him, did he appear nervous or out of sorts at anytime you saw him during March 1961?
A. Not that I noticed.
- Q. Do you know of any soldier that was in his unit in March 1961, that owed him \$52.00?
A. No.
- Q. Do you know if he had that amount of money loaned out to anyone?
A. I doubt if he had that kind of money to loan out, I never knew him to loan out any more than a dollar or two at a time.
- Q. When you went to town with FREIBURGER and stayed at the Gresham Hotel, what kind of clothing was he wearing?
A. He was dressed in his Army Green uniform.
- Q. Did he have any civilian clothes while he was at Fort Jackson, S.C.?
A. Yes. He had a pair of light grey trousers, a white shirt, a darker sport coat than the trousers.
- Q. Where did he get these clothes from?
A. He had them sent from home.
- Q. What was he wearing when you bought his bus ~~ticket~~ ^{Q.M.T.} ticket for him from Columbia, S.C. to Fort Wayne, Indiana on or about 17 March 1961?
A. His Army Green uniform.
- Q. Did he have a suitcase or hand bag with him when you and he left to go home at this time?
A. I had a cardboard box with me and it contained ^{his} ~~my~~ ^{Q.M.T.} civilian clothing and two of my Army Poplin shirts.
- Q. Who packed this box?
A. Well his clothes were already in the box and I put mine in on top of his and when we arrived at home I removed my clothing and he took the box containing his clothes and took the box to his house.
- Q. You didn't know then if he had a pistol or revolver in the bottom of this box?
A. No. I didn't look under his clothing that was in this box.
- Q. Do you know the names of any of his friends or that he went to town with?
A. The only person I know of that FREIBURGER at Fort Jackson, S.C. was a boy named PETER who was assigned to FREIBURGER's company and there was a boy named MORGAN who was also in FREIBURGER's company, but I don't know if FREIBURGER went to town with them or not.
- Q. Do you have anything further to add to this statement?
A. No.
- Q.M.T.

Exhibit 2

SHERIFF

13 leave
STROTHER S. SLIGH . RICHLAND COUNTY
Member National Sheriff Association
COLUMBIA, SOUTH CAROLINA

May 26, 1961

Honorable Arthur J. Shuping, Sheriff
Rowan County,
Salisbury, North Carolina.

Re: John H. Orner-Murder Case

Dear Sir:

I am enclosing herewith a questionnaire which we believe will be of assistance in the investigation of a murder case still open in this county. For your information the facts are briefly:

Subject - JOHN ORNER operated an independent cab with the State Cab Association in Columbia, S. C. His cab did not have a two-way radio system. The cab stand is located just outside of Gate #1 to the Fort Jackson reservation near Jimmie's Drive-In. On the night of February 28, 1961, Orner was operating his cab from the cab stand and was last seen at the stand around 11:40 P.M. No one saw him leave and it has not been ascertained whether he left with or without a passenger. His cab a 1957 Chevrolet, blue, four-door sedan, was found abandoned in the [redacted], Columbia, S. C., around 4 A. M., on the morning of March 1, 1961. The cab meter was in record position to record mileage time for the fare. The meter showed \$17.65. Blood stains were found on the back rest of the front seat directly behind the steering wheel. The body of Orner was found around noon March 3, 1961, just off the shoulder the embankment on U. S. Highway 601, approximately 30 miles southeast of Columbia, S. C. Medical examination of the body disclosed that Orner died as a result of a bullet wound in the head. The bullet entered the back of the head near the base of the skull. A ballistic analysis of the bullet recovered from the head of Orner indicates:

32 cal. long 98 grain, Lubaloy ammunition.

During the course of the investigation, it was ascertained that Edward L. Frieburger, a soldier stationed at Fort Jackson, purchased a 32 cal. Harrington & Richardson Blue Steel Revolver with white handles, from the Capitol Loan Company, Columbia, S.C., on February 28, 1961. This weapon has been recovered, and is now in our possession. Subject went A'OL from the U. S. Army at Fort Jackson, March 21, 1961, and has been returned to Military Authorities at Fort McPherson, Georgia, and is not available to this office at the present time for an interview. The purpose of the attached questionnaire is to get as much background information as possible about Frieburger's activities and movements on February 28, 1961,

000045

and subsequent to that date. It will be appreciated if you will have one of your officers contact the below named person and have him complete this questionnaire.

Name: Kay E. Beaver,

Address: [REDACTED]
Landis, North Carolina.

After interviewing the above named person, and you feel that it would be of value for us to talk to him, please contact this office by teletype or telephone, collect AL 2-8641.

Thanking you for your courtesy and cooperation in this matter and with kindest regards, I remain

Very truly yours,

Strother S. Slich
STROTHER S. SLICH, Sheriff
Richland County, S. C.

SSS/kbm
encl. Questionnaire

000047

Beaver

INFORMATION LISTED UNDER THE FOLLOWING QUESTIONS IS REQUESTED REGARDING EDWARD E. FRIEBURGER, WHOS PHOTO IS ATTACHED WITH A PHOTO OF THE WEAPON OWNED BY HIM ON FEBRUARY 28, 1961.

Did you know Edward E. Frieburger who occupied the same barracks that you did on February 28, 1961? (Yes) (No).

What length of time and how well did you know him? 6 Weeks

How many bunks were there between his bunk and yours? About half way up the barracks

Did you at any time accompany Frieburger to Columbia from the Fort? (Yes) (No).

Do you know the names of any friends who fraternized with Frieburger during his stay at Fort Jackson? If so give their names.

David Luma - Steph Close & him - from ALB or more
Ralph Ralphy - Keilnacker - from Chicago (German)

On February 28, 1961, Frieburger purchased a revolver (photo attached) from a pawn shop in Columbia, S. C. Were you with him when he bought the gun? (Yes) (No).

Did you know about him having purchased the gun? (Yes) (No).

Did you see Frieburger with this gun (see photo) at any time? (Yes) (No).

Did you hear any conversation about him having a revolver? (Yes) (No).

February 28, 1961, was pay day at Fort Jackson. Can you recall your activities on that date and anything pertaining to Frieburger? (Yes) (No).

Subject came home to Sandis this week and when returned heard conversation about the typewriter adding machine.

Do you know whether he went to Columbia on this date? (Yes) (No).

He said he heard Frieburger say he went to town.

Do you know time and date he returned? (Yes) (No).

He said Frieburger was at camp when he returned on Sunday night.

Do you know anything about a Timex wrist watch with a leather band that he might have had after February 28, 1961? (Yes) (No).

Do you know about Frieburger having been arrested regarding the theft of an adding machine and typewriter on March 2, 1961? (Yes) (No).

Do you recall having read news paper articles, or individuals discussing or talking about the taxi cab driver (JOHN ORNER) who was murdered on the night of February 28, 1961? (Yes) (No).

000048

John Morgan was in the
same week end we were talking
about - bloody and drunk and
said he had been left some where
out side of Columbia where he
said he was beat up. And
some taxi brought him in.

The patrol sgt. at that time was Wally
Bellack was the John Morgan up.
and also was in Columbia that week
end. Bellack is a German and worked
for a private Co. doing the same thing
as the merchant marines before joining
the army. Joined Army in Chicago.
He is in German now. He was in an
investigation of Lareburger, Lysenwith Case
and AWOI. John Morgan went AWOI. about a week
after he claims he was beat up -
German boy about 18 yrs old - Bad to drink
and fight.

000049

Do you remember having learned through the press or otherwise about the cab driver having been found murdered some few days later? (Yes) (No).

Did you hear Frieburger have anything to say on this subject? (Yes) (No)

How long had you known Frieburger prior to February 28, 1961?

approx. - 3 weeks -

Did you detect any noticeable change in Frieburger after February 28, 1961? (yes) (No). *He went AWOL after that and was nervous -*

Do you know the names and addresses of any of Frieburgers friends who lives in Columbia, S. C.? (Yes) (No).

Do you know directly or indirectly anything that would throw a light on this murder case? (Yes) (No).

Signed Kay Edward Beaver

Address [REDACTED]

Information obtained by:

A. J. Shuping Sargent / Beaver Co

John McManus / AS Beaver Co

Time 2 AM

Date: 5-20-61

Frieburger civilian clothes - were hid in a closet ^{or tent} in little room under The Barracks - Don't know how he got them in there. he had access to this room being a fireman.

Kay E. Beaver said he only knew Frieburger about 6 weeks, only time in same camp with him.

another friend James Riggs of Kay E. Beaver only knew Frieburger the same way but he slept closer to Frieburger

James Riggs - address South Norfolk Va.

original from old trap near Elizabeth City NC.

but married a girl in South Norfolk and lives there now.

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Exhibit 3

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	CA No. 06-CP-40-3866
	)	
EDWARD FREIBURGER # 286115,	)	
Applicant,	)	
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	
	)	
	)	

AFFIDAVIT OF WILLIAM A. TOBIN IN SUPPORT OF APPLICANT

1. I have a Bachelor of Science degree in Metallurgy from Case Institute of Technology in Cleveland, Ohio, and graduate studies in metallurgy and materials science at Ohio State University and the University of Virginia. While in graduate school, I accepted an offer of employment by the Federal Bureau of Investigation (FBI) as a Special Agent in 1971. After serving approximately 3 ½ years as a "street Agent", I was assigned to the FBI Laboratory in Washington, D.C., as a Forensic Metallurgist, where I remained until my retirement in 1998 as the *de facto* Chief Forensic Metallurgist. During my career at the FBI Laboratory, I undertook additional graduate studies in materials science (metallurgy) at the University of Virginia. In addition, I undertook studies for a Master of Arts in Special Studies at George Washington University (GWU), a program sponsored and instructed by both the Forensic Science Department and Law School at GWU.

Between 1986 and 1995, per Congressional mandate, I was responsible for all requested forensic metallurgical examinations in the United States, for all local, state and federal law enforcement agencies, including determination of the causes of the TWA 800 midair explosion disaster, the nation's worst rail disaster ("Sunset Unlimited" in Mobile, AL), the nation's second worst environmental disaster (oil spill by the "Emily Berman"), and numerous other high profile incidents. I have testified before two U.S. Senate Subcommittees on the Judiciary and Court Oversight, appeared on CBS' "60 Minutes" (televised twice) in my capacity as Principal of *Forensic Engineering International*, and have authored numerous scientific and technical publications. I have been employed as a research metallurgist and also as a plant metallurgist involved with manufacturing, production and materials processing in both the aluminum and copper industries. During both my metallurgical studies and also in my position as an FBI forensic metallurgist, I visited numerous metal manufacturing and processing plants throughout the United States and Taiwan to observe industrial manufacturing operations and practices. Additionally, I am very familiar with the current practice and methodology of firearm and toolmark examinations, and used the same comparison microscopy (with even more advanced scientific modifications for interference microscopy) in many metallurgical examination matters. My *curriculum vitae* is attached to this Affidavit as Exhibit A.

