STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
The Honorable Frank R. Addy, Circuit Court Judge
Appellate Case No. 2016-002244

THE STATE,

Respondent,

vs.

DESHANNDON MARKELLE FRANKS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE[S] ON APPEAL

1. Whether the court abused its discretion by qualifying Greenville County [Sheriff's] officer Dan Kelley as an expert to testify regarding where the contents of appellant's iPhone where the data allegedly showed the locations appellant was at on the night of the murder at different times, since Kelley deferred to Verizon, and Verizon engineers, regarding the accuracy of the data, because the court erroneously abdicated its gatekeeping function on reliability of this Rule 702, SCRE evidence?

2. Whether the court erred by charging the jury the *Belcher* instruction that "inferred malice may arise when the deed is done with a deadly weapon," since this was a purely circumstantial evidence case as to who the shooter was, the state admitted it had no theory of a motive for appellant to shoot the victims, and where the defense sought to show that a third-party more likely was actually the shooter, since the court improperly reasoned the instruction was proper because there were no lesser-included offense involved, but there was evidence in this case which "mitigated" against a verdict of murder?

RESPONDENT'S COUNTER-STATEMENT OF THE ISSUES PRESNTED

I. Whether Appellant's claim that Sgt. Dan Kelley was erroneously allowed to testify as an expert is not properly before this Court on appeal where he never contested Sgt. Kelley's qualification as an expert at trial but, rather, the State's inability to establish the reliability of the historical cell site data upon which Kelley relied, and where he failed to specifically object to the reliability of the data when the data was admitted into evidence earlier in the trial? (Argument I).

II. Whether the trial judge's finding that Appellant had waived any challenge to the reliability of the cell site data by not raising this specific objection when the cell phone records (State's Ex. 34) were admitted into evidence is the law of the case because Appellant has not argued on appeal that this finding was erroneous? (Argument I).

III Whether the trial judge abused his discretion by admitting Sgt. Kelley's testimony because the record supports trial judge's finding that Kelley's testimony satisfied the reliability threshold? (Argument I).

IV. Whether Appellant's unrecorded objection failed to preserve his challenge to the trial judge's malice instruction for appeal? Alternatively, did the trial judge abuse his discretion by charging the jury on the permissive inference that may be drawn from the use of a firearm in a homicide case because, unlike the facts in *State v. Belcher*, there was no evidence presented at trial that would have reduced, mitigated, excused or justified the homicide? (Argument II).

STATEMENT OF THE CASE

Appellant, DeShanndon Markelle Franks (Appellant) is confined in the South Carolina Department of Corrections (SCDC) as the result of his Laurens County murder convictions and sentence for murdering Sammie Darryl Leake and Nikesha James on January 31, 2014. The Laurens County Grand Jury indicted him in July 9, 2014, for both murders (2014-GS-30-0499 & -0500, respectively) and one count of possession of a pistol during the commission of a violent crime (2014-GS-30-0501). See ***R.*** ___-__. J. Faulkner Wilkes represented him on these charges.

Appellant received a jury trial before the Honorable Frank R. Addy on August 24-28, 2016. The jury found him guilty of all indicted offenses. ***Tr. 499, line 12 – p. 501, line 19***. Judge Addy sentenced him to concurrent forty-five year sentences for each murder and imposed a concurrent five year sentence for the weapons charge. ***Tr. 508, lines 8-14***. Appellant timely served and filed a notice of appeal.

STATEMENT OF FACTS

Viewed in the light most favorable to the State, the direct and circumstantial evidence presented at trial is that Sammie Darryl Leake and Nikesha James shared a mobile home in the Cross Hill area of Laurens County in January 2014. ***Tr. 133-35***.

Nikesha was close friends with both Atrayel Williams and Laquesha Currenton. She was supposed to fix Currenton's hair on January 31, 2014, but Currenton was unable to reach her by phone. Williams was likewise unable to reach Nikesha by phone. Currenton picked up Williams and they went to the Cross Hill barber shop where Nikesha worked. Still unable to reach Nikesha by phone, the two friends went to her mobile home, where they found her and Sammie dead. Williams called 911. ***Tr. 132-; 142-47***.

Although Nikesha's two friends were unaware of who murdered the victims, the State's remaining evidence pointed unerringly to Appellant as their murderer. Lavashta Pulley testified that she went to Washes Club with her aunt and uncle at approximately 11:00 p.m. on January 30, 2014. While there, she saw Appellant and Tevin Hill. ***Tr. 226-27.*** Appellant was "hyper[,] "[p]umped, [or] amped," and she had never seen him like that before in the years that she had known him. Also, she identified State's Ex. 38 as "a [tan] body overall suit ... [l]ike a hunting suit" that he was wearing that night. ***Tr. 228.***

As they talked, Appellant pulled out a black gun. She told him to get the gun away from her because she did not "mess with guns." He responded by telling her that she did not have to worry because it was a Ruger and the safety was on. He then placed the gun on the counter. When Lavashta left Washes at 11:30 p.m. or so, Appellant followed her outside while Hill remained in the club. ***Tr. 227; 229-30; 233-34.*** She heard about the victims' murders the following morning and she told law enforcement what she knew when contacted by them later that day. ***Tr. 230-31.***

Tamia Kinard testified that she lives in Laurens. She has known Appellant all of her life. They are related and they went to school together. Tamia also knew Nikesha James through school and considered Nikesha a "very close friend." ***Tr. 236-37.*** Tamia and her daughter went to Nikesha's residence at 8:00 p.m. on the evening of January 30th because she and Nikesha were cooking that night. At first, only the three of them were present. However, they were later joined by Tamia's aunt and, then, by Sammie Leake. ***Tr. 237-38.***

Tamia's aunt left around 9:30 p.m. ***Tr. 241.*** Appellant and Tevin Hill came to the residence at roughly 12:15 a.m. on January 31st. Appellant was wearing State's Ex. 38, which Tamia described as a "brown jumpsuit, like a hunting suit." Tamia confirmed that Appellant was

acting "hyper. Like amp, you could say. He was just wild. Like he was talking loud. He was jumping around like. He just wasn't acting normal." ***Tr. 238-39; 241; 243-44.***

Appellant and Nikesha began 'talking about something that she put on Facebook" and he asked her to talk to him about it "like a woman." ***Tr. 239.*** They eventually went back to Nikesha's bedroom and continued their conversation for "maybe 10, 15 minutes." Hill went back there while they were talking because he was ready to leave, but Appellant finished his conversation with Nikesha. When they emerged from her bedroom, they were laughing and talking normally. ***Tr. 239-41.***

Shortly after 1:00 a.m., Tamia asked Hill to take her and her baby home and he drove her back to her mobile home in his "Crown vehicle." Their route took them by Milton Grant's mobile home. Appellant was sitting down, drinking gin and soda when Tamia left Nikesha's. Sammie and Nikesha were the only other people in the residence at that point. ***Tr. 241-43.***

Tevin Hill testified that he was living with his grandmother in Cross Hill in January 2014. He has known Appellant all of his life. He also knew both murder victims. Hill was originally charged with the murders but the State entered a plea bargain with him: if he cooperated and testified truthfully, the murder charges would be dropped and he would only be charged with lying to police. ***Tr. 255-56; 279; 283-84.***

Hill and Appellant got together around 7:00 p.m. or 8:00 p.m. on January 30, 2014, and they thereafter went to Washes, in Mountville. They rode in Hill's Crown Victoria, which Hill drove. Hill described Washes as "a liquor house." Both men were drinking and they stayed there for roughly three hours. ***Tr. 257-58; 260.***

Hill testified that Appellant was wearing "a brown jumpsuit, overalls," and he identified State's Ex. 38 as Appellant's clothing.[1] Hill saw Lavashtia Pulley talking to Appellant at Washes, and he saw Appellant follow her outside when she left. ***Tr. 258-60.*** It was close to midnight by the time that Appellant and Hill left Washes, and they went to Cross Hill. Hill asked Appellant if he wanted to go to Nikesha James' house "[b]ecause that [is] where everybody used to [hang out] at. (Sic). It's just a hangout place where people be at." (Sic). ***Tr. 260.***

They then went to her house. Nikesha, Sammie, Tamia Kinard, and her baby were there when they arrived. ***Tr. 260-61.*** Appellant "was kind of like loud. Kind of amp like." Tamia did not like this because her baby was sleeping. ***Tr. 261.***

