

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

SC SUPREME COURT

Honorable Clifton Newman, Circuit Court Judge

Case No. 2010-CP-24-0259

CHARLES N. VANDROSS.....*Petitioner,*

v.

STATE OF SOUTH CAROLINA.....*Respondent.*

**APPENDIX
VOLUME III OF V**

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LIE

8

Didn't Speak To Her On Mon Night (statement)

1) The 2 white ladies could testify different
(but they may be her friends)

- I called out for Jo once I spotted her sitting between them "still" mouthing slowly with her cell phone to her left ear
- Jo behaved as if she did not hear me, but both the women looked and signaled the question "Do you want me to knudge her for you?" I said yes, and she did
- I ^{signaled} for Jo to come to me. she frowned, scooted to the left without a word to the lady, and pointed to a sliver of space on her right

LIE

9

Not Engaged Mon Night -- (statement, OT, NT)

1) She moved away from Best and slid between the 2 white ladies upon my arrival

2) she invited me to sit with her once the ladies got her attention for me

INCONSISTENCY :

LIE

19

Says in statement 1 "jerked her from the bed and "put" her on the floor ^{holding her down} beside the bed" -
 Says in trial 2 "body-slammed" her "face down".
 had her hair pulled back, straddled her.
 Think hand written statement to Tony Davis claims elbow or knee somewhere.

CharacterViolence

All this time had gun in hand she says.
 All of this allegedly done "one handed".

INCONSISTENCY :

LIE

20

Says mouth taped - no mention of a problem breathing in trial 1

Peace opening says specifically left her so she could see and breathe

Trial 2 - says mouth and one nostril taped
 NT 29, 31

Clarify that her hands never claimed to be taped in any of her statements or testimony.
 (mistakes in newspaper)

CharacterViolence

Trial 2 - repeatedly says she was having trouble breathing

Trial 1 - never complained of breathing problem...

She seems coached to make me look more violent in trial 2

INCONSISTENCY:

Written Statement says at New Tranquil (first church)
an unknown (implied "long") amount of time.

- says engine turned off
- that there was talking about the relationship
- rage and then calm
- waving of the gun
- no mention of the pastor or where he lives

LIE
24

Testimony - she says left immediately after
noticing light, followed by questions whether or
not the pastor lived next door, and being
told to continue on to Old Tranquil.

INCONSISTENCY:

In The Same Breath

LIE
25

"So I get out of the car,
He got me out of the car"

NONSENSE ;

9

Claims she asked me to let's stop and call someone
so Best could be checked on

This supposedly was said "on our way home"

10 minute ride from house to churches (around corner from
each other)

Is my family here

Ask Inks if Mr Best's blood discovered anywhere ^{in addition to} outside on the grounds, ~~or~~ in the car

~~Get Sherry's statement in w/o live testimony to the same~~

Return Tony Davis' phone call

I must see you tonight

Is Billy participating

~~Ask Joann Did you tell Sherry~~

Ask Sherry "In your statement to police did you say Charles brought up issues from counselling Or should we just use the fact she's a "good friend but is clearly lying to help Joann

Ask Inks Was any investigation done to determine whether the landline telephone at the residence had been disabled?

If it was either off the hook or cut it couldn't have rang while police there. ~~Answering~~ Voicemail would pick up. Not a completed call Wouldn't show up on call record.

Doesn't make sense that I would send her back inside that morning knowing phone could ring; standing right beside outside telephone wiring, and not cut the wires

Ask Joann if she's been engaged to anyone else since the break-up of her marriage to Jeremiah Wilson, and why those engagements were broken?

Robinson

Ronnie

Did you ever enter into counselling wherein you stated the problem in your relationship was your unfaithfulness

- Expert to define jealousy?
- Letters from inmate? ^{NO} Church trials? ^{SBC} Open Heart, ^{SBC} Comm. Mission, Rev. Kennedy's church, Grace, Others
- Will you represent me as you would your own mother - wife - daughter - son? So I'll not tie your hands in rep. me to the best of your ability: I'll testify, I'll agree to send the shirt off, etc. - if after discussion you think that's best.
- Explain the set-up?
- Will we make sure all my story gets out?
- Hypotheticalist? Will we have one?
- Let's "determine" to witness GOD's Will and push the truth to the jury.
- Do we have this trial's transcript yet? do it a quick producer?
- Flower shop lady to testify?
- "Where" is her blood on my pants?
- Are we trying to prove my innocence? Their guilt? show reas. doubt

* What questions might Peace ask if I testify?

- What about us not announcing my intention to testify until one or 2 of our witnesses remain
- Is transcript of Trial 2 being prepared?
- Will witnesses be sequestered again?
- What did the Index Journal report?

We the Jury are deadlocked.
at 1)

g/kny guilty / not guilty
9 3

at 2)

der guilty / not guilty
10 2

at 3)

rapping guilty / not guilty
3 9

at 4)

ission of
mearm guilty / not guilty
(NO vote)



On 11/11/11

We have two jurors
that feel like their personal
feelings are clouding their
decisions. They both have
verbally said that they are
not impartial.

Deirdra Powell
1/20/06



apartment was empty on 10/29. I had it only for times in the future when would be put out - like 10/31 - Getting the apartment was not giving up on the relationship. No one knows if on 11/4 I was not "officially" back in my in hand - at Joann's house when arrested.

we were together all of Oct at her house
- I'd been moved back in (Raheim helped) - not "trying" to move back in the apartment was no more than "a shelter" to and for me.

Why didn't you ask Rev. Howard about the other story Joann told about what happened that night? Why not "proffer" his testimony (for the record with jury absent even if objected to and Judge sustained)? Best family would have heard the lie - That's almost as important as the jury hearing the lie. What did the Best family say to the media - Index Journal - this time? Where are they? What do they think now? Do they now feel I could be innocent? Why not? -

Part 2 of 2
 trying to move on Sat
 tomorrow

she not scared - never intended me to get job TN before Thurs morn
 - never asked for dispar notice at home
 Vandross not stalking - didn't come to game after her
 - not at opposite ends of bleachers just staring
 Cheating not jealousy - Monday night sliding down
 - can hidden for that reason - "There's Charles?"
 Not kidnapping, no blood of tape with hair
 no sight by second car
 no park by side of road at all
 left alone indeterminate long time
 found in passenger seat where I was
 reportedly sitting

Went to game expecting an incident
 - he her withers - designed to provoke
 - brought it closer than ever (within 4ft)
 His blood on her shirt

Her blood on the half wall
 - no way that much blood from those scratches
 - could have been done prior to Rest's death, after he went to sleep
~~days prior even~~

Restraining Order paperwork being filled out
 - my name already as defendant
 - premeditation - no past incident

at job
 on Wed
 not home
 less than
 200 yds on
 or same
 police join
 wanted or
 paper for
 to lock it
 to police
 she was
 afraid, he
 knew I'd
 off work
 Thursday
 at job he
 not home
 made it 0!
 to come to
 house

FIREARMS TRANSACTION RECORD PART I - OVER-THE-COUNTER

04-109

WARNING: You may not receive a firearm if prohibited by Federal or State Law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm.

Prepare in original only. All entries must be in ink. Read the Important Notices, Instructions and Definitions on this form.

Section A - Must Be Completed Personally By Transferee (Buyer)

1. Transferee's Full Name (Last, First, Middle) Vandross, Charles Nemon.
2. Residence Address (No., Street, City, County, State, ZIP Code; cannot be a post office box) 3938 McCormick Hwy
Bradley SC 29817
Greenwood County
3. Place of Birth (City, State or foreign country) Florence SC
4. Height 6'3 1/2" Weight 240
5. ☒ Male ☐ Female
6. Birth Date Month 01 Day 24 Year 1963
7. Social Security Number (Optional, but will help prevent misidentification.) [REDACTED]
8. Race (Ethnicity) (Check one or more boxes)
- ☐ American Indian or Alaska Native ☒ Black or African American ☐ Native Hawaiian or Other Pacific Islander
- ☐ Hispanic or Latino ☐ Asian ☐ White
9. What is your State of residence (if any)? SC (See Definition 5. If you are not a citizen of the United States, you have a State of residence only if you have resided in a State for at least 90 days prior to the date of this sale.)
10. What is your country of citizenship? (List more than one, if applicable.) USA
11. If you are not a citizen of the United States, what is your INS-issued alien number or admission number? N/A

Certification Of Transferee

12. Answer questions 12a through 12l by writing "yes" or "no" in the boxes to the right of the questions.

- | | |
|--|-----|
| a. Are you the actual buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you. (See Important Notice 1 for actual buyer definition and examples.) | yes |
| b. Are you under indictment or information in any court for a felony, or any other crime, for which the judge could imprison you for more than one year? (An information is a formal accusation of a crime by a prosecutor. See Definition 3.) | no |
| c. Have you been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Important Notice 6, Exception 1.) | no |
| d. Are you a fugitive from justice? | no |
| e. Are you an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance? | no |
| f. Have you ever been adjudicated mentally defective (which includes having been adjudicated incompetent to manage your own affairs) or have you ever been committed to a mental institution? | no |
| g. Have you been discharged from the Armed Forces under dishonorable conditions? | no |
| h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Important Notice 7.) | no |
| i. Have you been convicted in any court of a misdemeanor crime of domestic violence? (See Important Notice 6, Exception 1 and Definition 4.) | no |
| j. Have you ever renounced your United States citizenship? | no |
| k. Are you an alien illegally in the United States? | no |
| l. Are you a nonimmigrant alien? (See Definition 6.) | no |

13. If you are a nonimmigrant alien, do you fall within any of the exceptions set forth in Important Notice 6, Exception 2?

Yes ☐ No ☐ Not applicable ☒ (If "yes," the licensee must complete question 18c.)

I certify that the above answers are true and correct. I understand that answering "yes" to question 12a when I am not the actual buyer of the firearm is a crime punishable as a felony. I understand that a person who answers "yes" to any of the questions 12b through 12k is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 12l is prohibited from purchasing or receiving a firearm, unless the person also answers "yes" to question 13. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of law. (See Important Notice 8.)

14. Transferee's Signature Charles N Vandross
15. Date 7/30/04

Exhibit 27

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
FIREARMS TRANSACTION RECORD PART I - OVER-THE-COUNTER

 Transferor's Transaction Serial
 Number

04-109

WARNING: You may not receive a firearm if prohibited by Federal or State Law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm.

Prepare in original only. All entries must be in ink. Read the Important Notices, Instructions and Definitions on this form.

Section A - Must Be Completed Personally By Transferee (Buyer)

1. Transferee's Full Name (Last, First, Middle) <u>Vandross, Charles Nemon</u>		2. Residence Address (No., Street, City, County, State, ZIP Code; cannot be a post office box) <u>3938 McCormick Hwy</u> <u>Bradley, SC 29819</u> <u>Greenwood County</u>	
3. Place of Birth (City, State or foreign country) <u>Florence SC</u>	4. Height <u>6'3 1/2"</u> Weight <u>240</u>	5. ☒ Male ☐ Female	6. Birth Date Month <u>01</u> Day <u>24</u> Year <u>1963</u>
7. Social Security Number (Optional, but will help prevent misidentification.)			

8. Race (Ethnicity) (Check one or more boxes)

☐ American Indian or Alaska Native	☒ Black or African American	☐ Native Hawaiian or Other Pacific Islander
☐ Hispanic or Latino	☐ Asian	☐ White

9. What is your State of residence (if any)? SC (See Definition 5. If you are not a citizen of the United States, you have a State of residence only if you have resided in a State for at least 90 days prior to the date of this sale.)

10. What is your country of citizenship? (List more than one, if applicable.) USA

11. If you are not a citizen of the United States, what is your INS-issued alien number or admission number? N/A

Certification Of Transferee

12. Answer questions 12a through 12k by writing "yes" or "no" in the boxes to the right of the questions.	
a. Are you the actual buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you. (See Important Notice 1 for actual buyer definition and examples.)	yes
b. Are you under indictment or information in any court for a felony, or any other crime, for which the judge could imprison you for more than one year? (An information is a formal accusation of a crime by a prosecutor. See Definition 3.)	no
c. Have you been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Important Notice 6, Exception 1.)	no
d. Are you a fugitive from justice?	no
e. Are you an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance?	no
f. Have you ever been adjudicated mentally defective (which includes having been adjudicated incompetent to manage your own affairs) or have you ever been committed to a mental institution?	no
g. Have you been discharged from the Armed Forces under dishonorable conditions?	no
h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Important Notice 7.)	no
i. Have you been convicted in any court of a misdemeanor crime of domestic violence? (See Important Notice 6, Exception 1 and Definition 4.)	no
j. Have you ever renounced your United States citizenship?	no
k. Are you an alien illegally in the United States?	no
l. Are you a nonimmigrant alien? (See Definition 5.)	no

13. If you are a nonimmigrant alien, do you fall within any of the exceptions set forth in Important Notice 6, Exception 2?

Yes ☐ No ☐ Not applicable ☒ (If "yes," the licensee must complete question 18c.)

I certify that the above answers are true and correct. I understand that answering "yes" to question 12a when I am not the actual buyer of the firearm is a crime punishable as a felony. I understand that a person who answers "yes" to any of the questions 12b through 12k is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 12l is prohibited from purchasing or receiving a firearm, unless the person also answers "yes" to question 13. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of law. (See Important Notice 8.)

14. Transferee's Signature <u>Charles N Vandross</u>	15. Date <u>7/30/04</u>
---	----------------------------

604-1187

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor



ROBERT M. STEWART
Chief

Department of Forensic
DNA Analysis
October 14, 2005
SLED Lab No.: L04-12594
Your Case No.: 04-16951
Incident Date: 11/4/04
(V) Sanford Best
(V) Joann Wilson
(S) Charles Vandross

SGT ERIC INKS
GREENWOOD CO SHERIFF'S OFFICE
528 EDGEFIELD STREET
GREENWOOD, SC 29646

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

SEROLOGY ANALYSIS

ITEMS SUBMITTED:

RESULTS OF EXAMINATIONS:

1	Blood standard-Sanford Best	1	See DNA results.
9.1	Swabs from gun	9.1	See DNA results.
14.1	Cutting from subject's pants	14.1	See DNA results.
14.2	Cutting from subject's pants	14.2	Blood indicated. See DNA results.
14.3	Cutting from subject's pants	14.3	No analysis performed.
18.1	Hair from piece of silver duct tape	18.1	No analysis performed.



P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

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SLED LAB NO.: L04-12594
October 14, 2005

ITEMS SUBMITTED:

18.2 Swab from piece of
silver duct tape

19.1 Swab from piece of
silver duct tape

20.1 Swab from piece of
silver duct tape

21 Pulled head hairs from
Joann Wilson (used as
known standard)

22.1 Swabs from outside of
duct tape roll

22.2 Swabs from inside of
duct tape roll

RESULTS OF EXAMINATIONS:

18.2 See DNA results.

19.1 See DNA results.

20.1 See DNA results.

21 See DNA results.

22.1 See DNA results.

22.2 See DNA results.

DNA ANALYSIS

ITEMS ANALYZED:

1 Blood standard from Sanford Best

21 Pulled head hairs from Joann Wilson (used as known
standard)

9.1 Swabs from gun

14.1 Cutting from subject's pants

14.2 Cutting from subject's pants

18.2 Swab from piece of silver duct tape

19.1 Swab from piece of silver duct tape

20.1 Swab from piece of silver duct tape

22.1 Swab from outside of duct tape roll

22.2 Swabs from inside of duct tape roll



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01013

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EXAMINATIONS

DNA analysis was performed on all items above except item 22.1 using Short Tandem Repeat (STR) PCR DNA analysis. The results of the analysis are shown in Table 1 and Table 2.
 No human DNA was extracted from item 22.1.

RESULTS

The DNA profile developed from items 14.1 and 19.1 matches the DNA profile of Joann Wilson. The probability of randomly selecting an unrelated individual from the population having a DNA profile matching these items is approximately 1 in 600 trillion.

The partial DNA profiles developed from items 14.2, 18.2, 20.1, and 22.2 also matches Joann Wilson.

The DNA profile developed from item 9.1 is too weak to reliably interpret.

Table 1 - Profiler Plus

Items	D3S1358	vWA	FGA	D8S1179	D21S11	D18S51	D5S818	D13S317	D7S820	Amelogenin
Sanford Best (1)	16,17	15	23,24	13,14	28,30	15,16	8,12	11,12	10,11	XY
Joann Wilson (21)	14,15	16,17	22,23	12,15	28,31	15,18	11,12	11,12	10,12	X
Gun (9.1)	-	-	-	-	-	-	(12)	-	-	X(Y)
Subject's pants (14.1)	14,15	16,17	22,23	12,15	28,31	15,18	11,12	11,12	10,12	X
Subject's pants (14.2)	(14)	(16,17)	(23)	12, (15)	28	(15)	11,12	-	(10)	X
Duct tape (18.2)	(14,15)	(16,17)	-	(12,15)	(28,31)	(18)	(11,12)	(12)	-	X
Duct tape (19.1)	14,15	16,17	22,23	12,15	28,31	15, (18)	11,12	11,12	10, (12)	X
Duct tape (20.1)	(14),15	-	-	12	(28,31)	(15,18)	(11,12)	(12)	(10)	X
Inside duct tape roll (22.2)	14, (15)	(16,17)	(22)	(12,15)	(28)	-	11,12	(11,12)	(10)	X

- = No result () indicates alleles between 75 and 149 rfu



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01014

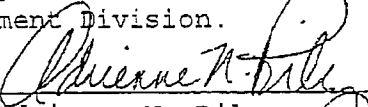
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Table 2 - Cofiler

Items	D3S1358	D16S539	TH01	TPOX	CSF1PO	D7S820	Amelo- genin
Sanford Best (1)	16,17	9,10	7,8	8,11	10,11	10,11	XY
Joann Wilson (21)	14,15	9,10	7,9	9,10	10,11	10,12	X
Gun (9.1)	(15)	-	(7)	-	-	-	X
Subject's pants (14.1)	14,15	9,10	7,9	9,10	10,11	10,12	X
Subject's pants (14.2)	14	-	(7,9)	-	-	(10)	X(Y)
Duct tape (18.2)	-	-	(7,9)	(9,10)	(11)	(10)	X
Duct tape (19.1)	14,15	9,(10)	7,9	9,10	(10),11	(10),12	X
Duct tape (20.1)	(14,15)	-	(7),9	(9)	(10),11	-	X
Inside duct tape roll (22.2)	14,(15)	-	(7)	(9,10)	(11)	-	X

- = No result
() indicates alleles between 75 and 149 rfu

These examinations were conducted by S/A Adrienne N. Riley, Forensic Analyst, South Carolina Law Enforcement Division.


Adrienne N. Riley
Senior Agent

14 October 2005
Date

jmj

cc: Greenwood County Solicitor's Office

Note: Any remaining evidence and/or packaging will be returned to the requesting agency.



4416 Broad River Road, P. O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300

01015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County

Wyatt T. Saunders, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHARLES NEMON VANDROSS,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589 -
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The trial judge committed reversible error by preventing the defense from introducing evidence Wilson may have killed Best (and then pinned the homicide on Vandross) out of jealousy over his blatant affairs, as the exclusion of this evidence violated *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), as well as the Sixth and Fourteenth Amendments, under *Holmes v. South Carolina*, 547 U.S. 319 (2006).

2. The trial judge committed reversible error by allowing into evidence State's Exhibit 34, "a photograph of a Bible that was laying in close proximity to the victim's right hand at the incident location," and State's Exhibit 37, "a photograph ... of the same Bible from a slightly different angle," as these photographs were irrelevant under *Rule 401, SCRE*, and unfairly prejudicial under *Rule 403*.

STATEMENT OF FACTS

On June 19 through 21, 2006, Charles Nemon Vandross (purportedly Luther's nephew) stood trial in Greenwood County, before Judge Wyatt T. Saunders and a jury, on an indictment charging him with murder, first-degree burglary, kidnapping and possession of a weapon during the commission of a violent crime. Vandross had no prior criminal record whatsoever. ROA p. 301, lines 1 and 2. The case mistried on two prior occasions. ROA p. 1, lines 18-20. The victims were Vandross' estranged girlfriend, JoAnn Wilson, who claimed she was kidnapped, and her longtime paramour, Sanford Best, who was shot once above the right eye as he dozed on her couch. Wilson was the State's key witness against Vandross. He himself did not testify or offer any other evidence. The jury found Vandross guilty as charged, and the judge imposed concurrent sentences of life imprisonment for murder, life for first-degree burglary, thirty years for kidnapping, and a consecutive sentence of five years for possession of a weapon during the commission of a violent crime.

ARGUMENT

1.

The trial judge committed reversible error by preventing the defense from introducing evidence Wilson may have killed Best (and then pinned the homicide on Vandross) out of jealousy over his blatant affairs, as the exclusion of this evidence violated *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), as well as the Sixth and Fourteenth Amendments, under *Holmes v. South Carolina*, 547 U.S. 319 (2006).

Had it been allowed, Vandross' defense would have been that Wilson killed Best in a jealous rage because of his blatant affairs. This scenario was not implausible, despite Wilson's testimony on direct that

... I was crazy about Sanford. I mean, Sanford and I were good friends, we just had a relationship like, even though it was rocky sometimes, we still always worked out our problems and we always remained friends, no matter who he went with or who I went with.

ROA p. 14, lines 10-20.

The State objected when defense counsel sought to ask Wilson on cross-examination if Best was dating "anybody else" at the time he was killed. ROA p. 94, lines 2-12. Defense counsel responded that the evidence was admissible under *Holmes v. South Carolina* to help establish that Wilson herself was the killer. ROA p. 94, line 14 – p. 96, line 2. The judge sustained the objection. ROA p. 99, line 17 – p. 100, line 2.

Back on cross, Wilson admitted that her relationship with Best had been troubled by "[c]heating issues." ROA p. 105, lines 8-14. "I had gone over to his house and seen somebody else there," she explained. "I was hurt." ROA p. 105, lines 17-24. When Wilson returned to the subject of Best's infidelity on her own, the judge again sustained the State's

objection. ROA p. 130, line 18 – p. 132, line 18. On redirect, Wilson flatly denied shooting

Best:

... I did not kill Sanford. I loved Sanford, and I could not sit there next to his mama and his family if they even thought I committed a crime against her son I did not kill him. I did not ask for any of this.

ROA p. 168, line 16 – p. 169, line 4.

In *State v. Gregory*, 16 S.E.2d at 534, the Supreme Court adopted the following Rule verbatim from 16 C.J. 560:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and as such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have [no] other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

See, also, *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999). In *Holmes v. South Carolina*, the United States Supreme Court abrogated *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001), which held that an accused must disprove the State's evidence of his guilt for evidence of third-party guilt to become relevant and admissible.

The trial judge violated *Gregory* and *Holmes* by excluding evidence that Wilson had one of the top two common motives – jealousy, the other being money – for killing her unfaithful boyfriend. In fact, jealousy was the same motive the State alleged Vandross had for shooting Best. The possibility of Wilson's guilt was far from speculative. Compare *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996).

Because of this error, the Court should reverse Charles Nemon Vandross' convictions and remand for a new trial.

The trial judge committed reversible error by allowing into evidence State's Exhibit 34, "a photograph of a Bible that was laying in close proximity to the victim's right hand at the incident location." and State's Exhibit 37, "a photograph ... of the same Bible from a slightly different angle," as these photographs were irrelevant under Rule 401, SCRE, and unfairly prejudicial under Rule 403.

Over defense counsel's objection that their prejudicial impact outweighed any probative value, the judge allowed the State to introduce photographs of Best's gunshot wound which he himself described as "rather graphic," as well as two photographs (State's Exhibits 34 and 37) of his Bible. ROA p. 219, line 11 – p. 225, line 10. In his closing argument, the Solicitor asked the jury to "study these photographs" and focus in particular on the Bible. ROA p. 294, lines 13-25.

Rule 401, SCRE, defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Evidence which is not relevant is not admissible." *Rule 402*. Finally, *Rule 403* states that even relevant evidence should be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues."

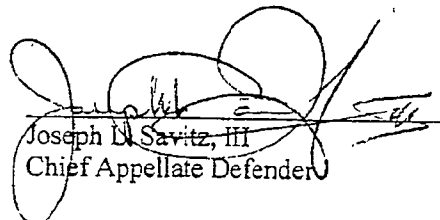
The admissibility of photographs is a matter generally entrusted to the discretion of the trial judge. *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986). "[T]here is no abuse of discretion if the offered photograph serves to corroborate testimony." *State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519, 523 (2000). "However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not

necessary to substantiate material facts or conditions.” *State v. Jackson*, 364 S.C. 329, 613 S.E.2d 374 (2005). To constitute unfair prejudice, the photographs must create “an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146, 149 (1991).

Photographic evidence that Best died with his Bible close at hand served no other purpose than to prejudice the jury unfairly against Vandross, his purported killer. Compare, for example, *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984). The Solicitor compounded the error by asking the jury to focus on the Bible during their deliberations.

Because of this error, the Court should reverse Charles Nemon Vandross’ convictions and remand for a new trial.

Respectfully submitted,


Joseph D. Savitz, III
Chief Appellate Defender

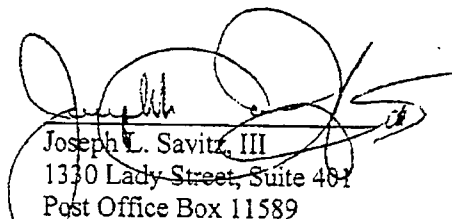
ATTORNEY FOR APPELLANT

This 17th day of June, 2008.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

June 17, 2008



Joseph L. Savitz, III
1330 Lady Street, Suite 401
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Columbia, SC 29211-1589
803) 734-1343
Attorney for Appellant

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County

Wyatt T. Saunders, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

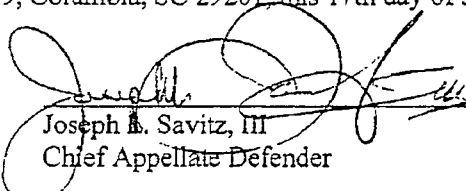
V.

CHARLES NEMON VANDROSS,

APPELLANT

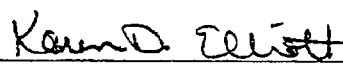
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of June, 2008.


Joseph B. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of June, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017.

AGENCY I.D.
SC0240000

INCIDENT REPORT

CASE NUMBER
0400018951

NCIC

INCIDENT TYPE		COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
1. MURDER		☒ YES ☐ NO	☐ YES ☒ NO	RESIDENCE/HOME		☒ Individual
2. KIDNAPPING/ABDUCTION		☒ YES ☐ NO	☐ YES ☒ NO	RESIDENCE/HOME		☐ Business
BURGLARY/BREAKING AND ENTERING		☒ YES ☐ NO	☐ YES ☒ NO	RESIDENCE/HOME		☐ Financial Inst.
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER) 838 MCCORMICK HWY BRADLEY SC					ZIP CODE 29819-	WEAPON TYPE HANDGUN
INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME	TIME ARRIVED
11/04/2004	00:01		11/04/2004	07:05	11/04/2004 08:50	07:05
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE) WILSON, JOANN		RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX
				J	B	F
ADDRESS 838 MCCORMICK HWY		CITY BRADLEY		STATE SC	ZIP CODE 29819-	LOCATION NO.
VICTIM'S NAME (LAST, FIRST, MIDDLE) BEST, SANFORD DEON		RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX
				J	B	M
ADDRESS 109 CARVER ST		CITY GREENWOOD		STATE SC	ZIP CODE 29846-	LOCATION NO.
COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES ☒ NO						
IN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/PLASMT. ☐ OTHER ☐ ALONE ☐ ASSISTED ☐ * J-This Jurisdiction. E-State. O-Out of State. U-Unknown						
SUBJECT	NAME (LAST, FIRST, MIDDLE) VANDROSS, CHARLES NEMON		RACE	SEX	AGE	ETH
			B	M	41	N
DATE OF BIRTH	11/24/1963		HEIGHT	WEIGHT		HAIR
			604	260		1
FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.		DAYTIME PHONE		EVENING PHONE		
ADDRESS 108 BARKWOOD DR #111-H		CITY GREENWOOD		STATE SC	ZIP CODE 29846-	LOCATION NO.
SUBJECT(No. 1) USING: ALCOHOL ☐ YES ☒ NO ☐ UNK ☐		ARRESTED NEAR OFFENSE SCENE ☒ YES ☐ NO ☐		DATE/TIME OF OFFENSE		DATE/TIME OF ARREST
DRUGS: ☐ YES ☒ NO ☐ UNK ☐ TYPE:		TOTAL # ARRESTED 1		11/04/2004 00:01:00		11/04/2004 07:05:00

***** Narrative Title: Narrative From CAD Date Entered: 11/04/2004
 10:35:48 Tag: SC 208SSJ VIN: Make: Model: Year: Color: Business: Name: , Comments: Complaint Type: S10 - ONE PERSON SHOT Caller Name: JOANN Officer ID: CMHAMMETT, Officer Name: CM HAMMETT [11/04/2004 07:10:07 : SSGOSSETT] 339 ETA 10 -15 MINS [11/04/2004 07:07:50 : SSGOSSETT] PER 309 CALL INVESTIGATOR 339 [11/04/2004 07:01:22 : 0540] CELL ONE FROM ABB DISPATCH 377-0080 [11/04/2004 06:58:06 : GWDD4] ADVISED 338 [11/04/2004 06:56:41 : 0540] [Call 2004-068470, 2004-068471 are related.] Cross streets: MUCKAWAY RD/VICKY R State road CHARLES VANDROSS.....
 ***** Narrative Title: Date Entered: 11/04/2004 13:06:58 ON ABOVE DATE AND TIME OFFICER'S RECIEVED A 911 CALL OF A GUN SHOT VICTIM AT ABOVE INCIDENT LOCATION AND NO OTHER INFORMATION AT THAT TIME. WHEN UNITS ARRIVED, COMP WAS STANDING NEXT TO THE ROADWAY YELLING HE'S

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY		JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY	
GROUP			TOTAL VALUE
CLERK			
ED			
COVERED			
SUBJECT IDENTIFIED		SUBJECT LOCATED	
☐ NO ☒ YES		☒ YES ☐ NO	
☐ ACTIVE ☐ ADM. CLOSED		☐ UNFOUNDED	
☐ ARRESTED UNDER 18		☐ EX-CLEAR UNDER 18	
☒ ARRESTED 18 AND OVER		☐ EX-CLEAR 18 AND OVER	
1. ☐ EXCEPTIONAL CLEARANCE 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY			
REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER
S. JAMES A	11/04/2004	0770	
FOLLOW-UP INVESTIGATION ☒ YES ☐ NO		OFFICER	DATE
		HAMMETT, CHRISTOPHER A	11/04/2004
			3365

Exhibit 30

AGENCY: GREENWOOD SHERIFFS OFFICE
Jurisdiction: SC0240000
Report Date / Time: 11/04/2004 06:50:00
Incident/Case Number: 0400016951.
Case Description: CAD Entry, S10 - ONE PERSON SHOT
Primary Officer Name/ID: BOGGS, JAMES A/0770
Approved By:
Time Printed: 11/05/2004 16:16:30

Narrative: Page 2

GOING OUT THE BACK. OFFICER'S RAN TO THE BACK YARD WHERE THEY FOUND SUBJECT
STANDING BESIDE THE DECK UP CLOSE TO THE HOUSE. SUBJECT WAS ORDERED TO RAISE
HANDS, WHICH HE DID. SUBJECT WAS THEN HANDCUFFED AND PADDED DOWN. THE
PATDOWN SEARCH DISCOVERED THAT SUBJECT HAD A SIMI-AUTOMATIC PISTOL IN HIS FRONT
RIGHT POCKET OF HIS PANTS. WHEN OFFICERS ENTERED THE RESIDENCE TO SEARCH FOR
EVIDENCE, EVERY ROOM WAS CHECKED BUT THE MASTER BEDROOM, IT WAS LOCKED. R/O
MADE ENTRANCE BY BREAKING OPEN SAID DOOR AND FOUND VICTIM LYING ACROSS THE BED
WITH WHAT APPEARED TO BE A GUN SHOT WOUND TO THE FRONT AREA OF HIS HEAD.
SUSPECT WAS TRANSPORTED TO THE L.E.C. WHERE THE INVESTIGATION WAS TO CONTINUE.
THE GUN WAS SEIZED A FIRESTORM SEMI AUTOMATIC, SERIAL #

4772. ***** Narrative Title: SUPPLEMENT TO ORIGINAL C. HAMMETT
-04-Date Entered: 11/05/2004 09:29:36 ON 11-04-2004 AT APPROX 0704HRS, R/O ALONG WITH
OTHER OFFICERS RESPONDED TO I/L FOR ABOVE INCIDENT. UPON ARRIVAL, R/O WAS
ADVISED BY CAPT. SCOTT THAT SUBJ WAS BEHIND THE HOUSE WITH A GUN. CAPT. SCOTT
AND LT BOGGS WENT AROUND THE LEFT SIDE OF THE HOUSE AND R/O WENT AROUND THE
RIGHT SIDE OF THE HOUSE. R/O OBSERVED SUBJ STANDING BETWEEN A BLUE IN COLOR MINI
VAN AND THE BACK DECK OF THE RESIDENCE. SUBJ WAS CONFRONTED BY LT BOGGS AND
SUBJ STEPPED AWAY FROM THE VAN WITH HIS HANDS RAISED. SUBJ WAS ASKED TO RAISE
HIS HANDS HIGHER SO THAT WE COULD DETERMINE IF THE GUN THAT HAD BEEN MENTIONED
WAS AROUND HIS WAIST AREA. SUBJ THEN STATED, "THE GUN IS IN MY POCKET, IT'S
LOADED." CAPT SCOTT AND LT BOGGS MOVED TOWARD SUBJ FROM HIS BACK WHILE R/O
MOVED TOWARD SUBJ FROM HIS FRONT. CAPT SCOTT REACHED AND REMOVED THE LISTED
PISTOL FROM SUBJ RIGHT FRONT PANTS POCKET. LT BOGGS THEN PLACED HAND CUFFS ON
SUBJ. R/O THEN BEGAN A PAT DOWN OF SUBJ WHILE CAPT SCOTT AND LT BOGGS WENT INTO
THE RESIDENCE TO CONTINUE INVESTIGATION. R/O LOCATED A LOADED MAGAZINE IN SUBJ
RIGHT PANTS POCKET. R/O ALSO LOCATED ONE (1) LOOSE BULLET IN THE RIGHT FRONT
POCKET. R/O LOCATED A SMALL PURPLE FLASH LIGHT, A GREEN UTILITY KNIFE, KEYS, A
CARTER, AND TWO (2) LOOSE BULLETS IN SUBJ LEFT FRONT PANTS POCKET. R/O ALSO
LOCATED A WALLET WITH CONTENTS IN SUBJ LEFT REAR POCKET. AS R/O ESCORTED SUBJ
TO A PATROL CAR, SUBJ STATED THAT HIS BLACK JACKET WAS LYING ON THE GROUND
BEHIND THE VAN. R/O DID LOCATE A BLACK JACKET WITH DIRT ON IT LYING ON THE GROUND
BEHIND THE BLUE MINI VAN. R/O ALSO FOUND THREE (3) LOOSE BULLETS ON THE GROUND
SIDE THE JACKET. R/O THEN TRANSPORTED SUBJ TO LEC. AFTER RETURNING TO THE
SCENE, R/O WAS ADVISED TO CHECK THE AREA OF HWY 10 AND CEDAR SPRINGS RD FOR
SUBJ BURGUNDY TOYOTA COROLLA. R/O DID LOCATE A BURGUNDY TOYOTA COROLLA AT A.M.
120 CEDAR SPRINGS RD, BRADLEY, SC, 29819. THIS VEHICLE DID SHOW TO BE
REGISTERED TO SUBJ AT 3938 MCCORMICK HWY, BRADLEY, SC, 29819. R/O DID STAND BY
WITH THE VEHICLE UNTIL DET. CROMER ARRIVED. R/O DID GIVE CROMER THE KEYS THAT
WERE FOUND IN SUBJ POCKET UPON BELIEF THAT THE CAR KEY ON THE KEY RING FIT THAT
VEHICLE.