2. Firearms examiners rely on markings left on bullets and shell casings by firearm components such as the barrel or breech face of a gun in their evaluations of evidence. The probative significance of these markings depends on, among other factors, the particular alloys used, manufacturing processes involved, product distribution, and subsequent service.

3. Barrel manufacture can vary, but in one typical process barrels are fabricated by first drilling a blank of rod stock with a stationary drill and the workpiece (barrel stock) rotated at 4,000 – 4,100 rpm. Faster speeds increase tool & die (drill) wear and create an undersized bore; slower speeds increase manufacturing and cycle times. Accordingly, a balance is struck by plant metallurgists for the particular operation and materials involved. The workpiece is typically next reamed to remove slight tool (drill) marks and increase bore diameter to accommodate a bullet, and then is finally rifled.

4. Different fabrication techniques are available for rifling of gun barrels. Rifling techniques include, but are not limited to, swaging over a fluted mandrel, rotary hammer forging over fluted mandrel, broaching and carbide button rifling. Some processes effect rifling by metal removal (*e.g.*, broaching) and others by metal displacement (flow) (swaging, forging, carbide button).

5. Other metal forming, shaping, treating and finishing processes are used for other components in each firearm.

6. Alloys used can vary for each component in a firearm and among manufacturers, although it is not uncommon for the same alloy to be used for both the barrel and receiver. For example, one manufacturer generally uses a cold-rolled 4140 resulfurized steel or 414 free-machining stainless steel in barrel and receiver production; another uses 416 grade resulfurized stainless steel for both.

7. To a plant metallurgist, probably the most critical consideration for many manufacturing operations in full production is tool and die wear. Various techniques are used to eliminate or reduce production "down time" caused by die wear, malfunctions or failures (breakdown), a costly consideration in many production processes. Accordingly, efforts to maximize die life have been a dominant concern for plant metallurgists for many decades. It is so important that a very significant amount of scientific research has been, and is being, conducted in the field of tribology, the branch of engineering that deals in the study of friction, wear and lubrication of component surfaces in relative motion against each other, such as bearings and gears.

8. The primary metallurgical consideration for tool & die materials, such as the rifling tool surfaces, is that the materials selected remain chemically, thermally and mechanically stable under production operating conditions. Additionally, relative hardness of tool & die material is a significant consideration in die longevity, but material hardness alone is generally not a sufficient indicator

of wear resistance or wear performance in specific situations.

9. In general, the use of lubricants in production to effect boundary lubrication, or even fluid lubrication, tends to reduce tool & die wear by one to two orders of magnitude. However, there are some situations in which they can *increase* wear such as inhibiting formation of a beneficial tribofilm. They can also act as a carrier of indigenous abrasive chips and exogenous debris if not properly filtered or maintained. Further, lubricants tend to break down over various periods of time, in part depending on the nature of the production process.

10. In short, it is almost always economically beneficial for a manufacturer to obtain the longest die life possible, not only out of concerns for production continuity but also because of costs of various tool & die materials such as tungsten carbide. In addition, a strong trend has existed in almost all metalworking industries to reduce variability in manufacturing processes. The confluence of these concerns means that the characteristic striae imparted to a workpiece such as a barrel have likely tended to be persistent over larger production lots over time.

11. For some processes, a die can last from many hours to many months, particularly where primarily compressive stresses are involved, depending on production rates. The general metallurgical principles involved in how markings are left on bullets and casings are no different in relevant aspects in the firearms

industry than they are for marks left on metals such as steels, copper, aluminum, *etc.* through other manufacturing processes such as drawing, extrusion and swaging.

12. Due to the manufacturing processes described above, a number of firearms can be expected to exhibit virtually identical characteristics. It is highly unlikely that plant metallurgists manufacturing gun barrels would accept such high rates of tool & die wear that the rifling broach, for example, is required to be changed or resurfaced by grinding or carbide inserts after only a few barrels are fabricated. Identical characteristics, in turn, will likely impart identical characteristics onto bullets and shell casings such that it is not possible to tell apart bullets or shell casings fired from different firearms. Due to the properties of both workpiece and die materials, and to the manufacturing process, a significant number of weapons may be indistinguishable in matchable characteristics, including any distinctions based on so-called individual characteristics.¹

13. Even when discernible extraneous characteristics are introduced in the fabrication process, it is difficult to understand how a forensic examiner far removed from the production process can assess the difference between individual characteristics and sub-class characteristics imparted by the die surface during the

¹ As an NRC Committee recently reported, two semiautomatic pistols purchased at the same time were found to produce sufficiently similar breech face markings that a match could be made to either weapon. See Report on Ballistics Imaging (2008), National Research Council (NRC) at 2-14.

production sequence. The difference between class, sub-class, and individual characteristics is extremely important. Class characteristics are common to every member of a particular production run, such as the number and direction of lands and grooves on a bullet. Sub-class characteristics are produced by the manufacturing process through a tool that leaves identical markings on a number of firearms. Individual characteristics are, by definition, unique to one firearm. Without personal knowledge of the individual and sub-class characteristics produced by a particular manufacturing run, an examiner cannot necessarily tell the two apart. Such knowledge must be specific to a particular production run and/or even to subsequent use in service; while some examiners have a general knowledge of how firearms are produced, such general knowledge does not provide any information about whether a particular mark on a bullet or casing is individual or sub-class in nature.²

Some of the characteristics imparted by a die can be intermittent over various runs, and even during a single workpiece run, during production, such that even if a firearm does not share a particular subclass characteristic with a consecutively manufactured firearm, it may share the characteristic with earlier or

² Some class characteristics are similarly difficult to distinguish from sub-class or individual characteristics. However, many class characteristics are reliably identifiable, such as the caliber of a bullet or the direction and number of lands and grooves. These are useful pieces of data and can dramatically narrow the range of possible firearms that could have been used to fire a particular bullet or casing. However, these characteristics cannot be used to support the absolute individualization identification claims made by firearm examiners.

later produced firearms.

14. The focus of a firearms/toolmark examiner is generally on finding *similarities* and dismissing or rationalizing non-matching characteristics as irrelevant. The quality of both agreements and disagreements can be difficult to assess. Unlike some forensic disciplines, such as fingerprints and DNA, firearms examiners do not follow the single dissimilarity rule, whereby the examiner will declare an exclusion if there is a single difference between two samples. Instead, firearms examiners generally do not make exclusions on the basis of individual characteristics, under the theory that bullets or casings fired from the same gun may acquire a number of dissimilar individual characteristics. However, it should be noted that, for example, it has been reported that a toolmark examiner can encounter 15-20% matching striations between bullets fired from different firearms of same manufacturer and type, and 21-38% on bullets fired from the same firearm. Consider, also, that field of view in normal comparisons is limited because examinations are typically conducted at between 5X and 40X, making it possible that field of view is of a subset of the 15-20%. See Biasotti, *A Statistical Study of the Individual Characteristics of Fired Bullets*, 4:1 J.For.Sci. 34, 34-50 (1959). A more recent work indicates that "...up to 25% of the striae in a non-match and more than 75% of the striae in a match will show concordance." See Heard, *Handbook of Firearms & Ballistics: Examining and Interpreting Forensic*

Evidence (1997). Thus, firearm examinations are largely subjective in nature, as each examiner must decide whether the non-matching characteristics being viewed should prevent declaration of a match. Even as a metallurgist / materials scientist and former plant metallurgist concerned with tool and die life, and knowledgeable about how manufacturing dies are produced, used and rehabilitated ("reworked" in the trade), it is doubtful that I could make such an assessment in most cases without control samples acquired contemporaneously to fabrication. Among materials scientists, it is not generally accepted that a person could make such an assessment without access to such control samples acquired contemporaneously to fabrication, or without at least a detailed personal knowledge of the individual and sub-class characteristics produced by a particular production run.

15. Though many firearm and toolmark examiners claim that individual differences on bullets and casings are reliably discernable under a microscope, the claim that examiners have a methodology that can reliably detect and characterize individual differences is scientifically unsubstantiated. I find no properly designed meaningful and comprehensive studies validating the assumptions of uniqueness and reproducibility relied upon by firearm examiners, in other words, that no two tools will leave the same markings on a bullet or casing.

16. Even in the few studies of "consecutively manufactured" guns, the small samples studied are meaningless without more thorough description of

sampling procedure and production methods. Neither "consecutively manufactured" nor consecutive serial numbers necessarily means "consecutively rifled", "consecutively machined" or any other relevant parameter because of mass production processes allowing for interchangeability. For example, two "consecutively manufactured" firearms may have non-consecutively rifled barrels or non-consecutively milled breech faces. In addition, the studies of which I am aware are neither double-blind nor blind and/or do not constitute a statistically significant sampling. Accordingly, any such opinions of exclusivity by firearm examiners are not based on scientifically accepted validation methodology.

17. It should be noted that there are two distinct primary issues to be resolved in assessing validity of toolmark source attributions: not only whether the premise of tool/firearm uniqueness is valid, but also, even assuming the premise of uniqueness is accepted, the accuracy of examiners' source attributions. It should be kept in mind that examiners are seeing only a relatively small portion of a bullet surface in the field of view of between 5X and 40X stereomicroscopy.

18. Recovered bullets present an additional problem because such bullets can be severely damaged and distorted, frequently limiting their utility as forensic evidence. Even simple methodological procedures used to capture bullets fired for control purposes can lead to misleading characteristics - striae not originating from sub-class characteristics of manufacture or as individual characteristics in service.

In order to stop a bullet in an extremely short distance, obviously a strong external force must be exerted opposing forward motion of the bullet. Hollow-point rounds fired into a water tank are frequently deformed; rounds fired into a cotton box can acquire striae from forced contact with the cotton fibers. See "Does the Recovery Method Affect the Quality of Test-Fired Bullets?", Ryan J. Postlethwait, Presentation B92, *Proceedings of AAFS* (Feb. 2007), Vol. XIII. Abstract at <http://www.aafs.org/pdf/07ProceedingsComplete.pdf>. If test-fired bullets in a controlled environment acquire extraneous striae from materials as ostensibly non-damaging (soft) as cotton, then real-world surfaces such as drywall, wood, metal, glass, human bone and other materials assuredly are more damaging. Although it can be speculated that striae introduced during test firing would likely result in non-matches, there are no studies or data indicative of how many times, if any, such extraneous characteristics can lead to false positives.