Hill also witnessed Appellant's conversation with Nikesha. While the conversation began in the main room, Appellant and Nikesha went back to her bedroom and continued their discussion. Hill could not hear them, he did not know what the conversation was about, and he did not even hear the tone of their voices. ***Tr. 261-62.***

Hill was beginning to get tired and he was hungry. So, he readily agreed to give Tamia and her baby a ride when she asked him to take her home. ***Tr. 262-63.*** Hill followed a route that took him by Milton Grant's residence and he had his bright lights on at the time. ***Tr. 263-64.*** After he took Tamia Kinard and her baby to her residence, he went to his grandmother's house and ate. He arrived between 2:00 and 3:00 a.m. on January 31st. ***Tr. 264-66.***

After he had been there for thirty or forty minutes, Appellant called and asked him to come outside. When Hill went outside, Appellant was walking up to him and coming from the direction of Nikesha James' mobile home. Appellant was "[shaky] a little bit" and "not normal." Appellant repeatedly said "stuff went bad" but he would not tell Hill what he meant. Instead, he

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[1] According to Hill, Appellant wore the clothing all that night and on the morning of the 31st. ***Tr. 278.***

asked Hill to give him a ride and Hill did so. He first claimed that "he had some females up the road ... in Greenville .... But once we got ... almost to Fountain Inn he said we're going to Derek Scurry['s] house." ***Tr. 266-67.***[2]

On Appellant's instructions, Hill took back roads to get there, instead of travelling a direct route. Appellant tried calling someone as they were riding, and Hill thought it was Scurry. They eventually reached Scurry's residence, where they slept until 8:00 a.m. ***Tr. 268-70.***

Scurry had already left by the time Hill and Appellant returned to Cross Hill. Along the way to Cross Hill, Appellant said, "[W]e got to get the guns out of the house, or something...." Hill did not know to what Appellant was referring. Once they reached Cross Hill, Hill dropped Appellant off at the residence of Appellant's grandmother before going to his grandmother's to sleep. ***Tr. 270-71; 277.***

However, Hill was soon awaked by the sound of sirens from police cars, and he went outside to investigate. The police had gone to Nikesha's mobile home. A group of people were standing around, and someone in the group told him what had happened. Hill immediately phoned his brother, told his brother that he had been at Nikesha's the previous night and asked his brother what he should do. His brother told him to tell all of this to law enforcement and that the victims were "well and healthy" when he left. ***Tr. 271-72.***

After his conversation with his brother, Hill walked down the road. As he was walking, Lt. Bryant Cheek, an investigator with the Laurens County Sheriff's Office pulled up and stopped. Cheek recognized Hill and gave him a ride. Hill got out of Cheek's vehicle without heeding his brother's advice of telling Lt. Cheek what he knew. Next, he received a call from his

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[2] Scurry and Tevin Hill are cousins. ***Tr. 268.***

cousin, Laurens County Deputy Sheriff Rakeisha Hill. Hill went to the crime scene following this call. ***Tr. 272-74; 281-82.***

At some point, Hill called Appellant "because she told me to call him and tell him he needed to come down here." She said that "they need[ed] to talk to us," but that Appellant was not answering her calls. ***Tr. 274.*** In Hill's conversation with Appellant, Appellant first asked if Hill had heard about what had happened to Nikesha and Sammie.[3] Hill said yes and told Appellant that the Sheriff's Office wanted to speak to them. Appellant was leery of cooperating and he told Hill that Hill knew what to say. ***Tr. 274-75.***

Appellant wanted Hill to say that after he dropped Tamia off at her house, Appellant flagged him down, got into his car and they headed towards Greenville to see some women. However, the women did not answer the phone once he and Appellant got to Greenville. Therefore, they went to Fountain Inn and slept at Scurry's residence, before coming back to Cross Hill later that morning. So, the first statement Hill gave to the Sheriff's Office included this information, even though it was not true. They never went to Greenville that morning and Hill had only lied in his first statement because Appellant had instructed him to do so and because he felt threatened if he did not. ***Tr. 275-77.***

Several days following his arrest, Tevin Hill gave a second, truthful statement to the sheriff's Department. ***Tr. 283-84.*** Finally, although he did not see Appellant with a gun on January 30th or 31st, he had seen Appellant with a gun resembling the one depicted in State's Ex. 6, a photograph retrieved from Appellant's iPhone. ***Tr. 278.***

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[3] He asked this question even though nothing in the record demonstrates that someone had told him of the double homicide before their conversation.

Sixty-one year old Milton Grant testified that he lived three mobile homes down from the victims and that he knew both of them. He was awakened sometime after 1:00 a.m. on the morning of January 31, 2014, by a car shining its bright lights through his bedroom window. When he got up and looked out the window, he saw a brown Ford.[4] Unable to go back to sleep, he watched television. ***Tr. 246-50; 252***.

Around 3:00 a.m., he heard three gunshots fired in rapid succession. He got up and looked outside. According to Mr. Grant, the area around Nikesha's residence was well lit. "The night light was on. The porch light was on. The door was open and the light on it was coming out of the house." Several minutes later, he saw somebody come out of the door of Nikesha's mobile home. At first, the person, who was wearing "something brown," went down the steps. Then, the person went back up, turned off the porch light and closed the door. The person walked up and down the steps several times before disappearing from Mr. Grant's view. ***Tr. 250-52***.

Rodrigus Scurry testified that he was living in Simpsonville, with his mother in January, 2014. Tevin Hill is his cousin. He had also known Appellant since elementary school and considered him a friend. Scurry received a call from Appellant sometime after 3:00 a.m. on January 31st. Appellant claimed that he and Hill needed a place to sleep because they had been to Greenville and were too intoxicated to make it home. ***Tr. 286-89***.

The call had awakened Scurry and he did not know of what Appellant said was true, but he agreed to let them stay at his place. After that call, Scurry went back to sleep. He received another call from Appellant around 4:00 a.m. Appellant said that he was outside. Scurry eventually got up and let the two men into the house. Appellant was wearing clothing with a brown "strap." Appellant and Hill stayed there that morning and were still there when Scurry

[4] Mr. Grant's testimony corroborates testimony by Tamia Kinard and Tevin Hill concerning the route they traveled when Hill took Tamia home in his Crown Victoria.

went to work. In a telephone conversation later on January 31st, Appellant asked Scurry if he had spoken to the police. ***Tr. 289-93.***

Lt. Bryant Cheek corroborated Hill's testimony regarding their encounter as Lt. Cheek was responding to the crime scene on January 31st. He explained that he had known Hill before the murders and recognized Hill. He remembered telling Hill, "I hope you didn't have anything to do with this situation down here." ***Tr. 295-97.***

Lt. Cheek also spoke to Appellant at the scene on January 31st. Appellant was not a suspect but his name had come up in the brief investigation. Lt. Cheek asked him to give a voluntary statement, similar to those that the officers had taken from others that day. Appellant agreed to do so and he provided a handwritten statement (State's Ex. 47) that Lt. Cheek witnessed. ***Tr. 298-300; 370.***

Lt. Cheek published Appellant's statement to the jury:

> "I ... Deshanndon Franks am not under arrest for, nor am I being detained for any criminal offense concerning the events I'm about to make known. I understand I am free to walk away without saying anything, and I volunteer the following information of my own free will for whatever purpose it may serve. I am 26 years of age and I live ... [in] Cross Hill, South Carolina. I can read and write and I completed the twelfth grade in school. .... [I] [l]eft Wash about 12:30. Got to Kesha's house. It was Kesha ... Tamia, her baby and Darryl. We chilled about ... 15 to 20 minutes. Tamia asked Tevin to take her home. He left to do so, and I was talking to Kesha and Darryl ... and [I] called Tevin and told him hold on. I'm going up the road. I met him at the top of the driveway and we left and ... went to Greenville. [I] [c]alled a girl I was going to see. .... [S]he didn't answer, so I called Scurry and spent the night up the road at the house in Fountain Inn." And then it's initialed by him and a line is marked through. And at the bottom of the page it says, "I have read each page of this statement consisting of one page. Each page of which bears my signature and corrections if any bear my initials and I certify that the facts contained herein are true and correct." The statement was completed at 4:45 p.m. on the 31st day of January, 2014. And it has the signature of the person giving the voluntary statement and then my signature as a witness.