***** Narrative Title: Date Entered: 11/05/2004 10:11:14 SUPP BY BR
WICKLAND 11-05-04 1000 HRS

ATTENDED THE AUTOPSY ON SANFORD BEST AT 1400HRS AT THE NEWBERRY HOSPITAL.

AGENCY: GREENWOOD SHERIFFS OFFICE
Jurisdiction: SC0240000
Report Date / Time: 11/04/2004 06:50:00
Incident/Case Number: 0400016951
Case Description: CAD Entry, S10 - ONE PERSON SHOT
Primary Officer Name/ID: BOGGS, JAMES A/0770
Approved By:
Time Printed: 11/05/2004 16:16:30

Narrative: Page 3

DOCTORS GARVIN, ROSS, AND SEXTON ADMINISTERED THE PROCEDURE. AT THE CONCLUSION, DR. SEXTON DID STATE THE CAUSE OF DEATH WAS A BRAIN LACERATION CAUSED BY ONE GUNSHOT WOUND TO THE HEAD. THE BULLET WAS RECOVERED AND ALL EVIDENCE FROM THE AUTOPSY WAS TURNED OVER TO R/O FROM DR. SEXTON AND THEN R/O TURNED IT OVER TO CPL. ERIC INKS WITH GREENWOOD COUNTY SHERIFFS OFFICE.

*****Narrative Title: INVESTIGATIVE REPORT Date Entered: 11/05/2004
15:49:23 INVESTIGATIVE/SUPPLEMENTAL REPORT BY T.DAVIS ON 11/05/2004:

ON 11/04/2004 AT APPROXIMATELY 0715 HRS. CPL. HAMMETT NOTIFIED R/O OF A DEATH AT 3938 MCCORMICK HWY IN BRADLEY AND THAT HE HAD SOMEONE IN CUSTODY. UPON ARRIVAL R/O MET WITH LT. BOGGS AND CAPT. SCOTT AND WAS TOLD OF WHAT HAD TAKEN PLACE AT THE LOCATION. CSI OFFICER INKS HAD ALSO BEEN NOTIFIED AND WAS DIRECTED BY R/O TO GO TO THE S.O AND DO A GSR ON THE SUSPECT AND THEN RESPOND TO THE SCENE. R/O WAS NOTIFIED DET. CROMER TO RESPOND TO THE SCENE AND TO ASSIST SGT. INKS. R/O WAS TOLD BY LT. BOGGS THAT JOANN WILSON, THE OCCUPANT OF THE RESIDENCE WAS AT THE SHERIFF'S DEPT, SO R/O MET WITH HER THERE.

DURING THE INTERVIEW, JOANN SUBER-WILSON RELATED THE FOLLOWING: THAT SHE FIRST STARTED DATING THE VICTIM, SANFORD DEON BEST, IN 1999 AND THAT THEY HAD AN ON AND OFF RELATIONSHIP FOR THE PAST FIVE YEARS. SHE STATED THAT THEY BROKE UP IN 2003 AND THAT SHE STARTED DATING THE SUSPECT, CHARLES NEMON VANDROSS, IN JULY OF 2003. SHE STATED THAT SHE MET VANDROSS AT A CHURCH FUNCTION AND THAT IN AUG. OF 2003 HE MOVED FROM GREENVILLE AND MOVED IN WITH HER. SHE STATED THAT THEY SPOKE OF MARRIAGE BUT THAT SHE FELT BEFORE THEY COULD SET A DATE THAT THEY NEEDED TO SEEK COUNSELLING TO TRY AND WORK OUT A COUPLE OF ISSUES. THE MAIN ISSUE BEING WAS JEALOUSLY.

SHE STATED THAT THE COUNSELLORS THAT THEY WERE SEEING WERE FROM GREENVILLE AND THAT THEY HAD A COUNSELLING SESSION ON SAT. 10-30-2004. WHEN THEY LEFT THE SESSION, ALL ISSUES WERE TO BE LEFT THERE AND NOT SPOKEN OF AGAIN UNTIL THE NEXT SESSION. ACCORDING TO MS. WILSON, ON SUNDAY MORNING, 10-31-2004 BEFORE CHURCH VANDROSS AND VANDROSS ARGUED AND SHE TOLD HIM TO PACK HIS BELONGINGS AND LEAVE, WHICH HE DID, BUT LEFT SEVERAL ITEMS AT HER RESIDENCE. AFTER CHURCH, SHE CALLED SANFORD BEST TO COME TO HER RESIDENCE. SHE STATED THAT SHE WAS THE TYPE OF PERSON THAT DIDN'T LIKE BEING ALONE AND FELT THAT SHE ALWAYS HAD TO HAVE A MAN. SHE SAID THAT SEVERAL TIMES BEFORE WHEN SHE AND VANDROSS WOULD BREAK UP, SHE WOULD CALL

BEST.
ON MONDAY, 11-01-04, WHILE SHE WAS AT WORK AT REGENCY PARK APTS. VANDROSS CAME TO HER JOB AND GAVE HER HIS KEY TO HER HOUSE AND SHE IN TURN GAVE HIM HER KEY TO APT. AT PINETREE APTS. AFTER HE LEFT, SHE FELT THAT THERE MAY BE A PROBLEM AND SHE CALLED THE GREENWOOD CITY P.D. TO DISCUSS THE INCIDENT AND TO HAVE HIM PUT A TRESPASS NOTICE AT HER PLACE OF WORK.

AFTER THAT EVENING HER SON HAD A FOOTBALL GAME AT THE CIVIC CENTER AND SHE WAS ACCOMPANIED THERE BY BEST. SHE STATED THAT VANDROSS ALSO CAME TO THE GAME BUT NEVER SAID ANYTHING TO HER. AFTER THE GAME SHE AND BEST WENT BY BEST'S

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Narrative: Page 4

RESIDENCE ON CARVER ST. FOR HIM TO GET SOME CLOTHES. SHE STATED FOR FEAR OF VANDROSS CAUSING A PROBLEM, BEST PARKED HIS VEHICLE SEVERAL HOUSES FROM HER'S AND THAT SHE WOULD DRIVE HIM TO HER HOUSE TO STAY FOR THE NIGHT AND THEN TAKE HIM TO HIS CAR AROUND 6 AM FOR HIM TO GO TO WORK.

ON 11-03-04, A FRIEND NAMED SHERRY MCCAULEY CALLED HER AND STATED THAT VANDROSS HAD COME TO HER HOUSE TO TALK ABOUT THE RELATIONSHIP BETWEEN HE AND WILSON. DURING THE CONVERSATION, VANDROSS STATED THAT HE KNEW THAT SHE WAS CHEATING ON HIM WITH BEST AND THAT HE KNEW WHAT THEY WERE DOING BECAUSE HE HAD BEEN WATCHING AND THAT HE HAD SEEN JOANN LEAVE THE RESIDENCE AT 0530 HRS. MCCAULEY TOLD HIM THAT IF WILSON DIDN'T WANT TO CONTINUE SEEING HIM THAT HE SHOULD JUST MOVE ON WITH HIS LIFE AND NOT DO ANYTHING RASH. VANDROSS THEN STATED THAT HE DIDN'T KNOW WHAT HE WAS GOING TO DO. MCCAULEY FELT UNEASY ABOUT THIS STATEMENT AND NOTIFIED MS. WILSON.

LATER THAT EVENING WILSON'S SON HAD A FOOTBALL GAME AT THE CIVIC CENTER THAT HE ATTENDED AND WAS ACCOMPANIED BY BEST. VANDROSS CAME TO THE GAME AND SAT SEVERAL ROWS BEHIND BEST AND WILSON AND ACORDING TO WILSON; VANDROSS STARED AT HER AND BEST THE ENTIRE GAME. AFTER THE GAME AS SHE AND BEST WERE RETURNING TO HER HOUSE A DECISION WAS MADE THAT BEST WOULD PARK HIS CAR AT HER HOUSE SINCE VANDROSS KNEW THAT THEY WERE TOGETHER. BEST PARKED HIS CAR UNDER HER GARPORT.

METIME BETWEEN 0001 HRS AND 0100 HRS: ON 11-04-04 AS SHE AND BEST WERE ASLEEP IN HER BEDROOM SHE WAS AWAKENED BY VANDROSS PUTTING HIS HAND OVER HER MOUTH, HIS ELBOW IN HER CHEST AND A GUN POINTED AT HER HEAD. SHE STATED THAT SHE TRIED TO STRUGGLE AND GET FREE AND TRIED TO SCREAM AND WAKE BEST. SHE STATED THAT BEST DIDN'T MOVE. SHE WAS THEN JERKED FROM THE BED AND PUT ON THE FLOOR BESIDE THE BED WITH VANDROSS HOLDING HER DOWN. SHE PLEADED FOR VANDROSS NOT TO HURT HER AND BEGGED TO GO TO THE BATHROOM, WHICH HE ALLOWED HER TO DO. AS SHE WAS GOING TO THE BATHROOM SHE NOTICED THE TIME ON THE VCR WAS 1259HRS. WHILE IN THE BATHROOM AND BLEEDING FROM THE MOUTH SHE WROTE CHARLES V AND THE WORD "HELP" ON THE WALL. VANDROSS GATHERED HER PANTS AND A ROLL OF DUCT TAPE AND THREW THEM INTO THE BATHROOM TELLING HER TO PUT ON THE PANTS AND PUT THE DUCT TAPE ON HER MOUTH. HE THEN CAME INTO THE BATHROOM AND WRAPPED DUCT TAPE AROUND THE BACK OF HER HEAD AND OVER HER MOUTH. WITH VANDROSS POINTING THE PISTOL AT HER, HE PUT ON HER PANTS AND THEY WALKED OUT OF THE BATHROOM. SHE NOTICED BEST LING IN THE BED WITH A PILLOW ON TOP OF HIM. AS SHE AND VANDROSS WERE WALKING OUT OF THE BEDROOM VANDROSS CLOSED THE DOOR BEHIND THEM. HE THEN GOT THE KEYS TO HER CAR, WHICH WERE IN THE KITCHEN AND TOLD HER "LETS GO". AS THEY WERE ABOUT TO EXIT THE BACK DOOR WILSON NOTICED THE BACK DOOR ALONG WITH THE STORM DOOR OPEN. AS THEY EXITED THE DOOR VANDROSS PUT ON HIS SHOES THAT HE HAD TAKEN OFF AND LEFT ON THE DECK BEFORE ENTERING THE RESIDENCE. HE THEN TOLD HER TO DRIVE, WALKING HER AT GUN POINT TO THE DRIVERS SIDE OF HER VEHICLE [2000 MERCURY MARQUIS] WITH HIM GETTING INTO THE PASSENGER SIDE. AS SHE DROVE AWAY HE TOLD HER TO TURN TO THE RIGHT OUT OF HER DRIVEWAY AND TO GO TO THE LIGHT. AS THEY WERE TRAVELLING ON HWY 221 HE TOLD HER TO MAKE A LEFT TURN

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Narrative: Page 5

WHERE HWY 221 SPLITS WITH 221 GOING TOWARD MCCORMICK AND HWY 10 TOWARD TROY. SHE TURNED TOWARD MCCORMICK AND HE TOLD HER TO GO NEW TRANQUIL A.M.E. CHURCH WHICH IS JUST BEFORE THE G'WOOD MCCORMICK COUNTY LINE. SHE TURNED INTO THE CHURCH YARD AND TURNED OFF THE CAR ENGINE. THIS IS WHERE VANDROSS TORE THE MOUTH OPEN FROM HER FACE. WITH THE GUN STILL POINTED AT HER, VANDROSS STARTED TELLING HER OF ALL THE THINGS HE HAD DONE FOR HER, THAT SHE NEEDED HIM AND THAT THE LORD SAID THAT THEY SHOULD BE TOGETHER. SHE STATED DURING THE CONVERSATION HE WOULD BE CALM AND THEN BECOME ENRAGED AND START WAVING THE GUN.

WILSON STATED THAT AFTER BEING THERE FOR AN UNKNOWN AMOUNT OF TIME HE TOLD HER TO CRANK THE CAR THAT THEY WERE LEAVING. HE TOLD HER TO GO TO OLD TRANQUIL A.M.E. CHURCH. THIS CHURCH IS LOCATED IN MCCORMICK COUNTY ON EDEN HALL ROAD, WHICH IS JUST OVER A MILE FROM NEW TRANQUIL CHURCH.

ON ARRIVING THERE WILSON PARKED BESIDE THE CHURCH NEAR A LARGE PROPANE TANK AND TURNED OFF THE ENGINE. AGAIN VANDROSS BEGAN TALKING ABOUT THEIR RELATIONSHIP. HE MADE HER GET OUT OF THE CAR, HE THEN GOT OUT AND BOTH CAME AROUND TO THE FRONT OF THE VEHICLE, FEARING FOR HER SAFETY SHE STARTED ARGUING WITH HIM AND GAVE HIM A HUG. AFTER THE HUG, HE FELL TO HIS KNEES, BEGAN CRYING AND QUOTING BIBLE VERSES. HE STATED THAT HIS LIFE WAS RUINED BECAUSE HE HAD JUST KILLED A MAN. WILSON STATED THAT SHE HAD LOST TRACK OF TIME BUT REMEMBERS HIM SAYING THAT IT WAS 0555HRS.

KNOWING THAT SHE HAD CHILDREN AT HOME IN THE BED IT WAS GETTING CLOSE TO THE TIME FOR THEM TO GET UP AND GET READY FOR SCHOOL, SO THEY LEFT AND HEADED BACK TO HER HOUSE, WITH WILSON DRIVING.

ON THE WAY BACK TO HER HOUSE, HE TOLD HER THAT HE HAD PARKED HIS CAR ON CEDAR SPRINGS ROAD, ALSO THAT HE WANTED HER TO STAND BY HIM AND WAIT FOR HIM. HE TOLD HER THAT HE WANTED HER TO TAKE CARE OF HIS STORED ITEMS AND TO PAY A BILL FOR HIM. HE TOLD HER THAT THEY WERE GOING TO HER HOUSE TO GET THE KIDS READY FOR SCHOOL, THEN THEY WERE GOING TO G'VILLE TO TELL HIS CHILDREN GOOD-BYE AND THEN THEY WERE GOING TO THE COUNSELLORS AND AFTER THAT HE WOULD TURN HIMSELF IN. ACCORDING TO MS. WILSON, HE TOLD HER THAT HE WANTED HER TO KEEP THE GUN FOR HER SAFETY AND THAT HE PAID A LOT OF MONEY FOR IT AND THERE WAS NO NEED TO GIVE IT TO THE POLICE BECAUSE HE WAS GOING TO CONFESS TO WHAT HE HAD DONE. HE ALSO TOLD HER NOT TO TELL THE POLICE WHAT HE HAD DONE TO HER, BECAUSE THEY WOULD CHARGE HIM WITH KIDNAPPING.

THEY APPROACHED HER RESIDENCE HE TOLD HER TO PARK THE CAR BEHIND HER HOUSE AND TO GO INSIDE AND AWAKEN THE KIDS FOR SCHOOL. WHILE INSIDE THE HOUSE HE FOUND HER CELL PHONE AND WAS ABLE TO CALL 911 FOR HELP. AS SHE WALKED INSIDE WITH HER 3 CHILDREN, WHO HAD BEEN ASLEEP INSIDE THE HOUSE ALL NIGHT, SHE HEARD SIRENS APPROACHING, SHE THEN WITH THE CHILDREN RAN INTO THE ROADWAY TO GET DOWN THE OFFICERS. WHEN THE OFFICERS GOT THERE SHE TOLD THEM THAT VANDROSS WAS ON THE BACK SIDE OF THE HOUSE AND BRIEFLY TOLD THEM WHAT HE HAD

OFFICERS SCOTT, BOGGS AND HAMMETT FOUND VANDROSS AT THE BACK CORNER OF THE

AGENCY: GREENWOOD SHERIFFS OFFICE
Jurisdiction: SC0240000
Report Date / Time: 11/04/2004 06:50:00
Incident/Case Number: 0400016951
Case Description: CAD Entry, S10 - ONE PERSON SHOT
Primary Officer Name/ID: BOGGS, JAMES A/0770
Approved By:
Time Printed: 11/05/2004 16:16:30

Narrative: Page 6

HOUSE AND ARRESTED HIM W/O INCIDENT. THE OFFICERS FOUND A 380 CAL. PISTOL IN THE
POCKET OF VANDROSS. CPL. HAMMETT TRANSPORTED VANDROSS TO THE COUNTY JAIL
LEAVING CAPT. SCOTT AND LT. BOGGS TO PROTECT AND PRESERVE THE SCENE UNTIL
INVESTIGATORS ARRIVED.

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

AFFIDAVIT

Personally appeared before me, one DETECTIVE MARC CROWLEY
 who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions
 of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

All weapons to include firearms and ammunition, human blood and all items stained with human
blood, ~~me~~ and any other items used in the preparation or commission of the shooting
death of Sanford Best.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

1998 Toyota 4-door burgundy in color, tag number 208-SSJ (SC) registered
to Charles Nimon Vandross (3938 McCormick Hwy) and located on the property
of A.M. Truck Inc. located at 120 Cedar Springs Road in the county of
Greenwood.

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

On 11/04/2004 at approximately 6:56 hrs., 911 dispatch received a call from a female
subject by the name of Joanne stating that somebody was dead at her residence
of 3938 McCormick Highway. Joanne also advised dispatch that the shooter was still
at her house and she gave the name of Charles Vandross. Officers did arrive at 3938 McCormick
Highway and located Charles Vandross in the back yard. Officers did recover a semi-automatic handgun
from Vandross's pistol, front pants pocket. officers located a deceased black male on the bed in the
master bedroom. The decedent, Sanford Best, appeared to have a gunshot wound to the head
with a pillow over his head.
Joanne Scher-Wilson, complainant, advised officers that Charles Vandross told her that his vehicle,
1998 Toyota, was parked on Cedar Springs Road. Officers did locate Vandross's vehicle abandoned on the
property of A.M. Truck Inc. at 120 Cedar Springs Road.

I have sworn to and Subscribed before me

his 4th day of November 2004
Franklin P. [Signature] (L.S.)
 Signature of Judge

[Signature]
 Affiant

Address 528 Lafayette St.Greenwood, SC 29646Phone 864-942-8600

STATE OF SOUTH CAROLINA

County of GREENWOOD

SEARCH WARRANT

Date 11/04/2004Officer Any Lawful Officer

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

SEARCH WARRANT

Form Approved by
S.C. Attorney General
Section 17-13-160
March 15, 1978

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY
OF GREENWOOD, SOUTH CAROLINA

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

1998 Toyota 4-door burgundy in color, tag number 208-SSJ (SC) registered to
Charles Nemon Vardalos (3938 McCormick Highway) and located on the property
of A. M. Truck Inc. located at 120 Cedar Springs Rd. in the county of
Greenwood.

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

All weapons to include firearms and ammunition, human blood and all items
stained with human blood, and any other items used in the preparation or commission
of the shooting death of Sanford Best.

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

James H. [Signature], S.C.
November 4th 1994

[Signature] (L.S.)
Signature of Judge

RETURN

I received the attached Search Warrant Nov. 04, 192004, and have executed it as follows:
On Nov. 04, 192004 at 1145 o'clock At M, I searched
(the person) described in the warrant and (the premises)

I left a copy of the warrant with ONE Bryan Toyota Corolla # 208555
Name of person searched or "at the place of search" with:
Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant: _____

(1) one pair of black leather sneakers and one pair of white
socks in back floor board behind driver's seat [recovered by M. Cromer]

This inventory was made in the presence of Ralph Evans
AND Marie Cromer

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this _____
day of _____, 19 _____

Signature of Judge

(L.S.)

Ralph Evans
(Signature of Officer Executing Warrant)

CONSENT TO SEARCH
RESIDENCE FORM

THE STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)

LOCATION: G.L.E.C. DATE: 11-04-04

I, JOANN SUBER-WILSON HAVING BEEN INFORMED OF MY CONSTITUTIONAL
RIGHTS NOT TO HAVE A SEARCH MADE OF THE PREMISES HEREINAFTER MENTIONED
WITHOUT A SEARCH WARRANT AND OF MY RIGHT TO REFUSE TO CONSENT TO SUCH
A SEARCH, HEREBY AUTHORIZE ^{ERIC JONES, MARC CROWDER} GREENWOOD SHERIFFS DEPT. OF THE GREENWOOD
COUNTY SHERIFF'S DEPT. TO CONDUCT A COMPLETE SEARCH OF MY PREMISES LOCATED
AT 3938 McCOMICK Hwy BRADLEY. THESE OFFICERS ARE
AUTHORIZED BY ME TO TAKE FROM MY PREMISES ANY LETTER, PAPERS, MATERIALS,
OR OTHER PROPERTY WHICH THEY MAY DESIRE.

THIS WRITTEN PERMISSION IS BEING GIVEN BY ME TO THE ABOVE NAMED POLICE
OFFICERS VOLUNTARILY AND WITHOUT THREATS OR PROMISES OF ANY KIND.

Jerry Davis 11-04-04
WITNESS DATE

WITNESS DATE

THIS IS TO CERTIFY THAT ON _____ AT _____
OFFICERS OF THE GREENWOOD SHERIFF'S DEPT. CONDUCTED A SEARCH OF MY
RESIDENCE. I CERTIFY THAT NOTHING WAS REMOVED FROM MY CUSTODY BY
OFFICERS OF THE GREENWOOD SHERIFF'S DEPT.

SIGNED DATE

WITNESS DATE

Joann Suber-Wilson 11-4-04
SIGNED DATE
ALSO TO INCLUDE A 2000 MERCURY
GRAND MARQUIS - TA9-702 PLW
THAT BELONGS TO JOANN SUBER

AGENCY: Greenwood Police Department
Jurisdiction: SC0240100
Report Date / Time: 11/03/2004 2:26 00 PM
Incident/Case Number: 04021442
Case Description: TRESPASS NOTICE GIVEN
Primary Officer Name/ID: Peppers, Kandice/1047
Approved By:
Date/Time Printed: 01/13/2006 11:07:27 AM

Narrative: Page 2

520 MONUMENT ST

On 11-03-04 at approx 1426hrs I spoke to Ms. Wilson at City Hall regarding a trespass notice. Ms. Wilson requested that Charles N. Vandross be placed on trespass notice for her place of employment (Regency Park). Ms. Wilson stated that she is the manager of the apartment complex. She further stated that she was engaged to Mr. Vandross but broke the engagement off a week prior and all contact was unwanted. She stated that she wanted him placed on trespass notice to deter any incidents at her place of employment. Ms. Wilson further stated that no specific incident has occurred, but she did not want to see or speak to him anymore.

On 11-03-04 at 1433hrs I telephoned Mr. Vandross's place of employment (McDonalds 223-8754) in attempt to locate at Mr. Vandross. I spoke to Henrietta Williams (manager) who stated that he was off and was not scheduled to return back to work until 11-04-04 at 1600hrs. I will conduct a follow-up investigation in an attempt to locate Mr. Vandross and place him on trespass notice.

SUPPLEMENTAL REPORT

11-04-04

On 11-04-04 at approx. 1612hrs I spoke to Mr. Vandross at the Greenwood County Detention Center and placed him on trespass notice for Regency Park (120 Edinborough Circle). He stated that he understood and would not return to that location.

Reporting Officer: Peppers, K.
Clerk/1241

PRACHT & BACOT

Attorneys at Law

Adam S. Bacot
James G. Padgett, III

TELEPHONE: (864) 227-1570
FACSIMILE: (864) 227-2610
EMAIL: bacot@bacotlawfirm.com

414 Monument Street
Suite C
Greenwood, SC 29646

February 15, 2005

Charles Vandross, inmate
Greenwood County Detention Center
528 Edgefield Street
Greenwood, South Carolina 29646

Re: State v. Charles H. Vandross
Warrant #: H-817300

Dear Charles

I am sorry that I have not been to see you in some time. I have had several cases go to court and have been out sick for nearly the last week.

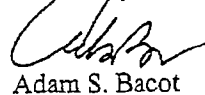
To follow up on our last meeting, I have discussed the motion for an investigator and doctor with Frank, and he is to get back with me with the name of a person that he would suggest using as the investigator. We are still searching for the appropriate doctor.

Of the revised property list, Ms. Wilson admits to only having the car and the rings (which she sold as they were a gift). The car is in process of either being moved to the sheriff's department as part of the crime scene or being put in storage. I should have more information on the car when it reaches its final destination.

I am still reviewing your latest notes and understand that you have more for me to review. I will be there as soon as I can.

If you have any questions or concerns, please do not hesitate to call.

Yours truly,



Adam S. Bacot

ASB/el

verizon wireless

COPY

Bill date December 1, 2004
Account number 819806549-00001
Invoice number 1032881396

Page 6 of 42

age detail continued...

Your Home Area

Exhibit 3H

	Date	Time	Rate	Minutes	Origination+	Phone number	Destination	Usage type	Call type	Airtime charges	Long distance and other charges	Total
71	11/03	03:01P	P	1	Greenwood SC	(864)377-0080	Incoming	CL A		Included	.00	.00
72	11/03	03:47P	P	2	Greenwood SC	(864)377-0080	Incoming	CL MN		Included	.00	.00
73	11/03	03:57P	P	2	Greenwood SC	(864)377-0080	Incoming	CL A		Included	.00	.00
74	11/03	04:25P	P	1	Greenwood SC	(919)605-9451	Raleigh	NC MN	REG	Included	.00	.00
75	11/03	04:26P	P	1	Greenwood SC	(919)605-9451	Raleigh	NC MN	REG	Included	.00	.00
76	11/03	04:27P	P	1	Greenwood SC	(919)605-9451	Raleigh	NC MN	REG	Included	.00	.00
77	11/03	04:30P	P	2	Greenwood SC	(864)344-1091	Greenwood	SC A		Included	.00	.00
78	11/03	05:27P	P	1	Greenwood SC	(864)377-0080	Incoming	CL A		Included	.00	.00
79	11/03	07:03P	P	8	Greenwood SC	(864)377-0080	Incoming	CL A		Included	.00	.00
80	11/03	08:20P	P	1	Greenwood SC	(864)993-0558	Mobile	CL MN		Included	.00	.00
81	11/03	08:31P	P	1	Greenwood SC	(864)227-9927	Greenwood	SC A		Included	.00	.00
82	11/03	08:32P	P	2	Greenwood SC	(864)227-9927	Greenwood	SC A		Included	.00	.00
83	11/03	08:45P	P	1	Greenwood SC	(864)554-5695	Greenwood	SC MN		Included	.00	.00
84	11/03	09:15P	O	1	Greenwood SC	(864)227-9927	Greenwood	SC		.00	.00	.00
85	11/03	09:43P	O	1	Greenwood SC	(864)344-1091	Greenwood	SC		.00	.00	.00
86	11/03	09:44P	O	1	Abbeville SC	(864)344-1091	Greenwood	SC		.00	.00	.00
87	11/03	09:46P	O	6	Abbeville SC	(803)407-0022	Columbia	SC	REG	.00	.00	.00
88	11/03	10:14P	O	18	Greenwood SC	(864)554-5695	Mobile	CL M		.00	.00	.00
89	11/04	06:56A	P	1	Greenwood SC	(864)227-1371	Greenwood	SC A		Included	.00	.00
90	11/04	04:01P	P	1	Greenwood SC	(864)377-0080	Incoming	CL A		Included	.00	.00
91	11/04	06:38P	P	1	Greenwood SC	(864)223-2953	Greenwood	SC A		Included	.00	.00
92	11/04	06:40P	P	1	Waterloo SC	(864)554-5695	Mobile	CL MN		Included	.00	.00
93	11/04	07:45P	P	1	Waterloo SC	(864)388-7760	Greenwood	SC A		Included	.00	.00
94	11/04	07:46P	P	2	Greenwood SC	(864)388-7760	Greenwood	SC A		Included	.00	.00
95	11/04	07:48P	P	60	Greenwood SC	(864)388-7760	Greenwood	SC A		Included	.00	.00
96	11/04	08:50P	P	1	Greenwood SC	(864)295-9382	Greenville	SC A		Included	.00	.00
97	11/04	09:21P	O	21	Greenwood SC	(864)992-2821	Mobile	CL M		.00	.00	.00
98	11/04	09:42P	O	1	Greenwood SC	(864)992-2821	Greenwood	SC M		.00	.00	.00
99	11/04	09:42P	O	1	Greenwood SC	(864)992-2821	Greenwood	SC M		.00	.00	.00
100	11/04	09:43P	O	1	Greenwood SC	(864)992-2821	Greenwood	SC M		.00	.00	.00
101	11/04	09:44P	O	1	Greenwood SC	(864)992-2821	Greenwood	SC M		.00	.00	.00
102	11/04	09:44P	O	1	Greenwood SC	(864)992-2821	Greenwood	SC M		.00	.00	.00
103	11/04	09:45P	O	1	Greenwood SC	(864)992-2821	Greenwood	SC M		.00	.00	.00
104	11/04	09:45P	O	33	Greenwood SC	(864)295-9382	Greenville	SC		.00	.00	.00
105	11/04	10:23P	O	1	Greenwood SC	(864)377-0080	Incoming	CL		.00	.00	.00
106	11/05	08:45A	P	1	Greenwood SC	(803)446-5269	Columbia	SC A	REG	Included	.00	.00
107	11/05	09:37A	P	2	Greenwood SC	(803)446-5269	Columbia	SC A	REG	Included	.00	.00
108	11/05	10:34A	P	1	Greenwood SC	(864)223-3868	Greenwood	SC A		Included	.00	.00
109	11/05	10:41A	P	41	Greenwood SC	(864)377-0080	Incoming	CL A		Included	.00	.00
110	11/05	11:23A	P	2	Greenwood SC	(864)227-8775	Greenwood	SC A		Included	.00	.00
111	11/05	11:24A	P	2	Greenwood SC	(864)341-2450	Mountville	SC A		Included	.00	.00
112	11/05	03:09P	P	18	Greenwood SC	(864)377-0080	Incoming	CL A		Included	.00	.00
113	11/05	05:27P	P	1	Greenwood SC	(803)446-5269	Columbia	SC A	REG	Included	.00	.00
114	11/05	05:28P	P	1	Greenwood SC	(803)446-5269	Columbia	SC A	REG	Included	.00	.00
115	11/05	05:28P	P	19	Greenwood SC	(803)446-5269	Columbia	SC A	REG	Included	.00	.00
116	11/05	07:42P	P	1	Greenwood SC	(864)254-6098	Greenville	SC A		Included	.00	.00
117	11/05	07:45P	P	45	Greenwood SC	(864)254-6098	Greenville	SC A		Included	.00	.00
118	11/06	08:40A	O	12	Greenwood SC	(864)377-0080	Incoming	CL		.00	.00	.00
119	11/06	10:25A	O	32	Greenwood SC	(864)375-1166	Anderson	SC		.00	.00	.00
120	11/06	10:25A	O	3	Greenwood SC	(864)377-0080	Incoming	CL C		.00	.00	.00
121	11/06	10:43A	O	46	Greenwood SC	(864)377-0080	Incoming	CL C		.00	.00	.00
122	11/06	11:26A	O	2	Greenwood SC	(864)375-1166	Anderson	SC		.00	.00	.00

Jane's motive - girlfriend jealousy
- took time from her that she once spent w/ Joann

November 6, 2004

Percival-Thompkins
330 Magnolia Avenue
Greenwood, SC 29646

Reference: Mr. Sanford Dion Best

The family of Mr. Sanford D. Best is requesting that Ms. JoAnn Wilson and members of her family are not allowed to attend the Wake, the funeral, nor are they prohibited to have any personal time viewing the body of Mr. Sanford D. Best

We (the Best family) are also requesting that Ms. JoAnn Wilson is notified of our request. If Ms. Wilson and her family fail to comply with this request, it will result in their arrest.