19. As the firearms examination community has started collecting and storing images of bullet and casing markings, there is evidence that the uniqueness claim made by firearm examiners is being undermined by the availability of more data. This is a phenomenon "...long observed by DNA analysts: as the size of the databases increases, the likelihood of an adventitious cold hit increases as well." Cole, Simon A., "MORE THAN ZERO: ACCOUNTING FOR ERROR IN LATENT FINGERPRINT IDENTIFICATION", *J.Crim.Law & Criminology*, 95:3

(2005) at 1064, referencing David J. Balding, *Errors and Misunderstandings in the Second NRC Report*, 37 JURIMETRICS 469, 470-71 (1997). It has been demonstrated by study of the Integrated Ballistic Identification System (IBIS), which "...is used successfully with numerous regional..."open case file" databases...[and] performs automated comparisons between bullets and cartridge cases from different crime scenes and is the cornerstone of the National Integrated Ballistics Information Network (NIBIN) deployed by BATF." See Review: AB1717 report, "Technical Evaluation: Feasibility of a Ballistics Imaging Database for All New Handgun Sales", Dr. Jan De Kinder, Ballistics Section Head, National Institute for Forensic Science, Department of Justice, Vilvoordsesteenweg 98-100, B-1120 Brussels, Belgium. De Kinder noted that "...the situation [correlation, or rankings of firearms considered likely candidates] worsens as the number of firearms in the database is increased" [De Kinder, *ibid* at 3] and "...increasing the database size, the ranking of a cartridge case decreases substantially" [De Kinder, *ibid* at 21]. Likewise, Joseph Masson, an ATF firearm examiner, noted that "[a]s the [computer] database grew within a particular caliber, 9mm for instance, there were a number of known non-matched testfires from different firearms that were coming up near the top of the candidate list. When retrieving these known nonmatches on the comparison screen, there were numerous two dimensional similarities." Joseph Masson, Confidence Level

Variations in Firearms, AFTE Journal 29(1) (Winter 1997). These striking similarities persisted even when the examiner looked at the bullets themselves. "When using a comparison microscope, these similarities are still present and it is difficult to eliminate comparisons even though we know they are from different firearms." *Id.*

20. Even assuming, *arguendo*, that firearms are capable of leaving toolmarks with unique individual characteristics on bullets and casings, the conclusion that a "match" between evidence toolmarks on a bullet or casing found at a crime scene and test toolmarks on bullets or casings that an examiner fired from a particular gun shows that the particular gun was the source of the ammunition components to the exclusion of all other firearms in the world is not supported by any scientifically meaningful body of research or empirical evidence. Moreover, examiners do not follow any objective, generally accepted scientific methodology to reach their identity conclusions. In particular, the claim that examiners can make reliable and statistically meaningful source attributions is undermined by several particular problems: the lack of research into firearm retail density and distribution patterns, the lack of an objective methodology for declaring a match, the lack of statistical research on the probability of finding coincidentally matching markings, the lack of independent peer review in the field, the demonstrated occurrence of observer bias among forensic examiners, and

the lack of any meaningful error rates for the field.

21. First, there exist no apparent studies or research into retail density and distribution patterns of firearms. This void makes it virtually impossible to determine or even assess the likelihood of other weapons exhibiting similar characteristics in a specific local area. Firearm products are likely not uniformly dispersed throughout the U.S. Instead, there may be a clustering effect, similar to that found by bullet lead researchers, where groups of firearms produced at the same time and in the same manufacturing process cluster in one particular area or region. See "A Retail Sampling Approach to Assess Impact of Geographic Concentrations on Probative Value of Comparative Bullet Lead Analysis", S.A. Cole, W.A. Tobin, L. Burgess, H. Stern, *Law, Probability & Risk*, Vol. 4, No. 4 (2005), Oxford University Press (probabilities of 1 were found in some geographic areas for some product lines, meaning that consumers had no choice but to purchase the same packing-coded (indicia of composition) bullets even if they wanted others). In assessing the statistical significance of "matching" characteristics on test and evidence bullets or casings, one must take into account the retail density and distribution demographics of the particular type of firearm and, indeed, even the prevalence of other similar caliber firearm types, in a particular region. Firearms and toolmark examiners do not currently use any data on the retail density and distribution patterns of firearms in assessing the probative

value of matching characteristics on test and evidence toolmarks due, in largest part, to the unvalidated premise upon which they rely - that no two firearms will produce toolmarks with the same "individual" characteristics. It should be noted that proponents of comparative bullet lead analysis (CBLA) maintained the same position for almost 40 years with regard to the similar underlying premise of uniqueness and also of probative value until relatively recent research proved CBLA invalid as practiced and without probative value. See "Comparative Bullet Lead Evidence (CBLA): Valid Evidence or *Ipsa Dixit?*", E.J. Imwinkelried & W.A. Tobin, *Okla. City Univ LR*, Vol. 28 No. 1 (2003). See also FBI Press Release dated Sept. 1, 2005, available at http://www.fbi.gov/pressrel/pressrel05/bullet_lead_analysis.htm (where FBI concedes lack of probative value).

22. There is little consensus in either the scientific community or the forensic community of firearms/toolmarks examiners as to number, type or characteristics of toolmarks that must match before a bullet or casing found at a crime scene can be attributed to the gun that an examiner test fired. Within the firearms and toolmark examiner community, the "standard" that examiners are supposed to follow provides no practical guidance. Instead, it provides vague and subjective benchmarks of "sufficient agreement," "best agreement", and "practical impossibility." In full it states:

"[a]greement is significant when it exceeds the best agreement demonstrated between tool marks known to have been produced by different tools and is consistent with the agreement demonstrated by tool marks known to have been produced by the same tool. The statement that "sufficient agreement" exists between two tool marks means that the agreement is of a quantity and quality that the likelihood another tool could have made the mark is so remote as to be considered a practical impossibility."

(AFTE Theory of Identification). This is a subjective standard, a characterization that the AFTE concedes. See AFTE Criteria for Identification Committee, "Theory of Identification, Range of Striae Comparison Reports and Modified Glossary Definitions – an AFTE Criteria for Identification Committee Report." AFTE Journal, Vol. 24, No. 2, April 1992, 336-340.

23. The first step for assessment of the probative significance of any source attribution is to estimate the statistical probabilities of a "match." Two metrics are required: (1) the likelihood that the observed results could occur if the samples had a common source, and (2) the likelihood that the observed results could occur if the samples *did not* have a common source. Without valid answers to both questions, there is no way to assess probative value of the evidence for an unequivocal source attribution. However, the literature does not answer either of these questions, and accordingly firearm examiners continue to make absolute identification claims without any proof of the probative value of such exclusive source attributions ("match").

24. The only generally accepted scientific method of making a conclusion that similar or matching markings on bullets or casings indicate that the bullets or casings came from a particular firearm would be to perform properly designed and statistically significant studies of both metrics. Such studies to assess both the premise of uniqueness and also the probative value of a source attribution would also necessarily require study of retail firearm distribution patterns as discussed above.

25. Since the study of metallurgy and materials science encompasses all manner of materials interactions, including solids, liquids and gases, materials scientists are easily capable of understanding and forming judgments about the forensic methodologies used by firearm examiners. Toolmark examinations, of which firearms (*aka*, "ballistics") examinations are a subset, is generally a study of metal interactions and, at times, of metal and environmental interactions (corrosion). There is no more appropriate scientific discipline to address such interactions than metallurgy or materials science.

26. Notwithstanding that the two most appropriate disciplines for assessing experimental methodology and conclusions of toolmarks examiners are metallurgy/materials science and statistics, to my knowledge, understanding and belief, there has been no demonstrable significant cross-discipline input from materials scientists or statisticians ever sought by the Association of Firearm and

Toolmark Examiners (AFTE) or SWGGUN for purposes of peer review or other scientific input into the development or testing of the methodology used by firearm examiners for exclusive source attributions.

27. Until only recently, there was little extrajudicial interest in toolmarks comparisons. The only "peer review" or testing of the methodology appears to be non-blind review of each other's work within the firearm examiner community. Within the materials science community this is not a generally accepted method of "peer review" of a methodology because each "reviewer" has an occupational or vested interest in the outcome of the "review", since the occupation, credibility, career and/or public standing of each reviewer is dependent on the outcome of the review, and the reviews were not undertaken in a blind fashion.

28. The AFTE community is a very closed one. Peer reviews in such a closed community are vulnerable to a phenomenon in social psychology and research methodology known as observer effects, of which 'expectation bias'/'confirmation bias' is an element(s), and which has been recognized by researchers at least as early as 1620 (*see* Francis Bacon, *Novum Organum*, Book I, 109, point 46 (1620), *reprinted in* 30 Great Books of the Western World 110 (Robert M. Hutchins ed., 1952)) and demonstrated by numerous researchers, "...especially in those forensic science practices utilizing subjective human judgment as their primary instrumentality and not based on techniques derived

from normal scientific methodology." See Risinger, Saks, Thompson & Rosenthal, "The Daubert/Kumho Implications of Observer Effects In Forensic Science: Hidden Problems of Expectation and Suggestion", *Cal.L.R.* 90:1 (2002) at 6. Confirmation bias, one of a number of biases revealed by researchers (see Paul Giannelli, "The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories", 4 *VA. J. SOC. POL'Y & L.* 439 (1997) for discussion of "pro-prosecution bias"), is a cognitive bias of selective thinking whereby one tends to notice and look for information that confirms one's existing beliefs, whilst ignoring anything that contradicts those beliefs. It is of most concern in practices involving subjective inference and was most recently implicated in the high profile and sensational misattribution matter of Brandon Mayfield, an American attorney accused of a terrorist bombing a train in Spain, where multiple fingerprint examiners (including one of the defense experts), quite experienced and held in high esteem within their community, peer reviewed the original fingerprint source attribution and confirmed it. As noted by Cole, "The fact that [even] defense examiners have corroborated disputed identifications indicates that expectation bias may be even more powerful than the expert's bias toward the party retaining her." See Simon A. Cole, "More Than Zero: Accounting for Error in Latent Fingerprint Identification", *J.Crim.Law & Criminology*, 95:3 at

29. As observed in paragraph 23, *supra*, the practice of toolmark associations lacks objective standards for declaring matches between test and evidence toolmarks, let alone for concluding that a "match" proves that the marks were made by one and only one gun. According to Saks & Koehler, "The lack of objective standards [for pattern recognition practices] helps explain the disturbing findings [of risk of error and examiner disagreements] from the small body of research that has been conducted on pattern matching by forensic scientists." See "The Individualization Fallacy in Forensic Science Evidence", *VANDERBILT L Rev* 61:1:199.

