

# VOLUME III OF III

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM HORRY COUNTY  
The Honorable Brooks P. Goldsmith, Circuit Court Judge

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Appellate Case No: 2018-000116

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**AUG 06 2018**

**S.C. SUPREME COURT**

CHRISTOPHER M. STEPHENS,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

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## APPENDIX

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## INDEX

|                                                    |      |
|----------------------------------------------------|------|
| INDEX.....                                         | i    |
| GENERAL SESSIONS TRIAL TRANSCRIPT.....             | 1    |
| GENERAL SESSIONS INDICTMENTS.....                  | 1047 |
| FINAL BRIEF OF APPELLANT.....                      | 1055 |
| FINAL BRIEF OF RESPONDENT.....                     | 1070 |
| SC COURT OF APPEALS OPINION 2013-UP-062.....       | 1111 |
| PETITION FOR REHEARING.....                        | 1115 |
| ORDER DEYING PETITON FOR REHEARING.....            | 1120 |
| PETITION TO WRIT FOR CERTIORARI.....               | 1121 |
| RETURN TO PETITION TO WRIT FOR CERTIORARI.....     | 1139 |
| ORDER DENYING PETITION TO WRIT FOR CERTIORARI..... | 1167 |
| REMITTITUR.....                                    | 1168 |
| POST-CONVICTION RELIEF APPLICATION.....            | 1169 |
| RETURN.....                                        | 1177 |
| AMENDED POST-CONVICTION RELIEF APPLICATION.....    | 1184 |
| POST-CONVICTION RELIEF HEARING TRANSCRIPT.....     | 1186 |
| ORDER GRANTING POST-CONVICTION RELIEF.....         | 1283 |
| STATE’S 59(e) MOTION TO ALTER OR AMEND.....        | 1292 |
| ORDER DENYING 59(e) MOTION TO ALTER OR AMEND.....  | 1296 |

1           **THE COURT:**   All right.

2           **MR. FREDERICK:**   ---Characterization of what we ---

3           **THE COURT:**   All right. All right. Very good. Very  
4 good. You know there's no speaking objections.

5           Ladies and gentlemen, go to your jury room.

6           **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE**  
7 **JURY.)**

8           **THE COURT:**   All right, sir. Your objection, Mr.  
9 Frederick.

10          **MR. FREDERICK:**   Judge, unless my hearing is failing me,  
11 I just heard the Prosecutor say that the Defense knows that  
12 their client is guilty.

13          **MR. RICHARDSON:**   No sir, Your Honor. I said the path  
14 that I've laid out leads to their clients' guilt and they know  
15 it.

16          **MR. FREDERICK:**   Thank you.

17          **THE COURT:**   That's what I heard, Mr. Frederick. If you  
18 want I'm sure we can have the Court Reporter play it back, but  
19 exactly what the Solicitor said is what I heard.

20          **MR. FREDERICK:**   Judge, if he said, this is the path ---

21          **THE COURT:**   I tell you what, we'll solve it. We'll  
22 solve it.

23          **MR. FREDERICK:**   ---That was laid out that they are  
24 guilty.

25          **THE COURT:**   Madame Court Reporter, can you go back to

1 the last two sentences of the Solicitor, please

2 (AT THIS TIME THE COURT REPORTER PLAYED BACK A PORTION  
3 OF THE STATE'S SUMMATION.)

4 THE COURT: Are you ready?

5 Now you can talk. You have to wait till the Court  
6 Reporter is ready. Yes sir.

7 MR. FREDERICK: Judge, the Prosecutor just said, the  
8 Defense knows that this path, or whatever that said, leads to  
9 their Defendants' guilt. The Prosecutor cannot say to the  
10 jury, the Defense knows that their clients are guilty, which  
11 is what that means, what he said, Judge. No more than in my  
12 closing argument I could say, ladies and gentlemen of the  
13 jury, the prosecutor knows they got the wrong people, the  
14 prosecutor knows that this path leads to these defendants'  
15 innocence. I cannot comment on what he believes or doesn't  
16 believe, and he certainly can't tell that jury that I believe  
17 my client is guilty, because I'll tell you, Judge, I believe  
18 he's innocent, and I have gone this entire trial not being  
19 able to tell that jury that. That's my objection.

20 THE COURT: All right, sir.

21 Solicitor, your response.

22 MR. RICHARDSON: Your Honor, I believe my statement is  
23 admissible. It's a summary of what I believe the case shows.  
24 I believe it's proper. I believe the objection was to slow me  
25 down, but I believe it's proper, Your Honor.

**JURY IN  
STATE'S SUMMATION CONTINUED**

1           **MR. FREDERICK:**   And I would just ask the Court to  
2           strike. We are not asking for a mistrial. We ask the Court  
3           to strike that statement.

4           **THE COURT:**   Very good. Ask the jury to come back in.

5           **MR. GARDNER:**   And for the record, Judge, I guess the  
6           Defense would join with that.

7           **THE COURT:**   Yes sir.

8           **MR. RICHARDSON:**   Your Honor, is there ---

9           **THE COURT:**   What I'm going to do is tell the jury  
10          that -- to disregard any comment by the State as to what the  
11          Defendants know or do not know.

12          Thank you.

13          And you may continue.

14               **(THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE**  
15               **JURY.)**

16          **THE COURT:**   Ladies and gentlemen of the jury, any  
17          comment that may have been made as to what the Defense knows,  
18          or the Defense attorneys know, is not proper, and I'm ordering  
19          you to strike that.

20          Thank you very much.

21          You may proceed, Solicitor.

22          **MR. RICHARDSON:**   Folks, as I said, the State has laid  
23          out a straight path, and it leads to one place, the guilt of  
24          those two Defendants sitting over there.

25          Now, the Defense has tried to take you off the path.

1 They've tried to take you down little dirt trails that dead  
2 end, go no place. They asked about what, twenty, twenty-three  
3 people that were, I know, that so and so said that they heard.  
4 They asked you about that. They want to put up D.N.A.  
5 evidence because the expert they called says doesn't really  
6 mean anything. The fact that these Defendants were careful  
7 and didn't leave any evidence means they wouldn't leave  
8 D.N.A.. The fact that I can't put Chris Stephens in the  
9 house, he doesn't have to be in the house to be guilty of  
10 accessory before the fact. So forensics don't tell us  
11 anything about him, but they are trying to take you down these  
12 little dirt roads. And they try and talk about jailhouse  
13 snitches, and they try and talk about what people have to  
14 gain, and what bias is. Folks, it leads you nowhere. They do  
15 that for one reason and one reason only. It's look over here,  
16 look over here, don't pay attention to the man behind the  
17 curtain, I am the great oz, don't pay attention to him, don't  
18 pay attention to his path.

19 They are trying to pick on James Pearl. He held onto  
20 the story for six months. You doggone right he did. What's  
21 the last thing that Jimmy Lee Sessions said to him, you ain't  
22 going to tell nobody, are you. He's facing two stone-blooded  
23 killers. Yeah, he's scared, scared for himself, scared for  
24 his family. They want to say that he's giving -- giving this  
25 information -- just giving up any information he can to get

JURY IN  
STATE'S SUMMATION CONTINUED

1 out of these charges. The first thing they asked him about,  
2 he's testified to, they asked him about a totally separate  
3 shooting. What you got on that K & W shooting. Man, I don't  
4 know, I don't know anything about the K & W shooting, I can't  
5 burn somebody that I don't have any information on, but I know  
6 about the Hightower homicide. He knows because Jimmy Lee  
7 Sessions confessed to it.

8 Matthew Campbell, didn't want to get involved until it  
9 does help him, so now he wants to get involved to tell what he  
10 knows.

11 Christy Pearl, folks, she told us she knows that -- the  
12 Defense quotes some times, and I believe they were actually  
13 quoting times to Christy, and Christy says, I don't recall  
14 that. She admitted from the stand, I don't keep up with time.  
15 She's living in that world.

16 Rodney Turner, they can't pick at him, so you didn't  
17 hear anything about a shallow ---

18 They want to play on all these forensics, on the shoe  
19 imprint, and I think Mr. Frederick is trying to tell you, it's  
20 right where a killer would be, in that fecal matter. One,  
21 their testimony was from a paid expert, a Defense paid expert.  
22 Two, I believe there's testimony E.M.S. came, checked the  
23 pulse. I believe Officer Arroyo said he came, checked the  
24 pulse. And when you are trying to save somebody's life you  
25 are not worried about stepping in a little fecal matter.

1           The fight was on about these shoes. Told you these  
2 shoes came off Jimmy Lee Sessions. We told you these shoes --  
3 we didn't say they match a hundred percent. We said they are  
4 consistent with a print left where no print should be. Nobody  
5 goes in the back of the house, except the killer. Now if that  
6 other print was left by E.M.T., or by Officer Arroyo they had  
7 a reason to be in the back of the house. They were trying to  
8 investigate what these shoes did. These shoes leave a print  
9 where none should be.

10           Now the Defense would say, maybe they were traded out at  
11 the jail, there's a grand shoe sale out at the jail, people  
12 trade shoes all the time. Folks, the Defense would have you  
13 believe Mr. Sessions has all of these people pointing fingers  
14 at him, all of these people pointing fingers at him, but he  
15 has to be brought back to South Carolina, to J. Reuben Long  
16 Detention Center, that he's there for six months before they  
17 take his shoes, and sometime during that he trades the real  
18 killer some hohos for those killer's shoes. Folks, that's  
19 ridiculous. He's worn the shoes for six months. Don't reward  
20 him because he was not smart enough to get rid of those shoes.

21           Folks, you saw everything that we did forensically. We  
22 tried to take tire tracks, shoeprints, fingerprints. There  
23 was D.N.A. in the house, there were fingerprints in the house,  
24 there were shoes -- shoe -- tire prints outside. Folks, it's  
25 been told. They dealt drugs in those -- house, people were in

1 and out, had to call Jamilla, but they were in and out.  
2 Yes, there's other D.N.A. in there. Yes, whenever you walked  
3 across the floor barefoot you are going to pick up other  
4 people's D.N.A., but the police did their job.

5 The Defense has tried to say there's a rush to judgment.  
6 We didn't make the arrest for almost eleven months. We sorted  
7 through all of these other suspects. If we were going to jump  
8 to conclusions why did we pick these guys? Because all the  
9 evidence points right to them. All the evidence tells you  
10 that on June 8, 2006, Jimmy Lee Sessions, after having planned  
11 carefully with Chris Stephens, wearing those gloves and the  
12 hoodie, goes and he get his key for Jamilla. He gets in the  
13 house, and he takes Jamilla to the back bedroom where the big  
14 stuff is. Anybody could come back and get the cookie jars in  
15 a minute. But he takes Jamilla back to the bedroom. Doesn't  
16 know Monica is in the bathroom yet. And he takes her and he  
17 puts her down on the floor. He grabs these pillows, grabs it,  
18 slams it down on her head, puts the gun to the back of her  
19 head because as Mike Prodan said, it's a lot easier to shoot  
20 that pillow than to shoot Jamilla Hightower. So he takes it,  
21 bamb, put her down, and he's ready to get the robbing, but uh  
22 oh, got to take care of one more, so he goes and he grabs  
23 Monica Wall -- you heard testimony about the night stand being  
24 knocked over right where the fecal trail starts -- and he  
25 takes her back to the bathroom, puts her down, so forcefully

1 she's got ligature marks right here. She's got petechiae in  
2 her eye where she's choked momentarily. Puts her down. Bamb.  
3 Take all the time you want to rob now. He's killed the person  
4 whose property it is, killed your only witness, everything  
5 going according to plan, but for that shoe print.

6 Folks, these two girls were shot dead, with no more  
7 humanity, and with all the depravity of someone shooting just  
8 dogs in the street. These Defendants carefully planned and  
9 orchestrated this crime, all to feed their greed, to feed  
10 their lust for drugs and money, and today they must learn the  
11 true cost of that. It's cost these two girls their lives.  
12 No long with us. It cost Barbara Hightower, Betty Wall, their  
13 baby girls, and today it will cost these two Defendants guilty  
14 verdicts on all charges.

15 **THE COURT:** All right, ladies and gentlemen, I want you  
16 to go to the jury room for about five minutes or so. I'm  
17 going to call you back in and we will finish with this case.

18 All right. Thank you very much.

19 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE**  
20 **JURY.)**

21 **THE COURT:** All right. We'll be at ease for about five  
22 minutes.

23 **(THE FOLLOWING TAKES PLACE AFTER A BREAK, AND OUTSIDE**  
24 **THE PRESENCE OF THE JURY.)**

25 **THE COURT:** All right. Ask the jury to come in,

1 please.

2 I assume y'all have a copy of the verdict forms, and  
3 y'all have looked at them?

4 MR. FREDERICK: We've seen them, Judge.

5 MS. ELDER: Yes, Your Honor. They are suitable to the  
6 State.

7 MR. FREDERICK: No objection, Judge.

8 THE COURT: Mr. Gardner.

9 MR. GARDNER: Yes sir. No objection, Your Honor.

10 THE COURT: Very good.

11 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE  
12 JURY.)

13 THE COURT: All right, ladies and gentlemen, it's now  
14 my responsibility to give you the law that you are going to  
15 apply to the facts as you so find them to be in this  
16 particular case.

17 At the very beginning I told you that I would not, in  
18 any way, indicate to you what I think the facts of this case  
19 are, and I believe I've done that, and in that same vain  
20 that -- and I'm telling you that you are the judges of the  
21 facts, and the same vain that you are judges of the facts, if  
22 you came into this courtroom with any preconceived ideas of  
23 what the law is, what it ought to be, what it should be, what  
24 you hoped it would be, you are going to disregard that. You  
25 will take the law, as I now give it to you, and apply it to

1 the facts as you so find them to be in this particular case.

2 Now I told you at the very beginning that one of your  
3 jobs in this particular case was to judge the credibility,  
4 that is, the believability of witnesses that have been  
5 presented before you in this particular trial. Now, in doing  
6 so I tell you that you can believe one witness against  
7 several, several against one, you can believe a portion of  
8 what a witness says and disregard the remaining portion of it.  
9 If you've got a good and sound reason for doing so you could  
10 disregard, in it's entirety, the testimony of a particular  
11 witness.

12 You look at whether or not the witness has exhibited to  
13 you any kind of interest, bias, prejudice, motive that they  
14 might have in giving you the particular testimony. You could  
15 consider their demeanor, that is, how did they appear on the  
16 witness stand when they gave you their testimony. Obviously  
17 you consider the opportunity for knowledge. How did they come  
18 about that information that they gave you from the witness  
19 stand.

20 It's your job, ladies and gentlemen, to find the truth.  
21 It doesn't matter from which witness or witnesses that comes  
22 from. That is your job in this case, to find that evidence  
23 which convinces you of it's truth, and how do you do that?  
24 You are going to use your good common sense, your good  
25 judgment, and apply it to the facts in this particular case,

1 and find those facts which convince you of their truth. If  
2 you think about it it's something you do every single day of  
3 your life. When somebody tells you something you are  
4 automatically thinking and judging whether or not you believe  
5 it, and you are using your good common sense and your judgment  
6 in doing so, and that's all we are asking you to do now, to  
7 find that evidence which convinces you of it's truth.

8         You don't have any friends to reward, you don't have any  
9 enemies to punish. Your verdict can't be the result of any  
10 kind of bias, prejudice, sympathy. You don't have any friends  
11 to reward or enemies to punish, as I indicated. Your job is a  
12 simple analysis of the evidence, find that evidence which  
13 convinces you it's true, and then, as I will talk about in a  
14 minute, you apply that evidence that you find to be true  
15 against the burden that the State of South Carolina has, to  
16 prove the defendant guilty beyond a reasonable doubt of the  
17 particular crime charged.

18         There are two types of evidence that are presented in  
19 virtually every single case that's tried, and this case is no  
20 exception. They are called direct and circumstantial  
21 evidence. Direct evidence is the testimony of a person who  
22 asserts or claims to have actual knowledge of a fact.  
23 Circumstantial evidence is proof of a chain of facts  
24 indicating the existence of a fact. The Law doesn't make any  
25 distinction between the two, the Law doesn't require a greater

1 degree of proof of one over the other. You look at all the  
2 evidence and find that evidence which convinces you of it's  
3 truth.

4 I told you at the very beginning that the Defendants in  
5 this case have pled not guilty to the indictments, or the  
6 charges against them, and that plea of not guilty puts the  
7 burden of proof upon the State of South Carolina to prove the  
8 Defendants guilty beyond a reasonable doubt of the particular  
9 crimes charged.

10 A defendant is never required to prove themselves  
11 innocent. It's an important rule of law that a defendant in a  
12 criminal trial, no matter what the seriousness of the charge  
13 may be, is always presumed to be innocent of the crime for  
14 which the indictment has been drawn and the charge levied  
15 against him. This presumption of innocence didn't end at the  
16 start of the trial. It hasn't ended now. It only ends when  
17 you, the jury, collectively, are convinced from the evidence  
18 before you of the guilt of that Defendant of the crime  
19 charged, beyond a reasonable doubt. Now this presumption of  
20 innocence is likened to a robe of righteousness. It's placed  
21 upon the shoulders of the defendant, and it stays upon the  
22 shoulders of the defendant until the State strips that robe of  
23 righteousness from the shoulders of the defendant by evidence  
24 which convinces you of the guilt of that particular defendant  
25 beyond a reasonable doubt.

1           This presumption of innocence isn't some legal theory.  
2       It isn't just some legal phrase. It's a substantial right to  
3       which every defendant is entitled unless you, the jury, are  
4       satisfied from evidence of the defendant's guilt beyond a  
5       reasonable doubt.

6           So what's reasonable doubt? Reasonable doubt is the  
7       kind of doubt that would cause an ordinary reasonable person  
8       to hesitate to act. Proof beyond a reasonable doubt is proof  
9       that leaves you firmly convinced of the defendant's guilt.  
10      Now, there's very few things that we can know with absolute  
11      certainty, and the law doesn't require the State of South  
12      Carolina to give you that kind of proof. What is required is,  
13      if based upon your consideration of the evidence you are  
14      firmly convinced that the defendant is guilty of the crime  
15      charged, you must find that defendant guilty. On the other  
16      hand, if you are not firmly convinced that the defendant is  
17      guilty of the crime charged you must give the defendant the  
18      benefit of the doubt and find him not guilty.

19           Now I allowed all of you to take notes during the trial  
20      of this case. You need to remember, obviously some people are  
21      better note takers than others. Just because somebody wrote  
22      something down does not give it any greater weight than the  
23      recollection of another juror. Recollections of individual  
24      jurors should be considered just as reliable as somebody's  
25      note that they took.

1           During the trial, the proceedings, I believe I directed  
2           you to disregard some statements. You disregard that. You do  
3           not use those statements as evidence, or in any way in  
4           arriving your verdict in this particular case.

5           The Rules of Evidence do not ordinarily allow witnesses  
6           to give their opinion. Now in this case I qualified several  
7           witnesses to give their opinions. They are sometimes called  
8           expert witnesses, but -- and that's basically someone who, by  
9           reason of their education, experience, has become  
10          knowledgeable in some kind of art or science or profession,  
11          and they can give an opinion when asked. This doesn't give  
12          them any special status. You consider that evidence and that  
13          opinion just like all the other evidence in the case. You  
14          weigh all the evidence in the case, and you find the evidence  
15          which convinces you of it's truth.

16          The testimony of a witness may be discredited or  
17          impeached by showing that that person previously made a  
18          statement that is inconsistent with their present testimony.  
19          Earlier contradictory statements are admissible only to  
20          impeach the credibility of that witness, and not to establish  
21          the truth of the statements.

22          The testimony of a witness may be discredited or  
23          impeached by showing that witness has been convicted of a  
24          crime for which they could have been imprisoned for more than  
25          one year, or a crime that involves dishonesty. As to this

1 evidence it is offered only on the issue of credibility and no  
2 other purpose.

3 In this particular case the Defendants did not testify.  
4 I instruct you, and I tell you, the fact the Defendants did  
5 not testify in this case is not a factor in this case. It may  
6 not be considered by you in any way. You may not talk about  
7 it in your jury room. It does not affect this case in any  
8 way. Every person charged with a crime has the Constitutional  
9 Right to remain silent. The assertion of this right cannot be  
10 considered against them, or by you in your deliberation. You  
11 are to draw no conclusion whatsoever from the fact the  
12 Defendants in this case did not testify. You remember, as I  
13 told you, the Defendants don't have anything to prove to you,  
14 to show to you. The State of South Carolina has the burden of  
15 proof to prove the Defendants guilty of the crimes charged,  
16 beyond a reasonable doubt.

17 Now, there are obviously two Defendants in this case,  
18 and I told you at the very beginning, it's like two trials.  
19 Jimmy Lee Sessions is charged with the following offenses, the  
20 murder of Monica Wall, the murder of Jamilla Hightower, the  
21 armed robbery of Jamilla Hightower, and burglary in the first  
22 degree of these individuals. Christopher Stephens is charged  
23 with the following offenses, accessory before the fact of the  
24 murder of Monica Wall, accessory before the fact of the murder  
25 of Jamilla Hightower, accessory before the fact to armed

1 robbery of Jamilla Hightower. Each case, of each Defendant,  
2 is separate. The evidence and law concerning that Defendant  
3 should be considered separately and individually. Your  
4 verdict does not have to be the same for both Defendants. You  
5 may find one Defendant guilty of a particular offense and find  
6 him not guilty of another offense. The fact that you find  
7 somebody -- one Defendant guilty of a particular offense, or  
8 not guilty, does not control your verdict as to the other  
9 Defendant. You may convict one and acquit the other. You may  
10 acquit both, or you may convict both. It will depend upon  
11 your view of the evidence and testimony in this particular  
12 case. You must take each Defendant and each case that they  
13 have and consider the evidence as to that Defendant in that  
14 case, and the instructions I've given to you, and then you  
15 write a separate verdict for each Defendant on each charge.

16 Evidence offered by an accused as to the commission of a  
17 crime by another person must be limited to facts that are  
18 inconsistent with the accused's guilt, and to such facts which  
19 raise an inference as to his innocence. There must be such  
20 connection with the crime, such facts or circumstances which  
21 tend to point out the other person as the guilty party.

22 Now, regarding the offense of murder -- and as we  
23 indicated to you, those -- that is the charge as against Jimmy  
24 Lee Sessions regarding the murder of Monica Wall, and the  
25 murder of Jamilla Hightower. This Defendant, having been

1 charged with the crime of murder, the State must prove, beyond  
2 a reasonable doubt, that the Defendant killed another person  
3 with malice aforethought.

4 Malice is hatred, ill-will, hostility toward another  
5 person. It's the intentional doing of a wrongful act without  
6 just cause or excuse, with an intent to inflict an injury, or  
7 under circumstances that the law will infer an evil intent.  
8 Malice aforethought does not require that malice exist for any  
9 particular time before the act is committed, but malice has to  
10 exist in the mind of the Defendant just before, and at the  
11 time the act is committed, therefore, there must be a  
12 combination of that evil intent and the act. Malice  
13 aforethought can either be expressed or inferred. Now that  
14 doesn't mean different kinds of malice. It just is the manner  
15 in which the malice can shown to be exist, or shown to exist.  
16 It's either by direct or by inference. Expressed malice is  
17 shown when a person speaks words which express hatred or ill-  
18 will for another, or when a person has prepared beforehand to  
19 do the act which was later accomplished.

20 Malice may be inferred from conduct showing a total  
21 disregard for human life. Inferred malice may also arise when  
22 the deed is done with a deadly weapon. A deadly weapon is any  
23 article, instrument or substance which is likely to cause  
24 death or great bodily harm. Whether an instrument has been  
25 used as a deadly weapon depends on the facts and circumstances

1 of each particular case.

2 Motive is not an element of the offense of murder, and  
3 the State of South Carolina does not need to prove motive.

4 If one intentionally kills another during the commission  
5 of a felony, the inference of malice may arise. If facts are  
6 proved beyond a reasonable doubt sufficient to raise an  
7 inference of malice to your satisfaction, this inference would  
8 simply be an evidentiary fact to be taken into consideration  
9 by you, along with all the other evidence in the case, and you  
10 give it the weight you decide it should receive.

11 Jimmy Lee Sessions is also charged with the crime of  
12 armed robbery. The Defendant, having been charged with the  
13 crime of armed robbery, the State must prove, beyond a  
14 reasonable doubt, that the Defendant took personal property  
15 from the person or presence of another person, and that can be  
16 legal or illegal property of that particular person. Property  
17 is in the presence of a person if it is within their reach,  
18 inspection, observation or control, so that the person could,  
19 if not overcome by violence, or prevented by fear, keep  
20 possession of that particular property. The State has to also  
21 prove, beyond a reasonable doubt, that the Defendant carried  
22 away the property, intending to permanently deprive the owner  
23 of that property, and to keep the property for the Defendant's  
24 own use. The slightest removal of the property, or complete  
25 possession of the property, even for an instant by the

1 Defendant is sufficient to show a taking a carrying away of  
2 the property. The taking and carrying away of the property  
3 must have been done with violence, or putting the owner of the  
4 property in fear of violence, and finally, the State has to  
5 prove, beyond a reasonable doubt, that the Defendant was armed  
6 with a deadly weapon during the robbery, again, that deadly  
7 weapon being any kind of article, instrument or substance  
8 which is likely to cause death or great bodily harm.

9 The Defendant, Jimmy Lee Sessions, is also charged with  
10 burglary in the first degree. The State has to prove, beyond  
11 a reasonable doubt, that the Defendant entered a dwelling  
12 without consent. A dwelling is any building, or a portion of  
13 a building in which a person ordinarily sleeps. In order to  
14 prove that the Defendant entered the dwelling the State does  
15 not have to show that the Defendant's entire body entered the  
16 dwelling. The smallest entry is sufficient. In addition, the  
17 State does not have to prove that force was used to gain  
18 entry. If a person enters a building using a deception,  
19 artifice, trick or misrepresentation to get consent to enter  
20 this is entry without consent. Next the State has to prove,  
21 beyond a reasonable doubt, that the Defendant intended to  
22 commit a crime therein, either a felony or a misdemeanor, at  
23 the time of the entry. Intent may be shown by acts and  
24 conduct of the Defendant, or other circumstances from which  
25 you may naturally and reasonably infer intent. And finally,

1 the State has to prove, beyond a reasonable doubt, that, when  
2 entering, while in the dwelling, or when fleeing the Defendant  
3 was armed with a deadly weapon or explosive, and again, the  
4 deadly weapon, again, is any article, instrument, or substance  
5 which is likely to cause death or great bodily harm.

6 Also, the State could prove that, if the Defendant  
7 entered or remained in the dwelling in the night time. Night  
8 time is the period between sunset and sunrise during which  
9 there is not enough daylight to recognize a person's face,  
10 except by artificial light or moonlight.

11 Now, the Defendant, Christopher Stephens, is charged  
12 with accessory before the fact. And I told you there are  
13 three charges of that, but they are all accessory before the  
14 fact. The Defendant being charged with accessory before the  
15 fact, in order to prove this crime the State has to prove,  
16 beyond a reasonable doubt, that the Defendant either advised,  
17 agreed, urged, counseled, hired or in some way aided or  
18 abetted another person to commit a crime, and then that that  
19 Defendant was not present when the offense was committed. Aid  
20 means to help, to promote the course or accomplishment of, to  
21 give support to, or to give assistance to. Abet means to  
22 encourage, or appear to favor or support.

23 That, ladies and gentlemen, is the law that you are  
24 going to apply to the facts as you so find them to be in this  
25 particular case.

1           Now, the Court has had prepared for you the verdict  
2 forms in this case, and they have the caption of the case, and  
3 I'm going to start with Jimmy Lee Sessions, because that's the  
4 order in which we have done these things during the trial.  
5 The verdict form, on the first page is, murder of Monica Wall.  
6 On the charge of murder, we, the jury, by unanimous consent,  
7 find the Defendant -- and there's two choices -- not guilty or  
8 guilty. I had to put one before the other. Obviously don't  
9 assign anything to that. Once you have reached a decision on  
10 count one, the murder of Monica Wall regarding Jimmy Lee  
11 Sessions, then you would go to count two, murder of Jamilla  
12 Hightower. On the charge of murder we, the jury, by unanimous  
13 consent, find the Defendant, again two choices, not guilty or  
14 guilty. Once you have reached a unanimous decision on that  
15 charge, count two, you go to count three, armed robbery of  
16 Jamilla Hightower. On the charge of armed robbery we, the  
17 jury, by unanimous consent, find the Defendant, again two  
18 choices, not guilty or guilty. And once you have reached a  
19 decision on count three of armed robbery regarding Jimmy Lee  
20 Sessions then you proceed to count four, burglary in the first  
21 degree. On the charge of burglary in the first degree we, the  
22 jury, by unanimous consent, find the Defendant, again, not  
23 guilty or guilty.

24           Once you have completed these forms on Mr. Jimmy Lee  
25 Sessions you proceed to the verdict forms on Christopher

1 Stephens. Regarding the verdict forms, has the caption of the  
2 case, State of South Carolina versus Christopher Stephens,  
3 count one, accessory before the fact of the felony of murder  
4 of Jamilla Hightower. On the charge of accessory before the  
5 fact of the felony of the murder of Jamilla Hightower we, the  
6 jury, by unanimous consent, find the Defendant, again, two  
7 choices, not guilty or guilty. Once you have reached a  
8 decision on that count you go to the next count, accessory  
9 before the fact of the felony of the murder of Monica Wall.  
10 On the charge of accessory before the fact of the felony of  
11 the murder of Monica Wall we, the jury, by unanimous consent,  
12 find the Defendant, again two choices, not guilty or guilty.  
13 Once you have reached a unanimous verdict on that particular  
14 one you proceed to the third count, accessory before the fact  
15 of the felony of armed robbery of Jamilla Hightower. On the  
16 charge of accessory before the fact of the felony of armed  
17 robbery of Jamilla Hightower we, the jury, by unanimous  
18 consent, find the Defendant, and again two choices, not guilty  
19 or guilty.

20 Mr. Foreman, when your jury has well and truly  
21 deliberated, and reached unanimous verdicts in those matters  
22 you will take the appropriate verdict form, you will check the  
23 appropriate block as to whatever that may be, and then you  
24 will sign your name and put today's date, indicating that  
25 that, indeed, is the unanimous verdict of the jury on that

1 particular charge.

2 Now, I have said unanimous I don't know how many times.  
3 It means exactly what you think it means. It means twelve  
4 zero, doesn't mean eleven one, ten two, any combination  
5 thereof. Whatever the verdict is, on each and every charge  
6 the verdict must be unanimous, twelve zero. Everybody has to  
7 agree that is their verdict on that particular charge, on that  
8 particular Defendant.

9 Mr. Foreman, when you check that block you are telling  
10 the Court every single member of the jury agrees that is their  
11 verdict on that particular charge, on that particular  
12 Defendant.

13 What I'm going to have you do, Mr. Foreman, is take the  
14 twelve members of the regular jury to the jury room. Do not  
15 begin your deliberations until the bailiff brings in to you  
16 all of the exhibits and all of the verdict forms. When all of  
17 the exhibits and the verdict forms are in your jury room then  
18 you may begin your deliberations.

19 I'll have the two alternates stay with me in the  
20 courtroom. The remaining twelve of you please proceed to the  
21 jury room.

22 Thank you very much.

23 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE  
24 JURY OF TWELVE.) (TWO ALTERNATES ARE PRESENT IN THE COURTROOM.)

25 THE COURT: All right. Mr. Cebula and Mr. Hall, your

1 jobs as alternates is to step in the shoes if one of the  
2 jurors cannot go forward with their duties and  
3 responsibilities in this case. They have not yet arrived at a  
4 unanimous verdict on all of these matters, therefore I cannot  
5 release you because some -- something unfortunate may happen,  
6 one of them may become ill and you may have to step in their  
7 shoes still.

8 So, what I'm going to have to have you do is go to  
9 another jury room where you will stay as long as that jury is  
10 deliberating, and until they finish deliberating in this case  
11 and reached a unanimous verdict in all these matters.

12 I promise we will not forget about you, but I cannot  
13 release you.

14 Mr. Deputy, find another jury room for them, please sir.

15 **ALTERNATE:** Your Honor, if ---

16 **THE COURT:** What I'm going to have to have you do is  
17 write that out. I can't have you say that in open court.  
18 Thank you. I appreciate it. Just write it out, I'll be glad  
19 to answer it. Thank you, sir.

20 **ALTERNATE:** Thank you.

21 **(THE FOLLOWING TAKES PLACE OUT OF THE PRESENCE OF ALL**  
22 **JURORS.)**

23 **THE COURT:** All right. Any exceptions, deletions,  
24 additions to the charge from the State?

25 **MS. ELDER:** No sir, Your Honor.

1           **THE COURT:**   From the Defendant, Sessions?

2           **MR. GARDNER:**   None from me, Your Honor.

3           **THE COURT:**   From the Defendant, Stephens?

4           **MR. FREDERICK:**   Just for the record we object to the  
5 charge on third-party guilt.

6           **THE COURT:**   Your objection was that it should not have  
7 been charged at all; is that correct?

8           **MR. FREDERICK:**   Yes sir, or if it is charged I think  
9 the charge would be that the jury is free to consider it. The  
10 charge as given I feel is a rule of admissibility, and the  
11 fact is, once it's admissible the jury is free to consider it  
12 in any way that they think is appropriate.

13           **THE COURT:**   All right, sir. Thank you.

14           All right. Anything else, gentlemen?

15           **MS. ELDER:**   No, Your Honor.

16           **THE COURT:**   All right. We will -- and I'm sorry,  
17 Solicitor.

18           Is there any -- what we will do is, we will be at ease  
19 till the jury needs us. What I need for all of y'all to do is  
20 please come forward, as far as the attorneys, meet with the  
21 Court Reporter, make sure that all of your exhibits for your  
22 particular Defendant are here and are ready to go into the  
23 jury room. If there is any issue about that please let me  
24 know.

25           I want to take a moment and tell both Solicitors, and to

1 tell both Defense attorneys, I appreciate very much the hard  
2 work that went into presenting both sides of this, both of you  
3 on the State's side, both of you on the Defense side, did  
4 excellent jobs on behalf of your clients in this particular  
5 matter, and I commend all of you for your work and your job  
6 that you did for your clients in this particular matter.

7 Thank you very much.

8 MS. ELDER: Thank you, Your Honor.

9 THE COURT: Be at ease till the jury needs us then.

10 (AFTER A REVIEW OF THE EXHIBITS BY COUNSEL FOR THE STATE  
11 AND COUNSEL FOR BOTH DEFENDANTS THE EXHIBITS WERE PASSED INTO  
12 THE JURY ROOM AND THE JURY WAS INSTRUCTED TO BEGIN  
13 DELIBERATION AT 5:35 P.M.)