Tr. 301-02.[5]

Deputy Rakeisha Hill testified that she was called to the crime scene on January 31st, to assist in the investigation and help control the crowd. She saw her cousin, Tevin Hill, at the scene. Appellant was not there initially, but he later arrived. **Tr. 322-23**. She asked if either man had a problem turning over his phone, and each voluntarily surrendered his phone to her. Appellant's iPhone was introduced as State's Ex. 41. Deputy Hill immediately surrendered both phones to Lt. McIntosh. ***Tr. 324-26***.

Lt. Keith McIntosh testified that he received the cell phones from Deputy Hill. On February 1st, he obtained a search warrant (Court's Ex. 3) before law enforcement looked at any of the information on either phone or performed a cell phone "dump" of the information on the phones. After the warrant was obtained and the phones were searched, he found a photograph of a semi-automatic pistol (State's Ex. 6) on Appellant's phone. ***Tr. 350-51; see also 370.***

Lt. McIntosh was interested in the cell phone tower locations used by the defendants' phones. He determined that Verizon Wireless was Appellant's cellular provider and he obtained a copy of the company's records for Appellant's iPhone (State's Ex. 34) from them, by making an "exigent circumstance" request. The records were sent by e-mail and he transferred them to a CD-ROM disc. ***Tr. 351-53***. *See also* Argument I.

It was important to get these records quickly because no one had been arrested for the murders, and some people in the community were concerned about their safety. ***Tr. 353-54***. McIntosh wanted to use the cell tower information to "plot [the] locations of the cell phone." He

[5] Lt. Cheek also witnessed a statement from Sonny DeMarco Hill and was aware of a statement taken from James Morgan Hill, but nothing in either man's statement warranted further investigation. ***Tr. 318-19***.

could do some of this but he had to enlist the assistance of Sgt. Dan Kelley, from the Greenville County Sheriff's Office to fully and accurately plot the locations. ***Tr. 354.***

Sgt. Kelley, who works in administration for the Greenville County Sheriff's Office, testified that his section goes over the evidence, looks at the information, and gathers phone records in all major cases for that office. Because phone records are quite voluminous when first received, he uses a software program called GeoTime to streamline a review of those records. GeoTime is "widely used" by law enforcement and "is becoming the industry standard." ***Tr. 399-401; 409.*** *See also* Argument I.

Using GeoTime to analyze the voluminous amount of information provided in this case, Sgt. Kelley was able to track Appellant's phone activity for the morning of January 31, 2014. ***Tr. 415-16.*** The first call was made at 2:53:52 a.m. on the 31st. The phone was using a tower on John Grant St. in Cross Hill South Carolina. A second call was placed at 3:06:28 a.m. and, again, it used a tower in Cross Hill. Finally, a call placed at 4:04:43 a.m. used a tower in Fountain Inn, South Carolina. None of these calls was placed from Greenville. Rather, all were east of Laurens, until the phone was onto I-385 North. ***Tr. 421-24.*** *See also* Argument I.

SLED Agent Mindy Worley and two other members of SLED's crime scene unit processed the crime scene on the afternoon of January 31st. They found Nikesha in the loveseat in the living room and Sammy was on the living room floor. Both victims had been shot. Officers also saw signs of a struggle in the living room.[6] They seized three projectiles or fragments of projectiles from bullets (State's Ex. 42). One was "right next to the front door" and

[6] The rug was folded over on itself, coffee mugs in the floor, picture frame knocked on the floor. There was blood, especially around [Mr. Leake], on the floor." Also, "two of the couch cushions were off the couch. One [cushion] was on top of a third one, and the other was propped in front of the couch." ***Tr. 168.***

the other two were close to Sammy. They also seized a cartridge casing off of the kitchen counter and another that was lying under a seat cushion. They likewise found a drug pipe. ***Tr. 165-77.***

Officers did not find anything of evidentiary value anywhere else in the residence. Agent Worley later returned to the scene and visually searched for more evidence, but she did not find anything. ***Tr. 178-81.***

Lt. Ben Blackmon testified that he obtained a search warrant for the crime scene on January 31st, and SLED responded to it that day. He also went to Milton Grant's mobile home that day. From the doorstep of Mr. Grant's residence, there was a clear view of the front of Nikesha's mobile home. ***Tr. 329-31.***

In addition to obtaining the statements from Appellant and Tevin Hill on the 31st, in which they admitted that they had been to the victims' residence on January 30th, officers spoke to Tamia Kinard the following day. She told them that Appellant had been wearing brown overalls or coveralls on the 30th, and that Appellant had stayed with the victims when Hill drove her home. By February 3rd, officers had also spoken to Mr. Grant, who had seen an individual leaving the victims' residence in brown overalls or coveralls. ***Tr. 332-34.***

In light of this information, officers obtained and executed a search warrant for Appellant's bedroom in his grandmother's residence on February 4th. In his bedroom, they found a pair of brown coveralls (State's Ex. 38) and a red backpack (State's Ex. 39). In the backpack, they discovered "a double stacked elongated magazine for a firearm (State's Ex. 29). ***Tr. 334-38; 370.*** Mr. Scurry cooperated with law enforcement and consented to a search of his residence, but nothing of evidentiary value was found there. ***Tr. 339.*** Appellant and Tevin Hill were arrested for the murders on February 5th. ***Tr. 371.***

Dr. James Fulcher, the forensic pathologist who performed autopsies on the victims' bodies, testified that Nikesha died as a result of a gunshot to the chest. The wound entered just below her right clavicle and angled "[sharply] downward." ***Tr. p. 197***. It "[p]enetrated deeply into the chest to make some very large holes in the heart which ... [were] fatal. And then it ... significantly damage[d] the left lung before embedding in the fat of her back on the left side." ***Tr. 195-96***.

Dr. Fulcher found "a significant amount of blood in the chest cavity and in the sack that surrounds the heart." He opined that Nikesha would have died within minutes without medical treatment. Because this was a distant gunshot wound, the manner of death was homicide. ***Tr. 197-98***.

Sammie Leake died from two gunshots to the head. Each wound penetrated into his brain, each wound caused significant damage to his brain, and either would have been almost instantly fatal. Again, the manner of death was homicide and Dr. Fulcher found no evidence that these wounds were close range or contact wounds, such as stippling. ***Tr. 198-202***. Dr. Fulcher recovered a projectile from Nikesha's back and he found "a deformed projectile loose in his clothing in the body bag" for Sammie ***Tr. 201-02***.

Ira Parnell testified that he is retired. He had previously worked as "a firearm and tool mark examiner with SLED for 42 years." In that capacity, former he examined the fired bullets and bullet fragments and the cartridge cases submitted by the Laurens County Sheriff's Office in this case. ***Tr. 203-07***.

He opined that the two fired bullets in State's Ex. 42, as well as the bullets introduced as State's Ex. 44 and 46 were all fired by the same weapon, but the fragment introduced as State's Ex. 45 was not unsuitable for identification. He further opined that all of the cartridge cases

(State's Ex. 43) were also fired by the same weapon. Ruger was one of approximately eighty different gun companies that could have made the weapon used to fire the bullets. ***Tr. 207-11.*** All of the fired bullets and the casings were fired by a semi-automatic weapon and were most consistent with having been fired by a 9 mm. ***Tr. 213-14; 219.***

Because Mr. Parnell did not receive a weapon in this case, however, he could not say that the casings and bullets came from the same weapon. ***Tr. 214-15.*** Mr. Parnell testified that State's Ex. 29, which was seized by the Sheriff's Office during a search of Appellant's bedroom, was "an extended high capacity magazine which appeared to be consistent with a 9 millimeter caliber." He explained that this magazine could hold up to thirty bullets, and that it "[v]ery possibly" would be consistent with a Ruger 9 mm. The photograph retrieved from Appellant's phone (State's Ex. 6) was consistent with being a Ruger 9 mm. pistol. ***Tr. 215-18.***

ARGUMENTS

I. Appellant's claim that Sgt. Dan Kelley was erroneously allowed to testify as an expert is not properly before this Court on appeal because he never contested Sgt. Kelley's qualification as an expert at trial but, rather, the State's inability to establish the reliability of the historical cell site data upon which Kelley relied; and he failed to specifically object to the reliability of the data when the cell phone records were admitted into evidence earlier in the trial. Alternatively, the trial judge's finding that he had waived any challenge to the reliability of the data by not raising this specific objection when the cell phone records were admitted into evidence is the law of the case because he has not argued on appeal that this finding was erroneous. (Respondent's Issues I-III).