30. The vulnerability of forensic examiners to *contextual* bias was vividly demonstrated in a study by Dror, Charlton & Peron. Experienced fingerprint examiners were presented fingerprint specimens in a blind re-test of fingerprints on which they had rendered previous identification decisions. However, the examiners were presented with contextually biasing information in the new exposure in an effort to contaminate their objectivity. Although the experts were instructed to ignore all the contextual information and to focus solely on the actual prints ... [80%] were affected by the context and made decisions

³ Both the practices of fingerprint comparisons and toolmarks comparisons are based on entirely subjective methodologies involving the opinion of the examiner that the markings could only have come from one source

inconsistent with their original decisions.⁴

31. In another aspect of the study, only one-third of the participants remained entirely consistent across the trials. From a pattern recognition standpoint, fingerprint ridge characteristics, of which there are only seven,⁵ are varied in geometry and should be easier to recall than the patterns in toolmarks. Researchers in the Dror study were most alarmed with the data points of inconsistent decisions made even in the *context-free* controls. They reasoned that the data suggest the possibility, at least for subjective evaluations such as those involved in toolmark and fingerprint comparisons, that expert decisions are inconsistent across time *regardless of contextual biasing contamination*. Dror, *ibid* at 613.⁶

32. It is my experience and opinion that current proficiency tests are virtually worthless in establishing rates of error for forensic practices. There are a

(person or firearm) in the world. Accordingly, the contextual, observer and confirmation biases and inconsistency issues of fingerprint examiners are relevant in reviewing the methodology of firearm and toolmark examiners.

⁴ "Contextual information renders experts vulnerable to making erroneous identifications" Dror, I., Charlton, D., & Peron, E., *J For Sci.*, 156 (2006) 74-78. Cf., "Why Experts Make Errors", Dror & Charlton, *J For.Sci.* 600 / 56 (4), 2006, at 605.

⁵ See "Psychological Aspects of Forensic Identification Evidence", William C. Thompson & Simon Cole, in *Expert Psychological Testimony for the Courts*, Lawrence Erlbaum Assoc. Publishers (2007), at 36

⁶ In view of the obvious pattern recognition difficulties demonstrated by subjects in the Dror study, it is even more apparent that the AFTE Theory of Identification cannot be reliably applied in practice to establish the statistical certainty required of exclusive source attributions. As noted by Risinger, *et al*, "...reliability cannot be judged "as drafted," but must be judged only specifically "as applied" for the task at hand." Risinger, *et al, supra*, at 6. I have not found any database, statistics, data, research or studies that have scientifically established the boundary conditions of the AFTE Theory, or even any metric by which they could be assessed. Further, in my opinion, pattern recognition of toolmarks is a perishable skill with limited mental shelf life. I have found no research or studies confirming that pattern retention of the toolmarks made by particular tools solely by memory over spans of hours, days, months or years between observations is humanly possible. Unless such pattern retention is possible, examiners cannot rely on their experience to determine whether, as the AFTE Theory requires, a "match" between

number of problems with current proficiency testing, including that: the tests are generally not double-blind or even blind, samples are most frequently not "real-world", examiners are sometimes familiar with the control samples such that complete analyses are not even necessary (if in-house control samples are used), bureaucratic concerns over credibility (damaging test results in personnel files that may potentially destroy the career of an expert witness), concerns over agency image, camaraderie allowing respondents to repeat tests until they "get it right", and no retention of the incorrect result records. *See also* "The Individualization Fallacy in Forensic Science Evidence", Michael J. Saks & Jonathan J. Koehler, at 14, available at:

http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=michael_saks.

34. Decades of acceptance by a closed community of toolmarks examiners does not constitute a generally accepted scientific validation of a theory, premise, hypothesis or forensic practice based on such a foundation. One reason the "test of time", also known as "implicit testing", is not a valid measure of practice validity or rate of error is that there is no effective feedback loop for expert witnesses testifying to exclusive source attributions. In part because there is little extrajudicial professional interest in the field of firearms/toolmarks comparisons, there are few avenues available for expert witnesses to learn of

test and evidence toolmarks exceeds the best known non-match.

individualization testimony errors other than by pure accident. In the profession of toolmarks examinations, alternative reliable techniques for discovering misidentifications are rare. Because there is no scientifically reliable feedback loop for an examiner's individualization process, claims of low rates of error are without foundation. See "Simon A. Cole, "Implicit Testing": Can Casework Validate Forensic Techniques?, 46 *Jurimetrics J.* 117-128 (2006). See also Saks & Koehler, *supra*.

35. It is my opinion that the current state of scientific research in the field of toolmarks comparisons does not support any inference of exclusive source attribution. In addition, the methodology used by firearm examiners to reach conclusions of individualization in the current state of the art would not be generally accepted among the relevant scientific community, including materials scientists.

Signed under the penalties of perjury this 17th day of December, 2008.

William A. Tobin
William Tobin

Subscribed and sworn to before me this 17th day of December, 2008

Margaret J. Atkins
Notary Public

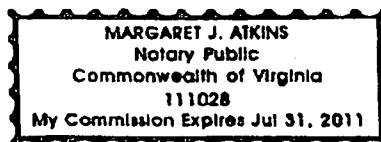


Exhibit 4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EDWARD FREIBURGER # 286115,
Applicant,

Y

STATE OF SOUTH CAROLINA,
Respondent.

IN THE COURT OF COMMON PLEAS
CA No. CA No 06-CP-40-3866

AFFIDAVIT OF WILLIAM C. THOMPSON

- 1 I am professor and chair of the Department of Criminology, Law & Society at the University of California, Irvine (UCI). I received a Ph.D. in psychology from Stanford University, where my studies focused on human judgment and particularly on how people evaluate scientific data. My dissertation concerned the way people assess forensic science. I also have a J.D. from UC Berkeley and have been a member of the California Bar since 1982.
- 2 For more than 20 years I have been studying and writing about what might be called the human element in forensic science. I have published a number of articles concerning the way experts interpret forensic science evidence, focusing particularly on the potential for error and bias when experts make subjective judgments. I have also studied and written about jurors' interpretations (and misinterpretations) of forensic science evidence. I have published several articles on the topic of *observer effects* in forensic science and I have been invited by the editors of the *International Encyclopedia of Forensic Science* to write the encyclopedia article on the topic of observer effects in forensic science.
- 3 *Observer effects* arise from the tendency of human observers to interpret data in a manner consistent with their expectations and desires. Psychologists have studied observer effects for nearly 100 years. It is widely recognized and accepted that observer effects can influence expert's interpretations of scientific data. The process of influence is typically unconscious and cannot be controlled or eliminated by act of will. Scientists in most fields routinely take careful steps to minimize observer effects when they must rely on subjective judgment to interpret the results of an experiment. Generally, this requires that they mask or shield the person interpreting data from extraneous information that

might improperly influence the interpretation. For example, scientists in most fields use "blind" or "double-blind" procedures when relying on subjective judgment to interpret data. Blind procedures are also widely used for peer-review of scientific articles, for grading of written examinations, and for other functions for which it is important to minimize observer effects.

4. Forensic scientists have generally been less careful about avoiding observer effects than scientists in other fields. I have published several articles criticizing the field of forensic science for failing to take adequate measures to minimize observer effects. There are signs that the field is beginning to take notice of the issue. Several high-profile errors in forensic science, including the FBI's erroneous fingerprint identification of lawyer Brandon Mayfield, have been attributed to observer effects. The importance of observer effects has also been demonstrated by a series of experimental studies that have shown that forensic experts can be induced to interpret the same data in different ways depending on what they expect the data to show. As a result, methods for minimizing observer effects have recently been under discussion at major forensic science meetings. Forensic science journals have recently begun to publish commentary on best practices for minimizing observer effects.
5. I have a general familiarity with the field of toolmark examination from having read the scientific literature. I have discussed and reviewed scientific literature on toolmark examination, and debates about the scientific foundations of toolmark examination, in some of my academic publications.
6. The judgments that toolmark examiners are routinely called upon to make in their professional practice, such as whether a particular mark was made by a specific tool, or whether the marks on a bullet were caused by its being fired by a specific gun, are precisely the type of judgments I would expect to be strongly influenced by observer effects. Observer effects tend to be most powerful when the data being interpreted are somewhat ambiguous and when there are no fixed standards for interpretation. Both conditions are typically present in toolmark examination. There are no published studies in the toolmark literature that show that toolmark experts can reliably distinguish individual and sub-class characteristics, nor do any established standards exist for distinguishing individual and sub-class characteristics.
7. Based on these considerations, I seriously doubt that toolmark experts can reliably determine whether a specific tool, rather than a similar tool, made a particular toolmark. Experts' judgments in such tasks are likely to be influenced by extraneous contextual information (unless careful steps are taken to shield the examiner from knowledge of the underlying facts of the case) and consequently their judgments will be slanted toward whatever result they expect or hope to find. In my opinion, such judgments are likely to

Exhibit 5

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	CA No. CA No. 06-CP-40-3866
	)	
EDWARD FREIBURGER # 286115,	)	
Applicant,	)	
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	
	)	
	)	

AFFIDAVIT OF ALICIA L. CARRIQUIRY IN SUPPORT OF APPLICANT

I, Alicia Carriquiry, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct

1 I received an undergraduate degree in 1982 in Agricultural Engineering from the Universidad de la República Oriental del Uruguay, in Montevideo, Uruguay. In 1985 I received a Master of Science degree in Animal Breeding and Genetics from the University of Illinois at Champaign-Urbana. In 1986 I received a Master of Science degree in Statistics from Iowa State University and in 1989 I was awarded a PhD degree in Statistics/Animal Breeding and Genetics from Iowa State University. After obtaining my PhD, I joined the Department of Statistics at Iowa State University as a tenure-track Assistant Professor in 1990. I was promoted to Associate Professor with tenure in 1996 and to Full Professor in 2000. Between 2000 and 2004 I served as Associate Provost of Iowa State University. I have been a Visiting Professor at the Catholic University of Chile (in 1993, 1996 and 2007-2008) and at Duke University (1997).

2 I am an elected member of the International Statistical Institute (ISI) and a Fellow of the American Statistical Association (ASA) and of the Institute of Mathematical Statistics (IMS). I am currently Vice President of the ASA and a member of the ISI Council. I have been President of the International Society for Bayesian Analysis, a member of the Executive Committee of the IMS and a member of the Board of Trustees of the National Institute of Statistical Sciences. I serve on two standing committees of the National Academy of Sciences and have been a member of several ad-hoc committees of the National Research Council (NRC) and the Institute of Medicine (IOM). In particular, I was a member of the recent NRC Committee on assessing the technical feasibility of a national ballistics database. The report from the Committee, which was recently released,

concluded that at this time, a comprehensive database, to include images of bullets and casings fired by all guns manufactured or imported into the United States, is not technically feasible. While deciding on the admissibility of firearm markings in court was not within the charge of the Committee, the practice of firearm-related toolmark examinations was discussed by the Committee. The Committee concluded that the two fundamental assumptions on which firearm marks examinations rest, those of "uniqueness" and "reproducibility" of the marks, have not been fully demonstrated and that more research is needed before that can be accomplished.