This information will be forwarded to the Greenwood City Police Department and the Greenwood County Sheriff's Office

Sincerely,

Mrs. Lula A. Best, mother of Mr. Sanford D. Best

Notary Public: Felicia A. Mota
Commission Expiration: 12/4/2005

CRIME SCENE EVIDENCE LOG

Exhibit 37

CASE NO. 04-116951 DATE 11-04-04
 LOCATION 3938 McClellan Hwy, Beasley SC (PRIMARY ☒ SECONDARY ☐
 EVIDENCE TECHNICIAN Sgt Eric D. Jones SIGNATURE Sgt Eric D. Jones

ITEM NO.	DESCRIPTION	LOCATION FOUND
1	TWO (2) Pcs. OFF WHITE ROCK-LIKE SUBSTANCE	DRIVER'S SEAT OF VICT #3'S VEHICLE
2	ONE (1) Pcs. OF DUCT TAPE, SILVER/GRAY IN COLOR - BUNDLED	PASSENGER SEAT (FRONT) OF VICT #3'S VEHICLE
3	ONE (1) .380 AUTO CAL. CARTRIDGE	BACK YARD OF RESIDENCE, ON GROUND AT REAR OF CHRYSLER VAN.
4	ONE (1) .380 AUTO CAL. CARTRIDGE	BACK YARD OF RESIDENCE, ON GROUND AT REAR OF CHRYSLER VAN.
5	ONE (1) .380 AUTO CAL. CARTRIDGE	BACK YARD OF RESIDENCE, ON GROUND UNDERNEATH CHRYSLER VAN.
6	ONE (1) BUNDLE OF PAPER - FOUR (4) Pcs.	MASTER BEDROOM - ON BED
7	TWO (2) Pcs. OF DUCT TAPE, SILVER/GRAY IN COLOR	MASTER BEDROOM - IN TRASHCAN
8	BLOODSTAIN ON WALL	MASTER BEDROOM - HALF WALL BESIDE TOILET.
9	ONE (1) BIBLE, BLACK LEATHER COVER, VICT'S NAME ON FRONT	MASTER BEDROOM - ON BED ABOVE VICT #1
10	ONE (1) PILLOW w/ BLOODSTAIN	MASTER BEDROOM - ON BED
11	VICT'S WALLET, BLACK LEATHER, CONTAINING TWELVE DOLLARS IN U.S. CURRENCY (\$12.00) AND VICT'S SEAL	FLOOR OF MASTER BEDROOM - IN VICT'S #1 POCKET.
12	PILLOW, ONE (1) w/ BLOODSTAIN	MASTER BEDROOM - ON BED, ABOVE VICT #1 HEAD
13	ONE (1) .380 AUTO CAL. SHELL CASING	MASTER BEDROOM - ON FLOOR AT HEAD OF BED
14	ONE (1) KNIT CAP, BROWN/ROST STRIPES ON TAN	BACK DECK OF RESIDENCE

33

GUNSHOT RESIDUE WORKSHEET

LAB NUMBER L04-12594ANALYST JMSDATE 8-9-05

Exhibit 38

Name / Location	Notes	Unique	Mixture	Single	ICP Data	Conclusions
#15 one shirt R. cuff Front	OK	(-)	(-)	(-)	/	oms. Negative
R. cuff Back	OK	1 NR GSR	(-)	1 Round Lead	/	} (+) Round Lead
R. sleeve	OK	(-)	(-)	2 Round Lead	/	
L. cuff Front	OK	(-)	1 Round Pb	3 Round Lead	/	} (+) Round Lead
L. cuff Back	OK	(-)	(-)	1 Round Lead	/	
L. sleeve	OK	(-)	(-)	1 Round Lead	/	

40

GUNSHOT RESIDUE WORKSHEET

LAB NUMBER LO4-12544ANALYST JMSDATE 8-8-05

Name / Location	Notes	Unique	Mixture	Single	ICP Data	Conclusions
#23 ONE JACKET						
R. cuff Front	OK	⊖	⊖	⊖	/	} Negative
R. cuff Back	OK	⊖	⊖	⊖	/	
R. sleeve	OK	⊖	⊖	⊖	/	
L. cuff Front	OK	⊖	⊖	⊖	/	} Inconclusive
L. cuff Back	OK	⊖	⊖	⊖	/	
L. sleeve	OK	⊖	⊖	1 Round lead	/	

Exhibit 39

Adam Bacot

From: Tripp Padgett**Sent:** Friday, January 06, 2006 11:51 AM**To:** Adam Bacot

A guide to gunshot residue analysis for the criminal defense investigator/attorney.

By: James W. Harbert CLI

Scientific evidence, including the analysis of gunshot residue (GSR), is a most fascinating aspect of criminal investigation.

GSR tests are used to determine whether or not an individual may have fired or handled a gun that has been fired. This test is most commonly used in murder and suicide investigations.

Gunshot residue consists of traces of antimony, barium and lead that are part of the blow back when a weapon is fired. The blow back consists of the residue of the primer, gunpowder and bullet. Antimony is also a hardening agent used in lead bullets. The amount of gunshot residue usually depends on the type of weapon, the number of times it was fired and the caliber of the weapon. The literature indicates that a revolver will produce more GSR than an automatic, a .38 caliber weapon will produce more GSR than a .22, a gun fired three or four times will produce more GSR than a gun fired once. These are reasonable statements but are not always true. It has been found that on occasion the opposite is true. The quantity of GSR depends on the quality of the gun, the brand of ammunition and the amount of wear and tear on the gun in question. A .22 Rossi revolver can leave large amounts of GSR and a .44 magnum Ruger Redhawk leaves very little, while the little .25 caliber automatic can be the dirtiest of all. [1]

In the Atomic Absorption GSR test, the chemist looks for chemical traces of antimony and barium, two elements fairly rare in the environment but common in cartridge primers. The ratio between the barium and the antimony, and in most labs, the lead, indicates whether or not the test is positive or negative for gunshot residue. Using the atomic absorption method of analysis, the lab and its analysts develop a critical level for GSR above or below which indicates whether the test is positive or negative. This critical level is called the threshold. The threshold is determined by control discharge studies and hand blank analysis.

(Photographs of primer, powder, casing and bullet, 1a and 1b)

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Control discharge studies are known values or tests for GSR residue. The FBI has established some of these values, the lab in which the sample is tested others, and the actual analyst will have done yet others. A competent chemist must have something with which to compare the results of the tests. [2] A good example would be a DUI blood analysis. The value in Florida is .08%, some states require a .10% BA, but this is the standard to which the chemist compares his test. It works the same way with GSR. The chemist establishes either through personal tests, State lab tests or FBI charts and tests what the threshold will be. If the given test meets or exceeds this level, then it is positive for GSR. If it does not, then the chemist will say it does not meet the criteria but that does not mean that the suspect did not fire a gun. By doing control discharge studies, the chemist establishes the values that he will use for comparison purposes. Unless you ask about these materials you will never hear about them.

There are two basic tests for gunshot residue, one using atomic absorption analysis (AA) and one using the scanning electron microscope (SEM). Because these tests are commonly done by a state laboratory, they will dictate to the agencies which type of collection kit to use. They are different. While atomic absorption is the most common of the two GSR tests at this time, the scanning electron microscope gives the more conclusive results. Perhaps 20 to 30% of crime labs now use the scanning electron microscope method of GSR determination. [3]

Atomic Absorption

GSR is collected for atomic absorption analysis by using a kit containing vials of cotton tipped swabs and nitric acid. There are five or sometimes six vials of two swabs each. The test is completed by treating the swabs with four drops each (kits may vary) of the dilute nitric acid and then rubbing them on the hands of the individual being tested. The GSR is dissolved in the nitric acid on the swab. The right back of the hand is tested with one set, the right palm with another. Same with the left hand. One additional swab receives four drops of nitric acid, except no swabbing is done with this swab. This is placed in the container and used as a control. The swabs are resealed in their vials and packaged in a plastic box to be properly marked with the defendant's name, the date and exact time of the test and an approximation of how long since the gun was fired.

(Photographs of atomic absorption kit, 2a, 2b, 2c, 2d)

The kit is then sent to a crime lab where an analyst tests the swabs by again treating them with a dilute nitric acid solution, one at a time, and testing them in an atomic absorption spectra-photometer. The results will come back to the investigator indicating whether or not gunshot residue is indicated. The analyst will give the specific amount of each element. If the amounts are detailed, they could be in PPM (parts per million) or micrograms per milliliter or just referred to as micrograms. They are all the same amounts, but expressed in different ways. [4]

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Scanning electron microscope

The collection of GSR residue for analysis with SEM is not a chemical based procedure. One of the characteristics of GSR is that it is easily transferable, that is it can be wiped off, washed off, wiped onto something else and generally is a transient and temporary phenomena. SEM collection methods utilize a double

sided sticky tape that has a stub of some type and is dabbed on the surface of the area to be collected, not placed directly on the surface. The actual particles of GSR will adhere to the tape. The tape is sent to the lab and then examined with the SEM. The residue in this test can be positively and conclusively identified as GSR.

(Photographs 3a, 3b, 3c, 3d, 3e, 3f, 3g, 3h, SEM collection kit)

The tests done by SEM cause a searching of the sample for actual individual particles of residue. These are usually spherical or 3-dimensional and contain lead, barium, and antimony for a specific identification. They are usually 3-10 microns in size but are often found at 1 micron size and smaller. A micron is about one millionth of a meter. There are times when a complete searching of the sample yields only one or two micron sized particles. It is not likely that that would have been detected by the AA (atomic absorption) method. Experts in the field opine that SEM is more sensitive than AA and definitely more specific. The AA only makes a determination of the amounts of metal present. [5]

What to look for in gunshot residue analysis:

1. Labs testing for GSR with atomic absorption will establish a threshold value for antimony and barium. As explained earlier, a threshold establishes that the test is positive if the results are above the threshold and negative or not conclusive if the results are below the threshold. The laboratory or agency usually establishes a uniform threshold that all of its chemists adhere to. Ideally the threshold levels of antimony and barium should be established by the chemists who are conducting the tests. The tests should be completed using their own equipment in the lab that originates the tests. As in any test, it is only as accurate as the equipment and constancy of the procedure that is used.

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When investigating for the defense in a case such as this, you may find that different chemists will use different values. For example, one chemist may testify that using his equipment and his studies, a .05 level of antimony is sufficient to indicate that the suspect fired a gun. [6] Many other labs in the country have a threshold higher than .05. Florida has a threshold of .1, [7] ATF has a threshold of .15. The FBI, an agency which is commonly used as a standard, uses .05. The FBI, however, uses neutron activation analysis. This is an extremely accurate test which utilizes a nuclear reactor to measure the amount of metals present just as is done with the AA spectrometer. It does not, however, look for lead. [8]

The point is, many of the agencies use different machines, different methods, but claim the same result. While it is not like comparing apples and oranges, it will offer a percent of deviation that should be addressed if the chemist starts making the comparisons. Thresholds should be established using the same machine and control discharge studies. The higher the threshold the greater the possibility of eliminating the environmental factors which cause false readings. [9] (also see paragraph #4).

2. If the gun was collected and test fired ballistically was a GSR test done during the ballistics test? When a gun is tested for ballistics, the examiner can fire the same number of bullets as was fired at the crime scene. The examiner can then take samples from his hands using a common collection kit and ship them to the GSR chemist for testing. The examiners will rarely do this even though it is recommended by one of the inventors of the neutron activation test. [10] This procedure would eliminate problems associated with individual guns, number of shots and possible environmental conditions. The only restrictions are the time and cost.

3. If you have a non-conclusive test, did they just test for one element, antimony? The test could have eliminated the Defendant if barium was tested for and not found in conjunction with antimony. Barium by itself is too common in the environment to be conclusive on its own. GSR has to have antimony and barium in a proper ratio. Most analysts also recommend testing for lead in conjunction with antimony and barium.

4. Antimony is found in the environment and workplace.

Plumbers, electricians, automotive mechanics, and others routinely have levels of antimony on their hands. For this reason the crime lab chemists regularly (in Florida they are required to) do occupational hand blank tests, [11] searching out working people in different occupations, swabbing their hands with nitric acid and testing for occupational levels of antimony and barium. The labs require this so that the chemist will know what the average occupational level of antimony is for certain occupations. As stated previously, a person with just antimony--no barium--who is a plumber--may have occupational levels of antimony sufficient to indicate that he has fired a gun.

5. Police equipment such as handcuffs, guns and gun belts, can carry and transfer GSR to a suspect.

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Anything that the police officer touches while at the range, or after handling a gun, can have GSR transferred to it.

6. Clothing can be examined with a scanning electron microscope but it is important to remember that, assuming that the clothing is not washed or cleaned, GSR can stay in the clothes for an extended period of time.

7. GSR can be easily rubbed off or washed off the hands. If

a person has had a chance to wash his hands thoroughly, there will be no GSR. As time goes by GSR will slough off. The longer the period of time, the less likely GSR will be found in threshold levels. Officers who take the samples must wash their hands thoroughly and use the rubber gloves provided in the kit to prevent contamination of the sample.

8. If your client is tested and the GSR is less than the threshold amount, the Prosecutor may bring in an expert to testify that the findings still indicate that the Defendant has fired a gun. If this happens you can use your own expert to contradict this position. In addition you can run tests with an exemplar gun or the gun in question. By firing the gun the same number of times and waiting for the appropriate time after firing the gun, a chemist can take the necessary samples using the same type of kit that the police used and test the samples. If the test readings are much higher than the state's threshold readings, than you have good testimony for the trial.

9. When questioning the Prosecutor's GSR expert, ascertain what the exact readings were on each of the swabs tested. The chemist should have tested a control swab which would be negative. If the control is positive in any amount the test is invalid. The next readings should be right hand palm, right hand back, left hand palm, left hand back. If the Defendant is left handed and there is a small amount of antimony or barium on the right hand and none on the left, it could be argued easily that the results from the right hand were environmental or occupational. Or if the defendant had something other than a gun in one of his hands, and this hand is positive for antimony or barium, it could also be argued that he was not the shooter.

10. GSR residue comes out of the gun in "blowback". It exhausts from the muzzle, cylinder or any leaky areas in a cloud of residue. Conceivably a person standing beside the shooter will have GSR on his person. It is unlikely that it will be on a bystander's hands in threshold quantities. This should be noted because the SEM examination for GSR positively identifies actual particles of GSR. Using this test, it would be possible to positively identify particles of GSR on an individual standing in the vicinity of the shooting. Tests have shown that residue in the emissions around a discharging gun will be deposited several feet to each side and to the rear of the shooter. GSR has been detected as much as 14 feet down range of the muzzle. [12]

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11. There are a few cartridges that utilize primers that do not use antimony and barium. Only recently have these appeared on the market, they are mostly .22 caliber and are marked "lead free" and "clean fire." [13] This is mostly a problem for the prosecution rather than the defense.

12. The weather. Rain, wind, or snow may change the amount of

residue present. If a hard wind is blowing from behind the shooter, it is conceivable that much of the residue will be blown forward and not deposited on the shooter. It could be deposited on another subject or object in the path of the wind. This is important to know if you represent a person who was close to the shooter and the police performed the GSR test on everyone. They may try and use the test to determine who fired the gun. If your client was standing next to the shooter, with the wind in the proper direction, he could have a positive test result. Also, since GSR is water soluble, shooting in rain or snow could cause some or all of the residue to be washed off. [14]

Questions for the GSR Expert

1. What is your background and training in gunshot residue analysis and testing?
2. What is your experience in gunshot residue analysis using AA (atomic absorption)?
3. What type of instrumentation have you used.
4. What procedures have you used? Have you actually collected GSR for testing? How many swabs are commonly used? Where is the GSR collected from on the hand, and in the instant case, what were the specific results of the test on each collection area?
5. What is your actual experience in test firing? Have you done extensive tests? Have you developed standards on your own? Do you use your own control discharge studies, the FBI's, or the agency for whom you work? If the expert uses others' studies, and did not prepare his own, does the expert know what type of equipment was used to make the tests in the other studies, how new the equipment was, etc.? Note: While it is disputed, chemists have testified that there can be as much as a 40% difference (20% up or down) in the results between a newer machine and an older machine (atomic absorption)

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spectrophotometer)and because they use the newest and most modern equipment they can use a lower threshold value than what has been established in other labs. [15]

6. What about the analysis of hand blank studies on different occupations? Are there many occupations that give you more than .05 Antimony? What are those occupations and give examples of the levels of antimony and barium found in occupations?

where does the antimony and barium come from in those occupations?

7. Are there some guns (make, caliber, models) that you test fire which give you below a .05? Elaborate on that.

8. How accurate are the expert's procedures? What about the equipment calibration? What type of standards does the expert use for lead, barium, antimony and how are they mixed? What is the usual ratio of these metals? What is the ratio in this case?

9. What method of analysis does the expert use? Have the expert explain the procedures and how the samples were tested.

10. What is the expert's criteria for a positive or conclusive result? What are the ratios that the expert used between antimony, barium and lead? What this means is, "what level of antimony or barium has to be present for the expert to conclude that the subject fired a gun?" What is the experts minimum requirements for a positive result? Does the expert have to analyze both antimony and barium to determine this? Does the expert stop if the antimony level is below the threshold criteria or does the expert determine barium presence even if the antimony is below threshold values?

→ If the chemist finds that the antimony level is below the threshold for a positive result, the expert can
→ conclusively clear the defendant if he does the barium analysis and finds no evidence of the barium.
→ This would mean that the antimony is occupational in nature and is not GSR. This, however, is not
→ likely to happen. If a test is negative the expert usually just says that there was not enough gunshot
→ residue. If a test is positive, the expert says that the defendant fired the gun.

11. What is the expert's understanding of thresholds used in other labs across the country? The chemist should elaborate on how his threshold values compare to others. The expert may deny knowledge of other values and if so, should have recent accurate control discharge studies using his machine to establish his values.

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12. Have the expert produce his lab's protocol. This is the step by step procedure for conducting the tests, establishing the threshold, setting the machine, etc. In addition you should have the chemist produce the control discharge studies that he uses. If you are using an expert of your own to retest the samples or to testify, it is a good idea for your expert to have the protocol and the prosecutions expert's deposition prior to giving his testimony.
13. What are some other uses for antimony? Plumbing, electrical, industrial, chemical applications.
14. What amount of antimony does the expert expect to find on the hands of a person who has shot a .38 revolver (or the type of weapon that is involved in your specific case)?
15. What would the expert expect to see as a result of multiple shots with the same gun and ammunition? There should be a higher concentration of GSR with multiple shots. The question is, what was the level that the expert found in the instant case--was it consistent with one shot, or would it have been consistent with more than one shot? Is there an inconsistency between the evidence and the analysis?
16. What is the expert's knowledge of antimony in the environment, where it is found, and in what quantities?
17. How much antimony is found on persons in various occupations. Plumbers, electricians, etc.? The chemist should have hand blank tests showing these results. The lab's protocol will outline the chemist's requirements for doing individual hand blank analysis to determine occupational levels of antimony. The defense attorney should request those studies and protocols.
18. What occupations could produce results of higher than .05 on their hands? Some industrial and chemical concerns use antimony is 50 and 100 lb. Bags. A person working in the vicinity of these quantities would have it on his hands, clothes, in his car, almost everywhere. It would also rub off on others who rode in the car and brushed against his clothes.
19. Without testing for other elements, what does the presence of antimony mean on a person's hands?
20. What other elements does he test for in his lab?

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21. Without testing for barium in a GSR test, what do the results mean? The results may be only occupational antimony. It is important to remember that these results are only meaningful when found in sufficient quantities in a ratio that has been established as valid.

22. Does the expert also test for lead to confirm the result of the test if barium and antimony are found? If not, why not? Note: Some experts feel that antimony, barium or lead by themselves are not positive, you must test for all three to be conclusive. Many labs only test for antimony and barium.

23. If the expert finds barium, antimony and lead above the threshold levels, does that conclusively establish gunshot residue?

24. Would the expert expect a person to have a higher level of antimony on his hands if only 30 minutes has passed since the gun was fired or 1 hour? How does time effect GSR? The longer the substance is on the suspect's hands the more likely it will be removed. The act of moving, wiping the face, or rubbing against any object will remove the GSR. If the suspect washes his hands it is gone. A GSR test should be done as soon as possible after the shooting.

25. What amount of antimony and barium would be on the hand

from just handling a gun? Has the expert done hand blank tests to determine the levels after just holding a gun that has been fired? What were those results? Would there be more from firing a gun or handling a gun? Is there a difference in where the residue is deposited, and if so, please explain why? Note: Residue will be deposited mainly on the back of the hand and outside of the fingers if the gun was fired. If it was handled, the GSR would be on the inside of the fingers and hand. Remember that each swab is taken from a different location on the hand. If the defendant has no residue in the most likely place, it may indicate that he only handled the gun.

26. What effect would handcuffs have on a suspect who is to be tested for GSR? Note: The handcuffs could be contaminated with GSR from the police officer handling them after firing his weapon. In addition the placement of the handcuffs can wipe off some of the residue. If the suspects hands are handcuffed behind him and he is then placed in a police car, the GSR can be wiped off as he rubs the outside of his hands against the back of the seat. If the seat had recently been used to transport recently fired weapons from the firing range, GSR from the shotguns, pistols or rifles can rub off on the seats and be transferred in small quantities to the suspect's hands.

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Glossary of terms (in order of appearance)

Blow back: a term describing the rearward and sideward discharge of gases and residue during the firing of a weapon. In general there are basically two types of handguns, a revolver and a semi-automatic pistol. The revolver discharges gases, powder, lead and primer residue from gaps between the cylinder and barrel, the barrel and rear of the cylinder. The semi-automatic pistol uses the discharge gases and recoil to open the breech, eject the fired casing and load another bullet. GSR is discharged during this process from the open chamber, from the gas which is kicked back during the slide operation, and, of course, from the barrel.

(Photographs of .45 semi-automatic pistol, 4a, 4b, 4c)

(Photographs of small caliber semi-automatic pistol, 5a, 5b, 5c)

(Photographs of P-38 semi-automatic pistol, 6a, 6b)

(Photographs of .357 Magnum revolver, 7a, 7b)

Atomic absorption GSR test: This test is commonly used to determine if an individual has fired a gun. Many times it is used in investigations where suicide is suspected. The presence of GSR on the deceased hands will rule out murder. In most shooting investigations AA is used to provide scientific evidence at the trial that the suspect fired a gun. Police crime scene investigators usually perform the test using a commercially purchased GSR analysis kit. The kit contains swabs in glass tubes. Each tube is marked as to where it will be used, right palm, left palm, right back, left back, cartridge case and control. Each swab is moistened with a 5% solution of nitric acid and used. The control is just moistened with the nitric acid and replaced in the tube. The cartridge case swab is moistened with nitric acid and used to swab the inside of the cartridge case. The case number and all pertinent information is filled out on an attached label and sent to a regional lab with GSR test capability. The swabs are then analyzed by a chemist using an atomic absorption spectra-photometer.

Threshold: the level at which the chemist can say that the test indicates that the suspect fired a gun. This threshold is based on control discharge studies performed by the chemist himself, the lab or agency for whom he works, the FBI, or perhaps the ATF.

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Control discharge studies: In order to determine what minimum level of antimony, barium and lead is present when a firearm is fired, a control discharge study must be performed. The chemist will shoot different firearms with different ammunition under different circumstances. Each of these firings establishes a criteria. The chemist then uses that criteria to compare to unknowns that he is asked to analyze. The chemist establishes a known level for each of these caliber's, guns and circumstances to which he can later compare GSR tests.

Hand blank analysis: Lab protocols may call for a chemist to go into the community and randomly test different people in different occupations. These tests give the chemist a knowledge of what ambient level or occupational level of antimony and barium is present in the general population and in different occupations. These tests can be used to compare to the cases where it is necessary to determine if a given person fired a gun. If one knows the ambient or occupational levels, it is less likely there will be a mistake or a positive GSR test.

Scanning electron microscope: This is an extremely powerful microscope that can observe the individual particles of GSR. It is much more accurate in finding the presence of GSR than the atomic absorption method. But remember, the presence of particles of GSR observed through a SEM do not necessarily mean that the defendant fired a gun.

Atomic absorption spectrophotometer: Machine used by chemists to find and measure the presence of barium, antimony and lead in GSR studies.

Micrograms per milliliter: Same as microgram. A unit of measurement used in the analysis of GSR using the atomic absorption spectrophotometer.

Neutron activation test: Neutron activation is a similar test to atomic absorption except that a nuclear reactor is used in the analysis. Dr. Vincent P. Guinn, author of "Applications of Nuclear Science in Crime Investigation" developed the procedure which was mainly used by the FBI.

Exemplar gun: An exemplar is a duplicate of the original. In this context, if you cannot use the actual gun that was fired, another gun of the same make and model using the same ammunition could be used. It is always best to use the actual weapon. Handguns can vary in their assembly, wear and tightness even among same makes and models.

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Endnotes:

[1] By studies and observations and experiences of Bob White, Forensic Chemist, retired head of the West Virginia Crime Laboratories. (7006 Kanawha Farm Circle, Charleston, WV 25312-9417—telephone 304-984-9456)

[2] FBI values are only available to other labs and analysts. This information can be obtained through discovery.

[3] Daniel Radcliffe, Florida Department of Law Enforcement crime scene analyst, testifying in deposition as a GSR expert in the Michael Griffin murder trial in Escambia County, Florida (1993).

[4] Bob White *ibid*.

[5] Bob White *ibid*.

[6] Testimony of Dr. Irving Stone, head of the Dallas, Texas crime laboratory. Michael Griffin murder trial, 1993/4)

[7] Daniel Radcliffe, crime laboratory analyst, Florida Department of Law Enforcement, deposition testimony in Michael Griffin murder trial (1993/4).

[8] Bob White, *ibid*.

[9] Bob White, *ibid*.

[10] Dr. Vincent P. Guinn, Laurel, MD., author of the article Applications of Nuclear Science in Crime investigation. Comments concerning this procedure were made by Dr. Guinn to the author during the Michael Griffin murder investigation.

[11] Florida Department of Law Enforcement GSR lab protocol.

[12] Bob White, *ibid*.

[13] Bob White, *ibid*.

[14] Bob White, *ibid*.

[15] Dr. Irving Stone, head of the Dallas, Texas crime laboratory in his deposition testimony in the Michael Griffin murder trial.

The author extends his thanks to Bob White, Forensic Chemist, retired head of the West Virginia

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Crime Laboratories, who was interviewed and quoted in this chapter and to Jim Richbourg of the Pensacola Police Department who supplied the evidence collection kits, took some of the collection photographs and assisted me in taking the remainder.

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Exhibit 40

BALTIMORE SUN

Convictions tied to controversial gun-residue test

Prosecutor's office counts several cases over 5 years; Defenders seek further review

By Julie Bykowicz
Sun Staff

March 27, 2005

The Baltimore state's attorney's office said last week that it has found about half a dozen convictions in cases that may have involved the controversial identification of gunshot residue evidence.

The preliminary review of shooting and weapons cases from the past five years came after a Circuit Court judge decided last month to exclude a two-element particle of gunshot residue evidence from a trial. He said a particle containing three elements -- lead, barium and antimony -- is required to meet the scientific community's threshold for establishing that a substance is gunshot residue.

Prosecutors insist that no one has been wrongly convicted. But defense attorneys say that enough questions have been raised to demand further review.

"We've said all along that the judge's ruling would not affect many, if any, cases, and our review proves that," said Margaret T. Burns, spokeswoman for the state's attorney's office. She said the assessment was preliminary and that prosecutors were still analyzing the findings. Burns also said it was too soon to tell how big of a role the disputed gunshot residue evidence played in the convictions.

Burns said gunshot evidence is used sparingly in the 10,000 felony cases prosecutors handle each year -- and that it is never presented to a jury without other corroborating evidence.

Defense attorneys said the prosecutors' review points to the ripple effect of evidence that some view as flawed. Of about 100 gunshot residue tests over the past five years that were deemed positive based on two-element particles, about 70 became part of criminal cases -- though often the suspected residue was collected from a person who ended up as a witness.

This could be problematic, the defense attorneys said, because some witnesses could originally have been co-defendants who agreed to cooperate with prosecutors only after learning that their hands tested positive for gunshot residue. On the flip side, prosecutors might have kept gunshot residue-positive witnesses from testifying, fearing credibility problems.

"The important point is that we're talking about bad science," said Patrick Kent, chief of the public defender's forensic division, which is examining gunshot residue evidence. "Unreliable evidence is unreliable evidence, and it has an impact on the criminal justice system that is simply unacceptable."

Burns said prosecutors see the issue differently.

"It appears that the forensic dream team is grasping at straws to prove a point," she said in a statement. "They have hit a dead end on their original theory that there were 'staggering' numbers of cases where this is an issue.

Gunshot residue is made up of tiny particles composed primarily of lead, barium, antimony and fusions of those three elements. It has been used for decades in courts across the country. But the Baltimore Police Department's collection and analysis of gunshot residue is being closely scrutinized by Kent and other public defenders who say the police crime laboratory has a pattern of problems with contamination.

More recently, the public defenders said, they have discovered that the lab uses what they believe to be too low of a standard for determining what it identifies as gunshot residue. Although many police departments define gunshot residue as particles with three elements, Baltimore says that some two-element particles can conclusively be called gunshot residue.

At a hearing last month, Baltimore Circuit Judge John C. Themelis agreed with the defense contention that only particles containing a fusion of lead, barium and antimony can conclusively be called gunshot residue. Themelis did not allow the jury to hear about a two-element particle that crime lab analyst Joseph Harant labeled gunshot residue. Police spokesman Matt Jablow has said the department "respectfully and vigorously" disagrees with Themelis.

The American Society for Testing and Materials considers some two-element particles to be gunshot residue, and the Maryland State Police also use that standard, Jablow said. However, the FBI and many police crime labs consider only three-element particles to be uniquely gunshot residue.

A media request after Themelis' Feb. 22 ruling prompted the state's attorney's office to research how often prosecutors have presented two-element particles as gunshot residue evidence, Burns said.

The prosecutors' office looked at test results from 2000 to present — the same time period that public defenders are using in their search for two-element cases that they said could have resulted in wrongful convictions.

Public defenders announced this month that of the 600 or so laboratory reports they had reviewed, they'd found about 100 gunshot residue tests with positive findings based on two-element particles.

Public defenders chose to begin in 2000 based on testimony from Harant, the city's only gunshot residue analyst. He testified in April that he had attended a conference in April 2000 at which he learned that "the scientific or gunshot residue analyst community changed the definition" of gunshot residue to be only three-element particles.

Harant testified differently before Themelis last month, saying that he still considers some two-element particles to be conclusively gunshot residue. Themelis said the seemingly contradictory testimony was "disturbing."

Kent said public defenders would examine hundreds of pre-2000 gunshot residue tests to see whether any positive conclusions were based on two-element particles. Some defense attorneys also said that Harant should no longer be qualified to testify, although he has done so at least three times since Themelis' ruling in February.

As the public defenders conduct their review, they and other defense attorneys are engaging in a case-by-case attack on gunshot residue evidence:

- In court last week, Circuit Judge John M. Glynn limited the scope of Harant's testimony in defendant Broderick Campbell's shooting case. Glynn said Harant did not adequately explain the scientific basis for his conclusion that the presence of suspected gunshot residue meant that the person tested "most probably" fired a weapon or was near a weapon when it was fired.

