VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Frank R. Addy, Circuit Court Judge

TREVEE GETHERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000284

APPENDIX

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(Whereupon the verdict of the jury is published as follows:)

VERDICT

THE CLERK: In regards to the State of South Carolina, County of Dorchester versus Trevee J. Gethers, Indictment No. 2007-GS-18-1755, the jury finds the defendant guilty of murder.

Ladies and gentlemen of the jury, if this was your verdict in the jury room and is still your verdict, please raise your right hand.

THE COURT: Let me observe for the record that all of our jurors had their hands raised.

Anything further from the State before we dismiss the jury?

MR. HILTON: Nothing from the State, Your Honor.

THE COURT: Anything from the Defense?

MS. ROGERS: Would you please poll the jury, Your Honor?

THE COURT: Very well.

(A discussion was held off the record.)

THE COURT: Ladies and gentlemen, I apologize for the disruption, and I will deal with that later. That is not appropriate.

But, ladies and gentlemen, I'm going to call your name, and as your name is called, I'm going to ask

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you to stand and I have two questions for you, and they are this: Was this your verdict in your jury room, and does it continue to be your verdict? And those are going to be the questions I'm going to ask of you.

I'm going to begin with Ms. Diane Piksa.

Was this your verdict in your jury room?

THE JUROR: Yes.

THE COURT: And is it your -- does it continue to be your verdict?

THE JUROR: Yes.

THE COURT: Thank you.

And next, Bryan Galloway.

Mr. Galloway, was this your verdict in your jury room?

THE JUROR: Yes, ma'am.

THE COURT: Does it continue to be your verdict?

THE JUROR: Yes, ma'am.

THE COURT: And Patricia Minus. Ms. Minus, was this your verdict in your jury room?

THE JUROR: Yes, ma'am.

THE COURT: Does it continue to be your verdict?

THE JUROR: Yes, ma'am.

THE COURT: And Cory Burchard, is that right?

THE JUROR: Burchard.

THE COURT: Burchard. Mr. Burchard, was this

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your verdict in your jury room?

THE JUROR: Yes, ma'am.

THE COURT: Does it continue to be your verdict?

THE JUROR: Yes, ma'am.

THE COURT: Ms. Salkowski, was this your verdict in your jury room?

THE JUROR: Yes, Your Honor.

THE COURT: And does it continue to be your verdict?

THE JUROR: Yes, Your Honor.

THE COURT: Very well.

Angela Ammons. Ms. Ammons, was this your verdict in your jury room?

THE JUROR: Yes, ma'am.

THE COURT: And does it continue to be your verdict?

THE JUROR: Yes, ma'am.

THE COURT: Betty Alston Campbell. Did I do that right?

THE JUROR: Betty Campbell Alston.

THE COURT: Betty Campbell Alston, was this your verdict in your jury room?

THE JUROR: Yes, Your Honor.

THE COURT: Does it continue to be your verdict?

THE JUROR: Yes, Your Honor.

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THE COURT: Franklin Raynor. Mr. Raynor, was this your verdict in your jury room?

THE JUROR: Yes, Your Honor.

THE COURT: Does it continue to be your verdict?

THE JUROR: Yes, Your Honor.

THE COURT: And Linda Newman, was this your verdict in your jury room?

THE JUROR: Yes, ma'am.

THE COURT: And does it continue to be your verdict?

THE JUROR: Yes, ma'am.

THE COURT: Dwight Beavers, was this your verdict in your jury room?

THE JUROR: Yes, Your Honor.

THE COURT: And does it continue to be your verdict?

THE JUROR: Yes, Your Honor.

THE COURT: And Cynthia Brown. Ms. Brown, was this your verdict in your jury room?

THE JUROR: Yes, Your Honor.

THE COURT: Does it continue to be your verdict?

THE JUROR: Yes, Your Honor.

THE COURT: And Joseph Rowell. Mr. Rowell, was this your verdict in your jury room?

THE JUROR: Yes, ma'am.

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THE COURT: And does it continue to be your verdict?

THE JUROR: Yes, ma'am.

THE COURT: I find that all of our jurors have been polled, that each and every juror has indicated that this verdict of guilt was their verdict in their jury room and it continues to be their verdict here in the courtroom.

Anything further from the State?

MR. HILTON: Nothing, Your Honor.

THE COURT: From the Defense?

MS. ROGERS: No, Your Honor.

THE COURT: Very well. Ladies and gentlemen, I want to thank you for your service on this jury. I want to thank you for your service on this panel this week. You have obviously given us so very, very much of your dear and precious time and I am so grateful to you for every single solitary tick of the clock.

These matters are not easy, but you have given to our way of life, to our system of justice so much of your time and I am truly, truly grateful to you for it.

This obviously concludes your service on this jury. This concludes your service on our jury panel this week.

And you are now at liberty to talk about this

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case should you wish to talk about it. You are going to be going home and whoever's been so curious, you can tonight certainly say, I am at liberty now to talk about this case. It's perfectly okay with me if you say, You can take me to dinner. That's perfectly fine.

Now, ladies and gentlemen, let me just share with you that the lawyers in this case, lawyers in every case, are practitioners. We call it the practice of law because the practice of law is just that, it is a profession at which you continue to improve, you continue to get better. And you may or may not hear from these young lawyers as they improve their skills, they may want to know from you what was helpful and what wasn't helpful.

If you get such a phone call from these lawyers or they approach you at some point when they happen to see you and they ask you, if you're comfortable talking about that, that is perfectly fine. You will provide them a service as they try to get better at what they do.

If you don't want to talk about it, that is absolutely perfectly fine, too. And you just tell them, I don't want to talk about it.

Now, for 13 years I have been telling jurors this, and I know it concerns them, but I want to tell you that this has never happened, but I'm afraid if I don't do it with every jury panel then it will happen and here it

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is.

Ladies and gentlemen, should you have somebody approach you and want to talk about this case and you tell them you don't want to talk about it and they don't respect your wishes, I want you to contact Ms. Graham, our Clerk of Court, and she will contact me and I will intercede on your behalf.

Again, I haven't had that happen. Arguably maybe sort of kind of once, but really not. But I always tell jurors that so if it should ever happen you would know who to call, because I'm there for you in that event. I don't want somebody telling you you've got to talk to them if you don't want to talk to them. And I'm afraid I'll jinx it, that one time I don't tell the jury panel that it will happen, so I don't think that's going to certainly, and certainly won't happen with these lawyers, but I tell you in an abundance of caution.

Now, I used to tell jurors that the check was in the mail because I really thought it was, and then Ms. Graham looked at me and said, "Don't tell them that, it's not true." but it does soon get in the mail. But our trip to Tahiti, yeah, it's in Jedburg. It is a very small token of all that you have given to us.

Ladies and gentlemen, I certainly wish for you and your families a very happy holiday season as we are

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approaching that time. And if you have any suggestions or comments or questions, you've given up so much of your time, I am delighted to give you some of mine.

If you have any questions or concerns or comments, you can leave a note, or if you want to speak with me for whatever reason, I'll be happy to do that if you'll just let Ms. Salisbury know as she escorts you back into your jury room. And I think what I'm going to ask you to do is if you want to escort back into your jury room, that's fine.

For your informational purposes, I'm going to proceed to sentencing. Sometimes jurors wish to observe that, sometimes they don't. It's completely -- you are now a member of the public and this is a public place. So if you wish to be present, you are welcome to return to the audience. You certainly can return right here to your jury box. And if you do not, then you certainly may go about your business.

Remember, those of you who are leaving us and need something for your employer, we'll be delighted to get that for you down in the Clerk's office. They will get you a statement that says where you have been and what you have been up to.

Our Clerk's office is directly below us. Those of you who are elevator riders, take a left on the first

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floor. Those of you who are stair walkers, take a right. It's at the bottom of the steps. Go to the Clerk's office and tell them you need something for your employer and they will get that for you promptly.

It has been an honor, it has been a privilege of mine to serve with you in this capacity. And should our paths ever cross again in this capacity, it would likewise be an honor and a privilege.

Again, I wish you all a safe and happy holiday, and at this time you are free to go. You are free to stay but are likewise free to go.

Ms. Salisbury, just let me know if there are any jurors that wish to speak and I will come right to them.

(The jury was excused from open court at approximately 10:46 a.m.)

SENTENCING

THE COURT: All right. If you have your sentencing sheet filled out, if you all would come forward, please, with your client.

All right. And, Mr. Hilton, I am happy to hear from you, and of course I'm happy to hear from Ms. Rogers and any family members if they wish to speak.

MR. HILTON: Yes, Your Honor. You heard the facts of the trial. We started on Monday with hearings. You heard all the testimony that was presented to the jury

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and some that we decided for different reasons not to present to the jury. You heard testimony that was inadmissible for other reasons.

But one thing I wanted to point out was one thing that I don't think I made as clear to the jury as I need to make to Your Honor, and that was the positioning of Mr. Robinson when he was shot in that vehicle.

You heard from Agent Ila Simmons that testified in reference to the gunshot residue.

THE COURT: Yes.

(A brief pause was taken while some jurors returned to the courtroom.)

MR. HILTON: You heard from Agent Ila Simmons in reference to the gunshot residue, and her testimony in conjunction with the pathologist's testimony about the positioning of the arm -- I'm just going to stop for a second if that's all right.

THE COURT: Sure. Let them come in.

(A brief pause was taken while some jurors entered the courtroom.)

THE COURT: Was anyone else coming? No. Okay.

MR. HILTON: Thank you, Your Honor. May it please the Court.

THE COURT: Sure.

MR. HILTON: What I was saying was you heard

from Agent Presnell (sic) with SLED in reference to the gunshot residue, her testimony in conjunction with Dr. Presnell's testimony about the location and the alignment of the arm, and both of those experts together indicate that the arm positioning was in a hands-up defensive, defenseless position to a person, Trevee Gethers, who shot him with either a .38 or a .357 revolver-style pistol. And there's just no excuse for that type of conduct.

The jury's convicted him of murder, and we just ask that a sentence be imposed upon Mr. Gethers that's appropriate to the crime that he committed.

THE COURT: Very well.

MR. HILTON: And I do not know if the family wishes to address the Court. I would just ask they be given that opportunity if need be.

THE COURT: I'm happy to hear from you. Absolutely. Come on around.

And again, for our record, if you would simply state your name. I know who you are, but our record must reflect who is speaking.

MS. ROBINSON: My name is Jestine S. Robinson.

THE COURT: Yes, ma'am.

MS. ROBINSON: I would just like to say to the jury, thank you for allowing the truth to come forward.

And I would just like to say to Mr. and Mrs.

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Gethers, I know your pain because I know you feel the same pain that I felt on September the 17th.

I still have a 15-year-old son that I cannot even bring to talk about his dad. They went to school together every day. And when I have to watch my sons ask me what they would normally ask their dad, and half the time I can't answer. My husband was a person.

Trevee, I say to you, if you had asked him for the money, he would have given it to you, no problem. He was that kind of person. He was that type of person.

He grew up -- his dad died when he was six years old. He always felt for children that didn't have a parent in the home, and he did what he can. I have nieces and nephews that would come here and tell you the same thing.

Trevee, you would never know what you took from us.

THE DEFENDANT: I didn't take nothing.

MS. ROBINSON: You will never know what you took from us.

So I would just like to say that I feel for his family because I know the pain that they're feeling and I pray that they will be able to get well.

But, Trevee, I never -- I asked God to never hate the person, and I never even pointed a finger at him,

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but I thank God that it's over. But I still have to go on with my life and watch my two sons and my family without.

THE COURT: You certainly must go forward and know that Mr. Robinson would want you to go forward. You know that he would want you to go forward knowing that he watches from above and he loves you, and he loves you still.

And you have many tasks yet to be done with those children. And while it's not fair for you to be doing it alone, he expects, you know he does, and he knows you're up to the task because you obviously come from only a place of love, and a person that comes from that place can accomplish probably all things, but certainly many, many things.

I am so sorry for your sadness. You didn't ask for this. This was completely placed upon you. Your beloved husband was a victim, and you are a victim. And for that I am so sorry.

But this will bring you closure. This will cause you sadness, but this will bring you closure. And you will know that you have seen it through.

You have guarded him, you've protected him, and you've done that which is appropriate. And I want you to take peace, peace, in the fact that you have done that. And I certainly wish you well.

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Yes, ma'am. And again if you would just identify yourself for the record.

MS. SINGLETON: Yes, I am Earlene Singleton. Earl was my brother-in-law and Jestine is my sister. And I would like to tell the jury thank you for your decision. It's not an easy one.

And to Mr. Hilton, thank you.

And to everyone, thank you.

But I just want to say that the day my brother-in-law died, a part of me went with him.

Earl wasn't just a brother-in-law. Earl was the person -- he and I were employed at South Carolina State University. You could go to that place right now and ask anyone there about Earl. There's still people who worked there and it's three years later and you would ask them a question about Earl and they would break down and cry.

Earl was the man who went beyond the call of duty, not just in his home, in the church, on the job. Even when this happened to him, he was trusting.

When my sister kept having abortions, they finally conceived Darius, and the day Darius was born, my brother and I said that he can't keep this up, it's too much. We thought it was all just a fad. But my brother-in-law, the day he died, he brought Darius to my house to get his cleats.

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He kept Darius in something. Every season if it wasn't basketball season, football season, whatever, he was a family man. And when my husband died suddenly of a heart attack, my son was nine at the time, Earl stepped up to the plate, which he was already doing. Earl took my son, he did more for my son than my own husband was doing.

Earl was a jovial person who trusted everybody and anybody. If he had asked Earl for the money, Earl would have given him the shoes off his feet or the shirt on his back. That's the kind of person Earl was.

Even our former president at South Carolina State University went to high school with Earl. People still can't believe that a person like Earl was murdered.

But -- and just like what was said about the family, we weren't taught to hover hatred. That's not us. But justice must prevail.

Justice must -- and I say to everyone in this courthouse today that we pray for one another because we'll need it. And no remorse towards his family. None towards any of the families, but justice prevails. And I thank God for having the opportunity -- and you, and I thank you and the court system here for such a fine job while we were here.

Thank you all so much.

THE COURT: Thank you for your time.

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MR. HILTON: I think that's all, Your Honor.

THE COURT: Very well. Thank you.

Yes, ma'am, Ms. Rogers, on behalf of the defendant.

MS. ROGERS: Yes, Your Honor.

As the Solicitor pointed out, you also saw evidence that the jury was not privy to and was inadmissible. And you will note that my client has maintained his innocence from the beginning.

The testimony that Russell speaks of regarding the experts and the position of the hands, I believe she also said they could have been on the steering wheel. So I would just ask you to keep that in mind in also making your decision, that even the expert couldn't say that it was in fact a defensive pose.

My client has been incarcerated for the past three years as you know and has had no issues in the jail, has gotten every certification I think you can get at Berkeley County and has been a peaceable person while there, and we ask that you take that into consideration.

THE COURT: Very well. Anyone that wishes to speak on his behalf?

MS. HOLMES: I will.

THE COURT: Yes. All right.

MS. HOLMES: My name is Sadie Holmes. I'm

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Trevee's aunt, one of his aunties.

THE COURT: Yes, ma'am.

MS. HOLMES: I lived in North Carolina for awhile so I wasn't around for much of his upbringing, but during the time I would come home and visit and everything I would always get a chance to be around him. I am so sorry for this situation. There's no win here. No win here.

THE COURT: No, there is not.

MS. HOLMES: And with all due respect, you've got a young man out here doing this and you have an older gentleman out here doing this. There is no win in this situation.

But I ask the Court to please consider that he was a young man. He has grown. He is showing that he is trying to change his life around.

And I apologize to the family to the highest, because the pain you all feel, we are feeling it, too. We really are. This is a mess, but we seriously apologize.

And I just want to hug him. I haven't hugged him in about three years. Can I just put my arms around him?

THE COURT: Okay. All right.

That will be sufficient. Thank you very, very much.

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MS. HOLMES: Thank you.

THE COURT: And thank you for your words.

MS. TAYLOR: I'm Trevee's sister.

THE COURT: And your name is?

MS. TAYLOR: Michelle Taylor.

THE COURT: Yes, ma'am.

MS. TAYLOR: He is a good kid. My brother would never, never do anything like this. I'm sorry to the family, but I know my brother. I apologize, but he's a good kid. He's always made good grades in school, done all kind of activities in school, and he would help anyone. He would never hurt anyone. I'm so sorry.

That's all I have to say. But can I hug my brother?

THE COURT: All right.

MS. ROGERS: Your Honor, do you mind if I step in the hall and see if his mom has composed herself enough to speak on his behalf?

THE COURT: If she wishes to speak I will certainly let you do that, yes.

(A brief pause was taken.)

MS. ROGERS: She's not able.

THE COURT: Too distraught?

MS. ROGERS: Yes, Your Honor.

THE COURT: Very well. And, Mr. Gethers, of

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course under our law you certainly have a right to speak if you wish as well.

THE DEFENDANT: I have nothing to say, Your Honor.

THE COURT: All right. Very well.

And anyone else who wishes to speak on his behalf, Ms. Rogers?

MS. ROGERS: No, Your Honor.

THE COURT: Very well.

MR. HILTON: Your Honor, he does have a prior record. He has a PWID, either methamphetamine or cocaine base, and he also has a possession of a pistol by a person under 21.

THE COURT: When was he convicted of that?

MR. HILTON: When?

THE COURT: When.

MR. HILTON: The drug charge was back in --

MS. ROGERS: 2007.

MR. HILTON: 2007. And then the pistol charge, do you know the date of that?

MS. ROGERS: March the 7th, 2007, is the pistol charge.

MR. HILTON: And he is on probation for the pistol charge and I think Probation would like to address that at the appropriate time.

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THE PROBATION AGENT: Your Honor, he does have a four year suspended to three years probation sentence, and we would just ask that the revocation run concurrent to any sentence.

THE COURT: Very well. Has he been served the warrant?

THE PROBATION AGENT: He was served with a warrant when he was originally taken and brought into custody on the charges he's here for now.

THE COURT: Very well. Would you like to address the probation matter further, Ms. Rogers?

MS. ROGERS: Again, Your Honor, I would like to say that it seems that 2007 was a year that wasn't so well for my client, and he has grown and matured since then, and I believe as the man that he is today and not the boy he was then, he would not have violated his probation in any way and would have complied fully.

THE COURT: All right. Mr. Gethers -- and to the family, I want you to know that as Mr. Gethers' family hugged him, I know you can't do that. And I felt that and I saw you watch that and I know you can't do that. So I wanted you to accept that acknowledgment also.

Mr. Gethers, first of all, I am going to revoke the four years on your gun charge.

And with regards to this murder charge, I'm

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going to commit you to the State Department of Corrections for a period of 45 years.

When you come out of prison you will be 64 years old. Hopefully at this point you will not pose such a tremendous threat to our community.

By statute, sir, you are entitled to credit for the time that you have served, which is what makes it approximately that you will be 64 years old.

That concludes this matter.

MR. HILTON: Thank you, Your Honor.

MS. ROGERS: Thank you, Your Honor.

THE COURT: Very well.

(The proceedings were concluded.)

*** END OF REQUESTED TRANSCRIPT OF RECORD ***

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

I, CAROL M. THUEME, RPR, Official Court Reporter for the 11th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Dorchester County, South Carolina, on the 18th and 19th days of November, 2010.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

May 1st, 2011

Carol M. Thueme

CAROL M. THUEME, RPR
Circuit Court Reporter

AS TRANSCRIBED FOR:
BONNIE H. KELLY
Circuit Court Reporter

0100506478

GETHERS, TREVEE JOXTEER

STATE'S EXHIBIT 40

251758818

DCSO
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KEB 9-18-07

KD 9-19-07

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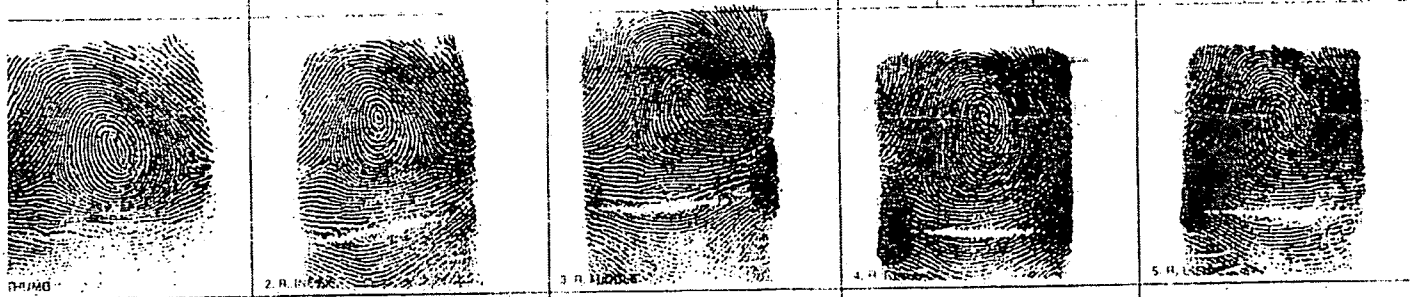

Charleston County Sheriff's Office

Detention Center

STATE'S EXHIBIT 41

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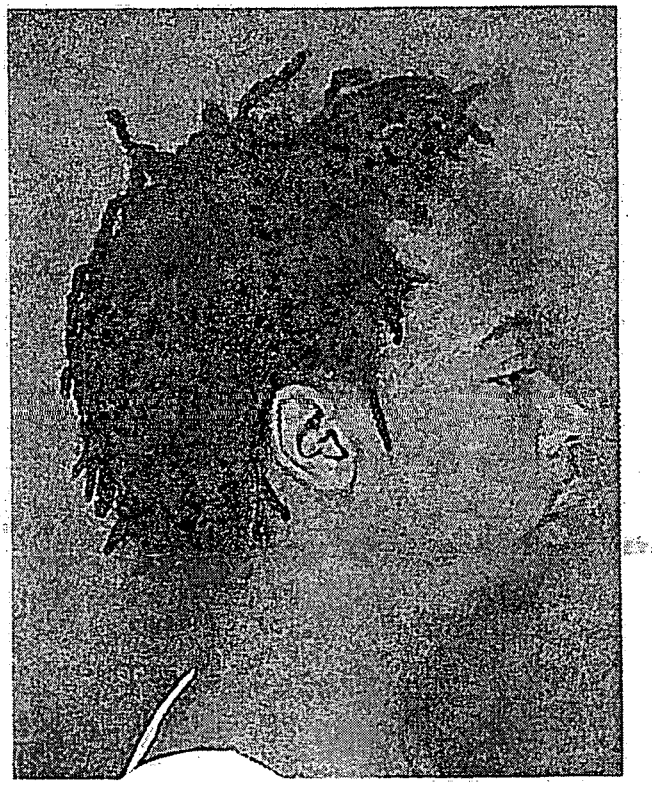
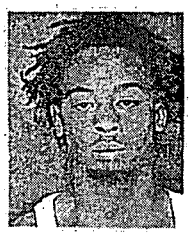
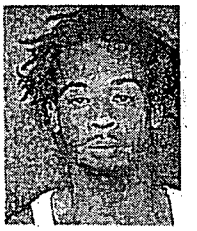
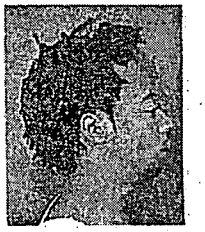
Date of Birth: ***Booking Date:*** 05/11/07

Race: B ***Sex:*** M ***Height:*** 5'8"









STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TREVEE J. GETHERS,

APPELLANT

FINAL BRIEF OF APPELLANT

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Cases

STATEMENT OF ISSUE ON APPEAL

Whether the trial court judge erred when she did not grant appellant's motion for a directed verdict when the evidence adduced at trial did not rise above mere suspicion that he was guilty of murder because the circumstantial evidence merely suggested that he was near the murder scene when the decedent was fatally shot?

STATEMENT OF THE CASE

Trevee Gethers was indicted for murder by the Dorchester County grand jury during its December 3, 2007 term. He was tried before the Honorable Diane Goodstein and a jury between November 15- 19, 2010. He was represented by Sara Jane Rogers, Esquire. The State was represented by Russell D. Hilton and Harrison Bell, Jr., Esquires. He was convicted and sentenced to 45 years incarceration.

This appeal timely follows.

ARGUMENT

The trial court judge abused his discretion when he did not grant appellant's motion for a directed verdict when the evidence adduced at trial did not rise above mere suspicion that he was guilty of murder because the circumstantial evidence merely suggested that he was near the murder scene when the decedent was fatally shot.