3 I was also the Principal Investigator (PI) on a research project funded by the Federal Bureau of Investigations (FBI, through the Midwest Forensic Resource Center at Iowa State University) in 1998-2000. Co-Principal Investigators were Professors Hal Stern (now Chair of the Department of Statistics at the University of California at Irvine) and Prof. Michael Daniels (now Acting Chair of the Department of Statistics at the University of Florida). The main objective of that research project was to assess whether an error rate (or a probability of a coincidental match) could be attached to comparative bullet lead analysis results, so that it would then be possible to quantify the probative value of bullet lead matches. We found that the probability of a match between two samples with **different origin** was non-negligible and that extensive research would need to be carried out before the probative value of bullet lead matches could be established. Results were reported to the FBI in a report entitled *Statistical Treatment of Trace Evidence*, submitted to FBI on May 4 of 2000. Possibly as a consequence of the findings in the report, several challenges to expert testimony on bullet lead arose. This in turn motivated the creation of the NRC Committee which investigated issues around bullet lead evidence and the eventual cancellation of bullet lead analyses by the FBI. I was asked to make a presentation to that Committee as an expert on issues associated with the estimation of the probability of coincidental matches in trace evidence.

4. I have read the Motion to Exclude Firearms Identification Testimony submitted by Mr. Troy Worsley and the various responses and re-joiners that have followed. The Motion, filed on April 10, 2008, raised four objections to the testimony of firearms examiner Mr. Jonathan Pope. In this write-up, I refer to three of them: (1) The fundamental assumptions of "uniqueness" and "reproducibility" of tool marks on ballistic evidence are not generally accepted in the relevant scientific community, (2) The subjective methodology for identifying so-called "individual" characteristics is not generally accepted, and (3) Claims of identity should not be admitted because there is no generally accepted statistical expression for the probability of a coincidental match. Objections (1) and (3) are closely related, indeed, if (1) is true, then (3) must follow.

5 Whether firearms examiners can accurately establish a match between two or more samples by observing the samples under a comparison microscope and counting "matching" striations is a matter of debate, even in the community of

firearms examiners. (See, for example, the work by Miller which appeared in the *AFTE Journal* in Spring 2000, Spring 2001 and Winter 2004) In his 2000 paper, Miller carried out thousands of land impression comparisons using bullets of different calibers that were known matches or known non-matches of specimens for which two and three dimensional images were available. His main objective was to establish that the less subjective approach known as CMS (Consecutive Matching Striae) produces few false positive identifications and that its performance does not depend on caliber. In his research, Miller obtained the distribution of the percentages of land impression matches (minimum, average, maximum) over the thousands of comparisons for known matches (KM) and known non-matches (KNM) samples. His results are striking in that they put into question whether an examiner who is only counting matching land impressions can accurately declare that two samples match. Miller's results suggest that there is a similar distribution of matching impressions among bullets that are known to be matches and among bullets that are known to be non-matches. In particular, when the comparisons were carried out using 9mm bullets he found that on the average, 7% and 11% of impressions among KNM and among KM actually matched using two-dimensional images and that the corresponding average percent matches were 11% and 18% using three dimensional images. Given that in both cases, the ranges of matching landmarks overlap to a high degree, it is clear that simply by counting the number of matching markings between two samples it is not possible to accurately declare a match between the samples. Consider, for example, the data obtained by Miller for 9 mm ammunition using two-dimensional images. The range in the number of matching striae was 2 to 9 in KNM and was 1 to 27 in KM. The corresponding average numbers were 5 and 7. Note that even though the maximum number of matching impressions appears to be much higher in KM (27 versus 9), the relatively low average of 7 indicates that much of the distribution of the number of matching impressions was actually concentrated around the lower values. Thus, given two samples with anywhere between 2 and 10 matching impressions it would be equally likely for them to be a "true" match or a "true" non-match.

6. Miller's results call into question the reliability of the method employed by firearms examiners. This is because for most calibers and for both two- and three-dimensional images, experimental data suggest that the overlap between the distributions of numbers (and percentages) of matching impressions in KMs and KNMs is too high to permit "separating" a match from a non-match. The CMS method (which was not employed by Mr. Pope) at least provides clear criteria for calling a "match" and prevents reliance on the misleading percentage of matching striations.

7. Even if we were to assume that a match can be accurately established using the traditional (i.e., non-CMS) approach, the significance of the match in terms of probative value relies on the assumption that each gun leaves a "unique" impression on all bullets fired with it. This is an unverified and very critical assumption. The assumption of "uniqueness" put in a different way says that if

two samples match (i.e., have indistinguishable markings) then they must have a common origin. In the case of markings on casings or bullets this says that the two samples must have been fired by the same gun. To my knowledge, this assumption has not been tested in a scientifically defensible way. With the information that is currently available, it is not possible to estimate the probability that two bullets or casings will match if they were fired by *different guns*. This probability is what we call the *coincidental match probability*. It is crucial to know whether this coincidental match probability is or is not negligible in order to appropriately evaluate the probative value of the match.

8. Consider evidence such as markings on a bullet or a casing that match the markings left on a different sample fired from a known gun. In order to determine its probative value, the evidence must be evaluated under two competing hypotheses: the "common origin" hypothesis and the "different origin" hypothesis. We can, in principle, compute the probabilities of observing the evidence under the two competing hypotheses, and the ratio of the two is called the *likelihood ratio* or the *odds against non guilt*. In the case of DNA evidence, for example, it is well known that:

- The probability that two samples will match if they were deposited by the same person (the "common origin" hypothesis) is very large
- The probability that two samples will match if they were deposited by a different person (the "no common origin" hypothesis) is very low.

The likelihood ratio for DNA evidence is very large and thus DNA evidence has high probative value. What can we say about the probative value of bullet or casing markings? Not much. That is due to the following: while we know that the numerator in the likelihood ratio (the probability of a match given the same gun) is high, the denominator (or the probability of a match of two samples fired by different guns) is unknown and will continue to be unknown unless extensive and as yet un-conducted studies are undertaken.

9. Estimating the probability of a match given the same gun is simple and is done routinely. In almost all investigations (including the one about which Mr. Pope testified in this case) examiners will test fire the gun in question repeatedly and will determine whether the markings on casings and bullets fired from the same test gun match. Typically a match will be established (again we do not address issues associated with the methods used to determine matches). We assume therefore that the numerator of the likelihood ratio mentioned in 7 above can be estimated and will typically be high for ballistic evidence.

10. The existing studies performed by firearms examiners are not adequate to establish the probability of a match given that different guns fired the samples, nor are they adequate to establish an error rate for firearms examiners. Estimating the probability of a match given that different guns fired the samples is very difficult and to my knowledge has not been done. The spotty, small scope studies that have been carried out in a disjointed manner by various firearms examiners in no way can be considered to provide the information that would be

needed to properly quantify the probative value of firearms markings. In order to reliably estimate the probability of a coincidental match (or the "uniqueness" of the markings left by a gun), it is necessary to conduct a population-wide study, where a representative (or at least very large) sample of guns is tested using a wide range of ammunition under both controlled and field conditions. Given that there are currently many millions of guns in use in the United States, such an experiment would need to include several thousand guns (although the exact number would need to be determined on the basis of experimental design principles and the margin of error that would be acceptable for the results). In essence, the study would result in a "reference database" similar to the database of DNA samples that has been used to successfully establish that the probability that two matches with different origin will match is essentially zero. In this light, Dr. Bieber correctly argues (Reply to Government's Opposition at 16) that currently, ballistics evidence is not easily amenable to the same type of quantitative treatment used in DNA evidence. But that was true also when DNA evidence was in its infancy, until a comprehensive reference database that permitted inferences at the population level became available, the probability of a coincidental match was not estimable either. Thus, we argue that the fact that at this time the information to make defensible statements about "uniqueness" is not available is no reason to unjustifiably assert that in the absence of evidence to the contrary the probability of a coincidental match will be assumed to be negligible.

11. In conclusion:

- Experimental results reported in the forensics literature cast doubts about the claim that by simply counting the number of matching striae or other impressions it is possible to determine whether two samples match. Miller's results, based on many thousand of comparisons of samples of different calibers and captured using two and three dimensional images clearly show that there is a significant overlap in the number of matching striae and other impressions in bullets known to be matches and bullets known to be non-matches. Thus, even among firearm examiners the practice of simply counting matching impressions appears to be questionable.
 - Even if we were to assume (against the evidence) that matches can be accurately established by counting impressions, stating that markings from firearms are "unique" and thus, that a common origin conclusion can be drawn is potentially incorrect and definitely over-reaching given the current level of information that is available. It has not been shown that a gun will leave markings on the bullets it fires that are indistinguishable from the markings left by *all other* guns that are in use in the United States at this time.
- It is generally accepted among statisticians that claims of identity (such as those made by firearms examiners when stating that two samples match) are inherently probabilistic. As such, these claims of identity must be supported by adequate data. In my opinion as a statistician with many years of experience, the studies that have been carried out and the (scant) data that have been collected in no
-

way support the methods or the conclusions that are routinely drawn by firearms examiners

Signed under the penalties of perjury this 23th day of April of 2009

Alicia Carriquiry
Alicia Carriquiry

Sarah Erickson 4/23/09


Exhibit 6

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

JIM HODGES
GOVERNOR

REC-1
2001 MAR 22 PM 3:41

RCSD



ROBERT M. STEWART
CHIEF

Firearms Department
March 20, 2001
SLED Lab No.: L01-1623
Your Case No.:
Incident Date: 3/1/61
(V) Orner, John
(S) Frieburger

BRIAN METZ
RICHLAND COUNTY SHERIFF'S DEPARTMENT
5623 TWO NOTCH ROAD
COLUMBIA SC 29223

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEM(S) SUBMITTED:

- 1 One (1) Harrington & Richardson Model 732 revolver; serial number W9893; caliber 32 S&W Long.
- 2 One (1) Harrington & Richardson Model 732 revolver; serial number W9948; caliber 32 S&W Long.
- 3 thru 5 Three (3) fragments of fired bullet(s) labeled as having been removed from the head of the victim John Orner.