14 (THE JURY DELIBERATED AND AT 7:00 P.M. A NOTE FROM THE  
15 JURY WAS MARKED COURT'S EXHIBIT NUMBER 1.)

16 (THE FOLLOWING TAKES PLACE AT 7:00 P.M. OUTSIDE THE  
17 PRESENCE OF THE JURY.)

18 THE COURT: Thank you very much. You may be seated.  
19 Thank y'all.

20 All right, ladies and gentlemen, I understand that the  
21 jury has reached a verdict in this matter. Is the State ready  
22 to receive it?

23 MR. RICHARDSON: The State is ready to proceed, Your  
24 Honor.

25 THE COURT: Is the Defendant, Sessions, ready to

1 receive it?

2 MR. GARDNER: Yes sir.

3 THE COURT: The Defendant, Stephens.

4 MR. FREDERICK: Yes, Your Honor.

5 THE COURT: All right. Very good.

6 Before I call the jury in let me speak real briefly to  
7 everyone sitting in the courtroom at the present time. I do  
8 not know what verdict of this jury is going to be regarding  
9 these particular matters. I will tell you that the verdict of  
10 the jury, whatever it might be in all these matters, will be  
11 received by everyone in this courtroom with respect and with  
12 silence. There will be no outbursts of any kind. There will  
13 be no reaction to the verdict of any kind. I am giving you a  
14 direct order to that effect. What that means is, should you  
15 violent that direct order you will be detained immediately by  
16 a member of the Horry County Sheriff's Department, and I will  
17 thereafter conduct a contempt of court hearing as to whether  
18 or not that person should be held in contempt of court, which  
19 I will tell you could subject you to one year in the  
20 Department of Corrections. If you cannot follow these  
21 directions please leave the courtroom now. If you feel, in  
22 any way, you cannot follow these directions I'm giving you the  
23 opportunity to leave. If you stay you are bound by this  
24 order. I am asking you, do not put me in the position of  
25 putting you in jail because you cannot respect the jury's

1 verdict in silence.

2 If anyone wants to leave, leave now.

3 Thank you very much.

4 Ask the jury to come in.

5 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE  
6 JURY AT 7:30 P.M.)

7 THE COURT: All right, Mr. Foreman, has your jury been  
8 able to reach a verdict on the matters presented to it?

9 FOREMAN: All counts, yes sir.

10 THE COURT: Very good, sir. Could you hand the verdict  
11 forms to the Clerk, please sir.

12 All right, Madam Clerk, you may publish the verdicts.

13 DEPUTY CLERK OF COURT: The State of South Carolina,  
14 County of Horry, versus Jimmy Lee Sessions, indictment number  
15 (07-GS-26-2962), murder of Monica Wall, on the charge of  
16 murder, we, the jury, by unanimous consent, find the Defendant  
17 guilty. Dated February 6, 2009.

18 State of South Carolina versus Jimmy Lee Sessions,  
19 indictment number (07-GS-26-2963), murder of Jamilla  
20 Hightower, on the charge of murder, we, the jury, by unanimous  
21 consent, find the Defendant guilty. Dated February 6, 2009.

22 State of South Carolina versus Jimmy Lee Sessions,  
23 indictment number (07-GS-26-2961), armed robbery of Jamilla  
24 Hightower, on the charge of armed robbery, we, the jury, by  
25 unanimous consent, find the Defendant guilty. Dated February

JURY IN/VERDICT  
MOTIONS/SENTENCING

1 6, 2009.

2 State of South Carolina versus Jimmy Lee Sessions,  
3 indictment number (08-GS-26-2698), burglary first degree, on  
4 the charge of burglary first degree, we, the jury, by  
5 unanimous consent, find the Defendant guilty. Dated February  
6 6, 2009. Signed by Walter Hucks, III.

7 State of South Carolina versus Christopher Stephens,  
8 indictment number (07-GS-26-2974), accessory before the fact  
9 of the felony of murder of Jamilla Hightower, on the charge of  
10 accessory before the fact of the felony of murder of Jamilla  
11 Hightower, we, the jury, by unanimous consent, find the  
12 Defendant guilty. Dated February 6, 2009.

13 State of South Carolina versus Christopher Stephens,  
14 indictment number (07-GS-26-2975), accessory before the fact  
15 of the felony of murder of Monica Wall, on the charge of  
16 accessory before the fact of the felony of the murder of  
17 Monica Wall, we, the jury, by unanimous consent, find the  
18 Defendant guilty. Dated February 6, 2009.

19 State of South Carolina versus Christopher Stephens,  
20 indictment number (07-GS-26-2976), accessory before the facts  
21 of the felony of armed robbery of Jamilla Hightower, on the  
22 charge of accessory before the fact of the felony of armed  
23 robbery of Jamilla Hightower, we, the jury, by unanimous  
24 consent, find the Defendant guilty. Dated February 6, 2009.  
25 Signed by Foreperson, Walter Hucks, III.

1 Ladies and gentlemen of the jury, if this is your  
2 verdict so signify by raising your right hand.

3 (AT THIS TIME EACH AND EVERY JUROR RAISED HIS OR HER  
4 RIGHT HAND AFFIRMING THE VERDICTS AS PUBLISHED.)

5 THE COURT: Thank you, Ma'am.

6 All right, the jury having spoken to this matter and  
7 affirmed their verdict, does the State wish the jury polled in  
8 this matter?

9 MS. ELDER: No sir, Your Honor.

10 THE COURT: Does the Defendant, Christopher Stephens,  
11 wish the jury polled in this particular matter?

12 MR. GARDNER: Yes sir, Your Honor.

13 THE COURT: All right. Very good.

14 All right, Madam Clerk, if you will poll the jury using  
15 their juror numbers, please Ma'am.

16 DEPUTY CLERK OF COURT: Did you say juror number?

17 THE COURT: Juror number, please Ma'am.

18 DEPUTY CLERK OF COURT: One thirty -- I'm sorry.

19 Whenever I call your name please stand, and I will ask you two  
20 questions. After you answer please be seated.

21 Juror 130, is this your verdict?

22 JUROR NUMBER 130: Yes.

23 DEPUTY CLERK OF COURT: Is it still your verdict?

24 JUROR NUMBER 130: Yes.

25 DEPUTY CLERK OF COURT: Thank you.

JURY IN/VERDICT  
MOTIONS/SENTENCING

1 One ten, is this your verdict?  
2 JUROR NUMBER 110: Yes.  
3 DEPUTY CLERK OF COURT: Is this still your verdict?  
4 JUROR NUMBER 110: Yes.  
5 DEPUTY CLERK OF COURT: Thank you.  
6 Three thirty-seven, is this your verdict?  
7 JUROR NUMBER 337: Yes.  
8 DEPUTY CLERK OF COURT: Is this still your verdict?  
9 JUROR NUMBER 337: Yes.  
10 DEPUTY CLERK OF COURT: Thank you.  
11 Forty-one, is this your verdict?  
12 JUROR NUMBER 41: Yes.  
13 DEPUTY CLERK OF COURT: Is this still your verdict?  
14 JUROR NUMBER 41: Yes.  
15 DEPUTY CLERK OF COURT: One seventy-four, is this your  
16 verdict?  
17 JUROR NUMBER 174: Yes.  
18 DEPUTY CLERK OF COURT: Is this still your verdict?  
19 JUROR NUMBER 174: Yes.  
20 DEPUTY CLERK OF COURT: Thank you.  
21 Three fifty-five, is this your verdict?  
22 JUROR NUMBER 355: Yes.  
23 DEPUTY CLERK OF COURT: Is this still your verdict?  
24 JUROR NUMBER 355: Yes.  
25 DEPUTY CLERK OF COURT: Thank you.

1 Three twenty, is this your verdict?

2 JUROR NUMBER 320: Yes.

3 DEPUTY CLERK OF COURT: Is this still your verdict?

4 JUROR NUMBER 320: Yes.

5 DEPUTY CLERK OF COURT: Thank you.

6 Two Sixty-one, is this your verdict?

7 JUROR NUMBER 261: Yes.

8 DEPUTY CLERK OF COURT: Is this still your verdict?

9 JUROR NUMBER 261: Yes.

10 DEPUTY CLERK OF COURT: One fifty-one, is this your  
11 verdict?

12 JUROR NUMBER 151: Yes.

13 DEPUTY CLERK OF COURT: Is this still your verdict?

14 JUROR NUMBER 151: Yes.

15 DEPUTY CLERK OF COURT: Thank you.

16 Twenty-five, is this your verdict?

17 JUROR NUMBER 25: Yes.

18 DEPUTY CLERK OF COURT: Is this still your verdict?

19 JUROR NUMBER 25: Yes.

20 DEPUTY CLERK OF COURT: Two forty-five, is this your  
21 verdict?

22 JUROR NUMBER 245: Yes.

23 DEPUTY CLERK OF COURT: Is this still your verdict?

24 JUROR NUMBER 245: Yes.

25 DEPUTY CLERK OF COURT: One seventy-three, is this your

**JURY IN/VERDICT  
MOTIONS/SENTENCING**

1 verdict?

2 JUROR NUMBER 173: Yes.

3 DEPUTY CLERK OF COURT: Is this still your verdict?

4 JUROR NUMBER 173: Yes.

5 DEPUTY CLERK OF COURT: Thank you.

6 THE COURT: All right. The jury having been polled and  
7 affirmed their verdict, is there anything further from the  
8 Defendant, Jimmy Lee Sessions, as to the jury?

9 MR. GARDNER: No, Your Honor.

10 THE COURT: From the Defendant, Christopher Stephens,  
11 as to the jury?

12 MR. FREDERICK: No, Your Honor.

13 THE COURT: Very good. Thank you.

14 Ladies and gentlemen of the jury in this particular  
15 matter, and speaking also to the alternates, I want to thank  
16 you for your service in this particular case. This obviously  
17 was a very difficult case. I was very much impressed with the  
18 attention to this case paid by all members of the jury. You  
19 took your oath, you took your duty extremely seriously, and I  
20 appreciate that very much as your Presiding Judge. You did  
21 exactly what the Court asked you to do, that is, to render a  
22 true and just verdict in this matter, and by your matter you  
23 have so done, and I want to thank you.

24 Please remember that you have earned an exemption from  
25 coming to Circuit Court jury duty in the next three years. If

1 your fine Clerk of Court here sends you a notice about jury  
2 duty here in Circuit Court please let her know.

3 With that you are now excused. You will please go with  
4 the Deputy to the jury room. There will be deputies there to  
5 escort you to your cars.

6 Thank you very much.

7 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE  
8 JURY.)

9 THE COURT: All right, Mr. Gardner, motions, sir.

10 MR. GARDNER: Your Honor, I believe I, for the record,  
11 would move for -- trying to remember what it's called in  
12 Criminal Court -- the motion ---

13 THE COURT: Motion for a new trial.

14 MR. GARDNER: ---Motion for a new trial.

15 THE COURT: All right, sir.

16 Would you join in that motion, Mr. Frederick ---

17 MR. FREDERICK: We do.

18 THE COURT: ---On behalf of Mr. Stephens?

19 MR. FREDERICK: We do. We move for a new trial based  
20 on the same grounds as our motion for a directed verdict.

21 THE COURT: All right, sir. Regarding the motions for  
22 a new trial made by Mr. Sessions and Mr. Stephens in this  
23 matter, I do find that, as I indicated in ruling on the  
24 directed verdict motions, that there is more than sufficient  
25 evidence, if so believed by the jury, to find these Defendants

JURY IN/VERDICT  
MOTIONS/SENTENCING

1 guilty of the crimes charges, therefore, I respectfully  
2 decline to grant your motions for a new trial, finding there  
3 is competent evidence to sustain the jury's verdict in this  
4 particular matter on both Defendants regarding all of the  
5 charges as against each Defendant.

6 Thank you very much.

7 All right. Is the State ready to proceed with  
8 sentencing in these matters?

9 MR. RICHARDSON: We are, Your Honor.

10 THE COURT: Is the Defendant, Sessions, ready to  
11 proceed?

12 MR. RICHARDSON: Your Honor, may I approach?

13 THE COURT: Yes sir.

14 MR. GARDNER: Yes sir.

15 THE COURT: Mr. Frederick, the Defendant, Stephens.

16 MR. FREDERICK: Yes sir.

17 THE COURT: Yes sir.

18 (SOLICITOR PASSES DOCUMENTS TO THE COURT.)

19 THE COURT: All right, sir. Thank you.

20 MR. RICHARDSON: Your Honor, if I could have a moment  
21 to speak to the family too, to see if they wish to address the

22 ---

23 THE COURT: Yes sir. Yes sir.

24 MR. RICHARDSON: Your Honor, at the appropriate time  
25 the victims' family -- each mother will speak to the Court.

1           **THE COURT:** All right, sir. Very good. Just give me a  
2 minute, please.

3           All right, Solicitor, I'll be glad to hear from you,  
4 sir.

5           **MR. RICHARDSON:** Your Honor, I'll address the  
6 Defendant, Christopher Stephens, first. I'll briefly go into  
7 his record, Your Honor. I did go into it earlier today when  
8 we discussed what would be allowed if he were to testify.

9           Your Honor, we'll just start back in 1997, the Defendant  
10 got convicted of distribution of drugs other than crack  
11 cocaine. He got a Y.O.A. sentence for that. That was June of  
12 '97.

13           Then in October of '97 he got convicted of m.d.p. drugs,  
14 manufacturing and distribution, possession with intent, drugs.  
15 I don't know if it's cocaine or marijuana, but he got two  
16 years suspended to jail, four months.

17           Then in 2001, he got a conviction for sale of a pistol,  
18 or possession of a pistol by certain person prohibited. Of  
19 course with his felony record he would be wrong in having  
20 anything to do with a handgun.

21           We've got assault and battery of a high and aggravated  
22 nature in 2001. Looks like that might have been pled down  
23 from assault and battery with intent to kill. He got thirty  
24 months on that.

25           He also has a 2004, conviction for manufacturing drugs

JURY IN/VERDICT  
MOTIONS/SENTENCING

1 again, Your Honor. He got five years suspended to one year,  
2 and three years probation.

3 He got another unlawful carrying of a weapon.

4 Your Honor, he's got a nice little history there. In  
5 addition, I'll pass up to the Court at this time, or I can  
6 read from this report, this is from J. Reuben Long Detention  
7 Center, dated January 21st, 2009, is whenever this Defendant  
8 got put into maximum security, and the reason he got put into  
9 maximum security, he was given a razor to shave, and then  
10 whenever it was time to hand that razor back in, because they  
11 can't have blades out there, he indicated he had given the  
12 razor back to another detention officer. The detention  
13 officer was questioned about this, said I didn't get a razor  
14 back. They went and searched the cell and they found the  
15 razor blade that had been removed from the razor, and that was  
16 under this Defendant's mattress. That's why he's in maximum  
17 security right now. That's why he was with Belal Harris.  
18 He's in maximum security because he was secreting a weapon.

19 Your Honor, as to both of these Defendants, this was a  
20 horrendous crime. It's a double murder. I was talking --  
21 Captain Bill Klonts, first double murder they've had in Myrtle  
22 Beach. This is a horrendous crime, pre-planned.

23 You heard Lieutenant Prodan tell you, there is no other  
24 way this could have occurred but by careful orchestration and  
25 planning.

1           Your Honor, the crime, accessory before the fact of  
2 murder carries the same sentence as the murder itself, and the  
3 State would ask you to impose the maximum sentence on that.

4           This is two counts of murder. The State would ask for  
5 consecutive sentences on all charges, Your Honor.

6           With regard to the Defendant, Sessions, Your Honor, he's  
7 got sale of hallucinogenic drugs, he got six years, three to  
8 serve, three on probation, out of New Haven, Connecticut. He  
9 got a conditional discharge on something else, but I don't  
10 ever see that being removed. That was on more controlled  
11 substance, Your Honor. That was all the way back in 2002.

12           We've got possession of a weapon -- that's a Federal  
13 charge -- for which he got eighty-four months. It was a 1996  
14 guilty plea, possession in effect in commit -- commission in  
15 the sale of firearms. That was in 2000.

16           He got a probation violation in 2003, I believe on the  
17 same offense.

18           He got a possession of a firearm, looks like 2000. He  
19 got twelve months, if I'm reading that right.

20           Your Honor, he's got carrying a concealed weapon. He  
21 got an Eight Hundred Ninety-Five (\$895.00) Dollar fine on that  
22 in 2000.

23           Trying to go back in time, Judge. He got a shoplifting  
24 back in '87, then he got a burglary in the first degree and  
25 grand larceny, which I believe is pled down to burglary --

JURY IN/VERDICT  
MOTIONS/SENTENCING

1 burglary second and grand larceny, for which he got a Y.O.A.  
2 sentence. That was back in '88.

3 In '93 he had simple possession of marijuana, something  
4 with his vehicle registration violation, simple possession of  
5 marijuana. He got fined on that.

6 He's got possession of crack cocaine. He got eight  
7 months on that in '94.

8 Your Honor, at the time of these crimes, June 6, 2006 --  
9 or June 8, 2006, I had trafficking cocaine charges on this  
10 Defendant. With his prior record it was going to be a  
11 trafficking second, I believe, just basing the sentence on  
12 that, while he was out on this.

13 He ran from that, ran from this, ran to Connecticut. We  
14 had to put his bondsman out to go get him in Connecticut. He  
15 ran from this. The flight just frustrated this more.

16 Your Honor, once again, this is a terrible crime, a  
17 double homicide, execution style, pre-planned, with no regard  
18 for human life. Your Honor, I've never asked for life on a  
19 Defendant before. That's what I'm asking for today. Double  
20 homicide, murder carries life. This Defendant deserves to  
21 never leave prison while he still draws breath, because these  
22 two girls ain't coming back, all over drugs and money, Your  
23 Honor.

24 Your Honor, if you would hear from the victims' family  
25 at this time.

1           **THE COURT:**   All right, sir.

2           Yes Ma'am.   If you would come right to the microphone.  
3   If you would tell me your name, and I'll be glad to hear from  
4   you, Ma'am.

5           **BARBARA HIGHTOWER:**   My name is Barbara Hightower.

6           **THE COURT:**   Yes Ma'am.

7           **BARBARA HIGHTOWER:**   Your Honor, I just want to say that  
8   for three years my heart has hurt, and I don't understand why.  
9   I just keep asking myself why.   They could have took anything  
10   they wanted.   They didn't have to take their lives.   Not only  
11   my family but their family is left back here hurting.   They  
12   devastated a lot of people's lives, and I just want to say,  
13   this has been a long time coming, and I'm glad it's over,  
14   justice but never closure, because I'm never going to get to  
15   see my daughter again.   I'm never going to have to talk to her  
16   again, have the opportunity any more.   I have to go to the  
17   graveyard to summon up what to say to my child, and I'm glad  
18   that justice has finally came.

19           **THE COURT:**   Thank you, Ma'am.

20           **MR. RICHARDSON:**   Your Honor, this is Monica's mother,  
21   Ms. Betty Wall.

22           **THE COURT:**   All right.   If you would state your name,  
23   Ma'am, I'll be glad to hear from you.

24           **MS. WALL:**   My name is Betty Wall.   I would like to say  
25   that, when they took Monica they took a best friend of mine.

JURY IN/VERDICT  
MOTIONS/SENTENCING

1 She was not only my daughter but she was my best friend.  
2 Every morning I wake up I look at her picture. All I can say,  
3 Mommy miss you, baby, and I've been sick ever since my baby  
4 died. I've been back and forth in the hospital. Right now  
5 I've suppose to have been put away, but I didn't want them to  
6 put me away because I wanted to be here in court just to see  
7 justice be done for my child. I have lost weight. My mama  
8 have been sick, everybody in the whole family. It just took a  
9 toll. It's just like a different family. It's not together  
10 no more like it used to be, and I just want to say that I  
11 thank you, and I thank everybody that had to get up, having  
12 justice done for my daughter.

13 That's all I have to say. It just ---

14 **THE COURT:** Thank you, Ma'am.

15 Anything further, Solicitor?

16 **MR. RICHARDSON:** No sir, Your Honor. I believe that's  
17 enough said.

18 **THE COURT:** Very good.

19 All right, Mr. Gardner, I'll be glad to hear from you,  
20 sir.

21 **MR. GARDNER:** Thank you, Judge.

22 He is, as you know, thirty-nine years old, present in  
23 the courtroom, and his parents are with him. He has three  
24 children who are not present in the courtroom.

25 You've heard the case. You know all about it. I -- for

1 the record -- I don't think it really matters -- but it's  
2 important to him. He didn't run from this case. He's been  
3 anxiously ready for this case. Denied his guilt the whole  
4 time. He's been grilled up and down like no other defendant  
5 I've ever seen, adamantly stood by that, and he still stands  
6 by it today.

7 I know we are here for the punishment, not that, but I  
8 would ask you to consider the minimum sentence. My  
9 understanding is that you have discretion between a mandatory  
10 minimum of thirty, up to what the Solicitor is asking for, and  
11 I would ask you to sentence him on the minimum, Your Honor.

12 **THE COURT:** Does Mr. Sessions wish to say anything to  
13 the Court?

14 **MR. GARDNER:** He would just like to tell the family  
15 that he didn't do it.

16 **THE COURT:** Thank you very much.

17 All right. Mr. Frederick, on behalf of Mr. Stephens.

18 **MR. FREDERICK:** Judge, Mr. Stephens, Christopher, is  
19 thirty years old. His family is also here in the courtroom  
20 today. He has three children -- he has five children, Judge.  
21 One is very soon going in for heart surgery. They've been  
22 putting that off.

23 His wife has been up here in the courthouse all week  
24 also.

25 I understand that he has a record, Judge. He also has

**JURY IN/VERDICT  
MOTIONS/SENTENCING**

1 maintained his innocence. That has no place here and now.  
2 This is sentencing hearing. Judge, if you sentence him to the  
3 minimum sentence he will be nearing sixty years old when he  
4 walks out of there, and weighing the relative severity of each  
5 of the Defendants' charges I think that would be appropriate.

6 **THE COURT:** Thank you, sir.

7 Did Mr. Stephens wish to say anything to the Court?

8 **CHRISTOPHER STEPHENS:** I can't apologize because we --  
9 we maintain our innocence, but I -- I just ask that you -- you  
10 do what you can -- show leniency, because as I said, I still  
11 stand by my innocence, as well as Mr. Sessions.

12 I feel sorry for the family. I've got my own family to  
13 feel sorry for as well.

14 Obviously they painted a better picture for the jury,  
15 so, you know, other than that I'd like to thank my attorneys,  
16 and our Defense team. They did what they could do, but you  
17 know, as I said, they painted the right picture for the twelve  
18 that was in the box.

19 **THE COURT:** Thank you, sir.

20 **MR. FREDERICK:** Judge ---

21 **THE COURT:** Yes sir.

22 **MR. FREDERICK:** ---I would just like to add that, over  
23 the last year and a half, as long as we've been working with  
24 Christopher, on more than one occasion he has expressed that  
25 he understood the pain that the families felt, but he did

1 maintain his innocence.

2 THE COURT: Yes sir.

3 MR. FREDERICK: He is not without feeling for these  
4 victims' families.

5 THE COURT: I understand that. Thank you, sir.

6 MR. FREDERICK: Thank you.

7 THE COURT: All right. These are going to be the  
8 sentences regarding Mr. Jimmy Lee Sessions.

9 Regarding (07-GS-26-2962), regarding the crime of  
10 murder, the sentence of the Court is, Defendant is committed  
11 to the State Department of Corrections for a determinat term  
12 of life in prison.

13 (07-GS-26-2963), regarding the crime of murder,  
14 Defendant is committed to the State Department of Corrections  
15 for a determinat term of life in prison, concurrent with the  
16 (07-GS-26-2962).

17 Regarding (08-GS-26-2698), as to the offense of  
18 burglary, Defendant is committed to the State Department of  
19 Corrections for a determinat term of thirty years, concurrent  
20 with (07-2962).

21 Regarding (07-GS-26-2967), regarding armed robbery, the  
22 sentence of the Court is, Defendant is committed to the State  
23 Department of Corrections for a determinat term of thirty  
24 years, concurrent with (07-GS-26-2962).

25 As to Mr. Christopher Stephens, regarding (07-GS-26-

JURY IN/VERDICT  
MOTIONS/SENTENCING

1     2974), State of South Carolina, County of Horry, Christopher  
2     Stephens, regarding accessory before the fact of murder, the  
3     sentence of the Court is Defendant is committed to the State  
4     Department of Corrections for a determinat term of forty  
5     years.

6             (07-GS-26-2975), accessory before the fact of murder,  
7     Defendant is committed to the State Department of Corrections  
8     for a determinat term, forty years, concurrent with (07-GS-  
9     26-2974) .

10            (07-GS-26-2976), accessory before the fact armed  
11     robbery, Defendant is committed to the State Department of  
12     Corrections for a determinat term, thirty years, concurrently  
13     with (07-GS-26-2974) .

14            Thank you very much.

15            MS. ELDER:    Thank you, Your Honor.

16            MR. RICHARDSON:   Thank you, Your Honor.

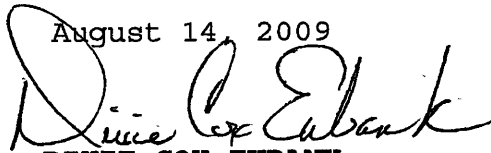
17     -----END OF REQUESTED TRANSCRIPT OF RECORD-----  
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C E R T I F I C A T E

I, the undersigned, DIXIE COX EUBANK, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the TRIAL of the captioned case, relative to appeal, in the COURT OF GENERAL SESSIONS FOR HORRY COUNTY, SOUTH CAROLINA, on the 2nd, 3rd, 4th, 5th and 6th days of February, 2009.

I DO FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

August 14, 2009

  
DIXIE COX EUBANK

CIRCUIT COURT REPORTER

FIFTEENTH JUDICIAL CIRCUIT

MANN/MBPD  
WITNESSES

ARREST WARRANT NO. K003391

CDR: 0002 16-01-0040, 0050

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date:

DOCKET NO. 2007-GS-26-2974

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

BCR 85448-002

COURT OF GENERAL SESSIONS

JULY TERM 2007

THE STATE  
VS

CHRISTOPHER STEPHENS

B/M

ATTORNEY: BOBBY FREDERICK

INDICTMENT FOR:

ACCESSORY BEFORE THE FACT OF A FELONY

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

1047

**1048**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

INDICTMENT FOR:

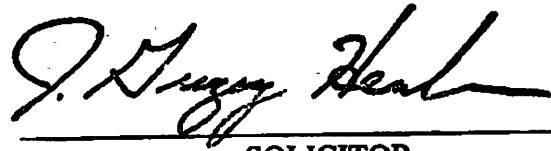
ACCESSORY BEFORE THE FACT OF A FELONY

At a Court of General Sessions, convened on July 19, 2007, the Grand Jurors of Horry County present upon their oath:

ACCESSORY BEFORE THE FACT OF A FELONY  
CDR: 0002 16-01-0040, 0050

That CHRISTOPHER STEPHENS did in Horry County on or about June 8, 2006, advised or agreed with or urged or hired or in some way aided, counseled or encouraged the principal felon to commit the felony of Murder of Jamilla Hytower, but was not himself present when the crime was committed, in violation of the Common Law and Section 16-1-40, S. C. Code of Laws, 1976, as amended.

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



SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Horry  
STATE VS.

CA: Christopher Stephens

DOB: B Sex: M Age:

DOB:  SS#:

Address:

City, State, Zip

#  SID#

1049  
IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2975

AW#: 2007

Date of Offense: June 8, 2006

S.C. Code §: 16-1-40.50

CDR Code #: 0101012

☐ CASE RESTORED

SENTENCE

☐ PLEA ☐ TRIAL

disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS

Accessory before the Fact - Murder

violation of § 16-1-40 of the S.C. Code of Laws, bearing CDR Code # 0101012

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

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

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

TEST:

Solicitor

Defendant

Attorney for Defendant

HEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 40 years or ☐ under the Youthful Offender Act not to exceed  years

and/or to pay a fine of \$ ; provided that upon the service of  days/months/years and/or payment

\$ ; plus costs and assessments as applicable; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 07-65-262974

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$  plus 20% fee: \$

Payment Terms:

Set by SCDPPPS

Recipient:

Fine:

14-1-206 (Assessments 107.5%)

14-1-211(A)(1) (Conv. Surcharge) \$100 \$100.00

14-1-211(A)(2) (DUI Surcharge) \$100 \$100.00

16-5-2995 (DUI Assessment) \$12 \$12.00

35.13 (Public Def/Prob) \$500 \$500.00

73.3, 1B TP (Law Enforce. Funding) \$25 \$25.00

33.7, 1B TP (Drug Court Surcharge) \$100 \$100.00

50-21-114(BUI Breath Test Fee) \$50 \$50.00

56-5-2942(J) (Vehicle Assessment) \$40/ea \$395.00

% to County (if paid in installments) \$5.00

TOTAL \$1339.00

Melanie Hagins  
Clerk of Court/Deputy Clerk

Court Reporter: Dixie L. L. L.

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

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

pmts. of \$ 25.00 beginning 01/06/2009

\$  paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, \$35.13 TP  
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date: 7/6/09

MANN/MBPD  
**1050** WITNESSES

DOCKET NO. 2007-GS-26-2975

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

BCR 85448-002

COURT OF GENERAL SESSIONS

JULY TERM 2007

THE STATE  
VS

ARREST WARRANT NO. CAW200707006

CDR: 0002 16-01-0040, 0050

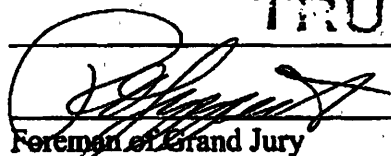
CHRISTOPHER STEPHENS

B/M

DOA: 

ACTION OF GRAND JURY

**TRUE BILL**

 OCT 25 2007  
Foreman of Grand Jury

VERDICT

ATTORNEY: BOBBY FREDERICK

INDICTMENT FOR:

ACCESSORY BEFORE THE FACT OF A FELONY

**ORIGINAL**

Foreman of Petit Jury Date:

J. GREGORY HEMBREE, SOLICITOR

**1051**

STATE OF SOUTH CAROLINA     )  
                                          )  
COUNTY OF HORRY             )

INDICTMENT FOR:

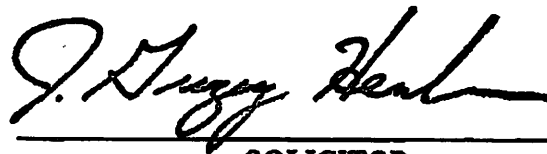
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ACCESSORY BEFORE THE FACT OF A FELONY  
CDR: 0002 16-01-0040, 0050

That CHRISTOPHER STEPHENS did in Horry County on or about June 8, 2006, advised or agreed with or urged or hired or in some way aided, counseled or encouraged the principal felon to commit the felony of Murder of Monica Walls, but was not himself present when the crime was committed, in violation of the Common Law and Section 16-1-40, S. C. Code of Laws, 1976, as amended.

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



SOLICITOR

MANN/MBPD  
**1052** WITNESSES

ARREST WARRANT NO. K003392

CDR: 0002 16-01-0040, 0050

DOA:                     

ACTION OF GRAND JURY

 **TRUE BILL**  
OCT 25 2007  
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date:                     

DOCKET NO. 2007-GS-26-2976

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

BCR 85448-002

COURT OF GENERAL SESSIONS

JULY TERM 2007

THE STATE  
VS

CHRISTOPHER STEPHENS

B/M

ATTORNEY: BOBBY FREDERICK

INDICTMENT FOR:

ACCESSORY BEFORE THE FACT OF A FELONY

**ORIGINAL**

J. GREGORY HEMBREE, SOLICITOR

**1053**

STATE OF SOUTH CAROLINA     )  
                                          )  
COUNTY OF HORRY            )

**INDICTMENT FOR:**

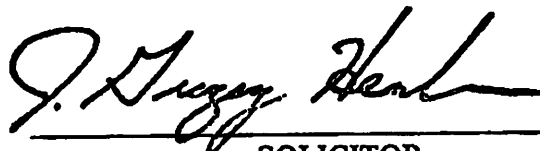
**ACCESSORY BEFORE THE FACT OF A FELONY**

At a Court of General Sessions, convened on July 19, 2007, the Grand Jurors of Horry County present upon their oath:

**ACCESSORY BEFORE THE FACT OF A FELONY**  
**CDR: 0002 16-01-0040, 0050**

That CHRISTOPHER STEPHENS did in Horry County on or about June 8, 2006, advised or agreed with or urged or hired or in some way aided, counseled or encouraged the principal felon to commit the felony of Armed Robbery of Jamilla Hytower, but was not himself present when the crime was committed, in violation of the Common Law and Section 16-1-40, S. C. Code of Laws, 1976, as amended.

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

A handwritten signature in black ink, appearing to read "J. Gregory Henkel", is written over a horizontal line.

**SOLICITOR**

## ARREST WARRANT

105K-003392

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

Myrtle Beach

THE STATE

01-08-045389

against

Christopher Maurice Stephens

Address:

Phone:

Sex: M Race: B Height: 5 8 Weight: 180

DL State: SC DL #:

DOB: Agency ORI #: SC0260600

Prosecuting Agency: Myrtle Beach Police Department

Prosecuting Officer: S Mann - 6224

Offense: Accessory / Accessory before the fact to a Felony,  
general provision (violent if violent Felony)

Offense Code: 0002

Code/Ordinance Sec: 16-01-0040, 0050

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality ofThe accused  
is to be arrested and brought before me to be  
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

## RETURN

A copy of this arrest warrant was delivered to

defendant Christopher M. Stephens

on 5/1/07

Inv. [Signature]  
Signature of Constable/Law Enforcement Officer

## RETURN WARRANT TO:

General Sessions  
PO Box 677  
1301 2nd Avenue  
Conway, SC 29528

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

Myrtle Beach

Personally appeared before me the affiant S Mann

being duly sworn deposes and says that defendant Christopher Maurice Stephens

did within this county and state on or about 06/09/2006

State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of Myrtle Beach

in the following particulars:

DESCRIPTION OF OFFENSE Accessory / Accessory before the fact to a Felony, general provision (violent if violent Felony)

I further state that there is probable cause to believe that the defendant named above did commit  
the crime set forth and that probable cause is based on the following facts:

See Attached Affidavit

Signature of Affiant

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

Myrtle Beach

Affiant's Address 1101 Oak Street

Myrtle Beach, SC 29577-

Affiant's Telephone

## ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 6/9/2007

defendant Christopher Maurice Stephens

did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☒ Municipality of Myrtle Beach

) as set forth below:

DESCRIPTION OF OFFENSE: Accessory / Accessory before the fact to a Felony, general provision (violent if violent Felony)

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or  
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as  
soon thereafter as is practicable  
Sworn to and subscribed before me

on 04/27/2007

[Signature] (L.S.)