Trevee Gethers was convicted of the murder of Earl Robinson which occurred on September 17, 2007. On that date, the decedent had earlier borrowed $200 from his son, Marcus. The decedent was then found in an apartment complex, and seated in the driver's seat of a white Toyota Sequoia. R. 71, ll. 18-22. He had been shot once in the arm, with the bullet entering his chest and mortally wounding him. R. 221, ll. 5-23.

Neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots, although no one identified appellant as the one arguing with the decedent. R. 52, l. 12- 53, l. 7. The apartment complex was known as a very high crime area and gunshots were "fairly common." R. 63, l. 7. An officer with the Dorchester County sheriff's office confirmed that there were many fights and drug-related calls that occurred in the area. R. 72, l. 24- 73, l. 6. As law enforcement conducted their investigation, they took into their custody a number of cigarette butts, a .40 caliber gunshot shell, and a Bluetooth telephone headset. R. 84, ll. 8-23. Law enforcement did not have analyzed the cigarette butts that were located in the immediate area of the car. R. 84, ll. 22-23. The .40 caliber bullet was determined not to be relevant to the crime scene. R. 89, l. 3.

Law enforcement also extracted 34 latent fingerprints from the decedent's car. R. 89, ll. 16-19. Three people were identified based on the presence of the fingerprints found on the car but they were never pursued in connection with this investigation. R. 119, ll. 19-

22. Later in their investigation, law enforcement obtained a buccal swab from appellant and obtained his DNA profile. R. 101, ll. 4-9.

Appellant's DNA was found on the Bluetooth telephone headset that was found in the apartment complex. Significantly, the telephone was not found close to where the decedent's body was located:

> A. That was just inside the first crime scene tape that was stretched across the road. It was actually in front of Apartment . It was not located anywhere around the vehicle. It was between Apartment and , the apartment complex to the right. It was in that area on the road as you came in.

R. 123, ll. 4-9 (emphasis added).

Brandee Kieffer was appellant's girlfriend and recalled that, around the time of this crime, she and appellant switched cars. R. 144, l. 16-147, l. 19. Veronica K. was another friend of appellant's. R. 155, l. 23- 156, l. 2. She testified that on the date the decedent was killed, she was supposed to meet with him. He was expected to bring her money that evening, R. 156, ll. 14 – 25, because he intended to have sex with Ms. K. who was 14 years old at the time. R. 158, l. 1 -- 159, l. 9; R. 176, ll. 10-14. That evening, she was using her friend, Maggie Reid's, telephone. R. 157, ll. 1 -- 2. At some point, after the decedent was killed, Ms. K. and the appellant drove to Virginia, and then eventually traveled to New York. R. 164, l. 4 -- 165, l. 2.

During their investigation, law enforcement obtained the telephone that belonged to the decedent, and which was located in his car, and noticed a number of telephone calls that he made to his son and to the telephone that was registered to Reid, Ms. K.'s friend. R. 188, l. 18- 189, l. 17. Their investigation led them to identify appellant's telephone number. R. 192, ll. 2 -- 25. Law enforcement obtained search warrants based on telephone calls

between Ms. K. and the appellant, but those searches did not uncover anything of evidentiary value. Law enforcement also had identified appellant's fingerprints located on the passenger side of the decedent's car. Other fingerprints were also located on the car, but they were not identified by law enforcement. R. 262, ll. 8-12. Law-enforcement never located the murder weapon even after exhaustively searching the area. R. 193, l. 5 -- 197, l. 18. Ultimately, Ms. K. and the appellant were located in New York City. R. 199, ll. 2 -- 19.

Ms. K. gave a statement to law enforcement that suggested that she had appellant meet with the decedent in order to take his money. At trial, she did not testify to these facts, but her statement was found admissible as a prior inconsistent statement. R. 208, l. 2- 209, l. 23; R. 204, ll. 6- 16. In change for cooperation, Ms. K. s charge of murder remained in the jurisdiction of Family Court. R. 279, ll. 7-11.

Appellant's DNA was located on the Bluetooth headset that was found in the apartment complex. R. 328, l. 2 -- 330, l. 25. Appellant did not testify at trial. R. 343, ll. 4 - - 7.

At the close of the State's case, counsel made a motion for directed verdict, which was renewed at the end of the case. R. 346, ll. 10-18. The trial court judge denied the motions. R. 346, ll. 19 -- 21.

The trial court judge erred when she denied appellant's motion for a directed verdict because the evidence adduced at trial did not rise above the level of providing a "mere suspicion" that appellant was guilty of murder.

A case should be submitted to the jury when the evidence is circumstantial "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. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); see also State v. Williams, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "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 . . ." State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. Id. at 133, 322 S.E.2d at 452 (citing State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (194). State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). *See also* State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004). In this case, the evidence presented by the State did not rise above the level of mere suspicion.

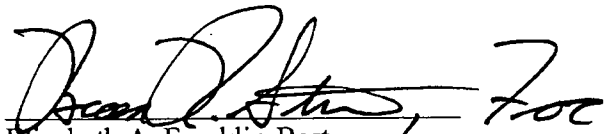
The trial court judge erred by not granting appellant's motion for a directed verdict because the evidence did constitute positive proof of facts and circumstances which reasonably tended to prove his guilt of murder. At most, the evidence proved that appellant had a relationship with a young woman who had a relationship with the decedent. Her statement tending to implicate appellant merely raised a suspicion that appellant was guilty, since it was made under circumstances militating against its trustworthiness because it was induced by a deal from the state. And, in any event, she did not testify against appellant during trial. All then, that was left to connect appellant to the murder, was appellant's telephone, found in the apartment complex, and phone calls between Ms. [redacted] and appellant. Additionally, appellant's fingerprints on the *outside* of

the car did not constitute evidence that appellant was guilty of committing murder. For these reasons, the trial court judge erred, and appellant respectfully asks this Court to reverse his conviction and order a directed verdict of acquittal.

CONCLUSION

For the preceding reason, appellant respectfully asks this Court to reverse his conviction and order a directed verdict of acquittal.

Respectfully submitted,



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of May, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TREVEE J. GETHERS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 7th day of May, 2012.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of May, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021 .

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

TREVEE J. GETHERS,

APPELLANT.

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STATEMENT OF CASE

The Dorchester County Grand Jury indicted Appellant, Trevee J. Gethers (Gethers) at the December 3, 2007 term of court for murder (2007-GS-18-1755), for the shooting death of Robert Earl Robertson. **R. pp. ___-__**. On November 15-17, 2010, he received a jury trial before the Honorable Diane Schafer Goodstein. The jury found Gethers guilty of murder and Judge Goodstein sentenced him to forty-five years imprisonment. **Tr. pp. 520-21.**[1]

Dorchester County Assistant Public Defender Sara Jane Rogers represented Gethers at trial. Senior Assistant Solicitor Harrison Bell, Jr., and Russell D. Hilton, of the First Circuit Solicitor's Office, prosecuted him.

A timely notice of appeal was served and filed.

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[1]She also revoked four years of a probationary sentence on an unrelated gun charge. **Tr. p. 520**.

ARGUMENT

Gethers' challenge to the trial judge's denial of his directed verdict motion is not preserved for this Court's review because he only made a general motion for a directed verdict at trial and did not raise the arguments he now presents. Alternatively, the trial judge properly denied Gethers' directed verdict motion because the State presented direct and substantial circumstantial evidence at trial that reasonably tended to prove that he murdered the victim, Robert Earl Robinson, or from which his guilt could be inferred.

Gethers maintains that the trial judge erroneously denied his motion for a directed verdict, claiming that "[a]t most, the evidence proved that appellant had a relationship with a young woman who had a relationship with the decedent." After discounting this co-defendant witness' statement implicating him as untrustworthy, he contends that the only evidence that connected him to the murder was his "telephone, found in the apartment complex, and phone calls between Ms [redacted] and appellant." **Brief of Appellant, p. 8**. Respondent submits that his challenge to the trial judge's trial judge's denial of his motion is not preserved for this Court's review because he only made a general motion for a directed verdict at trial and he did not raise the arguments he presents to this Court. Alternatively, the trial judge properly denied Gethers' motion for a directed verdict because the State presented direct and substantial circumstantial evidence at trial that reasonably tended to prove that he murdered the victim, Robert Earl Robinson, or from which his guilt could be inferred.

A. Proceedings in the trial court.

1. The prosecution's evidence.

The direct and circumstantial evidence presented by the State was that the victim, Earl Robinson, lived in Walterboro, South Carolina in September 2007. On the night of September 17, 2007, the victim called his son, Marcus Brothers, "about 8:30 p.m." and he asked if Marcus had any money that he could borough. Marcus did have money and agreed to loan some to him. When the

victim called again at 9:24 p.m., he said "he was going away" and needed cash. Marcus again agreed to loan money to him. **Tr. pp. 218-19; 379.**

The two men met at a Horizon Gas Station that is near Marcus' residence a few minutes after 10:00 p.m., and Marcus loaned $ 200.00 to his father.[2] The victim and Marcus engaged in some small talk and he purchased a fountain drink before leaving. Although the victim never told Marcus why he need the money, this was not unusual because the men often helped each other financially, when necessary. Also, Marcus and the victim's wife, Jestine Robinson, testified that Earl would often help out others who needed it. **Tr. pp. 219-24; 230; 379.**

Jestine Robinson testified that her husband told her on September 17th that he had to go somewhere. Because her SUV blocked his vehicle in their driveway, he took her 2001 Toyota Sequoia (*see* **State's Exhibit 4**), which he had washed the preceding Wednesday. Neither Mrs. Robinson nor Marcus knew Gethers or had seen him before court proceedings began in this case. Sometime after the murder, the coroner returned slightly over $ 199.00 to Mrs. Robinson. **Tr. pp. 223; 225-230.**

Within an hour after getting the loan from his son, the victim was murdered. Shortly before 11:00 p.m. on the night of September 17, 2007, Kimberly and Michael Ritchey were in the stairway leading to their upstairs apartment at Apartments in Dorchester County (*see* **State's Exhibit 1**), and Michael was smoking a cigarette. They heard what sounded like two men yelling and screaming. Kimberly testified that the argument was about "money." Both Kimberly and Michael testified that this was not unusual in the apartment complex. So, Kimberly went back

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[2] Their meeting was corroborated by the store's surveillance video (**State's Exhibit 30**), which was published to the jury. **Tr. pp. 220-21.** The victim had also called him again, at 10:02 p.m. **Tr. p. 397.**

upstairs to check on their small children, while Michael remained on the steps. **Tr. pp. 138-39; 142-43; 145-146; 149.**

While she was in the children's bedroom, which overlooks the parking lot, she heard at least one gunshot. She then went back outside. By this time, Michael Ritchey was at the bottom of the steps and headed toward the vehicle because it was still running. In fact, the vehicle almost struck him. He yelled at Kimberly to "[c]all the cops and she did so. **Tr. pp. 139-40; 142-43.**

Michael Ritchey testified that he did not see anyone, but that he heard the two people "yelling and screaming. After Kimberly went to check on the children, Michael heard a gunshot. He immediately ran down the steps and toward a car that had pulled out of a space in the parking lot and appeared to be trying to turn around. As Michael got the license tag number, the vehicle "jumped the curb into the grass and almost hit me because it backed out to the road and stopped in the middle of the road . . . with the motor running." **Tr. pp. 146-47.**

Michael walked over to the vehicle and put his hands on the glass in the rear of the vehicle to see if any children were in it, but he did not see any. Next, he walked up to the front door of the vehicle and saw someone "slumped over laying with their head against the passenger's seat." When Michael opened up the door to check on this person, he saw "blood everywhere and kind of freaked out." He did not see anyone running either in the direction of a nearby Bi-Lo or toward the

Apartments that are located a short distance away from . **Tr. p. 148.** *See also* **State's Exhibit 1.**

Shanika Moon lived in the apartment directly below the Ritcheys in September 2007. On the night of September 17th, she looked out of her window saw two people in an SUV that was "closed, parked forward." She could not identify either person in the vehicle and she could not hear any

argument. She sat back down but soon heard "a 'pop-pop' noise." She looked back out and again saw the SUV. However, she did not call 911 because she often heard shots. **Tr. pp. 150-54.**

The Dorchester County Sheriff's Department received several 911 calls reporting the shooting, the first of which was received at 10:57 p.m. **Tr. p. 380, lines 14-21; p. 382, lines 19-20.** Then-Officer Willard Driggers happened to be in front of Apartments when the dispatcher sent out the call, and he arrived on the scene within a minute. He was quickly followed by then-Officer Christopher Freshman, who pulled in behind him. Both officers saw a white Toyota Sequoia SUV. The doors on the vehicle were closed, the windows were up and the vehicle's engine was "revving at high RPMS." There was no one in the area. **Tr. pp. 154-56; 158; 160-62.**

Officer Driggers approached the SUV (see **State's Exhibit 2**) and he saw a person in the front seat, who was "slumped over." Wearing latex gloves, he opened the driver's door. There was blood on the seat and it did not appear that the person in the SUV (the victim) was breathing. Also, "the smoke from the gunpowder was still floating inside the vehicle." So, Officer Driggers reached in and turned off the ignition. The officers then secured the scene. **Tr. pp. 156-59; 161-62.**

Det. Earl Asbell, also with the Dorchester County Sheriff's Department, testified that he was the "lieutenant over the crime scene unit" at the time of the murder. With the assistance of another officer, he processed the crime scene at Apartments on September 17th. He explained that whenever there was a shooting, his unit collects "everything in the proximity," even if it is later determined that the item(s) collected are not involved in the crime. In this case, he first photographed the vehicle and everything around it. Next, he photographed the victim as seated in the vehicle, before removing the victim's wallet and obtaining the victim's driver's license. He also photographed (*see* **State's Exhibit 3**) and seized the victim's cell phone. **Tr. pp. 164-66; 168-69.**

Then, he seized a .40 caliber shell casing off of the road, some 40 or 50 feet from the SUV, that was ultimately determined to be irrelevant because the victim was shot by either a .38 or .350 magnum bullet.[3] He also seized a Bluetooth and earpiece associated with it. The Bluetooth was still blinking, indicating that it was activated. *See* **State's Exhibits 23-25**. These were found in the road and near a path between Apartments and Apartments. *See* **State's Exhibit 1**. Also, the Bluetooth "appeared to have been . . . either run over or it fell apart when it hit the road because the earpiece was separated from it." **Tr. pp. 170-72; 174-75; 212-14; 216.**

Det. Asbell had the SUV towed to the Sheriff's Department's garage and it was processed for fingerprints the following morning. In all, officers lifted thirty-four latent prints from the vehicle. He also photographed the latent prints that he found, and those lifts were submitted to the Charleston Police Department for analysis. **Tr. pp. 175-86; 339; 343-46.**

Det. John Garrison testified that he was the Dorchester County Sheriff' Department's lead investigator in this case. There was no suspect identified immediately after the murder. He spoke to the victim's family and subpoenaed the phone records for the victim's cell phone. Although the victim had called a number earlier on the day of September 17th, it was determined that the woman with whom he had spoken did not have any involvement in the case. However, there were a series of calls from and to a specific number on the night of the 17th, and it was discovered that the telephone number was for a cell phone owned by a Maggie Reid. **Tr. pp. 276-80.**

Officers located Ms. Reid at her residence in . Apartments and the records for her

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[3] Det. Asbell saw some cigarette butts that night but e did not seize them because they were located over forty feet from the SUV and "[e]verything took us in a different direction." **Tr. p. 170, lines 12-23; p. 208, line 17 - p. 209, line 10**. There is absolutely no evidence that these cigarette butts were relevant to this case.

cell phone (**State's Exhibit 42**) were then obtained. They obtained information that the initial results of the fingerprint analysis from AFIS showed that Gethers' prints were on the SUV at roughly the same time that they obtained the cell phone records for Reid's phone. **Tr. p. 280; 282-83; 333-36; 345-46.**

Ms. Reid testified that she lived in Apartments in September 2007. Veronica K. and Veronica's mother lived in the apartment beneath her. Veronica was dating a man nicknamed "City" at the time. Veronica was with her mother when her mother picked up Reid from work at 4:15 p.m. on September 17th. Veronica borrowed Ms. Reid's phone on the way home and again later that evening. **Tr. pp. 327-31.**

During the night of September 17th, Ms. Reid had gone to the K.'s apartment to look for her phone but was told that Veronica was not home. At that time, Reid saw City sitting on the back of his car, talking to Veronica. Reid finally got the phone back the next morning. **Tr. pp. 331-32.**

After learning that Gethers' prints were on the SUV, that Veronica K. had used Reid's phone to call him numerous times and that there was a close relationship between Gethers and Veronica, the Sheriff's Department obtained his cell phone records. **State's Exhibit 43.** Officers also executed search warrants at both Veronica's apartment and Gethers' residence on the morning of September 19th. Unfortunately, they did not find anything relevant to the case. Officers were also unable to locate either of the suspects. **Tr. pp. 283-84; 286-89.**

However, they spoke to Brandee Kiefer. They learned that Gethers had swapped cars with Kiefer and that he was driving her Kia. **Tr. pp. 288-89.** Keifer testified that she was romantically involved with Gethers in September 2007. When she got off from work on the night of Tuesday, September 18th, Gethers had taken her Kia Spectra (*see* **State's Exhibit 31**) and had left his Lincoln

for her to drive. **Tr. pp. 235-39**.

Keifer told detectives that she kept calling Gethers but he did not answer. Also, when she finally did speak to him, he told her that he would be back in three or four hours. However, he never returned. Also, she had to go to Virginia to pick up her car. Although she claimed that she did not remember telling detectives that "[w]hen I spoke to [Gethers], he said not to tell anyone . . . that they were in Virginia," she did not dispute that she said this. **Tr pp. 239-42; 245**.

Det. Garrison obtained an arrest warrant for Gethers charging him with murder on the morning of September 19th. He entered the warrant information and information that Gethers may be driving Kiefer's Kia into the N.C.I.C. database. On September 20th, the Sheriff's Department was notified that the Kia had been found at a truck stop off of the interstate in New Kent, Virginia. No one was in the car and it had been vandalized. **Tr. pp. 286-90**.

On September 22nd, the Sheriff's Department received a telephone call from the New York City Police Department informing them that Veronica K. had been apprehended using a fake ID. Also, she was accompanied by a man using the ID of "Dante Hubbard." It was determined that the man was Gethers. Eventually, both suspects were returned to South Carolina. **Tr. p. 290**.

Detective Steve Morelli also assisted in the investigation. He testified that the phone records of Gethers' (**State's Exhibit 42**), Ms. Reid's (**State's Exhibit 43**), and the victim's cell phones showed the following:

- At 4:33 p.m., there was a call from Ms. Reid's cell phone to the victim's cell phone;
- At 4:34 p.m., there was a call from Ms. Reid's cell phone to Gethers' cell phone;
- Between 5:11 and 5:12 p.m., there were three calls from Ms. Reid's cell

phone to Gethers' cell phone;

- At 6:55 p.m., Gethers' phone called Ms. Reid's phone;
- At 8:47, 8:48 and 8:55 p.m., there were calls from Ms. Reid's cell phone to Gethers' phone;
- At 8:57 p.m., there was a call from Ms. Reid's cell phone to the victim's cell phone;
- At 9:24 p.m, "[t]he victim called his son;"
- At 9:47 p.m., Ms. "Reid's phone called the victim's phone;"
- At 9:50 p.m., the victim dialed Ms. Reid's cell phone and, then Ms Reid's phone dialed the victim's cell phone;
- At 10:02 p.m., the victim called Ms. Reid's phone;
- At 10:04 p.m., "the victim contacted his son;"
- At 10:34 p.m., Ms. Reid's phone dialed the victim's phone;
- At 10:41 p.m., the victim called Ms Reid's phone;
- At 10:49 p.m. and at 10:51 p.m., Ms. Reid's phone dialed the victim's phone;
- At 10:56 p.m., Ms Reid's phone called Gethers' phone;
- At 10:57 p.m. and at 10:58 p.m., Ms. Reid's phone dialed the victim's phone;[4]
- After 10:58 p.m. on September 17th, Ms. Reid's phone did not call the victim's phone;
- At 11:40 p.m., Gethers' cell phone called Ms. Reid's phone;

Tr. pp. 378-83; State's Exhibits 42-43. There were also calls from the victim to Ms. Reid's phone on the 17th. **Tr. pp. 384-85.**

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[4] Again, the 911 calls began at 10:57 p.m. **Tr. p. 380.**

Although Veronica K. was Gethers' co-defendant, she was called as a prosecution witness.[5] She testified that she had lived at Apartments and that she was fourteen years old in 2007. She admitted that she knew the victim on September 17th 2007. He had initially been a family friend but he wanted to become romantically involved with her. She admitted that she spoke to the victim about bringing her some money on September 17th, and that she was using the cell phone of Ms. Reid, a fried of Veronica who lived upstairs from her, on the 17th. **Tr. pp. 246-49; 267.**

According to Veronica, she called the victim earlier that day and asked him for money. However, she was with her mother. The victim told her that he had money, but he did not want her mother to know he was going to give her money because he was planning on having sex with Veronica that night. He also told her to call him back later that night. In their numerous phone conversations, she told him to meet her at Apartments and to call her before he got there so that she would know when to leave her apartment. **Tr. pp. 248-49.**

Veronica claimed that she "never got a chance to give" the victim directions to , but she stated that he did know how to find Apartments. She further claimed that she ultimately stopped calling the victim because she assumed that he had changed his mind about giving her money. Also, she admitted that she had talked to Gethers, a/k/a "City," about the victim on the 17th and that she had asked Gethers to pick up the money for her because she did not want to have sex with the victim. Gethers supposedly told her that "he was going to have to call me back because he wasn't sure if he was going to do that." **Tr. pp. 249-51.**

Veronica claimed that the victim drove a white Explorer. Although the victim did not know

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[5] The parties stipulated that "the State has entered into an agreement whereby Veronica [K.'s] charge of murder will remain under the jurisdiction of the Family Court provided Ms. [K.] testifies truthfully and cooperates in the prosecution of this defendant, Trevee Gethers." **Tr. p. 374.**

Gethers, she testified that her plan was to tell the victim that her mother would not let her out of the apartment and that she would send her "friend," Gethers, to pick up the money. **Tr. p. 251.** Unfortunately, she was not very truthful in her testimony from this point forward. First, she denied telling Gethers what the victim was driving or where to pick up the money from the victim. **Tr. pp. 251-52.**

Then, she denied telling the police several matters in a March 9, 2009 statement that she had given. (**State's Exhibit 33, R. pp. ___-__**). She only she admitted telling officers that the victim said he would bring her "the money, but he wasn't going to keep bringing [her] the money without getting some," and that "I knew we were running from something." **Tr. pp. 253-55.**

Veronica did admit that she and Gethers had gone to Virginia in Kiefer's Kia, and that they had left it somewhere. She likewise admitted that she and Gethers had taken a bus to New York; that she was using Tambora Ravenel's ID; that she learned that Gethers was using the ID of a Dante Hubbard; and that State's Exhibit 34 were the ID cards that they had used. She testified that Ravenel was her friend and that Hubbard was someone she knew. However, she claimed that she did not know Hubbard's address. While she admitted that Gethers' was a "[p]retty close friend" and that she did not "want to see anything happen to him," she denied that he was her boyfriend. Also, she claimed that she only used Ravenel's ID so that she could by cigarettes. **R. pp. 255-58; 266; 268-69.**

In light of Veronica K.'s responses concerning her statement to the Sheriff's Department, which was given in the presence of her attorney and after she had waiver her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) (*see* **Tr. pp. 292-93**), the State was permitted to introduce a redacted version of it, as **State's Exhibit 33**, and it was published to the jury through Det. Garrison.[6] In her

[6] The trial judge's ruling on this issue is at **Tr. pp. 293-98.**

statement, she said that:

> I called Mr. Earl for some money. He said he would bring the money, but he wasn't going to bring me money without getting some. He wanted some in the past, but I kept tricking him. I told him to go to the Haven Oaks because I didn't want my momma to know about Mr. Earl bringing me the money. Mr. Earl was bringing me more than $50.00 because I asked him for some money. He thought we were going to a motel. I told Trevee Gethers "City" to get the money because I didn't want to mess with Mr. Earl. I told Trevee that Mr. Earl was in a white Sequoia because that's what Mr. Earl told me he was driving. I didn't tell Trevee to shoot Mr. Earl, I just told Trevee to get the money. I didn't know Trevee shot Mr. Earl. . . . I called Trevee after [(sic)] to see if he got the money, and he said no. Trevee said that Mr. Earl wouldn't give him the money. I didn't see Trevee until the next day and he said we had to go because he got in some stuff. I knew we were running from something. We went to a lady's house In Virginia on the air base. We went to Dro mama's house. [(sic)] Dro and Tam followed us to Virginia. Then we took the bus to New York. I have gotten money from Mr. Earl before and that's how I knew I could call him for money.
>
> Question: Has Mr. Earl ever been to before?
>
> Answer: Yes, he has brought me money there behind Bi-Lo, but I still had to give him directions.