RESULTS OF EXAMINATION: Items 1 and 2 were examined, test fired, and found to be in working order. The original test bullets fired in 1961, as well as the additional test bullets fired in 2000, were examined and compared to the Item 3, 4, and 5 fired bullet fragments. General rifling characteristic similarities were noted on both Item 1 and Item 2, however, no individual similarities were found on Item 1 test bullets and the submitted evidence. Some individual characteristic agreement was noted on Item 2 test bullets and the Item 3 bullet fragment, however, this agreement was insufficient for a positive identification. The Item 4 and Item 5 bullet fragments were inconclusive with Item 1 and Item 2 test bullets. Results of this re-examination were inconclusive. Items 3, 4,



000524

4416 Broad River Road, P. O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300

Page 2 of 2
SLED LAB NO.: L01-1623
March 20, 2001

and 5 could have been fired by Item 1, Item 2, or by another similarly rifled firearm of the same caliber.

Please note that this evidence was re-examined at the request of the Richland County Sheriff's Department.

These examinations and comparisons were conducted by Lt., Ira B. Parnell, Jr., Firearms Examiner with this Division.


Ira B. Parnell, Jr., Lieutenant

IBPJr/lme



000525

4416 Broad River Road, P. O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300

Exhibit 7

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EDWARD FREIBURGER # 286115,
Applicant,

v.

STATE OF SOUTH CAROLINA,
Respondent.

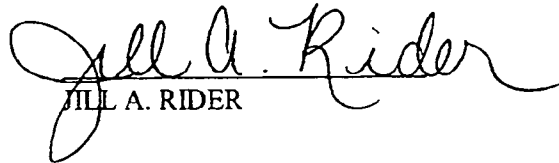
IN THE COURT OF COMMON PLEAS
CA No. CA No 06-CP-40-3866

AFFIDAVIT OF
JILL A RIDER

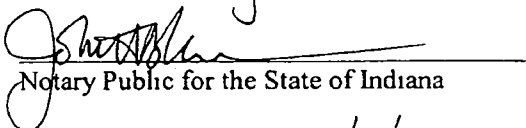
Jill A. Rider, who appeared personally before me, affirms and states the following:

1. I am a paralegal for the law office of Blume, Weyble, & Norris, LLC.
2. I have been employed by John Blume for the past eleven years
3. At Mr. Blume's request, I reproduced (by retyping) the July 19, 1961, letter from J P. Strom of the SC Law Enforcement Division to J. Edgar Hoover of the FBI. A photocopy of the letter is attached to this affidavit as exhibit A. The reproduction of the letter is attached to this affidavit as exhibit B.

Further affiant sayeth naught


JILL A. RIDER

Sworn to and subscribed before me
this 14 day of August, 2009


Notary Public for the State of Indiana

My commission expires: 3/27/2017

July 19, 1961

Honorable J. Edgar Hoover
Director
Federal Bureau of Investigation
United States Department of Justice
Washington, D C.

Re SLED Case #61-114
John Orner, Victim
Murder- Richland Co S C
February 28, 1961

ATTENTION FIREARMS LABORATORY

Dear Mr Hoover.

On February 28, 1961, Mr John Orner, a white cab driver, was murdered in Richland County. He was sot in the back of the head. The X-Ray showed three pieces of lead, and a few tiny fragments. There was only one entrance wound, and no exit wound. The three pieces of lead were turned over to Lt M N. Cate, Firearms Identification Technician, 59th MA, of this Division.

On April 12, 1961, an H&R Revolver, Serial #9893, was recovered in a house where it is possible that any number of persons could have carried it out. However, the owner, Alonzo Dreher, who is an old man, says that he does not believe that anyone had his gun. A number of known thieves and robbers, including members of his own family have been in this house from time to time. There was no physical evidence other than the gun.

Lt. Cate is of the opinion that this weapon killed the taxi driver, based on bullet comparisons, but has withheld a formal report because of the condition of the bullet.

On May 18, 1961, Sheriff S.S. Sligh of Richland County, submitted another H&R Revolver, Serial #9948, to Lt. Cate for examination, and comparison. This weapon was recovered from an AWOL Soldier, Pvt. Frieburger who purchased this weapon on the day of the murder in Columbia, S C.

Although some similarities were noted, Lt. Cate was unable to establish an identification of any kind. Again, there was no physical evidence other than the gun. Pvt. Frieburger, denies killing the Cab Driver.

On the account of a soldier being involved Sheriff Sligh requested that Lt. Cate consult the Army Firearms Examiner, Mr. Bird, at Fort Gordon. Mr. Bird checked the fatal bullet with bullets from both guns and stated that he did not believe the fatal bullet could be identified with any weapon because of its condition. Mr. Bird made no formal report. He was merely consulted and

stated that he would not enter the case officially, and that he would consider the conference confidential. This was on May 31, 1961.

On June 12, 1961 when Special Agent Bob Frazier was in Columbia, for the Winstboro Safe Burglary Trial, Lt. Cate showed Mr. Frazier his photo micrographs, and talked to him about this case. Mr. Frazier made no definite comments at that time. This is mentioned in case Mr. Frazier examines this evidence.

Sheriff Slight has requested, with the full knowledge and consent of Lt. Cate, that your Laboratory conduct examinations and comparisons of this evidence, which is being sent by Railway Express.

Evidence submitted. K-1-H & R Revolver, Serial #9893, belonging to Alonzo Dreher.
K-2-H & R Revolver, Serial #9948, belonging to Pvt. Frieberger
K-1, R-2 & K-3- piece of bullet from victim's head

If such examinations and comparisons can not be made due to circumstances and FBI policy, Lt. Cate request an opinion from your examiner as to the value of the fatal bullet as evidence, and what further course he may pursue.

Should your Examiner compare these bullets and effect an identification, you have my assurance, and the assurance of Lt. Cate that this will be final, and there will be no disagreement or conflicting testimony.

Your co-operation in this as in all past matters, is greatly appreciated.

Yours very truly,

J F Strom, Chief
S C. Law Enforcement Division

(X)

July 19, 1961

Honorable J. Edgar Hoover
Director
Federal Bureau of Investigation
Washington, D. C.

Re: CLEO Case 601-114
John Ormer, Victim
Murder - Richmond Co., S.C.
February 28, 1961

ATTENTION: FIREARMS LABORATORY

Dear Mr. Hoover:

On February 28, 1961, Mr. John Ormer, a white cab driver, was murdered in Richmond County, Georgia. He was shot in the back of the head. The X-Ray showed three pieces of lead, and a few tiny fragments. There was only one entrance wound, and no exit wound. The three pieces of lead were turned over to Lt. M. J. Cate, Firearms Identification Technician, 59th MA, of this Division.

On April 12, 1961, an H & B Revolver, Serial # 9948, was recovered in a house where it is possible that any number of persons could have carried it out. However, the owner, Alonzo Ormer, the 62-year-old man, says that he does not believe that anyone had his gun. A number of known thieves, and others, including members of his own family have been in this house from time to time. There was no physical evidence other than the gun.

Lt. Cate is of the opinion that this suspect killed the taxi driver, based on bullet comparisons, but has withheld a formal report because of the condition of the bullet.

On May 28, 1961, Sheriff W. E. Bligh of Richmond County, submitted another H & B Revolver, Serial # H 9948 to Lt. Cate for examination and comparison. This weapon was recovered from an ARCL Soldier, Pvt. Priestinger who purchased this weapon on the day of the murder in Columbus, S. C.

000301

Although some similarities were noted, Lt. Cate was unable to establish an identification of any kind. Again there was no physical evidence other than the gun. Pvt. Friaburger denies killing the Cab Driver.

On the account of a soldier being involved Sheriff Sligh requested that Lt. Cate consult the Army Firearms Examiner, Mr. Bird at Fort Gordon. Mr. Bird checked the fatal bullet with bullets from both guns and stated that he did not believe the fatal bullet could be identified with any weapon because of its condition. Mr. Bird made no formal report. He was merely consulted and stated that he would not enter the case officially, and that he would consider the conference confidential. This was on May 31, 1961.

On June 12, 1961 when Special Agent Bob Frasier was in Columbia for the Winnsboro Safe Burglary Trial, Lt. Cate showed Mr. Frasier photo micrographs and talked to him about this case. Mr. Frasier made no defining comments at that time. This is mentioned in case Mr. Frasier examines this evidence.

Sheriff Sligh has requested, with the full knowledge and consent of Lt. Cate, that your Laboratory conduct examination and comparison of this evidence which is being sent by registered letter.

Evidence submitted: A-1 H & R Revolver, serial # N 9893 belonging to Alonzo Draher.
A-2 H & R Revolver, serial # N 9948 belonging to Pvt. Friaburger.
B-1 B-2 & B-3 pieces of bullet from victim's head.

If such examination and comparison can not be made due to circumstances and FBI Agents are authorized to an opinion from your examiner as to the value of the fatal bullet as evidence and what further course to be followed.

Should your Examiner compare these bullets and effect an identification, you have my assurance, and the assurance of Lt. Cate that this will be final, and there will be no disagreement or conflicting testimony.

Your cooperation in this as in all past matters is greatly appreciated.

Yours very truly,

J. P. Stron, Chief
S. C. Law Enforcement Div.

000302

Although some similarities were noted, Lt. Cato was unable to establish an identification of any kind. Again there was no physical evidence other than the gun. Pvt. Friaburger denies killing the Cab Driver.

On the account of a soldier being involved Sheriff Sligh requested that Lt. Cato consult the Army Firearms Examiner, Mr. Bird at Fort Gordon. Mr. Bird checked the fatal bullet with bullets from both guns and stated that he did not believe the fatal bullet could be identified with any weapon because of its condition. Mr. Bird made no formal report. He was merely consulted and stated that he would not enter the case officially, and that he would consider the conference confidential. This was on May 31, 1961.

On June 12, 1961 when Special Agent Bob Frazier was in Columbia for the Winnsboro State Fair, Lt. Cato showed Mr. Frazier the photo micrographs and talked to him about this case. Mr. Frazier made no definite comments at that time. This is mentioned in case Mr. Frazier examined this evidence.

Sheriff Sligh has requested, with the full knowledge and consent of Lt. Cato that your laboratory conduct examination and comparison of this evidence which is being sent by certified mail.

Evidence submitted: K-1 H & B Revolver, serial # H 9893 belonging to Alonzo Draher.
K-2 H & B Revolver, serial # H 9948 belonging to Pvt. Friaburger.
E-1 E-2 & E-3 pieces of bullet from victim's head.

If such examination and comparison can not be made due to circumstances and FBI Laboratory is requested to give an opinion from your examiner as to the value of the fatal bullet as evidence, and what further course to be pursued.

Should your Examiner compare these bullets and effect an identification, it will be confidential and the name of the Lt. Cato that this will be final and there will be no disagreement or conflicting testimony.

Your co-operation in this as in all past matters is greatly appreciated.