Shelley C. Askey

Judge Code: 6013

Judge's Address 1101 Oak Street

Myrtle Beach, SC 29577-3599

Judge's Telephone (843)918-1356

Issuing Court: ☐ Magistrate ☒ Municipal☐ Circuit

ORIGINAL

AFFIDAVIT

Form Approved by  
S.C. Attorney General  
April 21, 2003  
SCCA 618FILED  
HURRY COUNTY  
CLERK OF COURT  
2007 MAY - 7 PM 1:27

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

1055  
RECEIVED

JUN 19 2013

S.C. Supreme Court

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK  
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

|                                    |   |
|------------------------------------|---|
| TABLE OF CONTENTS.....             | 1 |
| TABLE OF AUTHORITIES.....          | 2 |
| STATEMENT OF ISSUES ON APPEAL..... | 3 |
| STATEMENT OF THE CASE .....        | 4 |
| ARGUMENT                           |   |

## 1.

The court erred by admitting the hearsay testimony of James Pearl that Decedent Jamilla Hightower was screaming at appellant about the money he owed her for drugs since this hearsay testimony was highly prejudicial because it strongly implied an alleged motive for killing the drug dealing decedent .....5

|                       |   |
|-----------------------|---|
| Relevant Facts .....  | 5 |
| Other Testimony ..... | 6 |
| Discussion .....      | 7 |

## ARGUMENT

## 2.

The trial court committed reversible error by allowing SLED "victimologist" Mike Prodan to testify about the "victimology, method of operation, motive, things like that," of the murders, since such testimony was speculative, irrelevant, and inadmissible "expert" testimony under State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009) .....8

|                      |    |
|----------------------|----|
| Relevant Facts ..... | 8  |
| Discussion .....     | 11 |

|                  |    |
|------------------|----|
| CONCLUSION ..... | 12 |
|------------------|----|

TABLE OF AUTHORITIES**Cases**

|                                                                                |   |
|--------------------------------------------------------------------------------|---|
| <u>State v. Council</u> , 335 S.C. 1, 515 S.E.2d 508 (1999).....               | 8 |
| <u>State v. Caulder</u> , 287 S.C. 507, 339 S.E.2d 876 (Ct.App. 1986).....     | 7 |
| <u>State v. Davis</u> , 371 S.C. 170, 638 S.E.2d 57 (2006).....                | 7 |
| <u>State v. Morgan</u> , 326 S.C. 503, 485 S.E.2 <sup>nd</sup> 112 (1997)..... | 7 |
| <u>State v. Tapp</u> , 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009). ....      | 3 |
| <u>State v. White</u> , 382 S.C. 265, 676 S.E.2 <sup>nd</sup> 684 (2009) ..... | 7 |
| <u>State v. Saltz</u> , 346 S.C. 114, 551 S.E.2 <sup>nd</sup> 240 (2001).....  | 6 |

STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by admitting the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming at appellant in anger about the money he owed her for drugs since this hearsay testimony was highly prejudicial because it strongly implied an alleged motive for killing the drug dealing decedent?

2.

Whether the trial court committed reversible error by allowing SLED "victimologist" Mike Prodan to testify about the "victimology, method of operation, motive, things like that," of the murders, since such testimony was speculative, irrelevant, and inadmissible "expert" testimony under State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009)?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for two counts of accessory before the fact of murder and one count of accessory before the fact of armed robbery. R. p. 1059. Appellant's co-defendant, Jimmy Lee Sessions, was indicted for two counts of murder, burglary in the first degree and armed robbery. R. p. 1051.

Their joint cases were called to trial on February 2, 2009, before the Honorable Stephen H. John and a jury. Bobby Frederick and Laura Hiller represented appellant. Johnny Gardner represented co-defendant Sessions. Bradley Coy Richardson and Donna Elder were the assistant solicitors. R. 1.

At the conclusion of the trial on February 6, 2009, the jury found appellant guilty of two counts of accessory before the fact of murder and one count of accessory before the fact of armed robbery. R. 1032, ll. 7-25. Co-defendant Sessions was found guilty of two counts of murder, burglary in the first degree and armed robbery. R. 1032, l. 13 – 1024, l. 25.

The judge sentenced appellant to sentences totaling forty years. Co-defendant Sessions was sentenced to life imprisonment. R. 1047, l. 9-1048, l. 13.

This appeal follows.

ARGUMENT

1.

The court erred by admitting the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming at appellant about the money he owed her for drugs since this hearsay testimony was highly prejudicial because it strongly implied an alleged motive for killing the drug dealing decedent.

**Relevant Facts**

The state's star witness was James Pearl. Pearl admitted he was a cocaine addict and that he smoked marijuana the night before appellant's trial. R. 161, l. 17 – 165, l. 25. Pearl he knew Jamilla Hightower and Monica Wall. Hightower was a major drug dealer and she shared a house with Wall. R. 117, ll. 9-10. Pearl said he also knew appellant and co-defendant Sessions. R. 117, ll. 20-22.

Pearl testified that he learned that the decedents had been killed when he received a call from Hightower's cousin on a Friday. R. 118, ll. 5-21. Pearl said he saw Hightower on Wednesday, two days before, while he was conversing with appellant and co-defendant Sessions. Over defense counsel Frederick's repeated hearsay objections Pearl testified that Hightower was screaming at appellant about the money he owed her. Defense counsel made clear he understood the witness could repeat what appellant said but that he continued to object to the hearsay testimony about what Hightower was allegedly said to appellant. The judge continued to allow the solicitor to pursue this line of hearsay question and answer. Pearl said the decedent was yelling "about drug money that was owed [her by appellant]." R. 120, l. 6 – 123, l. 5.

**Other testimony**

Pearl claimed appellant said after Hightower left that he could not rob her because she knew him. Pearl maintained that Sessions then offered that he could rob Hightower. Pearl said he told both men he did not want anything to do with a robbery and he left. R. 123, l. 6 – 124, l. 21.

Pearl's claim was that appellant and co-defendant Sessions planned to rob and kill Hightower and steal her money and drugs. R. 124, l. 20 – 127, l. 14. Pearl maintained he later snorted cocaine with co-defendant Sessions and that the cocaine tasted like cucumbers. Pearl said that cocaine that tasted like cucumbers was "Jamilla's" signature cocaine. R. 126, l. 22 – 127, l. 14.

Pearl testified Hightower was major drug dealer and that he once saw her purchase two kilos of cocaine. Pearl also maintained that a purchaser had to call Hightower in advance to set up a drug buy: "You just couldn't go to her house and show up without calling." R. 131, ll. 13-25. As will be seen infra, witness Prodan worked this into his "profile" presentation that was strongly objected to defense counsel in this case, and was the subject of reversal in State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009).

On cross-examination Pearl acknowledged his prior criminal convictions and admitted that he had pending charges of second offense possession of cocaine and threatening a public official. Pearl acknowledged that he hoped the state would assist him with these charges. R. 149, ll. 9-12; 162, l. 6 – 163, l. 3; and 168, l. 22 – 169, l. 8.

**Discussion**

Hearsay is a statement, other than one made by the declarant, while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. See Rule 801(c), SCRE. See, also, State v. Saltz, 346 S.C. 114, 551 S.E.2<sup>nd</sup> 240 (2001).

Here, the state elicited Pearl's hearsay testimony that decedent Hightower was yelling at appellant about the money appellant owed her for drugs. This was inadmissible hearsay.

It was highly prejudicial hearsay because it was calculated to provide an alleged motive for the murder: That appellant elicited the help of co-defendant Sessions to rob and kill decedent Hightower. This would simultaneously relieve him of the drug debt, and also have Hightower fill the need for a victim of a robbery the men wanted to commit to obtain money. See State v. Caulder, 287 S.C. 507, 339 S.E.2d 876 (Ct.App. 1986). Appellant should be granted a new trial based upon the admission of this prejudicial hearsay evidence. State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006).

2.

The trial court committed reversible error by allowing SLED “victimologist” Mike Prodan to testify about the “victimology, method of operation, motive, things like that,” of the murders, since such testimony was speculative, irrelevant, and inadmissible “expert” testimony under State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009).

### **Relevant Facts**

Without any prior notice, the state called SLED agent Michael Prodan as a witness. R. 568 ll. 5-18. Prodan testified that he had worked in California, and he said he had been qualified as a “behavioral science expert” in the best. Prodan stated he had no “formal training, but self-initiated education involving keeping abreast of the literature involving homicide and sexual assault, and violent crime in general, and involving the literature and the texts that are available, not only to law enforcement but to the general public.” R. 569, l. 12 – 571, l. 24.

When the solicitor went to offer Prodan “as an expert in the field of crime scene interpretation and analysis”, the jury was removed from the courtroom while the defense attorneys put their considerable objections to Prodan being qualified as an expert on the record. R. 571, l. 14 – 572, l. 22. Defense Counsel Gardner said the defense was taken completely by surprise by this testimony and said: “It’s a shock to me. It’s a surprise to me, and I would just put that on the record.” R. 572, l. 14 – 573, l. 5.

Defense Counsel Frederick expanded on that objection noting that despite the voluminous discovery all he was aware of was that Prodan and other SLED “profilers”

suggested "that they put an informant in Christopher Stephens's cell. This was before he was charged. They – and that's it, judge." R. 573, ll. 6-19.

Prodan then testified in camera that he had not written any report on his work during this investigation. R. 575, ll. 16-22; 578, l. 3 – 579, l. 9; 580, l. 12 – 581, l. 8. Both defense attorneys objected to Prodan being qualified to give an opinion as an expert. R. 582, l. 17 – 585, l. 22. The objections included that Prodan's testimony in this regard was not relevant and that it was pure speculation. R. 602, ll. 4-18. The judge ruled he was going to qualify Prodan "in the areas of behavioral science, violent crimes, methodology, motive behavior." R. 585, l. 11 – 586, l. 3; 602, ll. 6-18.

As in State v. Tapp, supra, Prodan said he asked for background information on the victim or victims. Prodan testified he tried to ascertain whether the victim was a high risk individual because of their life style. Prodan opined that some people who were "low risk" because they were not involved "in criminal enterprises, they are not selling drugs, they are not involved in sexual affairs or promiscuity or prostitution." R. 576, l. 4 – 588, l. 4.

Prodan also told the jurors there were "moderate risk life styles." These included people working in a convenience store and a cab driver. R. 588, l. 17 – 589, l. 12.

The solicitor asked Prodan about the decedent's "risk level." Prodan opined decedent Hightower was probably a moderate risk because of her drug sales. "It was not – it doesn't give rise to the level of multi-national cartels, but it's not a college student selling five dollar baggies of marijuana to their dorm mates either, so it has to kind of fall in the middle." Prodan said the other decedent had an "exceedingly low risk" life style besides her living with decedent Hightower. R. 589, l. 16 – 590, l. 5.

Prodan opined that there is a misconception perpetuated by the media that violent crimes just happen and are random events. "Our experience and our training indicate that is not the case. There is a motive for murder. There are victims who are selected by the offender for that reason." R. 590, ll. 6-21.

Prodan said he had to ask himself how the person got into the house in this case since there was no forced entry. Prodan then stated his "background information" indicated that Hightower only sold drugs "if there was previous notification." R. 595, l. 1 – 596, l. 14.

Prodan offered there was no evidence either of the decedents were a "victim of blunt-forced trauma." Prodan opined that both decedents were able to be controlled by the murderer, and he noted the fact decedent Wall was found nude. "The question you ask yourself is, while the individual is having Ms. Wall disrobe, what's Ms. Hightower doing." Defense counsel Frederick objected that this testimony was pure speculation. R. 597, l. 14 – 598, l. 21. As Prodan continued, the defense made further relevance and speculation objections that were overruled. R. 602, ll. 4-18.

Prodan again opined that there was always a motive for murder and that the concept of murder without motive was a media myth. R. 608, l. 11 – 609, l. 8.

In his closing argument, the solicitor noted Prodan's testimony and argued that appellant and co-defendant Sessions planned the crime carefully and that one decedent was shot with a pillow over her head "because as Mike Prodan said, it's a lot easier to shoot that pillow than to shoot Jamilla Hightower." R. 1010, l. 5 – 1011, l. 5.

**Discussion**

In State v. Tapp, 397 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009), this Court in its substituted re-filed opinion held it was error to qualify Prodan as an expert witness. This Court noted the intervening case of State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), wherein the Supreme Court overruled State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (1997) inasmuch as it held that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission into evidence.

This Court in Tapp noted that the holding of White was that all expert testimony must satisfy Rule 702, SCRE, must pass the trial court's gate keeping function. This insures that the proposed expert testimony meets a threshold level of reliability, regardless of whether it is scientific or unscientific.

The White Court stated that simply ruling a challenge to expert testimony went to its weight and not its admissibility was an improper delegation of responsibility. The Court held the trial judge had to serve the gate keeping function of insuring that expert testimony and evidence were reliable before it was heard by the jury.

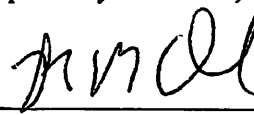
This Court in Tapp specifically rejected the state's position that Prodan's credentials, his education and experience, and his ability to rule out scenarios of whom or why the crime transpired made his testimony admissible. This Court also rejected the relative success of "victimology" or profiling as an investigative tool made Prodan's "expert" testimony admissible.

Against the evidentiary backdrop of State v. Council, 335 S.C. 1, 23, 515 S.E.2d 508, 519 (1999) and State v. White, supra, it is apparent that appellant's conviction based upon Prodan's inadmissible testimony must be reversed.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



---

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of December, 2010

## CERTIFICATE OF COUNSEL

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



---

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

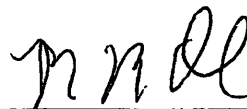
V.

CHRISTOPHER M. STEPHENS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Suite 501, Columbia, S.C. 29201, this 29th day of December, 2010.



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 29th day of December, 2010.



Notary Public for South Carolina

My Commission Expires: August 23, 2014

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED

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Appeal from Horry County  
The Honorable Steven H. John, Circuit Court Judge

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

APPELLANT.

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## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| TABLE OF AUTHORITIES .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | iii |
| STATEMENT OF ISSUES ON APPEAL .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 1   |
| COUNTERSTATEMENT OF ISSUES ON APPEAL .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 1   |
| STATEMENT OF THE CASE .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 3   |
| ARGUMENTS .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |     |
| I.    The trial judge properly allowed the State to introduce James Pearl's testimony about a conversation between Stephens and the victim because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. <i>See</i> Rule 801(d)(2)(B), SCRE. Likewise, the conversation was also admissible to show bad blood between Stephens and Jamilla. Alternatively, any error was harmless beyond a reasonable doubt. . | 4   |
| A.    How the issue arose at trial .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 4   |
| B.    Discussion .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 7   |
| II.    Stephens' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce the evidence. Respondent further submits that, if there was error, any error was harmless beyond a reasonable doubt. ....                                                                                                                                                             | 12  |
| A.    How issue developed at trial .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 12  |
| B.    Discussion .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 19  |
| 1.    Stephens' belated relevancy objection does not preserve any issue for appellate review concerning testimony that was only objected to on the basis that the State had committed a discovery violation .....                                                                                                                                                                                                                                                                                                                                                                                                                            | 19  |
| 2.    Alternatively, the trial judge properly admitted the testimony .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 21  |

|    |                                                                                           |    |
|----|-------------------------------------------------------------------------------------------|----|
| 3. | Any error in admitting Prodan's testimony was harmless<br>beyond a reasonable doubt ..... | 28 |
|----|-------------------------------------------------------------------------------------------|----|

|              |       |    |
|--------------|-------|----|
| CONCLUSION . | ..... | 33 |
|--------------|-------|----|

## TABLE OF AUTHORITIES

## FEDERAL CASES

## FEDERAL CASES

|                                                                                |             |
|--------------------------------------------------------------------------------|-------------|
| Brady v. Maryland, 373 U.S. 83 (1963) .....                                    | 15          |
| Schriro v. Landrigan, ___, U.S. ___, ___, 127 S.Ct. 1933, 1939-40 (2007) ..... | 5-8, 13, 15 |
| United States v. McDowell, 918 F.2d 1004, 1007 (1st Cir. 1990) .....           | 5-8, 13, 15 |
| United States v. Wills, 346 F.3d 476, 490 (4th Cir. 2003) .....                | 10          |

## STATE CASES

|                                                                                                       |                    |
|-------------------------------------------------------------------------------------------------------|--------------------|
| Gambell v. Int'l. Paper Realty Corp., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996) .....             | 7                  |
| I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) .....             | 21                 |
| Mizell v. Glover, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002) .....                                 | 22                 |
| People v. Prince, 40 Cal.4th 1179, 1222, 156 P.3d 1015, 1047, 57 Cal.Rptr.3d 543, 580 (2007)<br>..... | 22                 |
| Recco Paper & Label Co. v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994) .....              | 7                  |
| State v. Allen 360 N.C. 297, 308, 626 S.E.2d 271, 281 (2006) .....                                    | 25                 |
| State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) .....                                      | 10, 11, 20, 28, 32 |
| State v. Cooley, 342 S.C. 63, 68-69, 536 S.E.2d 666, 669 (2000) .....                                 | 9, 10              |
| State v. Cutro, 365 S.C. 366, 376-77, 618 S.E.2d 890, 895 (2005). .....                               | 27                 |
| State v. Griffin, 129 S.C. 200, 124 S.E. 81 (1924) .....                                              | 21                 |
| State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001) .....                       | 7                  |
| State v. Holmes, 320 S.C. 259, 266, 464 S.E.2d 334 (1995) .....                                       | 20                 |
| State v. Jones, 273 S.C. 723, 259 SE2d 120 (1979) .....                                               | 27                 |

# 1074

|                                                                                                                                              |                |
|----------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct.App.2005) .....                                                                    | 7              |
| State v. Knoten, 347 S.C. 296, 312, 555 S.E.2d 391, 399 (2001) .....                                                                         | 8              |
| State v. McIntosh, 94 S.C. 439, ___, 78 S.E. 327, 329 (1913) .....                                                                           | 8              |
| State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct.App.1997) .....                                                                            | 22             |
| State v. Nolan, 318 S.C. 253, 257-58, 456 S.E.2d 926, 928-29 (Ct.App. 1999) .....                                                            | 8              |
| State v. Parker, 249 S.C. 139, 153 S.E.2d 183 (1967) .....                                                                                   | 27             |
| State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) .....                                                                          | 21             |
| State v. Prince, [316 S.C. 57, 447 S.E.2d 177 (1993) .....                                                                                   | 27             |
| State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) .....                                                                       | 20             |
| State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1961), rev'd on other grounds, State v. Torrence,<br>305 S.C. 45, 406 S.E.2d 315 (1991) ..... | 8              |
| State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) .....                                                                        | 10, 11, 28, 32 |
| State v. Sims, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010) .....                                                                              | 8              |
| State v. Spann, 334 S.C. 618, 621-622, 513 S.E.2d 98, 100 (1999) .....                                                                       | 26, 27         |
| State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) .....                                                                                  | 19             |
| State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct.App. 2004) .....                                                                            | 10             |
| State v. Torrence, 305 S.C. 45, 60-71, 406 S.E.2d 315, 324-29 (1991) .....                                                                   | 21             |
| State v. Vanderbilt, 287 S.C. 597, 340 S.E.2d 543 (1986) .....                                                                               | 21             |
| State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct.App. 2009) .....                                                                   | 7              |
| State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) .....                                                                                    | 20-23          |
| State vs. Tapp, 387 S.C. 159, 691 S.E.2d 166 (Ct. App. 2009) .....                                                                           | 1, 12, 20, 23  |
| State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) .....                                                                  | 20             |

## STATE RULES

|                       |    |
|-----------------------|----|
| Rule 401, SCORE ..... | 21 |
|-----------------------|----|

OTHER AUTHORITIES

Essential Element of Capital Murder, 23 Law & Psychol. Rev. 69 (1999) ..... 27

STATEMENT OF ISSUES ON APPEAL

[1.] Whether the trial court erred by admitting the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming in anger about the money he owed her for drugs since this hearsay testimony was highly prejudicial because it implied an alleged motive for killing the drug-dealing decedent?

[2.] Whether the trial court committed reversible error by allowing SLED "victimologist" Mike Prodan to testify about the "victimology, method of operation, motive, things like that," of the murders, since such testimony was speculative, irrelevant, and inadmissible "expert" testimony under *State vs. Tapp*, 387 S.C. 159, 691 S.E.2d 166 (Ct. App. 2009)?

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether Stephens' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce the evidence. Respondent further submits that, if there was error, any error was harmless beyond a reasonable doubt?

II. Whether the trial judge properly allowed the State to introduce James Pearl's testimony about a conversation between Stephens and the victim because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to

rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. Whether the conversation was likewise admissible to show bad blood between Stephens and Jamilla? Alternatively, whether any error was harmless beyond a reasonable doubt?

## STATEMENT OF THE CASE

The Horry County Grand Jury indicted Appellant, Christopher M. Stephens (Stephens) at the July 2007 term of court for two counts of accessory before the fact of the two murders and armed robbery. (07-GS-26-2974 through -2976). The Grand Jury indicted his co-defendant, Jimmy Lee Sessions, (Sessions) at the July 2007 term of court for murder (07-GS-26-2962), burglary in the first degree (07-GS-26-2968) and armed robbery (07-GS-26-2961). These charges stemmed from the homicides of Jamilla Hightower and Monica Wall. Bobby G. Frederick and Laura L. Hiller, Esquires represented Stephens. Johnny Gardner, Esquire, represented Sessions. Assistant Solicitors Bradley Coy Richardson and Donna Elder, of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

A November 2008 trial on the charges ended in a mistrial. Charges against Marshall Stephens were dismissed for lack of evidence.

Stephens received a second jury trial on these charges before the Honorable Stephen H. John on February 2-6, 2009. Sessions was jointly tried with him. The jury found Stephens and Sessions guilty of all of the indicted charges. Stephens received current sentences of forty years imprisonment for the accessory convictions. Sessions received concurrent sentences of life imprisonment for the murders and concurrent thirty year sentences on the other offenses. A timely Notice of Appeal was served and filed by each defendant. This appeal follows.<sup>1</sup>

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<sup>1</sup> Sessions currently has an appeal pending from his convictions, as well.

## ARGUMENTS

- I. The trial judge properly allowed the State to introduce James Pearl's testimony about a conversation between Stephens and the victim because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. *See* Rule 801(d)(2)(B), SCRE. Likewise, the conversation was also admissible to show bad blood between Stephens and Jamilla. Alternatively, any error was harmless beyond a reasonable doubt.

Sessions maintains that the trial judge erroneously allowed the State to introduce the testimony of James Pearl of a conversation between Jamilla Hightower and Stephens, in which "decedent Jamilla Hightower was screaming in anger about the money he owed her for drugs because this testimony was highly prejudicial hearsay. Respondent submits that his argument lacks merit and that the trial judge properly allowed the State to introduce Mr. Pearl's testimony because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. *See* Rule 801(d)(2)(B), SCRE. Likewise, the conversation was also admissible to show bad blood between Stephens and Jamilla. Alternatively, any error was harmless beyond a reasonable doubt.

A. How the issue arose at trial.

James Pearl testified that he knew both victims and purchased drugs regularly from Jamilla. Sessions and Stephens came by Mr. Pearl's residence on Wednesday June 8<sup>th</sup>. This was slight They were in a blue Jeep Grand Cherokee that Sessions was driving. All three men were broke and, after Pearl got into the vehicle, his friends began talking about committing some robberies. While they were talking, Jamilla came up to the vehicle and got into a verbal argument with Stephens over drug money that he owed her. She was angry when she left. **R. pp. 119-22.**

Stephens' argument on appeal centers around the following exchange::

Q. Did Jamilla ever come up to that car?

A. Yes Ma'am.

Q. Were you present?

A. Yes Ma'am.

**MR. FREDERICK:** And Judge, we are going to object to any hearsay, as far as testimony from him about what Jamilla Hightower said.

**THE COURT:** I'll be glad to hear any objection as to any hearsay. I haven't heard anything yet.

Go ahead.

**Ms. Elder:** Thank you, Your Honor.

Q. Did she talk to anybody in the vehicle?

**MR. FREDERICK:** Judge, we object to the hearsay. [The] question elicits a hearsay response.

**THE COURT:** No sir, it does not. There is no hearsay at the present time. I'll be glad to hear from you if you wish to make an objection as to hearsay when any comes up.

Q. Did she talk to anybody in the vehicle?

A. Yes Ma'am.

Q. Did anybody in the vehicle talk to her?

A. Yes Ma'am.

Q. Who?

A. She was talking - - it was basically over money. It was - - she was screaming about money, and - - -

Q. Before we get to that, who was talking with her?

A. Well, she - - -

**MR. FREDERICK:** Judge, still objecting to the hearsay. Now he is testifying as to hearsay.

**THE COURT:** No sir.

You may proceed, Solicitor.

**Ms. Elder:** Thank you, Your Honor.

Q. Who was talking with her?

A. Chris.

Q. Chris Stephens?

A. Yes Ma'am.

Q. And what was Chris Stephens saying to her?

A. Basically she was screaming on Chris about the money that he owed her.

Q. And what was he saying?

A. He was - - he told her at first, I'm going to pay you, and then he laughed it off, you know, and then he was like, I ain't going to pay the -- I ain't going to pay this girl, you know what I mean, so she was mad, and she told him, I want my money or - - -

**MR. FREDERICK:** Judge, I've got no problem with him saying what Christopher said, because those are statements that are admissible outside of the hearsay rule, but I'm asking the Court to not allow the witness to testify as to what other people said, including Jamilla Hightower.

**THE COURT:** No sir. I'm going to allow it. Thank you.

Q. Continue, Mr. Pearl.

A. It was about -- it was about drug money that was owed, so she was mad, very upset, and after that she left.

R. p. 120, l. 16-p. 122, l. 19.

Immediately after Jamilla left, Stephens and Sessions resumed their discussion about Robbing her. Stephens said that he could not rob her because she knew him. However, Sessions indicated that he could rob her. Pearl did not want any part of their plan and he exited the car at that point in the conversation.<sup>2</sup> R. pp. 122-24.

#### B. Discussion.

“The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal.” *Gambell v. Int’l. Paper Realty Corp.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). To warrant reversal, an Appellant “must show both the error of the ruling and resulting prejudice.” *Recco Paper & Label Co. v. Barfield*, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994); *State v. Hamilton*, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001). “An error without prejudice does not warrant reversal.” *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct.App.2005). *See also State v. Vick*, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct.App. 2009) (“The improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice”).

Contrary to Sessions’ argument, which seeks to obfuscate the issue before the Court by derisively referring to the victim and Mr. Pearl but ignoring his own complicity in the murders of two individuals, the statements at issue are not hearsay. First, any statements by Stephens are admissible as admissions by him under Rule 801(d)(2), SCRE. His statements are also admissible as statements by a co-conspirator in furtherance of the conspiracy to rob and murder

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<sup>2</sup> They had wanted him to act as a “doorman,” to help them gain entry into Jamilla’s residence. R. pp. 123-24.

Jamilla Hightower. See Rule 801(d)(2)(E), SCRE.<sup>3</sup>

Nor was Pearl's testimony that Jamilla was screaming at Stephens because he owed her money for drugs hearsay. Under Rule 801(d)(2)(B) SCRE, "[a] statement is not hearsay if ... the statement is offered against a party and is ... a statement of which the party has manifested an adoption or belief in its truth." This rule is consistent with prior South Carolina law.<sup>4</sup> In *State v. McIntosh*, 94 S.C. 439, \_\_\_, 78 S.E. 327, 329 (1913), the Supreme Court explained the rule as follows:

Statements made in the presence of a party are generally admissible, if he remains silent, when they are made, and the circumstances are such that he can speak and naturally would or ought to respond to them. In such circumstances, his silence may afford ground for inferring that he acquiesces in the truth of the statements. But, where the situation is such that it would be improper for him to respond, statements made to him or in his presence are inadmissible. So, also, if he positively and unequivocally denies the truth of such statements, ... they are inadmissible.

See also *State v. Sharpe*, 239 S.C. at 271, 122 S.E.2d at 629 ("This Court has held that statements in the presence of the accused by a third person are admissible as evidence when such accused remains silent and does not deny such statements"); *State v. Nolan*, 318 S.C. 253, 257-58, 456 S.E.2d 926, 928-29 (Ct.App. 1999) (statement made by police officer, who died before

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<sup>3</sup> "While hearsay testimony generally is not admissible, an exception is allowed when a statement is offered against a party and is 'a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.' Rule 801(d)(2)(E), SCRE. When a statement meets these requirements, it is considered non-hearsay." *State v. Sims*, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010). Unlike the factual scenario in *Sims*, Stephens cannot seriously contend that his statements to Jamilla, in which he feigned an agreement to pay her money that he owed her and thereby provided he and Sessions with a possible manner for entry into her residence that would not otherwise exist, were not in furtherance of the conspiracy to rob and murder her.

<sup>4</sup> See Comments to Rule 801(d)(2)(B) (citing *State v. Sharpe*, 239 S.C. 258, 122 S.E.2d 622 (1961), *rev'd on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)); *State v. Knoten*, 347 S.C. 296, 312, 555 S.E.2d 391, 399 (2001).

the trial, that he had stopped vehicle being driven by drug defendant because it was weaving, was admissible over hearsay objection to establish probable cause for stop of vehicle where there were independent *indicia* of reliability since testifying officer had seen vehicle weave as it approached him after it had been initially stopped, and officer making initial stop had told testifying officer in presence of defendant that defendant had been stopped for weaving and defendant did not contradict statement).

In the present case, Jamilla accused Stephens of owing her money for drugs. This was the reason that she was mad at him. He did not deny this accusation, even though the circumstances surrounding the conversation demonstrated that he could speak and naturally would or should have denied it if it was untrue. Rather than deny her accusation, Stephens admitted that he owed her money and he ostensibly agreed to repay it. He only revealed his actual intent when she left his presence and he resumed the conspiratorial conversation with Stephens about their plan to rob and murder her.<sup>5</sup>

Further, the statements by her were admissible because, "[i]n homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor." *State v. Cooley*, 342 S.C. 63, 68-69, 536 S.E.2d 666, 669 (2000) (quoting *State v. Taylor*, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998)). As in *Cooley*, there is no contention that

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<sup>5</sup> Additionally, Respondent would note that the Stephens' conversation with Jamilla reflected that she had sold drugs to him. This statement was admissible under Rule 804(b)(3), SCRE, since it was "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."

Jamilla was the aggressor. However, this evidence was still “relevant to proving the ‘animus of the parties.’ ” *Cooley*, 342 S.C. at 69, 536 S.E.2d at 669. It might also be viewed as providing the motive for selecting her to rob and murder, as opposed to some other drug dealer. *See State v. Sweat*, 362 S.C. 117, 606 S.E.2d 508 (Ct.App. 2004).

Further, Sessions various statements to Jamilla were admissible. Thus, the jury properly heard him tell Jamilla, a drug dealer, that he would pay the money that he owed her. Her statements, by and large, simply gave context to Stephens’ statements and were admissible for this purpose. *See United States v. Wills*, 346 F.3d 476, 490 (4<sup>th</sup> Cir. 2003) (witness statements made in conversation with defendant properly admitted to show context of incriminating admissions); *United States v. McDowell*, 918 F.2d 1004, 1007 (1<sup>st</sup> Cir. 1990) (“McDowell’s own statements could, of course, be used against him; his part of the conversations was plainly not hearsay. Nor can a defendant, having made admissions, keep from the jury other segments of the discussion reasonably required to place those admissions into context.”).

More importantly and even if the Court does not find that her declarations were properly admissible on this theory, any error in admitting this evidence was harmless and non-prejudicial beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) (“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”). Again, the jury properly heard him tell Jamilla, a drug dealer, that he would pay the money that he owed her.

**1086**

Also, the State had established overwhelming evidence of guilt, separate and apart from either the evidence of which he now complains or Agent Prodan's testimony. In light of this evidence, discussed in **Argument II**, *infra*, any error was non-prejudicial and harmless beyond a reasonable doubt. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584. As a result, any error "could not reasonably have affected the result of the trial." *See Sherard*, 303 S.C. at 175, 399 S.E.2d at 596.

- II. Stephens' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce the evidence. Respondent further submits that, if there was error, any error was harmless beyond a reasonable doubt.

Relying upon a panel decision of the Court in *State v. Tapp*, 387 S.C. 159, 691 S.E.2d 165 (2010), cert pending, Stephens maintains that the trial judge abused his discretion by allowing the State to present expert testimony on crime scene analysis and victimology through SLED Agent Michael Prodan. Respondent submits that his challenge to Agent Prodan's testimony is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce the evidence. Respondent further submits that, if there was error, any error was harmless beyond a reasonable doubt.

A. How issue developed at trial.

Agent Prodan testified that he has been employed at SLED for ten years and that he was the Supervisor of the Behavioral Sciences Unit. Prior to that time, he was "the lead agent and the supervisor of the Violent Crime Analysis Unit" of the California Attorney General's Office. Both at SLED and with the California Attorney General's Office, his job responsibilities involved "crime scene analyses, consultation on violent crime, investigative techniques and strategies, threat assessment, interviews and interrogation, and what is generally referred to in the media as psychological profiling." R. pp. 568-69.

Agent Prodan also listed the extensive nature of his prior employment and his educational

and other experience in the field:

First started in violent crime training, of course, with the Las Angeles County Sheriff's Department and Police Academy in Violent Crime Investigation, but as a agent for the California Department of Justice, Bureau of Investigation, was a specialized six months program, with the advanced training center in the California Criminalistic Institute, involving crime scene analyses and criminalistic, if you would, that include courses in firearms trajectory, blood spatter interpretation, and forensic pathology.

During that time I was selected and spent a one-year Fellowship at the F.B.I. Academy in Quantico, Virginia, at the National Center for the Analyses of Violent Crime. That one year Fellowship also included courses at the Armed Forces Institute of Pathology on basic and advanced Forensic Pathology courses in Psychiatry in the Law, in the University of Virginia at Charlottesville. There were also courses at the Clark Institute of the Psychology of Aggression in Ottawa, Ontario, Canada.

There has been training over a varied of time involving the California Homicide Investigators Association, California Sexual Assault Investigators' Association, the Association of Threat Assessment Professionals.