Campbell's attorney, Catherine Flynn, said her case became stronger when Harant was not permitted to testify about his conclusion. Campbell, who was accused of shooting at a city police officer, was acquitted of attempted first-degree murder and all other charges related to the firing of a weapon.

- Public defenders recently were granted another post-conviction hearing in the case of Tyrone Jones, sentenced to life in prison for a 1998 murder. In May last year, a Circuit Court judge rejected a request for a new trial based on issues of contamination, but the same judge agreed to hear a similar motion this May.

- Prosecutors recently withdrew gunshot residue evidence from a shooting case of defendant Colby Madison, who is scheduled for trial in May. Public

defenders had filed a motion to exclude the evidence, alleging that police had violated their protocol by not immediately bagging Madison's hands -- to prevent the inadvertent transfer of gunshot residue -- when they arrested him.

Kent said these individual cases should be viewed as evidence of a systemic problem within the Police Department's crime lab. He said his office sent a letter last week to Jessamy, urging her to meet with the public defenders. Burns said Jessamy received the letter and will meet with them soon.

"Both of us have pieces of information, and I think we can get an accurate picture of what's going on only if we sit down together and talk," Kent said. "This should be a concern for the entire legal community -- not just public defenders."

Junk Science

Truth in Justice

Exhibit 41



Return to the Firearms Tutorial menu.



Return to Criminalistics Laboratory Methods.

Examination of Gunshot Residue

Composition of gunshot residue

Firing a weapon produces combustion of the primer and powder of the cartridge. The residue of the combustion products, or unburned primer or powder components, can be used to detect a fired cartridge. Residue may be found on the skin or clothing of the person who fired the gun, on an entrance wound of a victim, or on other target materials at the scene. The discharge of a firearm, particularly a revolver, can deposit residues even to persons at close proximity, so interpretations as to who fired the weapon should be made with caution. (Thornton, 1986)

The major primer elements are lead (Pb), barium (Ba), or antimony (Sb). Usually, all three are present. Less common elements include aluminum (Al), sulfur (S), tin (Sn), calcium (Ca), potassium (K), chlorine (Cl), or silicon (Si). A mercury-fulminant based primer may be found in ammunition manufactured in Eastern Europe and used in the Middle East. (Zeichner, et al, 1992) Primer elements may be easier to detect in residues because they do not get as hot as the powder, and compounds (not just elements) may be detectable. (Tassa et al, 1982b)

In addition, primer residues may adhere to fired bullets and gradually ablate through the path of the bullet. Thus, primer residue may be found in targets or wounds at considerable distance from the muzzle (up to 200 meters).

The cartridge case, bullet, bullet coating, and metal jacket also contain specific elements that can be detected. Virtually all cartridge cases are made of brass (70% copper and 30% zinc). A few have a nickel coating. Primer cases are of similar composition (Cu-Zn). Bullet cores are most often lead and antimony, with a very few having a ferrous alloy core. Bullet jackets are usually brass (90% copper with 10% zinc), but some are a ferrous alloy and some are aluminum. Some bullet coatings may also contain nickel. (Ravreby, 1982).

Modern gunpowder, or "smokeless" powder, can contain up to 23 organic compounds (FBI study). Nitrocellulose is virtually always present, along with other compounds containing nitrate or nitrogen. One of these compounds, diphenylamine (used as a

stabilizer in the powder), can be detected using reagents containing sulfuric acid. (Maloney et al, 1982) Modern gunpowders are also described as "single-base" when the basic ingredient is nitrocellulose and as "double-base" when there is additionally 1 to 40% nitroglycerine added. Hardy and Chera (1979) describe a method to differentiate them using a mass spectrometer.

In the physical examination of the scene or body for evidence of gunshot residue, it must be remembered that lead residues may mimic gunshot residue. Lead residues may be found up to 30 feet from the muzzle, and are always present on the opposite side of a penetrated target. Such a situation has been reported when an intermediate target (glass) was present. (Messler and Armstrong, 1978)

Though the amount of residue deposited tends to decrease with increasing range of fire, the actual deposits can be highly variable for ranges up to 20 cm. (Brown, Cauchi, et al, 1999)

Detection of Gunshot Residue

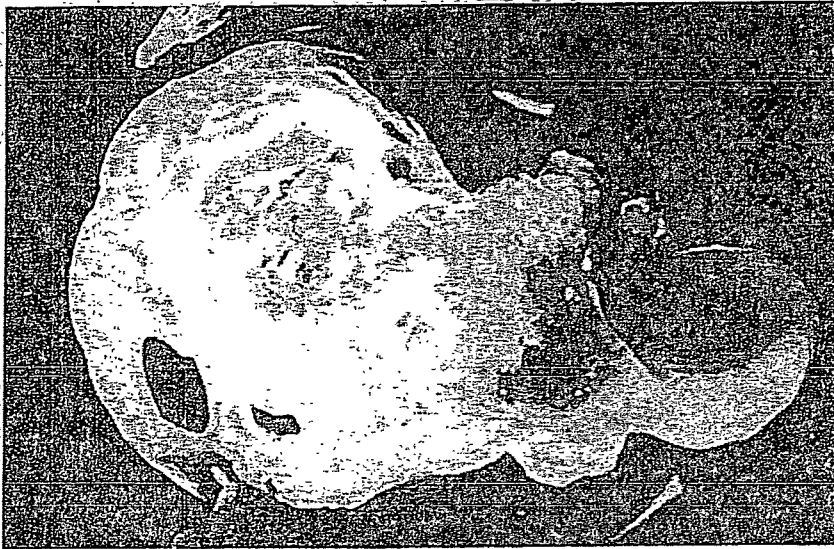
The major methods for detection of primer residues are neutron activation analysis (NAA), atomic absorption spectrophotometry (AAS), and scanning electron microscopy with energy dispersive analysis (SEM-EDA). For these methods, samples must be obtained from the skin surfaces of a victim at the scene. Delay in obtaining residues, movement, or washing of the body prior to autopsy will diminish or destroy gunshot residues. (Kilty, 1975)

Scanning electron microscopy with energy dispersive analysis (SEM-EDA) has become an excellent method for detection of gunshot residue. (Andrasko and Mashly, 1977)

The method of collection for residue is quite simple and easily carried out in the field (Tassa, et al, 1982a) directly onto the gummed surface of a chuck, or holder, applied to the surface (skin or other material) to be tested. The chuck, with the residue on the surface, can be directly prepared for examination in the SEM device. A polyvinyl-alcohol (PVAL) collection method has been developed that has the advantage of preserving the topical distribution of gunshot residues as well as sampling of other trace materials such as blood. (Schyma and Placidi, 2000)

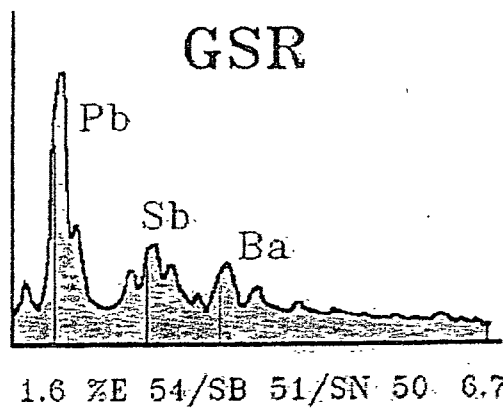
A major advantage of this method is that SEM can reveal the actual surface details of the particles examined, for comparison with known examples of gunshot residue, and pictures can be taken. The large particles of partially burned powder and the spheres of residue can be distinguished from contaminant materials.

Scanning Electron Micrograph of GSR



An X-ray analyzer can be beamed directly onto the particles, so that the energy dispersive pattern (EDX) can be generated, giving the elemental composition of the particles. (Nesbitt et al, 1976) A computer program to speed up the search for GSR particles by SEM has been described (Tillman, 1987)

Diagram of the SEM-EDX pattern of GSR



It should be remembered that any hand or body part that was

close to the fired weapon may have residue appearing consistent with having fired the weapon (Thornton, 1986). Clothing should always be retained on the body up to autopsy, as this may modify entrance wounds, need examination for gunshot residues, or aid in interpretation of the scene.

Gunshot residue analysis requires careful evaluation. False positives may be caused by contamination or transfer of GSR to the body by mishandling, or when the body is heavily contaminated by GSR from previous shooting. False negatives result from washing of the hands (when this area is sampled) or by victim wearing gloves. A rifle or shotgun may not deposit GSR on hands.

SEM may also have usefulness for examination of bullets, as embedded materials from the target such as bone fragments may aid in reconstruction of the scene (DiMaio VJ et al, 1987). SEM has been used to study tool marks made by the firing pin impressions in the primers of spent cartridges. Such findings could be useful to determine which gun was used to fire the cartridge. Grove et al (1972) found that SEM could reveal clearly all surface detail in the impression and that 50% of shotgun impressions and 75% of rifle impressions could be positively identified on the basis of four or more individual characteristics, given similar class characteristics.

It may be difficult to both find and determine the nature of gunshot wounds in a decomposed body. Determination of the range may be particularly difficult. Extreme care should be taken to avoid misinterpretation of the wounds and artefacts.

Other Examinations

Sometimes the question of whether the victim was holding the firearm arises in investigation. Lee (1986) has described an improved method for the detection of iron traces on the hands by use of a ferrozine spray. Prior to this, a hydroxyguinoline test was employed, but required fluorescent photography. (Stevens and Messler, 1974)

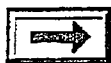
Cases have been described in which suicide victims' hands were stained orange-brown from contact with gun barrels following death, presumably from perspiration coupled with a prolonged post-mortem interval of contact. (Norton et al, 1979)

Latent fingerprints may be detectable on cartridges and expended shell casings. Such fingerprints, called latent because they are transferred via a substance on the skin ridges to an object. On a gun, such substances could include cleaning solvents or gun oils. Usually, the substances consist of

perspiration mixed with oils from sebaceous glands. Conditions of increased temperature and low humidity decrease the persistence of fingerprints. Brass retains the fingerprints better than nickel-plated materials. (Given, 1976)

Each firearm sold (other than black powder weapons) has a manufacturer's serial number stamped into it which may be used to identify the weapon. Registration of firearms provides a way of tracing gun ownership. However, attempts may be made to obliterate registration numbers by grinding or filing the metal. (Polk and Giessen, 1975)

Gas chromatography has been used to identify gun oils in targets, and was very sensitive, even with stored specimens (Kijewski and Jakel, 1986).



Proceed to Other Issues and Injuries.



Return to the Firearms Tutorial menu.

Exhibit 42

Micro Analytical

210 West Stone Avenue
Greenville, SC 29609

e-mail microanaly@aol.com

Telephone (864) 250-0804
Cell Phone (864) 325-2288

January 20, 2006

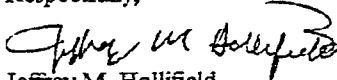
Mr. Adam Bacot
Bacot & Padgett, LLC
414 Monument Street, Suite C
Greenwood, SC 29646

Re: State vs. Charles Vandross

Dear Mr. Bacot:

Thank you for the opportunity to work with you on the Charles Vandross case. It is nice to work with someone who is organized, prepared, thorough, and who communicates with me regularly. I really appreciate your professionalism. Again, it was a pleasure working with you and your staff. If I can be of assistance in the future, or if I can refer you to those with other areas of expertise, feel free to contact me.

Respectfully,



Jeffrey M. Hollifield
Chemical Microscopist

Micro Analytical

210 West Stone Avenue
Greenville, SC 29609

e-mail MicroAnaly@aol.com

Telephone (864) 250-0804
Cell Phone (864) 325-2288

Questions for GSR Expert

GSR on Hands

Why were the Vandross GSR samples not tested? 6 hour rule

Why is this the policy? What is it based on?

Do all states follow this policy? (answer should be "no")

Do you know at exactly what time the incident occurred? What do you base this on?
(answer will be that it is based on the collection sheet, which is based on Wilson's story)

So you don't know for sure that more than 6 hours had passed before collection?

Primer residue doesn't all of a sudden disappear at 6 hours. It's a gradual reduction in primer residue; therefore, after 6 hours, even though levels may be below the "elevated threshold," they still may be high or at least much higher than "environmental" levels.

Wouldn't running the test after 6 hours still provide useful investigative information?

Could it indicate subsequent action by an individual such as a second shot sometime later, handling the gun, or unloading the gun, etc.?

Even if the GSR levels are below the "positive" threshold, if we had data from Vandross and from Wilson taken at approximately the same time, wouldn't it be useful to compare the two samples?

Clothing

When a weapon is discharged, does GSR remain on the gun? Yes

A lot? Yes

Can this residue be transferred from the gun to other objects? Yes

If someone handled the gun after it had been fired and then subsequently touched or handled other evidence, couldn't GSR be transferred to the other items of evidence?

#23 Jacket

If Corporal Hammett took the gun from the suspect and then picked up the jacket, could that account for the one single round lead particle found on the jacket?

#15 Shirt

If Investigator Inks handled the fired gun for evidence packaging and then either cuffed the defendant or packaged the defendant's shirt as evidence, could that account for the ten microscopic particles found on the ^{shirt} jacket?

Can you say for sure that the lead particles found on the items of clothing are not from contamination? No

Did you receive or examine any bedding items such as sheets, blankets, pillowcases, etc.?

Did you find any holes in any of these items suggesting that they had been used to muffle the sound of a weapon?

Tape

Was there a request to compare the roll of duct tape to the 3 pieces of duct tape? Yes, on the SLED Log-in sheet there is a request to match these.

Is it possible to match one piece of tape to another? Yes

How? By comparing the types of fibers in the tape
By comparing the tape backing
By comparing the tape adhesive
By comparing the weave of the fibers in the tape
By comparing the thickness of the tape
Etc.

Were any of these exams performed? No

Why not?

GSR on tape

Micro Analytical

210 West Stone Avenue
Greenville, SC 29609

e-mail MicroAnaly@aol.com

Telephone (864) 250-0804
Cell Phone (864) 325-2288

Questions for GSR Expert

GSR on Hands

Why were the Vandross GSR samples not tested? 6 hour rule

Why is this the policy? What is it based on?

Do all states follow this policy? (answer should be "no")

Do you know at exactly what time the incident occurred? What do you base this on?
(answer will be that it is based on the collection sheet, which is based on Wilson's story)

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Primer residue doesn't all of a sudden disappear at 6 hours. It's a gradual reduction in primer residue; therefore, after 6 hours, even though levels may be below the "elevated threshold," they still may be high or at least much higher than "environmental" levels.

Wouldn't running the test after 6 hours still provide useful investigative information?

Could it indicate subsequent action by an individual such as a second shot sometime later, handling the gun, or unloading the gun, etc.?

Even if the GSR levels are below the "positive" threshold, if we had data from Vandross and from Wilson taken at approximately the same time, wouldn't it be useful to compare the two samples?



Clothing

When a weapon is discharged, does GSR remain on the gun? Yes

A lot? Yes

Can this residue be transferred from the gun to other objects? Yes

If someone handled the gun after it had been fired and then subsequently touched or handled other evidence, couldn't GSR be transferred to the other items of evidence?

#23 Jacket

If Corporal Hammett took the gun from the suspect and then picked up the jacket, could that account for the one single round lead particle found on the jacket?

#15 Shirt

If Investigator Inks handled the fired gun for evidence packaging and then either cuffed the defendant or packaged the defendant's shirt as evidence, could that account for the ten microscopic particles found on the jacket?

Could it have been transferred when Corporal Hammett carried him to car?

Can you say for sure that the lead particles found on the items of clothing are not from contamination? No

Did you receive or examine any bedding items such as sheets, blankets, pillowcases, etc.?

Did you find any holes in any of these items suggesting that they had been used to muffle the sound of a weapon?

Barium / antimony -

Tape

Was there a request to compare the roll of duct tape to the 3 pieces of duct tape? Yes, on the SLED Log-in sheet there is a request to match these.

Is it possible to match one piece of tape to another? Yes

How? By comparing the types of fibers in the tape
By comparing the tape backing
By comparing the tape adhesive
By comparing the weave of the fibers in the tape
By comparing the thickness of the tape
Etc.

Were any of these exams performed? No

Why not?

GSR-type

*Why not tested
Can GSR on manure object be made*

Jenifer Storer

- No exam performed to compare tape ripped off to roll of tape

Exhibit 43

William Foster - Woodruff (took her out twice that I know ^{of} while ^{she was} w/ me)

Gary Robinson - Greenwood (called twice that I know of while ^{she} w/ me)

Rennie - Greenwood (called twice, came by once that I know of ^{while} w/ me)

Rev. Jeremiah Wilson - Marion Moates has his number (Joann reportedly cheated on him while married w/ Best - she had several multiple hour phone calls from him while w/ me - 2 children by him)

Darryl Suher - Newberry (^{mother} ~~parents~~ hates Joann; Dad nice); her first and only husband; he spent the night there once when she kicked me →

out, took him to church with her; says she didn't sleep with him then - 2 children by him)

Reportedly, Rev. Wilson told Marion Moates he's done with her. Rennie reportedly quit her when ~~she~~ ^{with Best} found she was cheated ^{on} and he got married to someone else

Robinson asked her to choose, and she chose Best when he caught them ^{at Robinsons/Joann's home where they lived together} together; I never did that

The Best sisters may know about all the guys she's been with; they rent a booth at the flea market.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION POST OFFICE BOX 21398 COLUMBIA, SOUTH CAROLINA 29221 ATTN: REGULATORY SERVICES				☒ SALE ☐ NO SALE REASON:	
PISTOL PURCHASE APPLICATION-RECORD				DN47-9TX	
NOTICE: Please read carefully and ANSWER ALL questions. Application should be printed in ink only. Please press hard: you are making three (3) copies. THE FOLLOWING IS TO BE COMPLETED BY PURCHASER ONLY.					
Buyer's Name (Last, First, Middle) PLEASE PRINT <u>Vandross Charles Newman</u>			Home Address (Street, City, State, Zip) <u>28819</u> <u>3938 McCormick Hwy, Bradley SC</u>		
Place of Employment <u>McDonald's (Westwood Location)</u>			Business Address (Street, City, State, Zip) <u>72 Business NW, Greenwood SC</u>		
Date of Birth <u>01-24-63</u>	Social Security Number <u> </u>	SC Driver's License or ID # <u> </u>	Place of Birth (City, County, State) <u>Florence, Florence, SC</u>	SEX <u>M</u>	RACE <u>AA</u>
I AM CURRENTLY ON ACTIVE MILITARY DUTY (MILITARY ID#): <u>NO</u>					
EACH ITEM MUST BE READ AND ANSWERED "YES" OR "NO"					
HAVE YOU EVER BEEN CONVICTED, ENTERED A PLEA OF GUILTY OR PLEA OF NOLO CONTENDERE OR FORFEITED BOND ON ANY ONE OR MORE OF THE FOLLOWING CRIMES: MURDER, MANSLAUGHTER, RAPE, MAYHEM, KIDNAPPING, BURGLARY, ROBBERY, HOUSEBREAKING, ASSAULT WITH INTENT TO KILL, COMMIT RAPE OR ROBBERY, ASSAULT WITH A DANGEROUS WEAPON, OR ASSAULT WITH INTENT TO COMMIT ANY OFFENSE PUNISHABLE BY POSSIBLE IMPRISONMENT FOR MORE THAN ONE YEAR?					<u>No</u>
ARE YOU A MEMBER OF ANY GROUP, COMMITTEE, CLUB, LEAGUE, SOCIETY, ASSOCIATION OR COMBINATION OF INDIVIDUALS WHOSE PURPOSE IS THE ESTABLISHMENT, CONTROL, CONDUCT, SEIZURE OR OVERTHROW OF THE GOVERNMENT OF THE U.S. OR ANY STATE OR POLITICAL SUBDIVISION THEREOF, BY THE USE OF FORCE, VIOLENCE, ESPIONAGE, SABOTAGE, OR THREATS OR ATTEMPTS OF ANY OF THE FOREGOING?					<u>No</u>
HAVE YOU PURCHASED A HANDGUN IN SOUTH CAROLINA WITHIN THE PAST THIRTY (30) DAYS?					<u>No</u>
HAVE YOU BEEN ADJUDGED UNFIT TO CARRY OR POSSESS A HANDGUN BY ORDER OF A CIRCUIT JUDGE?					<u>No</u>
I hereby certify that all information is true and correct. I understand that a person who answers YES to any of the above questions is prohibited by state law from purchasing and/or possessing a pistol. I understand that making false statements or presenting false or forged identification, is a crime punishable as a FELONY in South Carolina.					
BUYER'S SIGNATURE <u>Charles N Vandross</u>				DATE: <u>07-30-04</u>	
DEALER'S BUSINESS NAME AND ADDRESS (STREET, CITY, STATE, ZIP CODE) THIS AREA MUST BE COMPLETED IN DETAIL BY DEALER					
<u>Apache Gun & Pawn</u> <u>1101 South Main Street</u> <u>Greenwood, SC 29546</u> <u>(864) 223-4200</u>		Telephone #: <u> </u> County: <u> </u>		FEDERAL FIREARMS LICENSE # <u>1-57-047-02-SC-00375</u>	
(Automatic, Derringer, Revolver) Circle One:		Model <u>Firestorm</u>	Caliber <u>380</u>	STATE FIREARMS LICENSE # <u>1827</u>	
Manufacturer (and/or Importer) <u>Bersa</u>		Date of Sale (MM/DD/YY) <u>7-30-04</u>	SERIAL NUMBER <u>604772</u>		
Time of Sale <u>10:50</u>		<u>AM/PM</u>			
I hereby certify that I am a licensed retail pistol dealer in the State of South Carolina and that I have complied with all requirements with respect to the law of the sale of pistols in this state. I have observed the above applicant complete and sign this application in my presence. I have conducted a search of my records and verify (1) the pistol is not contraband as defined in Act 59 of 1975 South Carolina Statutes at Large as amended and (2) this is the only pistol purchased by this applicant within the past thirty (30) days. I understand I must maintain this record for a period of not less than three (3) years. I certify that my portion of this application is true and should I supply or stipulate false information or violate any other provision of Act 330 of 1965 as amended it will result in revocation of this license, and I will be subject to a crime punishable as a FELONY in this state.					
Dealer's Signature <u>Hanni Perry</u>					

White Copy - SLED

Yellow Copy - Dealer

Pink Copy - Buyer

Exhibit 44

01077

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

Transferor's Transaction Serial Number

FIREARMS TRANSACTION RECORD PART I - OVER-THE-COUNTER

WARNING: You may not receive a firearm if prohibited by Federal or State Law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm.

Prepare in original only. All entries must be in ink. Read the Important Notices, Instructions and Definitions on this form.

Section A - Must Be Completed Personally By Transferee (Buyer)

1. Transferee's Full Name (Last, First, Middle) <u>Vandross, Charles Nemon</u>		2. Residence Address (No. Street, City, County, State, ZIP Code: cannot be a post office box) <u>3938 McCormick Hwy Bradley, SC 29819 Greenwood County</u>	
3. Place of Birth (City, State or foreign country) <u>Florence SC</u>	4. Height <u>6'3 1/2"</u> Weight <u>240</u>	5. ☒ Male ☐ Female	6. Birth Date Month <u>01</u> Day <u>24</u> Year <u>1963</u>
7. Social Security Number (Optional, but will help prevent misidentification.) <u>34</u>			

8. Race (Ethnicity) (Check one or more boxes)

- ☐ American Indian or Alaska Native ☒ Black or African American ☐ Native Hawaiian or Other Pacific Islander
☐ Hispanic or Latino ☐ Asian ☐ White

9. What is your State of residence (if any)? SC (See Definition 5. If you are not a citizen of the United States, you have State of residence only if you have resided in a State for at least 90 days prior to the date of this sale.)

10. What is your country of citizenship? (List more than one, if applicable.) USA

11. If you are not a citizen of the United States, what is your INS-issued alien number or admission number? N/A

Certification Of Transferee

12. Answer questions 12a through 12l by writing "yes" or "no" in the boxes to the right of the questions.	
a. Are you the actual buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you. (See Important Notice 1 for actual buyer definition and examples.)	<u>yes</u>
b. Are you under indictment or information in any court for a felony, or any other crime, for which the judge could imprison you for more than one year? (An information is a formal accusation of a crime by a prosecutor. See Definition 3.)	<u>no</u>
c. Have you been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Important Notice 6, Exception 1.)	<u>no</u>
d. Are you a fugitive from justice?	<u>no</u>
e. Are you an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance?	<u>no</u>
f. Have you ever been adjudicated mentally defective (which includes having been adjudicated incompetent to manage your own affairs) or have you ever been committed to a mental institution?	<u>no</u>
g. Have you been discharged from the Armed Forces under dishonorable conditions?	<u>no</u>
h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Important Notice 7.)	<u>no</u>
i. Have you been convicted in any court of a misdemeanor crime of domestic violence? (See Important Notice 6, Exception 1 and Definition 4.)	<u>no</u>
j. Have you ever renounced your United States citizenship?	<u>no</u>
k. Are you an alien illegally in the United States?	<u>no</u>
l. Are you a nonimmigrant alien? (See Definition 6.)	<u>no</u>

13. If you are a nonimmigrant alien, do you fall within any of the exceptions set forth in Important Notice 6, Exception 2?

Yes ☐ No ☐ Not applicable ☒ (If "yes," the licensee must complete question 18c.)

I certify that the above answers are true and correct. I understand that answering "yes" to question 12a when I am not the actual buyer of the firearm is a crime punishable as a felony. I understand that a person who answers "yes" to any of the questions 12b through 12k is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 12l is prohibited from purchasing or receiving a firearm, unless the person also answers "yes" to question 13. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal Firearms License is a violation of law. (See Important Notice 8.)

Transferee's Signature

15 Date

Section B - Must Be Completed By Transferor (Seller)

16. Type of firearm(s) to be transferred:

☒ Handgun ☐ Long Gun ☐ Other

17. Location of sale if at a gun show. (See instruction to Transferor 13.) N/A (city, state)

18a. Type of Identification (e.g., driver's license or other valid government-issued photo identification.): SCDL

Number on Identification: 008075682

Expiration Date of Identification (if any) 1-24-2009 (See instruction to Transferor 1.)

18b. Aliens only: Types and dates of additional required identification (e.g., utility bills or lease agreements. See instruction to Transferor 2.)

18c. Nonimmigrant aliens only: Type of documentation showing an exception to the nonimmigrant alien prohibition (e.g., hunting license/permit; waiver. See instruction to Transferor 3.)

Question 19, 20, or 21 Must Be Completed Prior To The Transfer Of The Firearm(s) (See instructions to Transferor 5-7.)

19a. The transferee's identifying information in Section A of this form was transmitted to NICS or the appropriate state agency on 7-30-04 (Date).

19b. The NICS or state transaction number (if provided) was: 0N47-9TX

19c. The response initially provided by NICS or the appropriate state agency was:

☒ Proceed ☐ Denied ☐ Delayed

19d. If initial NICS or state response was "Delayed," the following response was received from NICS or the appropriate state agency on _____ (Date)

☐ Proceed ☐ Denied ☐ No resolution was provided within 3 business days.

19e. The name and Brady identification number of the NICS examiner (if provided)

(name) _____
(number) (optional)

20. ☐ No NICS check was required because the transfer involved only NFA firearm(s). (See instruction to Transferor 7.)

21. ☐ No NICS check was required because the buyer has a valid permit which qualifies as an exemption to NICS (See instruction to Transferor 7.)

State Permit Type: _____ Date of Issuance: _____

Expiration Date (if any): _____ Permit Number: _____

Section C

If the transfer of the firearm(s) takes place on a different day from the date that the transferee signed Section A, the transferee must complete Section C immediately prior to the transfer of the firearm(s). (See instruction to Transferee 3 & instruction to Transferor 8.)

I certify that the answers I provided to the questions in Section A of this form are still true and correct.

22. Transferee's Signature Charles A. Vandross 23. Date 7-30-04

Section D

24. Manufacturer and/or Importer	25. Model	26. Serial Number	27. Type (pistol, revolver, rifle, shotgun, etc.)	28. Caliber or Gauge
<u>Bersa</u>	<u>Firestorm</u>	<u>604772</u>	<u>Pistol</u>	<u>380</u>

Complete ATF F 3310.4 For Multiple Purchases Of Handguns (See instruction to Transferor 11.)

29. Trade/corporate name and address of transferor (Hand stamp may be used.)

Apache Gun & Pawn
1101 South Main Street
Greenwood, SC 29646
(864) 223-4200

30. Federal Firearms License Number (Hand stamp may be used.)

1-57-047-02-5C-00375

On the basis of (1) the statements in Section A; (2) my verification of identity noted in question 18a and my verification again at the time of transfer (if the transfer does not occur on the same day the verification was noted in question 18a); and (3) the information in the current State Laws and Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.

The Person Actually Transferring The Firearm(s) Must Complete Questions 31-34.

31. Transferor's Name (Please print.) Ronnie Perry 32. Transferor's Signature Ronnie Perry 33. Transferor's Title clerk 34. Date Transfer is completed 7-30-04

FROM: SCCH-01312 Fri Nov 05, 2004 16:09:45
TCHS/QH INQUIRY OF SCLED CCH FILES USING:

Exhibit 45

TN-BEAUFORD, LT
RI-SC0240001 PUR-C

NAM-VANDROSS, CHARLES NEMON
SOC-247295104 SEX-M RAC-B DOB-19630124

NO RECORD FOUND TO DISSEMINATE USING:

NAM (NAME), SOC (SOC SEC NUMBER), SEX, RAC (RACE), DOB (DATE OF BIRTH)
LISTED FOR CRIMINAL JUSTICE PURPOSES

LAST FORWARDED TO NCIC

ANY OUT-OF-STATE IDENT INFORMATION TO FOLLOW FROM NCIC VIA YOUR TERMINAL

* END OF MESSAGE **

IN Fri Nov 05, 2004 16:09:45

000335753522/3896

OUT Fri Nov 05, 2004 16:09:45 GRWSO03 MSG# 00069

SAN: OMQLHP06VQT6

NO
Record
Found

TO: GRWSO03-00070 Fri Nov 05, 2004 16:09:50 OMQLHP06VQT6

FROM: III-07910 Fri Nov 05, 2004 16:09:50

7L010F380011C62QH

SC0240001

THIS NCIC INTERSTATE IDENTIFICATION INDEX RESPONSE IS THE RESULT OF YOUR

INQUIRY ON NAM/VANDROSS, CHARLES NEMON SEX/M RAC/B DOB/19630124

SOC/247295104 PUR/C

NAME	FBI NO.	INQUIRY DATE
RUSSELL, GEORGE EDWARD	482349CA3	2004/11/05

DATE	PLACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR	BIRTH PLACE	PHOTO
M	W	1963/11/10	509	162	HAZ	SDY	GEORGIA	N

INGERPRINT CLASS	PATTERN CLASS
9 02 09 11 15	RS LS RS RS RS LS RS LS LS LS
8 TT 05 10 03	RS WU LS AU
	AU AU

ALIAS NAMES

EDWARD, GEORGE RUSSELL

RUSSELL, EDWARD

RUSSOM, L, GEORGE EDWARD-II

RUSSELL, GEORGE E

EVERETTE, GEORGE

RUSSELL, GEORGE EDWARD

RUSSELL, GEORGE

RUSSELL, GEORGE EDWARD

OTHER SCARS-MARKS-

IRTH DATES	TATTOOS	SOCIAL SECURITY
96 7/11	GLASSES	246-29-8104
96 1/06	SC L HND	247-29-5104
	SC R HND	247-29-8104
	TAT R ARM	247-29-8106

IDENTIFICATION DATA UPDATED 2001/07/31

THE CRIMINAL HISTORY RECORD IS MAINTAINED AND AVAILABLE FROM THE
FOLLOWING:

FLORIDA - STATE ID/FL03019239

GEORGIA - STATE ID/GA1416355X

SOUTH CAROLINA - STATE ID/SC00417387

THE RECORD(S) CAN BE OBTAINED THROUGH THE INTERSTATE IDENTIFICATION
INDEX BY USING THE APPROPRIATE NCIC TRANSACTION.