For the first time on appeal, Appellant claims that the trial judge erroneously qualified Sgt. Dan Kelley as an expert because his testimony about the location of Appellant's cell phone when Appellant made several calls on the morning of the murder supposedly deferred to the Verizon and its engineers regarding the accuracy of the historical cell site data upon which Sgt. Kelley relied. He further contends that by allowing this testimony "the trial court abdicated its gatekeeping function on reliability of ... Rule 702[,] SCRE." The State submits that his argument

is not properly before this Court on appeal because he never contested Sgt. Kelley's qualification as an expert at trial. Rather, he conceded that Keeley was qualified and, instead, challenged the State's inability to establish the reliability of the historical cell site data upon which Kelley relied, and because he failed to specifically object to the reliability of the data when the cell phone records (State's Ex. 34) were admitted into evidence earlier in the trial. Alternatively, the trial judge's finding that he had waived any challenge to the reliability of the data by not raising this specific objection when the cell phone records were admitted into evidence is the law of the case because he has not argued on appeal that this finding was erroneous. Further, Appellant's argument fails on the "merits."

A. Appellant's motion to suppress.

Appellant moved pretrial to suppress evidence resulting from the search of his iPhone. On January 31, 2014 and before he or his co-defendant, Tevin Hill, were suspects in the double homicide, both men had surrendered their phones to Laurens County Deputy Sheriff Rakeisha Hill, who was Hill's cousin. Appellant's iPhone was admitted as State's Ex. 41. ***Tr. 74-79; 82-83***. Lt. Keith McIntosh obtained a search warrant (Court's Ex. 3) before law enforcement looked at any of the information on either phone or performed a cell phone "dump" of information. ***Tr. 82-87.***[7]

Lt. McIntosh also obtained historical cell site information for Appellant's phone from Verizon Wireless, Appellant's cellular provider by faxing Verizon an "emergency situation disclosure" on February 4th. He did not seek a search warrant for the cell site data because it would take longer to obtain the data by a search warrant; there were people in the Cross Hill area where the murder occurred who were afraid; and law enforcement did not have a suspect(s) at

[7] Appellant does not challenge the warrant on appeal.

the time. ***Tr. 88-90; 95-97.*** He explained that the GPS coordinates are maintained by Verizon as business records. ***Tr. 89.***

Appellant argued that the seizure of his iPhone violated the Fourth Amendment. He contended that officers should have gotten a search warrant for the phone before taking it from him and that the subsequent search warrant was not supported by probable cause. ***Tr. 99-101.*** He also argued that the State's expert testimony would be based on the cell site records from Verizon and asserted that

> [t]hose records were obtained without a search warrant. They were obtained just by asking for them. And I would submit to the Court that a search warrant could have been obtained. Obviously [a warrant] could have been obtained if they had probable cause.

Tr. 101-02.

While he further argued that he "arguably ha[d] a privacy interest" in these records and that it was not enough for the State to claim that these were business records (***Tr. 102; 104***), he did not claim that the records were unreliable because the State was not presenting someone from Verizon to testify to the reliability of the data contained in the records. The trial judge denied the motion to suppress the historical cell site location data in light of then-existing precedent. *See State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015) (defendant did not have legitimate expectation of privacy in his historical cell phone cite location records which would be protected under the Fourth Amendment), *cert. granted in part, judgment vacated in part*, 415 S.C. 43, 780 S.E.2d 902 (2015). ***Tr. 105.*** [8]

B. Introduction of the cell site data into evidence.

[8] Appellant has not argued on appeal that the trial judge erred in denying his motion to suppress.

Lt. McIntosh testified before the jury that he was in the criminal investigation division of the Laurens County Sheriff's Office. He received Appellant's iPhone (State's Ex. 41) and Hill's cell phone (State's Ex. 42) from Deputy Rakeisha Hill.[9] He went to a magistrate the following morning and obtained a search warrant in order to search the phones' contents. He found a photograph (State's Ex. 6) on Appellant's phone. ***Tr. 348-51.*** Lt. McIntosh determined that Appellant's cellular provider was Verizon Wireless. He wanted to obtain the location of cell towers that Appellant's phone may have hit off of on January 31st. The cellular provider was the only one that could provide this information. So, he sent an "exigent circumstances" fax to Verizon,[10] and Verizon sent him the requested information electronically, via e-mail, and he transferred them onto a CD-ROM disc. ***Tr. 351-53.***

Appellant renewed his Fourth Amendment objection when the State offered the cell site records into evidence as State's Ex. 34, and the trial judge overruled it. ***Tr. 352, lines 16-25.*** Lt. McIntosh further explained that he wanted to "plot [the] locations of the cell phone." He could do some of this but he had to enlist the assistance of Sgt. Dan Kelley, from the Greenville County Sheriff's Office to fully and accurately plot the locations. ***Tr. 354.***

C. The qualification of Sgt. Kelley and Appellant's objection.

Sgt. Dan Kelley testified that he works in administration for the Greenville County Sheriff's Office. After testifying to his work history, he testified that his section goes over the evidence, looks at the information, and gathers phone records in all major cases for that office. He explained that when his office initially receives phone records, "it is a ...voluminous amount

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[9] The trial judge overruled Appellant's renewed objection that his phone was unlawfully seized in violation of the Fourth Amendment. ***Tr. 349.***

[10] He explained to the jury that there were people in the Cross Hill area, where the murder occurred, who were afraid; and law enforcement did not have any person arrested; and it would have taken longer if he had sought a warrant to obtain this information. ***Tr. 353-54.***

of data that you get" and it can take "weeks and months to sort through" the data manually. In order to speed up this process, the Sheriff's Office uses GeoTime, a software program that "works in conjunction with a program called the CRT ... or the Call Records Tool."[11] He analogized GeoTime to "a big coin sorter" for phone records that "makes it nice, neat and easy for us to see the data that we need to see." ***Tr. 399-401.***

Sgt. Kelley had been working with cell phones, cell phone technology and cell phone records for fifteen years, and he had used GeoTime for three or four years. He added that this was a "substantial portion" of his job duties. He had previously been qualified as an expert roughly fifty times and he had previously been qualified as "an expert witness in the use of GeoTime technology and call records translation tools" in the Eighth Circuit. ***Tr. 401.*** The State then proffered him as "an expert in the use of GeoTime software and call records translation tools." ***Tr. 401-02.***

On Appellant's voir dire of Sgt. Kelley, he testified that GeoTime is Microsoft based and that he believed that Microsoft was a partner, but he did not know whether it had been certified by Microsoft. He explained that one of GeoTime's functions was to convert the Greenwich Mean Time on the records to the appropriate time in the area where the call was placed. While he could not testify to the algorithms employed by GeoTime, he could "testify to the use of the software and the data that it translates." ***Tr. 402-03.***[12] Also, in each of the cases he has used GeoTime, he has verified the reliability of the longitudes and latitudes stated in the data. ***Tr. 403-04.***

He explained that:

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[11] The GeoTime software is more fully explained on the FAQ page of the manufacturing company's website, https://geotime.com/about-uncharted/faq/.

[12] Contrary to Appellant's derisive assertion, he did not attempt to "dodge" the question posed.

> ...[W]hen when we get the data, a lot of the data that consists when you get from phone companies, [is] all about the phone records, about their billing. So it has latitude and longitude. And so, that is the main focus of most records, where those points are. And we've used their mapping system, and we've used Esri's mapping system which has a lot of -- they're the recognized industry leader. We use their mapping system as well. And we also use Google to see where the points would line up with the data that we got and the points were accurate.

Tr. 404-05.

Sgt. Kelley does not personally have contact with a phone company and he received the phone records for Appellant's phone from the Solicitor's Office. ***Tr. 406.*** The raw data received from the phone company includes "the latitude and longitude of each call," the number of the phone placing the call, "text numbers, [and] phone numbers." Also, some of the data received is realtime transmission (RTT) data or "ping data," which is the time a signal from a phone "hits the tower and it comes back to the handset." This shows their best estimate of where that handset is at the time that phone was talking in communication with the tower." ***Tr. 406-07.***

He admitted that only the service provider's engineers could testify to the accuracy of the RTT data and the tower. He also conceded that RTT data is billing data and is not specifically location data according to Verizon, but he quickly explained, "... it does have location data in there as far as where the handset is at the time the call was made. ***Tr. 408.*** On further voir dire by the State, Sgt. Kelley testified that GeoTime software is "widely used" by law enforcement, that "[a] lot of the larger agencies in the nation are using this software;" and that "it is becoming industry standard." ***Tr. 409.***

In response to the trial judge's questioning, he testified that he first saw GeoTime at a seminar on mapping. There was a booth displaying GeoTime and law enforcement officers who had actually used it in cases were also present. He contacted those officers and spoke to them about it. He also watched some seminars and thereafter persuaded the Greenville County

Sheriff's Office "if we could get a demo for it." He reiterated, "It is becoming rapidly the industry standard." ***Tr. 410***.