*See R. pp. 569-70.*

Agent Prodan described his educational training as "ongoing" and he explained that, "more often than not," it involved in-service training . . . with the International Criminal Investigative Analyst Fellowship, certain training programs with the Federal Bureau of Investigation, yearly training and updates with the Association of the Threat Assessment Professionals."He likewise engages in "self-initiated education," by "keeping abreast of the literature involving homicide and sexual assault, and violent crime in general, and involving the literature and the texts that are available" to law enforcement and the general public. **R. pp. 570-71.**

Agent Prodan is a "member of the International Criminal Investigative Analyst Fellowship, which is . . . a worldwide organization that standardizes and provides training on

criminal investigative analyses profiling.” He is also “a member of the Association of Threat Assessment Professionals,” and he had previously been a member of the “California Homicide Investigators Association, and California Sexual Assault Investigators’ Association.” **R. p. 570.** Agent Prodan has “been brought in on cases by law enforcement . . . many times” and he has been qualified as a crime scene analyst in a number of courts. **R. p. 571.**

Both defendants objected when the State offered him as an expert in “Crime Scene Interpretation and Analyses” (**R. pp. 571-72**), and the trial judge heard their arguments *in camera*. Outside of the jury’s presence, both defendants initially complained because the State had not disclosed that Agent Prodan would be giving the testimony at issue and because there was no report. The State, however, responded by pointing to items where the testimony was disclosed. **R. pp. 572-75.**

Agent Prodan then testified that the Assistant Solicitor had met with him about two weeks earlier, and she provided him with copies of the crime scene photographs and the autopsy report; and she asked him to testify “[t]o the materials pertaining to how the crime occurred.” However, he had not kept notes, and he had not issued a report to law enforcement or the Solicitor’s Office. He also had not generated any report, except for his “case notes” that were merely bullet points “to keep my thoughts on track.” Even these were only generated a week before his testimony. **R. pp. 575-81.**

Once the trial judge had ascertained that Agent Prodan’s notes had been provided to the defense, he asked the State to briefly summarize to the proffered testimony. **R. pp. 581-82.** The Assistant Solicitor explained that:

the process of my direct-examination of Agent Prodan is going to be, show him

**1090**

some of the State's exhibits, . . . ask him if he has had an opportunity to review them, based on his expert opinion, what do these crime scene photos tell us in reference to victimology, method of operation, motive, things like that, Your Honor. It has nothing to do specifically with the Defendants. He has not reviewed the Defendants, he has not talked with the Defendants, he has not got the Defendants' statements.

**R. p. 582.**

The defendants stated their objections to the proffered testimony. Sessions' sole objection was relevance, **R. p. 582, l. 18**, while Stephens asked that he be able to view the notes to prepare for cross-examination and again argued that there had been a discovery violation. **R. p. 582, l. 21-p. 583, l. 3**. However, the trial judge found that there had not been a *Brady v. Maryland*, 373 U.S. 83 (1963) violation. He further noted that he had the notes that Agent Prodan had made provided to the defendants, and he noted that the examination would proceed after a break. **R. p. 583, ll. 12-25**. See also **R. pp. 584-85**.

When the jury returned, the trial judge explained that he was "going to allow the witness to -- and is going to qualify the witness to give his opinion in the areas of Behavioral Science, Violent Crime, Methodology, Motive Behavior." **R. p. 585, l. 23-p. 586, l. 1**.

In front of the jury, Agent Prodan explained that, upon receiving a request for assistance from a law enforcement agency, he first asks for background information about the victim or victims. "It is referred to in certain literatures. . . as a Victimology, the study of the victim." The initial question he tries to answer is why the victim was selected to be a victim of a violent crime. This requires him to assess the degree of risk the person had to be a victim - whether the level of risk is low, moderate or high. In making this assessment, "we insist that the agency does not give

us any information about any suspects that they may have developed . . . because we don't want to have any contamination . . . on suspect information as to what actually happened during the commission of the violent crime." **R. pp. 586-87.**

Agent Prodan explained that an individual's risk level is based upon the individual's circumstances. So, high risk victims are persons whose lifestyles put them "at a high risk of becoming a violent crime victim. He included persons who are "involved in criminal organizations and enterprises, criminal gangs," as well as persons who traffic in narcotics or are sexually promiscuous within this category. These are persons who "put themselves in a position" to be "more susceptible of becoming victims of violence than anyone else. Low risk victims are those persons who are not involved in sexual affairs or prostitution, and who are not involved in criminal enterprises or drug selling. Both experience and research reflect that "the lower the risk of a victim, the more likely it is that a person[ ] - - is a victim because of a person[al] cause." **R. pp. 586-88.**

In between low and high risk victims are the "moderate risk victims." Those persons do not live a very risky lifestyle, but certain circumstances in their lives increases their risk of being a victim. He included convenience store clerks and cab drivers in this category, as well as persons who are "dabbling in criminal enterprises." **R. p. 588.**

In this case, the background information he received was that one victim, Jamilla, "was involved in some reasonably moderate illicit drug sales." Selling illegal drugs is risky by its very nature because people will often try to steal from the person. The crime scene photographs confirmed that Jamilla had considered herself to be at risk because she had "availed herself" of a shotgun to provide her with physical protection. **R. pp. 588-89.**

Agent Prodan assessed Jamilla's risk level as moderate because of her drug trafficking.

With the exception of living with Jamilla, he assessed Monica's risk level as low. R. pp. 589-90.

The next step in his process is "to look at how the crime occurred" and ascertain the motive for the murders.<sup>6</sup> Here, the murders occurred in Jamilla's residence, which is where law enforcement learned that she would primarily engage in her drug transactions. Also the killer brought a weapon, which demonstrated some "pre-planning" by the perpetrator. Further, "[t]he victims were killed with what we typically see in a quote, unquote, drug related murder, a small to medium caliber handgun." Nor did the perpetrator make any effort to move or otherwise "interact with" the victims' bodies after killing them, and there was a minimal effort to destroy or conceal any physical evidence that was present,<sup>7</sup> other than taking the murder weapon. R. pp. 590-92.

Based on these factors, Agent Prodan opined that this was "a primarily drug-related murder, and the motive for drug-related murders have to do with the discipline of the individual" perpetrator. Sometimes, it is either to eliminate a competitor or to retaliate against a victim who owes the person money but cannot repay it. Also, drug dealers may be targeted for robbery of their drugs and money because drug dealers typically do not report robberies to the police. R. pp. 592-93; 600-01.<sup>8</sup>

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<sup>6</sup> It is his expert opinion, based upon experience and research, that there is always a motive for violent crimes, such as murder; and that any contrary belief misunderstands violent crimes. R. p. 590.

<sup>7</sup> For example, the crime scene reports did not reflect that the victims' bodies had been washed or that any effort was made to wipe for prints. R. p. 592.

<sup>8</sup> Agent Prodan opined that two other possible motives for drug-related murders were inapplicable in this case: the killing of an informant or a neighborhood anti-drug advocate. R. p. 603.

Next, Agent Prodan studied how the crimes occurred, both pre-offense and offense behavior. Before the crime, someone had to devise a plan: they had to select a particular place to rob and a particular time to rob it; they had to bring a weapon and ammunition; and they had to develop a plan to gain entry into the residence where the murder occurred. The manner in which the murders occurred shows that the plan for the murders originated outside of the residence. **R. pp. 593-95.**

Once inside the residence, the perpetrator has to gain control over the victim, which can be done by (1) the perpetrator's "mere presence;" (2) a verbal threat; (3) physical force; or (4) a weapon. In this case, neither the autopsy reports nor the crime scene photographs suggested that either Jamilla or Monica was the victim of blunt force trauma, such as defensive injuries or facial injuries. There was also no evidence of a struggle in the house or that either victim was physically restrained or "bound." Moreover, based on photographs of Jamilla in her bedroom (**State's Exs. 2 and 5**), "it appears, . . . most likely, that she was ordered to lie flat on the floor, the individual put a pillow over her head, and then fired one shot through the pillow at relatively close range into her head." **R. pp. 595-99.**

There were two possible reasons for using a pillow case in this fashion. First, it is easier, emotionally, to depersonalize the victim and shoot a pillow rather a person's head. Second, it would reduce the amount of recoil and prevent "any blow-back of blood" onto the perpetrator or his weapon. Again, this suggestion pre-planning. **R. pp. 599-600.** From his review of the crime scene photographs and autopsy reports, Agent Prodan did not see any evidence that either victim resisted. This suggested to Agent Prodan that the killer had gone into the residence with the belief that the victims would not cooperate and were potentially armed. This would explain why

the perpetrator killed the victims - *i.e.*, the motive for the killings. **R. pp. 600-02; 604-05.**

Stephens finally renewed his objection on the ground that the testimony would not be relevant when the Assistant Solicitor asked Agent Prodan to look at a series of photographs that were previously introduced as **State's Exs. 4, 10, 32, 40-41, and 49-51**. He stated his objection as follows: "Just for the record, I'm going to renew our objection. . . . I don't see where this will assist the jury in the facts of this case." This objection was overruled, as was his added argument, "speculation as well." **R. p. 602.**

Agent Prodan was then permitted to opine as to the manner in which Monica was murdered. He explained that, based on **State's Exs. 10 and 49**, she had been killed in a manner similar to Jamilla. Because there was some feces in Monica's bedroom, it appeared that she had been moved from her bedroom to the bathroom. She was moved there to kill her because she was a potential witness. **R. pp. 602-04.**

**B. Discussion.**

- 1. Stephens' belated relevancy objection does not preserve any issue for appellate review concerning testimony that was only objected to on the basis that the State had committed a discovery violation.**

As shown, Stephens' only initial objection was that the State had committed a discovery violation. He also later claimed that one brief portion of Agent Prodan's testimony was not relevant and that it was speculative. **R. pp. 573; 582-83; 602.** On appeal, he has not challenged the trial judge's ruling that there was no *Brady* violation. Therefore, that argument has been abandoned. *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (an issue not argued in the appellant's brief is deemed abandoned). In arguing the trial court, Sessions did not advance anything close to the argument that he now raises on appeal.

On appeal, he relies upon *Tapp*. In *Tapp*, the Court of Appeals agreed with Tapp's challenge to the qualification of Agent Prodan as an expert witness and it reversed Tapp's convictions and sentence based upon the Supreme Court's decision in *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), based upon its finding that the record was insufficient "for this court to determine whether Prodan should have been qualified [to testify] under *White*." *Tapp*, 387 S.C. at 164-69, 691 S.E.2d at 167, 169 -170.<sup>9</sup>

However, Sessions did not raise any type of challenge to the foundational requirements for this testimony or to Agent Prodan's expertise in the trial court. His only objection was that a small portion of Agent Prodan's testimony would not assist the jury any was speculative. This did not preserve any objection to the portions of Prodan's previously-admitted testimony to which no objection was taken and it did not preserve the current argument. Thus, his argument on appeal is procedurally barred. 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. 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); *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. Holmes*, 320 S.C. 259, 266, 464 S.E.2d 334 (1995) (appellant's general objection to introduction of wallet during the guilt phase that it had no relevance did not preserve motion

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<sup>9</sup> Specifically, the Court of Appeals in *Tapp* was concerned about the absence of findings by the trial judge of the foundational requirements under *White* that "(1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact." *Tapp*, 387 S.C. at 164-69, 691 S.E.2d at 167-70.

for a new trial, after the verdict in the sentencing phase, based on prejudice arising from various items contained in the wallet).<sup>10</sup> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Therefore, this Court should affirm based on the application of this well-settled and fundamental procedural bar. Application of the bar is particularly appropriate since Prodan’s testimony was relevant to the issues before the jury.

**2. Alternatively, the trial judge properly admitted the testimony.**

Even if this Court finds that the issue was not procedurally barred, Respondent alternatively submits that reversal still is not required. As demonstrated, the only objection preserved by Stephens, as to any portion was relevancy. Relevant evidence is “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.” Rule 401, SCRE. It cannot be seriously contended that Agent Prodan’s expertise in the areas of victimology any crime scene analysis met this criteria, as more fully discussed, *infra*.

Nor does *Tapp* require a different result. “A trial court’s decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).” *White*, 382 S.C. at 269, 676 S.E.2d at 686. *See also*

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<sup>10</sup> *See also State v. Torrence*, 305 S.C. 45, 60-71, 406 S.E.2d 315, 324-29 (1991) (Toal, J., concurring in result and joining Justice Chandler’s concurrence in result) (abolishing the doctrine of *in favorem vitae* review in capital cases and requiring contemporaneous objection or motion to preserve issue for appellate review); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) (“Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled”).

Rule 702, SCRE (“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”); *Mizell v. Glover*, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002) (“A trial court’s ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion”).<sup>11</sup> In *White*, the Court overruled *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct.App.1997) “to the extent it suggests that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission in evidence,” *White* 382 S.C. at 273, 676 SE2d at 688.

The Court held that nonscientific expert testimony, such as that in the present case, “must satisfy Rule 702;” and that in discharging his gatekeeping role, a trial judge “must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to ‘weight, not admissibility’ may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.” *White* 382 S.C. at 274, 676 SE2d at 689.

With respect to the reliability requirement, the Court in *White* recognized that the *Council* factors for determining the reliability of scientific evidence “serve no useful analytical purpose when evaluating nonscientific expert testimony.” *Id* at 274, 676 SE2d at 688. Also, because many

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<sup>11</sup> As the California Supreme Court in *People v. Prince*, 40 Cal.4th 1179, 1222, 156 P.3d 1015, 1047, 57 Cal.Rptr.3d 543, 580 (2007), “experts may testify even when jurors are not ‘wholly ignorant’ about the subject of the testimony. ... ‘If that [total ignorance] were the test, little expert opinion testimony would ever be heard.’” (Citations omitted).

different Rule 702 qualification and reliability challenges could arise with respect to

nonscientific expert evidence, the Court in *White* did not offer a bright-line approach to generally apply to these cases. *Id* at 274, 676 SE2d at 688-89.

The State does not dispute that *White*'s holding is that "[a]ll expert testimony must satisfy the Rule 702[, SCRE,] criteria, and that this includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *White*, 382 S.C. at 270, 676 S.E.2d at 686. However, the Court of Appeals erred by reversing under *White* in *Tapp* because the record in that case, like here, is sufficient for either this Court, or the trial judge on remand, to make the determination of whether the prosecution established that "(1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact," as required by Rule 702 and *White*. *See Tapp*, 387 S.C. at \_\_\_, 691 S.E.2d at 169 (citing *White*, 382 S.C. at 274, 676 S.E.2d at 689).

In the course of reversing in *Tapp*, the Court of Appeals found that:

the State highlights: (1) Prodan's credentials, education and experience, (2) his ability to rule out various scenarios of how or why the crime transpired, and (3) the process's relative success as an investigative tool to law enforcement. While these arguments are relevant, we find they go to the other *White* elements, (i.e., the expert's credentials, education, or experience and the ability of the expert to assist the trier of fact) rather than the element of reliability. *See [White, 387 S.C.]* at 274, 676 S.E.2d at 689 (indicating that under Rule 702 the State must establish: (1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact).

*Tapp*, 387 S.C. at 167, 691 S.E.2d at 169. In reaching this conclusion, the Court in *Tapp* ignored that Agent Prodan's testimony was sufficient to meet all three of the elements for its introduction

under *White*.

The same is true in the present case. Agent Prodan provided the trial judge with the extensive nature of his prior employment and his educational and other experience in the field, as thoroughly discussed. In addition to other educational and practical training, he has taken courses in the areas of Psychiatry and the Law and Abnormal Criminal Behavior; courses on psychology; and he "was the lead agent and the supervisor of the Violent Crime Analysis Unit" of the California Attorney General's Office. His *in camera* testimony also demonstrated the reliability of the proffered evidence, even though this was not challenged by the defense, in any fashion, in the trial court.

His *in camera* testimony also demonstrated the reliability of the proffered evidence. He explained what crime scene analysis and victimology are. Likewise, his testimony supports the conclusion of the general acceptance of crime scene analysis and victimology.

Further, his opinions helped the jury understand certain characteristics of the crime scene, and he clearly stated the reasons for the opinions he expressed. Rather than pure speculation on his part, a review of his testimony reflects that his conclusions were based upon evidence presented to him about both of the victims and the crime scene, as well as his extensive training and experience. Most jurors have a very limited exposure to real criminal activity.

Prodan's testimony was helpful to the jury in that it provided meaning to some of the evidence presented to the jury.<sup>12</sup> Likewise, through application of his expertise to the evidence

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<sup>12</sup> For example, the jury could look at the pictures of the crime scene and perhaps see that how the victims' bodies were left and how the crime scene looked. However, Agent Prodan was able to provide meaning and context that went beyond that ordinarily known to lay people, *i.e.*, that the manner in which they were found and the fact Jamilla had a weapon, and information provided as to how she conducted her drug illegal business suggested a drug-related robbery and pre-planning by the perpetrator

**1100**

about the crime scene and the victims, he was able to rule out certain possible motives for the homicides. Additionally, this testimony was anticipatory in nature: the State merely sought to negate possible attacks by Sessions and Stephens on the supposed weakness of the evidence presented by the State that was largely premised upon individuals who used drugs and often were in prison themselves.<sup>13</sup>

The victimology evidence was likewise relevant. From the victimology training, the information from about the manner in which Jamilla dealt drugs, and the information provided to him about the crime scene (the photographs and autopsy reports), Agent Prodan was also able to explain how and why perpetrators may pick a victim; and how a perpetrator may have been able to gain access to Jamilla's residence.

Further and similar to *White*, the trial judge instructed jurors on **R. p. 1017, ll. 5-15**, the trial judge charged the jury that "[t]he Rules of Evidence do not ordinarily allow witnesses to give their opinion. Now in this case I qualified several witnesses to give their opinions. They are sometimes called expert witnesses, but -- and that's basically someone who, by reason of their education, experience, has become knowledgeable in some kind of art or science or profession, and they can give an opinion when asked. This doesn't give them any special status. You consider that evidence and that opinion just like all the other evidence in the case. You weigh all the evidence in the case, and you find the evidence which convinces you of it's truth."

Further, the Court in *Tapp* found that it was "not convinced that the process's relative  

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to avoid resistance by a victim who may well be armed.

<sup>13</sup> It is an unfortunate reality that "prosecutors have often realized, 'to try the devil, you have to go to hell to get your witnesses.'" *State v. Allen* 360 N.C. 297, 308, 626 S.E.2d 271, 281 (2006).

success as an 'investigative tool' renders it *per se* reliable in the context of qualifying an expert" and analogizing Prodan's testimony to polygraph evidence. This finding overlooked that Prodan's testimony in the areas of crime scene analysis and victimology is virtually identical to the expert testimony in behavioral profiling that warranted a new trial for the capital inmate in *State v. Spann*, 334 S.C. 618, 621-622, 513 S.E.2d 98, 100 (1999). In *Spann*, the defendant moved for a new trial based upon after-discovered evidence that he contended was relevant to his guilt or innocence and required a new trial. *Id.* This Court agreed, over the State's contrary position; and it reversed and remanded for a new trial. In pertinent part, this Court reasoned in *Spann* as follows:

At the new trial hearing appellant presented the testimony of three expert witnesses: a forensic pathologist (Dr. Spitz); a forensic psychiatrist (Dr. Tanay); and an expert in crime scene analysis and criminal personality profiling (Mr. Ressler). Dr. Spitz testified that all three women were strangled in a unique way, a method he had never before observed in forty-three years of practice. He testified to other factual similarities between the crimes, and opined that one perpetrator was responsible for all three murders. Dr. Tanay testified the three murders were committed by a single individual, a sexual sadistic murderer. He testified to the psychiatric characteristics of these types of killers, and opined based upon his examination of appellant that it was "impossible" that appellant had committed these offenses. Dr. Tanay also testified that sexual sadistic killers are almost always psychiatrically disturbed white males. Appellant is a black man with no history of psychiatric problems; Johnny Hullett is a white male with a long psychiatric history. Finally, Mr. Ressler profiled the killer of these three women as a white male in his mid-20's to mid-30's with a history of mental illness, who was either single or had a dysfunctional marriage, a person with bizarre fantasies, a history of childhood abuse, and knowledge of the area. Appellant does not fit this profile.

The circuit court judge found the expert testimony "thought-provoking" and "intriguing", and specifically found that Mr. Ressler's testimony "raise[d] a reasonable inference as to [appellant's] innocence." The judge rejected the testimony of all three experts as grounds for the granting of a new trial, however, finding the evidence and science upon which their opinions were based was all in existence at the time of appellant's trial, and thus could have been discovered by

his attorneys with the exercise of due diligence. We disagree. In order for the attorneys to have pursued these types of experts, they would first have needed to recognize the similarities between the crimes, similarities not apparent at the time even to the experts (*i.e.* law enforcement investigators and the pathologist) involved in all three cases. We hold that the due diligence standard imposed upon trial attorneys cannot fairly be said to be this high.

We find the circuit court judge committed an error of law, under the unusual facts of this case, in holding the newly discovered expert evidence could have been discovered by the exercise of due diligence. *State v. Prince*, [316 S.C. 57, 447 S.E.2d 177 (1993)]; *State v. Parker*, 249 S.C. 139, 153 S.E.2d 183 (1967). Accordingly, we reverse and remand for a new trial.

*Spann*, 334 S.C. at 621-22, 513 S.E.2d at 100. Prodan's testimony is not substantively different than the testimony upon which Spann's new trial was predicated. To the contrary, it evolved out of precisely the same field of expertise at issue in *Spann*.<sup>14</sup>

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<sup>14</sup> The purposes for which this type of expert testimony are offered, and indeed admitted, appear to be expanding. See Donald Q. Cochran, *Alabama v. Clarence Simmons: FBI "Profiler" Testimony to Establish an Essential Element of Capital Murder*, 23 Law & Psychol. Rev. 69 (1999). Everyone is familiar with the old saying, "what is sauce for the goose is sauce for the gander." Basic principles of fairness call for the prosecution to be able to introduce virtually identical evidence under the same evidentiary rules. Moreover, reversal in this case may have overlooked that Prodan's testimony is likewise very similar to the expert testimony concerning Munchausen Syndrome by Proxy (MSBP) - that the State's medical experts defined as a form of child abuse, in which the perpetrator harms a child in order to garner sympathy and attention for herself - that this Court found was properly admitted to show motive in *State v. Cutro*, 365 S.C. 366, 376-77, 618 S.E.2d 890, 895 (2005). Further, the Court of Appeals in *Tapp* found that:

without the guidance of the *White* decision, Tapp was not able to sufficiently develop and pursue theories upon which to challenge Prodan's qualification; nor was the trial court given the opportunity to address the issue. We find that given the deficient nature of the record on this issue it would be imprudent of this court to attempt to fashion a test or rule for the qualification of a crime scene analyst or victimologist. Rather, justice demands this burden first be placed upon the trial court after allowing the parties to fully develop the issue.

*Tapp*, 387 S.C. at \_\_\_, 691 S.E.2d 170. This finding ignores that a similar argument was available to Tapp under *State v. Jones*, 273 S.C. 723, 259 SE2d 120 (1979), such as raised by him on appeal. The same is true in this case. Sessions could have but did not raise this argument.

Yet, assuming that *Tapp* is correct, then the most appropriate remedy for the absence of findings in accordance with *White* is either for the reviewing Court to apply the correct analysis or for the Court to

3. **Any error in admitting Prodan's testimony was harmless beyond a reasonable doubt.**

Even if the Court finds that the record is insufficient either for it to make the required findings consistent with *White* or to remand the case for the trial judge to make those findings, reversal of this case is still not required because any error in admitting Agent Prodan's testimony was harmless and non-prejudicial beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("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"). Although Agent Prodan's testimony was both relevant and probative of Stephens' guilt, his guilt was conclusively proven by other evidence.

The prosecution's case was that the killings occurred close to midnight on Thursday June 9, 2006. This was when Jamilla and Monica's neighbor, Teresa Greene, heard several "pops" that sounded like fire crackers. **R. pp. 298-301.**

Monica was a drug dealer who sold cocaine and marijuana. **R. p. 131; 182-84.** Anyone wishing to buy drugs from her had to telephone a request first and then go to her residence to get the drugs. She kept some marijuana and cocaine that had already been bagged in the kitchen, and

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make a limited remand, under *White*, for the trial judge to determine whether Prodan's testimony satisfies the threshold burden for admissibility, as oppose to the expense of a retrial. This is especially true given (1) the post-trial change in the law; (2) the extensive *in camera* hearing and development of the record, as to the admissibility of the evidence; and (4) that a finding by either this Court or the trial judge that the evidence was admissible under *White* would avoid the unnecessary expense of a retrial, where the evidence is ultimately determined to have been properly admitted.

she kept larger amounts of drugs in her bedroom She did not allow anyone into the bedroom. **R.**

**pp. 131-37.**

In addition to SLED Agent Prodan's testimony, the State's other evidence showed that:

- Sessions and Stephens came by the residence of James Pearl, who also knew both victims and purchased drugs regularly from Jamilla, on Wednesday June 8<sup>th</sup>. They were in a blue Jeep Grand Cherokee that Sessions was driving. All three men were broke and, after Pearl got into the vehicle, his friends began talking about committing some robberies. While they were talking, Jamilla came up to the vehicle and got into a verbal argument with Stephens over drug money that he owed her. She was angry when she left. **R. pp. 119-22.**
- Sessions and Stephens then discussed robbing Jamilla. Stephens said that "[h]e He couldn't rob her because she knew him, but Jimmy Lee was like, I can rob her though, . . . she don't know me." Because they knew that Jamilla would not voluntarily give them drugs or money, they said that they were "[g]oing to have to lay her down" or kill her. They asked Pearl to be the "door man," but he refused to get involved and he got out of the vehicle. Pearl did not think that his friends knew that Monica was there. **R. pp. 122-24; 142.**
- Pearl, who learned about the murders on Friday June 10<sup>th</sup>, testified that Sessions called him later that night and invited Pearl to "come chill" with Sessions. When Pearl reached Sessions' location, he and Sessions "had a little fling" with a girl who was there named "Poo." He and Sessions then went into the bathroom. Sessions had a "dinner plat[e] full" of cocaine and he allowed Pearl to snort some, using a drinking straw. Pearl surmised that the cocaine was Jamilla's based on its unique smell. While they used the drugs, Sessions told Pearl that he had killed Jamilla and Monica. Sessions also had some high-quality marijuana and the two friends smoked a "cigar of it. At some point, Sessions also showed Pearl a black semi-automatic weapon. However, Pearl was unsure whether it was a 9 mm. or a .40 caliber. **R. pp. 125-28.**
- When describing what he had done, Sessions told Pearl that "when he was in the house, and he was leaving out, he heard the shower go off, and . . . and the bathroom door opened up and [Monica] was standing there looking him in his face, so he said he rushed in the bathroom, put it - and shot her, and left her in the tub. **R. p. 129.**
- Sessions called Pearl on Saturday and he asked Pearl to send him a \$100.00 moneygram. While Pearl said that he would do so, he never sent it. **R. p. 130.**

- Pearl later had a telephone conversation with Stephens, in which Stephens accused him of sending the police to Connecticut after Sessions. Pearl denied doing this. **R. pp. 130-31.** Pearl did not initially come forward because he was afraid of Sessions and Stephens. **R. pp. 141-42.**
- Jamilla's first cousin, Rodney Turner, Jr., was at the house on Wednesday, June 8<sup>th</sup>. The house was neat at that time, **R. pp. 185-86**, but it was messy and articles were disturbed when police arrived on Friday the 10<sup>th</sup>.
- While Turner was there, Stephens came to the house between 9:30 and 10:00 p.m. on Wednesday. Stephens had come in a truck or SUV. "He had on all black when he came to the house. He was in the living room area." Also, he was "nervous, looking around." Stephens and Jamilla went outside briefly. When Jamilla returned, she was alone and she was mad. **R. pp. 186-87.**
- Shortly, thereafter, Turner drove Jamilla to another residence where she "re-up[ped]" her supply of cocaine. Afterwards, Turner drove her home. **R. pp. 187-88.**
- Turner had never seen Sessions at Jamilla's residence, but she had spoken about him. Apparently, the friendship between Sessions and Jamilla soured because of drug business disputes. **R. pp. 188-89.**
- Sometime between 9:00 and 10:30 p.m. on Thursday June 9<sup>th</sup>, Matthew Junior Campbell saw Sessions outside of the apartment complex where Campbell lives. Sessions was dressed in black clothing and he had on a black hoodie. Also, he had a gun "[o]n his side." Sessions told Campbell that "he's got to get him a lick, a robbery . . . because he's got to get out of town because he's hot." Sessions then left the complex with another person on foot. The apartment complex is within walking distance of the crime scene. **R. pp. 238-41.**
- Christy Regina Peal, James Pearl's cousin, testified that on Thursday the 9<sup>th</sup>, she was at the residence that she shared with Mildred Brown and her sister-in-law "partying and playing cards" all day. James Pearl and Phonetia Hightower (Jamilla's cousin) were also present. She had smoked a cigar full of marijuana that day. Mildred, James Pearl and Phonetia were using cocaine, while James and Mildred were drinking. At some point, Christy, Mildred and Phonetia left the residence and, at Jamilla's prior request, went to Jamilla's residence. Christy then drove Jamilla to a local Super 8 motel. When Jamilla came out of the motel, Christy drove her home. Jamilla paid her \$ 40.00 for the ride. After that, Christy and the other women went home. **R. pp. 265-76; 280.**

- At some point, Sessions came to the residence . He was dressed in black clothing, including a black hoodie, and he was wearing gloves. Phonetia left with him. **R. pp. 276-82.**
- Christy saw Phonetia later that morning and Phonetia told her that Jamilla and Monica were dead. She did not take Phonetia seriously because Phonetia often lies. However, Christy went to Jamilla's house around 1:00 p.m. or so; and Jamilla did not respond to either a telephone call or the door bell. **R. pp. 282-85; 287.**
- Antwann Higgins was another first cousin of Jamilla and they had briefly lived together at the residence where the murders occurred, along with Higgins' girlfriend, Melissa Gomez. Higgins and Melissa moved to another location when he and Jamilla argued over the fact he "had raised my hand at Melissa. Yet, they were not having any difficulties at the time of the murders. **R. pp. 303-08.** Higgins and Melissa discovered the bodies at roughly 6 p.m. on Friday, June 10<sup>th</sup>. They went next door and had a neighbor call -911. **R. pp. 309-10; 313-20; 358-64.**
- Higgins denied ever stepping into Monica's bathroom and he voluntarily submitted to gunshot residue testing. The police searched his residence, and the took the four pairs of shoes. Police also found two weapons: a .32 caliber handgun and a .25 caliber handgun. **R. pp. 324-25; 327-31.** None of the items seized connected him to the murders.
- Craig Burris, who was incarcerated while awaiting trial for an unrelated murder, was in the Jet Age "social club" one night shortly after the murders. He saw Sessions there, and Sessions invited him to get high with him at the residence of an individual named "LeeLee," in Myrtle Beach area. When Burris arrived at the residence, "LeeLee was there with his girlfriend, and Stephens was present. **R. pp. 531-35.**
- While there, Burris snorted cocaine and smoked marijuana that Sessions provided. Sessions also gave him "about a gram or two" of cocaine. Sessions and he had often shared drugs with one another, but this was the most cocaine that Session had ever given to him. Sessions acted as if he was celebrating and he told Burris that he "just . . . hit a lick, just like a robbery or something." Burris saw Sessions and Stephens talk, but their conversations were private. **R. pp. 535-39.**
- Expert testimony established that cartridge casings found at the scene (**State's Exs. 55-56**) were fired by the same firearm. The two projectiles - one recovered from the floor of the shower in the bathroom and the other removed from Jamilla's head at autopsy - were also fired by a single firearm. The projectiles

"were most consistent with bullets that are loaded into some [.40 caliber] Smith and Weston . . . cartridges." R. pp. 616-19.

Thus, the State had established overwhelming evidence of guilt, separate and apart from Agent Prodan's testimony. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.

Additionally, Agent Prodan's testimony, although expert in nature, did not identify Sessions, Stephens or any specific individual as the perpetrator. Rather, Prodan was not given any information about the defendants; he did not attempt to develop a profile of either man; and he did not express any opinion about either defendant's guilt or innocence. Thus, much like the testimony of the prosecution's experts concerning MSBP in *Cutro* or the evidence in *Spann*, his focus was solely upon the crime scene and the victim. Thus, any error "could not reasonably have affected the result of the trial." *See Sherard*, 303 S.C. at 175, 399 S.E.2d at 596.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and convictions of the lower court be affirmed.

Respectfully submitted,

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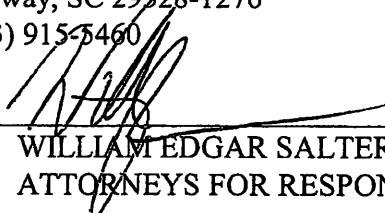
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By: 

WILLIAM EDGAR SALTER, III  
ATTORNEYS FOR RESPONDENT

December 29, 2010.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County  
The Honorable Steven H. John, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

APPELLANT.

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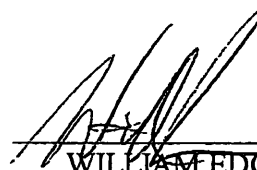
CERTIFICATE OF SERVICE

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I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, South Carolina 29201.

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

This 29<sup>th</sup> day of December, 2010.



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ATTORNEY FOR RESPONDENT

1110

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County  
The Honorable Steven H. John, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

APPELLANT.

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CERTIFICATE OF COMPLIANCE

---

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

This 29<sup>th</sup> day of December, 2010.



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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Christopher M. Stephens, Appellant.

Appellate Case No. 2009-116988

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Appeal From Horry County  
Steven H. John, Circuit Court Judge

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Unpublished Opinion No. 2013-UP-062  
Heard October 3, 2012 – Filed January 30, 2013

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**AFFIRMED**

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Robert Michael Dudek of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy  
Attorney General John W. McIntosh, Senior Assistant  
Deputy Attorney General Donald J. Zelenka, Senior  
Assistant Attorney General W. Edgar Salter, III, all of  
Columbia, for Respondent.

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**PER CURIAM:** Christopher Stephens was indicted on two counts of accessory  
before the fact of murder and one count of accessory before the fact of armed

robbery. He was tried together with Jimmy Lee Sessions, who was indicted on one count of first-degree burglary, one count of armed robbery, and two counts of murder. All counts arose from the same incident and involved the same victims. Both defendants were found guilty as charged. Stephens appeals, arguing the trial judge erred in admitting testimony that one of the victims accused him of owing her money for drugs and in allowing a SLED employee to testify about victimology and related matters. We affirm.

1. Over Stephens's objection, the trial judge allowed James Pearl to testify that shortly before the victims were murdered, he heard one of them accuse Stephens of owing her money for drugs. Stephens argues the testimony was (1) hearsay and (2) highly prejudicial because it suggested a motive for Stephens's involvement in her murder. We find no error.