Yours very truly,

J. P. Stran, Chief
S. C. Law Enforcement Div.

000302

EXHIBIT 8

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CA No. CA No. 06-CP-40-3866
	)	
EDWARD FREIBURGER # 286115,	)	
<i>Applicant,</i>	)	
	)	
	)	AFFIDAVIT OF
	)	EDWARD P HABROWSKI
v	)	
	)	
	)	
STATE OF SOUTH CAROLINA,	)	
<i>Respondent</i>	)	
	)	
	)	

Edward P Habrowski, who appeared personally before me, affirms and states the following

- 1 In 1971, I began teaching fifth and sixth grade at Most Precious Blood Parish in Fort Wayne, Indiana In 1977, I was named principal of the school.
- 2 I am currently the Assistant Superintendent of the Rensselaer Central Schools Corporation
3. The Freiburger family has a long association with Most Precious Blood Catholic Parish I knew Ed's parents, Louis and Hazel Freiburger, as they were stalwart members of the parish and could always be counted on
- 4 I taught Ed's two older children, John and Lorrie, in the sixth grade and was later the principal for all three of the Freiburger children. Through the families involvement with Most Precious Blood School and parish our relationship deepened into a lasting friendship.
- 5 Ed has a reputation in Fort Wayne, Indiana for peacefulness. He has always had a reputation for peacefulness throughout the entire time I have known him He has never had a reputation for violence
- 6 Ed has a reputation in Fort Wayne, Indiana for being a law-abiding man. He has always had a reputation for being a law-abiding man throughout the entire time I have known him

5. Ed is a deeply spiritual person and at the request of the priests at Most Precious Blood Parish and with a vote of confidence from the parishioners Ed trained as Eucharist Minister

6 Since Ed's incarceration, I have corresponded with him on a weekly basis

Edward P. Habrowski
EDWARD P HABROWSKI

Sworn to and subscribed before me
this 1 day of June, 2009.

Betty A. Baxter
Notary Public for the State of Indiana

My commission expires 6-3-2016

EXHIBIT 9

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CA No. CA No. 06-CP-40-3866
	)	
EDWARD FREIBURGER # 286115,	)	
<i>Applicant,</i>	)	
	)	AFFIDAVIT OF PAMELA JORDAN
	)	
v	)	
	)	
STATE OF SOUTH CAROLINA,	)	
<i>Respondent</i>	)	
	)	
	)	

Pamela Jordan, who appeared personally before me, affirms and states the following

- 1 I have known Edward Freiburger since we attended kindergarten together at Most Precious Blood Catholic School in Fort Wayne, Indiana I knew Ed in 1961.
- 2 We lived in the same neighborhood and attended the same church
- 3 Ed has a reputation in Fort Wayne, Indiana for peacefulness He had a reputation for peacefulness in 1961 and has continued to have a reputation for peacefulness throughout the entire time I have known him He has never had a reputation for violence.
- 4 Ed has a reputation in Fort Wayne, Indiana for being a law-abiding man. He had a reputation for being a law-abiding man in 1961 and has continued to have a reputation for being a law-abiding man throughout the entire time I have known him.
- 5 Ed was actively involved with the city "Catholic Youth Organization" sports program for many years, utilizing his gifts and talents with children.
- 6 Ed set up a lawn care business and had his children work there to teach them responsibility He expected them to save a percentage of their profits for college
- 7 Ed has always been a caring, loving, mild mannered person. His character and attitude can best be reflected by his day to day living within the prison walls. His

letters are always positive and speak of others rather than himself.

Pamela R. Jordan
PAMELA R. JORDAN

Sworn to and subscribed before me
this 27th day of MAY, 2009

Lynnda M. Cripe Lynnda M. Cripe
Notary Public for the State of Indiana Allen Co

My commission expires: January 30, 2014

EXHIBIT 10

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
EDWARD FREIBURGER # 286115,
Applicant,
AFFIDAVIT OF JULIE RENNIGER

IN THE COURT OF COMMON PLEAS
CA No. CA No. 06-CP-40-3866

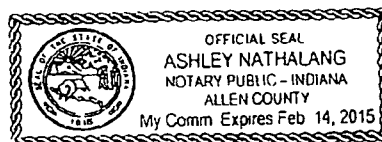
v.
STATE OF SOUTH CAROLINA,
Respondent.

Julie Renninger, who appeared personally before me, affirms and states the following:

1. Edward Freiburger and I attended Precious Blood Catholic School and then Central Catholic High School together.
2. After marriage, we both raised our families in the same neighborhood we grew up in.
3. Ed had his own landscaping business and employed his children, so they could work their way through college.
5. Ed was in charge of the Catholic Youth Organization in the diocese of Fort Wayne for ten years. He served the youth and was a coach for many years.
6. Ed had a "servant's heart" and always helped the elderly ladies in the neighborhood
7. He was a Eucharistic Minister at our parish church and never missed attending mass on Sunday.

Julie Renninger
JULIE RENNIGER

Sworn to and subscribed before me
this 5th day of August, 2009.



Shelly Nathalang
Notary Public for the State of Indiana
My commission expires: 2/14/2015

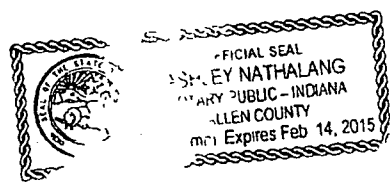


Exhibit 11

for the city

Carole Bowers TenBarge
CAROLE BOWERS TENBARGE

Sworn to and subscribed before me
this 5th day of August, 2009

[Signature]
Notary Public for the State of Indiana

My commission expires 5/13/2016

Exhibit 12

GENERAL AFFIDAVIT

Commonwealth of Massachusetts
County of Middlesex

BEFORE ME, the undersigned Notary,

Ronald P. Turturici [name of Notary]
before whom affidavit is sworn], on this 9th [day of month] day of
April [month], 2009, personally appeared Dr Steven John Laken
[name of affiant], known to me to be a credible person and of lawful age, who being by
me first duly sworn, on his oath, deposes and says:

See attached written report for Mr. Ed Frieburger

[set forth affiant's statement of facts]

[Signature]
[signature of affiant]

Steven John Laken, Ph.D.
[typed name of affiant]

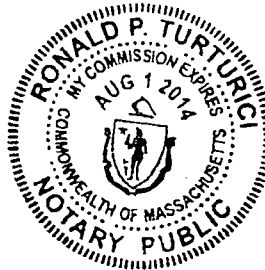
Cephos Corp., P.O. Box 45, Tyngsboro, MA 01879
[address of affiant, line 1]

Subscribed and sworn to before me, this 9th [day of month] day of
April [month], 2009.

[Notary Seal.]

Ronald P. Turturici
[signature of Notary]

Ronald P Turturici
[typed name of Notary]



NOTARY PUBLIC

My commission expires 8/1, 2014.

fMRI Testing of Mr. Ed Freiburger

Expert Report Regarding fMRI
Testing

Steven J Laken, Ph.D.
April 9, 2009

C E P H O S
C O R P

Contents

Background Information	3
Testing Procedure	3
Results.....	4
Appendix 1 -Questions administered	6
Control	6
Neutral.....	6
Testimony Questions	7
Appendix 2	8
Scan 1: Lie-Truth (left) and Truth-Lie (right).....	8
Scan 2: Lie-Truth (left) and Truth-Lie (right).....	9
Scan 3: Lie-Truth (left) and Truth-Lie (right)	10
Appendix 3 - Massachusetts License.....	11
Dr Laken's C.V.....	12



Background Information

Mr. Edward Freiburger is a 66 year-old Caucasian male, who requested testing to support his claims that he did not murder Mr John Orner in 1961 Steven Laken, Ph D Cephos' President and CEO, met with Mr. Freiburger on March 23, 2009 at the Medical University of South Carolina (MUSC) Center for Advanced Imaging Research, 30 Bee St., Suite 109, Charleston, SC 29403 between the hours of approximately 6:00 p m – 8:00 p m for the purposes of reviewing the magnetic resonance imaging (MRI) testing procedure and testing Mr Freiburger

Testing Procedure

On March 23, 2009 Mr. Freiburger was scanned at MUSC Center for Advanced Imaging Research, 30 Bee St, Suite 109, Charleston, SC 29403. Mr. Freiburger's MRI data analysis was performed by Dr Laken at Cephos Corp., P O. Box 45, Tyngsboro, MA 01879 on March 31, 2009

Prior to the MRI examination, Mr Freiburger was given a drug urine screening test, screened for MRI safety and to determine if he may be claustrophobic Dr. Laken showed Mr Freiburger questions related to the 1961 murder of Mr Orner (Testimony Questions, see Appendix 1) Mr Freiburger was given the questions to review prior to having his fMRI examination. Additionally neutral and control questions (see Appendix 1) were also reviewed with Mr. Freiburger Mr. Freiburger practiced answering these questions on a laptop computer outside of the scanner. When Mr. Freiburger felt comfortable with the pace of questions he was made MR safe and was escorted into the scanner

Mr. Freiburger was scanned three times Each scan had two periods where he would be visually instructed to 'Lie' and two periods where he would be visually instructed to tell the 'Truth' to the Testimony Questions The 'Lie' questions related to his testimony in which he states is the 'Lie'. Likewise, the 'Truth' questions related to his testimony in which he states is the 'Truth' During these periods he was to respond as if he was telling the truth or was lying to the Testimony Questions He was instructed to always tell the truth to the neutral and control questions The order of the questions given, but not the questions themselves were randomized by a computer when administered in the MRI – therefore the questions presented, but not the type of questions (e.g neutral), differed between 'Truth' and 'Lie' periods.

C E P H O S
C O R P

Mr. Freiburger was escorted into the MRI environment by Dr. Laken, Dr. Paul Morgan and Dr. Kevin Johnson, MRI researchers at MUSC. He was made comfortable in the MRI, and a mirror was placed over his head so that he could see a screen that randomly displays the questions on a screen outside of the MRI scanner. Neither the receiver nor the operator of the test knows the order of questions presented. Once in the MRI, Dr. Johnson aligned Mr. Freiburger's head in the MR scanner and performed the functional MRI (fMRI) testing parameters established at the Medical University of South Carolina, the University of Texas Southwestern - Dallas and Cephos Corp. [1-10] Mr. Freiburger had 3 fMRI tests performed followed by a structural image of his head and neck.