ID

Fri Nov 05, 2004 16:09:50

000335765464/3896

Fri Nov 05, 2004 16:09:50 GRWSO03 MSG# 00070 SAN: OMQLHP06VQT6

FROM: DMV-07916 Fri Nov 05, 2004 16:12:38
XLIC
DL NO 0008075682
ANDROSS, CHARLES NEMON
3936 MCCORMICK HWY
BRADLEY SC 298192110 GRWD CNTY
SEX M HGT 6 04 WGT 260 BIRTH 01/24/1963
SN 247-29-5104 RACE BLACK
IS-DL:NO SUSPENSION CDL:NO DISQUALIFICATION
DL: SR LICENSE CLASS D ISSUED 02/17/2004
** MORE **

IN Fri Nov 05, 2004 16:12:38 000336475460/3896
OUT Fri Nov 05, 2004 16:12:38 GRWSO03 MSG# 00011 SAN: OV7LHP06VTDC

TO: GRWSO03-00072 Fri Nov 05, 2004 16:12:39 OV7LHP06VTDC
FROM: DMV-07917 Fri Nov 05, 2004 16:12:38
XLIC
DLN = 0008075682
SUSP CAUSE BEGIN END
17 05/02/1996 05/30/1996 06/28/1996
END OF INQUIRY **

IN Fri Nov 05, 2004 16:12:38 000336476455/3896
OUT Fri Nov 05, 2004 16:12:39 GRWSO03 MSG# 00072 SAN: OV7LHP06VTDC

Exhibit 46

GREENWOOD COUNTY SHERIFF'S OFFICE
EVIDENCE SUBMISSION

CASE # 04-16751 AGENCY ID # SC0240000

OFFICER R. STICKLAND INCIDENT TYPE MURDER

REASON ITEM SUBMITTED: EVIDENCE ☒ SAFEKEEPING ☐

IS EVIDENCE TO BE PROCESSED? YES ☒ NO ☐

INCIDENT DATE 11-04-04

ITEMS SUBMITTED: (DETAILED DESCRIPTION AND WHERE ITEM WAS RECOVERED FROM)

① ONE (1) PLASTIC BAG CONTAINING AUTOPSY MATERIALS TO INCLUDE
BLOOD, TISSUE, PROJECTILE, BODY FLUIDS, GSR COLLECTION KIT.

② ONE (1) PAPER BAG CONTAINING ONE (1) PAIR UNDERWEAR, GRAY IN COLOR AND
ONE (1) PAIR SOCKS, WHITE IN COLOR

TOTAL # OF ITEMS SUBMITTED Two (2)

OFFICER'S SIGNATURE [Signature] DATE/TIME 11-04-04 1630

EVIDENCE CUSTODIAN'S SIGNATURE [Signature] DATE/TIME 11-04-04 1630

EVIDENCE LOG # 04-11-0014 EVIDENCE LOCATION (AFTER SUBMISSION) ER-10-1A/FRIDGE

NOTES: _____

CAN ITEM(S) BE RETURNED TO OWNER/VICTIM AFTER PROCESSING ? YES ☐ NO ☐

GREENWOOD COUNTY SHERIFF'S OFFICE

EVIDENCE SUBMISSION

CASE # 04-16951 AGENCY ID # SC0240000

OFFICER C. HAMMERT INCIDENT TYPE MURDER

REASON ITEM SUBMITTED: EVIDENCE ✓ SAFEKEEPING

IS EVIDENCE TO BE PROCESSED? YES ✓ NO

INCIDENT DATE 11-04-04

ITEMS SUBMITTED:	(DETAILED DESCRIPTION AND WHERE ITEM WAS RECOVERED FROM)
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- ① ONE (1) BERSA FIRESTORM .380 A&W W/ SEMI-AUTOMATIC PISTOL, S/N 60477X,
w/ MAGAZINE CONTAINING SIX (6) .380 A&W C&R CARTRIDGES.
- ② THREE (3) .380 AUTO CARTRIDGES (FROM SUSPECT'S PERSON)
- ③ THREE (3) .380 A&W CARTRIDGES (RECOVERED FROM GRABIN ACHING RESIDENCE)
- ④ ONE (1) BOX CUTTER, GREEN/OLIVE IN COLOR, PLASTIC HANDLE.
- ⑤ ONE (1) FLASHLIGHT, PURPLE IN COLOR, 6 1/8" IN LENGTH, 1 1/4" IN DIAMETER.
- ⑥ ~~ONE (1) FBI # 008075682, AKA OF CHARLES A. [REDACTED]~~ ED
- ⑦ ONE (1) QUARTER (25¢) A
- ⑧ ONE (1) POLAR FLEECE JACKET, GRAY/PURK INSIDE, UNKNOWN BRAND OR SIZE
- ⑨ ONE (1) WALLET LEATHER, BLACK IN COLOR, CONTAINING \$364.40 IN
U.S. CURRENCY, SERIAL # 008075682, AND OTHER PERSONAL PAPERS

TOTAL # OF ITEMS SUBMITTED 51645 (8)

OFFICER'S SIGNATURE [Signature] DATE/TIME 11-9-09 1620

EVIDENCE CUSTODIAN'S SIGNATURE [Signature] DATE/TIME 11-04-01 1621

EVIDENCE LOG # 04-11-0063 EVIDENCE LOCATION (AFTER SUBMISSION) ER-W shift

NOTES: _____

CAN ITEM(S) BE RETURNED TO OWNER/VICTIM AFTER PROCESSING ? YES _____ NO

Property Returned To Inmate
GREENWOOD SHERIFFS OFFICE

Inmate Name: VANDROSS, CHARLES NEMON

JCA: 22678

Property Returned On 11/04/2004

1 BLUE AND TAN STRIPE SHIRT

1 PAIR BROWN PANTS

Items seized by GWD Co. 50 By

X Sgt. Eric D. [unclear] 11-04-04 0828

X Sgt. [unclear]

Signature: Charles A. Vandross

Page 1

01084

September - put-out

EXHIBIT 47

We had not 5 minutes returned from Buffalo / Niagara Falls and her family's family reunion, and she was petting me out again.

She'd checked the messages, learned of my Uncle's death, claimed I'd never told her about him.

I called my relatives, learned he'd still lived in Pittsburgh, but had died earlier the day we passed thru - stopping at Heinz Field.

I didn't mention him while in Pittsburgh because the topic of my family always caused her to argue.

She complained she'd not met my family. I explained they lived up north - MD, DC, NY, DE. Her family was from Newberry & Columbia.

I arranged a Columbia meeting with my Mom passing thru to Florence.

She complained about the others so I tried to plan some trips. The trips didn't come fast enough. I offered to call, but she said "Too late." So I didn't call, and she complained about me not calling. So I'd call, she'd refuse to talk. She'd say "Too little, too late ... Get out."

My Uncle's funeral was a chance for her to meet my family. She refused to go, saying "You didn't set it up. If your uncle hadn't died, you wouldn't be taking me to meet your family. No!"

Returning from the funeral, with help from my family and employer I rented an apartment in Pinetree. I moved in 9/23 I believe. By Oct 1 she'd asked me to move back in with her, and I did; slept with her at the apartment, though, the night she asked.

We stayed together most of Oct, not just at the end of it for some "trying to get back together - make one last go of it" - there was no such thing as "giving up". Mid way thru she'd had Raheim come and help me move completely out. We then prepared to somehow "let it out" to someone else - though against the rules. I'd shown it and had a confirmed renter for 11/1. So and I were supposed to

11/11. 11/11. 11/11.

She'd come to see me the last Sat in Sept. 04 - last day to register for the Nov 04 ^{presidential} elections. I was about to do a voter registration drive in Pinetree. That's the day she asked me to move back in with her. The next night I resumed sleeping and living at 3938 McCormick Hwy.

Greenwood County Sheriff's Office
Victim Notification Information

Exhibit 48

Case Number: 04-16951

Court Information

State vs. Charles Nemon Vandross Warrant Number/Ticket Number _____

Offense(s) Murder, Kidnapping & Burglary

Victim Information

Name of Victim: Sanford Best Check if victim is ☒ deceased or ☐ a minor

Mailing Address: 86 Llays Rd., Trenton, SC 29847

Telephone Number (H) 803-637-9360 (W) _____ (EMERGENCY) _____

Relative or Contact Person: Lula Best (mother)

Their Mailing Address: Same

Their Telephone Number (H) _____ (W) _____ (EMERGENCY) _____

Additional Information/Comments:

The deceased Brother, Joseph Best is employed by the Public Defenders Office and his sister, Ursula Best is employed by DSS in Greenwood

Notification

☒ I do ☐ I do not wish to be notified when an arrest is made in this case. I understand this may be any time, day or night.

☒ I do ☐ I do not wish to be notified when a person arrested in this case appears for a bond hearing.

☒ I do ☐ I do not wish to be notified when the person arrested in this case appears for a preliminary hearing.

☒ I do ☐ I do not wish to be notified when a person arrested in this case appears in court for any plea, trial, or sentence.

By signing the blank provided below, I agree that I have received a copy of this Victim Notification Information form and that the information I have provided is correct. I understand that it is my responsibility to notify the appropriate agency (ies) of any change in my address and/or telephone number (s) so that law enforcement personnel may make reasonable attempts to notify me of arrest, detention, bonds and other pre-trial release hearings and/or procedures.

May A. Stump

Signature of person providing information

12-09-04

Date

At the request of the Best Family

White Copy - Magistrate's Office

Yellow Copy - Victim's Assistance

Pink Copy - Detention Center

Gold Copy - Crime Victim's Copy

Sanford Best- Family Members:

Mrs. Lula Best - mother
86 Lloyds Rd.
Trenton, SC 29847
803-637-9360-Hm
706-733-4992-Wk

Siblings—

Ms. Ursula Best
501 Haliwanger Rd. Apt. K-1
Greenwood, SC 29649
223-2849-Hm
2295258-Wk

Joseph J. Best, Jr. - Public Defender's Office -
Carrie L. Best (His and the other sibling's
Trae A. Best address are the same as
Candice S. Best their Mother's.
Brandon L. Best
Bryan L. Best

Exhibit 49

Don't ask Joann why her story is different

- she could say

- it's been 2 yrs

- I'm trying to forget this nightmare

- mind on staying alive / her children

Don't give her a chance to respond on point.

- label her and move on quickly to another tie

Relevance of questions about past engagements -
between time marriage to

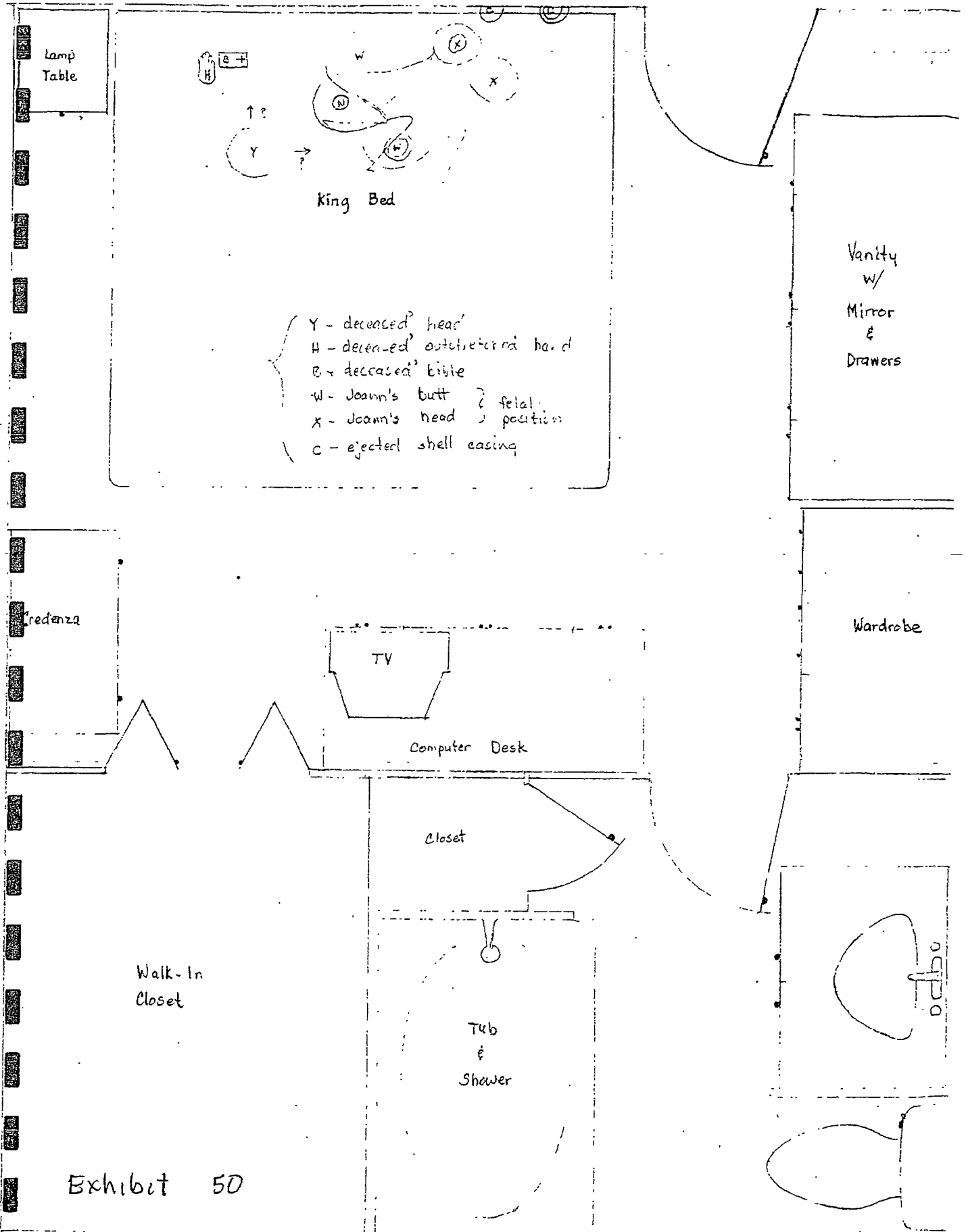
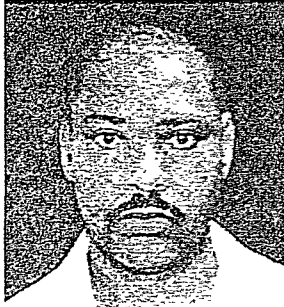


Exhibit 50

 Inmate Search

	SCDC ID	Name	Sex	Race	Height	Weight	Age
SCDC ID:	00316095	Vandross, Charles Nemon	Male	Black	6' 03"	260	43
First Name:	Charles						
Last Name:	Vandross						
SID:							
Phonetic Match: ☐	Submit Reset						

Picture Date**Inmate Description**

<u>Name</u>	Vandross, Charles Nemon
<u>SCDC ID</u>	00316095
<u>SID</u>	SC01570057
<u>DOB</u>	01/24/1963
<u>Citizenship</u>	Citizen - Native Born
<u>Build</u>	Large
<u>Complexion</u>	Medium
<u>Hair Color</u>	Black
<u>Eye Color</u>	Brown

Inmate Sentence and Location

<u>Offender Type</u>	Adult-straight Sentence
<u>Offense</u>	Murder
<u>Sentence Start Date</u>	11/04/2004
<u>Sentence Length</u>	999 YRS, 0 MOS, 0 DYS
<u>Admission Date</u>	06/22/2006
<u>Committing County</u>	Greenwood
<u>Location</u>	Mccormick
<u>Projected Release Date</u>	
<u>Projected Parole Date</u>	
<u>Supervised Furlough Eligibility</u>	
<u>Sex Offender Registry</u>	Yes



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[Version: 2.0.0 Built: 06/30/2006 04:18:32 PM Time: 02:31:22 PM]

Exhibit 51

Why did she lie ? later ?

Reflections

Closing not tough enough

Presumed innocent

AFFIDAVIT OF SERVICE

State of South Carolina

County of Greenwood

General Court

Case Number: 04-GS-24-1187 Court Date: 6/20/2006

Plaintiff:

State of South Carolina

vs.

Defendant:

Charles Nemon Vandross

Exhibit 53

For:

Sheek Law Firm, PC

Po Box 49878

Greenwood, SC 29649

Received by Sheek Law Firm, PC to be served on REV. NELSON HOWARD, 1409 Roper Mountain Road, Hunning Downs Apts. #213, Greenville SC.

I, Walter Spires, being duly sworn, depose and say that on the 19th day of June, 2006 at 5:00 pm, I:

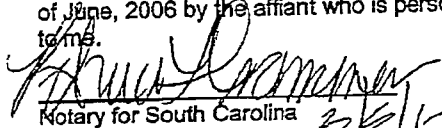
NON-SERVED: After due search, careful inquiry and diligent attempts I was unable to serve the Subpoena in a Criminal Case for the following reason(s) detailed in the comments below.

Additional Information pertaining to this Service:

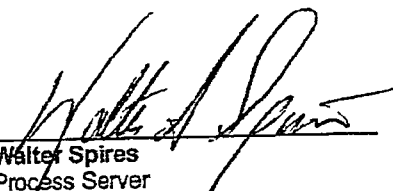
Unable to serve Rev. Nelson Howard at this address. No changes at the apartment or answer at the door and not able to tell if he still lives there.

I certify that I am over the age of 18, have no interest in the above action, and am a Process Server, in good standing, in the judicial circuit in which the process was served.

Subscribed and Sworn to before me on the 22nd day of June, 2006 by the affiant who is personally known to me.


Notary for South Carolina

My commission expires: 3/3/13


Walter Spires
Process Server

Sheek Law Firm, PC
Po Box 49878
Greenwood, SC 29649
(854) 227-6134

Our Job Serial Number: 2006004760

SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS COURT	COUNTY GREENWOOD
STATE OF SOUTH CAROLINA V. CHARLES NEMON VANDROSS	CASE NO. 04-GS-24-1187
	SUBPOENA FOR ☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)
TO: REV. NELSON HOWARD 1409 ROPER MOUNTAIN ROAD #213 HUNNING DOWNS APTS. GREENVILLE, SC	
☒ YOU ARE HEREBY COMMANDED to appear in the above-named court at the place, date, and time specified below to testify in the above-entitled case.	
PLACE GREENWOOD COUNTY COURTHOUSE 528 MONUMENT STREET GREENWOOD, SC 29646	COURTROOM GENERAL SESSIONS COURTROOM 2ND FLOOR
	DATE AND TIME JUNE 20 - 23, 2006 9:30 a.m.
☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s). LIST DOCUMENT(S) OR OBJECT(S)	
This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.	
CLERK OF COURT (BY) DEPUTY CLERK <i>Imogene Malone</i>	DATE JUNE 15, 2006
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☐ SOLICITOR ☒ DEFENDANT	ATTORNEY'S NAME AND ADDRESS C. LANCE SHEEK POST OFFICE BOX 49878 GREENWOOD, SC 29649 864-227-6134

defense therefore. I wanted to try and prove - most of all - that a sandwich
call was made or received that morning - revealing her lie about not ~~have~~
knowing if the phone was working.

JOANN'S LIES NEED TO BE WHAT INDICTS HER

asked that the school system and bus drivers be contacted to confirm
that the bus always came between 7:00 and 7:10 am - not close to 7:30 - so
since I lived there and knew what time the bus came, I never would have
given her until 7:30... to get out of the house 7:30 makes her story more believable.

I don't remember our making the point to the jury that I was out back,
supposedly planning to kill the whole family - with an empty gun.

Best family knows we're suggesting Joann did this. Why not now seek to
show what they want to do.

Question for Rev Howard: Were there issues discussed that they were intent
not to bring up again? (This links Jo and Sherry for the conspiracy)

made it sound like we were not living together 10/23 - 10/30 ... "trying to
get back together with her" she says ... That's the week she was with
Best at Bible Study.

Rev. Kennedy tells me Rev. Moore said Best was trying to break it off for go
with Joann. Ask Kennedy only about this to see if there's anything here for

handprint: ^{Lance says...} "What's this? Kinda' looks like a handprint - a small one." Pea
comes out and says strongly this is "my" handprint and the reason I have
no blood on me to wipe off on her clothes ... We should have been

relentless driving our point home that ① No way she didn't know, ② No
way she was not "in the crime itself." ... Blood on her is not coagulated

it had to be warm, fresh blood ... which she puts her hand in and wipes
on her shirt ... Ask, if she didn't hear the shot, why wouldn't I just
leave. ("Maybe" ask that) ... Might not be a good question, especially haphazard

We say nothing about the co-mingled blood, which Riley this time
declares is Joann's and his. Doesn't this suggest them struggling?
Why didn't we bring this out?

I don't remember us talking about the light that was on on the
back porch, and why a flashlight would be needed for entry ... I've

David's Bridal:

Exhibit 55

- ① Any record of our wedding date?

We were registered there for tuxedos

Marks & Morgan:

- ① Any record of our wedding date? Get photos of all rings - email
Purchased wedding ring (female) w/ suspended tiffany cut stone
2 complimentary / matching style diamond anniversary bands (female)
1 diamond wedding band (male)
(As I recall, about 3 carats total)

Neighbor:

- ① She said Jo returned flowers saying I was still married
(?)

she would have told any lie to keep herself from looking bad
and to garner sympathy.

Lauren Shop Owner Brian - Lauson reference:

- ① Decibel testing

Lauson may have been lying to get info from me

Photo Shop

- ① Actual sized blow-up of blood on wall (32" x 48")

→ A straight on shot was possible - why wasn't it taken?

Department 835
PO BOX 4115
CONCORD CA 94524

March 21, 2013

PERSONAL AND CONFIDENTIAL
Address Service Requested

#BWNFTZF #NCA2114751413031#

CHARLES VANDROSS
386 REDEMPTION
MCCORMICK CORREC
MC CORMICK SC 29899-9000



National Credit Adjusters

PO Box 3023 - 327 W 4th St.
Hutchinson, KS 67504-3023
Toll Free: 1-866-269-8070
Fax: 620-664-5947
www.ncaks.com

NATIONAL CREDIT ADJUSTERS
PO Box 3023
Hutchinson, KS 67504-3023

Current Balance: \$5090.57
NCA Reference Number 8340588

Original Creditor: MARKS AND MORGAN
NCA Reference Number 8340588
Current Balance: \$5090.57

SPECIAL SETTLEMENT OFFER \$3,817.93

National Credit Adjusters has been trying to make contact with you by phone, or letter regarding your outstanding debt. You have chosen to ignore our attempts to work this out in the past.

This can only mean you are having financial difficulties, or procrastinating on a problem that is not going away, unless you take steps to resolve it.

To help out, NCA is willing to settle your account for \$3,817.93, that is .75 cents on the dollar. All you need to do is call our office and accept the settlement and have your payment in our office by 4/11/2013, or this offer becomes null and void, and we are not obligated to renew this offer.

If you need more time to raise the funds or simply need a payment plan on the balance of your account, it is important that you call today.

Once the account is paid, NCA will, at your request, send a receipt upon request and we will also inform the credit reporting agencies that the account has been paid.

You can call us at 1-866-269-8070 between the hours of 8:00 am and 8:00 pm, CST, Monday through Thursday and 8:00 am to 12:00 pm, CST, Friday. After hours and weekends we have voice mail to receive any messages.

Call us for payment options.

This letter is null and void if prior arrangements have been made, if we have already received your full balance or if we have already sold your account.

This communication is from a debt collector trying to collect a debt. All information obtained will be used for that purpose.

Sincerely,
National Credit Adjusters

Experts:

Exhibit 56

- ① Doctor friend - Is blood on photo of halfwall possible ^{or likely} coming from the few light scratches indicated? Expert qualification?

- ✓ ② Sexton - Near contact? Contact? Why was story changed?

Tool Marks
Deanauer

- ③ Thrower - Do you believe she didn't hear the shot?

- ④ Riley - If you'd been asked to come to the scene and determine which 3 people last touched that door knob and in what order, could you have done it? What about the last person who touched it? (DNA trace evidence)

- ⑤ Stoner - GSR

STATE OF SOUTH CAROLINA }
COUNTY OF McCREWICK }

EXHIBIT 57
AFFIDAVIT

I, Jeffrey PARKS, declare that the foregoing is true, and correct. That I know personally "Best" to be a womanizer; And A person to date other men's girlfriends, and wives. I know this knowledge first hand because he did it to me.

That I was truly surprised to see Best and JoAnn together at church for Bible study 2 consecutive weeks before his "no-show" on November 3, 2004. I was additionally surprised to see Best driving JoAnn's car with her sitting in the passenger's seat together in public."

Additionally JoAnn told the public on T.V. that she was scared of Vandross and she hoped they (the Court) does the right thing because if Vandross got at she thinks that Vandross would kill her - he's smart and knows how to do things.

Pg 1 of 2

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of February, 2012 At McGowan, J.C. (USCA 28 § 1746, IC Code of Laws § 16-9-10)."

s/ Jeffrey Parks
Mr. Jeffrey Parks

primary
Deep - time

Questions

Exhibit 58 106

- Is reasonable doubt an appealable issue?
- Will any "body" overrule a jury's determination as to reasonable doubt or not
- What's the opinion on lesser included charges (help or hurt - I thought hurt)
- How does Saunders define direct and circumstantial evidence?
- Can we differentiate between evidence and discovery?
- If general public with me, why's the voting against me?
- Can you get court order for Peace not to call any more of your cases ^{prior} ~~new~~ to June 19 (Juneteenth)?

Mistrial is found guilty.

puzzle not map?
Which puzzle pieces really
belong -
I believe you did that

holding and not
producing
evidence suggesting
innocence.

- * - Let's discuss all pre-prepared cross examination in my notebook
- * - Do we believe the longer it takes to get a not guilty the harder it will be? Holding in and maintaining their lies?

Where Gun Was Kept - Who Had Access To It

My gun, in my pocket, doesn't make me the killer.

I kept my gun in my car, in the tirewell where the spare tire is kept, beneath the trunk, inside a multi-colored skull cap wrapped in a white towel.

I told noone where it was.

But all had access to my car, and they snooped.

Joann had exchanged cars with me so I could work on hers, and had driven it on other occasions.

The older boys with driving privileges had borrowed the car for dates and other outings a couple of times. I'd also left it for them to shuttle between school and games a time or two.

The next youngest, whom I'd placed on my lap and allowed to "steer" (in the country on side roads at low speeds) while I backed him up and operated the foot pedals, had been seen in the car shifting gears and playing with the steering wheel.

The youngest had been seen in the car looking for change beneath the seats.

There was a trunk release lever in the passenger section on the floor, on the driver's side, between the seat and door, I believe.

I'd fired my gun while riding along, out of the window of the car, in the country, and had never looked for spent shells in the car. Someone may have found one, and become suspicious, even more curious.

I'd purchased the car from Goodwill and had not yet detail cleaned it. I don't know what may have remained in there from the previous owner.

When I brought my office files home once, Joann didn't sleep until she'd gone thru every piece of paper.

While she had my car, she removed, without notice, my sister's name and address, and the name and address of a long-lost cousin - both stored in a wallet in my glove compartment - and, my picture of her and her mom, also in my glove compartment.

Either could have removed the gun.

Either could have fired the gun and killed Best.

I didn't realize my gun was missing.

GSR on my skull cap will show it's where I stored my gun and not something I brought to the scene that night along with the matching sweater found in my car.

My gun, therefore, does not make me the killer.

All had access.

Anyone of them could have killed Best.

Joann had comingled blood - hers and his mixed - on her shirt, in the center of her chest.

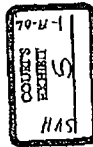
Best had previously assaulted Joann, and her son Raheim.

I had the gun in my pocket, unloaded - having retrieved it from my fiancée' at Old Tranquil Church - to prevent anyone else, including myself, from getting shot.

Why Gun Was Purchased

- Between June and August of 2004, a large, high-sitting pickup truck turned into the property where we lived in the middle of the night and travelled as far as the garage.
- I went outside, but felt powerless to do anything, not knowing whether or not the trespasser(s) with tinted windows were armed. I did see a gun rack thru the back glass. So I just watched to see if perhaps they were drunk or lost.
- The vehicle turned around and left, but I'm not sure what their purpose was. I felt violated and unsecure.
- I had a home to protect, and I felt I had failed.
- I determined to purchase a firearm as soon as I could make it happen.

⑩ We want a transcript of the trial? Please



Definitions written of each offense

Clarification of malice for murder is that the same as pre-meditation?

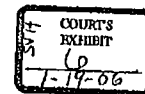
am shot residue on his arms that over 6 hours does that still put?

If you have a key to ~~open~~ house on have mail going to the house & implied that you have permission enter the house
~~no more~~

high side of the casing was the lead?
(trajectory of Bullet?)

If we want to hear one specific person's testimony or we hear just that testimony, do we have to hear everyone's testimony again?

The counselor/reverend that testified this morning was he a Counselor that Mrs. Wilson testified he had seen on 10/30/04?



25

↓

- Was I jealous?
- Did I tell her when I could see her bra?
- Did I complain when she, in my opinion, showed too much?
- " " " " her jeans seemed too tight?
- " " " " " skirts seemed too short?
- Was I stupidly jealous?
- Did she give that "same clothes when you met me" line?
- Did I complain when people stayed too long?
- " " " " she talked on the phone too long?
- Did I sneak around when she was in the kids' rooms?

26

↓

- Wasn't I outrageously jealous?
- Did you aggravate Joann and the boys with your jealousy?
- Didn't Joann put you out because of your jealousy?
- Did you ever have it in your mind to kill Mo Best?
- Have you ever made any statement anywhere different from the one you're making here today about the events that occurred that night?
- Why didn't you give her the key on Sun morn when she asked for it?
- Did you try to come around and talk?
- Did you come to Reg Pk. on Mon to exchange keys with Joann?
- Why now and not yesterday? she was calmer, hadn't gotten stuff yet.

Lance - Transcript One

- 1) If I shot a gun, it could have been 3 hrs later, down the road
- 2) "At first church a short time" - inconsistent with earlier statement claiming there an indeterminate "long" amount of time.
- 3) "Supposedly" murderer in back yard waiting to kill whole family with an unloaded gun. She says gun unloaded (ref: _____).
- 4) Not gunpowder, but even if it were, ~~it remains on clothes longer than on skin~~ (Could suggest I was there earlier.)
- 5) Not gunpowder, but even if it were, I could have fired gun 3 hrs later down the road to perhaps take suspicion off the woman he loved... and incriminate himself to take her place.
- 6) Raheim - ~~ask him~~ ask him if he really decided to iron ~~supposed~~ with a murderer waiting to kill the whole family.
- 7) Ask him "Is it a house rule or practice to lock the storm door when going into the house?" (~~Before~~ After asking Joann.

~~Car 40000~~

Next witnesses

Round lead particles could remain on clothing ~~at~~
longer than on the body - the skin

~~could have been transferred. She's said before that it's her expert~~
~~opinion that "it's gunshot residue"~~

*

But even if produced by firing the gun,

Mr Vandross could have fired the gun 3 hrs later.

*

Joann wrote letter for Jeremiah's which he read in court
to discredit his new wife / children's mom suggesting
she discussed with Joann plan to set him up for
domestic violence charge. He won. He owes her one.

Vandross

Exhibit 65

Cite as: 547 U.S. ³¹⁹ (2006)

1

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04-1327

**BOBBY LEE HOLMES, PETITIONER v. SOUTH
CAROLINA**

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH
CAROLINA

[May 1, 2006]

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict.

I

On the morning of December 31, 1989, 86-year-old Mary Stewart was beaten, raped, and robbed in her home. She later died of complications stemming from her injuries. Petitioner was convicted by a South Carolina jury of murder, first-degree criminal sexual conduct, first-degree burglary, and robbery, and he was sentenced to death. *State v. Holmes*, 320 S. C. 259, 262, 464 S. E. 2d 334, 336 (1995). The South Carolina Supreme Court affirmed his convictions and sentence, and this Court denied certiorari. *Ibid.*, cert. denied, 517 U. S. 1248 (1996). Upon state post-conviction review, however, petitioner was granted a new trial. 361 S. C. 333, 335, n. 1, 605 S. E. 2d 19, 20, n. 1 (2004).

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At the second trial, the prosecution relied heavily on the following forensic evidence:

"(1) [Petitioner's] palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by [petitioner] were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on [petitioner's] blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on [petitioner's] underwear; (5) [petitioner's] underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than [petitioner] and the victim were excluded as contributors to that mixture; and (6) [petitioner's] tank top was found to contain a mixture of [petitioner's] blood and the victim's blood." *Id.*, at 343, 605 S. E. 2d, at 24.

In addition, the prosecution introduced evidence that petitioner had been seen near Stewart's home within an hour of the time when, according to the prosecution's evidence, the attack took place. *Id.*, at 337-338, 343, 605 S. E. 2d, at 21, 24.

As a major part of his defense, petitioner attempted to undermine the State's forensic evidence by suggesting that it had been contaminated and that certain law enforcement officers had engaged in a plot to frame him. *Id.*, at 339, 605 S. E. 2d, at 22. Petitioner's expert witnesses criticized the procedures used by the police in handling the fiber and DNA evidence and in collecting the fingerprint evidence. App. 299-311, 313-323. Another defense expert provided testimony that petitioner cited as supporting his claim that the palm print had been planted by the police. *Id.*, at 326-327.

Petitioner also sought to introduce proof that another man, Jimmy McCaw White, had attacked Stewart. 361

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S. C., at 340, 605 S. E. 2d, at 22. At a pretrial hearing, petitioner proffered several witnesses who placed White in the victim's neighborhood on the morning of the assault, as well as four other witnesses who testified that White had either acknowledged that petitioner was "innocent" or had actually admitted to committing the crimes. *Id.*, at 340-342, 605 S. E. 2d, at 22-23. One witness recounted that when he asked White about the "word . . . on the street" that White was responsible for Stewart's murder, White "put his head down and he raised his head back up and he said, well, you know I like older women." App. 119. According to this witness, White added that "he did what they say he did" and that he had "no regrets about it at all." *Id.*, at 120. Another witness, who had been incarcerated with White, testified that White had admitted to assaulting Stewart, that a police officer had asked the witness to testify falsely against petitioner, and that employees of the prosecutor's office, while soliciting the witness' cooperation, had spoken of manufacturing evidence against petitioner. *Id.*, at 38-50. White testified at the pretrial hearing and denied making the incriminating statements. 361 S. C., at 341-342, 605 S. E. 2d, at 23. He also provided an alibi for the time of the crime, but another witness refuted his alibi. *Id.*, at 342, 605 S. E. 2d, at 23.