The victim's statements were made in Stephens's presence, and he never attempted to refute them; therefore, they were admissible as adoptive admissions. *See State v. Nolan*, 318 S.C. 253, 257, 456 S.E.2d 926, 928 (Ct. App. 1995) ("The adoptive admissions rule allows admission into evidence of a defendant's failure to deny statements made in his presence which tend to incriminate him, which a reasonable person would have denied under the circumstances, as by his silence, or his making an evasive, equivocal, unresponsive, or affirmative reply."). Moreover, because the deceased victim was an unavailable declarant and her accusation against Stephens included a declaration on her part that she sold illegal drugs to him, the statement was admissible under Rule 804(b)(3), SCRE, as a statement against her interest. Finally, Stephens himself acknowledged that he owed the victim money; therefore, her accusation would be "merely cumulative," and any error in admitting it would be harmless. *State v. Schumpert*, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993).

2. Stephens further argues the trial judge should not have allowed SLED Agent Michael Prodan to testify as an expert about victimology, method of operation, motive, and related subject matter, arguing admission of this testimony violated Rule 702, SCRE, *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and this court's opinion in *State v. Tapp*, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2010), *rev'd* 398 S.C. 376, 728 S.E.2d 468 (2012). We find no reversible error.

In *State v. White*, the South Carolina Supreme Court held:

[T]he trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under

Rule 702 [of the South Carolina Rules of Evidence], whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

*White*, 382 S.C. at 274, 676 S.E.2d at 689. The *White* decision was issued several months after the trial in the present case took place.

At trial, Stephens objected to Prodan's testimony, arguing (1) he was not informed that the State intended to call Prodan and (2) Prodan's testimony was not relevant. On appeal, Stephens argues only that the testimony was speculative, irrelevant, and therefore admissible. Although Stephens did not specifically request the trial judge to exercise a gatekeeping role in determining whether Prodan's testimony was admissible, we hold his objection on the ground of relevance was sufficiently specific to address this argument on appeal. See Rule 401, SCRE ("Relevant evidence' means 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."); *State v. Tapp*, 398 S.C. 376, 385-86, 728 S.E.2d 468, 473 (2012) ("While our preservation rules require that objections to the admissibility of evidence be specific, they most certainly do not require clairvoyance.") (citation omitted). Moreover, we hold that even though the law at the time of Stephens's trial allowed the reliability of nonscientific expert testimony to be determined by the jury, the trial judge erred in admitting Prodan's testimony without making his own determination as to whether it was reliable. See *id.* at 389, 728 S.E.2d at 475 (acknowledging the trial judge erred in admitting certain expert testimony after making an initial determination of the witness's expertise but without vetting the testimony for its reliability).

Nevertheless, we hold that "beyond a reasonable doubt the trial error did not contribute to the guilty verdict[s]" against Stephens. *Id.* at 390, 728 S.E.2d at 475. Here, Prodan's testimony concerned only the victims and the crime scene. He never identified Stephens, the co-defendant, or anyone else as a perpetrator and testified that at his insistence, he was not given any information about any suspects

**1114**

developed in the case. As was the case in *Tapp*, the jury made numerous factual determinations in arriving at its verdict, including (1) whether Pearl testified truthfully about the victim's accusations against Stephens and the defendants' attempt to enlist his help in committing the crimes, (2) the credibility of witnesses who allegedly heard Stephens's co-defendant admit to committing a crime, (3) whether shoe prints found at the crime scene matched the shoes taken from the property bag of Stephens's co-defendant, and (4) the credibility of testimony that certain individuals knew about the deaths of the victims before the police found their bodies.

**AFFIRMED.**

**HUFF, THOMAS, and GEATHERS, JJ., concur.**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

APPELLANT

---

Appeal from Horry County

Steven H. John, Circuit Court Judge

---

Opinion No. 2013-UP-062

Appellate Case No. 2009-116988

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PETITION FOR REHEARING

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Petitioner seeks rehearing pursuant to Rule 221(a), SCACR because this Court may have overlooked the fact that the accusation that appellant owed one of the victims money for drugs was simply not something a reasonable person would have thought was worth responding too. This Court respectfully has applied the strange in and of itself legal concept of an adoptive admission too broadly. Ignoring the declarant in this situation was instead the reasonable thing for appellant to have done. Appellant urges the Court to reconsider its application of an adoptive admission to this situation.

# 1116

Second, an accusation “on the street” that a person owes another person for drugs is not the kind of statement that “so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.” See Rule 804, (b)(3), SCRE. This was largely meaningless talk “on the street” that was not in the context that a reasonable person would have feared criminal prosecution for making the statement or accusation. The error also was not harmless as an accusation that a person was a drug user or drug dealer is explosively prejudicial in the minds of some jurors.

Instead the statement was prejudicial hearsay as appellant argued. See Rule 801(c), SCRE. See, also, State v. Saltz, 346 S.C. 114, 551 S.E.2<sup>nd</sup> 240 (2001). The solicitor elicited Pearl’s hearsay testimony that decedent Hightower was yelling at appellant about the money appellant owed her for drugs. It was highly prejudicial hearsay *because it was calculated to provide an alleged motive for the murder: That appellant elicited the help of co-defendant Sessions to rob and kill decedent Hightower. This would relieve him of the drug debt, and also have Hightower fill the need for a victim of a robbery the men wanted to commit to obtain money.* See State v. Caulder, 287 S.C. 507, 339 S.E.2d 876 (Ct.App. 1986); State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006).

## **State v. Tapp issue**

The Court should respectfully reconsider its holding that this error was harmless because Prodan never identified appellant or anyone else as the perpetrator. The point is this junk science was meant to lead the jury to believe that Prodan’s “victimology” could help identify the murderer by piling inference upon inference from the facts before it.

As in State v. Tapp Prodan here said he asked for background information on the victim or victims. Prodan testified he tried to ascertain whether the victim was a high risk individual because of their life style. Prodan opined that some people who were “low risk” because they were not

involved “in criminal enterprises, they are not selling drugs, they are not involved in sexual affairs or promiscuity or prostitution.” R. 576, l. 4 – 588, l. 4.

Prodan also told the jurors there were “moderate risk life styles.” These included people working in a convenience store and a cab driver. R. 588, l. 17 – 589, l. 12.

The solicitor asked Prodan about the decedent’s “risk level.” Prodan opined decedent Hightower was probably a moderate risk because of her drug sales. “It was not – it doesn’t give rise to the level of multi-national cartels, but it’s not a college student selling five dollar baggies of marijuana to their dorm mates either, so it has to kind of fall in the middle.” Prodan said the other decedent had an “exceedingly low risk” life style besides her living with decedent Hightower. R. 589, l. 16 – 590, l. 5.

Prodan opined that there is a misconception perpetuated by the media that violent crimes just happen and are random events. *“Our experience and our training indicate that is not the case. There is a motive for murder. There are victims who are selected by the offender for that reason.”* R. 590, ll. 6-21. (emphasis added).

Prodan said he had to ask himself how the person got into the house in this case since there was no forced entry. *Prodan then stated his “background information” indicated that Hightower only sold drugs “if there was previous notification.”* R. 595, l. 1 – 596, l. 14. (emphasis added).

Prodan offered there was no evidence either of the decedents were a “victim of blunt-forced trauma.” Prodan opined that both decedents were able to be controlled by the murderer, and he noted the fact decedent Wall was found nude. “The question you ask yourself is, while the individual is having Ms. Wall disrobe, what’s Ms. Hightower doing.” Defense counsel Frederick objected that this testimony was pure speculation. R. 597, l. 14 – 598, l. 21. As Prodan continued, the defense made further relevance and speculation objections that were overruled. R. 602, ll. 4-18.

**1118**

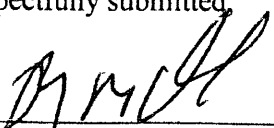
Prodan again opined that there was always a motive for murder *and that the concept of murder without motive was a media myth.* R. 608, l. 11 – 609, l. 8.

In his closing argument, the solicitor noted Prodan's testimony and argued that appellant and co-defendant Sessions planned the crime carefully and that one decedent was shot with a pillow over her head "*because as Mike Prodan said, it's a lot easier to shoot that pillow than to shoot Jamilla Hightower.*" R. 1010, l. 5 – 1011, l. 5.

Appellant respectfully submits that Prodan's junk science testimony – which the solicitor exploited – was very prejudicial and this Court should reconsider its holding that the error was harmless beyond a reasonable doubt. It cannot, respectfully, be stated that the error in admitting Prodan's testimony had little, if anything, to do with the guilty verdict in this case. That the error had little, if any, likelihood of affecting the verdict must be stated beyond a reasonable doubt. See State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) citing Chapman v. California, 386 U.S. 18 (1967).

Prodan's testimony was very prejudicial given that he led the jury to believe that his "science" dictated that the murderer or murderers knew the victim and he told the jurors that *Hightower only sold drugs "if there was previous notification."* R. 595, l. 1 – 596, l. 14. (emphasis added). Further, murder without motive was also a media myth and the state strongly desired the jury to believe that the motive here for the murder was a drug dispute between people who knew each other well. Rehearing should be granted.

Respectfully submitted,

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

This 14th day of February, 2013.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Horry County

Steven H. John, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

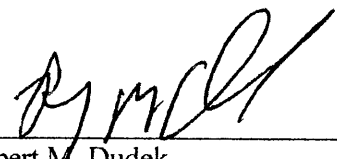
V.

CHRISTOPHER M. STEPHENS,

APPELLANT

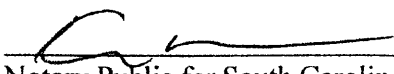
\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of February, 2013.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 13th day  
of February, 2013.

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

**1120**

**The South Carolina Court of Appeals**

The State, Respondent,

v.

Christopher M. Stephens, Appellant.

Appellate Case No. 2009-116988

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**ORDER**

---

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

*Thomas E. Huff* J.

*Paul E. Thomas* J.

*John D. Beatty* J.

Columbia, South Carolina

cc:  
Robert Michael Dudek  
W. Edgar Salter, III

**FILED**

20 Mar 2013

ORIGINAL

1121

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County  
Steven H. John, Circuit Court Judge

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RECEIVED

JUN 19 2013

S.C. Supreme Court

Opinion No. 2013-UP-062 (S.C. Ct. App. filed 1/30/2013)

07-GS-26-2974,2975, 2976

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THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

PETITIONER

Appellate Case No. 2013-000793

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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ROBERT M. DUDEK  
Chief Appellate Defender

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

## INDEX

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| INDEX.....                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 1  |
| CERTIFICATE OF COUNSEL.....                                                                                                                                                                                                                                                                                                                                                                                                                                         | 2  |
| QUESTIONS PRESENTED .....                                                                                                                                                                                                                                                                                                                                                                                                                                           | 3  |
| STATEMENT OF THE CASE.....                                                                                                                                                                                                                                                                                                                                                                                                                                          | 4  |
| ARGUMENT                                                                                                                                                                                                                                                                                                                                                                                                                                                            |    |
| 1. The Court of Appeals erred by holding that the error of the trial court in admitting the testimony of SLED “victimologist expert” Mike Prodan was harmless error, since his speculative, irrelevant, and inadmissible testimony under State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) impermissibly led the jury to believe the relationship between petitioner and the decedent was consistent with the motive for and the circumstances of the murder ..... | 5  |
| Relevant trial facts .....                                                                                                                                                                                                                                                                                                                                                                                                                                          | 5  |
| Other testimony.....                                                                                                                                                                                                                                                                                                                                                                                                                                                | 6  |
| Prodan .....                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 6  |
| Court of Appeals.....                                                                                                                                                                                                                                                                                                                                                                                                                                               | 9  |
| Discussion.....                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 9  |
| 2. The Court of Appeals erred by holding the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming at petitioner in anger about the money he owed her for drugs was admissible as an “adoptive admission” since petitioner was present and did not deny it since some accusations or assertions, including this one, are not worth of a response and the legal principle of an “adoptive admission” was therefore inapplicable .....       | 13 |
| Relevant Facts.....                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 13 |
| Court of Appeals.....                                                                                                                                                                                                                                                                                                                                                                                                                                               | 13 |
| Discussion.....                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 14 |
| CONCLUSION .....                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 16 |

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 3/20/2013.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by holding that the error of the trial court in admitting the testimony of SLED “victimologist expert” Mike Prodan was harmless error, since his speculative, irrelevant, and inadmissible testimony under State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) impermissibly led the jury to believe the relationship between petitioner and the decedent was consistent with the motive for and the circumstances of the murder?

2.

Whether the Court of Appeals erred by holding the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming at petitioner in anger about the money he owed her for drugs was admissible as an “adoptive admission” since petitioner was present and did not deny it since some accusations or assertions, including this one, are not worth of a response and the legal principle of an “adoptive admission” was therefore inapplicable?

STATEMENT OF THE CASE

Petitioner was indicted by the Horry County Grand Jury for two counts of accessory before the fact of murder and one count of accessory before the fact of armed robbery. R. p. 1059. Petitioner's co-defendant, Jimmy Lee Sessions, was indicted for two counts of murder, burglary in the first degree and armed robbery. R. p. 1051.

Their joint cases were called to trial on February 2, 2009, before the Honorable Stephen H. John and a jury. Bobby Frederick and Laura Hiller represented petitioner. Johnny Gardner represented co-defendant Sessions. Bradley Coy Richardson and Donna Elder were the assistant solicitors. R. 1.

At the conclusion of the trial on February 6, 2009, the jury found petitioner guilty of two counts of accessory before the fact of murder and one count of accessory before the fact of armed robbery. R. 1032, ll. 7-25. Co-defendant Sessions was found guilty of two counts of murder, burglary in the first degree and armed robbery. R. 1032, l. 13 – 1024, l. 25.

The judge sentenced petitioner to sentences totaling forty years. Co-defendant Sessions was sentenced to life imprisonment. R. 1047, l. 9-1048, l. 13.

The Court of Appeals confirmed petitioner's convictions in State v. Christopher M. Stephens, 2013-UP-062 (filed January 30, 2013). App. 1-4. Petitioner sought rehearing. App. 5-9. Rehearing was denied. App. 10.

This petition for writ of certiorari follows.

The Court of Appeals erred by holding that the error of the trial court in admitting the testimony of SLED "victimologist expert" Mike Prodan was harmless error, since his speculative, irrelevant, and inadmissible testimony under State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) impermissibly led the jury to believe the relationship between petitioner and the decedent was consistent with the motive for and the circumstances of the murder.

**Relevant trial facts**

James Pearl was the star witness for the state. He was an acknowledged cocaine addict, and he even admitted that he had smoked marijuana the night before petitioner's trial. R. 161, l. 17 – 165, l. 25. Pearl claimed he knew Jamilla Hightower and Monica Wall. Hightower was a major drug dealer and she shared a house with Wall. R. 117, ll. 9-10. Pearl said he also knew petitioner and co-defendant Sessions. R. 117, ll. 20-22.

Pearl learned that the decedents had been killed when he received a call from Hightower's cousin on a Friday. R. 118, ll. 5-21. Pearl said he had seen Hightower on Wednesday, two days before, while he was conversing with petitioner and co-defendant Sessions. Over defense counsel Frederick's repeated hearsay objections, Pearl testified that Hightower was screaming at petitioner about the money he owed her. Defense counsel made clear he understood the witness could repeat what petitioner said but that he continued to object to the hearsay testimony about what Hightower was allegedly said to petitioner. The judge continued to allow the solicitor to pursue this line of hearsay question and answer. Pearl said the decedent was yelling "about drug money that was owed [her by petitioner]." R. 120, l. 6 – 123, l. 5.

### Other testimony

Pearl claimed petitioner said after Hightower left that he could not rob her because she knew him. Pearl maintained that Sessions then offered that he could rob Hightower. Pearl said he told both men he did not want anything to do with a robbery and he left. R. 123, l. 6 – 124, l. 21.

Pearl's claim was that petitioner and co-defendant Sessions planned to rob and kill Hightower and steal her money and drugs. R. 124, l. 20 – 127, l. 14. Pearl maintained he later snorted cocaine with co-defendant Sessions and that the cocaine tasted like cucumbers. Pearl said that cocaine that tasted like cucumbers was "Jamilla's" signature cocaine. R. 126, l. 22 – 127, l. 14.

Pearl testified Hightower was major drug dealer and that he once saw her purchase two kilos of cocaine. Pearl also maintained **that a purchaser had to call Hightower in advance** to set up a drug buy: "You just couldn't go to her house and show up without calling." R. 131, ll. 13-25. As will be seen *infra*, witness Prodan worked this into his "profile" presentation that was strongly objected to defense counsel in this case, and was the subject of reversal in State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009); *reversed*, State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) (Prodan's testimony should not have been admitted but the error was harmless).

### Prodan

Without any prior notice, the state called Michael Prodan as a witness. R. 568 ll. 5-18. Prodan testified that he had worked in California, and he said he had been qualified as a "behavioral science expert" in the past. Prodan admitted he had no "formal training . . ." He asserted he had "self-initiated education involving keeping abreast of the literature involving homicide and sexual assault, and violent crime in general, and involving the literature and the texts that are available, not only to law enforcement but to the general public." R. 569, l. 12 – 571, l. 24.

When the solicitor went to offer Prodan “as an expert in the field of crime scene interpretation and analysis,” the jury was removed from the courtroom while the defense attorneys put their considerable objections to Prodan being qualified as an expert on the record. R. 571, l. 14 – 572, l. 22. Defense Counsel Gardner said the defense was taken completely by surprise by this testimony and said: “It’s a shock to me. It’s a surprise to me, and I would just put that on the record.” R. 572, l. 14 – 573, l. 5.

Defense Counsel Frederick expanded on that objection noting that despite the voluminous discovery all he was aware of was that Prodan and other SLED “profilers” suggested “that they put an informant in Christopher Stephens’s cell. This was before he was charged. They – and that’s it, judge.” R. 573, ll. 6-19.

Prodan then testified in camera that he had not written any report on his work during this investigation. R. 575, ll. 16-22; 578, l. 3 – 579, l. 9; 580, l. 12 – 581, l. 8. Both defense attorneys objected to Prodan being qualified to give an opinion as an expert. R. 582, l. 17 – 585, l. 22. The objections included that Prodan’s testimony in this regard was not relevant and that it was pure speculation. R. 602, ll. 4-18. The judge ruled he was going to qualify Prodan “in the areas of behavioral science, violent crimes, methodology, motive behavior.” R. 585, l. 11 – 586, l. 3; 602, ll. 6-18.

As in State v. Tapp, supra, Prodan said he asked for background information on the victim or victims. Prodan testified he tried to ascertain whether the victim was a high risk individual because of their life style. Prodan opined that some people who were “low risk” because they were not involved “in criminal enterprises, they are not selling drugs, they are not involved in sexual affairs or promiscuity or prostitution.” R. 576, l. 4 – 588, l. 4.

Prodan also told the jurors there were “moderate risk life styles.” These included people working in a convenience store and a cab driver. R. 588, l. 17 – 589, l. 12.

The solicitor asked Prodan about the decedent’s “risk level.” Prodan opined decedent Hightower was probably a moderate risk because of her drug sales. “It was not – it doesn’t give rise to the level of multi-national cartels, but it’s not a college student selling five dollar baggies of marijuana to their dorm mates either, so it has to kind of fall in the middle.” Prodan said the other decedent had an “exceedingly low risk” life style, other than her living with decedent Hightower. R. 589, l. 16 – 590, l. 5.

Prodan opined that there is a misconception perpetuated by the media that violent crimes just happen and are random events. “Our experience and our training indicate that is not the case. There is a motive for murder. There are victims who are selected by the offender for that reason.” R. 590, ll. 6-21.

*Prodan said he had to ask himself how the person got into the house in this case since there was no forced entry.* Prodan then stated his “background information” indicated that Hightower only sold drugs “*if there was previous notification.*” R. 595, l. 1 – 596, l. 14. (emphasis added).

Prodan offered there was no evidence either of the decedents were a “victim of blunt-forced trauma.” Prodan opined that both decedents were able to be controlled by the murderer, and he noted the fact decedent Wall was found nude. “The question you ask yourself is, while the individual is having Ms. Wall disrobe, what’s Ms. Hightower doing.” Defense counsel Frederick objected that this testimony was pure speculation. R. 597, l. 14 – 598, l. 21. As Prodan continued, the defense made further relevance and speculation objections that were overruled. R. 602, ll. 4-18.

Prodan again opined that there was always a motive for murder and that the concept of murder without motive was a media myth. R. 608, l. 11 – 609, l. 8.

In his closing argument, the solicitor noted Prodan's testimony and argued that petitioner and co-defendant Sessions planned the crime carefully and that one decedent was shot with a pillow over her head "because as Mike Prodan said, it's a lot easier to shoot that pillow than to shoot Jamilla Hightower." R. 1010, l. 5 – 1011, l. 5.

### **Court of Appeals**

The Court of Appeals held that the "[t]he trial judge erred in admitting Prodan's testimony without making his own determination whether it was reliable." *Citing State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). The Court found the error harmless because "Prodan's testimony concerned only the victims and the crime scene. He never identified Stephens, the co-defendant, or anyone else as a perpetrator and testified that at his insistence, he was not given any information about any suspects developed in this case." App 3-4.

### **Discussion**

The reasoning of the Court of Appeals above is respectfully what gave Prodan's testimony the illusion that his "expert victimology" should be given credence. The testimony was that the drug dealing victim would not allow a stranger into the house, and there had to be previous notification from a known buyer. The jury knew that petitioner apparently knew the drug dealer well, and vice versa.

In *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012), this Court held it was error to qualify Prodan as an expert witness. In *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), this Court overruled *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (1997) inasmuch as it held that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission into evidence.

This Court in Tapp noted that the holding of White was that all expert testimony must satisfy Rule 702, SCRE, must pass the trial court's gate keeping function. This insures that the proposed expert testimony meets a threshold level of reliability, regardless of whether it is scientific or unscientific.

The White Court stated that simply ruling a challenge to expert testimony went to its weight and not its admissibility was an improper delegation of responsibility. The Court held the trial judge had to serve the gate keeping function of insuring that expert testimony and evidence were reliable before it was heard by the jury.

This Court in Tapp specifically rejected the state's position that Prodan's credentials, his education and experience, and his ability to rule out scenarios of whom or why the crime transpired made his testimony admissible. This Court also rejected the argument the relative success of "victimology" or profiling as an investigative tool made Prodan's "expert" testimony admissible. It is apparent the Court of Appeals correctly held it was error to admit Prodan's "expert" testimony. See State v. Council, 335 S.C. 1, 23, 515 S.E.2d 508, 519 (1999).

However, the Court of Appeals erred in finding the error harmless. The point is this junk science was meant to lead the jury to believe that Prodan's "victimology" could help identify the murderer by pseudo piling inference upon pseudo inference from the facts before it.

As seen, Prodan testified he tried to ascertain whether the victim was a high risk individual because of their life style. Prodan opined that some people who were "low risk" because they were not involved "in criminal enterprises, they are not selling drugs, they are not involved in sexual affairs or promiscuity or prostitution." R. 576, l. 4 – 588, l. 4.

Prodan also told the jurors there were "moderate risk life styles." These included people working in a convenience store and a cab driver. R. 588, l. 17 – 589, l. 12.

The solicitor asked Prodan about the decedent's "risk level." Prodan opined decedent Hightower was probably a moderate risk because of her drug sales. "It was not – it doesn't give rise to the level of multi-national cartels, but it's not a college student selling five dollar baggies of marijuana to their dorm mates either, so it has to kind of fall in the middle." Prodan said the other decedent had an "exceedingly low risk" life style besides her living with decedent Hightower. R. 589, l. 16 – 590, l. 5.

Prodan opined that there is a misconception perpetuated by the media that violent crimes just happen and are random events. *"Our experience and our training indicate that is not the case. There is a motive for murder. There are victims who are selected by the offender for that reason."* R. 590, ll. 6-21. (emphasis added).

Prodan said he had to ask himself how the person got into the house in this case since there was no forced entry. *Prodan then stated his "background information" indicated that Hightower only sold drugs "if there was previous notification."* R. 595, l. 1 – 596, l. 14. (emphasis added).

Prodan offered there was no evidence either of the decedents were a "victim of blunt-forced trauma." Prodan opined that both decedents were able to be controlled by the murderer, and he noted the fact decedent Wall was found nude. R. 597, l. 14 – 598, l. 21. As Prodan continued, the defense made further relevance and speculation objections that were overruled. R. 602, ll. 4-18.

Prodan again opined that there was always a motive for murder *and that the concept of murder without motive was a media myth.* R. 608, l. 11 – 609, l. 8.

In his closing argument, the solicitor emphasized Prodan's testimony as for conviction grounds and argued that petitioner and co-defendant Sessions planned the crime carefully and that one decedent was shot with a pillow over her head *"because as Mike Prodan said, it's a lot easier to shoot that pillow than to shoot Jamilla Hightower."* R. 1010, l. 5 – 1011, l. 5.

It cannot, respectfully, be stated that the error in admitting Prodan's testimony had little, if anything, to do with the guilty verdict in this case. That the error had little, if any, likelihood of affecting the verdict must be stated *beyond a reasonable doubt*. See State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) *citing* Chapman v. California, 386 U.S. 18 (1967).

Prodan's testimony was very prejudicial given that he led the jury to believe that his "science" dictated that the murderer or murderers knew the victim and he told the jurors that *Hightower only sold drugs "if there was previous notification."* R. 595, l. 1 – 596, l. 14. (emphasis added). Further, Prodan told the jurors that murder without motive was also a media myth. The state strongly desired the jury to believe that the motive here for the murder was a drug dispute between people who knew each other well. Prodan's testimony was inextricably intertwined with the state's theory of the evidence and cannot be deemed harmless.

The Court of Appeals erred by holding the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming at petitioner in anger about the money he owed her for drugs was admissible as an “adoptive admission” since petitioner was present and did not deny it since some accusations or assertions, including this one, are not worth of a response and the legal principle of an “adoptive admission” was therefore inapplicable.

### **Relevant Facts**

As seen, Pearl said he also knew petitioner and co-defendant Sessions. R. 117, ll. 20-22. R. 118, ll. 5-21. Pearl said he saw Hightower on Wednesday, two days before the decedents were killed while he was conversing with petitioner and co-defendant Sessions. Over defense counsel Frederick’s repeated hearsay objections, Pearl testified that Hightower was screaming at petitioner about the money he owed her. The judge continued to allow the solicitor to pursue this line of hearsay question and answer. Pearl said **the decedent was yelling “about drug money that was owed [her by petitioner].”** R. 120, l. 6 – 123, l. 5.

On cross-examination, Pearl acknowledged his prior criminal convictions and admitted that he had pending charges of second offense possession of cocaine and threatening a public official. Pearl acknowledged that he hoped the state would assist him with these charges. R. 149, ll. 9-12; 162, l. 6 – 163, l.3; and 168, l. 22 – 169, l. 8.

### **Court of Appeals**

The Court of Appeals held the statements were made in Stephens’s presence, and “he never attempted to refute them; therefore, they were admissible as adoptive admissions.” App. 2. The Court also reasoned because the decedent was unavailable that her accusation about petitioner

owing her money branded her as a drug dealer and was therefore a statement against penal interest under Rule 804(b)(3), SCRE. App. 2.

### Discussion

Hearsay is a statement, other than one made by the declarant, while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. See Rule 801(c), SCRE. See, also, State v. Saltz, 346 S.C. 114, 551 S.E.2<sup>nd</sup> 240 (2001). Here, the state elicited Pearl's hearsay testimony that decedent Hightower was yelling at petitioner about the money petitioner owed her for drugs. This, respectfully, was inadmissible hearsay to prove petitioner bought drugs from the decedent which neatly fit Prodan's yet to come testimony. It was highly prejudicial hearsay because it was calculated to provide an alleged motive for the murder: That petitioner elicited the help of co-defendant Sessions to rob and kill decedent Hightower. This would simultaneously relieve him of the drug debt, and also have Hightower fill the need for a victim of a robbery the men wanted to commit to obtain money. See State v. Caulder, 287 S.C. 507, 339 S.E.2d 876 (Ct.App. 1986). Petitioner should be granted a new trial based upon the admission of this prejudicial hearsay evidence. State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006).

The Court of Appeals applied the strange in and of itself legal concept of an adoptive admission too broadly. Ignoring the declarant in this situation was instead the reasonable thing for petitioner to have done. "The adoptive admissions rule allows admission into evidence of a defendant's failure to deny statements made in his presence which tend to incriminate him, *which a reasonable person would have denied under the circumstances as by his silence*, or his making an evasive, equivocal, unresponsive, or affirmative reply." State v. Nolan, 318 S.C. 253, 257, 456 S.E.2d 926, 928 (1995). (emphasis added).

## 1136

“Statements made in the presence of a party are generally admissible, if he remained silent, when they are made, and the circumstances are such that he can speak and naturally would or ought to respond to them. In such circumstances, his silence may afford grounds for inferring that he acquiesces in the truth of the statements. But, where the situation is such that it would be improper for him to respond, statements made to him or in his person are inadmissible.” State v. Nolan, 318 S.C. 253, 257, 456 S.E.2d 926, 928 (1995). (emphasis added). Citing State v. McIntosh, 94 S.C. 439, 78 SE. 327 (1913).

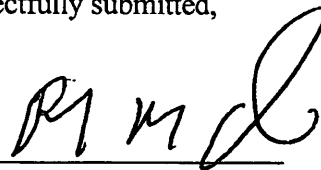
Second, an accusation “on the street” that a person owes another person for drugs is not the kind of statement that “so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.” See Rule 804, (b)(3), SCRE. This was largely meaningless talk “on the street” that was not in the context that a reasonable person would have feared criminal prosecution for making the statement or accusation. The error also was not harmless as an accusation that a person was a drug user or drug dealer is explosively prejudicial in the minds of some jurors.

Instead the statement was prejudicial hearsay as petitioner argued. See Rule 801(c), SCRE. See, also, State v. Saltz, 346 S.C. 114, 551 S.E.2<sup>nd</sup> 240 (2001). The solicitor elicited Pearl’s hearsay testimony that decedent Hightower was yelling at petitioner about the money petitioner owed her for drugs. It was highly prejudicial hearsay *because it was calculated to provide an alleged motive for the murder: That petitioner elicited the help of co-defendant Sessions to rob and kill decedent Hightower. This would relieve him of the drug debt, and also have Hightower fill the need for a victim of a robbery the men wanted to commit to obtain money.* See State v. Caulder, 287 S.C. 507, 339 S.E.2d 876 (Ct.App. 1986); State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006).

CONCLUSION

By reason of the foregoing arguments, the petition for writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of June, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Horry County  
Steven H. John, Circuit Court Judge

---

Opinion No. 2013-UP-062 (S.C. Ct. App. filed 1/30/2013)  
07-GS-26-2974,2975, 2976

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THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

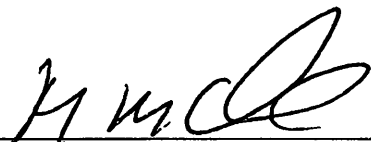
PETITIONER

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CERTIFICATE OF SERVICE

---

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 19th day of June, 2013.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day  
of June, 2013.

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

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

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**1139**  
**RECEIVED**

JUL 19 2013

**Appeal from Horry County  
The Honorable Steven H. John, Circuit Court Judge  
Appellate Case No. 2013-000793**

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**S.C. Supreme Court**

**THE STATE,**

**RESPONDENT,**

**V.**

**CHRISTOPHER M. STEPHENS,**

**PETITIONER.**

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| STATEMENT OF ISSUES ON APPEAL .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | iii |
| COUNTERSTATEMENT OF ISSUES ON APPEAL .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | iii |
| ADDITIONAL SUSTAINING GROUND .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | iii |
| STATEMENT OF THE CASE .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 1   |
| ARGUMENTS .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |     |
| I.    Stephens' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the Court of Appeals correctly found that any error was harmless beyond a reasonable doubt. ....                                                                                                                                                                                                                                                                         | 1   |
| A.    How issue developed at trial .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 2   |
| B.    Discussion .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 7   |
| 1.    Stephens' belated relevancy objection does not preserve any issue for appellate review concerning testimony that was only objected to on the basis that the State had committed a discovery violation .....                                                                                                                                                                                                                                                                                                                                                                                                                              | 7   |
| 2.    Alternatively, the Court of Appeals properly found that any error in admitting Prodan's testimony was harmless beyond a reasonable doubt .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 10  |
| II.    The trial judge properly allowed the State to introduce James Pearl's testimony about a conversation between Stephens and the victim because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. <i>See</i> Rule 801(d)(2)(B), SCRE. Likewise, the conversation was also admissible to show bad blood between Stephens and Jamilla. Alternatively, any error was harmless beyond a reasonable doubt. 14 |     |
| A.    How the issue arose at trial .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 15  |
| B.    Discussion .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 18  |

**CONCLUSION . . . . . 22**

**STATEMENT OF ISSUES ON APPEAL**

1. Whether the Court of Appeals erred by holding that the error of the trial court in admitting the testimony of SLED "victimologist expert" Mike Prodan was harmless error, since his speculative, irrelevant, and inadmissible testimony under State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) impermissibly led the jury to believe the relationship between petitioner and the decedent was consistent with the motive for and the circumstances of the murder?
  
2. Whether the Court of Appeals erred by holding the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming at petitioner in anger about the money he owed her for drugs was admissible as an "adoptive admission" since petitioner was present and did not deny it since some accusations or assertions, including this one, are not w01ih of a response and the legal principle of an "adoptive admission" was therefore inapplicable?

**COUNTER STATEMENT OF ISSUES ON APPEAL**

- I. Whether the Court of Appeals correctly found that any error in the introduction of the State's expert testimony on crime scene analysis and victimology was harmless beyond a reasonable doubt?
  
- II. Whether the trial judge properly allowed the State to introduce James Pearl's testimony about a conversation between Stephens and the victim because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. Whether the conversation was likewise admissible to show bad blood between Stephens and Jamilla? Alternatively, whether any error was harmless beyond a reasonable doubt?

**ADDITIONAL SUSTAINING GROUND**

- III. Whether Stephens' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because he failed to raise the same argument in the trial court? [Argued in Argument I].