State's Exhibit 33, R. pp. ___-__. *See also* **Tr. pp. 298-300.**

Despite a diligent search, the murder weapon was not found. Nor did officers locate a shell casing for the bullet that killed the victim. **Tr. pp. 284-85.** However, SLED Agent Frank Dan DeFreese, an expert in firearms analysis, testified that the bullet that killed the victim was "most consistent with bullets that we have found loaded into .38 special caliber and .357 magnum caliber cartridges," and that the crimping cannelure on the bullet suggested that the gun was a revolver, as opposed to a semi-automatic pistol. **Tr. pp. 394-97.**

Also, SLED Agent Ila Simmons, who was qualified as an expert in trace evidence and gunshot residue, testified that a gunshot residue test performed on the victims hands early in the morning after the murder (**Tr. pp. 173-74**) revealed the presence of metals on the palm and the back

of his right hand that "could be associated with gunshot residue.[7] And on the palm of the left hand there were also metals that were consistent with gunshot residue." Agent Simmons further opined that her findings were "most consistent with someone having or being in the vicinity of the weapon when it was discharged because the concentrations that we found are more consistent with being in front of a gun when it's discharged than handling or firing a gun." **Tr. pp. 408; 411-16.**

Officer Kalisha Gill testified that she is a forensic latent print examiner for the Charleston Police Department. Det. Asbell submitted the latent prints that he had lifted from the Robinsons' SUV to her for analysis. When she ran these prints through A.F.I.S., she got a "hit." The prints "came back to the fingerprint card bearing the name [of] Trevee Gethers." **Tr. pp. 339-46.**

However, A.F.I.S. is only a tool used to narrow the list of potential suspects and a conclusive match can only be made after manual comparison of latent prints with known standards. So, she was provided a set of Gethers' major case prints (**State's Exhibit 40**), which she compared with the latent prints that had been submitted.[8] She also received known prints from Quintavious Dominique Davis, the victim, Veronica K., Michael Amos Ritchey, Jr., and Donsurvi Chisholm. However, she did not receive known prints of either Mrs. Robinson or Marcus Brothers. **Tr. pp. 346-47; 353-54.**

Using the locations to which Det. Asbell testified that he had lifted prints, State's Exhibit 26, and Officer Gill expert analysis, the State presented the following evidence regarding the latent prints found on the recently-washed SUV:

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[7] The parties stipulated that there was a complete chain of custody for the gunshot residue samples from the time of the collection until they were tested. **Tr. p. 373.**

[8] Javon Wright testified that he is employed at the Charleston County Detention Center, where he took a set of Gethers' fingerprints and palm prints (State's Exhibit 40) when he booked Gethers, on May 11, 2007. **Tr. pp. 322-25.**

- **State's Exhibit 20** (latent lift number 10), which was taken from the passenger rear door in the center of the door, was Gethers' left palm;
- **State's Exhibit 22** (latent lift number 8), which was taken from "just above the pinstripes on the passenger's front door, was Gethers' left index finger;
- **State's Exhibit 16** (latent lift number 3), which was taken from the door post on the passenger's side front door, was Gethers' left index finger;
- **State's Exhibit 18** (latent lift number 5), which was taken from the door post on the passenger side rear door, was Gethers' left middle finger and his left palm;
- **State's Exhibit 17** (latent lift number 4), which was taken from the passenger rear door to the center of the door, was Gethers' left thumb;
- **State's Exhibit 19** (latent lift number 11), which was also taken from the passenger rear door in the center of the door, was Gethers' left thumb;
- **State's Exhibit 12** (latent lift number 19), which was taken from the edge of the driver's door, was the left middle and left ring fingers of Michael Ritchey;
- **State's Exhibit 9** (latent lift number 22), which was taken from the glass of the driver's side rear window, was Michael Ritchey's right palm;
- **State's Exhibit 8** (latent lift number 21), which was taken from the rear driver's window close to the front door, was Michael Ritchey's left palm;
- **State's Exhibit 6** (latent lift number 23), which was taken from the diver's side quarter panel between the back door and the window, was the victim's right middle and right ring fingers;
- **State's Exhibit 11** (latent lift number 16), which was taken from the driver's side door to the left of center of the door, was the victim's left middle finger and Michael Ritchey's left palm;
- **State's Exhibit 14** (latent lift number 12), which was taken from the "rear passenger's side edge just above the pinstripe, was the victim's left middle and left ring fingers.

Tr. pp. 347-53. *See also* **Tr. pp. 176-87 (Testimony of Earl Asbell); State's Exhibit 26.**

Later in the investigation, a Buccal swab of Gethers' DNA was obtained pursuant to a search

warrant.[9] **Tr. pp. 186-88**. Also, the Bluetooth headset was submitted to SLED's DNA laboratory for testing. SLED Agent Lilly Gallman, a forensic DNA analyst, testified that she was able to develop a DNA profile off of the Bluetooth headset.[10] She was also able to determine that the profile "was a mixture of at least three individuals. The DNA profile of the major contributor to that particular mixture was from an unknown male individual." **Tr. pp. 420-24**.

Agent Gallman placed the profile into the Combined DNA Index System (CODAS), which is a DNA database, and this resulted in a "hit:" the DNA of the major contributor to the profile matched Gethers' DNA. Because so many samples are in the CODAS database, she followed protocol and requested a standard of Gethers' DNA to guard against possible error. She thereafter compared the standard obtained from Gethers (**State's Exhibit 48**) to the profile developed from the Bluetooth headset. When she did so, she found that "the major contributor in . . . the swabs that came from the Bluetooth headset[] matched the DNA profile of Trevee Gethers." Also, she opined that "'[t]he probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor to this mixture is approximately one in 26 quadrillion." **Tr. pp. 424-28**.[11]

Dr. Erin Presnell, a forensic pathologist employed at the Medical University of South Carolina, performed the autopsy on the victim. Dr. Presnell explained that the victim had "one major injury." She described this injury as follows:

> He has a single gunshot wound. It actually enters in his right arm. It goes through his right arm just through the soft tissue, exits the right arm and goes into the right chest.

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[9] This was done on September 3, 2010. **Tr. pp. 187-88**.

[10] The parties stipulated that there was a complete chain of custody for both the Buccal swabs and the Bluetooth headset. **Tr. pp. 373-74**.

[11] There are roughly 6.5 billion people on earth. **Tr. p. 429**.

> It hits the right lung. It goes through the heart as well as the aorta, which is the main blood vessel taking blood to the rest of your body. It goes through the left lung and also hits the left rib and partially exits. So you actually have a hole in the skin where the bullet's exiting, where the bullet's still there and hanging on right there. So this is a partial exit gunshot wound.

Tr. pp. 307; 311-12.

Dr. Presnell testified that the bullet had traveled "pretty much straight across," but "slightly backwards on him a little bit." **Tr. p. 312.** She opined that her findings were consistent with the victim's right arm being either raised in a defensive posture or on the steering wheel when the shot was fired. Also, assuming the victim was seated in the driver's seat when shot, she opined that the shot came from the passenger side of the vehicle. She further opined that the gunshot wound was the cause of death; and she explained that, because the wound pierced the heart and aorta, "I can't imagine him being conscious over the seconds range" after the shooting. **Tr. pp. 318-22.**

The other "defining characteristic" of this wound was that the presence of "a fairly concentrated amount of stippling marks around the entrance wound to his arm." Based upon this finding, Dr. Presnell opined that it was "close-range gunshot wound" that had been fired "within a yard or less from him." Dr. Presnell recovered the bullet from the body. **Tr. pp. 312-14.**

2. The directed verdict motion and ruling.

At the close of the prosecution's case, Gethers moved for a directed verdict, but he did not make any argument in support of his motion. **Tr. p. 432, lines 10 - 12.** Without calling upon the State to respond, the trial judge denied his motion. She found that:

> it is not for the Court to weigh the evidence, that is for the jury. It's for the Court to determine whether or not there is evidence on each and every element, including any inferences reached, and of course from which the jury can reasonably determine guilt. And I find that there is evidence on each and every element from which the jury could reasonably determine guilt, and I would respectfully deny your motion.

Tr. p. 432, lines 13-22.

Prior to the defense's closing argument, Gethers renewed his directed verdict motion, and the trial judge again denied it. **Tr. p. 467, lines 21-25.**

B. Discussion.

The State initially submits that Gethers' argument is not properly before this Court on appeal because, as shown, counsel only made a general motion for a directed verdict, and it is settled that "a general directed verdict motion . . . does not preserve any issue for appeal." *State v. Sterling*, Op. No. 27096, 2012 WL 652455, 7 (S.C.S.Ct, Feb. 19, 2012) (citing *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989)). Having failed to present his present arguments to the trial judge, they may not be raised on appeal because "[a] party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal." *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.

Even assuming *arguendo* that this Court finds that his argument is not procedurally barred, the trial judge's ruling must be affirmed. In *State v. Odems*, 395 S.C. 582, ___, 720 S.E.2d 48, 50 (2011), the South Carolina Supreme Court recently set forth the applicable law governing the review of directed verdict motions in criminal cases:

> On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. *State v. Lollis*, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) (emphasis added). A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 451–52 (1984).

(Emphasis in original). *See also State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011)

(setting forth standard where State relies solely on circumstantial evidence).

Applying this standard to the case at bar, the trial judge's ruling must be affirmed because, notwithstanding Gethers' argument to the contrary, the State presented both direct and substantial circumstantial evidence reasonably tending to prove his guilt of murder. First, Mr. and Mrs. Ritchey heard two men arguing in the parking lot immediately before the shooting. Before Mr. Ritchey could reach the victim's still-running SUV, the assailant had fled. Likewise, the first officer on the scene arrived within moments of the dispatch for the shooting and he did not see anyone running, even though the smoke from the gunpowder was still in the cabin when he opened the SUV. However, a Bluetooth headset, which was still activated and had Gethers' DNA on it, was found between the area of the parking lot, where the victim's car had been, and Apartments, where Gethers' co-defendant and girlfriend, Veronica K. lived.

Second, the phone records (*see* **State's Exhibits 42-43**) reflected the calls between Veronica and the victim, and between Veronica and Gethers. She called Gethers up until almost the time of the shooting and, despite numerous calls to the victim's phone before the shooting, she did not call the victim after 10:58 p.m., one minute after the 911 calls had been placed. Also, Ms. Reid testified that Veronica was dating Gethers at the time and that she saw Gethers talking to Veronica on the night of the 17th.

Third, Veronica K.'s statement, **State's Exhibit 33**, also clearly implicates Gethers in the crime. In it, she admitted that she asked Gethers to get money from the victim and she told him what vehicle the victim was driving. She further indicates that he later told her that he did not get the money, which was corroborated by the testimony of the victim's wife that over $ 199.00 of the $ 200.00 the victim had borrowed from his son was returned to her.

Her statement also implicates Gethers in the murder, including evidence of flight from the jurisdiction and the use of a car that did not belong to Gethers and fake identification cards to elude capture. In the statement, she stated that "I didn't tell Trevee to shoot Mr. Earl, I just told Trevee to get the money. I didn't know Trevee shot Mr. Earl." Veronica also said that "I didn't see Trevee until the next day and he said we had to go because he got in some stuff. I knew we were running from something." **State's Exhibit 33, R. p. ___.**

The evidence of flight was corroborated by both Det. Garrison and Kiefer. Clearly, flight from prosecution is admissible as evidence of guilt in South Carolina. *State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003); *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct.App. 2003). Evidence of flight has been held to constitute evidence of defendant's guilty knowledge and intent. *Pagan, supra*; *see also State v. Thompson*, 278 S.C. 1, 292 S.E.2d 581 (1982) (finding that evidence of flight was admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension), *overruled on other grounds, State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Moreover and unlike the factual scenario in *Odems*, the totality of the circumstances in this case created an inference that Gethers had knowledge that law enforcement would look for him and Veronica in connection with the shooting. Contra *Odems*, 395 S.C. at ___, 720 S.E.2d at 52. *Accord Pagan, supra*; *State v. Beckham*, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999).

Further, testimony of prior inconsistent statements may be "used as substantive evidence when the declarant testifies at trial and is subject to cross examination." *State v. Copeland*, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982); *see also In re Richard D.*, 388 S.C. 95, 100, 693 S.E.2d 447, 450 (Ct.App. 2010) ("Even if the family court had limited the admissibility of the statement, that does not negate the fact that consideration of the statement as substantive evidence in a directed

verdict analysis would have been proper under *Copeland* and [*State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009)]"); *State v. Smith*, 309 S.C. 442, 447–48, 424 S.E.2d 496, 499 (1992) (exclusion prior inconsistent statement of defendant's nephew constituted reversible error); *State v. Ferguson*, 300 S.C. 408, 411, 388 S.E.2d 642, 644 (1990) (exclusion of victim's prior inconsistent statement as substantive evidence was harmless error when other evidence was cumulative of statement); *State v. Crawford*, 362 S.C. 627, 634, 608 S.E.2d 886, 890 (Ct.App. 2005) (co-conspirator's later testimony did not obviate the efficacy of the first statement made closer in time to the event in question); *State v. Caulder*, 287 S.C. 507, 513, 339 S.E.2d 876, 880 (Ct.App. 1986) (trial court erroneously instructed jury to disregard witness's prior inconsistent statement for substantive purposes). Gethers' argument that Veronica K.'s statement was untrustworthy is contrary to well settled authority that, in reviewing an appeal from denial of a directed verdict motion, this Court must view the evidence in the light most favorable to the State." *E.g.*, *Lollis*, 343 S.C. at 583, 541 S.E.2d at 256; *Burdette*, 335 S.C. at 46, 515 S.E.2d at 531. His argument likewise ignores that "[i]n reviewing a motion for directed verdict, the trial judge is concerned with the existence of evidence, not with its weight." *State v. Curtis*, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

Both Veronica's statement and her testimony reveal a crystal clear motive in this case: greed for the money that the victim was carrying and, inferably, the killing occurred when Gethers did not get they money as he and Veronica had planned. Additionally, Respondent would note that Gethers' fingerprints and palm print from his left hand - and only his - were found on the passenger's side of the recently-washed white Toyota Sequoia SUV that was driven by the victim. Prints belonging to Mr. Ritchey were found elsewhere on the vehicle, and circumstantially corroborated his testimony.

This was important because the pathologist opined that the victim was shot from the passenger's side of the car. There was also no evidence that the victim was armed.

Thus, this case is readily distinguishable from *Odems*, *Bostick* and *Lollis*, cases where the Court held that the State's evidence created only a mere suspicion of guilt. For instance, in *Odems*, the Court found that "[t]he State's case against Petitioner relied primarily on three pieces of circumstantial evidence: (1) the fact that less than ninety minutes after the burglary, police located Petitioner in the getaway car with the burglars and the stolen goods; (2) Petitioner fled from law enforcement; and (3) Petitioner asked an uninvolved person to lie for him." *Odems*, 395 S.C. at ___, 720 S.E.2d at 51. Also, in *Bostick*, the State only presented evidence that "(1) investigators found personal items belonging to Polite, including a watch and two sets of car keys, in a burn pile located on the Bostick family property; (2) Bostick's shoes contained a pattern that matched gasoline, and gasoline was the accelerant used to start the house fire; (3) and investigators found blood on the clothes Bostick was wearing the day of the murder, but that evidence could not be matched to Polite's DNA." However, no motive was established. *See Odems*, 395 S.C. at ___, 720 S.E.2d at 50 (citing *Bostick*, 392 S.C. at 141–42, 708 S.E.2d at 778).

Here, however, there was an undeniable motive. Moreover, the direct and circumstantial evidence was such that " all of the circumstances proven [were] consistent with each other and taken together, point[ed] conclusively to the guilt of [Gethers] to the exclusion of every other reasonable hypothesis." *Contra Odems*, 395 S.C. at ___, 720 S.E.2d at 52 . Therefore, the trial judge's ruling must be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the lower

court and Gethers conviction be affirmed.

Respectfully submitted,

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By: _____
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

March 28, 2012.

WES

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

TREVEE J. GETHERS,

APPELLANT.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by the Appellant, Respondent proposes the following to be included in the Record on Appeal:

1. State's Exhibit 1 (aerial photograph):
2. State's Exhibit 2 (photograph);
3. State's Ex. 3 (photograph);
4. State's Ex. 4 (crime scene photograph);
5. State's Ex. 26 (diagram);
6. State's Ex. 32 (statement of Brandee Kiefer); and
7. State's Exhibit 33 (statement of Veronica Kitt).

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. Respondent would also point out that the name of prosecution witness Veronica K. should be redacted in accordance with the South Carolina Supreme Court's August 13, 2007 *Order RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive*

Information in Appellate Court Filings because she was only fourteen years old at the time of the murder and seventeen at the time of trial

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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ATTORNEYS FOR RESPONDENT

March 28, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

TREVEE J. GETHERS,

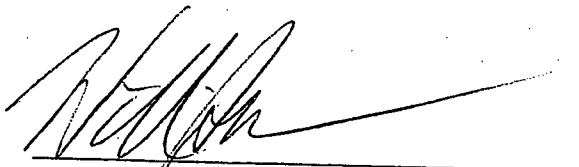
APPELLANT.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent on Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Elizabeth A. Franklin-Best, Esquire, South Carolina Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589.

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

This 28th day of March, 2012.



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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Trevee J. Gethers, Appellant.

Appellate Case No. 2010-178687

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2012-UP-576
Submitted October 1, 2012 – Filed October 24, 2012

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

PER CURIAM: Trevee J. Gethers appeals his conviction of murder, arguing the trial court erred in denying his motion for a directed verdict because the State failed to produce sufficient evidence to prove Gethers murdered the victim. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *id.* ("When reviewing a denial of a directed verdict, [an appellate court] views the evidence and all reasonable inferences in the light most favorable to the state."); *id.* at 292–93, 625 S.E.2d at 648 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [c]ourt must find the case was properly submitted to the jury.").

AFFIRMED.

FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

TREVEE J. GETHERS,

APPELLANT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2012-UP-576

Appellate Case No. 2010-178687

PETITION FOR REHEARING

On October 24, 2012, this Court affirmed Appellant's murder conviction and sentence in an unpublished opinion. State v. Trevee J. Gethers, 2012-UP-576 (Ct. App. filed Oct. 24, 2012). Appellant respectfully requests this Court grant his Petition for Rehearing and direct a verdict of acquittal in his favor.

Although this Court recited no facts to support its decision, this Court cited State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) for the legal standard used when considering a directed verdict motion. Appellant agrees with this Court that Weston, supra, provides an accurate discussion of the current state of the law in this area. However, when the law is applied to the facts presented at

Appellant's trial, the only conclusion is that the trial judge erred in failing to direct a verdict of acquittal. When the evidence against a defendant is circumstantial, the trial judge should submit the case to the jury only "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. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). "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." State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Evidence must constitute positive proof of facts and circumstances, which reasonably tends to prove guilt. Id. at 133, 322 S.E.2d at 452 (citing State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (194); see also State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). A trial judge should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). In this case, the evidence presented by the prosecution did not rise above the level of a mere suspicion.

Appellant was convicted of the September 17, 2007 murder of Earl Robinson. On that date, the decedent had earlier borrowed $200 from his son, Marcus. He was found in his SUV in a parking area of an apartment complex. R. 71, ll. 18-22. He had been shot once in the arm, with the bullet entering his chest and mortally wounding him. R. 221, ll. 5-23. Neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots. R. 52, l. 12- 53, l. 7. The apartment complex was known as a very high crime area and gunshots were "fairly common." R. 63, l. 7; R. 72, l. 24- 73, l. 6. Law enforcement obtained a buccal swab from appellant and obtained his DNA profile. R. 101, ll. 4-9. Appellant's DNA was found on the Bluetooth telephone headset that was found in the apartment complex. Significantly, the headset was "not located anywhere around the vehicle." R. 123, ll. 4-9.

Veronica K. was appellant's friend. R. 155, l. 23- 156, l. 2. She testified that on the date the decedent was killed, she was supposed to meet with the decedent, have sex with him and receive money from him. R. 156, ll. 14 – 25; R. 158, l. 1 - 159, l. 9; R. 176, ll. 10-14. That evening, she was using Maggie Reid's telephone. R. 157, ll. 1-2. At some point, Veronica and Appellant drove to Virginia, and then eventually traveled to New York. R. 164, l. 4 - 165, l. 2. During the investigation, law enforcement obtained the decedent's telephone, and noticed a number of telephone calls that he made to his son and to the telephone that was registered to Reid, Veronica's friend. R. 188, l. 18 - 189, l. 17. Their investigation led them to identify Appellant's telephone number. R. 192, ll. 2-25. Law enforcement also had identified Appellant's fingerprints located on the passenger side of the decedent's car. Law-enforcement never located the murder weapon even after exhaustively searching the area. R. 193, l. 5 - 197, l. 18.

Veronica gave a statement to law enforcement that suggested that she had Appellant meet with the decedent in order to take his money. At trial, she did not testify to these facts, but her statement was found admissible as a prior inconsistent statement. R. 208, l. 2- 209, l. 23; R. 204, ll. 6- 16. In exchange for cooperation, Veronica's charge of murder remained in the jurisdiction of Family Court. R. 279, ll. 7-11.

At the close of the State's case, counsel made a motion for directed verdict, which was renewed at the end of the case. R. 346, ll. 10-18. The trial court judge denied the motions. R. 346, ll. 19 -- 21.

The trial court judge erred when she denied Appellant's motion for a directed verdict because the evidence adduced at trial did not rise above the level of providing a "mere suspicion" that Appellant was guilty of murder. The trial court judge erred by not granting Appellant's motion for a directed verdict because the evidence did constitute positive proof of facts and

circumstances which reasonably tended to prove his guilt of murder. At most, the evidence proved that Appellant had a relationship with a young woman who had a relationship with the decedent.

Appellant respectfully requests this Court grant his Petition for Rehearing and direct a verdict of acquittal in his favor.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 6th day of November, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TREVEE J. GETHERS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Trevee J. Gethers, #343706, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 6th day of November, 2012.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 6th day
of November, 2012.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

The South Carolina Court of Appeals

The State, Respondent,

v.

Trevee J. Gethers, Appellant.

Appellate Case No. 2010-178687

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc: W. Edgar Salter, III
Elizabeth Anne Franklin-Best

RECEIVED

FEB 25 2013

S.C. COURT OF APPEALS

FILED
February 22, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2012-UP-576 (S.C. Ct. App. filed 10/24/2012)

07-GS-18-1755

THE STATE,

RESPONDENT,

V.

TREVEE J. GETHERS,

PETITIONER

Appellate Case No. 2013-000617

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER.

INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on February 22, 2013.

QUESTION PRESENTED

Did the Court of Appeals err in affirming Petitioner's conviction for murder and the trial judge's failure to direct a verdict of acquittal where the evidence adduced at trial did not rise above mere suspicion because the circumstantial evidence suggested only that Petitioner was near the murder scene when the decedent was fatally shot?

STATEMENT OF THE CASE

Petitioner was indicted for murder by the Dorchester County Grand Jury during its December 3, 2007 term (2007-GS-18-1755). R. 431-432. He was tried before the Honorable Diane Schafer Goodstein and a jury beginning on November 15, 2010. R. 1. He was represented by Sara Jayne Rogers. The state was represented by Russell D. Hilton and Harrison Bell, Jr. R. 1. He was convicted and sentenced to forty-five years' incarceration. R. 406, lines 4-7; R. 425, line 25 – R. 426, l. 2. Petitioner filed a timely notice of appeal, which was perfected by Elizabeth A. Franklin-Best of the Office of Appellate Defense. On October 24, 2012, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. App. 1-2; State v. Gethers, 2012-UP-576 (Ct. App. filed Oct. 24, 2012). On November 6, 2012, Petitioner filed a petition for rehearing. App. 3-7. By order filed February 22, 2013, the Court of Appeals denied the petition for rehearing. App. 8.

Petitioner now files this timely petition for writ of certiorari.

ARGUMENT

The Court of Appeals erred in affirming Petitioner's conviction for murder and the trial judge's failure to direct a verdict of acquittal where the evidence adduced at trial did not rise above mere suspicion because the circumstantial evidence suggested only that Petitioner was near the murder scene when the decedent was fatally shot.