Analysis of the functional MRI data was performed using Statistical Parametric Mapping software (SPM 2, Wellcome Department of Cognitive Neurology, London, UK - using Matlab version 2006a). Individual activated t-maps were generated by defining the following contrasts: Lie-Truth, Truth-Lie, Lie-Neutral and Truth-Neutral. The individual t-maps of Lie-Truth and Truth-Lie were used to generate the figures in Appendix 2. To determine what Mr. Freiburger was lying about, the number of significantly activated voxels ($p \leq 0.05$, uncorrected) for Lie-Neutral and Truth-Neutral was determined in three regions of interest (roughly the right orbitofrontal/inferior frontal, the right middle frontal, and the right anterior cingulate) previously defined. If the number of significantly activated voxels was greater for the Lie-Neutral contrast versus the Truth-Neutral contrast, then it was concluded Mr. Freiburger is being deceptive about the Lie questions - his version of the lie. Conversely, if the number of significantly activated voxels was greater for the Truth-Neutral contrast versus the Lie-Neutral contrast, then it was considered Mr. Freiburger is being deceptive about the Truth questions - his version of the truth. If the two contrasts had an equal number of significant voxels, then an indeterminate call was made. Because Mr. Freiburger was scanned 3 times, two of the three scans must show the same results in order to draw a conclusion.

Results

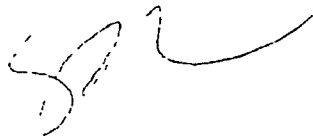
Mr. Freiburger tolerated the fMRI procedure extremely well. He remained virtually motionless, answered an appropriate number of questions, his drug screening test was negative and his structural brain scan did not show any obvious abnormalities. Therefore I concluded that Mr. Freiburger's fMRI scans were of sufficient quality for Cephos to draw conclusions on whether Mr. Freiburger was being deceptive on the Lie questions or the Truth questions.



C E P H O S
C O R P

I, Dr. Laken reviewed and processed Mr Freiburger's data on a server that has processed over 300 subjects in a similar format in Tyngsboro, Massachusetts. Results of the brain scans are shown in Appendix 2. It should be noted these scans are pictorial renderings and are not used for conclusions

Cephos' algorithms and computer programs examines the brain for 3 regions that have been shown to be more active when a person lies then when they tell the truth. Mr Freiburger's results for all three scans indicated he was **lying** when admitting to the murder questions (see Appendix 2). This conclusion is based solely on this testing, using the automated computer algorithms developed at Cephos and documented by Cephos' peer reviewed and scientific publications I am of the scientific opinion that Mr Freiburger is telling the truth about not murdering Mr John Orner.



Steven J Laken, Ph D
President and C E O

Appendix 1 -Questions administered

Control

Do you ever gossip-
Have you ever done something illegal-
Have you ever done something immoral-
Have you used illegal drugs-
Have you ever deceived a loved one-
Have you ever made someone angry-
Have you ever committed a crime-
Have you ever cheated on a test-
Have you ever told a white lie-
Do you obey every traffic law-
Have you always told the truth-
Have you ever cheated on your taxes-
Do you curse-
Have you ever faked an illness-
Are you a law-abiding citizen-
Have you ever forged a signature-
Have you ever kept the truth from someone-
Have you ever been arrested-
Do you speed-
Have you ever littered-

Neutral

Do you like to swim-
Do you like to read-
Are you awake-
Are you asleep-
Are you under age 70-
Are you over age 18-
Do you like the beach-
Do you live in the United States-
Do you live in Massachusetts-
Do you like chocolate-
Do you like to watch TV-
Do you have a dog-
Do you have a cat-
Is it 2004-
Do you like movies-

C E P H O S
C O R P

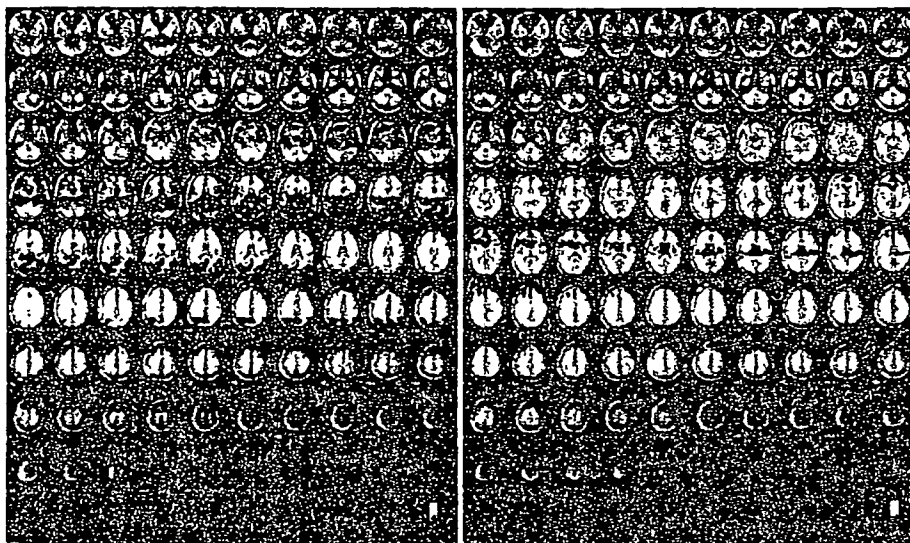
Do you speak English-
Is it October-
Are you in South Carolina-
Are you in an MRI-
Are you laying down-

Testimony Questions

Did you shoot a taxi cab driver-
Did you move a taxi cab driver's body after shooting him-
Did you kill someone in 1961-
Did you kill someone while stationed at Fort Jackson, SC-
Did you drive a taxi cab after shooting the driver-
Did you shoot the driver of a taxi-
Did you use a 32 caliber weapon for murder -
Did you shoot the driver in the head-
Were you questioned about a murder in 1961-
Were you stationed at Fort Jackson in 1961 when a man was murdered-
Did you ever murder a taxi driver-
Did you ever go into downtown Columbia in 1961-
Were you a private at Fort Jackson-
Did you go to basic training at Fort Jackson-

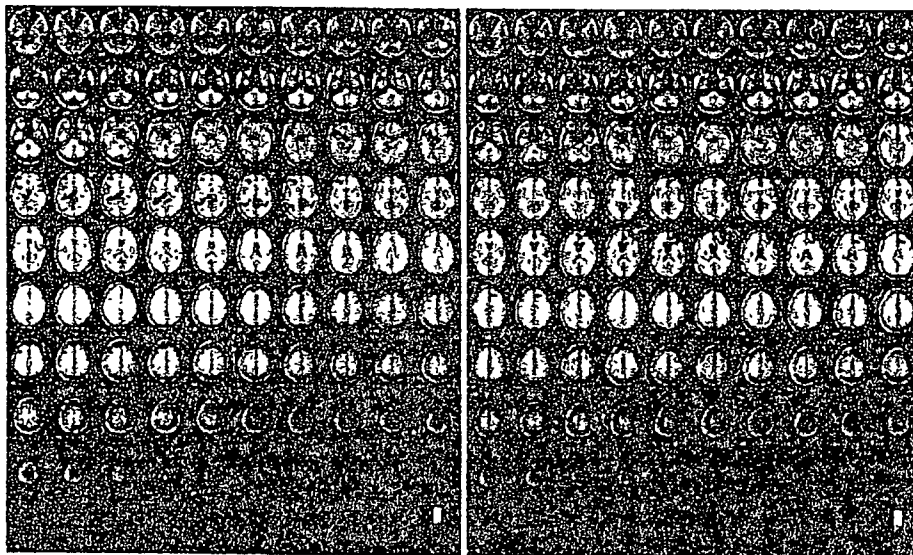
Appendix 2

Scan 1: Lie-Truth (left) and Truth-Lie (right)



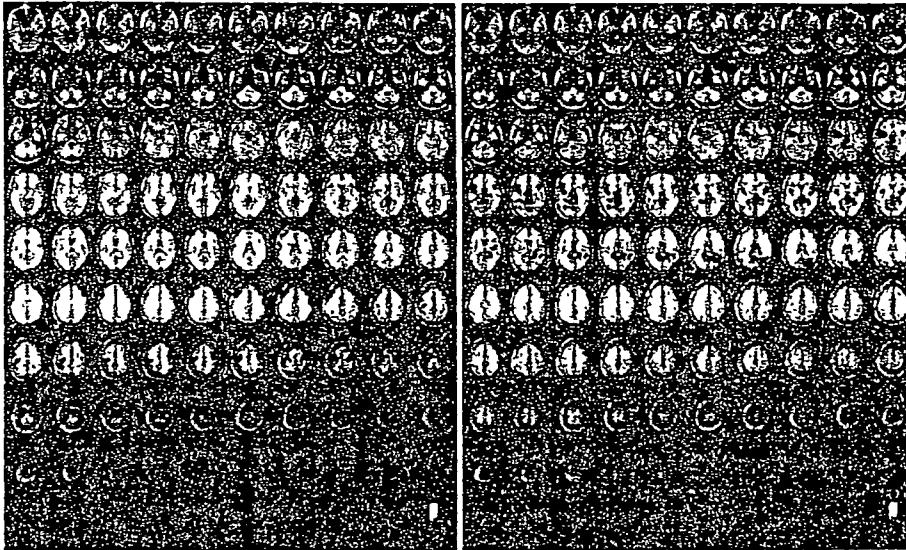
The figure depicts brain regions preferentially activated when Mr. Freiburger reported to telling the truth (Lie) and to lying (Truth) to the Testimony Questions. The image on the left represents regions preferentially activated in (Lying to the Testimony Questions over Telling the Truth to the Testimony Questions). The image on the right represents regions preferentially activated in (Telling the Truth to the Testimony Questions over Lying to the Testimony Questions). Regions activated are shown in red to orange. Activation shown are equivalent to a minimum statistical threshold of $p \leq 0.05$. The computer concluded that Mr. Freiburger was lying when admitting to the Testimony Questions.

Scan 2: Lie-Truth (left) and Truth-Lie (right)



The figure depicts brain regions preferentially activated when Mr. Freiburger reported to telling the truth (Lie) and to lying (Truth) to the Testimony Questions. The image on the left represents regions preferentially activated in (Lying to the Testimony Questions over Telling the Truth to the Testimony Questions). The image on the right represents regions preferentially activated in (Telling the Truth to the Testimony Questions over Lying to the Testimony Questions). Regions activated are shown in red to orange. Activation shown are equivalent to a minimum statistical threshold of $p \leq 0.05$. The computer concluded that Mr. Freiburger was lying when admitting to the Testimony Questions.

Scan 3: Lie-Truth (left) and Truth-Lie (right)



The figure depicts brain regions preferentially activated when Mr Freiburger reported to telling the truth (Lie) and to lying (Truth) to the Testimony Questions. The image on the left represents regions preferentially activated in (Lying to the Testimony Questions over Telling the Truth to the Testimony Questions). The image on the right represents regions preferentially activated in (Telling the Truth to the Testimony Questions over Lying to the Testimony Questions). Regions activated are shown in red to orange. Activation shown are equivalent to a minimum statistical threshold of $p \leq 0.05$. The computer concluded that Mr Freiburger was lying when admitting to the Testimony Questions.