The trial court excluded petitioner's third-party guilt evidence citing *State v. Gregory*, 198 S. C. 98, 16 S. E. 2d 532 (1941), which held that such evidence is admissible if it "raise[s] a reasonable inference or presumption as to [the defendant's] own innocence" but is not admissible if it merely "cast[s] a bare suspicion upon another" or "raise[s] a conjectural inference as to the commission of the crime by another." App. 133-134 (quoting *Gregory*, *supra*, at 104, 16 S. E. 2d, at 534). On appeal, the South Carolina Supreme Court found no error in the exclusion of petitioner's third-party guilt evidence. Citing both *Gregory* and its

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later decision in *State v. Gay*, 343 S. C. 543, 541 S. E. 2d 541 (2001), the State Supreme Court held that “where there is strong evidence of an appellant’s guilt, especially where there is strong forensic evidence, the proffered evidence about a third party’s alleged guilt does not raise a reasonable inference as to the appellant’s own innocence.” 361 S. C., at 342–343, 605 S. E. 2d, at 24. Applying this standard, the court held that petitioner could not “overcome the forensic evidence against him to raise a reasonable inference of his own innocence.” *Id.*, at 343, 605 S. E. 2d, at 24. We granted certiorari. 545 U. S. ____ (2005).

II

“[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.” *United States v. Scheffer*, 523 U. S. 303, 308 (1998); see also *Crane v. Kentucky*, 476 U. S. 683, 689–690 (1986); *Marshall v. Lonberger*, 459 U. S. 422, 438, n. 6 (1983); *Chambers v. Mississippi*, 410 U. S. 284, 302–303 (1973); *Spencer v. Texas*, 385 U. S. 554, 564 (1967). This latitude, however, has limits. “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane, supra*, at 690 (quoting *California v. Trombetta*, 467 U. S. 479, 485 (1984); citations omitted). This right is abridged by evidence rules that “infring[e] upon a weighty interest of the accused” and are “‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Scheffer, supra*, at 308 (quoting *Rock v. Arkansas*, 483 U. S. 44, 58, 56 (1987)).

This Court’s cases contain several illustrations of “arbitrary” rules, *i.e.*, rules that excluded important defense evidence but that did not serve any legitimate interests. In *Washington v. Texas*, 388 U. S. 14 (1967), state statutes

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barred a person who had been charged as a participant in a crime from testifying in defense of another alleged participant unless the witness had been acquitted. As a result, when the defendant in *Washington* was tried for murder, he was precluded from calling as a witness a person who had been charged and previously convicted of committing the same murder. Holding that the defendant's right to put on a defense had been violated, we noted that the rule embodied in the statutes could not "even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury" since the rule allowed an alleged participant to testify if he or she had been acquitted or was called by the prosecution. *Id.*, at 22–23.

A similar constitutional violation occurred in *Chambers v. Mississippi*, *supra*. A murder defendant called as a witness a man named McDonald, who had previously confessed to the murder. When McDonald repudiated the confession on the stand, the defendant was denied permission to examine McDonald as an adverse witness based on the State's "voucher" rule, which barred parties from impeaching their own witnesses. *Id.*, at 294. In addition, because the state hearsay rule did not include an exception for statements against penal interest, the defendant was not permitted to introduce evidence that McDonald had made self-incriminating statements to three other persons. Noting that the State had not even attempted to "defend" or "explain [the] underlying rationale" of the "voucher rule," *id.*, at 297, this Court held that "the exclusion of [the evidence of McDonald's out-of-court statements], coupled with the State's refusal to permit [the defendant] to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process," *id.*, at 302.

Another arbitrary rule was held unconstitutional in *Crane v. Kentucky*, *supra*. There, the defendant was pre-

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vented from attempting to show at trial that his confession was unreliable because of the circumstances under which it was obtained, and neither the State Supreme Court nor the prosecution "advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence." *Id.*, at 691.

In *Rock v. Arkansas*, *supra*, this Court held that a rule prohibiting hypnotically refreshed testimony was unconstitutional because "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnotic recollections." *Id.*, at 61. By contrast, in *United States v. Scheffer*, *supra*, we held that a rule excluding all polygraph evidence did not abridge the right to present a defense because the rule "serve[d] several legitimate interests in the criminal trial process," was "neither arbitrary nor disproportionate in promoting these ends," and did not "implicate a sufficiently weighty interest of the defendant." *Id.*, at 309.

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. See, e.g., Fed. Rule Evid. 403; Uniform Rule of Evid. 45 (1953); ALI, Model Code of Evidence Rule 303 (1942); 3 J. Wigmore, Evidence §§1863, 1904 (1904). Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Crane*, *supra*, at 689-690 (quoting *Delaware v. Van Arsdall*, 475 U. S. 673, 679 (1986); ellipsis and brackets in original). See also *Montana v. Egelhoff*, 518 U. S. 37,

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42 (1996) (plurality opinion) (terming such rules "familiar and unquestionably constitutional").

A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. See, e.g., 41 C. J. S., Homicide §216, pp. 56–58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded"); 40A Am. Jur. 2d, Homicide §286, pp. 136–138 (1999) ("[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged. . . . [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial" (footnotes omitted)). Such rules are widely accepted,* and neither petitioner

* See, e.g., *Smithart v. State*, 988 P. 2d 583, 586–587 (Alaska 1999); *Shields v. State*, 357 Ark. 283, 287–288, 166 S. W. 3d 28, 32 (2004); *People v. Hall*, 41 Cal. 3d 826, 833, 718 P. 2d 99, 103–104 (1986) (en banc); *People v. Mulligan*, 193 Colo. 509, 517–518, 568 P. 2d 449, 456–457 (1977) (en banc); *State v. West*, 274 Conn. 605, 624–627, 877 A. 2d 787, 802–803 (2005); *Winfield v. United States*, 676 A. 2d 1 (DC App. 1996) (en banc); *Klinec v. State*, 269 Ga. 570, 573, 501 S. E. 2d 810, 813–814 (1998); *State v. Rabellizsa*, 79 Haw. 347, 350–351, 903 P. 2d 43, 46–47 (1995); *People v. Fort*, 248 Ill. App. 3d 301, 314, 618 N. E. 2d 445, 455 (1993); *State v. Adams*, 280 Kan. 494, 504–507, 124 P. 3d 19, 27–29 (2005); *Beaty v. Commonwealth*, 125 S. W. 3d 196, 207–208 (Ky. 2003); *State v. Dechaine*, 572 A. 2d 130, 134 (Me. 1990); *Commonwealth v. Scott*, 408 Mass. 811, 815–816, 564 N. E. 2d 370, 374–375 (1990); *State v. Jones*, 678 N. W. 2d 1, 16–17 (Minn. 2004); *Moore v. State*, 179 Miss. 268, 274–275, 175 So. 183, 184 (1937); *State v. Chaney*, 967 S. W. 2d 47, 55 (Mo. 1998) (en banc); *State v. Cotto*, 182 N. J. 316, 332–333,

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nor his *amici* challenge them here.

In *Gregory*, the South Carolina Supreme Court adopted and applied a rule apparently intended to be of this type, given the court's references to the "applicable rule" from *Corpus Juris* and *American Jurisprudence*:

"[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." 198 S. C., at 104-105, 16 S. E. 2d, at 534-535 (quoting 16 C. J., Criminal Law §1085, p. 560 (1918) and 20 Am. Jur., Evidence §265, p. 254 (1939); footnotes omitted).

In *Gay* and this case, however, the South Carolina Supreme Court radically changed and extended the rule. In *Gay*, after recognizing the standard applied in *Gregory*, the court stated that "[i]n view of the strong evidence of appellant's guilt—especially the forensic evidence— . . . the proffered evidence . . . did not raise 'a reasonable inference' as to appellant's own innocence." *Gay*, 343 S. C., at

865 A. 2d 660, 669-670 (2005); *Gore v. State*, 2005 OK CR 14, ¶¶13-24, 119 P. 3d 1268, 1272-1276; *State v. Gregory*, 198 S. C. 98, 104-105, 16 S. E. 2d 532, 534-535 (1941); *Wiley v. State*, 74 S. W. 3d 399, 405-408 (Tex. Crim. App. 2002); *State v. Grega*, 168 Vt. 363, 375, 721 A. 2d 445, 454 (1998); *State v. Thomas*, 150 Wash. 2d 821, 856-858, 83 P. 3d 970, 988 (2004) (en banc); *State v. Parr*, 207 W. Va. 469, 475, 534 S. E. 2d 23, 29 (2000) (*per curiam*); *State v. Denny*, 120 Wis. 2d 614, 622-625, 357 N. W. 2d 12, 16-17 (Wis. App. 1984).

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550, 541 S. E. 2d, at 545 (quoting *Gregory*, *supra*, at 104, 16 S. E. 2d, at 534, in turn quoting 16 C. J., §1085, at 560). Similarly, in the present case, as noted, the State Supreme Court applied the rule that "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt" may (or perhaps must) be excluded. 361 S. C., at 342, 605 S. E. 2d, at 24.

Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case. If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

Furthermore, as applied in this case, the South Carolina Supreme Court's rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence. Here, for example, the defense strenuously claimed that the prosecution's forensic evidence was so unreliable (due to mishandling and a deliberate plot to frame petitioner) that the evidence should not have even been admitted. The South Carolina Supreme Court responded that these challenges did not entirely "eviscerate" the forensic evidence and that the defense challenges went to the weight and not to the admissibility of that evidence. *Id.*, at 343, n. 8, 605 S. E. 2d, at 24, n. 8. Yet, in evaluating the prosecution's forensic evidence and deeming it to be "strong"—and thereby justifying exclusion of petitioner's third-party guilt evidence—the South Carolina Supreme Court made no mention of the defense challenges to the prosecution's evidence.

Interpreted in this way, the rule applied by the State Supreme Court does not rationally serve the end that the

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Gregory rule and its analogues in other jurisdictions were designed to promote, i.e., to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues. The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

The rule applied in this case is no more logical than its converse would be, i.e., a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty. In the present case, for example, the petitioner proffered evidence that, if believed, squarely proved that White, not petitioner, was the perpetrator. It would make no sense, however, to hold that this proffer precluded the prosecution from introducing its evidence, including the forensic evidence that, if credited, provided strong proof of the petitioner's guilt.

The point is that, by evaluating the strength of only one

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party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "a meaningful opportunity to present a complete defense." *Crane*, 476 U. S., at 690 (quoting *Trombetta*, 467 U. S., at 485).

III

For these reasons, we vacate the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD
NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY
PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Charles Nemon Vandross, Appellant.

Appeal from Greenwood County
Wyatt T. Saunders, Jr., Circuit Court Judge

Unpublished Opinion No. 2009-UP-192
Submitted April 1, 2009 – Filed May 5, 2009

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, Assistant Attorney General Melody J.

Full text at <http://pub.bna.com/cl/0530401.pdf>

Right to Counsel

Filing Anders Brief Doesn't Relieve Counsel Of Duty to Inform Client of Right to Appeal

Appellate counsel's filing of an *Anders* no-merit brief in the court of appeals does not relieve the attorney of the duty to inform the client of the right to file a pro se petition for discretionary review in a higher court, the Texas Court of Criminal Appeals ruled Sept. 13. The court further held that a habeas corpus petitioner seeking relief on the ground that counsel's failure to provide that information violated his Sixth Amendment right to effective counsel may prevail without having to show that he would have managed to obtain discretionary review if he had been properly advised. (*Ex parte Owens*, Tex. Crim. App., No. AP-74,996, 9/13/06)

In *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997), the court held that appellate counsel may not deny a client the right or opportunity to seek discretionary review pro se even though the attorney need not discuss the merits of such review with the client. This ruling built on *Ex parte Jarrett*, 891 S.W.2d 941 (Tex. Crim. App. 1995), in which the court said that a defendant is denied his Sixth Amendment right to the effective assistance of counsel if appellate counsel's action or inaction costs him the opportunity to seek discretionary review.

Meritless Appeal. In the case before the court, the petitioner's appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), asserting that there were no meritorious grounds for appeal and that, in his opinion, the appeal was wholly frivolous. The petitioner filed a separate pro se brief. The court of appeals affirmed the petitioner's conviction in a memorandum opinion, and no petition for discretionary review was filed.

Subsequently, the petitioner sought a habeas writ claiming, among other things, that appellate counsel neglected to tell him he was entitled to file a petition for discretionary review. He produced a letter written to him by his attorney opining that the petitioner had a greater chance of succeeding in a habeas corpus action than on direct review. The state thereafter obtained an affidavit from the attorney stating that he had felt the habeas route would prove more advantageous to the petitioner, and that he did not discuss filing a petition for discretionary review with the petitioner because it "had no chance of being granted."

In his habeas application, the petitioner asked the court of criminal appeals to decide whether Wilson applies when appellate counsel has filed an *Anders* brief on direct appeal. The court, in an opinion by Judge Tom Price, said it did not see "any principled reason" why it would not. The court reasoned that "the harm that occurs from the failure to timely inform the appellant of his right to file a petition for discretionary review is that he is deprived of the benefit of an entire proceeding, or at least of the opportunity to exercise his unfettered right to attempt to persuade us to exercise our discretion."

A client whose attorney files an *Anders* brief "is no less deprived" by appellate counsel's failure to discuss his right to file a petition for discretionary review than is the client of an attorney who files a merits brief, the court said. After all, it noted, "attorneys who file *Anders* briefs are not always correct that there is no merit to an appeal."

→ **Limited Standard of Prejudice.** The state further argued that the petitioner should not be granted relief even if his appellate counsel's failure to inform him of his right to seek discretionary review amounted to deficient performance. The court of appeals' summary affirmation of the conviction indicated that the petitioner's chances of obtaining discretionary review were "negligible," the state maintained, and thus any mistake by counsel did not prejudice him.

→ Ordinarily, the test for Sixth Amendment ineffectiveness claims that was established in *Strickland v. Washington*, 466 U.S. 668 (1984), requires a defendant to show both that counsel's performance fell below professional norms and that the deficient performance was likely to have affected the outcome of the trial.

Texas's highest criminal appeals court decided, however, that this standard is too demanding for cases in which counsel's actions wholly deprived the client of his right to seek discretionary review. *Ex parte Crow*, 180 S.W.3d 135 (Tex. Crim. App. 2005), held that appellate counsel's failure to follow *Wilson*'s dictates must be measured by a "more limited" standard for prejudice. Under this standard, the court explained, the client need not show that counsel's actions deprived him of a favorable outcome; instead, the client need show only that he was deprived of a proceeding that he would have availed himself of had counsel not failed to inform him of his right to pursue it. "All the applicant need establish in the way of showing prejudice," the court wrote, "is that he would in fact have sought a petition for discretionary review, had he been timely informed by his appellate counsel of his right to do so."

Applying this standard to the case at bar, the court concluded that the petitioner was entitled to relief. The fact that he filed a pro se brief in the court of appeals once the attorney told him of his intention to file an *Anders* brief "strongly militates" in favor of finding that he also would have filed a pro se petition seeking discretionary review in the court of criminal appeals, the court said. The petitioner did not have to show any likelihood that he would have succeeded in obtaining review, it added.

Other Opinions. Judge Paul Womack, joined by Judge Cathy Cochran, concurred in the result but argued that requiring an attorney who has filed an *Anders* brief to inform a defendant that he has a right to seek discretionary review is inconsistent with the attorney's ethical obligations. Once counsel files an *Anders* brief, he no longer represents the client and cannot give advice on whether to seek further review, Womack said. He said he knew of no other jurisdiction that imposes a duty upon counsel rather than the court to inform a defendant of his right to appeal and of the procedures for seeking review.

Presiding Judge Sharon Keller dissented, saying relief was unwarranted because the petitioner failed to sign and verify the pleading in which he asserted he would have sought discretionary review if he had known he could do so. Judge Barbara Parker Hervey,

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STATE OF CONNECTICUT v. RUSSELL KIRBY
(SC 17531)

Sullivan, C. J., and Borden, Norcott, Palmer and Zarella, Js.*

Argued January 5—officially released October 17, 2006

Jeremiah Donovan, for the appellant (defendant).

Kevin T. Kane, state's attorney, for the appellee (state).

Opinion

NORCOTT, J. This appeal requires us to consider whether various hearsay statements made by the deceased complainant to a police dispatcher, a responding police officer, and an emergency medical technician were "testimonial" and, therefore, inadmissible as violative of the confrontation clause of the sixth amendment to the United States constitution¹ as explained by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The defendant, Russell Kirby, appeals² from the judgment of conviction, rendered after a jury trial, of one count of kidnapping in the second degree in violation of General Statutes § 53a-94,³ and one count of assault in the third degree in violation of General Statutes § 53a-61.⁴ In addition to raising the *Crawford* and associated evidentiary issues, specifically whether the deceased complainant's statements to the police officer and dispatcher were "spontaneous utterances," the defendant also contends that the trial court improperly denied his motions: (1) to suppress statements that he had made to the police at his residence and at the police station; and (2) for judgment of acquittal based on the trial court's failure to order the state to move for the grant of immunity for a witness pursuant to General Statutes § 54-47a. Guided by the United States Supreme Court's recent decision in *Davis v. Washington*, U.S. , 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), we reverse the judgment of the trial court and remand the case for a

new trial.

The record reveals the following facts and procedural history. On the evening of May 2, 2002, Leslie Buck (complainant), a fifty-nine year old second grade teacher, attended a meeting of Alpha Delta Kappa, an honorary sorority for teachers. After the meeting ended at approximately 8:15 p.m., the complainant left the meeting and drove home, intending to stop first at her mother's house to drop off some dessert from the meeting. Later that evening, at approximately 10:45 p.m., Charles Buck, the complainant's husband, called Judy Barber, a close friend of the complainant who also had attended the sorority meeting, and asked about the complainant's whereabouts. Barber did not know where the complainant was at that time.

Buck previously had called the Stonington police at approximately 10:30 p.m., to report the complainant missing.⁵ Timothy Thornton, a Stonington police officer, responded to Buck's home and took a report from him. After Thornton spoke to Buck, as well as to Barber, he drove to the nearby A & P supermarket on the chance that the complainant might have stopped there on her way home. While Thornton was at the A & P, the complainant returned home; Buck notified the police of her return via telephone at 11:07 p.m. The complainant then interjected in Buck's conversation with Allyson Gomes, the police dispatcher, and told Gomes that the defendant had surprised her when she arrived home, and then assaulted and abducted her before she was able to escape.⁶ Gomes then dispatched Thornton back to Buck's residence, where he interviewed the complainant, whom he found near hysterical and disheveled, but coherent.⁷ Thornton then called for medical assistance at that time. After Thornton interviewed the complainant, she was assessed and transported to a hospital by Jeremy Knapp, a volunteer emergency medical technician, and his ambulance crew.⁸

The complainant's statements during her interview with Thornton and telephone call to Gomes, introduced into evidence through Thornton's testimony and the tape recording of the telephone call, develop in greater detail the altercation between the complainant and the defendant as follows. When the complainant arrived home from the meeting, she heard someone call her name. When she turned toward the voice, an individual that she had identified as the defendant struck her on the head and neck with a black object that made a humming noise. She then scuffled with the defendant, who tied her up. The complainant was able to extricate herself at first, but the defendant chased and tackled her again, tying her up more securely the second time. The defendant then put the complainant in her car, a Buick Park Avenue, and threw a bag into the backseat before driving away with her to his residence.

ant drove around in her car, he pulled over to the side of the road and untied her. The defendant then pulled over again on Interstate 95 in Mystic because he thought he had hit something after hearing a thumping noise. After the defendant exited the car to check the source of the noise, the complainant, whose hands previously had been untied, was able to use a spare key in her pocket to start the car and drive off, leaving the defendant on the side of the highway. The complainant then drove the car to her home, at which point Buck called the police to tell them that she had returned.

Once the complainant had been transported to the hospital, Thornton and several other police officers, including Sergeant Keith Beebe, met to discuss the case. They subsequently decided to go to the defendant's home to discuss the case with him. When the police arrived at the defendant's home in Ledyard at 4:30 a.m. on May 3, 2002, they knocked on his door. The defendant declined their requests to step outside, but invited the police officers into the house. While in the house, the officers noticed, on the kitchen counter, a key ring that was readily identifiable as belonging to the complainant because she previously had described its emblems and accessories to the officers; they seized those keys. In response to Beebe's question about whether the defendant knew why the police were there, the defendant first said yes, and when asked about whether it was about the complainant, he said yes again. The defendant then admitted to the officers that he had tied up the complainant as part of kidnapping her for money, and asked whether he would be coming with the officers. The defendant was then taken into custody.

Subsequently, David Knowles, a detective sergeant with the Stonington police department, searched the complainant's automobile. He found a duffel bag belonging to the defendant in the backseat containing a .45 caliber handgun and a magazine with seven live rounds, two stun guns, one of which was functional, two plastic bottles of liquid, which turned out to be a chopped olive martini, a hickory log, several ropes, two pairs of men's eyeglasses, and one pair of women's eyeglasses that a local optician subsequently identified as belonging to the complainant. The bag also contained several bandannas and white cotton gloves that were similar to other bandannas and gloves that the police had found on a dresser in the defendant's residence.⁹

Early in the morning of May 3, 2002, the complainant called Barber, and told her what had happened to her. The complainant then went and worked a full day at school. That evening, after Thornton had stopped by the complainant's home to check on her, the complainant died as a result of a fall down a flight of stairs at her home.

of § 53a-94, two counts of burglary in the first degree in violation of General Statutes § 53a-101 (a) (1) and (2), and one count of assault in the third degree in violation of § 53a-61. The defendant then moved in limine to exclude the complainant's statements to Thornton, Gomes and Knapp as inadmissible hearsay that also would violate the defendant's confrontation clause rights. The defendant also moved to suppress statements that he made to the police after his arrest, as well as the keys that the police had seized from his residence. The trial court denied these motions in two extensive oral decisions. The case was then tried to the jury, and the trial court rendered judgment of conviction in accordance with the verdict of guilty on the kidnapping and assault charges. After denying the defendant's motions for a judgment of acquittal and a new trial, the trial court sentenced the defendant to a total effective sentence of twenty-one years imprisonment, three of which are nonsuspendable.¹⁰ This appeal followed.

I

WHETHER THE COMPLAINANT'S STATEMENTS TO GOMES, THORNTON AND KNAPP WERE PROPERLY ADMITTED INTO EVIDENCE

The primary issue in this appeal is whether the trial court properly admitted into evidence the complainant's statements to Gomes, the police dispatcher who received the telephone call, Thornton, the police officer who initially responded to the call and interviewed the complainant, and Knapp, the emergency medical technician who treated and transported her. The trial court denied the defendant's motions in limine to preclude the admission of those statements, rejecting his claims that the statements: (1) were not "spontaneous utterances" admissible under § 8-3 (2) of the Connecticut Code of Evidence; and (2) were "testimonial" and, therefore, inadmissible under *Crawford v. Washington*, supra, 541 U.S. 36. We note at the outset that it is undisputed that the defendant properly preserved all of these issues for appellate review when he filed relevant motions in limine, objected again at trial, and reiterated his objection in his motion for a new trial. We begin with the defendant's evidentiary claims.¹¹

A

Whether the Complainant's Statements to Gomes and Thornton Were Spontaneous Utterances

The defendant first claims that the trial court improperly admitted the statements to Thornton and Gomes as spontaneous utterances under § 8-3 (2) of the Connecticut Code of Evidence. Specifically, the defendant notes that the complainant made her statements to Thornton and Gomes two and one-half to three hours after she initially had arrived home from the sorority

ant was able to drive home created an opportunity for fabrication that rendered these statements inadmissible as spontaneous utterances. The state argues in response that the trial court did not abuse its discretion in determining that the statements were admissible because less than thirty minutes had passed since she had escaped from the defendant, and that both the telephone call tape recording and the witnesses' testimony demonstrated that those statements were made while she was still extremely emotional and fearful. We agree with the state.

"An out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies." (Internal quotation marks omitted.) *State v. Wargo*, 255 Conn. 113, 127, 763 A.2d 1 (2000). Section 8-3 of the Connecticut Code of Evidence provides that certain statements are "not excluded by the hearsay rule, even though the declarant is available as a witness" A "spontaneous utterance" is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Conn. Code Evid. § 8-3 (2). Furthermore, the commentary to § 8-3 (2) provides: "The hearsay exception for spontaneous utterances is well established. . . . Although Section 8-3 (2) states the exception in terms different from that of the case law on which the exception is based . . . the rule assumes incorporation of the case law principles underlying the exception.

"The event or condition must be sufficiently startling, so 'as to produce nervous excitement in the declarant and render [the declarant's] utterances spontaneous and unreflective.'" (Citations omitted.)

"The excited utterance exception is well established. Hearsay statements, otherwise inadmissible, may be admitted into evidence to prove the truth of the matter asserted therein when (1) the declaration follows a startling occurrence, (2) the declaration refers to that occurrence, (3) the declarant observed the occurrence, and (4) the declaration is made under circumstances that negate the opportunity for deliberation and fabrication by the declarant

"The requirement that a spontaneous utterance be made under such circumstances as to [negate] the opportunity for deliberation and fabrication by the declarant . . . does not preclude the admission of statements made after a startling occurrence as long as the statement is made under the stress of that occurrence. . . . While [a] short time between the incident and the statement is important, it is not dispositive. . . .

"Whether an utterance is spontaneous and made under circumstances that would preclude contrivance

to be decided by the trial judge. . . . The trial court has broad discretion in making that factual determination, which will not be disturbed on appeal absent an unreasonable exercise of discretion. . . . Furthermore, although the time period between the occurrence and the utterance is important, it is *not* dispositive.”¹² (Citations omitted; emphasis added; internal quotation marks omitted.) *State v. Kelly*, 256 Conn. 23, 41–42, 770 A.2d 908 (2001); *id.*, 41 (sexual assault victim’s statement made to sister while victim was hysterical and in fetal position, fifteen minutes after arriving home from altercation, properly admitted as spontaneous utterance).

Thus, we follow the rule embraced by the “majority of the jurisdictions that have addressed the issue of the effect of the time interval between the startling occurrence and the making of the spontaneous utterance,” and conclude that there is no identifiable discrete time interval within which an utterance becomes spontaneous; “[e]ach case must be decided on its particular circumstances.” *State v. Stange*, 212 Conn. 612, 618, 563 A.2d 681 (1989); *id.*, 618–20 (collecting cases reflecting acceptable time lapses ranging from fifteen minutes to six and one-half hours and upholding victim’s statement made fifteen to thirty minutes after shooting as victim was witnessed in “agitated and painful state”); see also *State v. Artuk*, 75 Conn. App. 181, 188–90, 815 A.2d 694 (2003) (thirty minutes not excessive time between family fight and child blurting out to police officer that he saw “daddy hit his mommy” when child was still under stress of having witnessed that altercation [internal quotation marks omitted]); cf. *State v. Gregory C.*, 94 Conn. App. 759, 771–72, 893 A.2d 912 (2006) (Statements of the victim made to a police officer were not spontaneous utterances when “more than fifteen hours had passed between the time of the alleged sexual assault and the victim’s statement to [an investigating police officer]. Further, the victim discussed her alleged assault at length with [her friend] prior to giving her statement. The victim thus had considerable time and opportunity to collect her thoughts and reflect on what had occurred the night before.”); *State v. McNair*, 54 Conn. App. 807, 813, 738 A.2d 689 (noting that when “significant time lapse was allowed” for spontaneous utterance, “the declarant had undergone drastic personal trauma and remained in a severe emotional state from the time of the event until the time of the statement”), cert. denied, 251 Conn. 913, 739 A.2d 1249 (1999). Moreover, that a statement is made in response to a question does not preclude its admission as a spontaneous utterance. See *State v. Stange*, *supra*, 619.

We conclude that the trial court did not abuse its broad discretion in determining that the complainant’s statements to Thornton and Gomes were admissible as

has recognized, "the application of the exception entails a uniquely fact-bound inquiry. The overarching consideration is whether the declarant made the statement before he or she had the opportunity to undertake a reasoned reflection of the event described therein." *State v. Westberry*, 68 Conn. App. 622, 628, 792 A.2d 154, cert. denied, 260 Conn. 923, 797 A.2d 519 (2002). In the present case, it is undisputed that the complainant's statements followed a startling occurrence, namely, her altercation with the defendant, and that the complainant both observed and referred to that occurrence. With respect to the fourth element, as the defendant himself states, "[t]here can be no doubt that the trial court found correctly that [the complainant] sounded highly emotional when she spoke with [Gomes], [Thornton] and [Knapp]."¹³ Moreover, all of the statements at issue were made within one-half hour of the complainant having arrived home from her multihour altercation with the defendant, which our cases indicate is not an excessive time lapse for purposes of avoiding contrivance or fabrication by an alleged victim. See, e.g., *State v. Stange*, supra, 212 Conn. 618-20; cf. *State v. McNair*, supra, 54 Conn. App. 813 (Trial court improperly admitted a statement made after a one-half hour time lapse when the declarant "was not the actual or intended victim, or even a close bystander. The witness viewed the incident from the safety of her apartment. The thirty minute intervening period gave the witness ample time to collect her thoughts before making the statements at issue." [Internal quotation marks omitted.]). There also is no evidence that the complainant had the opportunity to speak to anyone else prior to making the statements, which would indicate the opportunity to reflect or contrive a story. See *State v. Gregory C.*, supra, 94 Conn. App. 771-72. "The conclusion that evidence is admissible under a hearsay exception does not preclude the possibility, in a criminal trial, that the same evidence will be inadmissible under the confrontation clause of the sixth amendment. The confrontation clause limits the state's use of hearsay evidence against a criminal defendant at trial." *State v. Smith*, 275 Conn. 205, 232, 881 A.2d 160 (2005). Accordingly, we now turn to the constitutional issues presented by this case concerning the admissibility of the complainant's statements.

B

Crawford Issues with Respect to Gomes and Thornton

The defendant next claims that the trial court improperly admitted into evidence the complainant's statements made via telephone to Gomes and on the scene to Thornton. The defendant claims specifically that these statements are inadmissible under the United States Supreme Court's recent decision in *Davis v. Washington*, supra, 126 S. Ct. 2266, which provides greater explanation of the application of that court's decision in

contexts.¹⁴

We first note the standard of review applicable to the trial court's determination of whether a statement is testimonial and, therefore, subject to the admissibility restrictions of *Crawford*. Because this is a question of constitutional law, we agree with the parties that the trial court's determination is subject to plenary review. Cf. *State v. Merriam*, 264 Conn. 617, 640–41 n.27, 826 A.2d 1021 (2003) (following plurality opinion in *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 [1999], and “conduct[ing] an independent review of the circumstances surrounding the victim’s statements in determining whether those statements possess the particularized guarantees of trustworthiness that are necessary to satisfy the requirements of the confrontation clause”); see also *Wall v. State*, 184 S.W.3d 730, 742–43 (Tex. Crim. App. 2006) (“Although we defer to a trial court’s determination of historical facts and credibility, we review a constitutional legal ruling, i.e. whether a statement is testimonial or non-testimonial, de novo. This is particularly so because the legal ruling of whether a statement is testimonial under *Crawford* is determined by the standard of an objectively reasonable declarant standing in the shoes of the actual declarant. On that question trial judges are no better equipped than are appellate judges, and the ruling itself does not depend upon demeanor, credibility, or other criteria peculiar to personal observation.”).

“Traditionally, for purposes of the confrontation clause, all hearsay statements were admissible [under *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)] if (1) the declarant was unavailable to testify, and (2) the statement bore adequate indicia of reliability. . . . [In *Crawford v. Washington*, supra, 541 U.S. 68], the United States Supreme Court overruled *Roberts* to the extent that it applied to testimonial hearsay statements. . . . In *Crawford*, the court concluded that the reliability standard set forth in the second prong of the *Roberts* test is too amorphous to prevent adequately the improper admission of core testimonial statements that the [c]onfrontation [c]ause plainly meant to exclude. . . . The court held, therefore, that such testimonial hearsay statements may be admitted as evidence against an accused at a criminal trial only when (1) the declarant is unavailable to testify, and (2) the defendant has had a prior opportunity to cross-examine the declarant. . . .

“In so concluding, the court drew a distinction between testimonial hearsay statements and those deemed nontestimonial. Where nontestimonial hearsay is at issue, it is wholly consistent with the [f]ramers’ design to afford the [s]tates flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from [c]on-

words, nontestimonial hearsay statements may still be admitted as evidence against an accused in a criminal trial if it satisfies both prongs of the *Roberts* test, irrespective of whether the defendant has had a prior opportunity to cross-examine the declarant.