Relevant facts

Petitioner was convicted of the murder of Earl Robinson which occurred on September 17, 2007. Earlier on that date, the decedent had borrowed $200 from his son, Marcus. The decedent was found seated in the driver's seat of a white Toyota Sequoia in the parking lot of apartment complex. R. 69, l. 3 - R. 72, l. 5. He had been shot once in the arm, with the bullet entering his chest and mortally wounding him. R. 221, ll. 5-23.

Neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots, although no one identified Petitioner as the one arguing with the decedent. R. 52, l. 12 – R. 53, l. 12; R. 61, lines 4-8. The apartment complex was known as a very high crime area and gunshots were "fairly common." R. 63, ll. 5-7; R. 56, ll. 12-15 (testimony by a neighbor that "arguments happen a lot" in the neighborhood); R. 60, ll. 19-23 (testimony by a neighbor that arguments were "common around there" and he had "learned to tune it out"); R. 66, ll. 6-12 (testimony by a neighbor that hearing "pop-pop" was not unusual and "it always happened in the neighborhood"); R. 67, ll. 6-14 (testimony by a neighbor that violence was a common occurrence at the apartment complex); R. 77, ll. 9-15 (testimony by a police officer that the area was violent and he responded to multiple shootings there). An officer with the Dorchester County Sheriff's Office confirmed that there were many fights and drug-related calls that occurred in the area. R. 72, l. 24 – R.73, l. 6. As law enforcement conducted their investigation, they seized a number of cigarette

butts, a .40 caliber gunshot shell, and a Bluetooth telephone headset. R. 84, ll. 8-19. Law enforcement did not analyze the cigarette butts that were located in the immediate area of the car. R. 84, ll. 20-23. The .40 caliber bullet was determined not to be relevant to the crime scene. R. 88, l. 20 - R. 89, l. 3.

Law enforcement also extracted thirty-four latent fingerprints from the decedent's car. R. 89, ll. 14-19. Three people were identified based on the presence of the fingerprints found on the car, but they were never pursued in connection with this investigation. R. 119, ll. 16-22. Later in their investigation, law enforcement obtained a buccal swab from Petitioner and obtained his DNA profile. R. 101, ll. 4-9.

Petitioner's DNA was found on the Bluetooth telephone headset that was found in the middle of the road near the apartment complex. Significantly, the telephone headset was not found close to where the decedent's body was located:

> That was just inside the first crime scene tape that was stretched across the road. It was actually in front of Apartment It was not located anywhere around the vehicle. It was between Apartment and , the apartment complex to the right. It was in that area on the road as you came in.

R. 123, ll. 4-9 (emphasis added).

Brandee Kiefer, Petitioner's girlfriend, recalled that around the time of this crime, she and Petitioner switched cars. R. 144, l. 18 – R. 147, l. 19. Veronica K. was another friend of Petitioner's. R. 155, l. 25 – R. 156, l. 2. She described the decedent as her friend as well. R. 156, ll. 3-13. She testified that on the date the decedent was killed, she was supposed to meet with him. He was expected to bring her money that evening because he intended to have sex with K., who was fourteen-years old at the time. R. 156, l. 14 – R. 159, l. 9; R. 176, ll. 10-14. That evening, she was using her friend, Maggie Reid's, telephone. R. 157, ll. 1 - 2. At some point, after the decedent

was killed, [redacted] and Petitioner drove to Virginia, and then eventually traveled to New York. R. 164, l. 4 – R. 165, l. 2.

During their investigation, law enforcement obtained the telephone that belonged to the decedent, and noticed a number of telephone calls that he made to his son and to the telephone that was registered to Reid, [redacted]'s friend. R. 188, l. 18 – R. 189, l. 17. Ultimately, their investigation led them to identify Petitioner's telephone number. R. 192, ll. 2-25. Law enforcement obtained search warrants based on telephone calls between [redacted] and Petitioner, but those searches did not uncover anything of evidentiary value. Law enforcement also had identified Petitioner's fingerprints located on the passenger side of the decedent's car. Other fingerprints were also located on the car, but they were not identified by law enforcement. R. 193, ll. 6-10; R. 196, ll. 15-17; R. 262, ll. 8-12. Law-enforcement never located the murder weapon even after exhaustively searching the area. R. 193, l. 5 – R. 197, l. 18. Ultimately, [redacted] and Petitioner were located in New York City. R. 199, ll. 2 - 19.

[redacted] gave a statement to law enforcement that suggested that she had Petitioner meet with the decedent in order to take his money. At trial, she did not testify to these facts, but her statement was found admissible as a prior inconsistent statement. R. 208, l. 2 - R. 209, l. 23; R. 204, ll. 6-16. In exchange for cooperation, [redacted]'s charge of murder remained in the jurisdiction of Family Court. R. 279, ll. 7-11.

Petitioner's DNA was located on the Bluetooth headset that was found in the middle of the road at the apartment complex. R. 328, l. 2 – R. 330, l. 25. Petitioner did not testify at trial. R. 343, ll. 4 - 7.

At the close of the prosecution's case, counsel made a motion for directed verdict, which was renewed at the end of the case. R. 346, ll. 10-18. The trial court judge denied the motions. R. 346, ll. 19 -- 21.

Discussion

The trial court judge erred when she denied Petitioner's motion for a directed verdict because the evidence adduced at trial did not rise above the level of providing a "mere suspicion" that Petitioner was guilty of murder. The Court of Appeals erred in affirming the trial judge's decision.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Odems Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009).

In one of the Supreme Court's most recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

The trial court judge erred by not granting Petitioner's motion for a directed verdict because the evidence did constitute positive proof of facts and circumstances which reasonably tended to prove his guilt of murder. At most, the evidence proved that Petitioner had a relationship with a young woman who had a relationship with the decedent. Her statement tending to implicate Petitioner merely raised a suspicion that Petitioner was guilty, since it was made under circumstances militating against its trustworthiness because it was induced by a deal from the state. And, in any event, she did not testify against Petitioner during trial. All then, that was left to connect Petitioner to the murder, was Petitioner's Bluetooth telephone headseat, found in the apartment complex parking lot, and phone calls between K. [redacted] and Petitioner.

Additionally, Petitioner's fingerprints on the *outside* of the car did not constitute evidence that Petitioner was guilty of committing murder.

CONCLUSION

For these reasons, the trial court judge erred, and Petitioner respectfully asks this Court to reverse his conviction and order a directed verdict of acquittal.

Respectfully submitted,

Susan B Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 15th day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2012-UP-576 (S.C. Ct. App. filed 10/24/2012)
07-GS-18-1755

THE STATE,

RESPONDENT,

V.

TREVEE J. GETHERS,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 15th day of May, 2013.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of May, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2013-000617

THE STATE,

RESPONDENT,

v.

TREVEE J. GETHERS,

PETITIONER.

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ATTORNEYS FOR RESPONDENT.

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STATEMENT OF ISSUE ON APPEAL

Did the Court of Appeals err in affirming Petitioner's conviction for murder and the trial judge's failure to direct a verdict of acquittal where the evidence adduced at trial did not rise above mere suspicion because the circumstantial evidence suggested only that Petitioner was near the murder scene when the decedent was fatally shot?

COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether Gethers' arguments challenging to the trial judge's denial of his directed verdict motion are preserved for this Court's review because he only made a general motion for a directed verdict at trial and he did not raise the arguments he now presents?

II. Whether the Court of Appeals correctly upheld the trial judge's ruling denying Gethers directed verdict motion because the State presented direct and substantial circumstantial evidence at trial that reasonably tended to prove that he murdered the victim, Robert Earl Robinson, or from which his guilt could be inferred?

ADDITIONAL SUSTAINING GROUND

III. Whether the Court of Appeals erred by failing to find that Gethers' argument was not properly before it on appeal because Gethers only made a general motion for a directed verdict at trial and he did not make any of the arguments at trial that have been subsequently made on appeal?

STATEMENT OF CASE

The Dorchester County Grand Jury indicted Petitioner, Trevee J. Gethers (Gethers), on December 3, 2007, for murder (2007-GS-18-1755), in connection with the shooting death of Robert Earl Robertson. **R. pp. 431-32**. On November 15-17, 2010, Gethers received a jury trial before the Honorable Diane Schafer Goodstein. The jury found him guilty of murder and Judge Goodstein sentenced him to forty-five years imprisonment. **R. pp. 425-26**.[1] Dorchester County Assistant Public Defender Sara Jane Rogers represented Gethers at trial. Senior Assistant Solicitor Harrison Bell, Jr., and Russell D. Hilton, of the First Circuit Solicitor's Office, prosecuted him. **R. p. 1**.

Gethers timely served and filed a notice of appeal. On October 24, 2012, the Court of Appeals affirmed his conviction and sentence in an unpublished opinion. *State v. Gethers*, 2012-UP-576 (Ct. App. filed Oct. 24, 2012), **App. pp. 1-2**. On November 6, 2012, Gethers filed a Petition for Rehearing. **App. pp. 3-7**. The Court of Appeals denied rehearing in an Order filed on February 22, 2013. **App. 8**.

Gethers thereafter filed a timely Petition for Writ of Certiorari. Respondent now makes its Return to Petition for Writ of Certiorari.

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[1]She also revoked four years of a probationary sentence on an unrelated gun charge.R. p. 425.

ARGUMENTS

I. Gethers' challenges to the trial judge's denial of his directed verdict motion are not preserved for this Court's review because he only made a general motion for a directed verdict at trial and he did not raise the arguments he now presents. Alternatively, the Court of Appeals correctly upheld the trial judge's ruling denying Gethers directed verdict motion because the State presented direct and substantial circumstantial evidence at trial that reasonably tended to prove that he murdered the victim, Robert Earl Robinson, or from which his guilt could be inferred.

Gethers maintains that the trial judge erroneously denied his motion for a directed verdict, claiming that "[a]t most, the evidence proved that appellant had a relationship with a young woman who had a relationship with the decedent." After discounting this co-defendant witness' statement implicating him as untrustworthy, he contends that the only evidence that connected him to the murder was his "telephone, found in the apartment complex, and phone calls between Ms. K. and appellant." **Brief of Appellant, p. 8**. Respondent submits that his challenge to the trial judge's trial judge's denial of his motion is not preserved for this Court's review because he only made a general motion for a directed verdict at trial and he did not raise the arguments he presents to this Court. Alternatively, the Court of Appeals correctly upheld the trial judge's ruling denying Gethers directed verdict motion because the State presented direct and substantial circumstantial evidence at trial that reasonably tended to prove that he murdered the victim, Robert Earl Robinson, or from which his guilt could be inferred.

A. Proceedings in the trial court.

1. The prosecution's evidence.

The direct and circumstantial evidence presented by the State was that the victim, Earl Robinson, lived in Walterboro, South Carolina in September 2007. On the night of September 17,

2007, the victim called his son, Marcus Brothers, "about 8:30 p.m." and he asked if Marcus had any money that he could borough. Marcus did have money and agreed to loan some to him. When the victim called again at 9:24 p.m., he said "he was going away" and needed cash. Marcus again agreed to loan money to him. **R. pp. 127-28; 284.**

A few minutes after 10:00 p.m., the two men met at a Horizon Gas Station near Marcus' residence and Marcus loaned $ 200.00 to his father.[2] The victim and Marcus engaged in some small talk and the victim purchased a fountain drink before leaving. Although the victim never told Marcus why he need the money, this was not unusual because the men often provided financial help to each other, when necessary. Also, Marcus and the victim's wife, Jestine Robinson, testified that Earl would often help out others who needed it. **R. pp. 128-33; 139; 284.**

Jestine Robinson testified that her husband told her on September 17th that he had to go somewhere. Because her SUV blocked his vehicle in their driveway, he took her 2001 Toyota Sequoia (*see* **State's Exhibit 4**), which he had washed the preceding Wednesday. Neither Mrs. Robinson nor Marcus knew Gethers or had seen him before court proceedings began in this case. Sometime after the murder, the coroner returned slightly over $ 199.00 to Mrs. Robinson. **R. pp. 132; 134-139.**

Within an hour after getting the loan from his son, the victim was murdered. Shortly before 11:00 p.m. on the night of September 17, 2007, Kimberly and Michael Ritchey were in the stairway leading to their upstairs apartment in a Dorchester County apartment complex (*see* **State's Exhibit 1**), and Michael was smoking a cigarette. They heard what sounded like two men yelling and

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[2] Their meeting was corroborated by the store's surveillance video (**State's Exhibit 30**), which was published to the jury. **R. pp. 129-30.** The victim had also called him again, at 10:02 p.m. **R. p. 302.**

screaming. Kimberly testified that the argument was about "money." This was not unusual in the apartment complex. So, Kimberly went back upstairs to check on their small children and Michael remained on the steps. **R. pp. 52-53; 56-57; 59-60; 63.**

While Kimberly was in the children's bedroom, which overlooks the parking lot, she heard at least one gunshot. She then went back outside. By this time, Michael Ritchey was at the bottom of the steps and headed toward the vehicle because it was still running. In fact, the vehicle almost struck him. He yelled at Kimberly to "[c]all the cops" and she did so. **R. pp. 53-54; 56-57.**

Michael Ritchey did not see anyone, but he heard the two people "yelling and screaming." After Kimberly went to check on the children, Michael heard a gunshot. He immediately ran down the steps and toward a car that had pulled out of a space in the parking lot and appeared to be trying to turn around. As Michael got the license tag number, the vehicle "jumped the curb into the grass and almost hit me because it backed out to the road and stopped in the middle of the road . . . with the motor running." **R. pp. 60-61.**

Michael walked over to the vehicle and put his hands on the glass in the rear of the vehicle to see if any children were in it, but he did not see any. Next, he walked up to the front door of the vehicle and saw someone "slumped over laying with their head against the passenger's seat." When Michael opened up the door to check on this person, he saw "blood everywhere and kind of freaked out." He did not see anyone running either in the direction of a nearby Bi-Lo or toward another apartment complex that is located a short distance away from his. **R. p. 62.** *See also* **State's Exhibit 1.**

Shanika Moon lived in the apartment directly below the Ritcheys in September 2007. On the night of September 17th, she looked out of her window saw two people in an SUV that was "closed,

parked forward." She could not identify either person in the vehicle and she could not hear any argument. She sat back down but soon heard "a 'pop-pop' noise." She looked back out and again saw the SUV. However, she did not call 911 because she often heard shots. **R. pp. 64-68.**

The Dorchester County Sheriff's Department received several 911 calls reporting the shooting, the first of which was received at 10:57 p.m. **R. p. 285, lines 14-21; p. 287, lines 19-20.** Then-Officer Willard Driggers happened to be in front of the apartment complex when the dispatcher sent out the call, and he arrived on the scene within a minute. He was quickly followed by then-Officer Christopher Freshman, who pulled in behind him. Both officers saw a white Toyota Sequoia SUV. The doors on the vehicle were closed, the windows were up and the vehicle's engine was "revving at high RPMS." There was no one else in the area. **R. pp. 68-70; 72; 74-76.**

Officer Driggers approached the SUV (see **State's Exhibit 2**) and he saw a person in the front seat, who was "slumped over." Wearing latex gloves, he opened the driver's door. There was blood on the seat and it did not appear that the person in the SUV (the victim) was breathing. Also, "the smoke from the gunpowder was still floating inside the vehicle." So, Officer Driggers reached in and turned off the ignition. The officers then secured the scene. **R. pp. 70-73; 75-76.**

Det. Earl Asbell, also with the Dorchester County Sheriff's Department, testified that he was the "lieutenant over the crime scene unit" at the time of the murder. With the assistance of another officer, he processed the crime scene at the apartment complex parking lot on September 17th. He explained that whenever there was a shooting, his unit collects "everything in the proximity," even if it is later determined that the item(s) collected are not involved in the crime. **R. pp. 78-80; 82-83.**

In this case, he first photographed the vehicle and everything around it. Next, he photographed the victim as seated in the vehicle, before removing the victim's wallet and obtaining

the victim's driver's license. He also photographed (*see* **State's Exhibit 3**) and seized the victim's cell phone. **R. pp. 78-80; 82-83.**

Then, he seized a .40 caliber shell casing off of the road, some 40 or 50 feet from the SUV, that was ultimately determined to be irrelevant because the victim was shot by either a .38 or .350 magnum bullet.[3] He also seized a Bluetooth and earpiece associated with it. The Bluetooth was still blinking, indicating that it was activated. *See* **State's Exhibits 23-25**. These were found in the road and near a path between the apartment complex where the shooting occurred and some nearby apartments. *See* **State's Exhibit 1**. Also, the Bluetooth "appeared to have been . . . either run over or it fell apart when it hit the road because the earpiece was separated from it." **R. pp. 84-86; 88-89; 121-23; 125.**

Det. Asbell had the SUV towed to the Sheriff's Department's garage and it was processed for fingerprints the following morning. In all, officers lifted thirty-four latent prints from the vehicle. He also photographed the latent prints that he found, and those lifts were submitted to the Charleston Police Department for analysis. **R. pp. 89-100; 248; 252-55.**

Det. John Garrison testified that he was the Dorchester County Sheriff' Department's lead investigator in this case. There was no suspect identified immediately after the murder. He spoke to the victim's family and subpoenaed the phone records for the victim's cell phone. Although the victim had called a number earlier on the day of September 17th, it was determined that the woman with whom he had spoken did not have any involvement in the case. However, there were a series of calls from and to a specific number on the night of the 17th, and it was discovered that the

[3] Det. Asbell saw some cigarette butts that night but e did not seize them because they were located over forty feet from the SUV and "[e]verything took us in a different direction."R. p. 84, lines 12-23; p. 117, line 17 - p. 118, line 10. There is absolutely no evidence that these cigarette butts were relevant to this case.

telephone number was for a cell phone owned by a Maggie Reid. **R. pp. 185-89.**

Officers located Ms. Reid at her residence in nearby apartments and the records for her cell phone (**State's Exhibit 42**) were then obtained. They obtained information that the initial results of the fingerprint analysis from AFIS showed that Gethers' prints were on the SUV at roughly the same time that they obtained the cell phone records for Reid's phone. **R. p. 189; 191-92; 242-45; 254-55.**

Ms. Reid testified that she lived in the apartments near the crime scene in September 2007. Veronica K. and Veronica's mother lived in the apartment beneath her. Veronica was dating a man nicknamed "City" at the time. Veronica was with her mother when her mother picked up Reid from work at 4:15 p.m. on September 17th. Veronica borrowed Ms. Reid's phone on the way home and again later that evening. **R. pp. 236-40.**

During the night of September 17th, Ms. Reid had gone to the K.'s apartment to look for her phone but was told that Veronica was not home. At that time, Reid saw "City" sitting on the back of his car, talking to Veronica. Reid finally got the phone back the next morning. **R. pp. 240-41.**

After learning that Gethers' prints were on the SUV; that Veronica K. had used Reid's phone to call him numerous times; and that there was a close relationship between Gethers and Veronica, the Sheriff's Department obtained his cell phone records. **State's Exhibit 43.** Officers also executed search warrants at both Veronica's apartment and Gethers' residence on the morning of September 19th. Unfortunately, they did not find anything relevant to the case. Officers were also unable to locate either of the suspects. **R. pp. 192-93; 195-98.**

However, they spoke to Brandee Kiefer. They learned that Gethers had swapped cars with Kiefer and that he was driving her Kia. **R. pp. 197-98.** Keifer testified that she was romantically involved with Gethers in September 2007. When she got off from work on the night of Tuesday,

September 18th, Gethers had taken her Kia Spectra (*see* **State's Exhibit 31**) and had left his Lincoln for her to drive. **R. pp. 144-48.**

Keifer told detectives that she kept calling Gethers but he did not answer. Also, when she finally did speak to him, he told her that he would be back in three or four hours. However, he never returned. Also, she had to go to Virginia to pick up her car. Although she claimed that she did not remember telling detectives that "[w]hen I spoke to [Gethers], he said not to tell anyone . . . that they were in Virginia," she did not dispute that she said this. **R. pp. 148-51; 154.**

Det. Garrison obtained an arrest warrant for Gethers charging him with murder on the morning of September 19th. He entered the warrant information and information that Gethers may be driving Kiefer's Kia into the N.C.I.C. database. On September 20th, the Sheriff's Department was notified that the Kia had been found at a truck stop off of the interstate in New Kent, Virginia. No one was in the car and it had been vandalized. **R. pp. 195-99.**

On September 22nd, the Sheriff's Department received a telephone call from the New York City Police Department informing them that Veronica K. had been apprehended using a fake ID. Also, she was accompanied by a man using the ID of "Dante Hubbard." It was determined that the man was actually Gethers. Eventually, both suspects were returned to South Carolina. **R. p. 199.**

Detective Steve Morelli also assisted in the investigation. He testified that the phone records of Gethers' (**State's Exhibit 42**), Ms. Reid's (**State's Exhibit 43**), and the victim's cell phones showed the following:

- At 4:33 p.m., there was a call from Ms. Reid's cell phone to the victim's cell phone;
- At 4:34 p.m., there was a call from Ms. Reid's cell phone to Gethers' cell phone;

- Between 5:11 and 5:12 p.m., there were three calls from Ms. Reid's cell phone to Gethers' cell phone;
- At 6:55 p.m., Gethers' phone called Ms. Reid's phone;
- At 8:47, 8:48 and 8:55 p.m., there were calls from Ms. Reid's cell phone to Gethers' phone;
- At 8:57 p.m., there was a call from Ms. Reid's cell phone to the victim's cell phone;
- At 9:24 p.m, "[t]he victim called his son;"
- At 9:47 p.m., Ms. "Reid's phone called the victim's phone;"
- At 9:50 p.m., the victim dialed Ms. Reid's cell phone and, then Ms Reid's phone dialed the victim's cell phone;
- At 10:02 p.m., the victim called Ms. Reid's phone;
- At 10:04 p.m., "the victim contacted his son;"
- At 10:34 p.m., Ms. Reid's phone dialed the victim's phone;
- At 10:41 p.m., the victim called Ms Reid's phone;
- At 10:49 p.m. and at 10:51 p.m., Ms. Reid's phone dialed the victim's phone;
- At 10:56 p.m., Ms Reid's phone called Gethers' phone;
- At 10:57 p.m. and at 10:58 p.m., Ms. Reid's phone dialed the victim's phone;[4]
- After 10:58 p.m. on September 17th, Ms. Reid's phone did not call the victim's phone;
- At 11:40 p.m., Gethers' cell phone called Ms. Reid's phone;

R. pp. 283-88; State's Exhibits 42-43. There were also calls from the victim to Ms. Reid's phone on the 17th. **R. pp. 289-90**.