Appellant's counsel then argued as follows:

> MR. WILKES: Your Honor, **my argument is not as much with GeoTime. It is with the data in which we feed into GeoTime**. It is with the data in which we feed into GeoTime. ... I think his testimony was the accuracy of the information, the data that they receive from the phone company, is subject to the testimony of Verizon's expert as to how accurate it is. The question of scientific evidence would be that RTT data, for instance, is accepted in the scientific community to be accurate, that it has the sufficient testing, the sufficient -- what would be peer review type of analysis and the examinations to say that this information, this type of data, when it is collected properly, stored under the proper method and then transferred to the Solicitor's Office under proper methods, becomes credible and accurate for them then to testify as an expert in using GeoTime, that it's reliable. So the objection --
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> THE COURT: Your argument is essentially garbage in, garbage out --
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> MR. WILKES: It is precisely that. And then the burden is on the State to establish the reliability, the scientific acceptance of this data that he relies on. **It's not ... a question that he's not very proficient with what he does and that he knows how to use GeoTime**. But the question is, if Verizon cannot testify and will not send an expert to testify to the accuracy of it, then how can we say that no matter what happens after that, that that scientific – you know, because there's several steps in it. And the verification to say, well, we just checked it on Google. But they're checking the same data that has not been established as reliable.

Tr. 411-12 (emphasis added).

The State pointed out that his objection had not been made contemporaneously with the introduction of the records, and the trial judge agreed. ***Tr. p. 412***. The trial judge then stated that:

> For purposes of a 702 expert, reliability analysis, ... the Court's gate keeping function is basically to determine whether the methodology, in this case GeoTime, is a reliable trusted method of obtaining relevant data. Relevant information. And I'm hearing from Mr. Wilkes that he does not have so much of a problem with the underlying reliability of GeoTime. So the Court would be inclined to go ahead and qualify this witness as an expert in the field of using this technology, as well as call records and translation tools. So I will qualify him as an expert in that particular field.

Tr. 412.

When the trial judge told Appellant's counsel that any objections to the underlying data was a "completely separate matter" that went "to the weight as opposed to the admissibility of testimony" (***Tr. 412-13***), counsel stated that his understanding was "the weight versus admissibility has been held not to be the standard, because ... the gate keeping function also applies to the scientific data and testimony on that data." ***Tr. 413***. The judge understood that counsel was referring to *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), which "sort of altered the 702 analysis."

He then ruled that Sgt. Kelley expert testimony was admissible:

> The Court's function as gate keeper is to determine whether the scientific testimony is reliable, peer reviewed or whether it's trusted, and essentially can be used or is appropriately admitted under [Rule] 702 for expert testimony. Your issue is with the data provided. Your issue is [with] the data provided from the phone company. From Verizon Wireless. That's something completely separate. I agree with you if that information is -- if for some reason Verizon provided inaccurate data then perhaps you would have an inaccurate result. **But there was no objection to the admission of the underlying data on reliability grounds, only under search grounds was my understanding -- or, sorry, under the issue of the warrant grounds.** .... So I understand your point. I am familiar with that. I think it is the White case, if I'm not mistaken.

Tr. 413-14 (emphasis added).

Appellant's counsel claimed that he had not waived a challenge to the reliability of the data and the State's "burden to establish it as scientific evidence" by failing to object earlier on that ground. **Tr. 414**.

The trial judge understood counsel's position and noted counsel's objection. However, he stood by his earlier ruling and comments. ***Tr. 414***. He then instructed jurors that he had found Sgt. Kelley "to be an expert in the use of GeoTime and also ... other call record translations. So he can give opinion testimony in that regard that you can use as you deem appropriate on the reliability of the evidence." ***Tr. 414-15***.

Sgt. Kelley testified on direct examination Verizon is the largest cell phone and cellular service provider, and that he had worked with information provided by Verizon in previous cases. He has found that the information provided by the company is "reliable and it's overwhelming sometimes with the amount of data that they supply." He used GeoTime to analyze the voluminous amount of information provided in this case and he was able to track Appellant's phone activity for the morning of January 31, 2014. Without objection, the State introduced "a portion of the cell phone record that was received from Verizon" (State's Ex. 50) containing the date and times of calls, the phone numbers, the cell phone locations, and a "confidence level" for the data's reliability provided by Verizon. ***Tr. 415-20***. Again without objection, the State introduced two documents (State's Exs. 24 and 25) created from "screen shots that GeoTime put out," that reflected three phone calls made by Appellant's phone on January 31, 2014. ***Tr. 420-21***.

The first call was made at 2:53:52 a.m. on the 31st. The phone was using a tower on John Grant St. in Cross Hill South Carolina. A second call was placed at 3:06:28 a.m. and, again, the phone used a tower in Cross Hill. Finally, on a call placed at 4:04:43 a.m., the phone used a tower in Fountain Inn, South Carolina. None of these calls was placed from Greenville. Rather, all were east of Laurens, until the phone was onto I-385 North. ***Tr. 421-24***.

E. Discussion.

1. Appellant's argument is procedurally barred.

Initially, Respondent submits that Appellant's argument that Lt. Kelley was not properly qualified to testify as an expert is procedurally barred for two separate reasons. First, he did not challenge Kelley's qualifications to testify as an expert at trial. On appeal, Appellant has confused the qualification of Sgt. Kelley as an expert with the admissibility of his expert opinion

testimony. Although the two concepts are - quite obviously - closely related, the South Carolina Supreme Court has made clear that they are distinct: "To be clear, the reliability of a witness's testimony is not a pre-requisite to determining whether or not the witness is an expert. The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined *prior* to determining the reliability of the testimony." *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474–75 (2012) (emphasis in original) (footnote omitted).

Rule 702, SCRE, provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). "There is no exact requirement concerning how knowledge or skill must be acquired." *Honea v. Prior*, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988) (citation omitted). In determining a witness's qualifications as an expert, the trial court should not have a solitary focus, but rather should make a broad inquiry. *Maybank v. BB&T Corp.*, 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016), *reh'g den.* (July 13, 2016). "The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject." *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004). *State v. Robinson*, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct.App.2012). Any "defects in the amount or quality of education or experience go to the weight of the expert's testimony and not its admissibility."

Appellant did not challenge whether Sgt. Kelley was qualified to testify as an expert at trial and he did not obtain a ruling on Kelley's qualification from the trial judge. To the contrary, Appellant conceded that "It's not ... a question that [Sgt. Kelley's] not very proficient with what he does and that he knows how to use GeoTime." Appellant likewise did not challenge the reliability of GeoTime. ***Tr. 411***. Accordingly, he may not now raise a challenge to Sgt. Kelley's qualification as an expert for the first time on appeal. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory in support of his objection or motion at trial and raise a different theory on appeal); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground"); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (explaining that imposing issue preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law and arguments; and noting that the purpose of an appeal is to determine whether the trial court erroneously acted or failed to act, and when appellant's contentions are not presented or passed upon by the trial court, such contentions will not be considered on appeal).

Secondly, Appellant is not preserved because he failed to specifically raise an objection to the reliability of the data when the data was admitted into evidence, earlier in the trial, as State's Ex. 34. ***Tr. 352-53***. He also did not object to the State's failure to adequately authenticate the records under Rule 901(a), SCRE, even though the documents were not admitted through a records custodian from Verizon, or another appropriate Verizon employee. *See Deep Keel, LLC*

v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (stating the burden to authenticate evidence is not high and requires only that the proponent of the evidence offer a satisfactory foundation from which the jury could reasonably find the evidence is authentic). If Appellant had contemporaneously objected to inadequate authentication, then the State could have introduced these records through a Verizon records custodian or other employee who may have been able to answer the questions as to reliability that Appellant subsequently raised.