## STATEMENT OF THE CASE

The Horry County Grand Jury indicted Petitioner, Christopher M. Stephens (Stephens) in July 2007 for two counts of accessory before the fact of the two murders and armed robbery. (07-GS-26-2974 through -2976). His co-defendant, Jimmy Lee Sessions, (Sessions) in July 2007 for two counts of murder (07-GS-26-2962), burglary in the first degree (07-GS-26-2968) and armed robbery (07-GS-26-2961). Bobby G. Frederick and Laura L. Hiller, Esquires represented Stephens. Johnny Gardner, Esquire, represented Sessions.<sup>1</sup>

Sessions and Stephens were jointly tried on these charges before the Honorable Stephen H. John on February 2-6, 2009. tried with him. The jury found Stephens and Sessions guilty of all of the indicted charges. Stephens received current sentences of forty years imprisonment for the accessory convictions. A timely Notice of Appeal was served and filed by each defendant. The Court of Appeals affirmed in a January 30, 2013, unpublished Opinion. *State v. Stevens*, 2013-UP-062 (S.C. Ct.App., Jan. 30, 2013), **App. 1-4**. A timely rehearing petition (**App. 5-9**) was denied on March 20, 2013. **App. 10**. The Petition for Writ of Certiorari was filed on June 19, 2013.<sup>2</sup>

## ARGUMENTS

- II. Stephens' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the Court of Appeals correctly found that any error in the introduction of the State's expert testimony on crime scene analysis and victimology was harmless beyond a reasonable doubt. [Respondent's Issue I and Additional sustaining Ground].**

Relying upon this Court's decision in *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468(2012)

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<sup>1</sup> Assistant Solicitors Bradley Coy Richardson and Donna Elder, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. A November 2008 trial on the charges ended in a mistrial. Charges against Marshal Stephens were dismissed for lack of evidence.

<sup>2</sup> Sessions currently has a pending certiorari petition, which was filed on the same date as well.

(*Tapp II*), Stephens maintains that the trial judge abused his discretion by allowing the State to present expert testimony on crime scene analysis and victimology through SLED Agent Michael Prodan. Respondent submits that his challenge to Agent Prodan's testimony is procedurally barred because he failed to raise the same argument in the trial court. Alternatively, Respondent submits that the trial judge did not abuse his discretion by allowing the State to introduce the evidence. Respondent further submits that, if there was error, any error was harmless beyond a reasonable doubt.

**A. How issue developed at trial.**

Agent Prodan testified that he has been employed at SLED for ten years and that he was the Supervisor of the Behavioral Sciences Unit. Prior to that time, he was "the lead agent and the supervisor of the Violent Crime Analysis Unit" of the California Attorney General's Office. Both at SLED and with the California Attorney General's Office, his job responsibilities involved "crime scene analyses, consultation on violent crime, investigative techniques and strategies, threat assessment, interviews and interrogation, and what is generally referred to in the media as psychological profiling." R. pp. 568-69.<sup>3</sup> Agent Prodan described his educational training as

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<sup>3</sup> As he had in *Tapp II*, Agent Prodan also listed the extensive nature of his prior employment and his educational and other experience in the field:

[I] first started in violent crime training, of course, with the Las Angeles County Sheriff's Department and Police Academy in Violent Crime Investigation, but as a agent for the California Department of Justice, Bureau of Investigation, was a specialized six months program, with the advanced training center in the California Criminalistic Institute, involving crime scene analyses and criminalistic, if you would, that include courses in firearms trajectory, blood spatter interpretation, and forensic pathology.

During that time I was selected and spent a one-year Fellowship at the F.B.I. Academy in Quantico, Virginia, at the National Center for the Analyses of Violent Crime. That one year Fellowship also included courses at the Armed Forces Institute of Pathology on basic and advanced Forensic Pathology courses in Psychiatry in the Law, in the University of Virginia at Charlottesville. There were also courses at the Clark Institute of the

"ongoing" and he explained that, "more often than not," it involved in-service training ... with the International Criminal Investigative Analyst Fellowship, certain training programs with the Federal Bureau of Investigation, yearly training and updates with the Association of the Threat Assessment Professionals." He likewise engages in "self-initiated education," by "keeping abreast of the literature involving homicide and sexual assault, and violent crime in general, and involving the literature and the texts that are available" to law enforcement and the general public. **R. pp. 570-71.**<sup>4</sup>

Both defendants objected when the State offered him as an expert in "Crime Scene Interpretation and Analyses" (**R. pp. 571-72**) and the trial judge heard their arguments *in camera*. Once the trial judge had ascertained that Agent Prodan's notes had been provided to the defense,<sup>5</sup> he asked the State to briefly summarize to the proffered testimony. **R. pp. 581-82.**

The Assistant Solicitor explained that:

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Psychology of Aggression in Ottawa, Ontario, Canada.

There has been training over a varied of time involving the California Homicide Investigators Association, California Sexual Assault Investigators' Association, the Association of Threat Assessment Professionals.

See **R. pp. 569-70.**

<sup>4</sup> Agent Prodan is a "member of the International Criminal Investigative Analyst Fellowship, which is ... a worldwide organization that standardizes and provides training on criminal investigative analyses profiling." He is also "a member of the Association of Threat Assessment Professionals," and he had previously been a member of the "California Homicide Investigators Association, and California Sexual Assault Investigators' Association." **R. p. 570.** Agent Prodan has "been brought in on cases by law enforcement ... many times" and he has been qualified as a crime scene analyst in a number of courts. **R. p. 571.**

<sup>5</sup> Both defendants initially complained because the State had not disclosed that Agent Prodan would be giving the testimony at issue and because there was no report. The State, however, responded by pointing to items where the testimony was disclosed. **R. pp. 572-75.** Prodan then testified that the Assistant Solicitor had met with him about two weeks earlier, and she provided him with copies of the crime scene photographs and the autopsy report; and she asked him to testify "[t]o the materials pertaining to how the crime occurred." However, he had not kept notes, and he had not issued a report to law enforcement or the Solicitor's Office. He also had not generated any report, except for his "case notes" that were merely bullet points "to keep my thoughts on track." Even these were only generated a week before his testimony. **R. pp. 575-81.**

the process of my direct-examination of Agent Prodan is going to be, show him some of the State's exhibits, . . . ask him if he has had an opportunity to review them, based on his expert opinion, what do these crime scene photos tell us in reference to victimology, method of operation, motive, things like that, Your Honor. It has nothing to do specifically with the Defendants. He has not reviewed the Defendants, he has not talked with the Defendants, he has not got the Defendants' statements.

**R. p. 582.** The defendants stated their objections to the proffered testimony. Sessions' sole objection was relevance, **R. p. 582, l. 18**, while Stephens asked that he be allowed to view the notes to prepare for cross-examination and again claimed that there had been a discovery violation. **R. p. 582, l. 21-p. 583, l. 3.** However, the trial judge found that there had not been a *Brady v. Maryland*, 373 U.S. 83 (1963) violation. He further noted that he had the notes that Agent Prodan had made provided to the defendants, and he noted that the examination would proceed after a break. **R. p. 583. ll. 12-25.** See also **R. pp. 584-85.**

When the jury returned, the trial judge explained that he was "going to allow the witness to -- and is going to qualify the witness to give his opinion in the areas of Behavioral Science, Violent Crime, Methodology, Motive Behavior." **R. p. 585, l. 23-p. 586, l. 1.** In front of the jury, Agent Prodan explained that, upon receiving a request for assistance from a law enforcement agency, he first asks for background information about the victim or victims. "It is referred to in certain literatures ... as a Victimology, the study of the victim." The initial question he tries to answer is why the victim was selected to be a victim of a violent crime. This requires him to assess the degree of risk the person had to be a victim - whether it is a low, moderate or high risk of being a victim. In making this assessment, "we insist that the agency does not give us any information about any suspects that they may have developed. . . because we don't want to have any contamination ... on suspect information as to what actually happened during the commission of the violent crime." **R.**

pp. 586-87.

Agent Prodan explained that an individual's risk level is based upon the individual's circumstances. So, high risk victims are persons whose lifestyles put them "at a high risk of becoming a violent crime victim."<sup>6</sup> Low risk victims are those persons who are not involved in sexual affairs or prostitution, and who are not involved in criminal enterprises or drug selling. Experience and research reflect that "the lower the risk of a victim, the more likely it is that a person[ ] - - is a victim because of a person[al] cause." **R. pp. 586-88.** In between low and high risk victims are the "moderate risk victims." Those persons do not live a very risky lifestyle, but certain circumstances in their lives increases their risk of being a victim. He included convenience store clerks and cab drivers in this category, as well as persons who are "dabbling in criminal enterprises." **R. p. 588.**

The background information he received in this case was that one victim, Jamilla, "was involved in some reasonably moderate illicit drug sales." Selling illegal drugs is risky by its very nature because people will often try to steal from the person. The crime scene photographs confirmed that Jamilla had considered herself to be at risk because she had "availed herself" of a shotgun to provide her with physical protection. **R. pp. 588-89.** Agent Prodan assessed Jamilla's risk level as moderate because of her drug trafficking. With the exception of living with Jamilla, he assessed Monica's risk level as low. **R. pp. 589-90.**

The next step in his process is "to look at how the crime occurred" and ascertain the motive for the murders.<sup>7</sup> Here, the murders occurred in Jamilla's residence, which is where law enforcement

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<sup>6</sup> He included persons who are "involved in criminal organizations and enterprises, criminal gangs," as well as persons who traffic in narcotics or are sexually promiscuous within this category because these persons "put themselves in a position" to be "more susceptible of becoming victims of violence than anyone else."

<sup>7</sup> It is his expert opinion, based upon experience and research, that there is always a motive for violent crimes, such as murder; and that any contrary belief misunderstands violent crimes. **R. p. 590.**

# 1148

learned that she would primarily engage in her drug transactions. Also, the killer brought a weapon, which demonstrated some "pre-planning" by the perpetrator. Further, "[t]he victims were killed with what we typically see in a quote, unquote, drug related murder, a small to medium caliber handgun." Nor did the perpetrator make any effort to move or otherwise "interact with" the victims' bodies after killing them, and there was a minimal effort to destroy or conceal any physical evidence that was present, other than taking the murder weapon.<sup>8</sup> **R. pp. 590-92.** Based on these factors, Agent Prodan opined that this was "a primarily drug-related murder, and the motive for drug-related murders have to do with the discipline of the individual" perpetrator. **R. pp. 592-93; 600-01.**<sup>9</sup>

Next, Agent Prodan studied how the crimes occurred, both pre-offense and offense behavior. Before the crime, someone had to devise a plan: they had to select a particular place to rob and a particular time to rob it; they had to bring a weapon and ammunition; and they had to develop a plan to gain entry into the residence where the murder occurred. The manner in which the murders occurred shows that the plan for the murders originated outside of the residence. **R. pp. 593-95.**

Once inside the residence, the perpetrator has to gain control over the victim, which can be done by (1) the perpetrator's "mere presence"; (2) a verbal threat; (3) physical force or (4) a weapon. In this case, neither the autopsy reports nor the crime scene photographs suggested that either Jamilla or Monica was the victim of blunt force trauma, such as defensive injuries or facial injuries. There was also no evidence of a struggle in the house or that either victim was physically restrained or

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<sup>8</sup> For example, the crime scene reports did not reflect that the victims' bodies had been washed or that any effort was made to wipe for prints. **R. p. 592.**

<sup>9</sup> Sometimes it is either to eliminate a competitor or to retaliate against a victim who owes the person money but cannot repay it. Also, drug dealers may be targeted for robbery of their drugs and money because drug dealers typically do not report robberies to the police. **R. pp. 592-93.** Agent Prodan opined that two other possible motives for drug-related murders were inapplicable in this case: the killing of an informant or a neighborhood anti-drug advocate. **R. p. 603.**

“bound.” Moreover, based on photographs of Jamilla in her bedroom (State’s Exs. 2 and 5), “it appears, ... most likely, that she was ordered to lie flat on the floor, the individual put a pillow over her head, and then fired one shot through the pillow at relatively close range into her head.” R. pp. 595-99.<sup>10</sup> From his review of the crime scene photographs and autopsy reports, Agent Prodan did not see any evidence that either victim resisted. This suggested to Agent Prodan that the killer had gone into the residence with the belief that the victims would not cooperate and were potentially armed. This would explain why the perpetrator killed the victims - *i.e.*, the motive for the killings. R. p. 600-02; 604-05.

Over Stephens renewed objection to lack of relevancy, Agent Prodan was permitted to opine as to the manner in which Monica was murdered. He explained that, based on State’s Exs. 10 and 49, she had been killed in a manner similar to Jamilla. Because there was some feces in Monica’s bedroom, it appeared that she had been moved from her bedroom to the bathroom. She was moved there to kill her because she was a potential witness. R. pp. 602-04.

**B. Discussion.**

1. **Stephens’ belated relevancy objection does not preserve any issue for appellate review concerning testimony that was only objected to on the basis that the State had committed a discovery violation. [Additional Sustaining Ground].**

The Court of Appeals erroneously found the matter properly preserved for appellate review. As shown, Stephens’ only initial objection was that the State had committed a discovery violation. He also later claimed that one brief portion of Agent Prodan’s testimony was not relevant and that

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<sup>10</sup> There were two possible reasons for using a pillow case in this fashion. First, it is easier, emotionally, to depersonalize the victim and shoot a pillow rather a person’s head. Second, it would reduce the amount of recoil and prevent “any blow-back of blood” onto the perpetrator or his weapon. Again, this suggestion pre-planning. R. pp. 599-600.

it was speculative. R. pp. 573; 582-83; 602.<sup>11</sup> In arguing the trial court, Sessions did not advance anything close to the argument that he now raises on appeal.

On appeal, he relies upon this Court's opinion in *Tapp II*. In *State v. Tapp*, 387 S.C. 159, 691 S.E.2d 165 (2010) (*Tapp I*), reversed, 398 S.C. 376, 728 S.E.2d 468 (2012), the Court of Appeals had agreed with the defendant's challenge to the qualification of Agent Prodan as an expert witness and it reversed Tapp's convictions and sentence based upon this Court's decision in *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and its finding that the record was insufficient "for this court to determine whether Prodan should have been qualified [to testify] under *White*." *Tapp I*, 387 S.C. at 164-69, 691 S.E.2d at 167, 169-170.<sup>12</sup> This Court granted certiorari and reversed in *Tapp II*. See 398 S.C. at 379, 728 S.E.2d at 470.

This Court found that the Court of Appeals had

misstated that White created the requirement that "the foundational reliability of nonscientific testimony must be tested prior to the qualification of an expert." *Tapp I*, 387 S.C. at 166, 691 S.E.2d at 169 (emphasis added). The court additionally stated, "this court is left with no guidance on what test or elements must be satisfied to establish the foundational reliability necessary to qualify an expert in the fields of crime scene analysis and victimology." *Id.* at 166-67, 691 S.E.2d at 169. 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

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<sup>11</sup> On appeal and despite a claim that he was not given notice of Prodan's testimony, he has not challenged, either before the Court of Appeals or this Court, the trial judge's ruling that there was no *Brady* violation. Therefore, that argument has been abandoned. *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (an issue not argued in the appellant's brief is deemed abandoned); Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari ..."); *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the court of appeals and not raised in petition for rehearing).

<sup>12</sup> Specifically, the Court of Appeals in *Tapp I* was concerned about the absence of findings by the trial judge of the foundational requirements under *White* that "(1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact." *Tapp I*, 387 S.C. at 164-69, 691 S.E.2d at 167-70.

to the admission of expert testimony, and generally, a witness's expert status will be determined prior to determining the reliability of the testimony.

*Tapp II*, 398 S.C. at 388, 728 S.E.2d at 474-75.

Contrary to Stephens' construction of this Court's decision, the Court did not find that the trial court had erred in qualifying Prodan as an expert. *Id* at 387-89, 728 S.E.2d at 474-75. Rather, the Court found that "[u]nder *White*, after qualifying Prodan as an expert, the circuit judge should have then evaluated the substance of Prodan's testimony to determine if it was reliable, as required by Rule 702, SCRE." This Court did not express any view on the reliability of his opinions. *Id* at 387 n. 11, 728 S.E.2d at 474 n. 11. While the trial court had erred, this Court found that any error was harmless beyond a reasonable doubt because it "did not contribute to the guilty verdict." *Id* at 389-90, 728 S.E.2d at 475.

However, Sessions did not raise any type of challenge to the foundational requirements for this testimony or to Agent Prodan's expertise in the trial court. His only objection was that a small portion of Agent Prodan's testimony would not assist the jury any was speculative. This did not preserve any objection to the portions of Prodan's previously-admitted testimony to which no objection was taken and it did not preserve the current argument. Thus, his argument on appeal is procedurally barred. *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").<sup>13</sup>

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<sup>13</sup> *See also State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled").

Also, his suggestion that this Court found that it was improper to qualify Prodan as an expert ignores that why this Court reversed the Court of Appeals, and his argument must be rejected in light of both the current record and this Court's decision in *Tapp II*. See also Rule 702, SCRE ("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"); *White*, 382 S.C. at 269, 676 S.E.2d at 686 ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)"); *Mizell v. Glover*, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002) ("A trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion"). As the California Supreme Court in *People v. Prince*, 40 Cal.4th 1179, 1222, 156 P.3d 1015, 1047, 57 Cal.Rptr.3d 543, 580 (2007), "experts may testify even when jurors are not 'wholly ignorant' about the subject of the testimony. ... 'If that [total ignorance] were the test, little expert opinion testimony would ever be heard.'" (Citations omitted).

**2. Alternatively, the Court of Appeals properly found that any error in admitting Prodan's testimony was harmless beyond a reasonable doubt.**

Even if this Court finds that the issue was not procedurally barred, Respondent alternatively submits that reversal still is not required because the Court of Appeals correctly found, as this Court had in *Tapp II*, that any error in admitting the substance of his testimony - without first vetting it for reliability - was harmless beyond a reasonable doubt because it did not contribute to the verdict. The Court of Appeals observed that this Court's decision in *White* "was issued several months after the trial in the present case took place." It further found that Sessions' gatekeeper argument was

preserved for appellate review based upon this Court's decision in *Tapp II. Sessions*, at 3, **App. 3**.

It then found that any error was harmless, as follows:

we hold that "beyond a reasonable doubt the trial error did not contribute to the guilty verdict[s]" against Stephens. *Id.* at 390, 728 S.E.2d at 475. Here, Prodan's testimony concerned only the victims and the crime scene. He never identified Stephens, the co-defendant, or anyone else as a perpetrator and testified that at his insistence, he was not given any information about any suspects developed in the case. As was the case in *Tapp [II]*, the jury made numerous factual determinations in arriving at its verdict, including ( 1) whether Pearl testified truthfully about the victim's accusations against Stephens and the defendants' attempt to enlist his help in committing the crimes, (2) the credibility of witnesses who allegedly heard Stephens's co-defendant admit to committing a crime, (3) whether shoe prints found at the crime scene matched the shoes taken from the property bag of Stephens's co-defendant, and (4) the credibility of testimony that certain individuals knew about the deaths of the victims before the police found their bodies.

*See Sessions*, at 3-4, **App. 3-4**.

Additionally, Respondent would point to the other, overwhelming evidence that conclusively proved Stephens' guilt. The prosecution's case was that the killings occurred close to midnight on Thursday June 9, 2006. This was when Jamilla and Monica's neighbor, Teresa Greene, heard several "pops" that sounded like fire crackers. **R. pp. 298-301.**<sup>14</sup>

Apart from Agent Prodan's testimony, the State's other evidence showed that:

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<sup>14</sup> Monica was a drug dealer who sold cocaine and marijuana. **R. p. 131; 182-84**. Anyone wishing to buy drugs from her had to telephone a request first and then go to her residence to get the drugs. She kept some marijuana and cocaine that had already been bagged in the kitchen, and she kept larger amounts of drugs in her bedroom. She did not allow anyone into the bedroom. **R. pp. 131-37**.

- Sessions and Stephens came by the residence of James Pearl, who also knew both victims and purchased drugs regularly from Jamilla, on Wednesday June 8<sup>th</sup>. They were in a blue Jeep Grand Cherokee that Sessions was driving. All three men were broke and, after Pearl got into the vehicle, his friends began talking about committing some robberies. While they were talking, Jamilla came up to the vehicle and got into a verbal argument with Stephens over drug money that he owed her. She was angry when she left. **R. pp. 119-22.**
- Sessions and Stephens then discussed robbing Jamilla. Stephens said that "[h]e He couldn't rob her because she knew him, but Jimmy Lee was like, I can rob her though, . . . she don't know me." Because they knew that Jamilla would not voluntarily give them drugs or money, they said that they were "[g]oing to have to lay her down" or kill her. They asked Pearl to be the "door man," but he refused to get involved and he got out of the vehicle. Pearl did not think that his friends knew that Monica was there. **R. pp. 122-24; 142.**
- Pearl, who learned about the murders on Friday June 10<sup>th</sup>, testified that Sessions called him later that night and invited Pearl to "come chill" with Sessions. When Pearl reached Sessions' location, he and Sessions "had a little fling" with a girl who was there named "Poo." He and Sessions then went into the bathroom. Sessions had a "dinner plat[e] full" of cocaine and he allowed Pearl to snort some, using a drinking straw. Pearl surmised that the cocaine was Jamilla's based on its unique smell. While they used the drugs, Sessions told Pearl that he had killed Jamilla and Monica. Sessions also had some high-quality marijuana and the two friends smoked a "cigar of it. At some point, Sessions also showed Pearl a black semi-automatic weapon. However, Pearl was unsure whether it was a 9 mm. or a .40 caliber. **R. pp. 125-28.**
- When describing what he had done, Sessions told Pearl that "when he was in the house, and he was leaving out, he heard the shower go off, and . . . and the bathroom door opened up and [Monica] was standing there looking him in his face, so he said he rushed in the bathroom, put it - and shot her, and left her in the tub. **R. p. 129.**
- Sessions called Pearl on Saturday and he asked Pearl to send him a \$100.00 moneygram. While Pearl said that he would do so, he never sent it. **R. p. 130.**
- Pearl later had a telephone conversation with Stephens, in which Stephens accused him of sending the police to Connecticut after Sessions. Pearl denied doing this. **R. pp. 130-31.** Pearl did not initially come forward because he was afraid of Sessions and Stephens. **R. pp. 141-42.**
- Jamilla's first cousin, Rodney Turner, Jr., was at the house on Wednesday, June 8<sup>th</sup>. The house was neat at that time, **R. pp. 185-86**, but it was messy and articles were disturbed when police arrived on Friday the 10<sup>th</sup>.

- While Turner was there, Stephens came to the house between 9:30 and 10:00 p.m. on Wednesday. Stephens had come in a truck or SUV. "He had on all black when he came to the house. He was in the living room area." Also, he was "nervous, looking around." Stephens and Jamilla went outside briefly. When Jamilla returned, she was alone and she was mad. **R. pp. 186-87.**
- Shortly, thereafter, Turner drove Jamilla to another residence where she "re-up[ped]" her supply of cocaine. Afterwards, Turner drove her home. **R. pp. 187-88.**
- Turner had never seen Sessions at Jamilla's residence, but she had spoken about him. Apparently, the friendship between Sessions and Jamilla soured because of drug business disputes. **R. pp. 188-89.**
- Sometime between 9:00 and 10:30 p.m. on Thursday June 9<sup>th</sup>, Matthew Junior Campbell saw Sessions outside of the apartment complex where Campbell lives. Sessions was dressed in black clothing and he had on a black hoodie. Also, he had a gun "[o]n his side." Sessions told Campbell that "he's got to get him a lick, a robbery . . . because he's got to get out of town because he's hot." Sessions then left the complex with another person on foot. The apartment complex is within walking distance of the crime scene. **R. pp. 238-41.**
- Christy Regina Peal, James Pearl's cousin, testified that on Thursday the 9<sup>th</sup>, she was at the residence that she shared with Mildred Brown and her sister-in-law "partying and playing cards" all day. James Pearl and Phonetia Hightower (Jamilla's cousin) were also present. She had smoked a cigar full of marijuana that day. Mildred, James Pearl and Phonetia were using cocaine, while James and Mildred were drinking. At some point, Christy, Mildred and Phonetia left the residence and, at Jamilla's prior request, went to Jamilla's residence. Christy then drove Jamilla to a local Super 8 motel. When Jamilla came out of the motel, Christy drove her home. Jamilla paid her \$ 40.00 for the ride. After that, Christy and the other women went home. **R. pp. 265-76; 280.**
- At some point, Sessions came to the residence. He was dressed in black clothing, including a black hoodie, and he was wearing gloves. Phonetia left with him. **R. pp. 276-82.**
- Christy saw Phonetia later that morning and Phonetia told her that Jamilla and Monica were dead. She did not take Phonetia seriously because Phonetia often lies. However, Christy went to Jamilla's house around 1:00 p.m. or so; and Jamilla did not respond to either a telephone call or the door bell. **R. pp. 282-85; 287.**
- Antwann Higgins was another first cousin of Jamilla and they had briefly lived

together at the residence where the murders occurred, along with Higgins' girlfriend, Melissa Gomez. Higgins and Melissa moved to another location when he and Jamilla argued over the fact he "had raised my hand at Melissa. Yet, they were not having any difficulties at the time of the murders. **R. pp. 303-08.** Higgins and Melissa discovered the bodies at roughly 6 p.m. on Friday, June 10<sup>th</sup>. They went next door and had a neighbor call -911. **R. pp. 309-10; 313-20; 358-64.**

- Higgins denied ever stepping into Monica's bathroom and he voluntarily submitted to gunshot residue testing. The police searched his residence, and the took the four pairs of shoes. Police also found two weapons: a .32 caliber handgun and a .25 caliber handgun. **R. pp. 324-25; 327-31.** None of the items seized connected him to the murders.
- Craig Burris, who was incarcerated while awaiting trial for an unrelated murder, was in the Jet Age "social club" one night shortly after the murders. He saw Sessions there, and Sessions invited him to get high with him at the residence of an individual named "LeeLee," in Myrtle Beach area. When Burris arrived at the residence, "LeeLee was there with his girlfriend, and Stephens was present. **R. pp. 531-35.**
- While there, Burris snorted cocaine and smoked marijuana that Sessions provided. Sessions also gave him "about a gram or two" of cocaine. Sessions and he had often shared drugs with one another, but this was the most cocaine that Session had ever given to him. Sessions acted as if he was celebrating and he told Burris that he "just . . . hit a lick, just like a robbery or something." Burris saw Sessions and Stephens talk, but their conversations were private. **R. pp. 535-39.**
- Expert testimony established that cartridge casings found at the scene (**State's Exs. 55-56**) were fired by the same firearm. The two projectiles - one recovered from the floor of the shower in the bathroom and the other removed from Jamilla's head at autopsy - were also fired by a single firearm. The projectiles "were most consistent with bullets that are loaded into some [.40 caliber] Smith and Weston . . . cartridges." **R. pp. 616-19.**

Thus, the State had established overwhelming evidence of guilt, separate and apart from Agent Prodan's testimony. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.

- II. The trial judge properly allowed the State to introduce James Pearl's testimony about a conversation between Stephens and the victim because any statements by Stephens were admissible as admissions and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. *See Rule 801(d)(2)(B), SCRE.* Likewise, the conversation was also admissible to show bad

**blood between Stephens and Jamilla. Alternatively, any error was harmless beyond a reasonable doubt.**

Stevens maintains that the trial judge erroneously allowed the State to introduce the testimony of James Pearl of a conversation between Jamilla Hightower and Stephens, in which “decedent Jamilla Hightower was screaming in anger about the money he owed her for drugs because this testimony was highly prejudicial hearsay.” Respondent submits that his argument lacks merit and that the trial judge properly allowed the State to introduce Mr. Pearl’s testimony because any statements by Stephens were admissible as admissions by him and as statements by a co-conspirator in furtherance of a conspiracy to rob and murder Jamilla. Further and as the Court of Appeals correctly reasoned, *Stephens*, at 2, **App. 2**, his silence in the face of her statements were adoptive admissions by him of the debt that he owed her for drugs. *See* Rule 801(d)(2)(B), SCRE. Also, “because the deceased victim was an unavailable declarant and her accusation against Stephens included a declaration on her part that she sold illegal drugs to him, the statement was admissible under Rule 804(b)(3), SCRE, as a statement against her interest.” *Stephens*, at 2, **App. 2**.<sup>15</sup> Alternatively, any error was harmless beyond a reasonable doubt.

**A. How the issue arose at trial.**

James Pearl testified that he knew both victims and purchased drugs regularly from Jamilla. Sessions and Stephens came by Mr. Pearl’s residence on Wednesday June 8<sup>th</sup>. It was still light. They were in a blue Jeep Grand Cherokee that Sessions was driving. All three men were broke and, after Pearl got into the vehicle, his friends began talking about committing some robberies. While they were talking, Jamilla came up to the vehicle and got into a verbal argument with Stephens over drug

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<sup>15</sup> Likewise, their conversation was also admissible to show bad blood between Stephens and Jamilla.

money that he owed her. She was angry when she left. **R. pp. 119-22.**

Stephens' argument on appeal centers around the following exchange:

Q. Did Jamilla ever come up to that car?

A. Yes Ma'am.

Q. Were you present?

A. Yes Ma'am.

**MR. FREDERICK:** And Judge, we are going to object to any hearsay, as far as testimony from him about what Jamilla Hightower said.

**THE COURT:** I'll be glad to hear any objection as to any hearsay. I haven't heard anything yet.

Go ahead.

**Ms. Elder:** Thank you, Your Honor.

Q. Did she talk to anybody in the vehicle?

**MR. FREDERICK:** Judge, we object to the hearsay. [The] question elicits a hearsay response.

**THE COURT:** No sir, it does not. There is no hearsay at the present time. I'll be glad to hear from you if you wish to make an objection as to hearsay when any comes up.

Q. Did she talk to anybody in the vehicle?

A. Yes Ma'am.

Q. Did anybody in the vehicle talk to her?

A. Yes Ma'am.

Q. Who?

A. She was talking - - it was basically over money. It was - - she was screaming about money, and - - -

Q. Before we get to that, who was talking with her?

A. Well, she - - -

**MR. FREDERICK:** Judge, still objecting to the hearsay. Now he is testifying as to hearsay.

**THE COURT:** No sir.

You may proceed, Solicitor.

**Ms. Elder:.** Thank you, Your Honor.

Q. Who was talking with her?

A. Chris.

Q. Chris Stephens?

A. Yes Ma'am.

Q. And what was Chris Stephens saying to her?

A. Basically she was screaming on Chris about the money that he owed her.

Q. And what was he saying?

A. He ... told her at first, I'm going to pay you, and then he laughed it off, you know, and then he was like, I ain't going to pay the -- I ain't going to pay this girl, you know what I mean, so she was mad, and she told him, I want my money or - - -

**MR. FREDERICK:** Judge, I've got no problem with him saying what Christopher said, because those are statements that are admissible outside of the hearsay rule, but I'm asking the Court to not allow the witness to testify as to what other people said, including Jamilla Hightower.

**THE COURT:** No sir. I'm going to allow it. Thank you.

Q. Continue, Mr. Pearl.

A. It was about -- it was about drug money that was owed, so she was mad, very upset, and after that she left.

**R. p. 120, l. 16-p. 122, l. 19.**

Immediately after Jamilla left, Stephens and Sessions resumed their discussion about robbing her. Stephens said that he could not rob her because she knew him. However, Sessions indicated that he could rob her. Pearl did not want any part of their plan and he exited the car at that point in the conversation.<sup>16</sup> **R. pp. 122-24.**

**B. Discussion.**

“The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal.” *Gambell v. Int’l. Paper Realty Corp.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). To warrant reversal, an Appellant “must show both the error of the ruling and resulting prejudice.” *Recco Paper & Label Co. v. Barfield*, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994); *State v. Hamilton*, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001). “An error without prejudice does not warrant reversal.” *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct.App.2005). *See also State v. Vick*, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct.App. 2009) (“The improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice”).

Contrary to Sessions’ argument, which seeks to obfuscate the issue before the Court by derisively referring to the victim and Mr. Pearl while simultaneously ignoring his own complicity in the murders of two individuals, the statements at issue are not hearsay. First, any statements by Stephens are admissible as admissions by him under Rule 801(d)(2), SCRE. His statements are also admissible as statements by a co-conspirator in furtherance of the conspiracy to rob and murder

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<sup>16</sup> They had wanted him to act as a “doorman,” to help them gain entry into Jamilla’s residence.**R. pp. 123-24.**

Jamilla Hightower. *See* Rule 801(d)(2)(E), SCRE.<sup>17</sup>

Nor was Pearl's testimony that Jamilla was screaming at Stephens because he owed her money for drugs hearsay. Under Rule 801(d)(2)(B) SCRE, "[a] statement is not hearsay if ... the statement is offered against a party and is ... a statement of which the party has manifested an adoption or belief in its truth." This rule is consistent with prior South Carolina law.<sup>18</sup> In *State v. McIntosh*, 94 S.C. 439, \_\_\_, 78 S.E. 327, 329 (1913), this Court explained the rule as follows:

Statements made in the presence of a party are generally admissible, if he remains silent, when they are made, and the circumstances are such that he can speak and naturally would or ought to respond to them. In such circumstances, his silence may afford ground for inferring that he acquiesces in the truth of the statements. But, where the situation is such that it would be improper for him to respond, statements made to him or in his presence are inadmissible. So, also, if he positively and unequivocally denies the truth of such statements, ... they are inadmissible.

*See also State v. Sharpe*, 239 S.C. at 271, 122 S.E.2d at 629 ("This Court has held that statements in the presence of the accused by a third person are admissible as evidence when such accused remains silent and does not deny such statements"); *State v. Nolan*, 318 S.C. 253, 257-58, 456 S.E.2d 926, 928-29 (Ct.App. 1999) (statement made by police officer, who died before the trial, that he had stopped vehicle being driven by drug defendant because it was weaving, was admissible over hearsay objection to establish probable cause for stop of vehicle where there were independent *indicia* of reliability since testifying officer had seen vehicle weave as it approached him after it had been

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<sup>17</sup> "While hearsay testimony generally is not admissible, an exception is allowed when a statement is offered against a party and is 'a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.' Rule 801(d)(2)(E), SCRE. When a statement meets these requirements, it is considered non-hearsay." *State v. Sims*, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010). Unlike the factual scenario in *Sims*, Stephens cannot seriously contend that his statements to Jamilla, in which he feigned an agreement to pay her money that he owed her and thereby provided him and Sessions with a possible manner for entry into her residence that would not otherwise exist, were not in furtherance of the conspiracy to rob and murder her.

<sup>18</sup> *See* Comments to Rule 801(d)(2)(B) (citing *Sharpe*, *supra*; *State v. Knoten*, 347 S.C. 296, 312, 555 S.E.2d 391, 399 (2001)).

initially stopped, and officer making initial stop had told testifying officer in presence of defendant that defendant had been stopped for weaving and defendant did not contradict statement).