[4] Again, the 911 calls began at 10:57 p.m. **R. p. 285.**

Although Veronica K. was Gethers' co-defendant, she was called as a prosecution witness.[5] She testified that she had lived at apartments near the crime scene and that she was fourteen years old in 2007. She also admitted that she knew the victim on September 17th 2007. He had initially been a family friend but he wanted to become romantically involved with her. She admitted that she spoke to the victim about bringing her some money on September 17th and that she was using the cell phone of Ms. Reid, a friend who lived upstairs from her, on the 17th. **R. pp. 155-58; 176.**

Veronica testified that she called the victim earlier that day and asked him for money. However, she was with her mother. The victim told her that he had money, but he did not want her mother to know he was going to give her money because he was planning on having sex with Veronica that night. He also told her to call him back later that night. In their numerous phone conversations, she told him to meet her at apartments where the murder occurred and to call her before he got there so that she would know when to leave her apartment. **R. pp. 157-58.**

Veronica claimed that she "never got a chance to give" the victim directions to the crime scene, but she stated that he did know how to find her apartment complex. She further claimed that she ultimately stopped calling the victim because she assumed that he had changed his mind about giving her money. Also, she admitted that she had talked to Gethers, a/k/a "City," about the victim on the 17th and that she had asked Gethers to pick up the money for her because she did not want to have sex with the victim. Gethers supposedly told her that "he was going to have to call me back because he wasn't sure if he was going to do that." **R. pp. 158-60.**

Veronica claimed that the victim drove a white Explorer. Although the victim did not know

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[5] The parties stipulated that "the State has entered into an agreement whereby Veronica [K.'s] charge of murder will remain under the jurisdiction of the Family Court provided Ms. [K.] testifies truthfully and cooperates in the prosecution of this defendant, Trevee Gethers." **R. p. 279.**

Gethers, she testified that her plan was to tell the victim that her mother would not let her out of the apartment and that she would send her "friend," Gethers, to pick up the money. **R. p. 160.** Unfortunately, she was not very truthful in her testimony from this point forward. First, she denied telling Gethers what the victim was driving or where to pick up the money from the victim. **R. pp. 160-61.**

Then, she denied telling the police several matters in a March 9, 2009 statement that she had given. (**State's Exhibit 33, R. pp. 429-30**). She only she admitted telling officers that the victim said he would bring her "the money, but he wasn't going to keep bringing [her] the money without getting some," and that "I knew we were running from something." **R. pp. 162-64.**

Veronica did admit that she and Gethers had gone to Virginia in Kiefer's Kia, and that they had left it somewhere. She likewise admitted that she and Gethers had taken a bus to New York; that she was using Tambora Ravenel's ID; that she learned that Gethers was using the ID of a Dante Hubbard; and that State's Exhibit 34 were the ID cards that they had used. She testified that Ravenel was her friend and that Hubbard was someone she knew. However, she claimed that she did not know Hubbard's address. While she admitted that Gethers' was a "[p]retty close friend" and that she did not "want to see anything happen to him," she denied that he was her boyfriend. Also, she claimed that she only used Ravenel's ID so that she could by cigarettes. **R. pp. 255-58; 266; 268-69.**

In light of Veronica K.'s responses concerning her statement to the Sheriff's Department, which was given in the presence of her attorney and after she had waiver her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) (*see* **R. pp. 201-02**), the State was permitted to introduce a redacted version of it, as **State's Exhibit 33**, and it was published to the jury through Det. Garrison.[6] In her

[6] The trial judge's ruling on this issue is at **R. pp. 202-07.**

statement, she said that:

> I called Mr. Earl for some money. He said he would bring the money, but he wasn't going to bring me money without getting some. He wanted some in the past, but I kept tricking him. I told him to go to the because I didn't want my momma to know about Mr. Earl bringing me the money. Mr. Earl was bringing me more than $50.00 because I asked him for some money. He thought we were going to a motel. I told Trevee Gethers "City" to get the money because I didn't want to mess with Mr. Earl. I told Trevee that Mr. Earl was in a white Sequoia because that's what Mr. Earl told me he was driving. I didn't tell Trevee to shoot Mr. Earl, I just told Trevee to get the money. I didn't know Trevee shot Mr. Earl. . . . I called Trevee after [(sic)] to see if he got the money, and he said no. Trevee said that Mr. Earl wouldn't give him the money. I didn't see Trevee until the next day and he said we had to go because he got in some stuff. I knew we were running from something. We went to a lady's house In Virginia on the air base. We went to Dro mama's house. [(sic)] Dro and Tam followed us to Virginia. Then we took the bus to New York. I have gotten money from Mr. Earl before and that's how I knew I could call him for money.
>
> Question: Has Mr. Earl ever been to [the apartments where he was killed] before?
>
> Answer: Yes, he has brought me money there behind Bi-Lo, but I still had to give him directions.

State's Exhibit 33, R. pp. 429-30. *See also* **R. pp. 207-09.**[7]

Also, SLED Agent Ila Simmons, who was qualified as an expert in trace evidence and gunshot residue, testified that a gunshot residue test performed on the victims hands early in the morning after the murder (**R. pp. 87-88**) revealed the presence of metals on the palm and the back of his right hand that "could be associated with gunshot residue.[8] And on the palm of the left hand

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[7] Despite a diligent search, the murder weapon was not found. Nor did officers locate a shell casing for the bullet that killed the victim. **R. pp. 193-94.** However, a SLED expert in firearms analysis, testified that the bullet that killed the victim was "most consistent with bullets that we have found loaded into .38 special caliber and .357 magnum caliber cartridges," and that the crimping cannelure on the bullet suggested that the gun was a revolver, as opposed to a semi-automatic pistol. **R. pp. 299-02.**

[8] The parties stipulated that there was a complete chain of custody for the gunshot residue samples from the time of the collection until they were tested. **R. p. 278.**

there were also metals that were consistent with gunshot residue." Agent Simmons further opined that her findings were "most consistent with someone having or being in the vicinity of the weapon when it was discharged because the concentrations that we found are more consistent with being in front of a gun when it's discharged than handling or firing a gun." **R. pp. 313; 316-21**.

Officer Kalisha Gill, a forensic latent print examiner for the Charleston Police Department, testified that Det. Asbell submitted the latent prints that he had lifted from the Robinsons' SUV to her for analysis. When she ran these prints through A.F.I.S., she got a "hit." The prints "came back to the fingerprint card bearing the name [of] Trevee Gethers." **R. pp. 248-55**.

However, A.F.I.S. is only a tool used to narrow the list of potential suspects and a conclusive match can only be made after manual comparison of latent prints with known standards. So, she was provided a set of Gethers' major case prints (**State's Exhibit 40**), which she compared with the latent prints that had been submitted.[9] She also received known prints from Quintavious Dominique Davis, the victim, Veronica K., Michael Amos Ritchey, Jr., and Donsurvi Chisholm. However, she did not receive known prints of either Mrs. Robinson or Marcus Brothers. **R. pp. 255-56; 262-63.**

Using the locations to which Det. Asbell testified that he had lifted prints, State's Exhibit 26, and Officer Gill expert analysis, the State presented the following evidence regarding the latent prints found on the recently-washed SUV:

- **State's Exhibit 20** (latent lift number 10), which was taken from the passenger rear door in the center of the door, was Gethers' left palm;
- **State's Exhibit 22** (latent lift number 8), which was taken from "just above the pinstripes on the passenger's front door, was Gethers' left index finger;

[9] Javon Wright is employed at the Charleston County Detention Center. He testified that he took a set of Gethers' fingerprints and palm prints (**State's Exhibit 40**) when he booked Gethers, on May 11, 2007. **R. pp. 231-34.**

- **State's Exhibit 16** (latent lift number 3), which was taken from the door post on the passenger's side front door, was Gethers' left index finger;
- **State's Exhibit 18** (latent lift number 5), which was taken from the door post on the passenger side rear door, was Gethers' left middle finger and his left palm;
- **State's Exhibit 17** (latent lift number 4), which was taken from the passenger rear door to the center of the door, was Gethers' left thumb;
- **State's Exhibit 19** (latent lift number 11), which was also taken from the passenger rear door in the center of the door, was Gethers' left thumb;
- **State's Exhibit 12** (latent lift number 19), which was taken from the edge of the driver's door, was the left middle and left ring fingers of Michael Ritchey;
- **State's Exhibit 9** (latent lift number 22), which was taken from the glass of the driver's side rear window, was Michael Ritchey's right palm;
- **State's Exhibit 8** (latent lift number 21), which was taken from the rear driver's window close to the front door, was Michael Ritchey's left palm;
- **State's Exhibit 6** (latent lift number 23), which was taken from the diver's side quarter panel between the back door and the window, was the victim's right middle and right ring fingers;
- **State's Exhibit 11** (latent lift number 16), which was taken from the driver's side door to the left of center of the door, was the victim's left middle finger and Michael Ritchey's left palm;
- **State's Exhibit 14** (latent lift number 12), which was taken from the "rear passenger's side edge just above the pinstripe, was the victim's left middle and left ring fingers.

R. pp. 256-62. *See also* **R. pp. 90-101 (Testimony of Earl Asbell); State's Exhibit 26.**

Later in the investigation, a Buccal swab of Gethers' DNA was obtained pursuant to a search warrant.[10] **R. pp. 100-02.** Also, the Bluetooth headset was submitted to SLED's DNA laboratory for testing. SLED Agent Lilly Gallman, a forensic DNA analyst, testified that she was able to develop

[10] This was done on September 3, 2010. **R. pp. 101-02.**

a DNA profile off of the Bluetooth headset.[11] She was also able to determine that the profile "was a mixture of at least three individuals. The DNA profile of the major contributor to that particular mixture was from an unknown male individual." **R. pp. 325-29.**

Agent Gallman placed the profile into the Combined DNA Index System (CODAS), which is a DNA database, and this resulted in a "hit:" the DNA of the major contributor to the profile matched Gethers' DNA. Because so many samples are in the CODAS database, she followed protocol and requested a standard of Gethers' DNA to guard against possible error. She thereafter compared the standard obtained from Gethers (**State's Exhibit 48**) to the profile developed from the Bluetooth headset. When she did so, she found that "the major contributor in . . . the swabs that came from the Bluetooth headset[] matched the DNA profile of Trevee Gethers." Also, she opined that "'[t]he probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor to this mixture is approximately one in 26 quadrillion." **R. pp. 329-33.**[12]

Dr. Erin Presnell, a forensic pathologist employed at the Medical University of South Carolina, performed the autopsy on the victim. Dr. Presnell explained that the victim had "one major injury." She described this injury as follows:

> He has a single gunshot wound. It actually enters in his right arm. It goes through his right arm just through the soft tissue, exits the right arm and goes into the right chest. It hits the right lung. It goes through the heart as well as the aorta, which is the main blood vessel taking blood to the rest of your body. It goes through the left lung and also hits the left rib and partially exits. So you actually have a hole in the skin where the bullet's exiting, where the bullet's still there and hanging on right there. So this is a partial exit gunshot wound.

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[11] The parties stipulated that there was a complete chain of custody for both the Buccal swabs and the Bluetooth headset. **R. pp. 278-79.**

[12] There are roughly 6.5 billion people on earth. **R. p. 334.**

R. pp. 216; 220-21.

Dr. Presnell testified that the bullet had traveled "pretty much straight across," but "slightly backwards on him a little bit." **R. p. 221.** She opined that her findings were consistent with the victim's right arm being either raised in a defensive posture or on the steering wheel when the shot was fired. Also, assuming the victim was seated in the driver's seat when shot, she opined that the shot came from the passenger side of the vehicle. She further opined that the gunshot wound was the cause of death; and she explained that, because the wound pierced the heart and aorta, "I can't imagine him being conscious over the seconds range" after the shooting. **R. pp. 227-31.**

The other "defining characteristic" of this wound was that the presence of "a fairly concentrated amount of stippling marks around the entrance wound to his arm." Based upon this finding, Dr. Presnell opined that it was "close-range gunshot wound" that had been fired "within a yard or less from him." Dr. Presnell recovered the bullet from the body. **R. pp. 221-23.**

2. The directed verdict motion and ruling.

At the close of the prosecution's case, Gethers moved for a directed verdict, but he did not make any argument in support of his motion. **R. p. 337, lines 10 - 12.** Without calling upon the State to respond, the trial judge denied his motion. She found that:

> it is not for the Court to weigh the evidence, that is for the jury. It's for the Court to determine whether or not there is evidence on each and every element, including any inferences reached, and of course from which the jury can reasonably determine guilt. And I find that there is evidence on each and every element from which the jury could reasonably determine guilt, and I would respectfully deny your motion.

R. p. 337, lines 13-22.

Prior to the defense's closing argument, Gethers renewed his directed verdict motion, and the trial judge again denied it. **R. p. 372, lines 21-25.**

B. Discussion.

The State initially submits that Gethers' argument is not properly before this Court on appeal because, as shown, counsel only made a general motion for a directed verdict, and it is settled that "a general directed verdict motion . . . does not preserve any issue for appeal." *State v. Sterling*, 396 S.C. 599, 612, 723 S.E.2d 176, 183 (2012) ("A general directed verdict motion, however, does not preserve any issue for appeal") (citing *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989)). Having failed to present his present arguments to the trial judge, they may not be raised on appeal because "[a] party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal." *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.[13]

Even assuming *arguendo* that the Court finds that his argument is not procedurally barred, the trial judge's ruling must be affirmed. In *Odems*, 395 S.C. at 586, 720 S.E.2d at 50, this Court set forth the applicable law governing the review of directed verdict motions in criminal cases:

> On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. *State v. Lollis*, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). However, if there is any direct or *substantial* circumstantial evidence

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[13] It does not appear that the Court of Appeals relied upon the procedural bar. *See* **App. p. 2.** As a result, Respondent as raised this procedural bar as an additional sustaining ground. Likewise, neither the Initial Brief of Appellant **(IBOA, pp. 5-9)**, nor the Petition for Rehearing **(App. pp. 3-7)**, presented the analysis of *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000), *State v. Lollis*, 343 S.C. 580,584, 541 S.E.2d 254,256 (2001), or *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011), found at pp. 9-10 of the Petition for Writ of Certiorari, although *Mitchell* and *Lollis* were cited in the Initial Brief. Therefore, it would be improper for this Court to consider his arguments on certiorari. *See* Rule 208 (b)(1)(D), SCACR ("particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority"); *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281, 282 n. 3 (2003) (an issue must also be argued fully in the initial brief of appellant to be preserved for the Court's consideration); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (the failure to provide arguments or cite to authority in support of argument constitutes abandonment of issue on appeal); Rule 242(d)(2), SCACR (("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari ... ."); *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the court of appeals and not raised in petition for rehearing).

> reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) (emphasis added). A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 451–52 (1984).

(Emphasis in original). *See also State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011) (setting forth standard where State relies solely on circumstantial evidence).

Applying this standard to the case at bar, the trial judge's ruling must be affirmed because, notwithstanding Gethers' argument to the contrary, the State presented both direct and substantial circumstantial evidence reasonably tending to prove his guilt of murder. First, Mr. and Mrs. Ritchey heard two men arguing in the parking lot immediately before the shooting. Before Mr. Ritchey could reach the victim's still-running SUV, the assailant had fled. Likewise, the first officer on the scene arrived within moments of the dispatch for the shooting and he did not see anyone running, even though the smoke from the gunpowder was still in the cabin when he opened the SUV. However, a Bluetooth headset, which was still activated and had Gethers' DNA on it, was found between the area of the parking lot where the victim's car had been and the nearby apartments, where Gethers' co-defendant and girlfriend, Veronica K. lived.

Second, the phone records (*see* **State's Exhibits 42-43**) reflected the calls between Veronica K. and the victim, and between Veronica and Gethers. She called Gethers up until almost the time of the shooting. Also, although she made numerous calls to the victim's phone before the shooting, she did not call the victim after 10:58 p.m., which was only one minute after the 911 calls had been placed. Also, Ms. Reid testified that Veronica was dating Gethers at the time and that she saw Gethers talking to Veronica on the night of the 17th.

Third, Veronica K.'s statement, **State's Exhibit 33**, also clearly implicates Gethers in the

crime. In it, she admitted that she asked Gethers to get money from the victim and she told him what vehicle the victim was driving. She further indicates that he later told her that he did not get the money, which was corroborated by the testimony of the victim's wife that over $ 199.00 of the $ 200.00 the victim had borrowed from his son was returned to her.

Her statement also implicates Gethers in the murder, including evidence of flight from the jurisdiction and the use of a car that did not belong to Gethers and fake identification cards to elude capture. In the statement, she stated that "I didn't tell Trevee to shoot Mr. Earl, I just told Trevee to get the money. I didn't know Trevee shot Mr. Earl." Veronica also said that "I didn't see Trevee until the next day and he said we had to go because he got in some stuff. I knew we were running from something." **State's Exhibit 33, R. p. 429-30**.

The evidence of flight was corroborated by both Det. Garrison and Kiefer. Clearly, flight from prosecution is admissible as evidence of guilt in South Carolina. *State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003); *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct.App. 2003). Evidence of flight has been held to constitute evidence of defendant's guilty knowledge and intent. *Pagan, supra*; *see also State v. Thompson*, 278 S.C. 1, 292 S.E.2d 581 (1982) (finding that evidence of flight was admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension), *overruled on other grounds, State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Moreover and unlike the factual scenario in *Odems*, the totality of the circumstances in this case created an inference that Gethers had knowledge that law enforcement would look for him and Veronica in connection with the shooting. *Contra Odems*, 395 S.C. at 589-90, 720 S.E.2d at 52. *Accord Pagan, supra*; *State v. Beckham*, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999).

Further, testimony of prior inconsistent statements may be "used as substantive evidence

when the declarant testifies at trial and is subject to cross examination." *State v. Copeland*, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982); *see also In re Richard D.*, 388 S.C. 95, 100, 693 S.E.2d 447, 450 (Ct.App. 2010) ("Even if the family court had limited the admissibility of the statement, that does not negate the fact that consideration of the statement as substantive evidence in a directed verdict analysis would have been proper under *Copeland* and [*State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009)]"); *State v. Smith*, 309 S.C. 442, 447–48, 424 S.E.2d 496, 499 (1992) (exclusion prior inconsistent statement of defendant's nephew constituted reversible error); *State v. Ferguson*, 300 S.C. 408, 411, 388 S.E.2d 642, 644 (1990) (exclusion of victim's prior inconsistent statement as substantive evidence was harmless error when other evidence was cumulative of statement); *State v. Crawford*, 362 S.C. 627, 634, 608 S.E.2d 886, 890 (Ct.App. 2005) (co-conspirator's later testimony did not obviate the efficacy of the first statement made closer in time to the event in question); *State v. Caulder*, 287 S.C. 507, 513, 339 S.E.2d 876, 880 (Ct.App. 1986) (trial court erroneously instructed jury to disregard witness's prior inconsistent statement for substantive purposes). Gethers' argument that Veronica K.'s statement was untrustworthy is contrary to well settled authority that, in reviewing an appeal from denial of a directed verdict motion, this Court must view the evidence in the light most favorable to the State." *E.g.*, *Lollis*, 343 S.C. at 583, 541 S.E.2d at 256; *Burdette*, 335 S.C. at 46, 515 S.E.2d at 531. His argument likewise ignores that "[i]n reviewing a motion for directed verdict, the trial judge is concerned with the existence of evidence, not with its weight." *State v. Curtis*, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

Both Veronica's statement and her testimony reveal a crystal clear motive in this case: greed for the money that the victim was carrying and, inferably, the killing occurred when Gethers did not

get they money as he and Veronica had planned. Additionally, Respondent would note that Gethers' fingerprints and palm print from his left hand - and only his - were found on the passenger's side of the recently-washed white Toyota Sequoia SUV that was driven by the victim. Prints belonging to Mr. Ritchey were found elsewhere on the vehicle, and circumstantially corroborated his testimony. This was important because the pathologist opined that the victim was shot from the passenger's side of the car. There was also no evidence that the victim was armed.

Thus, this case is readily distinguishable from *Odems*, *Bostick* and *Lollis*, cases where the Court held that the State's evidence created only a mere suspicion of guilt. For instance, in *Odems*, the Court found that "[t]he State's case against Petitioner relied primarily on three pieces of circumstantial evidence: (1) the fact that less than ninety minutes after the burglary, police located Petitioner in the getaway car with the burglars and the stolen goods; (2) Petitioner fled from law enforcement; and (3) Petitioner asked an uninvolved person to lie for him." *Odems*, 395 S.C. at 590-91, 720 S.E.2d at 51. Also, in *Bostick*, the State only presented evidence that "(1) investigators found personal items belonging to Polite, including a watch and two sets of car keys, in a burn pile located on the Bostick family property; (2) Bostick's shoes contained a pattern that matched gasoline, and gasoline was the accelerant used to start the house fire; (3) and investigators found blood on the clothes Bostick was wearing the day of the murder, but that evidence could not be matched to Polite's DNA." However, no motive was established. *See Odems*, 395 S.C. at 586-87, 720 S.E.2d at 50 (citing *Bostick*, 392 S.C. at 141–42, 708 S.E.2d at 778).

Here, however, there was an undeniable motive. Moreover, the direct and circumstantial evidence was such that " all of the circumstances proven [were] consistent with each other and taken together, point[ed] conclusively to the guilt of [Gethers] to the exclusion of every other reasonable

hypothesis." *Contra Odems*, 395 S.C. at 590, 720 S.E.2d at 52 .

II. The Court of Appeals erred by failing to find that Gethers' argument was not properly before it on appeal because Gethers only made a general motion for a directed verdict at trial and he did not make any of the arguments at trial that have been subsequently made on appeal. [Additional Sustaining Ground]

It does not appear that the Court of Appeals found that Gethers' argument was procedurally barred, although he did not make the same argument inthe trial court. **App. p. 2**. Therefore, as an additional sustaining ground, Respondent submits that the Court of Appeals erred by failing to find that Gethers' argument was not properly before it on appeal because Gethers only made a general motion for a directed verdict at trial and he did not make any of the arguments at trial that have been subsequently made on appeal.

As argued above, Gethers' argument was not properly before the Court of Appeals and is not properly before this Court on certiorari because, as shown, counsel only made a general motion for a directed verdict, and it is settled that "a general directed verdict motion . . . does not preserve any issue for appeal." *Sterling*, 396 S.C. at 612, 723 S.E.2d at 183 ("A general directed verdict motion, however, does not preserve any issue for appeal") (citing *Bailey*, *supra*). Having failed to present his present arguments to the trial judge, they may not be raised on appeal because "[a] party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal." *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584. Therefore, certiorari must be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny certiorari to review the judgment of the lower court and Gethers's conviction.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 12, 2013.

WES

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2013-000617

THE STATE,

RESPONDENT,

v.

TREVEE J. GETHERS,

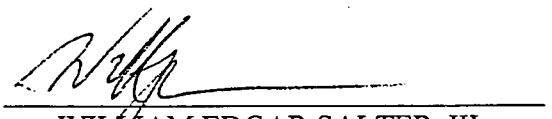
PETITIONER.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari and Certificate of Compliance on Petitioner by depositing three (3) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Susan B. Hackett, Esq., SCCID/Division of Appellate Defense, PO Box 11589, Columbia, South Carolina 29211-1589.

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

This 12th day of July, 2013.



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STATE OF SOUTH CAROLINA
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THE STATE,

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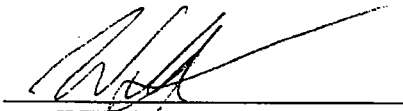
TREVEE J. GETHERS,

PETITIONER.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Return to Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 12th day of July, 2013.



WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305
ATTORNEY FOR RESPONDENT

The Supreme Court of South Carolina

The State, Respondent,

v.

Trevee J. Gethers, Petitioner.

Appellate Case No. 2013-000617
Lower Court Case No. 2007-GS-18-1755

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Gethers*, Op. No. 2012-UP-576 (S.C. Ct. App. filed Oct. 24, 2012). The petition is denied.

C.J.

FOR THE COURT

(Beatty, J., not participating)

Columbia, South Carolina

May 7, 2014

cc:
The Honorable Jenny Abbott Kitchings
The Honorable Cheryl L. Graham
Susan Barber Hackett, Esquire
W. Edgar Salter, III, Esquire

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FORM 5

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)
)
Trevee Gethers SCDC#343706)
Full name and prison number (if any) of Applicant.)
)
v.)
)
State of South Carolina)
)

IN THE COURT OF COMMON PLEAS

2014-CP-18-1287

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Correctional INstitution, Pelzer, SC.
2. Name and location of Court which imposed sentence Dorchester, General Sessions
3. Name(s) of co-defendant(s) (if any) none
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 2007-GS-18-1755 (murder)
   (b)
   (c)
5. The date upon which sentence was imposed and the terms of the sentence:
   (a) November 16, 2010 (45-years)
   (b)

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty trial by jury

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Apeals

ii. South Carolina Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. denied relief

ii. denied cert.

iii. _____

(c) the date of each such result:

i. October 24, 2012

ii. May 7, 2014

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 2012-UP-576 (S.C.Ct.App. filed October, 2012)

ii. (attached hereto)

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) n/a

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) INeffective Assistance of Counsel

(b) Denial of Right to a fair trial

(c)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) see attached memorandum of law in support

(b) see attached memorandum of law in support

(c)

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? no

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no

(d) any other petitions, motions or applications in this or any other Court? no

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. n/a

ii.

iii.

iv.

(b) the name and location of the Court in which each was filed:

i. n/a

ii.

iii.

iv.

(c) the disposition thereof:

i. n/a

ii.

iii.

iv. _____

(d) the date of each such disposition:

i. n/a

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. n/a

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

first filing for post conviction relief

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. n/a

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. n/a

ii. _____

iii. _____

16. If any ground 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) first filing for post conviction relief

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Sara Jayne Rogers, Esquire, Dorchester Bar

ii. same as above

iii. Susan Barbra Hacket, Esquire, S.C.Appellant Defense

(b) the proceedings at which each such attorney represented you:

i. trial

ii. sentencing

iii. appeal

19. State clearly the relief you seek in filing this application:

vacte sentence and conviction and grant new trial

20. Are you now under sentence from any other court that you have not challenged?

no

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

Indictment NO.2007-GS-18-1755

Trevee Gethers -- Applicant,

-Vs-

State of South Carolina -- Respondent,

MEMORANDUM OF LAW IN SUPPORT OF

APPLICATION FOR POST CONVICTION RELIEF

PURSUANT TO S.C.CODE ANN.