Appellant was undoubtedly aware that the State planned to present an expert, whose testimony would assist jurors in understanding the cell phone records. Thus, his argument is procedurally barred, in the absence of a contemporaneous and specific objection at the time the records were introduced. *See, e.g., State v. Webb*, 389 S.C. 174, 183-84, 697 S.E.2d 662, 667 (Ct. App. 2010) ("In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground"); *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review"); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently *specific* manner that it brings attention to the exact error); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (to be preserved for appellate review, *an issue must have been* (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) *raised in a timely manner, and* (4) raised to the trial court *with sufficient specificity*); *State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) ("Failure to object when the evidence is offered constitutes a waiver of the right to object"); *State v. Halcomb*, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009) (defendant abandoned appellate claim regarding his cooperation with police

about co-defendant's subsequent murder, where defendant's appellate brief did not contain any arguments about this claim). *Cf. State v. Penland*, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal"); *State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (stating the failure to make a proper contemporaneous objection to the admission of evidence "cannot be later bootstrapped by a motion for a mistrial" and waives any objection to the evidence); *State v. Mayfield*, 235 S.C. 11, 23, 109 S.E.2d 716, 723 (1959) ("But if indeed the jury was not sworn, that was a fact known to appellant during the trial and which he should then and there have called to the attention of the trial judge").[13]

Moreover, an appellant may not use the reply brief to argue issues not argued in the initial brief. *Hunter v. Staples*, 335 S.C. 93, 103, 515 S.E.2d 261, 267 (Ct. App. 1999) (where the Department argued in the initial brief that the evidence was inadmissible under Rule 608 and 613 and did not argue error under Rule 609(a)(2) in its initial brief, it was precluded from asserting this argument for the first time in its reply brief); *Glasscock, Inc. v. United States Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("... an argument in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief"); *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct.App.1993) ("The partners make several new arguments relating to estoppel and ratification in their reply brief. However, these arguments are not properly before this Court because an appellant cannot make

[13] Respondent submits that a failure to enforce this procedural bar would encourage sandbagging by trial attorneys. *Contra Penland*, 275 S.C. at 538, 273 S.E.2d at 766. The Supreme Court's concern about possible sandbagging by trial counsel in capital cases was one reason the Court abolished *in favorem vitae* review. See *State v. Torrence*, 305 S.C. 45, 64-65, 406 S.E.2d 315, 326 (1991) (Toal, J., concurring in result).

new arguments for reversal in a reply brief") (citation omitted); Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 75-76 (2d. ed. 2002).

2. Alternatively, the trial judge's finding that Appellant had waived his ability to challenge the reliability of the data in the Verizon records by not objecting on that ground when the State introduced the records is the law of the case because Appellant has not challenged this finding on appeal.

Addressing the issue that was preserved for this Court's review, i.e., the admissibility of Sgt. Kelley's testimony, Respondent submits that the trial judge found that Appellant had waived his challenge to the reliability of the data in the Verizon records by not objecting on that ground when the State introduced the records. ***Tr. 412, lines 10-11; 413, line 22 – 414, line 5.*** On appeal, Appellant has not presented this Court with any challenge to the trial judge's adverse finding in his Initial Brief of Appellant. Therefore, the trial judge's finding that Appellant waived his challenge to the reliability of the data in the Verizon records by not objecting on that ground when the State introduced the records is law of the case. *See, e.g.,* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal"); *Carolina Chloride, Inc. v. Richland County,* 394 S.C. 154, 714 S.E.2d 869 (2011) (an unchallenged ruling, right or wrong, becomes the law of the case); *Caprood v. State,* 338 S.C. 103, 525 S.E.2d 514 (2000) (where the appealing party does not challenge a ruling, it becomes the law of the case and will not be considered by this Court); *see also State v. Black*, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012).

3. The trial did not abuse his discretion by permitting Sgt. Kelley's testimony.

Further, the trial did not abuse his discretion by permitting Sgt. Kelley's testimony. Contrary to Appellant's contention, the trial judge did not abdicate his duty as a gatekeeper on the reliability of the evidence." Rather, he properly applied Rule 702, SCRE, *White*, and its progeny by determining that Sgt. Kelley's expert testimony was admissible. Again, "[t]he

qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion." *Gooding*, 326 S.C. at 252, 487 S.E.2d at 598. The Supreme Court has explained that:

> In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Watson,* 389 S.C. at 446, 699 S.E.2d at 175. Second, the expert must have "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," although he "need not be a specialist in the particular branch of the field." *Id.* Finally, the substance of the testimony must be reliable. *Id.* It is this final requirement of reliability which is the central feature of the inquiry. *White,* 382 S.C. at 270, 676 S.E.2d at 686.
>
> If the proffered testimony is scientific in nature, then the circuit court must determine its reliability per the factors set forth in *Council. Id.* at 449–50, 699 S.E.2d at 177. Under *Council,* the court must consider the following: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. at 19, 515 S.E.2d at 517.

Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 74–75, 735 S.E.2d 650, 655 (2012).

The State submits that Sgt. Kelley's testimony fully supports the finding that he was qualified to testify as an expert under Rule 702, SCRE, even though it was not necessary for him to be so qualified.[14] Also, while Appellant contests both his qualification as an expert and the

[14] This Court has previously affirmed a case pursuant to Rule 220(b), SCACR, in which the appellant asserted that his murder and armed robbery convictions should be reversed because the trial court allegedly erred in permitting two witnesses to testify regarding cell phone location data without qualifying them as experts. *See State v. McDonald*, 2017-UP-285, 2017 WL 4791156, at *1 (S.C. Ct. App. July 12, 2017). Other jurisdictions have likewise consistently found testimony that simply describes the information in a cell phone record, such as that given by Kelley, is proper lay testimony. *See Collins v. State*, 172 So. 3d 724, 743 (Miss. 2015) (holding that testimony that merely informs the jury as to the location of cell phone towers is proper lay testimony when it is based upon the personal observations of the witness); *Perez v. State*, 980 So. 2d 1126, 1131-32 (Fla. 3d Dist. Ct. App. 2008) (finding a cellular company's records custodian was not required to be qualified as an expert to testify regarding geographic coverage of a typical cell tower and factually explain the contents of phone records); *United States v. Baker*, 496 Fed. App'x 201, 204 (3d Cir. 2012) (finding a federal agent's testimony as to

reliability of his testimony, he conceded in the trial court that Sgt. Kelley as qualified to give expert testimony. ***Tr. 411.***

Further, the record fully supports the trial judge's ruling that his testimony was admissible. He explained how the raw data received from the phone company records includes "the latitude and longitude of each call," the number of the phone placing the call, "text numbers, [and] phone numbers." Also, he testified that some of the data received is realtime transmission (RTT) data or "ping data," which is the time a signal from a phone "hits the tower and it comes back to the handset." ***Tr. 406-07.*** Moreover, he fully explained

- How he had been working with cell phone records and cell phone technology for roughly fifteen years and with GeoTime software for three to four years;

- how GeoTime, the program on which he based his expert testimony "works in conjunction with a program called the CRT ... or the Call Records Tool," to simplify and organize the "voluminous" amount of data from cell phone records, thereby "mak[ing] it nice, neat and easy for us to see the data that we need to see," (***Tr. 399-403***);

- how he first came to use GeoTime, and the educational training he received on its use (***Tr. 410***);

- that GeoTime is Microsoft based and that he believed that Microsoft was a partner;

- that in each of the cases he has used GeoTime, he has verified the reliability of the longitudes and latitudes stated in the data by comparing this information to the longitudes and latitudes obtained by using "Esri's mapping system" and Google (***Tr. 403-05***);

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his use of computer mapping software to create map of defendant's general location from cell phone records did not involve expert testimony); *United States v. Evans*, 892 F. Supp. 2d 949, 953 (N.D.Ill. 2012) (finding creation of a map plotting cell towers utilized by a defendant's phone does not require specialized knowledge and is admissible through lay opinion testimony); *Burnside v. State*, 352 P.3d 627, 636 (Nev. 2015) (holding the State was not required to notice as an expert witness a detective who made a map of cell phone sites that handled calls from cell phones registered to the defendant).

- that GeoTime software is "widely used" by law enforcement, that "[a] lot of the larger agencies in the nation are using this software;" and that "it is becoming industry standard" (***Tr. 409***).