"Although the court declined to define the terms testimonial and nontestimonial, it considered three formulations of th[e] core class of testimonial statements The first formulation consists of ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially The second formulation consists of extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions Finally, the third formulation consists of statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial The court did not adopt any one particular formulation, noting that, [t]hese formulations all share a common nucleus and then define the [c]lause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, ex parte testimony at a preliminary hearing. . . . Similarly, [s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. . . . Therefore, [w]hatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the [c]onfrontation [c]lause was directed." (Citations omitted; internal quotation marks omitted.) *State v. Rivera*, 268 Conn. 351, 362–64, 844 A.2d 191 (2004).

The Supreme Court recently considered the applicability of *Crawford* to more informal statements made to police dispatchers in the context of 911 calls, and to police officers on the scene of a crime. In *Davis v. Washington*, *supra*, 126 S. Ct. 2266, the court articulated the following test for determining whether such statements are testimonial and, therefore, inadmissible under *Crawford* in the absence of a prior opportunity for cross-examination by the defendant: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency,

later criminal prosecution." Id., 2273-74.

The court then applied this test to the facts of the two cases before it.¹⁶ The court first assumed that 911 operators are agents of the police, and concluded that the recording of the 911 call in that case was not testimonial hearsay because the declarant, a domestic violence victim calling to report that her former boyfriend was at her house beating her, "was speaking about events *as they were actually happening*, rather than 'describ[ing] past events' Moreover, any reasonable listener would recognize that [the caller] . . . was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, [the victim's] call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered . . . objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn . . . what had happened in the past. This is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon." (Citation omitted; emphasis in original.) Id., 2276. Ultimately, the Supreme Court concluded that, "the circumstances of the [caller's] interrogation objectively indicate its primary purpose was to enable police assistance to meet an *ongoing* emergency." (Emphasis added.) Id., 2277. The court did, however, note that a call for help could evolve into testimonial statements once the purpose of the emergency call has been achieved, such as after the emergency has been averted by, for example, the departure of the perpetrator from the scene. It left to trial courts, through in limine procedure, to "redact or exclude the portions of any statement that have become testimonial" Id.

With respect to the on-scene statements by a domestic violence victim to a police officer, the Supreme Court concluded that the statements before it were testimonial, despite the fact that they were not the formal police station interviews with *Miranda* warnings initially contemplated in *Crawford*. Id., 2278. The court used its "primary purpose" test to hold that these statements were testimonial because it "is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything" (Citation omitted.) Id. The court noted that the officer's questioning was directed not at seeking "to determine . . . 'what is happening,' but rather 'what happened.' Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, pre-

"questions at the scene will yield nontestimonial answers," as officers might need to make initial inquiries to assess the danger level of the situation. *Id.*, 2279. The court also emphasized that, "in cases like this one, where [the victim's] statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial." *Id.*

1

Applying the *Davis* test to the facts of the present case, we first conclude that the complainant's statements by telephone to Gomes were testimonial and, therefore, inadmissible under *Crawford*. A review of Gomes' conversation with the complainant makes clear that the "primary purpose" of the call was to investigate and apprehend a suspect from a prior crime, rather than to solve an ongoing emergency or crime in progress at the time of the call.¹⁷ The defendant properly points out that the call at issue was made after the emergency had been averted and the complainant no longer was under any threat from the defendant because she already had escaped and had left him stranded on the side of the road. Thus, although the complainant might have needed emergency medical assistance at the time she made the call, the bulk of her conversation with Gomes nevertheless consisted of her account of a crime that had happened to her in the recent past, rather than one that was happening to her at the time of the call. This renders the call, viewed as a whole,¹⁸ distinct from the telephone call that was held nontestimonial in *Davis*, in which the declarant, a domestic violence victim calling to report that her former boyfriend was at her house beating her, "was speaking about events as they were actually happening, rather than 'describ[ing] past events . . .'" (Citation omitted; emphasis in original.) *Id.*, 2276. Put differently, at the time of her telephone conversation with Gomes, the complainant in the present case was not under a "bona fide physical threat" at the hands of the defendant. *Id.* Her call was made for the purpose of reporting a past criminal act, rather than to avert a presently occurring one. This renders the telephone call recording testimonial and, therefore, inadmissible under *Crawford* in the absence of an opportunity for prior cross-examination by the defendant. Cf. *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006) (applying *Davis* and concluding that 911 call was nontestimonial when anonymous caller reported there had just been shooting and shooter had immediately fled scene); *Jackson v. State*, 931 So. 2d 1062, 1063 (Fla. App. 2006) (applying *Davis* and concluding that 911 tape was nontestimonial when victim "described events as they were actually happening"); *Cook v. State*, Court of Appeals, Docket No. 01-05-00107-

motorist who had just thrown beer bottle at caller's vehicle and gestured obscenely at him was nontestimonial because it reported "potential crime in progress"). We, therefore, conclude that the trial court improperly admitted the recording of the call into evidence.¹⁹

2

We conclude similarly as to the complainant's statements to Thornton at her home, which also were testimonial and, therefore, inadmissible under *Crawford* because the defendant lacked a prior opportunity for cross-examination. The facts and circumstances of this case indicate that, as in *Davis*, the officer's questioning was directed not at seeking "to determine . . . 'what is happening,' but rather 'what happened.' Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officer should have done." *Davis v. Washington*, supra, 126 S. Ct. 2278. In the present case, just as in *Davis*, any emergency with respect to the complainant had ceased because the alleged crimes no longer were in progress and she was rendered protected by Thornton's presence at her home, which constituted part of the alleged crime scene in this case. *Id.*, 2279. In this respect, we find instructive *State v. Mechling*, W. Va., 633 S.E.2d 311, 323 (2006), a recent case in which the West Virginia Supreme Court of Appeals applied *Davis* and concluded that a trial court had improperly permitted sheriffs' deputies to testify about statements by a domestic violence victim because "[i]t is clear from the circumstances that the deputies' interrogation of [the victim] was part of an investigation into possibly criminal past conduct." In so holding, the court emphasized that the perpetrator had departed the scene and there "was no emergency in progress when [they] arrived . . ." *Id.*; cf. *State v. Reardon*, Court of Appeals, Docket No. CR-2005-1177, 2006 Ohio App. LEXIS 3960, *7-8 (Ohio App. August 4, 2006) (statements to police officers responding to home invasion nontestimonial and concerned "ongoing emergency" when suspects were still fleeing scene upon officers' arrival). In the present case, Thornton's presence and the fact that the defendant, the alleged perpetrator, was located some distance away, rendered the primary purpose of Thornton's interaction with the complainant investigatory, and her answers to his questions testimonial statements. Accordingly, the trial court improperly permitted Thornton to testify about the complainant's statements to him.²⁰

Moreover, the state does not argue in its primary or supplemental briefs that the admission of the statements to Gomes or Thornton, in violation of the defendant's confrontation clause rights, constituted harmless error beyond a reasonable doubt. Accordingly, we must reverse the judgment of the trial court and remand the

us with a variety of issues that are likely to arise again on remand. We turn to them now, beginning with the defendant's third *Crawford* claim.

C

Crawford Issues with Respect to Statements
Made to Knapp

The defendant does not contest the admissibility of the complainant's statements to Knapp under the medical treatment exception to the hearsay rule, specifically § 8-3 (5) of the Connecticut Code of Evidence,²¹ but asks us to conclude that the trial court should have excluded the portions of Knapp's testimony repeating the complainant's statements that she had been "kidnapped," which he considers accusatory and, therefore, testimonial under *Crawford*. The defendant also argues that the complainant's statement to Knapp was testimonial because of the involvement of the police at the scene. The state argues in response that these statements were not testimonial because they were part of Knapp's immediate response to and medical assessment of the complainant at the scene. We agree with the state.

We begin with a review of Knapp's testimony before the trial court at the motions hearing and before the jury. At the motions hearing, Knapp testified about the complainant's "distraught" and "shak[en]" appearance and about her visible injuries and complaints, including chest and stomach pain, swollen wrists from having her hands tied, and numerous abrasions and lacerations. Knapp and his partner photographed her injuries, and those photographs were admitted at trial. In accordance with his usual medical assessment procedure, Knapp questioned her about the source of her injuries. The complainant told Knapp that she had been "thrown down" and "taken for several hours," but said nothing else other than that she had been to the kidnapper's home before she broke free. Knapp then testified about the first aid and transportation process to Lawrence and Memorial Hospital in New London. The complainant did not tell Knapp who had abducted her, or about the use of a stun gun. At the house, Thornton listened to Knapp's questioning, but did not himself participate in that questioning. Knapp testified consistently at trial. See footnote 8 of this opinion.

We note at the outset that, as with Gomes and Thornton, our review of the trial court's determination as to the testimonial nature of the complainant's statements to Knapp is plenary. See part I B of this opinion. The defendant's claim with respect to the complainant's statements to Knapp implicates the third formulation of testimonial statements under *Crawford*, namely, "statements that were made under circumstances which would lead an objective witness reasonably to

a later trial" (Internal quotation marks omitted.) *Crawford v. Washington*, supra, 541 U.S. 52. Most courts considering statements made for medical treatment, in cases that generally have arisen in the assessment and treatment of sexual assault victims, have concluded that, "if an interview is done strictly for medical purposes, and not in anticipation of criminal proceedings, the statement would be considered nontestimonial. . . . [I]f a statement is made as part of an investigation by government officials the statement is generally considered testimonial." (Citations omitted.) *State v. Blue*, 717 N.W.2d 558, 563 (N.D. 2006); *id.*, 564 (videotaped interview of child sex abuse victim by forensic examiner, taken one week after alleged assault, was testimonial when directed and witnessed by police detective); see also *People v. Vigil*, 127 P.3d 916, 926 (Colo. 2006) (With no police officer present, an objective witness in a child's position would not see the statements as testimonial because that "child would reasonably be interested in feeling better and would intend his statements to describe the source of his pain and his symptoms. In addition, an objectively reasonable seven-year-old child would expect that a doctor would use his statements to make him feel better and to formulate a medical diagnosis. He would not foresee the statements being used in a later trial."); *In re T.T.*, 351 Ill. App. 3d 976, 992, 815 N.E.2d 789 (2004) (The child victim's statements to a pediatrician "describing the cause of symptoms or pain or the general character of the assault were not testimonial in nature. . . . However, [the victim's] statement identifying [the] respondent as the perpetrator was testimonial" [Citation omitted.]); *Commonwealth v. DeOliveira*, 447 Mass. 56, 64, 849 N.E.2d 218 (2006) (child victim's statements "cannot persuasively be said to have been made in response to police interrogation" when police were present at hospital, but not for examination, and they had not "instructed the doctor on the manner in which his examination should proceed"); *Foley v. State*, 914 So. 2d 677, 685 (Miss. 2005) (child victim's statements to physicians not testimonial because they "were made as a part of neutral medical evaluations" and medical professionals did not contact and were not being used by police); *State v. Moses*, 129 Wash. App. 718, 730, 119 P.3d 906 (2005) (Domestic violence victim's explanation to an emergency room physician of how her jaw was injured was not testimonial because the "purpose of [the physician's] examination was for medical diagnosis and treatment of [the victim's] significant injuries. [The physician] had no role in the investigation of the assault and he was not working on behalf of or in conjunction with the police or governmental officials to develop testimony for the prosecution."), review denied, 157 Wash. 2d 1006, 136 P.3d 759 (2006).

The key to the inquiry is whether the examination

whether the "statement was the by-product of substantive medical activity." *In re T.T.*, supra, 351 Ill. App. 3d 992; id., 993 (pediatrician's "primary investment in cooperating with law enforcement agencies was in facilitating the least traumatic method of diagnosis and treatment for the alleged victim, rather than a specific interest in enforcing sexual abuse laws"). Also significant to whether the statement is testimonial is whether "such statements . . . accuse or identify the perpetrator of the assault." Id.; but see *Wallace v. State*, 836 N.E.2d 985, 996 (Ind. App. 2005) (dying victim's statements to emergency medical technician and emergency room nurse identifying defendant as shooter not testimonial because record contained no indication that inquiries were "taken in significant part for purposes of preserving it for potential future use in legal proceedings, i.e., with an eye toward trial" [internal quotation marks omitted]).

We conclude that the complainant's statements to Knapp were not testimonial under *Crawford*, and, therefore, properly were admitted under the "firmly rooted" medical treatment hearsay exception, which satisfied the applicable rule of *Ohio v. Roberts*, supra, 448 U.S. 66. The statements did not identify the defendant as the assailant, and the complainant's statements about her kidnapping and assaults were relevant to Knapp's determination of the origin of her injuries. They were, therefore, germane to describing the complainant's need for "medical treatment," and were not "testimonial." Moreover, Knapp's questioning of the complainant was secondary to the more detailed interview and statements taken by Thornton at the scene, which we have concluded were testimonial under *Crawford*. See part I B 2 of this opinion. Accordingly, the trial court properly admitted into evidence Knapp's testimony about the complainant's statements to him.

II

THE DEFENDANT'S MOTIONS TO SUPPRESS

A

Whether Questioning at the Defendant's Residence Constituted a Custodial Interrogation Requiring *Miranda* Warnings

The defendant next claims that the trial court improperly denied his motion to suppress certain statements that he had made to the police at his residence, which he claims were made without benefit of *Miranda* warnings.²² The defendant argues that the trial court improperly concluded that he was not the subject of a custodial interrogation at the time, and that *Miranda* warnings were, therefore, not required.

In its oral decision, following a suppression hearing, the trial court found that the defendant's statements

the statements themselves were voluntary. The trial court credited the police officers' testimony that they had gone to the defendant's home only to get his side of the story as part of their investigation, they did not draw their weapons, he invited the officers into his home, and the defendant cooperatively and calmly told them that he had tied up the complainant and kidnapped her for money. The trial court further credited Beebe's testimony that the defendant had stated words to the effect of, "I guess I'm going with you," after relating his story of what had happened. The trial court concluded that the defendant was not in custody until he acknowledged that he was going with the officers and was handcuffed, both of which occurred after he told the police what had happened. The trial court further found that the defendant's statements at his residence were voluntary because there was no show of force and the defendant's will had not been "overborne in any way"

"Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation. . . . [A]lthough the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. . . . A person is in custody only if, in view of all the surrounding circumstances, a reasonable person would have believed [that] he was not free to leave. . . . Further, the United States Supreme Court has adopted an objective, reasonable person test for determining whether a defendant is in custody. . . . Thus, in determining whether *Miranda* rights are required, the only relevant inquiry is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest. . . .

"The defendant bears the burden of proving that he was in custody for *Miranda* purposes. . . . Two discrete inquiries are essential to determine custody: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. . . . The first inquiry is factual, and we will not overturn the trial court's determination of the historical circumstances surrounding the defendant's interrogation unless it is clearly erroneous. . . . The second inquiry, however, calls for application of the controlling legal standard to the historical facts. . . . The ultimate determination of whether a defendant was subjected

novo." (Citations omitted; internal quotation marks omitted.) *State v. Turner*, 267 Conn. 414, 434-35, 838 A.2d 947, cert. denied, 543 U.S. 809, 125 S. Ct. 36, 160 L. Ed. 2d 12 (2004).

In the present case, the defendant does not attack the trial court's underlying factual findings, and our review of the record indicates that they are supported by the testimony of the various police officers, including Beebe and Thornton. Rather, the defendant contends that a reasonable person would not have felt free to leave because five police officers arrived at his house in separate vehicles at approximately 4:30 a.m., and that opening his door and inviting the officers inside was only "bowing to superior force" because his choice was interrogation in the dark outside, or interrogation inside the lighted house. He also notes that the officers did not tell him that he was free to leave or to ask them to leave.

We conclude that the trial court properly determined that the defendant did not carry his burden of proving that he was in custody at the time he made his initial statement to the police. We find instructive our decision in *State v. Johnson*, 241 Conn. 702, 719-20, 699 A.2d 57 (1997), in which we concluded that the interview of a suspect in the kitchen of his father's house was not custodial. In *Johnson*, detectives investigating the murder of a state trooper during the course of a burglary went to the home of the suspect's father, where the vehicle considered the getaway car had supposedly been parked at the time of the shooting. *Id.*, 716. Two detectives and a uniformed police officer went to the house and saw the car—they then saw the defendant, the suspect's brother, approach the house in his car, slow down as if to turn, but continue past the driveway. *Id.* "Suspecting that the defendant might know something about [his brother's] involvement in the burglary and shooting, [one detective] and the uniformed police officer entered the unmarked police car and drove after the defendant. They had driven approximately 100 yards when the defendant turned his car around and returned to the house. The police followed him into the driveway.

"The detectives asked the defendant if he would be willing to speak to them inside the house. The defendant agreed. The detectives also asked the defendant's father for permission to speak with his son in his house. He also agreed. The two detectives and the defendant sat at the kitchen table while the defendant's father and the uniformed police officer stayed outside. [One detective] told the defendant that the defendant knew why the detectives were there and that the defendant had a story to tell. [The other detective] then produced a copy of the composite drawing. The defendant stated that he did not know how to begin, and [the first detective] suggested that the defendant use a 'once upon a time'

the burglary and the shooting of [a state trooper]. At some point during the defendant's recounting of events, his father entered the kitchen to get a portable telephone and left. The detective then asked the defendant to repeat the story with more detail, and the defendant did so." Id., 716-17.

This court concluded that the interrogation was not custodial, noting that, "[t]he interview took place in the familiar surroundings of his father's kitchen. There was no evidence that the defendant was ever handcuffed or otherwise restrained at the time of the statements, nor did the officers use or threaten the use of force, or display their weapons. The court expressly found that the police had been neutral and reserved. The defendant had access to a telephone. The defendant's father entered the kitchen during this period. The defendant never expressed a desire to leave, stop talking, or speak with his father. Under these circumstances, we cannot conclude that the defendant has met his burden of proving custodial interrogation." Id., 720.

In the present case, evidence at the suppression hearing indicated that the police went to the house to speak to the defendant and get his side of what Beebe called a "fairly bizarre" story, and found the defendant to be calm and cooperative with them. He declined their request to step outside, but invited the police into his house. He told the police that he knew why they were there, and answered affirmatively in response to their question that it was about the complainant. The encounter lasted only ten or fifteen minutes. The officers' guns remained holstered, and the defendant was not handcuffed until *after* his arrest following his admission of involvement in the kidnapping, even at which point he was permitted to go get his shoes. Accordingly, we conclude that the defendant's statement was not the product of custodial interrogation.

B

Whether Admission of the Defendant's Statement at the Police Station Violated *Miranda* and *Doyle*

The defendant next asks for suppression of a comment that he made to Officer Bryan Schneider after his arrest at the police station, claiming that: (1) the statement was unwarned and in response to custodial interrogation in violation of *Miranda*; and (2) admission of the statement violated *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), because it resulted in using the invocation of silence against the defendant.

The record reveals the following additional relevant facts. After he was arrested, Schneider drove the defendant to Stonington police headquarters where he took the defendant into the booking area and removed his handcuffs. Schneider testified that he informed the

paperwork," including a *Miranda* consent form, and the defendant into an interview room. Schneider and the defendant sat down, and Schneider explained the process, including the notice of rights form, to the defendant. Schneider testified that the officers read the warnings out loud to the defendant, and asked him to initial next to each warning after the defendant indicated that he understood the warnings. When asked whether he understood the warnings, the defendant was silent and did not respond to Schneider. When asked again whether he understood the warnings, the defendant then told Schneider that he was not interested in filling out paperwork because "[h]e stated that he knew what he had done was wrong, that we had what we wanted and that he wasn't gonna go around and around with paperwork. He just wanted to get it over with." Beebe then entered the room, explained the form to the defendant again, and the defendant just bowed his head and closed his eyes. The officers then stopped any questioning altogether. They did not question the defendant at all about the specifics of the events of that night, and attempted only to explain the warnings to him. The trial court concluded that admission of these statements did not violate *Miranda* because they were not the product of an interrogation, and did not violate *Doyle* because they were statements and not silence or the invocation of the right thereto.²³ Schneider subsequently testified to this effect at trial.

1

The defendant claims that Schneider's questioning of the defendant as to whether he understood his rights constituted "custodial interrogation" requiring the reading of his *Miranda* rights because those inquiries constituted "express questioning" that also were "reasonably likely to elicit an incriminating response from the suspect." We disagree. In *Rhode Island v. Innis*, 446 U.S. 291, 300-302, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), the United States Supreme Court concluded that, "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is

since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." (Emphasis added.)

Questions about whether a suspect understands his or her rights do not, without more, constitute "interrogation" as that term was defined in *Rhode Island v. Innis*, supra, 446 U.S. 301-302, but rather are considered "words or actions" that are "normally attendant to arrest and custody" See *Shields v. State*, 269 Ga. 177, 179, 496 S.E.2d 719 (1998) (trial court properly denied motion to suppress defendant's statement following question about whether he understood his rights, which was "a routine and appropriate inquiry and we cannot conclude that it constituted interrogation" [internal quotation marks omitted]); *State v. Lescard*, 128 N.H. 495, 496-97, 517 A.2d 1158 (1986) (questioning about whether defendant understood his rights under implied consent statute "was in no way calculated to produce an incriminating response"); *Commonwealth v. Lark*, 505 Pa. 126, 133, 477 A.2d 857 (1984) ("fact that the police read appellant his rights and questioned him concerning his understanding of those rights did not violate his apparent wish to remain silent" because those actions were "normally attendant to arrest and custody"); accord *State v. Dobson*, 221 Conn. 128, 133, 602 A.2d 977 (1992) (serving arrest warrant on suspect in custody "is a procedural formality not tantamount to an initiation of interrogation"); *State v. Evans*, 203 Conn. 212, 225-27, 523 A.2d 1306 (1987) (discussing *Innis* and concluding with respect to "routine booking questions," that "not every express question posed in a custodial setting is equivalent to interrogation" when "routine, noninvestigatory questions were unrelated to the crime and were objectively neutral . . . [and] there is nothing in the record to suggest an improper motive on the part of the . . . police" [internal quotation marks omitted]). We, therefore, reject the defendant's claim that Schneider's attempt to ensure that he understood his rights constituted impermissible custodial interrogation.

The defendant also claims that the state's introduction of Schneider's testimony constituted use of the defendant's invocation of his right to silence against him in violation of *Doyle v. Ohio*, supra, 426 U.S. 610, wherein "the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. The court based its holding [on] two considerations: First, it noted that silence in the wake of *Miranda* warnings is insolubly ambig-

and more important[ly], it observed that while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (Internal quotation marks omitted.) *State v. Cabral*, 275 Conn. 514, 523, 881 A.2d 247, cert. denied, U.S. , 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005). "[I]t also is fundamentally unfair, and, therefore, a deprivation of due process, for the state to use evidence of a defendant's post-*Miranda* silence as affirmative proof at trial." (Internal quotation marks omitted.) *Id.*, 524, citing *State v. Plourde*, 208 Conn. 455, 468, 545 A.2d 1071 (1988), cert. denied, 488 U.S. 1034, 109 S. Ct. 847, 102 L. Ed. 2d 979 (1989). Under *Doyle*, "silence . . . does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." (Internal quotation marks omitted.) *State v. Cabral*, supra, 524.

We conclude that the defendant has failed to establish a *Doyle* violation in the present case. With respect to the defendant's statement, specifically, that "he knew what he had done was wrong" and that he did not want to deal with "paperwork," this statement as testified to by Schneider was neither itself silence nor the invocation of the right to silence. Accordingly, "[t]he *Doyle* decision . . . is not applicable to the facts of this case. The crucial distinction is that, here, the defendant did not remain silent after he was arrested and advised of his rights. After being given *Miranda* warnings, the defendant clearly chose to [forgo] his right to remain silent." *State v. Talton*, 197 Conn. 280, 295, 497 A.2d 35 (1985); *id.* (defendant cannot use selective silence to tell police only exculpatory parts of story); see also *State v. Joly*, 219 Conn. 234, 256-57, 593 A.2d 96 (1991) ("[t]he factual predicate of a claimed *Doyle* violation is the use by the state of a defendant's postarrest and post-*Miranda* silence either for impeachment or as affirmative proof of his guilt," and concluding that "the state offered [a police officer's] testimony for the permissible purpose of presenting the defendant's statements, not his refusals to speak, as evidence of his guilt"). Moreover, to the extent that any silence by the defendant after he made that statement was implicated in the present case, it is not a *Doyle* violation because "we have permitted the state some leeway in adducing evidence of the defendant's assertion of that right for purposes of demonstrating the investigative effort made by the police and the sequence of events as they unfolded . . . as long as the evidence is not offered to impeach the testimony of the defendant in any way." (Citation omitted; internal quotation marks omitted.)

defendant has not demonstrated any reliance by the state on his poststatement silence, such as its use in cross-examination or summations, we conclude that there is no *Doyle* violation in this case.

III

WHETHER THE TRIAL COURT SHOULD HAVE ORDERED THE STATE TO GRANT IMMUNITY TO BUCK OR GRANTED THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

The defendant next claims that the trial court should have ordered the state to grant immunity, pursuant to § 54-47a,²⁴ to Buck, who invoked his privilege against self-incrimination pursuant to the fifth amendment to the United States constitution; see footnote 5 of this opinion; or have granted the defendant's motions for judgment of acquittal or a new trial.

"As a threshold matter, we must first determine the applicable standard of review that governs our examination of the defendant's claims. The issue of whether a defendant's rights to due process and compulsory process require that a defense witness be granted immunity is a question of law and, thus, is subject to de novo review. . . .

"[A] defendant has a right under the compulsory process and due process clauses to present [his] version of the facts as well as the prosecution's to the jury so [that] it may decide where the truth lies. . . . The compulsory process clause of the sixth amendment generally affords an accused the right to call witnesses whose testimony is material and favorable to his defense

"We begin our analysis with the statutory provision concerning prosecutorial immunity for witnesses. [Section] 54-47a authorizes the prosecution to grant immunity to state witnesses under certain circumstances. We explicitly have held that § 54-47a confers no such authority upon the courts with regard to defense witnesses. . . . Indeed, this court has held repeatedly that there is no authority, statutory or otherwise, enabling a trial court to grant immunity to defense witnesses. . . . We have no occasion to revisit those holdings today.

"We recognize that other courts have held that under certain compelling circumstances the rights to due process and compulsory process under the federal constitution require the granting of immunity to a defense witness. The federal Circuit Courts of Appeals have developed two theories pursuant to which the due process and compulsory process clauses entitle defense witnesses to a grant of immunity. They are the effective defense theory, and the prosecutorial misconduct theory. . . . Because such circumstances are not pre-

due process or compulsory process clause.

"Under the effective defense theory . . . the trial court has the authority to grant immunity to a defense witness when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding . . . immunity The Third Circuit [Court of Appeals] has held explicitly that under the effective defense theory [i]mmunity will be denied if the proffered testimony is found to be ambiguous [or] not clearly exculpatory" (Citations omitted; internal quotation marks omitted.) *State v. Holmes*, 257 Conn. 248, 252-55, 777 A.2d 627 (2001), cert. denied, 535 U.S. 939, 122 S. Ct. 1321, 152 L. Ed. 2d 229 (2002).

The prosecutorial misconduct theory of immunity "is based on the notion that the due process clause [constrains] the prosecutor to a certain extent in [its] decision to grant or not to grant immunity. . . . Under this theory, however, the constraint imposed by the due process clause is operative only when the prosecution engages in certain types of misconduct," which include forcing the witness to invoke the fifth amendment or engaging in discriminatory grants of immunity to gain a tactical advantage, and the testimony must be material, exculpatory and not cumulative, and the defendant must have no other source to get the evidence. (Citations omitted; internal quotation marks omitted.) *Id.*, 256-57.

The present case again provides us with no occasion to reach either of these immunity theories. The defendant has not pointed to anything that Buck might testify to as "clearly exculpatory," and cites as "misconduct" only the state's use of hearsay testimony of an unavailable complainant who may have had some prior animosity against the defendant, an act that has some confrontation clause implications, but does not rise to the level of prosecutorial gamesmanship or misconduct. Thus, we again leave to another day consideration of either theory of immunity under the due process clause.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other justices concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

¹ "The sixth amendment to the United States constitution provides in relevant part: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him' The confrontation clause of the sixth amendment is made applicable to the states through the due process clause of the fourteenth amendment." *State v. Sandoval*, 283 Conn. 524, 532 n.17, 821 A.2d 247 (2003).

² The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

³ General Statutes § 53a-94 provides: "(a) A person is guilty of kidnapping

years of the sentence imposed may not be suspended or reduced by the court."

⁴ General Statutes § 53a-61 provides: "(a) A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) he recklessly causes serious physical injury to another person; or (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon.

"(b) Assault in the third degree is a class A misdemeanor and any person found guilty under subdivision (3) of subsection (a) of this section shall be sentenced to a term of imprisonment of one year which may not be suspended or reduced."

⁵ Buck was called to testify at trial, but invoked his fifth amendment privilege against self-incrimination in response to every question asked during both the pretrial hearings and the trial itself, outside the presence of the jury. See part III of this opinion.

⁶ We note the following transcript of the tape recording of the conversation between Gomes, Buck and the complainant. The call was received by the Stonington police at 23:07:52 on Thursday, May 2, 2002, and provided as follows:

"[The Complainant]: (Screaming in the background.)

"[Gomes]: Stonington Police Dispatcher Gomes.

"[Buck]: Hello?

"[Gomes]: Stonington Police Department.

"[Buck]: Yeah, Charlie Buck, my wife just came home, she said she was kidnapped!

"[The Complainant]: By [the defendant]! Oh my God!

"[Gomes]: Any description?

"[Buck]: Oh Sweetheart.

"[The Complainant]: Look at me!

"[Buck]: Oh!

"[Gomes]: Is she injured?

"[The Complainant]: He's so sick!

"[Buck]: Hello?

"[Gomes]: Sir?

"[Buck]: Yeah, Thornton was just here.

"[The Complainant]: Ooooooh!

"[Buck]: My wife is . . . sweetheart I'm talking.

"[Gomes]: Sir?

"[Buck]: There here get Thornton back here will ya please?

"[Gomes]: The officer there?

"[Buck]: Yeah.

"[Buck]: Ohhhhhh . . . oh sweetie.

"[Buck]: Are you . . . there?

"[The Complainant]: I've been bound up!

"[Buck]: Oh god!

"[The Complainant]: I told you I never liked him!

"[Buck]: Nu-huh.

"[Buck]: Hello?

"[Gomes]: Sir, calm down a moment.

"[Buck]: Oh my wife is up here, she's a mess here.

"[Gomes]: Any description of the people who did this?

"[Buck]: She knows who it is she said. She's getting on the phone.

"[The Complainant]: Hello, I just, I came home and this person, a friend of my husband's was in the garage, I think he had a stun gun, he grabbed me by the neck, he kept pulling me, he pushed me down, then he finally, he tied my hands & feet when he took me to his house on where is it? . . . Lantern Hill?

"[Buck]: Yup.

"[Gomes]: Okay, what is his name?

"[The Complainant]: He punched me in the stomach, and I tried to pull away and finally we've been driving around in the car and he just stopped on [Interstate] 95 and he had the keys with him, he has our house keys!

"[Buck]: Oh God!

"[Gomes]: Okay, ma'am? Ma'am?

"[The Complainant]: Yes.

"[Gomes]: Listen to me, what was his name please?

"[The Complainant]: [The defendant], He's about [sixty-five] years old, he

"[The Complainant]: In my car.

"[Gomes]: And he has your car?

"[The Complainant]: He, no, I have the car.

"[Gomes]: Okay.

"[The Complainant]: He untied me. I have an extra key in my pocketbook. I, during the night I got it out and had it in my hand, when he got out of the car to check something, I just shut the door, shoved that in and drove like crazy home here.

"[Buck]: Ohhhhhh.

"[Gomes]: Okay, stay on the phone.

"[The Complainant]: What?

"[Gomes]: Go ahead, Tack 3.

"[The Complainant]: I don't know what they're saying to me?

"[Gomes]: Do you need an ambulance there?

"[The Complainant]: No.

"[Gomes]: Okay.

"[The Complainant]: I don't think so, but I got bad chest pains.

"[Buck]: Oh sweetheart.

"[The Complainant]: What?

"[Gomes]: Talking with officer in the car, the suspect that abducted her is [the defendant], says he's on [Interstate] 95 right now.

"[The Complainant]: And he's on [Interstate] 95 at least he was, in between Allyn Street near the Mystic exit.

"[Gomes]: Talking to officer, near the Mystic exit. She's home, has her vehicle, but he has a set of spare keys with him.

"[The Complainant]: Got mom's keys.

"[Buck]: Ohhhh. I don't know what is the problem he was just here and took all the information. I showed him a picture of her.

"[Gomes]: He's on Mason's Island right now.

"[Buck]: Okay.

"[The Complainant]: I think my thumb's broken.

"[Gomes]: He should be there any minute.

"[Buck]: Okay, oh no.

"[Gomes]: What is [the defendant's] address on Lantern Hill, do you know?