§§17-27-20 THROUGH §17-27-160

Trevee Gethers
PCI
430 Oaklawn Rd.
Pelzer, SC. 29669

INDEX

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER) (2007-GS-18-1755)

Trevee Gethers)

Applicant,) MEMORANDUM OF LAW IN SUPPORT OF

-vs-) APPLICATION FOR POST CONVICTION

State of South Carolina) RELIEF PURSUANT TO S.C.CODE ANN.

Respondent,) §§17-27-20 THROUGH §17-27-160

)

COMES NOW, above captioned Applicant, Trevee Gethers, pro-se, seeking relief in this Honorable , claiming that his rights were violated during trial, to include, but not limited to his Sixth Amendment right to the Effective Assistance of Counsel and his Fourteenth Amendment right to a fair trial that is protected by United States Constitution, and the South Carolina Constitution.

Applicant would submit that the issues presented, statement of facts and citations of authorities relied on will show unto this Honorable Court that Applicant is entitled to relief sought herein.

Respectfully Submitted,

/s/ Trevee Gethers

Trevee Gethers

Applicant, pro-se

ISSUE (A)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT WHEN THE TRIAL COURT SHIFTED THE BURDEN OF PROOF BY TELLING THE JURY THEY, THE JURY WERE TO "SEARCH FOR THE TRUTH", THUS RELIEVING THE STATE OF THEIR BURDEN OF PROVING APPLICANT GUILTY BEYOND A REASONABLE DOUBT?

FACTS

At the onset of the trial, the Trial Court made the following comments to the jury, as was recorded:

> Now, before we begin this trial, I want to tell you that this trial probably will be different from what you may expect. Many people do not have the chance to attend and to be a part of a jury in an actual court trial as you are now doing, and they may think, you may think, that from watching television or movies or reading books, that trials are always full of high drama, intense action and riveting circumstances.
> While all these things may be true as times --- and I can tell you that based on my experience they are true at times -- this trial is not for entertainment. It is a -- and it may be the --- fundamental party of democracy, a search for the truth in an effort to make sure that justice is done between the State and Mr. Gethers. Searching for the truth and making sure that justice is done is often slow, deliberate, and repetitive, the opposite no doubt of what you may have seen on television, read in books, or perhaps in the movies.
> (Tr.p.121, L.25 -p.121, L.1-18).

As is seen in the above the Court has instructed the jury to "search for the truth" in an effort to make sure that justice is done between the State and Applicant. The Court then further went on as is seen in the above and explained to the jury what "searching for the truth" is.

The Court then went on to make further comments regarding "a search for the truth", as was recorded:

> The attorneys before you are advocates for the parties they represent, but first and foremost , they are officers of the court, sworn to uphold the integrity and fairness of our judicial system and to help you in a a search for the truth. You should expect them to be professional, competent and ethical in their representation of their clients.
> (Tr.p.122, L.23-25 -p.123, L.14).

As is seen in the above the Court has told the jury that the "attorney(s) before them are advocates for the clients they represent, and it is their job to help the jury "in a search for the truth." Applicant would assert that the Trial Court has successfully "shifted the burden of proof" from the State to the jury by instructing the jury "to search for the truth, thus clearly relieving the State of "their" burden since the Trial Court told the jury the "Attorney(s) were advocates for "their clients" and "the attorneys jobs was to help the jury "search for the truth."

Applicant would assert a reasonable jurist would have interpreted this to mean that [both] Attorneys would present their side of the version of events and it was for the jury to "search for the truth" and decide who version they believe. Clearly this relived the State of their burden of proving Applicant guilty beyond a reasonable doubt.

DISCUSSION

The United States Supreme Court recognized that the "Prosecution must prove each and every element of the crime charged beyond a reasonable doubt," citing In re Winship, 397 U.S. 158 (1970), and the burden of proof on any element cannot be shifted to the defense, because in so doing it decreases the [State's] burden of proving the crime beyond a reasonable doubt.

Jury instructions which charge the jury to "seek the truth" are disfavored because they "[run] the risk of unconstitutionally shifting the burden of proof to the defendant, State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 587, 567-68 (1998).

The standard for reviewing an unambiguous jury instruction is whether there is a reasonable likelihood that the jury applied it in a way that violates the Constitution, See Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991), see also Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990).

The Court in State v. Aleskey, 538 S.E.2d 248, 251 (2000), relied on United States v. Gonzales-Balderas, 11 F.3d 1218 (5th Cir.1994), in analyzing a contested jury instruction regarding "...seek the truth" language. The Fifth Circuit Court of Appeals in a nearly identical situation where the Court had instructed the jury: "Remember at all times you are the judges -- judges of the facts. Your sole interest is to "seek the truth" from the evidence in the case, Gonzales, supra at 1223.

The Court in Gonzales explained:

> As an abstract concept, "seeking the truth" suggest determining whose version of events is more likely true, the government's or the defendant's and thereby intimates a preponderance of the evidence standard. Such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt. Id.

In a more recent South Carolina case, State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (S.C.2012), the Court analyzed the "seek the truth" language and concluded that jurors are sworn to declare the facts of the case as they are proved from the evidence and placed before them, 50A CJS Juries §1 (2004). The very term "jury " connotes a deliberative body of persons Id. While a judge sits as a public officer who presides over, conducts and administers the law by virtue of office, and does so cloaked in judicial authority, Id Judges §7 (2004). Judge and juries are not, together.

The Daniels Court concluded that while their functions may act as complement to one another, it is erroneous to imply that they somehow work hand in hand, and any blurring of their roles serves as unnecessary and improper distraction.

Applicant would submit the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by State Courts under the U.S Supreme Court's guidance. It is inappropriate to jeopardize the Constitutionality of the trial by instructing the jury to "search for the truth". Applicant would assert a reasonable jurist could have interpreted this as placing the burden of the jury to search

for the truth", especially after the Court instructed the jury that the jury should "search for the truth" in an effort to make sure that justice is done [between] "the State" and "Mr. Gethers" . The Court then went on to instruct the jury "the attorneys before you are advocates for the parties they represent, and then went on to instruct the jury the attorney's jobs is to [help] the "jury in a search for the truth", and the jury should expect them to be competent and ethical in their representation of their cleints. Here there can be no doubt the jury after being told to "search for the truth" and that the Prosecution represented the State as "a client", surely a reasonable jurist would have assumed the Court was telling the jury "whose version of events is more likely true, the governments or the defendants, which clearly takes on the assumption that the burden was shifted in violation of due process, (emphasis supplied).

Applicant asserts he was denied the effective assistance of counsel when counsel failed to object to the trial Court telling the jury to "search for the truth". Here counsel's performance was deficient and Applicant was prejudiced thereby as the State's burden was shifted by this instruction, Strickland v. Washington, 466 U.S. 668, 687 (1984).

Applicant is entitled to a new trial on this issue.

ISSUE (B)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S JURY INSTRUCTIONS ON MALICE THAT RESULTED IN A MANDATORY PRESUMPTION IN VIOLATION OF DUE PROCESS WHEN THE TRAIL COURT FAILED TO INSTRUCTED THE JURY THAT THEY WERE FREE TO "ACCEPT OR REJECT" THE INFERENCE OF MALICE FROM THE USE OF A DEADLY WEAPON BASED ON THEIR CONSIDERATION OF THE EVIDENCE AND THEY COULD GIVE IT SUCH WEIGHT AS THEY DETERMINED?

FACTS

During closing summation to the jury Applicant's counsel made the following statement, as was recorded:

> Murder is defined by the South Carolina Code of law as the Solicitor has already informed you is the killing of any person with malice aforethought, either express or implied. (Tr.p.474, L.8-11)

As is seen in the above underlined portions Counsel has told the jury that malice is either "express or implied".

Coming directly after Counsel's just finished closing the Trial Court gave the following instructions regarding murder, as was recorded:

> Ladies and Gentlemen, the defendant Mr. Gethers, is charged with murder. The State must prove beyond a reasonable doubt that the defendant, Mr. Gethers, killed another person with malice afore-thought.
> Now, malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under the circumstances that the law will infer an evil intent.
> (Tr.p.488, L.15-23).

As is seen in the above underlined portion of the Court's instruction, the Court has defined malice as "the intentional doing

of a wrongful act" without just cause or excuse.

The Court further instructed the jury:

> Now, malice aforethought may be express or inferred. The terms "express" and "inferred" do not mean different kinds of malice but merely the manner in which malice may be shown to exist; that is either of course by direct or by inference from the facts and circumstances which are proved.
> Express malice is shown where a person speaks words express hatred or ill will for another, or when the person prepares beforehand to do the act, such as lying in wait, or any other acts going to show that the deed was within the defendant's mind would be express malice.
> Now, malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon
> A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm.
> (Tr.p.489, L.6-22).

As is seen the Court has now instructed the jury with on the elements of malice, thus being "express" and "inferred" malice.

Applicant would assert, as is seen in the above underlined portion of the Court's instructions the Court has told the jury that "malice is inferred when the deed is done with a deadly weapon", and then the Court goes on simply instructs the jury on [examples] of what instruments could be "deadly weapons", but the Court fails to instruct the jury that they can "accept or reject" the inference of malice from the use of a deadly weapon based on their consideration of the evidence presented and that they can give it such weight as they so determine.

Applicant would submit the Court's instructions in this regard has resulted in a "mandatory presumption" which is a violation of Due Process and the resulting implication is a structual error in the Constitutional mechanism of Applicant's trial.

DISCUSSION

In a long line of cases, culminating in Yates v. Evatt, 500 U.S. 391 (1991), the United States Supreme Court recognized that the prosecution must prove each and every element of the crime charged beyond a reasonable doubt, citing In re Winship, 397 U.S. 158 (1970). The burden of proof on any element cannot be shifted to the defense; because in so doing it decreases the State's burden of proving the crime beyond a reasonable doubt.

As early as 1975 the U.S. Supreme Court considered a Maine Rule which required the defendant charged with murder to prove that he acted in the heat of passion in order to reduce the homicide to manslaughter. The Court determined that a State could not shift the burden on any element of the crime to the defendant, finding the risk described to be intolerable, reversing the conviction, Mullaney v. Wilbur, 421 U.S. 684, 701 (1975).

The Supreme Court overturned another conviction in Sandstrom v. Montana, 442 U.S. 510 (1979). Montana law provided that a person could be charged with deliberate homicide when that person "purposely or knowingly" caused the death of another and, at Sandstrom's trial, the trial judge instructed the jury that, "the law presumes that a person intends the ordinary consequences of his voluntary acts," Id at 512.

After considering Sandstrom's argument, the Court agreed that the effect of that was to shift the burden of proof to Sandstrom on a critical element of the offense. The Court reiterated that a State must prove every element beyond a reasonable doubt and

the defendant cannot be required to prove any elements of his defense or disprove any element of his crime, holding a "reasonable juror might have interpreted the instructions either as a conclusive presumption or as a burden shifting presumption, but either interpretation, the Court rendered the instruction unconstitutional." Id.

In Francis v. Franklin, 472 U.S. 307 (1985), the Court found that the use of a "rebuttable" presumption was also unconstitutional for the same reason set forth in Sandstrom, supra.

Following Sandstrom v. Montana, Mullaney v. Wilbur and Francis v. Franklin, the case of Yates v. Evatt, 310 S.E.2d 805 (1982) ,474 U.S. 896 (1985)(Yates v. Aiken) and 500 U.S. 391 (1991), wound it's way through the judicial system on identical issues.

Therefore, this matter is thus solid stare decisis in South Carolina. While Yates was winding it's way through the judicial system, the case of State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1985) was presented with a "mandatory presumption" jury instruction. The Elmore Court instructed the lower courts the proper suggested instruction is: "The law says if one intentionally kill another with a deadly weapon, the implication of malice may arise . If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive."

After giving the suggested instruction, the Elmore Court stated: "WE CAUTION THE BENCH, THAT HERAFTER ONLY SLIGHT DEVIATIONS FROM THIS CHARGE WILL BE TOLERATED, Id 308 S.E.2d at 784.

In 1985 shortly after Elmore was decided our Court in State v Peterson, 335 S.E.2d 800 (S.C.1985), the Court held: "the judge should make it clear to the jury that it is free to "accept or reject" these permissive inferences depending on it's view of the evidence", citing State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984), State v. Lewellyn, 281 S.C. 199, 314 S.E.2d 326 (1984), and State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983).

The standard for reviewing an unambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the constitution, Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991), Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990).

In the instant matter, State's witness Dr. Presnell testified that the cause of death was a "gunshot" would that went through both lungs, heart and the aorta, Tr.p.318, L.25 -p.319, L.1.

Therefore the State proved the victim was killed with a gun, and therefore the jury needed to look no further than the Court's instructions that "malice may be inferred from the use of a deadly weapon" in order to find the element of malice. Applicant wou- submit the Court's instructions resulted in a "mandatory presumption" since the Court [failed] to instruct the jury they could "accept or reject" the inference of malice based on their view of and consideration of the evidence and give it such weight as they so determine. Rather here the Court simply told the jury the State must prove the killing was done with malice aforethought and then the Court instructed the jury that "malice is inferred from

the use of a deadly weapon" and therefore [if] the State proved the victim was killed with a deadly weapon then: it was mandatory that malice existed.

Applicant would submit that the State's burden of proof was not only substantially lightened but also shifted in violation of due process. If the jury followed the Trial Court's instructions and it must be presumed that they did, then the jury had to look no further than the State simply proving the victim was killed with a deadly weapon (gun). The Court's failure to instruct the jury they could "accept or reject" the inference of malice based on their consideration of the evidence and give such weight as they so determine, the Judge merely instructed the jury to direct a verdict for the State.

Applicant asserts the Counsel should have objected to the Court's failure to instruct the jury regarding the "accepting or rejecting" the inference of malice from the use of a deadly weapon, as well as the failure to give the Elmore charge.

Here Counsel's performance was deficient and Applicant was prejudiced thereby, Strickland v. Washington, 466 U.S. 668, 687 (1984).

Applicant should receive a new trial on this issue.

ISSUE (C)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE FACTS OF THE CASE DURING THE COURT'S CHARGE ON EXPRESS MALICE, THAT WAS TO BE DETERMINED BY THE JURY?

FACTS

During Applicant's trial the Court made the following comment to the jury while instructing the jury on the elements of malice, as was recorded:

> Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepares beforehand to do the act, such as lying in wait, or any other acts going to show that the deed was within the defendant's mind would be express malice.

As is seen in the above underlined portions of the Court's malice instructions on "express malice" the Court has told the jury that when a person "prepares beforehand" to do the act such as "lying in wait or "any other acts" going to show that the deed was within the defendant's mind would be express malice.

Applicant would submit the Court has impermissibly commented on the facts of the case and prematurely directed a verdict for the State. During trial Officer John Garrison testified for the State. While testifying Garrison was allowed to read the alleged statement given by alleged co-defendant Veronica K[redacted]. In pertinent part the statement reads: "I called Mr. Earl for some money", "I told (Applicant) to get the money because I didn't want to

mess with Mr. Earl (victim). I told (Applicant) that Mr. Earl was in a white Sequoia because that's what Mr. Earl told me he was driving." "I didn't tell Applicant to shoot Mr. Earl, I just told Applicant to get the money, I didn't know Applicant shot Mr. Earl "I called Applicant to see if he got the money, and he said no."

Applicant would submit that under the [facts] as presented by the State, a reasonable juror could have interpreted the Trial Court's instructions on express malice as reiterating the very facts as put forth by the State, and when considering the last statement made by the Trial Court... "any other acts.." "..would be express malice." Here the Court told the jury that express malice existed simply because the State had Officer Garrison read K[redacted]'s statement into the record which [if] believed was ".any other act" as presented by the State. Applicant would submit that a jurist of reasonable could have easily interpreted the Court's instructions on "express malice" as being a judicial comment on the facts of the case.

DISCUSSION

Impermissible comments on the facts of a case is prohibited in South Carolina, See, South Carolina Constitution, art. V, §21, and as the Court said in State v. Hartley, 414 S.E.2d 182 at 183-83: "Judges shall not charge juries in respect to matters of fact ,but shall declare the law, State v. Bagwell, 201 S.C. 387, 23 S. E,2d 244 (1942)(A judge cannot express in his charge, or intimate any opinion as to the weight or sufficiency of testimony without violating the prohibition of the Constitution as to charging upon

the facts). 75 AM.Jur.2d Trial §1203 at 693 (1991)(the trial court may not instruct the jury what weight should be given [to the evidence] or even that any particular evidence is or is not entitled to receive weight or consideration from them), Cf. State v. Edwards, 127 S.C. 116, 120 S.E. 490 (1923)("Wherein Our Supreme Court held the absence of motive is a mere circumstance to be considered by the jury and rejected an instruction that the absence of motive may raise a reasonable doubt as to the defendant's guilt because it was a charge on the facts), Id.

Applicant asserts that a reasonable jurist could have interpreted the Trial Court's comments regarding "express malice" that mirrored the facts as put forth by the State as directing a verdict. Here, Applicant would submit the Trial Court impermissibly comments on the facts of the case and relieved the State from the burden of persuassion of proving Applicant guilty beyond a reasonable doubt, but also acted in a manner that found the facts that were to be determined by the jury.

Applicant would submit the Trial Court acted in a manner to serve the Prosecution, and this was an abuse of power that denied Applicant his right to a fair trial.

Applicant asserts Counsel should have objected, as here Counsel's performance was deficient and Applicant was clearly prejudiced thereby, Strickland v. Washington, 466 U.S. 668, 687 (1984).

Applicant should receive a new trial on this issue.

CONCLUSION

WHEREFORE, based on the foregoing Applicant will respectfully pray this Honorable Court will find that Applicant was denied his Sixth Amendment right to the Effective Assistance of Counsel, and the prejudice incurred denied him his Fourteenth Amendment right to a fair trial.

THEREFORE, Applicant respectfully prays this Honorable Court will grant the requested relief of a new trial.

Respectfully Submitted,

/s/ Trevee Gethers

Trevee Gethers

Applicant, pro-se

STATE OF SOUTH CAROLINA)
)
County of Greenville)

VERIFICATION

I, Trevee Gethers, 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 this application; and that the matters and allegations therein set forth are true.

Trevee Gethers

SWORN to and subscribed before me this 18th day of June, 2014.

Mary C Merchant (L.S.)
Notary Public

My Commission Expires: 1-23-2023

CERTIFIED COPY
2014 JUL -3 PM 5:11
CLERK OF COURT
DORCHESTER COUNTY

642

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Trevee Gethers, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. 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 thereof.

Applicant

SWORN or affirmed to and subscribed before me this 18th day of June, 2014.

Notary Public

My Commission Expires: 1-23-2023

CERTIFIED COPY
2014 JUL -3 PM 5:11
CLERK OF COURT
ROCHESTER COUNTY

Revised 3/2003

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	C.A. No. 2014-CP-18-1287
COUNTY OF DORCHESTER)	
)	
Trevee Gethers,)	
S.C.D.C. No. 343706,)	
)	
Applicant,)	
)	**RETURN**
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

In response to the post-conviction relief application filed July 3, 2014, the Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Dorchester County Clerk of Court's orders of commitment. The Dorchester County Grand Jury indicted the Applicant at the December 2007 term of General Sessions for Murder (2007-GS-18-1755). Sara Jayne Rogers, Esquire represented Applicant. The State called Applicant's case for trial before the Honorable Diane S. Goodstein where he was found guilty. On November 19, 2010, Judge Goodstein sentenced Applicant to forty-five (45) years' imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The court of appeals affirmed Applicant's conviction and sentence on October 24, 2010. State v. Gethers, Op. No. 20120-UP-576 (S.C. Ct. App. filed October 24, 2012). Applicant's writ of certiorari to the South Carolina Supreme court was denied

on May 7, 2014. The Remittitur was sent on May 15, 2014.

Attached herewith and incorporated herein by reference are the records of the Orangeburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of counsel.
   a. Failed to object to impermissible burden shifting during the Court's opening remarks
   b. Failed to object to impermissible jury charge instructing jurors that "they were free to 'accept or reject' the inference of malice from the use of a deadly weapon."
   c. Failed to object when the Court impermissibly commented on the facts of the case during the jury charge

III.

Respondent asserts Applicant's allegation that his attorney was ineffective is without merit. Respondent asserts Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

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 on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation

within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Respondent submits Applicant cannot satisfy either requirement of the Strickland v. Washington 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, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, Respondent requests that a hearing be held on the issue of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: _____
Attorneys for Respondent

February 24th, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	
	)	2014-CP-18-1287
	)	
TREVEE GETHERS, #343706	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

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 by depositing same in the United States mail, postage prepaid:

Rodney D. Davis, Esquire
Lowcountry Law Office
4000 Faber Place Drive, Suite 300
Charleston, South Carolina 29405

DATED this 24th day of February, 2015.

Sara B. Moore

Sara B. Moore, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER)	FIRST JUDICIAL CIRCUIT
TREVEE GETHERS,)	
APPLICANT,)	TRANSCRIPT OF RECORD
V.)	2014-CP-18-1287
STATE OF SOUTH CAROLINA,)	
RESPONDENT.)	

OCTOBER 28, 2015

ST. GEORGE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE FRANK R. ADDY, JR., PRESIDING JUDGE

A P P E A R A N C E S:

RODNEY D. DAVIS, ESQUIRE

ATTORNEY FOR THE APPLICANT

J. CLAYTON MITCHELL, ASSISTANT ATTORNEY GENERAL

ATTORNEY FOR THE STATE

SHARON L. VIZER

CIRCUIT COURT REPORTER

I N D E X

** NO EXHIBITS WERE MARKED **

Wednesday, October 28, 2016

THE COURT: Attorney General, What is the next case, please.

MR. MITCHELL: Trevee Gethers.

THE COURT: Go ahead and call the case, if you would for me, please.

MR. MITCHELL: This is Mr. Gethers vs. The State of South Carolina, case number 2014-CP-18-1287. Mr. Gethers was indicted in December of 2007 for murder. He was represented on these charges by Ms. Sara Jayne Rogers. He was tried before Judge Goodstein. He was found guilty in November of 2010. He was sentenced to 45 years of imprisonment.

Notice of appeal was filed where his conviction was affirmed in an unpublished opinion. That was filed October of 2012. He's filed this application, post-conviction relief, July 3rd of 2014, where he's alleged various aspects of ineffective assistance of counsel. I think specifically what we are going forward on is a failure to object to the solicitor's comment in opening, failure to object to a mugshot photo being introduced, failure to request a voluntary manslaughter charge, and I believe one other allegation. I'll let Mr. Davis speak to that. I know that Mr. Gethers is present and represented by Counsel Davis.

THE COURT: All right. Mr. Davis?

MR. DAVIS: Judge, the only other thing is there was an instruction given as to malice and we would have an argument about that.

THE COURT: Under the Belcher?

MR. DAVIS: Correct. There was no objection to that, and other than that I think the State --

THE COURT: Did the case predate or postdate Belcher, the trial?

MR. DAVIS: Give me a moment. I just had that, Judge.

(PAUSE.)

MR. DAVIS: Belcher was decided October 12th of '09. The sentence was November 19th, 2010.

THE COURT: All right. Very good. Call your first witness then, please.

MR. DAVIS: Your Honor, out of an abundance of caution I would ask you, if you don't mind, I certainly have gone over with him the risks and benefits of going forward. It's my understanding he wishes to go forward but if you could review that on the record with him in an abundance of caution.

THE COURT: All right. Certainly.

Mr. Gethers, if you would, just raise your right hand. I have to ask you a few questions.

TREVEE GETHERS, after having been duly sworn, testified as follows:

THE COURT: You are Trevee?

THE APPLICANT: Yes, sir.

THE COURT: Trevee Gethers. Mr. Gethers, you understand, of course, Mr. Davis is representing you on this case and he has told me to inquire of you about the ramifications of going forward. I'm told that you received a 45-year sentence; is that correct, sir?

THE APPLICANT: Yes, sir.

THE COURT: Obviously, if you succeed at post-conviction relief the State of South Carolina can try you again and you would be facing -- because it's a homicide charge you would be facing up to life imprisonment and a minimum of 30 years; do you understand that, sir?

THE APPLICANT: Yes, sir.

THE COURT: So there's no guarantee that you'll get another 45-year sentence if you succeed at PCR. You could get something a lot worse; you understand that, sir?

THE APPLICANT: Yes, sir.

THE COURT: Now, obviously, if you don't succeed at PCR you can appeal the Court's ruling, and assuming that the Court is affirmed you would simply continue to serve

out that 45-year sentence that you are currently doing; do you understand that, sir?

THE APPLICANT: Yes, sir.