Appellant's contention that the testimony was not sufficiently reliable because Sgt. Kelley could not precisely determine the reliability of the underlying data misses the mark and ignores experts are not required to testify to the precise reliability of the underlying data, as opposed to the reliability of the underlying science, generally. *See White*, 382 S.C. at 274, 676 S.E.2d at 688; *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (holding scientific evidence is admissible under Rule 702, SCRE, if the trial court determines the underlying science is reliable after applying the factors set forth in *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979)).[15] The State would likewise note that several courts have rejected challenges to the reliability of cell phone mapping technology, with some finding that it is so well accepted in both science and law that a hearing on its admissibility is unnecessary. *See, e.g., Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1204 n. 5 (8th Cir. 2015) (rejecting a challenge to the reliability of cell phone mapping technology); *United States v. Lewisbey*, 843 F.3d 653, 659 (7th Cir. 2016) ("Using call records and cell towers to determine the general location of a phone at specific times is a well-accepted, reliable methodology"); *United State v. Jones*, 918 F.Supp.2d 1, 6-7 (D.D.C. 2013) (finding the reliability of cell phone mapping is so well-established that a *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), hearing was unnecessary); *People v. Wells*, 2007 WL 466963, at *11 (Cal.Ct.App.2007) ("It is simply not true, as defendant contends, that

[15] The fallacious nature of his position is readily apparent if one imagines a hypothetical case in which each party has an expert in a given field, each expert relies upon different underlying data, and each reaches a different conclusion(s) based upon his or her underlying data. Each party could then argue that the other party's expert could not sufficiently establish the reliability of his testimony. This is an absurd result. Additionally, it appears that Appellant is making an effort to backdoor a Rule 901(a), SCRE objection by calling authentication something else.

the use of cell phones to locate a caller is new to the law. Cell phone evidence has been introduced for that purpose in a number of cases across the country...."); *People v. Davis*, 2006 WL 2965368, at *10 (Cal.Ct.App.2006) ("[T]he technology in question is neither new to science or the law."); *Pullin v. State*, 272 Ga. 747, 534 S.E.2d 69, 71 (2000).

Additionally, the record reflects that Sgt. Kelley testified that he was familiar with Verizon's status in the hierarchy of the cell phone providers and service providers and that it was the largest. He also testified that he had worked with Verizon's information in previous cases that he had investigated, and that their information to be "reliable and it's overwhelming sometimes with the amount of data that they supply." ***Tr. 415***. Therefore, he did testify that the underlying data was reliable.

Sgt. Kelley's testimony also passes a Rule 403, SCRE, analysis because the danger of unfair prejudice does not substantially outweigh its probative value. *See State v. Aleksey*, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). It was extremely probative because it circumstantially corroborated testimony from Tevin Hill that he and Appellant had not gone to Greenville on the 31st, but had stopped when they reached Fountain Inn. Thus, the testimony circumstantially proves that both Appellant and Hill (at Appellant's direction) gave false information to the Sheriff's Department in their January 31st statements.

It also corroborates the timeframes of the calls to which Hill and Scurry testified, as discussed in the "Statement of Facts." There was no danger of unfair prejudice because Sgt. Kelley's testimony did not establish any point that was not already before the jury. Given the present record, the trial judge did not abuse his discretion by permitting Sgt. Kelley's expert testimony and he properly reasoned that Appellant's attacks on the State's perceived failure to establish the reliability of the testimony was merely fodder for the jury but did not render the

testimony inadmissible. *See White*, 382 S.C. at 273-74, 676 S.E.2d at 688 (explaining that the trial court may determine that challenge to expert's testimony goes to the weight testimony should receive as opposed to admissibility "only after making a threshold determination for purposes of admissibility"). *See also Perry v. New Hampshire*, 565 U.S. 228, 237, 132 S.Ct. 716, 723 (2012) ("The Constitution ... protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to counsel, ... compulsory process, ... and confrontation plus cross-examination of witnesses .... Apart from these guarantees, we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial") (citations omitted).

Moreover, any error in admitting Kelley's expert testimony must be viewed as harmless beyond a reasonable doubt, since introduction of it could not reasonably have affected the result of Appellant's trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). "Whether an error is harmless depends on the circumstances of the particular case." *Tapp*, 398 S.C. at 389, 728 S.E.2d at 475.

Even though the case was based on circumstantial evidence, there was overwhelming circumstantial evidence of Appellant's guilt. Appellant was the last person seen with the victims

before they were murdered; several witnesses identified State's Ex. 38, clothing seized from his bedroom, as the distinctive brown clothing that he was wearing on January 30th-31st; and Milton Grant testified that the person he saw emerge from Nikesha's residence was wearing "something brown." Inferably, shortly after the shooting occurred, Appellant telephoned Tevin Hill and enlisted Hill's assistance in fleeing the scene, which further evinces his guilty knowledge.[16]

Also, the weapon used to kill the victims was a 9 mm. semi-automatic pistol; Appellant was displaying a Ruger 9 mm. only hours before the murders; he had a photograph of a weapon consistent with a 9 mm. on his iPhone; and he had a clip that could hold up to thirty rounds in his bedroom that could be used on a 9 mm. Further, he lied to the Sheriff's Office about his whereabouts on the morning of January 31st and he initially managed to persuade Trevin Hill to tell the same lie. Indeed, about the only thing missing from the prosecution's evidence was an eyewitness to, or a video recording of, the murders.

And, as noted, Sgt. Kelley's testimony did not establish any point that was not already before the jury. Instead, it circumstantially corroborated the testimony of Hill and Scurry.[17] Thus,

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[16] *See State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003) (evidence of flight constitutes evidence of defendant's guilty knowledge and intent); *State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent") (citation omitted). *See also United States v. Kennard*, 472 F.3d 851, 855 (11th Cir. 2006) ("People, including jurors, realize that while "[t]he wicked flee when no man pursueth," Proverbs 28:1(KJV), they really flee when law enforcement is looking for them. That is why evidence of flight is admissible and probative").

[17] As discussed in the "Statement of Facts," Hill testified that he followed Appellant's instructions and took back roads when he drove from Cross hill to Fountain Inn. As they were riding, Appellant tried calling someone and Hill thought it was Scurry. They eventually reached Scurry's residence, where they slept until 8:00 a.m. Tr. 268-70. Also, Appellant had instructed Hill to say that they had gone to Greenville on the morning of January 31st and Hill said this in the first statement he gave to authorities. However, he testified that this was not true and that they never went to Greenville. ***Tr. 275-77.***

Lt. Kelley's testimony was harmless beyond a reasonable doubt because it was merely cumulative to other testimony admitted without objection. *See State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless [when] it is merely cumulative to other evidence."); *State v. Holder*, 382 S.C. 278, 289, 676 S.E.2d 690, 696 (2009) (the erroneous admission of evidence is harmless when, in view of the record as a whole, the impact of the evidence was minimal and it was cumulative to other evidence admitted without objection); *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence"). Therefore, Appellant's first argument lacks merit.

II. Assuming *arguendo* that Appellant's unrecorded objection preserved this issue for appeal, the trial judge did not abuse his discretion by charging the jury on the permissive inference that may be drawn from the use of a firearm in a homicide case because, unlike the facts in *State v. Belcher*, there was no evidence presented at trial that would have reduced, mitigated, excused or justified the homicide.

Relying upon *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) Appellant's remaining contention is that the trial judge erred by giving a jury instruction on the permissive inference that may be drawn from the use of a firearm in a homicide case. Assuming *arguendo* that Appellant's unrecorded objection preserved this issue for appeal, the State submits that his reliance on *Belcher* is misplaced and that there was no error because, unlike the facts in *Belcher*, there was no evidence presented at trial that would have reduced, mitigated, excused or justified the homicide. Rather, Appellant was either guilty or not guilty of the crime of murder.

A. How issue developed at trial.

Scurry testified that he received a call from Appellant sometime after 3:00 a.m. on January 31st. Appellant claimed that he and Hill needed a place to sleep because they had been to Greenville and were too intoxicated to make it home. ***Tr. 289***. The call had awakened Scurry and he did not know of what Appellant said was true, but he agreed to let them stay at his place. After that call, Scurry went back to sleep. He received another call from Appellant around 4:00 a.m., who was outside. Scurry eventually got up and let the two men into the house. ***Tr. 289-91***.