In the present case, Jamilla accused Stephens of owing her money for drugs. This was the reason that she was mad at him. He did not deny this accusation, even though the circumstances surrounding the conversation demonstrated that he could speak and naturally would or should have denied it if it was untrue. Rather than deny her accusation, Stephens admitted that he owed her money and he ostensibly agreed to repay it. He only revealed his actual intent when she left his presence and he resumed the conspiratorial conversation with Stephens about their plan to rob and murder her. Additionally, Stephens' conversation with Jamilla reflected that she had sold drugs to him. Her statement to this effect was admissible under Rule 804(b)(3), SCRE, since it was "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."

Further, the statements by her were admissible because, "[i]n homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor." *State v. Cooley*, 342 S.C. 63, 68-69, 536 S.E.2d 666, 669 (2000) (quoting *State v. Taylor*, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998)). As in *Cooley*, there is no contention that Jamilla was the aggressor. However, this evidence was still "relevant to proving the 'animus of the parties.'" *Cooley*, 342 S.C. at 69, 536 S.E.2d at 669. It may also be properly viewed as providing the motive for selecting her to rob and murder, as opposed to some other drug dealer. See *State v. Sweat*, 362 S.C.

117, 606 S.E.2d 508 (Ct.App. 2004).

Further, Stephens various statements to Jamilla were admissible. Thus, the jury properly heard him tell Jamilla, a drug dealer, that he would pay the money that he owed her. Her statements, by and large, simply gave context to Stephens' statements and were admissible for this purpose. See *United States v. Wills*, 346 F.3d 476, 490 (4<sup>th</sup> Cir. 2003) (witness statements made in conversation with defendant properly admitted to show context of incriminating admissions); *United States v. McDowell*, 918 F.2d 1004, 1007 (1<sup>st</sup> Cir. 1990) ("McDowell's own statements could, of course, be used against him; his part of the conversations was plainly not hearsay. Nor can a defendant, having made admissions, keep from the jury other segments of the discussion reasonably required to place those admissions into context.").

More importantly and even if the Court does not find that her declarations were properly admissible on this theory, any error in admitting this evidence was harmless and non-prejudicial beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. See *State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("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"). Again, the jury properly heard him tell Jamilla, a drug dealer, that he would pay the money that he owed her, and any statements by her were thus cumulative and not prejudicial.

Also, the State had established overwhelming evidence of guilt, separate and apart from either the evidence of which he now complains or Agent Prodan's testimony. In light of this

**1164**

evidence, discussed in **Argument I**, *supra*, any error was non-prejudicial and harmless beyond a reasonable doubt. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584. As a result, any error "could not reasonably have affected the result of the trial." *See Sherard*, 303 S.C. at 175, 399 S.E.2d at 596.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that this Court should deny certiorari.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

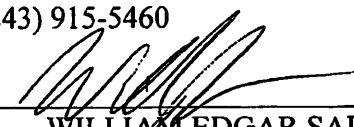
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By: 

WILLIAM EDGAR SALTER, III  
ATTORNEYS FOR RESPONDENT

July 19, 2013.

RECEIVED

JUL 19 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

S.C. Supreme Court

Appeal from Horry County  
The Honorable Steven H. John, Circuit Court Judge  
Appellate Case No. 2013-000793

THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

PETITIONER.

CERTIFICATE OF COMPLIANCE

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

This 19<sup>th</sup> day of July, 2013.



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

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

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**Appeal from Horry County  
The Honorable Steven H. John, Circuit Court Judge  
Appellate Case No. 2013-000793**

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**THE STATE,**

**RESPONDENT,**

**V.**

**CHRISTOPHER M. STEPHENS,**

**PETITIONER.**

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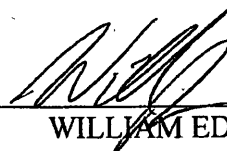
**CERTIFICATE OF SERVICE**

---

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari and Certificate of Compliance on Appellant by depositing three (3) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, South Carolina 29201.

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

This 19<sup>th</sup> day of July, 2013.



---

**WILLIAM EDGAR SALTER, III**

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P. O. Box 11549  
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(803) 734-6305

**ATTORNEY FOR RESPONDENT**

# The Supreme Court of South Carolina

The State, Respondent,

v.

Christopher M. Stephens, Petitioner.

Appellate Case No. 2013-000793

Lower Court Case No. 2007-GS-26-02974

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## ORDER

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Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Stephens*, Op. No. 2013-UP-062 (Ct. App. filed January 30, 2013). The petition is denied.

 C.J.  
FOR THE COURT

Columbia, South Carolina

November 7, 2014

cc:

The Honorable Jenny Abbot Kitchings

The Honorable Melanie Huggins-Ward

W. Edgar Salter, III, Esquire

Robert Michael Dudek, Esquire

1168



## The South Carolina Court of Appeals

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November 10, 2014

The Honorable Melanie Huggins-Ward  
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Conway SC 29528-0677

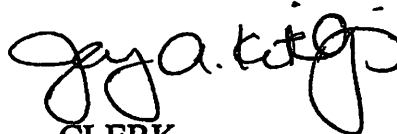
### REMITTITUR

Re: The State v. Stephens, Christopher M.  
Lower Court Case No. 2007GS2602974, 2007GS2602976, 2007GS2602975  
Appellate Case No. 2009-116988

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

  
CLERK

Enclosure

cc: Robert Michael Dudek, Esquire  
W. Edgar Salter, III, Esquire

STATE OF SOUTH CAROLINA )

County of Horry )

Christopher Stephens )  
Full name and prison number (if any) of Applicant )

#301767 )

v. )

State of South Carolina )

IN THE COURT OF COMMON PLEAS

20 14 CP26 7977

APPLICATION FOR

POST-CONVICTION RELIEF

CLERK OF COURT  
14 DEC -4 PM 1:57

**INSTRUCTIONS - READ CAREFULLY**

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

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

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

1. Place of detention Lieber Correctional Inst. Ridgerville  
S.C. 29472

2. Name and location of Court which imposed sentence Horry County

3. Name(s) of co-defendant(s) (if any) Jimmy Lee Sessions

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 07-GS-26-2974 Accessory before Fact Murder

(b) 07-GS-26-2975 Accessory before Fact Murder

1170

(c) 07-65-26-2976 - Accessory before fact Armed Robbery

5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 40 years Concurrent Feb. 6<sup>th</sup>, 2009
- (b) 40 years Concurrent Feb. 6<sup>th</sup>, 2009
- (c) 30 years Concurrent Feb. 6<sup>th</sup>,
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty ☒ \_\_\_\_\_
- (c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (b) the result in each such Court to which you appealed:
- i. Affirmed Conviction
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (c) the date of each such result:
- i. January 30, 2013
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Stevens, 2013-4P-062 (sc.ctApp)
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A

- (c) \_\_\_\_\_
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel / Trial
- (b) Investigative & Prosecutorial Misconduct; Judicial
- (c) Ineffective Assistance of Appellate Counsel
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See: Attached Memorandum of Law
- (b) Supporting Application for P.C.R.
- (c) \_\_\_\_\_
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Petition for Writ of Certiorari
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
- i. S.C. Supreme Court
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(c) the disposition thereof:

- ? i. \_\_\_\_\_  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_  
 iv. \_\_\_\_\_

(d) the date of each such disposition:

- ? i. \_\_\_\_\_  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_  
 iv. \_\_\_\_\_

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

- ? i. \_\_\_\_\_  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_  
 iv. \_\_\_\_\_

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

No

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

(a) which grounds have been presented:

- i. N/A  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

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

- i. N/A  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A  
 (b) \_\_\_\_\_  
 (c) \_\_\_\_\_

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

(a) your arraignment and plea? yes  
 (b) your trial, if any? yes  
 (c) your sentencing? yes  
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes  
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?  
yes

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

(a) the name and address of each attorney who represented you:  
 i. Bobby G. Frederick, Esq. P.O. Box 8219  
Myrtle Beach, S.C. 29578  
 ii. Laura L. Hiller, Esq.  
 iii. Robert M. Dudek, Esq. 1330 Lady St. Suite 401  
P.O. Box 11589, Columbia, S.C. 29211-1589  
 (b) the proceedings at which each such attorney represented you:  
 i. (a); (b); (c) of 17.  
 ii. (A); (b); (c) of 17.  
 iii. (d); (e) of 17.

1174

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

See Attached sheets  
Memorandum of Law  
Supporting Application for P.C.R.

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

NO

STATE OF SOUTH CAROLINA )

County of Horry )

14 7977  
VERIFICATION

I, Christopher M. Stephens, #301767, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

x [Signature]

SWORN to and subscribed before me this 01  
day of December, 2014.

Ludrean Bryant (L.S.)  
Notary Public

My Commission Expires: May 26, 2020

14 DEC -4 PM 1:57  
CLERK OF COURT  
WARD

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

2014

7997

I, Christopher M. Stephens, #301767, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

  
Applicant

SWORN or affirmed to and subscribed before me this  
01 day of December, 2014.

  
Notary Public

My Commission Expires: May 26, 2020

CLERK OF COURT  
14 DEC -4 PM 1:57  
COUNTY

December 1, 2014

1176

Madam Clerk,

Could you please send me a clocked stamped copy as  
a matter of record for my Habeas Corpus. Thank you in  
advance!

Christopher M. Stephens



CLERK OF COURT  
14 DEC -4 PM 1:57  
CLERK OF COURT

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Christopher Stephens, #301767,

) Case No. 2014-CP-26-7977  
)

Applicant,

)

)

)

v.

)

**RETURN**

)

State of South Carolina,

)

)

Respondent.

)

)

Respondent, making its Return to the Application for Post-Conviction Relief filed December 4, 2014, would respectfully show this Court:

**I.**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In July 2007, the Horry County Grand Jury indicted Applicant for three counts of accessory before the fact to two murders and an armed robbery (2007-GS-26-2974, -2974, -2976). Bobby G. Frederick, Esquire, and Laura L. Hiller, Esquire, represented Applicant. On February 2, 2009, Applicant proceeded to trial before the Honorable Steven H. John and a jury. On February 6, 2009, the jury found Applicant guilty as indicted. Judge John sentenced Applicant to concurrent terms of forty years imprisonment for each count of accessory before the fact to murder and thirty years imprisonment for accessory before the fact to armed robbery.

Applicant filed a timely notice of appeal, and Robert M. Dudek, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 30, 2013. State v. Stephens, Op. No. 2013-UP-062 (S.C. Ct. App. filed

January 30, 2013). The South Carolina Supreme Court denied Applicant's petition for writ of certiorari on November 7, 2014. The remittitur was returned to the circuit court on November 10, 2014.

## **II.**

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel/Trial"
2. "Investigative & Prosecutorial Misconduct & Judicial"
3. "Ineffective Assistance of Appellate Counsel"

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the Application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRPC.

Attached to this Return and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

## **III.**

Respondent moves pursuant to Rule 12(e), SCRPC, to require Applicant to provide a more definite statement of his allegations. The Uniform Post-Conviction Procedure Act requires applicants to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Furthermore, Rule 8(a), SCRPC, requires all civil

pleadings include “a short and plain statement of the facts showing that the pleader is entitled to relief.”

Question 11 of the PCR application asks Applicant to state concisely the supporting facts for each of his grounds for relief. In response to that question, Applicant indicates his supporting facts are located in an attached memorandum. However, no memorandum was attached to the application.

Accordingly, Respondent submits Applicant’s allegations are so vague and ambiguous that Respondent cannot be reasonably required to frame a responsive return. Therefore, Respondent moves to require Applicant to file an amended application well in advance of the hearing scheduled in this matter.

#### **IV.**

Without waiving its motion for a more definite statement in Part III, supra, Respondent submits Applicant’s allegation of ineffective assistance of trial counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove trial 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.” Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the

exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

## V.

Without waiving its motion for a more definite statement in Part III, supra, Respondent submits Applicant's allegations regarding investigative, prosecutorial, and judicial misconduct should be dismissed. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.").

Applicant's allegations regarding investigative, prosecutorial, and judicial misconduct could have been raised on appeal. His failure to do so has waived these allegations as grounds for relief.

Therefore, Respondent requests these allegations be dismissed pursuant to Rule 12(b)(6), SCRC.P.

## VI.

Without waiving its motion for a more definite statement in Part III, supra, Respondent submits Applicant's allegation of ineffective appellate counsel is without merit. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 526; Strickland, 466 U.S. at 687. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. Sharper, 279 S.C. 264, 305 S.E.2d 247.

**1182**

**VII.**

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

**VII.**

WHEREFORE, having made its return, Respondent requests Applicant provide a more definite statement of his claims, and an evidentiary hearing be held on any claims so requiring one.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS  
Assistant Attorney General  
S.C. Bar No. 100777

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
Telephone: (803) 734-3737

July 30, 2015

STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS

CHRISTOPHER STEPHENS, #301767 )

2014-CP-26-7977

Applicant, )

vs )

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA, )

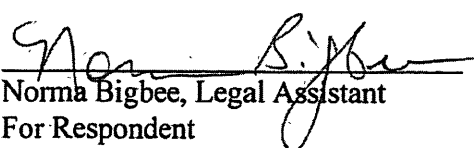
Respondent. )  

---

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Steven W. Fowler, Esquire  
1019 Highway 17 South #222  
North Myrtle Beach, SC 29582

DATED this 30<sup>TH</sup> day of July, 2015.

  
Norma Bigbee, Legal Assistant  
For Respondent

**1184**

|                         |   |                               |
|-------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA | ) | COURT OF COMMON PLEAS         |
|                         | ) |                               |
| COUNTY OF Horry         | ) | FOR THE 15th JUDICIAL CIRCUIT |
|                         | ) |                               |
| Christopher Stephens    | ) |                               |
| Plaintiff               | ) | 2014-CP-26-07977              |
| vs.                     | ) |                               |
|                         | ) |                               |
| State of South Carolina | ) | AMENDED PCR APPLICATION       |
| Defendant,              | ) |                               |
| _____                   | ) |                               |

TO: Caitlin Hastings, Office of SC Attorney General, PO Box 11549,  
Columbia, SC 29211-1549.

Applicant by counsel moves to amend his PCR application by amending his response to question 11 on his Application for PCR relief to include the following factual support for his claims of ineffective assistance.

1. Appellate Counsel Robert Dudek, Chief Appellate Defender, failed to include in Applicant's appeal the issue of whether the Court erred in charging the Jury on the issue of Third Party Guilt. On page 1010 of the record on appeal, the trial court charged the jury on third party guilt. On page 1019 of the record on appeal trial counsel objected to the inclusion of the third party guilt charge. The issue was properly preserved by trial counsel, and Appellate counsel should have included it as one of the issues on appeal.
2. Certain family members of the victims appeared in court and in the presence of the jury wearing T-shirts and or buttons bearing pictures of the victims. Once it was known that certain jurors were exposed to this influence from the victim's family, trial counsel should have either moved for a mis-trial or sought to have jurors subjected to individual voir dire to determine if the exposure affected the jurors' ability to be fair and impartial.
3. Prior to this trial, there was a mistrial as the result of a hung jury. Trial counsel was ineffective by failing to procure a transcript of the prior trial prior to the commencement of the dispositive trial. There were numerous instances

where the State's witness's testimony differed from the first trial to the second trial. Trial counsel's failure to obtain the prior transcript deprived trial counsel of an effective tool for impeaching the testimony of the State's witnesses.

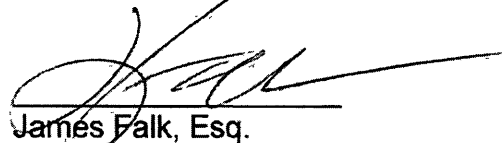
4. Trial counsel failed to call witnesses that would have provided either alibi or other exculpatory testimony.

5. Trial counsel failed to object during State's closing arguments when State impermissibly bolstered the testimony of its own witnesses.

6. Trial counsel failed to object to the State's impermissible "golden rule" arguments during the State's opening and closing arguments.

7. During closing arguments the State told jury that defense counsel know their clients were guilty. Trial counsel was ineffective for merely asking that prejudicial remarks be stricken and not seeking a mistrial.

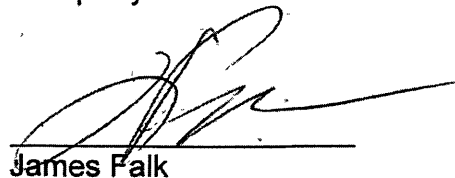
Respectfully Submitted,



James Falk, Esq.  
PO Box 1058  
Charleston, SC 29402  
(843) 606- 6007  
(843) 972 9005 fax  
jfalklaw@gmail.com

**CERTIFICATE OF SERVICE**

Undersigned certifies that on November 7, 2016 a copy of the above was deposited in the US Mail to the above named party at the above identified address. Additionally a copy of the above was emailed to the above named party.



James Falk

1186

1 STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD

2 COUNTY OF HORRY )

3 PCR HEARING

4 -----  
5 B E F O R E: The Honorable Brooks P. Goldsmith  
6 November 15, 2016  
7 -----

8 JIMMY LEE SESSIONS, CASE NO.: 2014-CP-26-8318

9 Petitioner/Applicant,

10 vs.

11 STATE OF SOUTH CAROLINA,

12 Respondent.  
13 -----

14 CHRISTOPHER STEPHENS, CASE NO.: 2014-CP-26-7977

15 Petitioner/Applicant,

16 vs.

17 STATE OF SOUTH CAROLINA,

18 Respondent.  
19 -----

20 APPEARANCES:

21

22 James Falk, Esq.  
23 For the Petitioners.

24 Jessica Kinard, Esq.  
25 For the Respondent.

26

27

28

29

Court Reporter:  
Natalie Dahl, RPR

**1187****I-N-D-E-X**1  
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25**WITNESSES****ROBERT DUDEK**

Direct Examination by Mr. Falk..... 6

**LIBBY PIERCE**

Direct Examination by Mr. Falk..... 15

Cross-Examination by Ms. Kinard..... 21

**CHRISTOPHER STEPHENS**

Direct Examination by Mr. Falk..... 22

Cross-Examination by Ms. Kinard..... 30

Redirect Examination by Mr. Falk..... 32

**JIMMY LEE SESSIONS**

Direct Examination by Mr. Falk..... 33

Cross-Examination by Ms. Kinard..... 39

**BOBBY FREDERICK, ESQ.**

Direct Examination by Mr. Falk..... 42

Cross-Examination by Ms. Kinard..... 58

Redirect Examination by Mr. Falk..... 63

**JOHNNY GARDNER**

Direct Examination by Mr. Falk..... 64

Cross-Examination by Ms. Kinard..... 75

Examination by The Court..... 80

Redirect Examination by Mr. Falk..... 82

**E-X-H-I-B-I-T-S****EXHIBITS****MARKED & ADMITTED****(NO EXHIBITS MARKED)**

1188

P-R-O-C-E-E-D-I-N-G-S

1  
2 MS. KINARD: We'll do together Christopher  
3 Stephens and Jimmy Lee Session versus South Carolina.  
4 Mr. Stephens is 2014-CP-26-7977. We're before the  
5 Court for an application for post-conviction relief  
6 filed September 4, 2014. Mr. Stephens is presently  
7 confined in the Department of Corrections of South  
8 Carolina pursuant to orders of commitment by the Horry  
9 County Clerk of Court. In July of 2007, the Horry  
10 County Grand Jury indicted him for three counts of  
11 accessory before the fact to two murders and an armed  
12 robbery. He was represented by Bobby Frederick and  
13 Laura Hiller. On February 2, 2009, he proceeded to  
14 trial along with Mr. Sessions before the Honorable  
15 Steven H. John, and a jury. On February 6, 2009, he  
16 was found guilty as indicted and he was sentenced to  
17 concurrent terms of 40 years imprisonment for each  
18 count of accessory before the fact of murder, and 30  
19 years imprisonment for accessory before the fact of  
20 armed robbery. He did file a Notice of Appeal and was  
21 represented by Mr. Bob Dudek. The Court of Appeals  
22 affirmed his conviction on January 3, 2013, and the  
23 supreme court denied his petition for writ of  
24 certicrari on November 7, 2014, with the remittitur  
25 being returned on November 10, 2014. He also filed an

1189

1 amended application by and through Mr. Falk on  
2 November 7, 2016.

3 Turning to Mr. Sessions, his case number is  
4 2014-CP-26-8318. His application for post-conviction  
5 relief was filed December 16, 2014. He also is  
6 confined to the South Carolina Department of  
7 Corrections pursuant to orders of commitment of the  
8 Horry County Clerk of Court. Also in July of 2007 he  
9 was indicted by the Horry County Grand Jury for two  
10 counts of murder and one count of armed robbery. In  
11 July 2008, he was indicted for burglary first degree  
12 and was represented by Johnny Gardner on all charges.  
13 He proceeded to trial along with Mr. Stephens on  
14 February 2 through the 6th, 2009 -- Your Honor, Mr.  
15 Gardner ran downstairs for a juvenile hearing, and  
16 they just started his hearing, so we might have to  
17 push this for a few minutes, if that is amenable, or  
18 we can start other testimony. What do you think, Jim?

19 THE COURT: Do you need that witness to begin  
20 with? I don't know.

21 MR. FALK: I'm not trying to delay things, but I  
22 think we need him.

23 MS. KINARD: I would like him to hear the  
24 testimony.

25 THE COURT: We have some guilty pleas we can do

1190

1 in the meantime, that we can go ahead and get through.  
2 Stand this down for a few minutes.

3 (A recess was taken.)

4 MS. KINARD: We're back with Stephens and  
5 Sessions versus State, codefendants. I believe we  
6 read the entire history at this point. Both  
7 applicants are here and represented by Jim Falk.

8 MR. FALK: There is one matter, just so the  
9 record reflects, in an earlier hearing both of these  
10 clients already went on the record and said they would  
11 waive conflict of interest with me representing both  
12 of them. I think that is still their intention, and  
13 I've been in communication with them, and I just want  
14 you to know that that was addressed before and they  
15 did both waive.

16 THE COURT: All right.

17 MS. KINARD: One of the allegations raised by Mr.  
18 Falk is ineffective of appellant counsel. Because Mr.  
19 Dudek is in Columbia and under subpoena around the  
20 state this week, and Your Honor has been so gracious  
21 to allow telephone testimony, if we could go off the  
22 record to get him on, and then go back on.

23 THE COURT: Sure.

24 (A recess was taken.)

25 DIRECT-EXAMINATION

## ROBERT DUDEK - DIRECT EXAMINATION

1191

1 BY MR. FALK:

2 Q One of the issues that I've raised --

3 THE COURT: Do we need to put the witness under  
4 oath?

5 MS. KINARD: That's probably a good idea.

6 THE COURT: State your name for the record.

7 THE WITNESS: Robert M. Dudek, D-U-D-E-K.

8 (ROBERT DUDEK, having been duly sworn,  
9 testified as follows:) you may proceed

10 DIRECT-EXAMINATION

11 BY MR. FALK:

12 Q Were you appointment to represent Mr. Stephens or  
13 Mr. Sessions on the appeal of his -- of their trial  
14 here in Horry County?

15 A Right. I represented Mr. Stephens, and former  
16 case attorney, and later senior appellant defender,  
17 Joseph Savage represented the codefendant.

18 Q As part of reviewing -- in order to prepare for  
19 your appellant arguments, did you obviously review the  
20 transcript in this case?

21 A Yes. My habit, Mr. Falk, is to read the  
22 transcript, take notes as I go along on witness  
23 testimony, and then either at the top of the legal pad  
24 or on another sheet, I note any objections or  
25 exceptions.

1192

## ROBERT DUDEK - DIRECT EXAMINATION

1 Q So you note the objections or the exceptions that  
2 trial counsel made?

3 A That's correct.

4 Q Okay. Do you recall an objection to a jury  
5 charge in this case?

6 A Yes, I do. It has been brought to my attention  
7 again by both you and the attorney general.

8 Q Let me just make it for the record that what I'm  
9 referring to here appears on Page 1019 on the record of  
10 appeal, which was also 1010 of the trial transcript.  
11 Bob, I'll read what my concern was.

12 A Okay.

13 Q The Court charged as follows: Evidence offered  
14 by an accused as to the commission of a crime by  
15 another person must be limited to facts that are  
16 inconsistent with the accused guilt and to such facts  
17 which raise an inference as to his innocence. There  
18 must be such connection with the crime, such facts or  
19 circumstances which tend to point out that the other  
20 person as the guilty party.

21 A All right. I do have that before me, Mr. Falk.

22 Q Okay. Do you think that accurately reflects the  
23 law as to what the South Carolina law is on the  
24 admissibility of evidence of third-party defense or  
25 third-party guilt?

## ROBERT DUDEK - DIRECT EXAMINATION

**1193**

1     A     I think it is an accurate statement on the  
2     admissibility of third-party evidence.  I, you know, do  
3     not -- there again, I can be in error in, whatever, my  
4     26 years of doing this that I've ever seen it as a jury  
5     charge.  That may be an extreme coincidence, but I  
6     think it is accurate as to admissibility.  I'm not sure  
7     that I've seen it as a jury charge.

8     Q     Are you familiar with the -- I've lost my  
9     glasses, excuse me.

10    A     Hello?

11    Q     Sorry, I lost my glasses.  There is a case, I  
12    don't know if you are familiar with, Holmes versus  
13    South Carolina, United States Supreme Court case.

14    A     Yes, I am.

15    Q     And, you know, I've reviewed that case, and it  
16    looks to me that that is sort of the law that  
17    accurately reflects the current law as far as what the  
18    judge should do as far as considering the admissibility  
19    of the testimony.

20    A     That is my understanding.  Holmes abrogated State  
21    v. Donald Gaye, which was an old case of mine, but it  
22    said that, as I understand it, Mr. Falk, it stated that  
23    State v. Gregory was still good law in South Carolina,  
24    and I think that is a fair and accurate depiction of  
25    what Gregory would say as to the admissibility.

**1194**

## ROBERT DUDEK - DIRECT EXAMINATION

1 Q Okay. Now, if you would look at Page 1028 of the  
2 record on appeal, which is 1019 of the actual trial  
3 transcript. You'll see --

4 A I have it before me.

5 Q Okay. So would you agree that Mr. Frederick  
6 objected to the inclusion of that charge?

7 A He did. 1019, Lines 8 through 12. He said, The  
8 charge is given I feel as a rule of admissibility.  
9 Once it is admissible, the jury is free to consider it.  
10 And the judge noted his objection was it should not  
11 have been charged at all.

12 So as far as preserved, you know, I would say  
13 that it was preserved on, you know, what arguments  
14 that, you know, that there may be some leeway, but I  
15 will wait for follow-up questions.

16 Q Here is the problem. What I'm trying to find, it  
17 seems like to me that when we look at the charge we do  
18 burden shifting, as far as I think the jury could be  
19 confused by what the defendant's burden of proof is, if  
20 there is a discussion of third-party guilt, because  
21 there certainly is a reference in there that -- you  
22 know, evidence offered by an accused as to the  
23 commission of a crime must be limited to facts that are  
24 inconsistent with the accused's guilt?

25 A Right, I agree.

## ROBERT DUDEK - DIRECT EXAMINATION

**1195**

1 Q So it appears to be burden shifting as to whose  
2 job it is to prove the defendant guilty; is that  
3 correct?

4 A I mean, I think -- I think it is a confusing jury  
5 instruction, and I think, you know, Bobby Frederick, as  
6 far as the argument and objection at the time, was that  
7 it should not have been given. You know, in looking  
8 back at it over the past couple of days, when it was  
9 brought to my attention, I tend to find that, you know  
10 -- tend to agree very humbly that I don't think that  
11 instruction should have been given very respectfully to  
12 the trial judge.

13 Q It also appears that based on this instruction  
14 you could have confusion of the jury in that it almost  
15 is asking the jury to make a determination as to the  
16 relevancy of the evidence, because the trial judge is  
17 supposed to determine what evidence a third-party guilt  
18 is relevant and what is too attenuated in order to be  
19 admissible. But it seems to me that where the  
20 statement says, There must be such connection with the  
21 crime such facts and circumstances which tend to point  
22 out others, it is almost asking the jury to weigh what  
23 evidence they should be considering?

24 A Right. I would agree it is confusing, and not to  
25 repeat myself, I don't think I ever have seen that

1196

## ROBERT DUDEK - DIRECT EXAMINATION

1 before. Now, whether it is in the judge's charge book,  
2 I simply don't know that fact. But all I can say is I  
3 honestly do not remember seeing that jury charge on the  
4 admissibility of evidence, maybe to give kind of a bad  
5 example, I guess it would be like, you know, talking  
6 about Rule 401 on when evidence is admissible. I  
7 thought Bobby Frederick was right in as much as Bobby  
8 said that, you know, once a judge determines that it  
9 comes in, that's the rule of admissibility and that it  
10 shouldn't be a part of the jury charge.

11 Q I guess here is the situation. It is my concern,  
12 and my client's concern, that the jury charge possibly  
13 confused the jury. This was a case where there was  
14 clearly discussions about third-party guilt, that was  
15 their focus. From my point of view, to be blunt,  
16 either appellant defense should have picked up the  
17 issue, or they didn't because they thought it wasn't  
18 well preserved?

19 A Well, the best I can do with that, Mr. Falk, I  
20 mean, I think that on your thoughts on its burden  
21 shifting, I do not respectively think that the court of  
22 appeals would find a burden shifting objection to be  
23 preserved from Page 1019, Lines 4 to 13, which is where  
24 this happens. Now, just an objection on it should not  
25 have been charged at all, I think that certainly is

## ROBERT DUDEK - DIRECT EXAMINATION

1197

1 preserved. Now, I do not -- on this day, frankly,  
2 recall why I didn't make that argument. I will say  
3 this. I thought I was going to win on the State v.  
4 Tapp issue, which was the victimology, because I think  
5 that is junk science. The supreme court later agreed  
6 after I briefed my brief on Mr. Stephens' case based on  
7 Tapp, State versus Tapp out of Charleston. Then the  
8 supreme court later in Tapp found that although it was  
9 erred to admit victimology testimony, very similar to  
10 what happened in this case, the Court found that it was  
11 harmless beyond a reasonable doubt. Ed Satler,  
12 Mr. Salter, Senior Assistant Attorney General, who  
13 argued this case in court of appeals mailed a letter to  
14 the court of appeals shortly before our oral argument  
15 in this particular case, Mr. Stephens' case, pointing  
16 out that Tapp had later been found to be harmless, and  
17 Mr. Salters stayed with beating on that argument  
18 through -- to the South Carolina Supreme Court on that  
19 particular issue.

20 Again, whether I thought the two issues I had  
21 were -- I do remember thinking that State versus Tapp  
22 was our ride home here to a new trial, and in the  
23 final analysis, that obviously turned out to be  
24 erroneous when the court found it harmless.

25 Q Is it your testimony that the decision not to

**1198****ROBERT DUDEK - DIRECT EXAMINATION**

1 include this issue on appeal was part of your overall  
2 trial strategy for the appeal?

3 A You know, that is a bomb of a question, and I  
4 really don't, Mr. Falk, you know, remember the exact  
5 reason I didn't raise it. Again, it is -- I don't  
6 know. I just thought that the issues that I did raise,  
7 the hearsay regarding the -- Mr. Pearl, I believe it  
8 was, reflecting -- or saying what the decedent  
9 allegedly said to Mr. Stephens about you owe me money  
10 for drugs, and kind of that all going into the State's  
11 theory that this was a drug-related murder. Again, I  
12 do specifically remember thinking State v. Tapp was the  
13 winning issue for us, particularly because at the time  
14 of the initial brief in this case, when I wrote it, you  
15 know, State v. Tapp came out from the court of appeals  
16 and said, you know, this guy that testified in this  
17 case, that that evidence -- that victimology evidence  
18 should never have been admitted. And, like I say, that  
19 was a real hot issue at the time that I thought we  
20 would win on.

21 Q Okay.

22 A But I cannot -- part of that is the simply it  
23 should not have been charged objection, I would say  
24 would have been preserved. Maybe just -- maybe to push  
25 that, it should not have been given a little more that

## ROBERT DUDEK - DIRECT EXAMINATION

**1199**

1 it was confusing. In all candor, and respectively, I  
2 don't think that a burden-shifting objection -- I don't  
3 think that the court of appeals would have found that  
4 preserved.

5 Q Okay. But do you believe they may have found it  
6 preserved, that by his asking that it not be included  
7 at all, that an objection that it was confusing, that  
8 that would have been preserved?

9 A I think that it should not have been given with a  
10 little leeway to me as the appellant attorney to say  
11 that it should not have been given because it was a  
12 rule of admissibility and not a jury charge would have  
13 been preserved. And maybe pushing that a little extra  
14 step further of the reason you don't give -- you know,  
15 the purpose of jury charges are to enlighten the jury  
16 to come to a correct verdict and not to be confused  
17 under State v. Leonard and other cases. I think I  
18 could have gotten away, you know, with that -- with  
19 that -- certainly with that being preserved, but at a  
20 minimum it just should not have been given because it  
21 was a rule of admissibility for the Court and not a  
22 consideration for the jury. I absolutely think that  
23 that would have been preserved.

24 MR. FALK: No further questions. Thank you.

25 MS. KINARD: Ms. Falk asked all the questions I

1200

## LIBBY PIERCE - DIRECT EXAMINATION

1 had, so unless there is something else you would like  
2 to add for the Court.

3 MR. DUDEK: No. Hopefully I answered your  
4 questions.

5 MS. KINARD: Thank you for your time. I  
6 appreciate your cooperation.

7 MR. DUDEK: Thank you.

8 THE COURT: Now, where are we?

9 MR. FALK: There is a witness that -- potential  
10 alibi witness -- who is present today. My  
11 presentation may be out of order, but then she could  
12 leave. She's been here since 9 o'clock, so I would  
13 like to call her.

14 THE COURT: Any objection?

15 MS. KINARD: No, Your Honor.

16 THE COURT: All right. Present that witness.

17 MR. FALK: The applicants call Libby Pierce to  
18 the stand.

19 (LIBBY PIERCE, having been duly sworn,  
20 testified as follows:)

## 21 DIRECT-EXAMINATION

22 BY MR. FALK:

23 Q State your name and spell it, please.

24 A Libby Pierce, L-I-B-B-Y, P-I-E-R-C-E.

25 Q Could you describe what relationship you have or

## LIBBY PIERCE - DIRECT EXAMINATION

**1201**

1 do you know Mr. Stephens or Mr. Sessions?

2 A Yes. They are very good friends of mine.

3 Q What is your relationship with Mr. Sessions?

4 A We was dating at one time.

5 Q You were dating at one time?

6 A Uh-huh.

7 Q And where do you -- in 2006, 2007, 2008, where  
8 were you living in that area?

9 A I moved to Virginia.

10 Q When were you living in South Carolina?

11 A I'm from South Carolina.

12 Q Do you recall ever finding out anything about the  
13 murder of Jamilla Hightower and Monica Wall?

14 A Yes. When I left to go to Virginia and called  
15 back down here to let my friends know I made it back to  
16 Virginia okay, that is when they told me that she got  
17 killed, her and her girlfriend.