THE COURT: All right. Knowing all that do you want to go forward with this hearing today?

THE APPLICANT: Yes, sir.

THE COURT: All right. So you do want to pursue your rights under post-conviction relief, correct, sir?

THE APPLICANT: Yes, sir.

THE COURT: Very good.

All right. Mr. Davis, call your first witness.

MR. DAVIS: Thank you very much, Your Honor. We would call Mr. Gethers to the stand.

THE COURT: Sir, of course, you're still under oath. Just come around and have a seat, please.

DIRECT EXAMINATION

BY MR. DAVIS:

Q. Mr. Gethers, we are here today based on your application for post-conviction relief on your conviction for the murder charge in 2010; is that correct?

A. Yes, sir.

Q. As a little background, were you represented by someone before Mr. Rogers?

A. Yes, sir. I actually had three different attorneys.

Q. And can you tell the Judge about those attorneys?

A. My first attorney was Marva Hardee Thomas.

THE COURT: Would you say that again.

A. Marva Hardee Thomas.

THE COURT: Do you know how to spell that, sir?

A. M-a-r-v-a, first name, H-a-r-d-e-e.

THE COURT: And then Thomas?

A. And then Thomas.

THE COURT: Thank you.

Q. And that was an appointment at the Public Defender's Office; do you recall? Was she with the Public Defender's Office when she represented you?

A. Yes, sir.

Q. And then at some point there was an attorney substituted for her?

A. Yes, sir.

Q. And who was that?

A. John Witherspoon.

Q. And there was a co-defendant in this case, correct?

A. Yes, sir.

Q. And who was that?

A. Veronica K[redacted].

Q. Okay. And was she also represented by the Public Defender's Office?

A. Yes, sir.

Q. And so then at some point after that were you given another attorney?

A. Yes, sir.

Q. And who was the attorney after that?

A. Well -- well, John Loy was the attorney after Marva Hardee. It was John Loy, but it was a conflict of interest because he represented her, also.

Q. And all of these would have been attorneys with the Public Defender's Office here in Dorchester County?

A. Yes, sir.

Q. And ultimately were you given another attorney to represent you independent of the Public Defender's Office?

A. Yes, sir.

Q. And who was that?

A. John Witherspoon, his name is, after John Loy.

Q. And I apologize. You've already testified to that. After he was on the case, then who?

A. Sara Rogers.

Q. And is that the attorney who went to court with you?

A. Yes, sir.

Q. Through this trial?

A. Yes, sir.

Q. Is that the attorney you have complaints about --

A. Yes, sir.

Q. -- in your application?

Let's talk to the Judge a little bit about the communication between you and Ms. Rogers. How long did she work with you on the case before this went to trial? How long was she your attorney?

A. She was appointed to my case like four months before I went to trial.

Q. Okay. And in those four months did she share with you the discovery from the State in your case?

A. No, sir. Throughout the 38 months that I was in the county I never received a Rule 5 from any of my attorneys, my own personal copy.

Q. I understand your testimony you never got a copy of the Rule 5. Was there any discussions, though, with you and Ms. Rogers about what was contained in the Rule 5 materials?

A. Yes, sir.

Q. Okay. Did she discuss with you how strong or weak that evidence was?

A. Yes, sir.

Q. And what was her opinion about the case?

A. She believed that the evidence was weak, that the State couldn't prove beyond a reasonable doubt.

Q. And she conveyed this to you in person, correct?

A. Yes, sir.

Q. In the four months that she represented you before you went to trial on this charge can you tell the Court how many times you would have met with her in person?

A. I believe we met twice.

Q. And that would have been at the county jail?

A. Yes, sir.

Q. And how lengthy were those meetings?

A. They were probably like an hour long a piece.

Q. Did you all discuss a potential defense to this charge?

A. On the first -- the first visit I believe she told me that she didn't have all of my paperwork from the previous attorney. So there wasn't much we could go over on the first visit, but the second visit we went over more detail.

Q. Okay. And so that more detailed second visit would she have -- let me ask this first. Would she have explained to you what the State had to prove to convict you of murder?

A. Yes, sir.

Q. Okay. So she went over the elements of the defense. Did she also discuss potential defenses?

A. No, sir.

Q. Was there any discussion about resolving this case

any other way other than going trial with Ms. Rogers?
A. No, sir.
Q. Now, just for a second -- I know we are here focussed on Ms. Rogers's representation when she went to trial with you but at some point was there an offer from the State to resolve this case?
A. Yes, sir. The first offer came when John Witherspoon had my case. It was a 20 year manslaughter plea, and the second time, I believe -- the second time that Ms. Rogers came to see me she told me that the plea was still on the table. That was like a couple of days before my trial.
Q. The second of the two meetings with Ms. Rogers was days ahead of your actual trial?
A. Yes, sir.
Q. Okay. And at that point that offer was still available?
A. I believe so.
Q. That was conveyed to you by Ms. Rogers?
A. Yes, sir.
Q. Do you remember any discussions, any lengthy discussions with Ms. Rogers about whether to take that offer or not?
A. No, sir.
Q. Ultimately, you did not accept that offer, correct?

A. Yes, sir.
Q. And you went to trial on the murder charge?
A. Yes, sir.
Q. Did she express an expert opinion on whether you should accept that offer or go to trial?
A. No, sir. I mean, all three of the lawyers that I had basically was telling me that they couldn't -- they don't think the State could prove beyond a reasonable doubt that I committed the crime so I would have good chances of going to trial.
Q. Mr. Gethers, the Court has a copy of your transcript and has reviewed your packet so we don't need to go in great detail but can you generally explain to the Judge your understanding of the State's evidence against you.
A. I believe they had -- my fingerprint was found on the passenger rear door. A bluetooth earpiece was found like 50 feet away from the vehicle. They had a statement from Ms. Veronica K. . That's about it right there.
Q. And so it was that evidence that you would have reviewed with Ms. Rogers and it was her opinion that it was a weak case by the State; is that correct?
A. Yes, sir.
Q. During these two meetings prior to going to court did you have any discussions with Mr. Rogers about

whether you would testify or not?

A. No, sir.

Q. I'm sorry?

A. No, sir.

Q. Did you have any understandings after -- during or after these two meetings as to what Ms. Rogers' argument, what her defense for you would be.

A. Her defense was that the State could only prove mere presence and mere presence wasn't enough to convict me.

Q. All right. When the trial started, when the trial started one of the first things that we noticed on the record is the Judge addressing the jury about the process; do you recall that?

A. Yes, sir.

Q. Is there any complaint about that initial discussion with the jury by the Judge? Do you have a complaint about that?

A. Yes, sir.

Q. And what was that?

A. Well, the Judge told the jury that they should search for the truth to make sure that justice was done between the State and me and -- yeah. That the State should search for the truth in an effort to make sure that justice was done.

Q. I'm going to kind of do it in reverse. Did Ms. Rogers make any objection to that?
A. Ms. Rogers did not make an objection.
Q. Do you feel she should have?
A. I believe she should have made an objection.
Q. Why is that?
A. Because from my understanding of the law it isn't for the jury to search for the truth. It's for the State to prove beyond a reasonable doubt that I committed the crime.
Q. The next stage in the trial process would have been opening statements, and is there a complaint you have about the opening statement by the Solicitor's Office?
A. Yes, sir.
Q. And what's that complaint?
A. The solicitor talked about me robbing the victim in his opening statement but there was never any evidence of a robbery.
Q. Okay. Did Ms. Rogers object to the reference of the State that you attempted to rob the victim?
A. No, sir, she did not.
Q. Had you been charged at any point with armed robbery?
A. No, sir.
Q. Strong armed robbery?

A. No, sir.
Q. Common law robbery?
A. No, sir.
Q. And, again, just to be clear, what charge did you go to trial on?
A. Murder.
Q. During testimony in an attempt to identify you there was testimony by an officer dealing with a photograph of you; do you recall that?
A. Yes, sir.
Q. And what complaints do you have about that testimony?
A. Where Ms. Rogers failed to object to the introduction of the photo mugshot of me from a prior arrest.
Q. And do you recall any -- do you recall testimony concerning that photograph identifying it as a mugshot or identifying it as a photograph from a prior arrest; do you recall that?
A. Yes, sir. The State witness testified on the stand that it was indeed a mugshot. He even gave the date of mugshot, which didn't match up to the date that I got arrested for the murder charge.
Q. Do you recall testimony in addition to the fact that this was a prior arrest photo -- do you remember

testimony about that fingerprints were obtained during that arrest booking process? Do you recall that?

A. Yes, sir.

Q. Can you tell the Court about that briefly.

A. Yes, sir. They admitted it in the fingerprint file from the previous arrest also into evidence, along with the mugshot.

Q. Do you recall whether there was testimony allowed in evidence about what offense that arrest -- the mugshot photo arrest was for?

A. For PWID.

Q. That's literally what it was for. Do you recall whether the testimony about what the charge was, was presented in court?

A. No, sir. I can't recall.

Q. That's all right. The Court has the record of the transcript on that. And, again, to be clear, during that testimony was there any objection by Ms. Rogers?

A. There was no objection.

Q. Following testimony and after arguments by the attorneys do you recall the period of time where the Judge gave the jury the jury instructions?

A. Yes, sir.

Q. There's two different things I want to talk to you about on that. First of all, do you have complaints

about your lawyer's conduct during the jury instructions?

A. Yes, sir.

Q. The Judge instructed the jury as to murder; do you recall that?

A. Yes, sir.

Q. And many other instructions, but was there any instruction as to a lesser included offense of voluntary manslaughter?

A. No, sir.

Q. Had you discussed that option with Ms. Rogers?

A. We talked about the plea.

Q. And can you explain that a little more further for the Judge?

A. We talked about the manslaughter plea. She talked about the Judge should give the voluntary manslaughter charge to the jury but I don't think the Judge ever did.

Q. Two parter. Do you recall Ms. Rogers ever asking the Judge, actively ask the Judge to give that instruction?

A. No, sir. She did not.

Q. Secondly, do you recall Ms. Rogers objecting to the fact that the Judge did not give that instruction?

A. No, sir.

Q. There was a second part of the Judge's instructions that you have a complaint about your attorney, correct?

A. Yes, sir.
Q. What other instruction do you have a complaint about?
A. Well, Ms. Rogers failed to object to the trial judge's jury instructions on malice that resulted in the mandatory presumption because the Judge failed to inform te jury that they were free to accept or reject the inferences of malice from use of a deadly weapon based on a consideration of the evidence.
Q. That instruction was given by the Court to the jury, correct?
A. Yes, sir.
Q. Was not asked for by Ms. Rogers?
A. No, sir.
Q. But it was not objected to by Ms. Rogers?
A. No, sir.
Q. Let me is you so we get a better response. Did Ms. Rogers object to the instruction on malice the Court gave?
A. She did not object.
Q. Your Honor, if I could have just a moment.
(PAUSE.)
Q. Mr. Gethers, as to the grounds that we've already presented to the Court is there any other explanation on any of the grounds that you want the Judge to hear about?

A. No, sir.

Q. Mr. Gethers, are there any other complaints about Ms. Rogers' performance that we have not yet put on the record that you want the Judge to hear about?

A. No, sir.

Q. Okay, Mr. Gethers. The Attorney General has some questions for you.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. MITCHELL:

Q. Good afternoon, Mr. Gethers.

A. Good afternoon.

Q. So Ms. Rogers was your fourth attorney; is that right?

A. Yes, sir.

Q. Okay. Now, you testified you didn't have a copy of the discovery yourself but, I mean, you had been over that discovery with your previous lawyers, also; is that right?

A. Not with Ms. Marva Hardee Thomas but John Witherspoon I did once, and with Ms. Rogers I did once.

Q. So she went over it with you as well?

A. Yes, sir.

Q. You knew the evidence the State was planning to presence though, didn't you?

A. A lot of things came up during my trial that I didn't even know because I didn't have time to look over my Rule 5 because I never gotten one.

Q. I mean, you knew that Ms. K[redacted] or Ms. K[redacted] was possibly going to testify against you, right?

A. Yes, sir, I knew.

Q. And, I mean, you knew that your fingerprints had been found on the victim's car, right, or truck?

A. Yes, sir.

Q. And that your DNA matched on the bluetooth headset, right --

A. Yes, sir.

Q. -- that was found? And that offer that was made, the 20 years, that was voluntary manslaughter, correct?

A. Yes, sir.

Q. And you still had a chance to accept that just before the trial?

A. She told me about it. She told me it was still on the table but the Judge didn't refer that to me or anything like that.

Q. But at that point you obviously didn't accept that offer, right?

A. I didn't.

Q. And that was on advice of counsel?

A. Yes, sir.

Q. So her advice to you is that you thought you had a chance to beat this case; is that right or --

A. Yes, sir.

Q. But you wanted to go to trial though, right?

A. Yes, sir.

Q. That wasn't your defense that it was self defense or anything like that, right?

A. Sir?

Q. You didn't put up a self defense case or anything like that, did you?

A. I never went over that with any of my attorneys.

Q. Okay. But you didn't -- you never told your attorney or any of your attorneys that you and the victim had gotten into a fight and that you were acting in self defense, did you?

A. No, sir.

Q. That wasn't your version of events, was it?

A. No, sir.

Q. It was kind of your strategy that, you know, you were there at some point but you didn't commit this murder, right?

A. Yes, sir.

Q. Okay. Because I think you -- I mean, at that point you really didn't deny that you were around the scene at some point, right?

A. Yes, sir.
Q. Okay. It was just the strategy that you had noting to do with it, right?
A. Yes, sir.
Q. And the part about the statement where the State -- in the opening statement when they say something about that you intended to rob the victim, right?
A. Yes, sir.
Q. So when they said that that was kind of their -- partially their theory of the case?
A. Yes, sir.
Q. So it was kind of that you and Ms. K. had concocted -- or that you were going go get this money from the victim and that the State's position was that you were going to rob him if he didn't give it to you, right?
A. Yes, sir.
Q. Okay. And that's kind of what, you know, the -- that's supported a bit by Ms. K.; is that right?
A. No, sir.
Q. Okay.
A. She never said anything about robbery.
Q. Okay. You were just there to get money from him though, right? That was her testimony?
A. Yes, sir.

Q. No further questions. Thank you.

THE COURT: Anything on redirect?

MR. DAVIS: Just very briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. DAVIS:

Q. Mr. Gethers, in response to the State's questioning, since you did not have a copy of your discovery you said some things -- some unexpected things came up at trial. I think that was your testimony.

A. Yes, sir.

Q. Can you expand on that a little bit to the Court. What came up unexpectedly because you did not have your Rule 5 to review?

A. Veronica's statements. I had heard about her statement but I never got a chance to read her full statement until the day of my trial.

Q. So you knew the gist of what she was going to say but not the details?

A. Yes, sir.

Q. And what specific details that came up at trial were surprising to you?

A. Are you taking about in the statement?

Q. Well, in the testimony. If you didn't have the statement to review prior to trial, and you didn't, correct?

A. Sure.

Q. And so some unexpected things came up at trial pertaining to her and her statement. What would those have been?

A. Well, she said that she didn't know if I got the money or something like that.

Q. All right. Thank you, Mr. Gethers. No other questions.

MR. DAVIS: Thank you, Your Honor.

THE COURT: All right. Thank you. You can step down.

Call your next witness, please.

MR. DAVIS: We would call Ms. Rogers, Your Honor.

SARA J. MCCLELLAN, after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q. And forgive me, Ms. Rogers. I spoke with the Attorney General just briefly. I'm probably calling you by the wrong name now; is that correct?

A. Yes, sir.

Q. Okay. What is your name now?

A. McClellan.

Q. McClellan?

A. Sara McClellan.

Q. Can you spell it.

A. M-c-C-l-e-l-l-a-n.

Q. Thank you. Ms. McClellan, you did represent Mr. Gethers at his trial for the murder charge back in 2010?

A. Yes, sir.

Q. Was it your advice to him to proceed to trial?

A. Not exactly. We had several conversations about pleading and ultimately he would repeatedly say he was not pleading to something he did not do.

Q. It's accurate that he did not get from you a hard copy of his discovery; is that right?

A. To the best of my memory, yes. I was informed that he had been given everything. When I got the case from Mr. Witherspoon I was told that everything was pretty much ready for trial. He just was physically unable to go forward with the trial.

Q. And you obtained the case a few months before the trial, correct?

A. Probably three, four months.

Q. Now, at this time in the fall of 2010, late fall, how many murder cases had you handled up to that point?

A. None.

Q. How many trials had you handled up to that point?

A. Criminal trials or...

Q. Yes. I'm sorry. Yes.
A. Probably five or six. Not a lot. I was mostly a family court attorney at that point.
Q. I think this is clear but the case was with Mr. Witherspoon because of a conflict from the Public Defender's Office; is that your understanding?
A. Yes, sir.
Q. Then Mr. Witherspoon was incapacitated in some way and you were appointed to take over the case?
A. I was not appointed. I was asked by Mr. Witherspoon and one of his associates, and that associate and I went to visit Mr. Gethers in the jail and I was introduced and he was asked if that would be okay, and he said yes. So it was given to me.
Q. Okay. Did you at any time request a funding order for an investigator for this murder case?
A. I did not. It was already in the file from Mr. Witherspoon's paperwork. He had -- I'm not sure if he received funding or it was done as a favor but there was an investigator that did that.
Q. And you worked with the investigator once you came on or that had already been --
A. It had already been done.
Q. And in the three to four months leading up to the trial you had a couple meetings with Mr. Gethers to

prepare for trial?

A. Yes, sir.

Q. Were you the sole attorney or was there a second chair with you?

A. No, sir. It was just me.

Q. Did you at any time see the need or did you, in fact, request a continuance for the trial?

A. I don't believe so. If I remember correctly he had already waited so long, I want to say five or six years, that he was ready to proceed.

Q. Meaning Mr. Gethers?

A. Yes. I'm sorry.

Q. We have a transcript of the record, of course. Do you recall any in-chambers or off-the-record discussions with the Court about a lesser included instruction of voluntary manslaughter?

A. I believe so, yes.

Q. And what do you recall about that?

A. There was the plea deal. Like I said, he did not want to plead, and in chambers prior to trial it was discussed and ultimately decided that it wasn't going to happen.

Q. And when we say it wasn't going to happen, are you meaning taking the plea?

A. The lesser charge. The plea for the lesser charge.

He had not taken that. So in chambers prior to the trial it was discussed between the State's attorney and myself with the Judge that they were not going to proceed with the lesser charge during the trial basically because he turned down the plea.

Q. The State made an offer, he rejected it. The State says, Fine, we are going to prosecute him on a murder not the voluntary --

A. Yes, sir.

Q. -- is that my understanding?

Okay. Fair enough, and I appreciate that. At this time, of course, is pretrial. At that time, were there any discussions about potential jury charges?

A. Not at that time. No, sir.

Q. But it's clear that any offer from the State on something lower than murder the ship had sailed, correct?

A. Yes, sir.

Q. All right. During the trial or at the end before jury charge and verdict would there have been any off-the-record or in-chambers discussions about any lesser included charges to the jury?

A. Yes. I believe so.

Q. And can you explain those to the Court.

A. It was discussed as a whole with the jury charges. I had consulted with some other attorneys that had been

practicing for a long time, kind of gone over what my requests were going to be in the meeting with the Judge and the State. And ultimately, the jury was instructed on the murder charge, and that was the only thing that the Judge and the State felt were appropriate based on our earlier conversations of A, not charging him with the lesser included during the trial; and B, that nothing in the trial gave rise for that charge of the lesser included offense.

Q. Okay. So that was the discussion between the solicitor, yourself, and the Judge in chambers?

A. Yes, sir.

Q. That was never -- those discussions were never placed on the record?

A. To the best of my knowledge, no, sir.

Q. And with the Judge indicating that the lesser instruction was not going to be given there was no objection made by you on the record?

A. No, sir.

Q. And you didn't -- other than those discussions, you didn't, in fact, either file with the clerk of court a proposed jury instruction of voluntary manslaughter. You didn't do that, did you?

A. I don't believe so.

Q. And you didn't submit it as a court's exhibit, a

proposed charge for voluntary manslaughter?

A. I don't believe so.

Q. This was, again, November of 2010. Were you familiar at that time with the State vs. Belcher case dealing with the instruction on malice?

A. I probably read it but I can't tell you with a hundred percent certainty. I no longer practice law so I don't have the file or any of that to see what I had written in my notes.

Q. Whether you were familiar with Belcher or not you did not object to the Judge's instruction about inferring malice by the use of a weapon? There was no objection from you on that?

A. No, sir.

Q. Last thing, and I do want to get to what you just testified to, you no longer practice, correct?

A. Yes, sir.

Q. There was an order of disbarment from --

MR. MITCHELL: Objection, relevance.

MR. DAVIS: It goes to the competency, Your Honor. It goes to the very issue we are dealing with which is the presumption that she was effective, so that, I believe, brings this absolutely relevant and doesn't have any tendency to make any fact more or less likely.

THE COURT: Well, the Court will take judicial

notice of the order from July, I believe, of this year. It's a matter of public record. If there's something specific that you want to inquire with her about as it relates to this case you are free to do so, but the Court can't take judicial notice of her current status and the reasons that she's no longer practicing.

MR. DAVIS: Thank you, Your Honor. I'll move on from that.

BY MR. DAVIS:

Q. You also just testified you no longer have this file; is that correct?

A. No, sir.

Q. You no longer maintain a law office?

A. No, sir.

Q. We hadn't talked before your testimony here today?

A. No, sir.

MR. DAVIS: Your Honor, if I could have just a moment?

THE COURT: Certainly.

(WHEREUPON, Mr. Davis has a brief conversation privately with the Applicant.)

BY MR. DAVIS:

Q. Ms. McClellan, that's all the questions I have for you. Thank you.

THE COURT: Attorney General?

CROSS-EXAMINATION

BY MR. MITCHELL:

Q. Good afternoon, Ms. McClellan.

A. Good afternoon.

Q. Sorry I've been calling you Rogers as well?

A. It's okay.

Q. Thanks for being here with us today. So you took over representation from Mr. Witherspoon; is that correct?

A. Yes, sir.

Q. And at this time the case had pretty much been prepped for trial?

A. Yes, sir. It was ready to go.

Q. So when you got the file a lot of this stuff we talked about earlier with discovery and investigation, that had already been taken care of?

A. Yes, sir.

Q. So the case was just ready to go, right?

A. Yes, sir.

Q. And there was a question about a continuance, whether you made a continuance or not, and did you have any reason to move for a continuance at that point?

A. No, sir.

Q. I mean, you felt prepared to go forward with the case?

A. Yes, sir.

Q. And that you were familiar enough with the -- familiar with the facts and with everything the State planned to present at that point?

A. Yes, sir. I spent a lot of time with Mr. Witherspoon and one of his assistants or associates that had worked on the case going over things, looking through the case. I spent some time with the solicitor discussing what they had, looking at evidence, and I spent a lot of time with my client going over that evidence.

Q. Now, were you here when he testified previously?

A. Yes, sir.

Q. In his testimony I think he testified he only met with you a couple of times and discussions were kind of bare; is that true?

A. No, sir.

Q. So when you -- what did you discuss when you met with him leading up to the trial?

A. The first time, as I said, that one was probably brief because I was introduced to him and it was asked if it was okay if I represented him or not.

The second time I was still going through some of his file. So we discussed pretty much the getting to know you part of it, who he was, what he did in the

community.

I believe at that point we might have discussed the plea and theories of the case. And the third time we went over evidence, we went over what other people were testifying to, whether or not he would testify, his family would testify, what Ms. K. was going to say. I also met with his family before the trial.

Q. So you reviewed just about everything that the State had planned to present, like including Ms. K., alleged co-defendant's statement?

A. Yes, sir.

Q. And if you don't mind, can you give us just a quick factual background -- or summary of what the allegations, what the State hoped to prove at least.

A. The State hoped to prove that he and Ms. K. were basically in on it together. Ms. K. had lured the victim there with the promise of sex or sexual favors, and asking for money. And Mr. Gethers was going to then rob him instead of sending Ms. K. out, and the robbery went bad. The victim ended up being shot, and they ran.