"[The Complainant]: I don't know.

"[Buck]: I don't know.

"[Gomes]: You don't know?

"[Buck]: No. . . .

"[Gomes]: What was he wearing?

"[The Complainant]: What?

"[Gomes]: What was he wearing, ma'am?

"[The Complainant]: He had on I think corduroy pants and a plaid shirt and he has on a toupee. He had on brown shoes.

"[Gomes]: He had white . . . ?

"[The Complainant]: He's got a lot of his stuff in the back of my car. I don't even know what it is.

"[Gomes]: Roger, the officer is there right now.

"[The Complainant]: Okay.

"[Buck]: Alright.

"[Gomes]: Okay.

"[Buck]: Yup.

"[Gomes]: Wait til he makes contact with you.

"[The Complainant]: What?

"[Gomes]: Let me know when he's there.

"[The Complainant]: What time did you get home?

"[Buck]: Oh, about five after ten, I called, called Anna right away and she didn't see you then I called Judy, then Judy said you left about quarter past eight. Oh, oh, you poor thing, your hand is cut oh God, oh God!

"[The Complainant]: Alright, goodbye. (Hangs up.)"

Thornton testified that the complainant appeared as if she had been in a scuffle because her hair was in disarray, her stockings were ripped and she had black marks under her eyes.

Knapp testified that he interviewed the complainant about what had happened in connection with his medical assessment of her. The complainant appeared shaking and upset to him, and also told him that she had been kidnapped and tied up for several hours. Knapp assessed the complainant as having injuries to her hands and shoulder, and she complained of chest and abdominal pain as well.

became very friendly with Buck when he began to do work for Buck's electrical contracting business, and subsequently worked for Buck as a mechanic for his antique cars. In that capacity, he had free access to the garage at Buck's home and the tools kept therein.

The defendant also testified that, on May 2, 2002, which was a rainy night, he was having mechanical difficulties starting his pickup truck, and went to Buck's house to borrow truck parts and tools from the garage. He testified that the complainant arrived home and found him in the garage, and then, because she was angry at him because Buck had paid him with joint funds, attacked him with her pocketbook and large key ring. He then wrestled her and used the stun gun on her in self-defense. He then tied up the complainant and put her in her car in order to go find Buck, who was out at a bar, to settle the issue; he placed his bag in the car. The defendant testified that he did not call the police because he did not want to embarrass his friend's wife. The defendant then testified that he drove the complainant back to his house in Ledyard to get more truck parts, where he unbound her when she calmed down. They then headed back to Stonington on Interstate 95, at which point he pulled over to check the thumping noise and the complainant escaped using her spare key.

The defendant then testified that he had a reason for each of the items in the duffel bag. He testified that he had altercations with vicious Roitweillers at a different job, and he intended to use the martini to drug them and the gun to protect himself if necessary. The log and ropes were intended for leverage for lifting heavy items at that site. The stun gun was going to be used to start his pickup truck, which had electrical problems. Finally, the gloves were intended to alleviate symptoms of the defendant's carpal tunnel syndrome.

¹⁰ The trial court sentenced the defendant to twenty years imprisonment, three of which are nonsuspendable, on the kidnapping count. With respect to the assault charge, the trial court imposed a sentence of one year imprisonment, consecutive to the kidnapping sentence.

¹¹ We note that the defendant does not contest, on evidentiary grounds, the admission of the complainant's statements to Knapp pursuant to the medical treatment exception to the hearsay rule. See Conn. Code Evid. § 8-3 (5).

¹² This represents an evolution from the "traditional" approach formerly followed by this court, under which there was "a very narrow time frame within which a spontaneous utterance could arise. *Rock/Hill v. White Line Bus Co.*, 109 Conn. 706, 710, 145 A. 504 (1929) (three minutes too long); *Ferry v. Haritos*, [100 Conn. 476, 483, 124 A. 44 (1924)] (utterance permitted where made in such close proximity to accident as to be almost part of and contemporaneous with it). The presence or absence of a very brief time frame between the event and the spontaneous utterance was 'decisive.'" *State v. McNair*, 54 Conn. App. 807, 812, 738 A.2d 689, cert. denied, 251 Conn. 913, 739 A.2d 1249 (1999).

¹³ The defendant contends that the statements were inadmissible under the spontaneous utterance exception because the complainant's time driving with the defendant and then driving home after leaving him on the side of the road left her ample time to "reflect upon what she should say in order to explain her own actions, get [the defendant] into serious trouble, and rid her husband of his companionship" The defendant further argues that "[e]motion . . . is no indicia of trustworthiness," and adds that "the distorting power of shock, fear and excitement cannot be underestimated." These arguments go, however, to the weight afforded to the complainant's statements, and does not necessarily serve to undermine the trial court's determination as to their admissibility.

¹⁴ The present case was briefed and argued prior to the June 19, 2006 release of the United States Supreme Court decision in *Davis v. Washington*, supra, 126 S. Ct. 2266. On June 22, 2006, to afford the parties the opportunity to address the import of *Davis*, we ordered them to file simultaneous supplemental briefs addressing the question of whether the trial court properly admitted into evidence the complainant's statements to Gomes and Thornton, in light of the United States Supreme Court's recent decision in *Davis*.

¹⁵ *Davis* is a consolidated opinion resolving two cases to which the Supreme Court granted certiorari, specifically, *Hammon v. Indiana*, 829 N.E.2d 444 (Ind.) (addressing on-scene statements to police officers), cert. granted, U.S. , 126 S. Ct. 652, 183 L. Ed. 2d 459 (2005), and *State v. Davis*, 154 Wash. 2d 291, 111 P.3d 844 (involving statements to 911 opera-

investigations themselves are, of course, in no way impugned by [its] characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory 'nontestimonial' evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. *The [c]onfrontation [c]lause in no way governs police conduct, because it is the trial use of, not the investigatory collection of, ex parte testimonial statements which offends that provision.* But neither can police conduct govern the [c]onfrontation [c]lause; testimonial statements are what they are." (Emphasis altered.) *Davis v. Washington*, supra, 126 S. Ct. 2279 n.6.

"The state contends that it is irrelevant to our inquiry that the call was made to a regular telephone number rather than to 911. We agree with this proposition in the limited context of this case because the telephone was dialed not by the complainant, but by Buck.

"We recognize that some isolated portions of the telephone call, specifically when the complainant described to Gomes the injuries and chest pains that affected her at the time of the conversation, are *not* testimonial in nature and, therefore, would not by themselves be barred under *Crawford*. We conclude, however, that the telephone recording remains inadmissible in its entirety because the recording is so heavily dominated by testimonial statements that redacting them in accordance with the procedure directed in *Davis v. Washington*, supra, 126 S. Ct. 2277, would leave the nontestimonial portions of the conversation without any meaningful context.

"The state contends that the complainant's conversation with Gomes "objectively indicate[d] that the purpose of . . . Gomes' interrogation was to gain information to assess the ongoing event in order to provide appropriate assistance." We disagree with the state's broad portrayal of the circumstances of the call, and its description of the facts of this case as "constitut[ing] an ongoing public safety emergency and a possible medical emergency" Even if we were to accept the state's contention that the complainant was hysterical and in need of medical assistance, those portions of the call explaining what had happened to her at the hands of the defendant did not point to an ongoing emergency, but rather to an explanation of past events. Put differently, accepting the state's arguments on this point would render meaningless the distinction drawn by the United States Supreme Court, as they would render virtually any telephone report of a past violent crime in which a suspect was still at large, no matter the timing of the call, into the report of a "public safety emergency."

"Our conclusion that the complainant's statements to the police officer are inadmissible under *Crawford* and *Davis* is not inconsistent with our recent decision in *State v. Greene*, 274 Conn. 134, 874 A.2d 750 (2005), cert. denied, U.S. , 126 S. Ct. 2981, 1 L. Ed. 2d (2006), a case decided prior to *Davis* that was our first opportunity to consider the admissibility under *Crawford* of hearsay statements made to a police officer who had responded to the scene of a crime. In *Greene*, we concluded that, "where a victim contacts a police officer immediately following a criminal incident to report a possible injury and the officer receives information or asks questions to ensure that the victim receives proper medical attention and that the crime scene is properly secured, the victim's statements are not testimonial in nature because they can be 'seen as part of the criminal incident itself, rather than as part of the prosecution that follows.'" Id., 172. In so concluding, we followed the majority of sister state cases decided prior to *Davis* addressing on-scene statements to police officers, and determined that, under *Crawford*, two police officers properly could testify concerning the assault victim's statements to them about the circumstances of his shooting and his injury, which had occurred immediately following a shooting spree through a neighborhood in which the defendant had participated. Id., 165, 173.

We conclude that *Greene* is distinguishable from both the present case and *Davis*, and, therefore, remains good law in light of the Supreme Court's recent decision. The statements in *Greene* were near contemporaneous with a shooting spree on the street, in which numerous perpetrators were still at large, and the safety of the citizens in the vicinity was still immediately at issue. At that point, it reasonably and objectively could be said that the police officers' "primary purpose" in their questioning was to secure the scene and ascertain what had happened. Indeed, as the Supreme Court noted in *Davis*, it explicitly "[d]id not hold . . . that no questions at the

they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.' . . . Such exigencies may often mean that 'initial inquiries' produce nontestimonial statements." (Citation omitted; emphasis in original.) *Davis v. Washington*, supra, 126 S. Ct. 2279.

⁸¹ Section 8-3 (5) of the Connecticut Code of Evidence provides: "A statement made for purposes of obtaining medical treatment or advice pertaining thereto and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical treatment or advice."

⁸² *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 18 L. Ed. 2d 694 (1966) ("[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed").

⁸³ The trial court also rejected these arguments in conjunction with the defendant's motion for a new trial.

⁸⁴ General Statutes § 54-47a provides: "(a) Whenever in the judgment of the Chief State's Attorney, a state's attorney or the deputy chief state's attorney, the testimony of any witness or the production of books, papers or other evidence of any witness (1) in any criminal proceeding involving narcotics, arson, bribery, gambling, election law violations, felonious crimes of violence, any violation which is an offense under the provisions of title 22a, corruption in the executive, legislative or judicial branch of state government or in the government of any political subdivision of the state, fraud by a vendor of goods or services in the medical assistance program under Title XIX of the Social Security Act amendments of 1965, as amended, any violation of chapter 949c, or any other class A, B or C felony or unclassified felony punishable by a term of imprisonment in excess of five years for which the Chief State's Attorney or state's attorney demonstrates that he has no other means of obtaining sufficient information as to whether a crime has been committed or the identity of the person or persons who may have committed a crime, before a court or grand jury of this state or (2) in any investigation conducted by an investigatory grand jury as provided in sections 54-47b to 54-47g, inclusive, is necessary to the public interest, the Chief State's Attorney, the state's attorney, or the deputy chief state's attorney, may, with notice to the witness, after the witness has claimed his privilege against self-incrimination, make application to the court for an order directing the witness to testify or produce evidence subject to the provisions of this section.

"(b) Upon the issuance of the order such witness shall not be excused from testifying or from producing books, papers or other evidence in such case or proceeding on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, and no testimony or evidence so compelled, and no evidence discovered as a result of or otherwise derived from testimony or evidence so compelled, may be used as evidence against him in any proceeding, except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony or producing such evidence. Whenever evidence is objected to as inadmissible because it was discovered as a result of or otherwise derived from compelled testimony or evidence, the burden shall be upon the person offering the challenged evidence to establish a source independent of the compelled testimony or evidence."

DAVID E. BELDING
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Mailing Address:
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Columbia, S.C. 29211

Phone: 803-665-3161
Fax: 866-220-6352
Email:

November 19, 2013

The Honorable Angela M. Woodhurst
Greenwood County Clerk of Court
528 Monument Street, Room 114
Greenwood, SC 29646

Re: Charles N. Vandross #316095 vs. State of South Carolina
Docket No.: 2010-CP-24-0259

Dear Ms. Woodhurst:

I am the court-appointed counsel for the Applicant in the above-referenced PCR case. I am writing to respond to the letter dated November 8, 2013, sent to you by J. Rutledge Johnson, Esquire, Assistant Attorney General.

As you know, Mr. Vandross filed his PCR application *pro se*. He has been working on his own case for a long time, so it not surprising that he would file documents in his case. Mr. Johnson's letter objects to the filing of *Applicant's Rule 15(B) & (C) Motion* on the grounds that the motion is not signed by counsel of record. I have reviewed the motion sent to you by Mr. Vandross (with the copying and mailing having been completed by his sister, Ms. Gina Martin of Washington, DC) and request that you allow me to submit the enclosed motion coversheet and signature page *nunc pro tunc* to be included with the motion. I would appreciate your filing same and returning the clocked copy in the enclosed pre-addressed envelope.

By copy of this letter, I am serving a copy of this communication on counsel for the State in accordance with Rule 5(b)(1), *SCRCP*. Thank you very much for your assistance in this matter.

Sincerely,


David E. Belding

DEB/fcv
Enclosures

cc: J. Rutledge Johnson, Esquire
Mr. Charles N. Vandross #316095



 **COPY**

ALAN WILSON
ATTORNEY GENERAL

November 8, 2013

The Honorable Angela M. Woodhurst
Clerk of Court, Greenwood County
528 Monument Street; Room 114
Greenwood, SC 29646

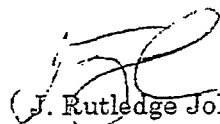
**RE: Charles N. Vandross v. State of South Carolina
2010-CP-24-0259**

Dear Mr. Hamilton:

I received the attached "Applicant's Rule 15 (B) & (C) Motion" in the aforementioned matter on November 7, 2013. Please be advised that Rule 11 of the South Carolina Rules of Civil Procedure requires every pleading, motion, or other paper of a party represented by counsel to be signed by at least one attorney of record who is an active member of the South Carolina Bar. If a pleading, motion, or other paper is not signed, "it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." Rule 11, SCRCP.

Therefore, the State does not consider this document part of this action. According to our records, Inmate Charles N. Vandross, is represented by David E. Belding, Esquire. By copy of this letter, I am notifying counsel of the State's position.

Sincerely,


J. Rutledge Johnson
Assistant Attorney General

cc: David E. Belding, Esquire

 **COPY**

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)
)
Charles N. Vandross, #316095,)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)

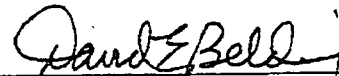
IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

C/A No.: 2010-CP-24-0259

FILED
IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT
COLUMBIA, S.C.
NOV 20 2013

APPLICANT'S RULE 15 (B) & (C) MOTION

Undersigned counsel hereby ratifies the filing of *Applicant's Rule 15 (B) & (C) Motion* in accordance with Rule 11, *South Carolina Rules of Civil Procedure*.



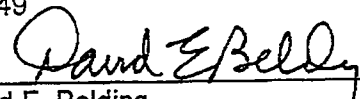
David E. Belding (SC Bar #00623)
Post Office Box 11964
Columbia, SC 29211-1964
Phone: 803-665-3161
Fax: 866-220-6352
Email:
ATTORNEY FOR APPLICANT

November 19, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of this document upon opposing counsel by First-Class United States mail this 19th day of November, 2013.

Addressed to: J. Rutledge Johnson, Esquire
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549



David E. Belding

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

Charles N. Vandross, #316095,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2010-CP-24-0259

ORDER OF DISMISSAL

2014 MAR 17 PM 3:32

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 26, 2010. Respondent made its Return on July 29, 2010. An evidentiary hearing into the matter was convened on March 13, 2013, at the Greenwood County Courthouse. David Belding, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Lance Sheek, Esquire also testified. This Court had before it a copy of the records of the Greenwood County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript and the appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. Applicant was indicted at the December 2004 term of the Greenwood County Grand Jury for Burglary, 1st Degree; Murder; Kidnapping; and Possession of a Firearm or Knife during the Commission of a Violent Crime (2004-GS-24-1187). Lance Sheek, Esquire, represented Applicant on these charges. Applicant proceeded

Page 1 of 15

ATTEST A TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S.C.

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to trial and was convicted by a jury of all charges on June 21, 2006. The Honorable Wyatt T. Saunders sentenced Applicant to confinement for the balance of his natural life for both Murder and Burglary 1st Degree, thirty (30) years for Kidnapping, and five (5) years for Possession of a Firearm or Knife during Commission of a Violent Crime.

A Timely Notice of Appeal was filed and an appeal was perfected on Applicant's behalf by Joseph L. Savitz, III, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions. State v. Vandross, Op. No. 2009-UP-192 (S.C. Ct. App. filed May 5, 2009) The Remittitur was issued on May 22, 2009.

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel;
2. Ineffective Assistance of Appellate Counsel;
3. "Prosecutorial Misconduct (Trial)"; and
4. "Judge's Abuse of Discretion (Trial)."

At the PCR hearing, Applicant proceeded on the claim of ineffective assistance of counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety, including ~~the~~ Applicant's submissions, and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

This Court finds Counsel's testimony credible based upon his demeanor, his extensive experience in criminal law, and his knowledge of this case. The Court also finds Applicant's testimony concerning Counsel's ineffectiveness not credible.

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to retain and call expert witnesses

Applicant alleges Counsel was ineffective for failing to retain and call an expert witness on Applicant's behalf to examine the handprint found on JoAnn Suber Wilson's (Wilson) shirt. Applicant also alleged Counsel was ineffective for not retaining an expert witness on the subject of ballistics. Applicant further claims Counsel was ineffective for failing to retain a gunshot residue expert in this case.

At the PCR hearing, Applicant testified he had conversations with Counsel about the handprint found on Wilson's shirt and how none of the blood on the shirt matched his DNA profile. Applicant also claims the State argued at trial that the handprint was Applicant's, and Counsel failed to contest this through the use of expert testimony.

Applicant testified Counsel failed to question the State's evidence of the shell casing found in the bedroom where the shooting occurred. Applicant alleged Counsel did not impeach Wilson's testimony that she was asleep when the shooting occurred with the trajectory of the shell casing which, Applicant claims, would have travelled over Ms. Wilson while she was sleeping. Applicant further testified Counsel failed to fully contest Dr. Sexton's testimony concerning the distance which the gun was fired at the decedent.

Additionally, Applicant testified Counsel failed to retain a gunshot residue expert in this case to challenge the State's evidence that lead particles, which are consistent with gunshot residue, were found on Applicant's sleeve.

On cross-examination, Applicant admitted that none of these "experts" were present to testify on his behalf at the PCR hearing.

Counsel testified he wanted to retain experts in this case, but Applicant had no funds with which to hire these experts. Counsel also testified he used the prior trial transcripts to fully cross-

examine the witnesses, especially Wilson.

Prejudice from trial counsel's failure to call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Applicant produced no such testimony of any expert witnesses at the PCR hearing, and therefore cannot show any resulting prejudice.

This Court finds counsel was effective in his representation of Applicant and no prejudice resulted in this case. Applicant has failed to meet his burden of proof and thus, this allegation is denied.

Failure to call lay witnesses

Applicant alleges Counsel was ineffective for failing to call lay witnesses on his behalf at trial. Applicant testified he consulted with Counsel and provided a list of witnesses Applicant wanted Counsel to interview and call at trial.

Applicant testified he wanted Counsel to call Wilson's preacher and his employer on his behalf at the trial. Applicant alleges these witnesses would have attacked Wilson's character and credibility and would have shown that he was not a jealous man, as the State argued. He also wanted character witnesses to bolster his credibility.

Counsel testified he interviewed all of the fact witnesses in the case and found no reason to call them at trial because they were also the State's witnesses. Further, the only eye-witnesses to this

crime were Applicant and Wilson. Additionally, Counsel testified he would not have called Applicant's employer as a witness at trial because Counsel was of the opinion, based on his investigation and case preparation, that Applicant admitted his guilt to his employer.

This Court finds Counsel's testimony credible concerning the decision not to call witnesses on Applicant's behalf at trial.

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead, supra. Counsel testified he did not call any witnesses on Applicant's behalf because the fact witnesses had already testified for the State in this case. Counsel also stated that he did not call Applicant's employer at trial because of Counsel's view that Applicant admitted his guilt to his employer. Further, Counsel was able to secure the last argument to the jury by not presenting witnesses on Applicant's behalf. This Court finds Counsel articulated valid reasons for not calling witnesses on Applicant's behalf based on his reasonable trial strategy.

Second, prejudice from trial counsel's failure to call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood, supra. An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister, supra. Applicant produced no such testimony at the PCR hearing, and therefore cannot show any resulting prejudice.

This Court finds counsel was effective in his representation of Applicant and no prejudice resulted in this case. Applicant has failed to meet his burden of proof and thus, this allegation is denied.

Applicant's testimony at trial

Applicant alleges he wanted to testify at trial to tell "his side of the story" to the jury.

Counsel testified he implored Applicant to testify at trial and that there was a good possibility for a hung jury in this case if he had. Counsel also testified it was Applicant's decision not to testify.

This Court has reviewed the entire record and finds evidence in the trial transcript which directly refutes Applicant's claim. Applicant was thoroughly advised by the trial court of his constitutional rights to remain silent or to testify on his own behalf. (Tr. p. 525 ln. 4-19) When questioned by the trial court about his decision not to testify, Applicant stated he did not want to testify in this case (Tr. p. 525 ll. 21-22 "Sir, I have decided not to testify."). Because there is evidence which directly refutes Applicant's claim, this allegation is denied.

Change of Venue Motion

Applicant alleges Counsel was ineffective for not filing a Motion for a Change of Venue due to the media coverage of this case. S.C. Code Ann. §17-27-90 states "All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application." This issue was not raised in the original application, and no amended application was filed. Thus, it is not properly before this Court.

Nevertheless, Applicant failed to produce evidence sufficient to meet his burden of proof as to this allegation. Applicant failed to produce evidence that the jury was influenced by the media coverage and that the trial would have had a different outcome had Counsel filed a motion for a change of venue. Accordingly, this allegation is denied.

Jury selection

Applicant alleged Counsel was ineffective for not properly raising a challenge pursuant to

Batson v. Kentucky, 476 U.S. 79 (1986).

Applicant testified Counsel was ineffective for not challenging two jurors; one was a student and the other was an unemployed housewife.

Counsel testified he filed a Batson motion, but the trial judge overruled it. Counsel stated he utilized the juror questionnaire, the nature of the charges and the defendant's interest when deciding to make a Batson challenge. Counsel also stated he used all of his strikes on this particular jury.

This Court finds Counsel was effective in his representation of Applicant by filing a Batson motion. Applicant alleges Counsel was ineffective for not challenging two jurors because one was a student and the other an unemployed housewife. Applicant's understanding of a Batson challenge is misguided. A Batson challenge is an objection to a preemptory challenge based solely on a juror's race. In this case, Applicant is not claiming race as a factor for the State's strikes but lack of employment. Employment status is not a ground for a Batson challenge. Because Applicant has failed to meet his burden of proof under 71.1(e) SCRCP, this allegation is denied.

Failure to request a Jackson v. Denno hearing

Applicant alleged Counsel was ineffective for not properly raising a challenge to his statement pursuant to Jackson v. Denno, 378 U.S. 368 (1964).

Applicant testified Counsel was ineffective for not challenging whether the statement Applicant made to law enforcement was considered voluntary.

Applicant testified Counsel should have requested a hearing pursuant to Denno in an attempt to suppress his statement as involuntarily given.

On cross-examination, Applicant admitted he was not in custody when he gave the statement to law enforcement that, "[t]he gun is in [Applicant's] pocket. It's unloaded." (Tr. p. 278 ln. 12).

Counsel testified he did not ask for a Denno hearing because when Applicant made the statement that the gun was in his pocket, Applicant was neither in custody nor was there any interrogation. Applicant made this statement on his own accord without responding to any law enforcement question.

This Court finds this allegation without merit. For Counsel to have a legitimate reason to request a Denno hearing, Counsel must be challenging a statement made during the course of custodial interrogation. In this case, Applicant was neither in custody nor was subject to interrogation when he made the voluntary statement. Therefore, Denno does not apply to this case.

Failure to object to the trial court's reasonable doubt jury charge

Applicant alleges Counsel was ineffective for failing to object to the trial court's jury instruction concerning reasonable doubt.

During the jury instructions, the trial court charged the jury:

This presumption of innocence remains with a defendant at all times throughout the trial and is only removed when and if the State has proved the guilt of the defendant beyond a reasonable doubt. It is your solemn duty, ladies and gentlemen of the jury, if not clearly convinced of the defendant's guilt beyond a reasonable doubt to the contrary to find him not guilty....So, the burden of proof is upon the State to establish by evidence to your satisfaction, Mr. Foreman and ladies and gentlemen, the guilt of the defendant here on trial beyond a reasonable doubt. The Court will not attempt to define for you what is meant by the term beyond a reasonable doubt. This is up to you. A reasonable doubt is simply a doubt that you, under all of the circumstances and facts that have been presented to you, find to be reasonable. A reasonable doubt can arise from the evidence presented or it can arise from the evidence not presented. If the State has presented evidence that has removed all reasonable doubt from your mind as to the defendant's guilt it's your duty to find the defendant to be guilty. However, if you are left with a reasonable doubt in your mind it's your duty to find the defendant to be not guilty.

(Tr. p. 594 ln. 1- p 595 ln. 13).

"In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution." Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009).

In this case, the trial court clearly emphasized the State's burden of proving Applicant guilty beyond a reasonable doubt. At no time during this charge, was this burden shifted to Applicant. As jurors are presumed to follow the instructions of the trial court (see State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975)), Applicant presented no evidence to show how Counsel's failure to object to this instruction violated his Constitutional Due Process rights. Further, Applicant can show no prejudice because, as indicted below, there is overwhelming evidence of Applicant's guilt in this case. Therefore, this allegation is without merit.

Failure to object to Solicitor's closing argument

Applicant alleges Counsel failed to object to the Solicitor's closing argument concerning Dr. Sexton testimony as the evidence and testimony did not support the inference made by the Solicitor.

During the State's case, Dr. Joel Sexton was qualified as an expert in forensic pathology. Dr. Sexton was also allowed to testify about gunshots in relation to the volume of sound based on his personal experience. His testimony, in part, is as follows:

I personally put things like a quart size or more, commonly a half gallon size coke bottle or any type of bottle of that sort and you put it over the muzzle of the gun and fire it as opposed to firing it without anything on the muzzle, you see a great difference in the sound. So, it tends to deafen that or silence that because of the characteristic of that particular structure. Here we've got a skull that's solid and inside of which we've got brain [t]issue that is the consistency of cold toothpaste. It's very soft, it tends to absorb that sound so that the sounds comes back out of the same hole with time but the majority of it is captured inside the head and that's why we often hear people say they didn't hear the gunshot and people nearby who have had the gun against their head at the time the shot was fired.

Q: Dr. Sexton, is it your opinion, based on this particular wound, it would be usual, or unusual for a person not to hear the shot?

A: It would not be unusual.

(Tr. p. 427 ln. 11- p. 528 ln 8).

During closing arguments, the Solicitor stated:

Now, you know, [Ms. Wilson] doesn't know what's happened. She doesn't know [Victim] is dead because she hasn't heard the gunshot. Now, doesn't that sound stupid? Doesn't that sound stupid? [Ms. Wilson's] in the bed with [Victim] and she didn't hear the gunshot? But what did we learn later? Dr. Sexton, Dr. Sexton, who has been handling guns since 1954, he's been a forensic pathologist for over thirty years, "That doesn't surprise me at all." Why? Why? Because it's a contact or close contact wound, and you will have all the photographs back there with you and you can see, just as he testified, the imprint, you can see the imprint of this barrel on the head of [Victim].

(Tr. p. 541 line 21- p. 542 line 9).

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009). Even if there are impermissible arguments made by the State, courts must consider whether there is overwhelming evidence of guilt in a prejudice analysis. Id.

This Court finds the Solicitor was properly inferred from Dr. Sexton's testimony that it was not unusual for someone close to the gunshot to not hear it as there was ample testimony during the State's case-in-chief to support his argument. This Court also finds the Solicitor did not arouse the jurors' passions or prejudices in his closing argument and that the content of his argument stayed within the record and reasonable inferences therefrom. As such, Counsel was not required to object

to the Solicitor's argument. Therefore, this Court finds Applicant has failed to meet his burden of proof as to this allegation. Thus, it is dismissed.

Failure to properly cross-examine the State's witnesses

Applicant alleges Counsel failed to properly cross-examine the State's witnesses during this trial.

Applicant specifically testified that Counsel was ineffective for not challenging, objecting to or arguing the following issues: failure to impeach Ms. Wilson with her prior inconsistent statements from Applicant's previous trials; failure to attack Ms. Wilson's testimony about her being duct taped during the incident; failure to impeach Ms. Wilson concerning her being asleep when the gun was fired and not having heard the gunshot; failure to argue the defense that Applicant was "set-up" by Ms. Wilson; failure to object to the autopsy photographs of Victim; and failure to argue that Applicant fired the gun hours later.

Counsel testified he prepared this case by reviewing the facts, reading the prior trial transcripts, interviewing witnesses, meeting with law enforcement, and discussing the case with Applicant. Counsel also stated, in his professional opinion, that he thoroughly cross-examined each of the State's witnesses which he felt needed to be discredited. Specifically, Counsel cross examined Ms. Wilson for roughly sixty pages in the transcript. (See Tr. pp. 202-262). Counsel testified he based his cross-examinations of these witnesses on the facts of the case and his preparation of the case. Counsel also stated, while Applicant passed him notes during the trial, he was not going to allow Applicant to control the cross-examinations.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525

S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d, 529 (1992).

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). Applicant did not proffer specific questions Counsel allegedly failed to ask, and did not present any testimony showing the Victim's answers at trial would have been different had Counsel asked certain questions. This Court finds Counsel adequately cross-examined the State's witnesses and challenged the State's evidence in this case. Accordingly, Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. Applicant has failed to meet his burden of proof and thus, this allegation is denied.

Overwhelming Evidence

This Court further finds overwhelming evidence of the Applicant's guilt in this case. No prejudice can be shown, even when trial counsel's performance is deficient, where there is overwhelming evidence of the Applicant's guilt. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (citing Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2008)).

In this case, Wilson testified she and Applicant dated in the past and Applicant became jealous when she began dating Victim. On the night of the incident, Wilson testified she woke up with Applicant's hand over her mouth and a gun to her head. (Tr. p. 127). Applicant then threw

Wilson onto the floor, and she did not resist because she believed Applicant would involve Wilson's children who were inside of the home. Wilson also testified Applicant forced her to put duct tape over her own mouth. (Tr. p. 133). This duct tape was found in the bathroom trashcan as well as the car in which they both rode to the church. Wilson testified that when they arrived at the church, Applicant ripped off the duct tape and stated, "My life is ruined, I've killed a man." (Tr. p. 155). Wilson also stated that on the way back to her house, Applicant made her promise that she would do a few things for Applicant and then, when Wilson asked Applicant to stop the car and call police because Victim might not be dead, Applicant responded, "Trust me, [Victim's] dead." (Tr. p. 161). Applicant presented no testimony to prove Wilson lied under oath, and as such this Court takes her testimony under oath as the truth.

Additionally, when police arrived on the scene to arrest Applicant and found Applicant behind the house, Applicant exclaimed, "The gun is in my pocket. It's unloaded." (Tr. p. 278). The bullets for this gun matched exactly the shell casing found in the bedroom where Victim was shot and killed. Moreover, the shell casing found in the bedroom was determined to have been fired from Applicant's gun. (Tr. p. 486). Police also found a loaded magazine and loose bullets on Applicant's person. (Tr. p. 279). Further, an expert from South Carolina Law Enforcement Division testified that lead particles, which are commonly found after one had fired a gun, were found on Applicant's sleeve and were consistent with gunshot residue. (Tr. p. 505-506; p. 519).

This Court finds that all of the testimony and evidence presented at trial culminates in overwhelming evidence of Applicant's guilt in this case.

Because there is overwhelming evidence of Applicant's guilt in this case, no prejudice can be shown by Applicant's alleged errors.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

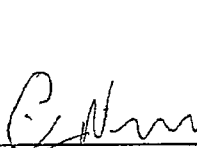
This Court is also in receipt of Applicant's Motion under SCRCF 15 (b) and (c) to Amend the Pleadings to Conform to the Evidence. This Court finds all issues raised at the PCR hearing were raised in the pleadings. This Court finds no reasons for further hearings in this case.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCF, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent.

AND IT IS SO ORDERED!


Clifton Newman
Presiding Judge

March 16, 2014

Conway, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas
The Honorable Clifton Newman, Circuit Court Judge
MAR 24 2014
S.C. Supreme Court

Case No. 2010-CP-24-0259

Charles N. Vandross, #316095,.....Appellant,

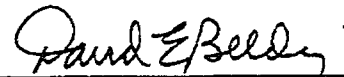
v.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

Charles N. Vandross, #316095, appeals from the *Order of Dismissal* of the Honorable Clifton Newman, Circuit Court Judge, in this case, dated March 11, 2014, and filed March 17, 2014, dismissing Appellant's *Application for Post-Conviction Relief*. Appellant's counsel received notice of entry of this *Order* on March 21, 2014.

BY:



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