Appellant waived his right to testify at trial and the defense was given the last closing argument. ***Tr. 439-40***. The trial judge apparently provided the parties with his proposed jury instructions (*see* ***Tr. 436-37***) and those proposed instructions apparently did not include a charge on the permissive inference of malice that may be drawn from the use of a firearm in a homicide case. Following the State's closing argument, the trial judge excused the jury and informed the parties that:

> THE COURT: The reason I decided to call a brief break, when the State delivered its closing it occurred to the Court that the Court had not included the inference of malice language from use of a deadly weapon in the construction concerning malice and I did not want to sandbag Mr. Wilkes or anyone, because under my reading of Belcher, a case that's actually out of Laurens County, that instruction would be appropriate in this case because there's no evidence tending to reduce the homicide to a voluntary or an involuntary homicide. Accordingly I have included the inference of malice language, as well as a definition of what constitutes a deadly weapon under South Carolina law. I have included those in my new instructions and I wanted Mr. Wilkes to be able to deal with that in his closing if he chose to, to try to deal with that or address that in his closing argument, hence the Court taking a brief break. The Court has now, of course, included that language, and I do understand Mr. Wilkes' objection to that that he made at sidebar. Despite that objection, the Court has included that language.

Tr. 463, line 22 – 464, line 16.

As part of the trial judge's instructions on inferred malice, he thereafter charged jurors that:

> Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is defined under our law as an article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. The following are examples of instruments recognized under our law which may be deadly weapons. A pistol, shotgun, rifle, dirk, dagger, knife, slingshot, metal knuckles, razor, gasoline, firebomb or Molotov cocktail, or lighter fluid.

Tr. 486, lines 15-25.

Appellant took exception to this portion of the jury instruction for the reasons that he had given at the unrecorded sidebar. ***Tr. 492***.

B. Discussion.

Initially, Respondent submits that Appellant's second issue is not preserved for this Court's review on appeal. "In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground." *Webb*, 389 S.C. at 183-84, 697 S.E.2d at 667; *State v. Hess*, 279 S.C. 14, 301 S.E.2d 547 (1983). "An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review." *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997). *See also Benton v. Davis*, 248 S.C. 402, 410, 150 S.E.2d 235, 239 (1966) ("The duty to make timely objection to portions of the charge considered erroneous is not discharged by an objection made at an informal conference in the judge's chambers which is not recorded as a part of the record"). Therefore, Appellant's second argument is not properly before this Court on appeal. *Id.*

Even if he had preserved this issue for appellate review, it lacks merit. "The law to be charged must be determined from the evidence presented at trial." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "An appellate court will only reverse a trial court's decision regarding a jury charge if there is an abuse of discretion." *State v. Cottrell*, Op. No. 27754, 2017 WL 6503904, at *8 (S.C.S.Ct., Dec. 20, 2017) (citing *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007)). As the Court noted in *Cottrell*, "[t]his Court's landmark decision in [*Belcher*] departed from the then-common practice of charging the jury that it may imply malice from the use of a deadly weapon, even where the defendant presents evidence that he used the weapon in self-defense." *Cottrell*, 2017 WL 6503904, at *8 (citation to *Belcher* omitted)

In *Belcher*, the Court held that "where evidence is presented that would reduce, mitigate, excuse or justify a homicide ... caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. The **permissive inference charge**

concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder ...." *Belcher*, 385 S.C. at 612, 685 S.E.2d at 810 (emphasis added) (footnote omitted).

In the present case, the only evidence presented was that Appellant was either guilty or not guilty of murdering the victims. Thus, the instruction was appropriate. *Id.* Appellant is asking this Court to extend *Belcher* to the present case because the State could not establish a motive for the double murder and because it relied upon circumstantial evidence to prove his guilt. He further contends that the charge was erroneous because the defense "sought to show that a third-party more likely was actually the shooter." Each of these arguments is flawed and does not show that the trial judge erred by giving the challenged instruction.

"In this state, it is well settled that motive is not an element of murder and, therefore, the State need not prove motive." *State v. Smith*, 307 S.C. 376, 385, 415 S.E.2d 409, 414 (Ct. App. 1992), *cert. granted* (April 7, 1993), *cert. dismissed as improvidently granted* (Nov. 10, 1993); *State v. Thrailkill*, 73 S.C. 314, 53 S.E. 482 (1906). *Cf. State v. Edwards*, 127 S.C. 116, ___, 120 S.E. 490, 491 (1923) (holding the absence of motive is a mere circumstance to be considered by the jury and rejecting an instruction that the absence of motive may raise a reasonable doubt as to the defendant's guilt because it was a charge on the facts). Also, the Supreme Court has not applied its holding in *Belcher* to cases proven by circumstantial evidence, where there is no evidence in the record that that would reduce, mitigate, excuse or justify the homicide committed by the use of a deadly weapon. Nor should this Court extend *Belcher* in this case. *Cf. State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) ("although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon

reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt"); *State v. Larmand*, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015) ("Although Respondent presented plausible explanations for each of these facts, our duty is not to weigh the plausibility of the parties' competing explanations. Rather, we must assess whether, in the light most favorable to the State, there was substantial circumstantial evidence from which the jury could infer Respondent's guilt").

Likewise, there is no merit to his claim that the trial judge erroneously gave the charge because "the defense sought to show that a third-party more likely was actually the shooter." His argument ignores that proof of third party guilt does not tend to "reduce, mitigate, excuse or justify a homicide" committed by use of a deadly weapon, as *Becher* requires. 385 S.C. at 612, 685 S.E.2d at 810. To the contrary, it is evidence that someone other than the accused committed the murder.

Further, in *State v. Gregory*, 198 S.C. 98, 104, 16 S.E.2d 532, 534-535 (1941), the South Carolina Supreme Court set forth the rule governing the admissibility of evidence offered by the defendant to establish that someone else committed the offense with which he was charged. This rule for the admission of "third party guilt" was stated as follows:

> " '[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).

(quoting 16 C.J., *Criminal Law* § 1085, p. 560 (1918) and 20 Am.Jur., *Evidence* § 265, p. 254 (1939)) (footnotes omitted).

In *Holmes v. South Carolina*, 547 U.S. 319, 328-29, 126 S.Ct. 1727, 1733 (2006), the United States Supreme Court held that subsequent decisions of the South Carolina Supreme Court "had radically changed and extended the rule," and that this extension violated due process by considering the weight of the prosecution's evidence when ruling on the admissibility of such evidence. 547 U.S. at 328-30, 126 S.Ct. at 1733-34. However, the rule as announced in *Gregory* is constitutional and remains in effect. *Id* at 328, 126 S.Ct. at 1733. *See also Burgess*, *State v. Burgess*, 391 S.C. 15, 23, 703 S.E.2d 512, 516-17 (Ct.App. 2010).

In the present case, Appellant did not present any evidence that the third party he asserted may be responsible, James Morgan Hill (who was supposedly dating Nikesha James), was anywhere near the crime scene on January 31st, and he rested his case without availing himself of the trial judge's offer to let him call James Morgan Hill or Sonny Hill as a witness. *See* ***Tr. 362-68***.[18] Moreover, the trial judge found that he did not present sufficient evidence to satisfy the requirements for presenting evidence of third party guilt, as opposed to questioning the adequacy of law enforcement's investigation in the case (*see* ***Tr. 304-19; 342-43; 356-66; 377-85***), and he has not appealed the trial judge's ruling in this regard. So, the question of third party guilt is merely a red herring that obfuscates the issue before this Court.

Therefore, Appellant cannot prove that the trial judge erred in giving a *Belcher* charge.

CONCLUSION

[18] James Morgan Hill was in the hospital during the trial but, pursuant to the trial judge's order, the State determined that he would have been available to testify. ***Tr. 382***.

For all of the foregoing reasons, this Court should affirm the judgment, convictions and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 1, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
The Honorable Frank R. Addy, Circuit Court Judge
Appellate Case No. 2016-002244

THE STATE,

Respondent,

vs.

DESHANNDON MARKELLE FRANKS,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served two (2) copies of the within Initial Brief of Respondent and Designation of Matter on counsel for the Appellant by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

Robert M. Dudek, Esq.
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1330 Lady Street, Suite 401
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This 1st day of February, 2018.

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February 1, 2018

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Deshanndon M. Franks*
Appeal from Laurens County
Appellate Case No. 2016-002244

Dear Ms. Kitchings:

Enclosed for filing in your office is an Initial Brief of Respondent, Designation of Matter and Certificate of Service in the above-captioned matter.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES/dmd
Enclosures
cc: Robert M. Dudek, Esq. (w/two copies of encls.)
The Honorable David Stumbo., Solicitor, 8th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)