Q. When you say ran, they went to Virginia and then to New York; is that right?

A. Yes, sir.

Q. And they were using, I believe, one of Ms. K.'s friend's cars at that point?

A. I believe so.
Q. It wasn't one of their own cars?
A. No, sir.
Q. So they fled -- or the State alleged that they fled and they were fleeing because of what happened, right?
A. Yes, sir.
Q. And they were then apprehended in New York with fake IDs?
A. Trying to commit a robbery, yes, sir.
Q. And then they were extradited down here to face charges of murder, right?
A. Yes, sir.
Q. And Ms. K[redacted] was also charged with murder, correct?
A. I believe so.
Q. You mentioned that there was an alleged robbery. That was the State's position, that it was a planned type of situation where Mr. Gethers would get the money from the victim as kind of a guise where Ms. K[redacted] had lured him there; is that right?
A. Yes, sir.
Q. And that's not said very well. I apologize.
A. That's okay.
Q. So in the opening statement the solicitor says -- he does mention that Mr. Gethers was there to rob the victim, and you think that had factual support --

MR. DAVIS: Objection, Your Honor, calls for speculation.

THE COURT: He can ask if it was consistent with what her understanding of the State's theory was.

BY MR. MITCHELL:

Q. Right. Did that mesh with what you thought the evidence would possibly show?

A. Yes, sir.

Q. So did you see that comment as objectionable?

A. No, sir. And frankly, I felt objecting to it would probably even draw more attention, draw more attention than just letting it go.

Q. Just letting it go. Because there could have been some testimony that yeah, you know, he was there to rob the victim, right?

A. Yes, sir. If I recall correctly it was in one of Ms. K[redacted]'s letters or statement.

Q. There was also some testimony regarding that the Judge thought -- the Judge instructed the jury to seek the truth. Did you see that as objectionable?

A. No, sir.

Q. So the way the investigation went was NCIC hit in New York when they were arrested, and when I say they, Mr. Gethers and Ms. K[redacted], correct?

A. Yes, sir.

Q. And then Mr. Gethers' fingerprints were taken and used to match fingerprints taken at the scene; is that right?

A. I believe so, yes, sir.

Q. And that's also when a mugshot photo was introduced of him. Do you recall that?

A. During the trial?

Q. Yes, ma'am.

A. I believe -- I believe so.

Q. So it was kind of part of the investigation how -- it kind of showed how step by step --

MR. DAVIS: Objection, Your Honor, leading.

THE COURT: Overruled.

BY MR. MITCHELL:

Q. It was part that the investigators were putting this together and that's kind of how they were presenting the case. Do you agree with that?

A. Yes, sir. The testimony was -- of that particular officer, if I recall, was talking about how we got to this point.

Q. It was kind of a step by step, like first we did this, then we checked out the video at the convenience store --

A. Yes, sir.

Q. -- etcetera?

All right. There's also testimony about a voluntary manslaughter charge. Now, I know there was some negotiations as far as pleading guilty to voluntary manslaughter but was there any evidence to support a voluntary manslaughter charge, in your opinion?

A. No, sir.

Q. And let's talk about that a little bit. Your theory of the case wasn't that there was a fight and that, you know, he accidentally killed the victim. It was just that it was not Mr. Gethers, right?

A. Yes, sir.

Q. So, you know, and kind of each witness you cross-examined you went through and asked about the background of the area and the apartment complex, right?

A. Yes, sir.

Q. Why did you do that?

A. is a bad area. It's a high crime area; murders, shootings, robberies, stuff like that happens every day.

Q. So there was testimony from lay witnesses and law enforcement -- well, they are also lay witnesses, but law enforcement and other witnesses that it was a violent area and that it was not unusual to have -- hear gunshots or have violent events happen, right?

A. Yes, sir.

Q. Okay. And there was even a shell casing found right near the murder scene that had nothing to do with the crime; is that correct?

A. Yes, sir.

Q. As far as the Belcher instruction goes, was there any evidence presented to mitigate the murder or -- I mean, it really was -- the defense was that Mr. Gethers did not -- was not involved with this killing, right?

A. Yes, sir. The basic defense or theory was that he might have been a drug dealer but that didn't make him a murder, and that this victim was one of his major clients and he wouldn't have taken money out of his pocket like that.

Q. Okay.

A. So there was no evidence at all about, like, maybe there was a fight or maybe -- there was nothing to mitigate presented.

MR. MITCHELL: One second, Your Honor.

THE COURT: Yes, sir.

(PAUSE.)

BY MR. MITCHELL:

Q. There was really no other evidence tying him to the murder. I mean, there may have been evidence that he came in contact with the victim, correct?

A. Yes, sir. There was no smoking gun so-to-speak.

Q. Literally and figuratively.

A. Yeah.

Q. So there never was a murder weapon recovered, right?

A. No, sir.

Q. And Ms. K[redacted] was kind of supposed to be the State's star witness?

A. Yes, sir.

Q. And she was not quite cooperative with the State while she testified, correct?

A. No, sir.

Q. I think she even denied making a statement to law enforcement completely?

A. Yes, sir.

Q. So her testimony -- I'll withdraw that. Excuse me. I believe that's all the questions I have. Thank you.

THE COURT: Redirect?

MR. DAVIS: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. DAVIS:

Q. Let's start there at the end. Do you recall that there was evidence and testimony that a witness heard what they believed was a heated argument? Do you recall that?

A. No, sir.

Q. One of the apartment renters or homeowners?
A. No, sir, but if it's in the transcript then obviously it happened.
Q. Do you recall evidence and/or testimony of the fact -- I'm sorry. Let me go back. It was your understanding that one connection between Mr. Gethers and the victim was through other illegal activity; is that fair enough?
A. Yes, sir.
Q. There was evidence in the record and/or testified to that there was money owed from the victim to Mr. Gethers for drugs previously?
A. Yes, sir.
Q. During any of your discussions with Mr. Gethers did you explain to him that this would be your first murder trial?
A. Yes, sir. I believe either during that first meeting when I was introduced to him --
Q. But --
A. -- or second one. It was fairly early on.
Q. But to be clear, you were not appointed on this case, correct?
A. No, sir.
Q. Mr. Gethers nor his family hired you directly, correct?
A. No, sir.

Q. Simply, Mr. Witherspoon because of his condition asked you to step in, take over, correct?

A. Yes, sir.

Q. And that information was presented to Mr. Gethers at the jail one of the early meetings with him; is that fair?

A. Yes, sir, and he was given that option.

(WHEREUPON, Mr. Davis has a brief conversation privately with the Applicant.)

MR. DAVIS: Thank you, Ms. McClellan. No other questions.

Thank you, Your Honor.

THE COURT: Nothing from you?

MR. MITCHELL: Nothing from the State.

EXAMINATION

BY THE COURT:

Q. Just a couple of points of clarification by me, if you don't mind. There was reference made to a mugshot photo of the defendant being introduced into evidence for purposes of identification.

First of all, expand a little bit, if you could, why the State was seeking its introduction. And second of all, because I don't have that photo with me and I don't think it's a part of the record, but was the photograph itself modified in any way so as to minimize

any suggestion that it was a mugshot? Can you kind of take those two things and address those for me, please?

A. The State was discussing the mugshot in its presentation of how they came to associate Mr. Gethers with this crime and how they got him back to South Carolina, and I do not recall if it was altered.

Q. All right. So the mugshot was one of the methods that the police used to identify him, positively identify him when he was apprehended in New York or that's one of the items that they used to initially identify him and make him a suspect down here and then -- or both?

A. I believe both.

THE COURT: Okay. All right. Follow up based on my questions from the applicant?

MR. DAVIS: One moment, Your Honor. I don't believe so but if you'll give me a moment.

THE COURT: Sure.

(PAUSE.)

BY THE COURT:

Q. Let me ask you this. This was, I believe, a Dorchester case. Do you know if the mugshots taken at that particular point in time, were they taken with a person just being in orange or were they draped like they are doing now with kind of the black turtleneck, for lack of a better word, that's sort of...

A. No, sir. I believe it would have been just a regular prisoner type --

Q. Regular orange-type thing?

A. Or stripes. One or the other.

THE COURT: Okay.

MR. DAVIS: And, Your Honor, give me just one moment. We have one issue.

THE COURT: All right. Go ahead.

While he's looking, do you have any follow-up questions of her?

MR. MITCHELL: I do not, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MR. DAVIS:

Q. Ms. McClellan, do you recall that that -- the exhibit, just for the record, again, thankfully my client has pointed me out to page 324, I think is when it is. At the bottom of 24, State's Exhibit 41, it's a mugshot. They describe it as mugshot photo, booking date 5-11-07. So that exhibit. Do you recall it having two photographs on it, a front-facing and side-facing photograph? Do you recall that?

A. No, sir.

Q. But there's no dispute that the arrest from which that photo was derived was unrelated to this incident?

A. No. Yeah.

Q. They were separate?
A. They were separate. Yes. They were separate incidents.
Q. By a few years?
A. Yes.
MR. DAVIS: Thank you, Your Honor.
MR. MITCHELL: Nothing further.
THE COURT: Ms. McClellan, thank you very much for coming. You can step down.
Any additional witnesses?
MR. MITCHELL: The State has no witnesses.
MR. DAVIS: Your Honor, we'd ask to call Mr. Gethers to that one issue, the mugshot issue only.
THE COURT: All right. You can come on up. You are still under oath, of course, Mr. Gethers.

DIRECT EXAMINATION

BY MR. DAVIS:
Q. Mr. Gethers, as to the issue we are taking about, the mugshot exhibit that was admitted into evidence in your trial, okay?
A. Yes, sir.
Q. Do you recall reviewing that photograph -- or that exhibit?
A. Yes, sir.
Q. On that exhibit that was admitted -- first of all,

was it a picture of you?

A. Yes, sir.

MR. MITCHELL: Objection. The record speaks for itself.

THE COURT: Fair enough. I don't have the record though, so go ahead.

BY MR. DAVIS:

Q. On that exhibit --

THE COURT: Or that exhibit. I don't have the exhibit. I got the record.

Q. -- with the photo of you, was it a single photo or more than one photo?

A. No. It was the typical photo mugshot, photo one view in frontwards and one sideways.

Q. Okay. So two photos on the same exhibit?

A. Yes, sir.

Q. Thank you, Mr. Gethers. No other questions.

MR. DAVIS: Thank you, Your Honor.

THE COURT: No follow-up based on that?

MR. MITCHELL: No further questions.

THE COURT: Thank you, sir.

MR. DAVIS: And that would be the applicant's presentation, Your Honor.

THE COURT: All right. Very good. I do have a good feel for the situation. I need look at Belcher a

second time but certainly if you all want to highlight anything or give me any particular argument that would be fine.

Attorney General, if you happen to have a copy of that photograph, I'm sure it's in the record somewhere, maybe not in your possession but if it would be possible to perhaps scan that and maybe make that a part of the record at a later point in time, if possible, and let me look at it.

But anything that you all want to point out or argue to me at this point, Gentlemen?

MR. DAVIS: Judge, if I may just briefly, I'm not going belabor. Basically, we had five main points; the Court's instruction, search for the truth, the State's opening talking about robbery an unchartered offense, the mugshot admission, no request for voluntary manslaughter as a lesser included, and then no objection to malice. I'm not going to belabor those.

One thing I do want to highlight, Your Honor, if I can find it, that during -- the plaintiff testified that some things unexpected came up at trial, that had he had full discovery, that had there been more meaningful and frequent meetings with Ms. McClellan he would have been more prepared.

One of the issues that I want to just make a

connection, I'm not sure it's clear from the testimony, he did not have his co-defendant's statement to review prior to trial. It was in discovery but he did not have it. At trial there's testimony where she said she's not sure whether he got money or not.

Now, the reason I want to highlight that is that is something the State -- even reviewing in the transcript, the State at the end connected her knowledge that the perpetrator -- and the co-defendant alleged, of course, Mr. Gethers did not obtain any money and then money was found on the body of the victim, was crucial.

So at first blush, the fact that he didn't have that to review, and first blush the statement she's not sure if he got the money may seem like a throwaway line. The State connected that quite precisely in closing.

Now, I will confess to the Court, I don't believe that is the one and sole argument we have that would cause a jury to return a different verdict, but I just want to make that factual causal connection there that that's why that is relevant.

In summary, there are errors here by counsel that do rise to the level of ineffectiveness. I'll not enumerate them. You paid close attention, you have the transcript, you've taken judicial notice of Ms. McClellan's current status, and those fundamental

failures as to the process of the trial and instructions to the jury at the end of the trial we have shown that that would have to a reasonable jury cause the outcome to be different.

I would argue that certainly if the Court is impressed that the verdict of guilt was the wrong verdict then we've met our burden, but even if we have shown that there is significant reasonable doubt that a unanimous verdict would not have been rendered that would have changed the outcome as well.

A mistrial, hung jury certainly does not acquit my client but is a different outcome than a conviction on a murder charge. For all those reasons, Your Honor, we respectfully submit that we have presented sufficient evidence to jump both hurdles of Strickland and we would ask for relief in this case to overturn the conviction. Thank you, Your Honor.

THE COURT: Thank you.

Anything, Attorney General?

MR. MITCHELL: Judge, I'll just start with the opening argument. I think there was evidence to support that there was a plan to rob the victim in place. I don't think that's -- there's no deficiency there because I think the record ended up supporting that.

As the testimony came out, as far as Judge

Goodstein's comments that the jury is there to seek the truth, I don't see any problem with that in any way at all. I see that in the transcripts all the time.

As far as the mugshot goes, I think that that really was just part of the State's case in proving how they identified Mr. Gethers. It was kind of how they puzzled the entire case together on that. And it was admitted, and I note that on 324 and 325 there's a mention to -- it's admitted subject to a condition, and we don't see what that condition is. And that may be kind of what she was getting at with whether there was some kind of modification to where it would just be a picture and not an actual mugshot with a jail suit.

THE COURT: That's why I'm kind of curious as to what actually went back to the jury, and I don't know that any of the attorneys involved in this action or the Court involved in this action really understands that. It's a digital image. That can be manipulated in a thousand different ways to minimize any sort of prejudice, and so I saw that and that's kind of why I threw that out there and that's kind of why I'm still curious as to what that photo looks like, not that that's particularly damning to either case.

MR. MITCHELL: As far as the voluntary manslaughter, I don't think there's any -- there was no

evidence to support that kind of charge. There was no evidence that there was a sudden heat of passion or there's provocation, anything like that. I mean, I think the defense that was put up was that it was not me, I was not there when this happened. I was there maybe at some point, that's why some of my stuff was there, but it's not that, you know, we were in a fight. This justifies, you know, my actions here. There was no evidence in support of the charge for voluntary manslaughter.

I think as far as Belcher goes it's kind of on the same ring there. Belcher, that instruction is still proper but -- I'll read it to you exactly. The implied malice instruction has no place in a murder case where in a prosecution where evidence is presented that would reduce, mitigate or excuse or justify the killing.

I don't think there's any evidence presented that would reduce, mitigate or justify the killing. That wasn't the defense. The defense was I was not there. There was nothing presented to -- it just goes right along with the voluntary bit, I think, nothing to reduce that charge or mitigate an altercation when you deny the altercation ever happened.

And I think as far as he argued failure to preserve the voluntary manslaughter charge for appeal, I don't think that would be meritorious on appeal for the same

reasons. I don't think it was -- you know, would be properly admitted -- or properly given to the jury. And I think that's all I have. Thank you, Judge.

MR. DAVIS: Your Honor, if I may just to that. Every element must be proved on the murder. On a self defense claim, which was not presented here, and that's clear from today's testimony, the client would have had to testify to set up a defense. However, if there's evidence in the record that malice was lacking, and I would argue that the Court could and should have given voluntary manslaughter, and the defense attorney could and should have argued for it and objected that it was absent from the charge.

In common parliaments it's the compromised verdict. Guilty of murder, not guilty, or the compromised verdict. It is appropriate and does not require the defense to present evidence if the State is failing in evidence on the malice. I would argue that that's where it would come in play. Thank you, Your Honor.

THE COURT: Very good.

Gentlemen, thank you very much. As usual, I will take it under advisement. There are portions of this transcript I have not read so allow me at least -- I've been promising everybody else that you'll have a Form 4 by the end of week. This one may take a bit longer,

okay, just because the transcript is rather long. So bear with me. If you don't hear from me within two weeks somebody send me a reminder, but I generally try and have these things resolved as quickly as possible. Okay? Very good.

MR. MITCHELL: Thank you.

(WHEREUPON, the hearing was concluded.)

C E R T I F I C A T E

I, Sharon L. Vizer, Official Court Reporter for the First Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 28th day of October 2015.

I do further certify that I am neither of kin, counsel nor have an interest to any party hereto.

April 11, 2016

s/Sharon L. Vizer

SHARON L. VIZER

CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

Trevee Gethers, #343706,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2014-CP-18-01287

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 3, 2014. Respondent filed a Return on February 26, 2015, requesting an evidentiary hearing be convened. Rodney D. Davis was appointed by the Dorchester Clerk of Court. An evidentiary hearing was held on October 28, 2015, at the Dorchester County Courthouse. Applicant was represented by Mr. Davis. Respondent was represented by J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office.

At the PCR hearing, Applicant testified on his own behalf. Also testifying were Applicant's trial counsel Sara Jayne McClellan[1], Esquire. This Court had before it the Dorchester County Clerk of Court records, Applicant's South Carolina Department of Corrections records, appellate records, the PCR application, the Return, the appellate records, and the transcript.

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Dorchester County Clerk of Court's orders of commitment. The Dorchester County Grand Jury indicted the Applicant at the December 2007 term of General Sessions for Murder (2007-GS-18-1755). Ms. McClellan represented Applicant. The State called Applicant's case for trial

[1] Formerly Ms. Sara Jayne Rogers.

before the Honorable Diane S. Goodstein where he was found guilty. On November 19, 2010, Judge Goodstein sentenced Applicant to forty-five (45) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed Applicant's conviction and sentence on October 24, 2010. State v. Gethers, Op. No. 20120-UP-576 (S.C. Ct. App. filed October 24, 2012). Applicant's writ of certiorari to the South Carolina Supreme court was denied on May 7, 2014. Remittitur was sent on May 15, 2014.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

I. Ineffective assistance of trial counsel in:
   a. Failing to object to Judge Goodstein's opening instruction;
   b. Failing to object the solicitor's comments regarding robbery as a motive despite the fact that Applicant was not indicted for robbery;
   c. Failing to object to the admission of Applicant's booking photo; and
   d. Failing to request a voluntary manslaughter charge.

II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Trial Counsel

Failure to Object to Judge Goodstein's Comments

First, Applicant alleges Counsel was ineffective in failing to object to Judge Goodstein's opening comments to the jury. He alleges that the comments were inappropriate and prejudicial. When speaking to the jury before the trial began, Judge Goodstein explained the trial's procedure and cautioned jurors to temper any expectations:

> It is a – and it may be the – fundamental part of democracy, a search for the truth in an effort to make sure that justice is done between the State and Mr. Gethers. Searching for the truth and making sure that justice is done is often slow, deliberative, and repetitive, the opposite no doubt of what you may have seen on television, read about in books, or perhaps in movies.

(Trial Tr. p. 122, lines 11-18). Applicant argues the "search for the truth" portion is inappropriate and that an objection should have been made.

This Court finds Counsel's failure to object was not erroneous. Counsel credibly testified that she did not find the statements objectionable. These remarks are part of the standard opening instructions for many judges, and Judge Goodstein's opening remarks are not an instruction on the law. Additionally, because Judge Goodstein properly instructed the jury on the burden and standard of proof at the close of the case, any error was clearly harmless and did not affect the result.

Solicitor's Comments Regarding Robbery

Applicant alleges Counsel was ineffective for failing to object to the solicitor discussing robbery as a motive for the murder when Applicant was not indicted for robbery. During opening statements the solicitor stated:

> Ladies and gentleman of the jury, September 17, 2007, the victim in that case, Mr. Robert Earl Robinson, lost his life to that man sitting right over there at the defense table in his attempt to rob Mr. Robinson of a few dollars. And what did he get from it? Not one red cent.

(Trial Tr. p. 131, line 12-18). Applicant argues that since he was not charged with robbery that the State could not claim that he robbed the victim.

This Court finds Applicant has failed to meet his burden in proving Counsel was ineffective. Robbery was part of the *res gestae* of the crime, and the solicitor was permitted to argue the State's theory of the case. See State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) ("The res gestae theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred."). These comments would also be admissible under Rule 404(b) of the South Carolina Rules of Evidence which allows prior bad act evidence to be presented to the jury if offered to show motive. Accordingly, trial counsel was not ineffective for failing to object. Applicant has failed to present any credible evidence to show how the result of the trial would have been different if an objection had been made. This allegation is denied and dismissed.

Applicant's Booking Photo

Applicant also alleges Counsel was ineffective for failing to object Applicant's booking photo being offered as evidence. A booking photo of Applicant was admitted during the testimony of Javon Wright, a Charleston County Detention Center employee. (Trial Tr. p. 324, line 15 – p. 325, line 16).

This Court finds the booking photo was offered in a relevant line of questioning. See (Trial Tr. p. 323-26). Testimony was elicited concerning prints lifted from the automobile where the victim was found murdered. Applicant was identified based upon an earlier set of case prints (State's Exhibit 40) taken from that earlier arrest. The booking photo tied those prints to Applicant. Counsel testified credibly to this effect and agreed that the photo was admitted to

show how law enforcement identified Applicant as a suspect in the murder. Accordingly, the photo was introduced for identification purposes. Applicant has failed to prove Counsel was ineffective in failing to object. Applicant has also failed to prove that if an objection had been made, that it would have been successful and would have changed the result of the trial. This allegation is denied and dismissed.

Jury Charges

Finally, Applicant alleges Counsel was ineffective in failing to request a voluntary manslaughter charge and for failing to object to the inference of malice from the use of a deadly weapon instruction.

This Court finds no evidence existed to warrant a voluntary manslaughter charge. A judge is only required to charge a jury on a lesser-included offense if evidence exists that suggests that the lesser, rather than the greater, crime was committed. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996). There must be evidence that the defendant committed the lesser-included offense to entitle him to a jury charge on the offense. State v. Mathis, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986). No evidence existed to show a sufficient legal provocation or a sudden heat of passion. See State v. Locklair, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation."). Therefore, Counsel was not ineffective for failing to request such an instruction.

This Court also finds Applicant failed to meet his burden in proving Counsel was ineffective in failing to object to the jury instruction regarding the inference of malice from the use of a deadly weapon. Belcher held that the "use of a deadly weapon" implied malice instruction was no longer proper where evidence is presentenced that "would reduce, mitigate,

excuse or justify the killing (or the alleged assault and battery with intent to kill)." State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009). This Court finds this instruction was a correct statement of law in light of the absence of evidence tending to reduce the homicide from a murder to a lesser degree of manslaughter. Counsel's testimony that she did not request the lesser included charge because no evidence was presented to support it and because it was inconsistent with their defense of mere presence is both credible and persuasive. Accordingly, Counsel was not ineffective for not requesting a voluntary instruction or for not objecting to the inference of malice instruction.

As a final matter, Counsel Davis notes that Counsel was disbarred in July 2015. The Court has reviewed the order of our Supreme Court, and the Court finds nothing in the order indicating a pattern of inadequate representation of clients at trial. Accordingly, the Court finds that Applicant has failed to demonstrate any causal link between Counsel's professional disciplinary history and the alleged deficiencies of representations at trial. Accordingly, the Court finds Applicant has failed to meet his burden of demonstrating Counsel's representation fell below professional norms. Applicant has also failed to prove any resulting prejudice that would entitled him to relief.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application.

Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 8th day of January, 2016.

FRANK R. ADDY, JR.
Presiding Judge

Greenwood, South Carolina

WITNESSES

Garrison, John

DCSO

Agency Case #: 07009049

ARREST WARRANT NUMBER

K269291

Arrested: Oct 02, 2007

ACTION OF GRAND JURY

TRUE BILL

DATE 11-29-07

Foreperson of Grand Jury
Date: November 29, 2007

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2007GS18-1755

The State of South Carolina

County of

DORCHESTER

COURT OF GENERAL SESSIONS

December 03, 2007 TERM

THE STATE
vs.

Trevee J. Gethers

Indictment for

MURDER

SC Code: 16-03-10 / 16-03-20
Class: FEL-X

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED COPY
CLERK OF COURT
DORCHESTER COUNTY
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STATE OF SOUTH CAROLINA)
) INDICTMENT
COUNTY OF DORCHESTER) 2007GS18-1755

2011 MAR -2 PM 12: 19

At a Court of General Sessions, convened on December 03, 2007 the Grand Jurors of Dorchester County present upon their oath:

MURDER

The defendant, Trevee J. Gethers, did in Dorchester County on or about September 17, 2007, with malice aforethought, kill one Robert Earl Robinson by means of shooting the victim, and the said victim did die as a proximate result thereof, this being in violation of section 16-3-10 of the South Carolina Code of Laws, as amended and the common law of South Carolina.

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

Donald Sorensen, Solicitor