18 Q So you weren't in South Carolina when you found  
19 out?

20 A No, I wasn't here. I was in Virginia.

21 Q You were in Virginia?

22 A Uh-huh.

23 Q Who was with you in Virginia?

24 A (Indicates.)

25 Q You are pointing to Mr. Sessions?

1202

## LIBBY PIERCE - DIRECT EXAMINATION

1 A Uh-huh.

2 THE COURT: You need to speak up.

3 Q (MR. FALK) So it is your testimony when you  
4 found out Jamilla Hightower and Monica Wall had been  
5 killed, you were with Jimmy Sessions in Virginia?

6 A Yes.

7 Q How long had you been up there? A week? A  
8 month?

9 A No, like three, four weeks.

10 Q All right. Did you ever have an opportunity to  
11 speak to Mr. Sessions' lawyer about this or to Mr.  
12 Stephens' lawyer?

13 A I talked to a private investigator that came and  
14 talked to me, or whatever. I told him that, you know,  
15 it is impossible for them to do that because  
16 Christopher was home and Jimmy was with me. So I don't  
17 understand. I told him if they needed me, to come here  
18 I would come, you know, and give my testimony, you  
19 know, and I came here.

20 Q Let me take these in smaller pieces. You talked  
21 to an investigator?

22 A Uh-huh.

23 Q Was it your understanding you were talking to an  
24 investigator for one of the lawyers, or was that  
25 someone from Horry County Sheriff's Office?

## LIBBY PIERCE - DIRECT EXAMINATION

**1203**

1 A I guess from one of the lawyers.

2 Q So that person didn't show you a badge or  
3 something?

4 A Huh-huh, no, sir.

5 Q And you had given them a statement?

6 A Yes, sir.

7 Q And do you remember about when that was? I mean,  
8 so -- all right. Let's go back. You were living in  
9 Virginia?

10 A Uh-huh.

11 Q Who were you visiting?

12 A My friend. I have friends and stuff that stay in  
13 Virginia.

14 Q When did you come back in Horry County?

15 A Was probably like.....

16 Q This happened sometime around the first of June,  
17 so first of the summer.

18 A I would say probably around like -- I think like  
19 August, September, something like that.

20 Q And after you came back here, you talked to an  
21 investigator?

22 A Yes, sir, because he was looking for me. He came  
23 to my mother's, and my mother called and said an  
24 investigator wants to talk to me, and I was like for  
25 what, and she was telling me about Jamilla situation,

1204

## LIBBY PIERCE - DIRECT EXAMINATION

1 and I said I don't know nothing about that. She said I  
2 know, but the man keep coming by to talk to you, so I  
3 asked for his number. She gave me the number, and I  
4 called and talked to him and said I'll be down within a  
5 week and two, and when I get in town, I'll call him. I  
6 did, and he met me at my mother's house and I gave my  
7 statement to him then.

8 Q He met you at your mother's house and you gave a  
9 statement then?

10 A Yes.

11 Q Do you recall what that statement was?

12 A Basically saying that it is impossible for Jimmy  
13 to have anything to do with this because I know for a  
14 fact Jimmy was with me in Virginia. I told him that.  
15 He said I wasn't in trouble, he just wanted my  
16 statement to use for trial, and I said if he needed me,  
17 I would come, but nobody never contacted me. So I came  
18 here one day myself.

19 Q What was going on in the courtroom that day that  
20 you came? Did you know a trial was going on?

21 A Yes, I did know. I came to give my statement  
22 then, because I said why didn't no one contact me yet.  
23 I asked the guard or whatever about the case, and he  
24 told me which courtroom it was, and I came in. I told  
25 him I was here for Christopher Stephens and Jimmy

## LIBBY PIERCE - DIRECT EXAMINATION

**1205**

1 Sessions, and he said we don't need you, you can go  
2 back home. I said I am here to give my testimony  
3 because they did not do it. It is impossible.

4 Q Do you remember who you talked to?

5 A I don't remember the guy's name. I think it was  
6 one of the solicitors or something, because the way he  
7 gave me the attitude.

8 Q Do you know Mr. Frederick?

9 A You look sort of like the guy. I don't know.

10 Q Do you know Mr. Gardner?

11 A No. No. No.

12 Q So was it one of those two you talked to?

13 A No.

14 Q But you do recall talking to an investigator?

15 A Yeah. I came in here and he was on this side of  
16 the table. Put two and two together, you know.

17 Q Okay. Could the investigator's name be Bill  
18 Bean?

19 A Something like that. That sounds about right.

20 Q Now, did you know Jamilla Hightower and Monica  
21 Wall?

22 A I know of them.

23 Q Did you kind of run in the same circles?

24 A No.

25 Q Well, why would it have been important that they

1206

## LIBBY PIERCE - CROSS-EXAMINATION

1 were shot or that they had been murdered?

2 A You know, at any day that is something that -- I  
3 mean I knew of them. That is when I called down here  
4 and let everybody know I was here safe and everyone was  
5 telling me what happened, and I said, wow, really. I  
6 didn't hear anything about it until I was in Virginia.  
7 It just stuck out to me. Like why would they say it  
8 was him, I know Christopher was at home for a fact, and  
9 he was with me.

10 Q But you knew Jamilla Hightower?

11 A I knew of her.

12 Q What did you know of her?

13 A She sold drugs, used to sell cocaine, marijuana.

14 MS. KINARD: Objection. That's not in the  
15 record?

16 A It is a fact.

17 THE COURT: Sustain the objection.

18 MR. FALK: No further questions.

19 MS. KINARD: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MS. KINARD:

22 Q You said that Mr. Sessions was with you in  
23 Virginia?

24 A Yes.

25 Q And what did you know about Mr. Stephens?

## CHRISTOPHER STEPHENS - DIRECT EXAMINATION

1207

1 A He was home with his kids.

2 Q How do you know that?

3 A Because his baby mama works at nights. I know  
4 that for the fact he had to be with the kids.

5 Q Were you friends with him at that time?

6 A Yes.

7 MS. KINARD: Thank you. No further questions.

8 THE COURT: Thank you. You may step down.

9 MR. FALK: Could the witness be excused?

10 MS. KINARD: No objection.

11 THE COURT: You may be excused.

12 MR. FALK: I'll call Chris Stephens to the stand.

13 (CHRISTOPHER STEPHENS, having been duly sworn,  
14 testified as follows:)

15 THE WITNESS: Christopher Maurice Stephens,  
16 S-T-E-P-H-E-N-S.

17 DIRECT-EXAMINATION

18 BY MR. FALK:

19 Q State your name?

20 A Christopher Maurice Stephens.

21 Q Last name?

22 A S-T-E-P-H-E-N-S.

23 Q And you and I had a conversation about this case?

24 A Yes, sir.

25 Q I filed an amended PCR on behalf of you and

1208

## CHRISTOPHER STEPHENS - DIRECT EXAMINATION

1 Mr. Sessions. I would like to read over the  
2 allegations to make sure that these are -- we're on the  
3 same page.

4 First issue that I raised was the issue we  
5 discussed with appellant counsel and the jury charge  
6 on third-party guilt. Second issue that I discussed  
7 was I said certain family members of the victims  
8 appeared in court and in the presence of the jury  
9 wearing T-shirts and/or buttons bearing pictures of  
10 the victims, and that this was something that your  
11 lawyers knew about. They knew that they were there,  
12 and they had maybe confronted some of the witnesses or  
13 some of the jurors; is that correct?

14 A Right. I think Ms. Williams, she addressed Bobby  
15 about the situation. They had an altercation out in  
16 the hallway where Ms. Wall was making derogatory  
17 statements in front of the jurors before they were even  
18 polled, okay. So she mentioned that to Bobby and Bobby  
19 said something to the judge. The judge, in my opinion,  
20 just blew it off. That was one of the issues we were  
21 trying to bring forth.

22 Q Do you feel that the issue you are raising that  
23 your lawyer should have asked to voir dire the jurors  
24 to make sure they weren't persuaded by that?

25 A Right. You know, being a layman, not knowing

## CHRISTOPHER STEPHENS - DIRECT EXAMINATION

1209

1 much of the law, I didn't know that we should have  
2 asked the judge to give a better or more clear defined  
3 ruling, but that didn't occur, so.

4 Q Because there was a lot of -- was there a lot of  
5 publicity? This wasn't your run-of-the-mill case?

6 A No. This case was -- it was everywhere,  
7 newspapers, television, you know. Everyone was talking  
8 about it. It wasn't something that -- it wasn't an  
9 ordinary case.

10 Q And, actually, on the day of trial, that was not  
11 the first time this case was in court, was it?

12 A No. It was our second trial.

13 Q What happened in the first trial?

14 A First trial was a hung jury. We actually had  
15 the same situation in the first trial, but, you know,  
16 Mr. Larry Hyman, Judge Hyman, excuse me, he corrected  
17 the issue the first time, you know.

18 Q How did he correct the issue?

19 A He addressed the court -- well, they didn't do it  
20 in front of the jury in the first trial, but did it in  
21 the courtroom, so he addressed it in court, and it  
22 didn't happen anymore.

23 Q What were they doing? Wearing the shirts with  
24 the victims?

25 A Shirts, buttons, things like that.

1210

## CHRISTOPHER STEPHENS - DIRECT EXAMINATION

1 Q Can you describe the shirts?

2 A Well, you know, 'RIP shirts and, you know, buttons  
3 with, you know, the victims' pictures and stuff on it.

4 Q So you said there was a first trial?

5 A Right.

6 Q Did any of the -- Mr. Pearl testified at the  
7 first trial; did he not?

8 A Yes, sir.

9 Q And he testified at the second trial?

10 A Yes, sir.

11 Q Do you recall his testimony differing from one  
12 trial to the other?

13 A Yes, sir.

14 Q What is your recollection of it?

15 A Well, in the first trial he -- I guess he left  
16 out a few things that he forgot to say in the second  
17 trial, but in the first trial -- he didn't say as much  
18 as in the first trial as in the second trial, and it  
19 was very much different.

20 Q Do you recall any specifics or topics he left out  
21 the first time?

22 A I think in the first trial -- and I don't have it  
23 here, but the first trial he was saying -- I think I  
24 have it here.

25 (A brief pause in the proceedings.)

## CHRISTOPHER STEPHENS - DIRECT EXAMINATION

1211

1 A I didn't bring my transcripts with me.

2 Q Did you have concerns about -- with how the case  
3 was investigated by Officer DeLorenzo?

4 A With regard to Officer DeLorenzo, he pretty much  
5 forced all the witnesses against us to say what he  
6 wanted them to say in order to fit his investigation.  
7 He went so far as to threatening one particular witness  
8 with either you take the witness stand or the  
9 defendant's stand.

10 MS. KINARD: Objection, hearsay.

11 A No, it is not hearsay.

12 MR. FALK: I think it is in part of the record.  
13 I think he is just referring to portions.

14 MS. KINARD: I'll defer to the transcript, if it  
15 is in there.

16 THE COURT: Sorry?

17 MS. KINARD: I'm defer to the transcript, if it  
18 is in there, but I wasn't aware of that.

19 MR. FALK: I think he's recollecting sections of  
20 the transcript, but the record is what it is.

21 THE COURT: Okay.

22 Q (MR. FALK) So in general terms, you thought that  
23 Mr. DeLorenzo was intimidating some of the witnesses  
24 or forcing them?

25 A I do.

**1212**

## CHRISTOPHER STEPHENS - DIRECT EXAMINATION

1 Q Did you bring that to your lawyer's attention?

2 A I did.

3 Q Do you think they were aware of that fact?

4 A I think he was, and he was -- he mentioned it in  
5 trial about the investigator's misconduct as far as  
6 intimidating the witnesses to say whatever he wanted  
7 them to say.

8 Q Do you know Libby Pierce?

9 A Yeah, of course.

10 Q Did you tell your lawyer to contact her?

11 A I did. I told Bobby to contact her right when I  
12 first met him.

13 Q And that is Bobby Frederick?

14 A Right. Yes.

15 Q Did you give him her contact information?

16 A I didn't have it at the time. I told him that,  
17 you know, he could pretty much find her. I came from  
18 prison to the jailhouse, you know. I was doing a  
19 probation violation, and I never went home. I went  
20 straight from prison to the county jail, and when he  
21 came to meet me, I told him that maybe he should talk  
22 to her about the situation because, you know -- but I  
23 didn't have any contact information for anyone.

24 Q Could you describe her? Did you know how old she  
25 was, where she worked, where she lived?

## CHRISTOPHER STEPHENS - DIRECT EXAMINATION

1213

1 A Yeah. I told him pretty much where she lived or  
2 where he could find her maybe.

3 Q Did you ask him to call her as a witness?

4 A I was under the impression that she was going to  
5 testify at our first trial; however, we didn't put up a  
6 defense in the first trial, so we didn't need her. So  
7 she was told to leave, okay. Now, in the second trial,  
8 I didn't know why she didn't come back, because we did  
9 put up a defense and using our own witnesses. I  
10 thought it was important, but, you know, obviously she  
11 didn't -- I didn't think that he thought she was  
12 important enough to use, so.

13 Q This amended PCR, you told me concerns you had  
14 about the solicitor bolstering the testimony of some of  
15 the witnesses; is that correct?

16 A Right.

17 Q I'm not asking you to get into specifics, but we  
18 covered all the claims.

19 A Right.

20 Q You had concerns about bolstering of the  
21 witnesses by the Solicitor?

22 A Right.

23 Q And you had concerns about the State's  
24 impermissible Golden Rule arguments in opening and  
25 closing?

1214

## CHRISTOPHER STEPHENS - DIRECT EXAMINATION

1 A Yes.

2 Q And you had concerns that at some point in the  
3 closing argument the Solicitor told trial counsel that  
4 -- excuse me, that the Solicitor in that case told the  
5 jury, Look at their lawyers, they know their guys are  
6 guilty?

7 A Right.

8 Q And that was brought to the Court's attention,  
9 wasn't it?

10 A Right.

11 Q But you thought you should have moved for a  
12 mistrial?

13 A I thought we were going to go for a mistrial,  
14 obviously, because during the whole closing arguments  
15 he was playing on the passion of the jury, screaming at  
16 the top of his voice. He was making them gasp for air  
17 and he was being very, very dramatic with it. So he  
18 had a couple jurors crying and things like that. So  
19 when he made the mistake, I thought that, you know, we  
20 would start over, you know. We had the opportunity to  
21 do so, so I thought we would.

22 Q Is there any other issues you think we should  
23 have raised?

24 A I think that was Ground 7. You did ask me about  
25 the prosecutor and investigator misconduct, so I think

## CHRISTOPHER STEPHENS - CROSS-EXAMINATION

1215

1 that would be all.

2 MR. FALK: No further questions.

3 THE COURT: Cross-examination.

4 MS. KINARD: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MS. KINARD:

7 Q Good afternoon.

8 A Good afternoon.

9 Q Was Mr. Frederick appointed to your case?

10 A Yes.

11 Q Did you have a pretty good working relationship  
12 with him?

13 A I did.

14 Q Did you all thorough discuss all of the facts  
15 that the State had against you?

16 A I think -- well, I never received the discovery  
17 packet, so I didn't know what was there and not there.  
18 I understand there was some phone records that  
19 weren't -- that was never gone through, so I don't know  
20 exactly the extent of the evidence against me.

21 Q Did you review a lot of evidence with him in  
22 preparation for trial?

23 A A few strategy notes, but that's about it.

24 Q In terms of strategy, did you discuss the  
25 defenses he would be using on your behalf?

1216

## CHRISTOPHER STEPHENS - CROSS-EXAMINATION

1 A As far as the second trial, no. First trial we  
2 had a clear understanding what we would be doing. The  
3 second trial, not so much.

4 Q Do you know why it was different?

5 A I don't know.

6 Q Did you all talk about the need to change  
7 anything from the first trial to the second trial?

8 A Other than we were going to put witnesses on the  
9 stand this time, no.

10 Q Did you have any trouble communicating with  
11 Mr. Frederick?

12 A No.

13 Q You felt that you met enough times and prepared  
14 for trial?

15 A I don't know how many times you are supposed to  
16 meet before you are ready for trial. This is a big  
17 case and I'm fighting for my life. I don't know. I  
18 don't think I could ever be prepared for that. I don't  
19 know how I could answer that.

20 Q That is a fair answer. Did you have any  
21 questions that he hadn't answered?

22 A That Bobby didn't answer?

23 Q Correct.

24 A As far as what?

25 Q Anything. Anything for preparing for trial.

## CHRISTOPHER STEPHENS - REDIRECT EXAMINATION

1217

1 A I mean, there was tons of questions, you know,  
2 that I had, but, you know, time didn't permit us to do  
3 a lot of things, so I guess, as you can see, we went to  
4 trial in November and then again in February, so we  
5 didn't have a whole lot of time to do a whole of stuff.

6 Q What witnesses did you provide Mr. Frederick?

7 A In the second trial, I don't recall -- I think he  
8 just picked and chose who he wanted to. The first  
9 trial I had was Nancy Gause and Libby, of course. I  
10 knew she was supposed to be here. I think that is  
11 about it that I knew about, that would testify on my  
12 behalf. Eddie Lee Washington. I guess he figured he  
13 would tell the truth.

14 Q Did you talk about -- sorry, strike that please.

15 MS. KINARD: I believe that is all I have. Thank  
16 you.

## 17 REDIRECT-EXAMINATION

18 BY MR. FALK:

19 Q During the trial, did you ask why he wouldn't  
20 call Libby Pierce to the stand?

21 A In the second trial I did. I asked, and he just  
22 said, you know -- I don't think -- I don't know why. I  
23 think I asked, but I can't remember an answer. I can  
24 just remember the first trial.

25 MR. FALK: No further questions.

1218

## JIMMY LEE SESSIONS - DIRECT EXAMINATION

1 THE COURT: Thank you. You may step down. Call  
2 your next witness.

3 MR. FALK: We call Jimmy Lee Sessions.

4 (JIMMY LEE SESSIONS, having been duly sworn,  
5 testified as follows:)

## 6 DIRECT EXAMINATION

7 BY MR. FALK

8 Q What is your name?

9 A Jimmy Lee Sessions, S-E-S-S-I-O-N-S.

10 Q Who represented you at your trial?

11 A Johnny Gardner.

12 Q What is your relationship with Libby Pierce?

13 A Me and her used to go together.

14 Q Did you ever tell Mr. Gardner to get ahold of  
15 Libby Pierce?

16 A Yes, sir.

17 Q Were you in custody at the time?

18 A Yes, sir.

19 Q Did you give her any contact information on how  
20 to reach her?

21 A I ain't have the contact number at that time,  
22 because at that time I was on the run for my  
23 trafficking drug charge, so I ain't have no information  
24 to get to her.

25 Q Did you have any information where you might find

## JIMMY LEE SESSIONS - DIRECT EXAMINATION

1219

1 her, where she works and her family?

2 A I know her family stays in Aynor, but that is  
3 about it.

4 Q Aynor?

5 A Yes, sir.

6 Q Did you give that information to your lawyer?

7 A Yes, sir.

8 Q Why did you want your lawyer to contact  
9 Ms. Pierce?

10 A Because, therefore, I know me and her were  
11 staying in Virginia at that time. I was trying to get  
12 someone to talk to her, but ain't happened.

13 Q So it is your testimony that on June 8 you were  
14 in Virginia with Ms. Pierce?

15 A Yes, sir.

16 Q Is that how you found out that Jamilla Hightower  
17 and Monica Wall had been killed?

18 A Yes, sir.

19 Q Did you ask your lawyer why he didn't call her to  
20 testify in the second trial?

21 A You know, during the second trial -- during the  
22 first trial, I didn't think she would come, but like I  
23 said, we didn't put up a defense. But the second trial  
24 they said they were going to use her, and I don't know  
25 why they didn't use her.

1220

## JIMMY LEE SESSIONS - DIRECT EXAMINATION

1 Q Was it your understanding that either  
2 Mr. Frederick or Mr. Gardner had spoken with her or had  
3 an investigator speak with her?

4 A Yes, sir.

5 Q Do you remember whether or not Mr. Pearl's  
6 testimony changed from the first trial to the second  
7 trial?

8 A Yeah, in a way it changed. Certain things in the  
9 first, he didn't say in the second trial. He was  
10 saying something.....

11 Q Do you have any specifics?

12 A No, sir. I ain't got my paperwork with me,  
13 didn't bring it.

14 Q I mean, it is just that it was raining today or  
15 tomorrow, it was specifics about your identification or  
16 Mr. Stephens' identification?

17 A Yeah. In a way, when he was saying that -- I  
18 don't know where -- he was saying he came to a motel I  
19 was at and the records show that I ain't never been at  
20 this motel, so that is a conflict right there. He said  
21 I told him something in the hotel, and the records  
22 showed I ain't never been there.

23 Q Did he testify about the motel in both trials?

24 A Yeah, he talked about it. The owner of the  
25 records came in, and the owner came. The man said it

## JIMMY LEE SESSIONS - DIRECT EXAMINATION

1221

1 was a white family staying in this room. How can I  
2 tell you something in this room, and there was another  
3 family staying in the room, you know, so.

4 Q Rodney was the other fact witness against you?

5 A Who?

6 Q The second witness, who was that?

7 A Washington?

8 Q Yeah?

9 A Eddie Lee Washington.

10 Q Did his testimony change from one to the other?

11 A His testimony changed as far as -- well, he  
12 talked to the investigators about -- because once he  
13 came to -- you know, I guess he was scared. He got  
14 locked up and came to J. Reuben Long. Only thing I  
15 ever told him, Man, you go to court, just tell the  
16 truth. That is the only thing I say from the get-go,  
17 from the beginning. Anyone just tell the truth, man.  
18 That is all I ask.

19 Q Can you tell us -- what is your recollection of  
20 the courtroom as far as what the victims' family was  
21 wearing?

22 A You know, they had T-shirts with pictures and  
23 little buttons with the little pictures on them and  
24 everything.

25 Q And do you believe the jurors saw it?

**1222**

## JIMMY LEE SESSIONS - DIRECT EXAMINATION

1 A I know one time the juror was crying, and I told  
2 Mr. Gardner, Look at the jury, the jury is crying. How  
3 am I going to get a fair trial when they are crying by  
4 seeing certain things in the courtroom?

5 Q This was a juror that saw --

6 A Yeah. When some of the family was crying in the  
7 court, they ran out of the courtroom, and I told my  
8 lawyer, Johnny Gardner, Look, man, jury crying, how can  
9 I get a fair trial when you have the jury crying  
10 already?

11 Q This was at the second trial?

12 A Yes, sir.

13 Q Did you ask your lawyer to ask the judge to  
14 intervene, either ask for some kind of instruction to  
15 the jury or orders for the jury or for a mistrial?

16 A I know when Mr. Rich said when he made a  
17 statement at the end, look, even their lawyers know  
18 they are guilty. Both lawyers stood up and objected,  
19 and I understand the judge asked about the mistrial,  
20 and I told my lawyer right there, he asked me what I  
21 think about it, and I said a mistrial. I agree with a  
22 mistrial instead of going with it.

23 Q Did you have concerns with the way that Officer  
24 DeLorenzo was investigating the case?

25 A Yes, sir.

## JIMMY LEE SESSIONS - DIRECT EXAMINATION

1223

1 Q Can you say generally what the concerns were?

2 A My concerns was hearing people telling me, yo,  
3 the investigator telling me if we don't do this -- you  
4 can be a witness or you can be a defendant. I was like  
5 I don't understand why people telling me -- the  
6 investigator coming and visiting them in jail and  
7 telling them if you don't say this about Sessions, you  
8 are going to be on the defense side, you are going to  
9 sit where they are sitting at. So there was a big  
10 concern, because it was like -- I don't understand.  
11 Like I told everybody, you know, I was ready to do  
12 anything with the prosecutor, because they was telling  
13 me about taking a polygraph, and I said I would take  
14 one, but they refused to give me that, but everyone  
15 else is taking one and they are failing theirs and you  
16 still use the same people against me.

17 Q As far as you having information that Officer  
18 DeLorenzo was putting words in the witnesses' --  
19 intimidating them, did you make your lawyers aware of  
20 that fact?

21 A Yes, sir.

22 Q Did you ask them to either get orders from the  
23 judge or --

24 A My lawyer went to visit, I guess, with the  
25 investigator, or someone. He went to see Eddie Lee

**1224**

## JIMMY LEE SESSIONS - CROSS-EXAMINATION

1 Washington in the county jail, so I didn't know what he  
2 told him or whatever, but he did go see him.

3 Q Did you have concerns about the closing  
4 arguments?

5 A I definitely had concerns about that. Any time a  
6 prosecutor can tell the jury, who are supposed to be  
7 peers and look through everything, you can tell them,  
8 look, even their lawyers know they are guilty, you  
9 know, I knew that was wrong. I knew that was a big  
10 impact in the closing arguments.

11 Q Did you have concerns that the prosecutor was  
12 bolstering the witnesses?

13 A Yes, sir.

14 Q What does "bolstering" mean?

15 A Meaning me sitting here now and you telling me  
16 something, but at the same time you are coercing me  
17 with that.

18 MR. FALK: No further questions for this  
19 witnesses.

20 CROSS-EXAMINATION

21 BY MS. KINARD:

22 Q Was Mr. Gardner appointed to your case?

23 A At first James Gilmore (sic) was appointed, but  
24 then, you know, there was a conflict between me and  
25 him, and then they appointed me Johnny Gardner.

JIMMY LEE SESSIONS - CROSS-EXAMINATION **1225**

1 Q Did you get along with Mr. Gardner?

2 A Yes, ma'am.

3 Q Did he go over the discovery with you?

4 A Somewhat. Like I said, I had James Gilmore, and  
5 when I did get him, I saw him a few times.

6 Q So you met with Mr. Gardner several occasions?

7 A Yes, ma'am.

8 Q And did you discuss your understanding of what  
9 happened at the incident with Mr. Gardner?

10 A Yeah, I discussed it with him.

11 Q Your version of the facts?

12 A Yes, ma'am.

13 Q And you thought he understood that and understood  
14 your case?

15 A I thought he did.

16 Q Did you discuss a possible defense with him?

17 A Not really. Because at that time, to me, I  
18 thought Bobby was talking to him about what they were  
19 doing with the case.

20 Q You thought the two attorneys were working  
21 together?

22 A Yes, ma'am.

23 Q Did you feel you understood everything you  
24 discussed with Mr. Gardner?

25 A No, I don't know. I don't know too much about

**1226**

## JIMMY LEE SESSIONS - CROSS-EXAMINATION

1 the law, so I don't know. I'll tell you straight up,  
2 no.

3 Q Did you ask him a lot of questions?

4 A Yeah, I asked him some question.

5 Q Did he answer your questions?

6 A To the best of his knowledge, I think he did.

7 Q The first trial and second trial, let me clarify  
8 that, did you know of any difference in strategy  
9 between the first trial and the second trial?

10 A The first trial, we didn't put up no strategy.  
11 Second one, that is the one we put up the strategy in.

12 Q Meaning you presented witnesses on your behalf?

13 A We did, but not who I wanted.

14 Q Who did you want?

15 A Libby Pierce, who I was with at that time and in  
16 Virginia.

17 Q You testified that you gave Mr. Gardner her  
18 information?

19 A Yeah, the information I know.

20 Q Who else's information did you give to him?

21 A Which I gave him, Eddie Lee Washington. I gave  
22 him some information about James Pearl was staying at.  
23 He was saying he was staying in Dunbar, I ain't never  
24 came to his house at no Dunbar. To me, he never stay  
25 at no Dunbar when I met him.

## BOBBY FREDERICK - DIRECT EXAMINATION

**1227**

1 Q Do you know -- did Mr. Gardner or anyone on his  
2 behalf talked to his witnesses?

3 A I don't know if Mr. Gardner did, but I know  
4 whoever the investigator was from Bobby talked to some  
5 of them.

6 MS. KINARD: Nothing further.

7 MR. FALK: No redirect.

8 MR. FALK: We call Bobby Frederick to the stand.

9 (BOBBY FREDERICK, having been duly sworn,  
10 testified as follows:)

## 11 DIRECT-EXAMINATION

12 BY MR. FALK:

13 Q State your name for the record?

14 A Bobby Frederick, F-R-E-D-E-R-I-C-K.

15 Q And can you tell me how you got involved in this  
16 case?

17 A I was appointed to the case.

18 Q Are you a 608 appointment?

19 A Yes.

20 Q Sorry, are you in the -- are you a public  
21 defender?

22 A I was not a public defender or a contract  
23 defender, so it is a Rule 608 appointment.

24 Q Okay. Thank you. Do you have an investigator  
25 you work with?

1228

## BOBBY FREDERICK - DIRECT EXAMINATION

1 A His name is Bill Beam.

2 Q Do you recall asking him to look for Libby

3 Pierce, I guess they called her "Poo"?

4 A He did. He did. I believe -- here is all I can  
5 tell you about Libby. I believe he found her and  
6 interviewed her. I believe she was here. I don't know  
7 if it was the first trial or second trial, and I really  
8 can't remember why we did not call her as a witness. I  
9 recognized her when she testified, that is really all I  
10 can remember.

11 Q And do you recall that she was providing an alibi  
12 for Mr. Sessions?

13 A I really don't remember. When I heard she would  
14 be here today, I recognized her name, and that was it.

15 Q Okay. And the first trial ended in a hung jury;  
16 is that correct?

17 A That's right.

18 Q And then there was a second trial, that is the  
19 one we are talking about here today?

20 A Yes.

21 Q And you're representing them both -- Mr. Stephens  
22 on both of those cases; is that correct?

23 A In both trials.

24 Q In both trials, yes?

25 A Yes.

## BOBBY FREDERICK - DIRECT EXAMINATION

1229

1 Q You heard them characterize the pictures, the  
2 family being in the courtroom; is that correct?

3 A Yes.

4 Q And is that an accurate representation, that they  
5 -- victims were here and wearing -- family of the  
6 victims were wearing shirts of the victims like RIP and  
7 other commemorations for the victims in the case?

8 A No, they weren't. If you are reading the  
9 transcript, at the beginning of the trial we made a  
10 motion asking the Court to suppress anything like that,  
11 and we did the same thing at the first trial. At both  
12 trials, no one was in the courtroom wearing buttons  
13 with T-shirts. I think at the first trial someone may  
14 have been downstairs with the buttons and T-shirts on.  
15 They did not show up wearing buttons and T-shirts at  
16 this trial. They had done that at almost every hearing  
17 that we had in the case, which is why we brought it up  
18 pretrial. In this trial, there was an incident with I  
19 think Monica Walt's mother that I brought to the  
20 Court's attention, and I think, absolutely, that I  
21 should have requested a mistrial based on that, and I  
22 did not. I brought it to the Court's attention, and  
23 the judge said that is not going to happen again, and  
24 we let it go. There weren't -- during the trial, in  
25 this trial, there were no T-shirts or buttons, though.

1230

## BOBBY FREDERICK - DIRECT EXAMINATION

1 Q Okay. What do you have? Do you have the record  
2 on appeal, or trial transcript?

3 A Just the transcript.

4 Q Could you look at 47 of the transcript?

5 MR. FALK: Your Honor, I'm not sure what you  
6 have, but is there a --

7 THE COURT: Record of appeal.

8 MR. FALK: I'll call his attention to Page 50 on  
9 the record of appeal, which is a copy of Page 47 for  
10 the trial transcript. Look around Line 15, Page 47.

11 A That is what I was talking about.

12 Q (MR. FALK) And Ms. Wall, you are talking about,  
13 what was her relationship to the case?

14 A Monica Walt's mother.

15 Q Victim's mother, okay. And do you know anything  
16 about this incident, I mean what happened?

17 A I don't remember specifics, but I remember she  
18 was saying something about the case that was very  
19 negative, and she was doing it loudly, and there were  
20 jurors present.

21 Q And it is your testimony that you should have  
22 asked for a mistrial at that point?

23 A Yeah. Yeah. I probably should have. I don't  
24 think I asked the judge for anything. I don't think I  
25 asked him to question the jurors.

## BOBBY FREDERICK - DIRECT EXAMINATION

**1231**

1 Q Of course, because that is another choice, you  
2 could have had the individual voir dire to see if they  
3 heard or --

4 A Yeah, I think I should have moved for a mistrial.  
5 I think the judge probably would have done that,  
6 instead of granting a mistrial, voir dire the jurors,  
7 we didn't do any of that though.

8 Q Mr. Stephens described this as not just any ole  
9 case in Horry County, there was publicity built about  
10 this case?

11 A There was a good bit of pretrial publicity,  
12 things like candlelight vigils at the police  
13 department. The reason for it is because they couldn't  
14 find who did it, and the longer it went on, the more  
15 pressure, I think, was put on them.

16 Q How many of the victims' family and friends were  
17 present during the trial?

18 A The courtroom was packed to capacity.

19 Q Was it this courtroom or in another?

20 A It was in the big courtroom, and I think it was  
21 split half-and-half pretty evenly.

22 Q So kind of a highly-charged thing?

23 A It was.

24 Q My clients discussed some concerns they had about  
25 Investigator DeLorenzo.

**1232**

## BOBBY FREDERICK - DIRECT EXAMINATION

1 A Uh-huh.

2 Q Were you aware that he was maybe putting words or  
3 threatening witnesses?

4 A If you read the transcript, the answer is, yes,  
5 absolutely. If I can direct you to Page 757 in the  
6 actual transcript, my cross-examination of Eddie Lee  
7 Washington begins there, where we went into that in  
8 great detail. What happened is at the first trial they  
9 called Eddie Lee Washington as a witness. Let me back  
10 up. What DeLorenzo did is he interviewed Eddie Lee  
11 Washington on videotape, and in the video, during the  
12 interrogation, he told Eddie Lee Washington --  
13 DeLorenzo told Eddie Lee Washington what DeLorenzo  
14 believed happened. Eddie Lee Washington said, no, that  
15 didn't happen, and he candidly told him what he did  
16 know. Then DeLorenzo began threatening him angrily,  
17 and DeLorenzo told him if he didn't tell him the  
18 truth -- is what he kept saying -- then he was going to  
19 arrest Eddie Lee Washington and charge him with either  
20 murder or accessory to the murder. He told him that he  
21 would then arrest his wife, and charge her with an  
22 unrelated robbery, that she had nothing to do with, and  
23 then he told him he needed to think about his children,  
24 because obviously at that point DSS is going to have to  
25 get involved and take his children.

BOBBY FREDERICK - DIRECT EXAMINATION **1233**

1 He did that for sometime, berating him on the  
2 video, and then the video turned off. Then, when the  
3 video turned back on, Eddie Lee Washington's demeanor  
4 completely changed, shoulders slumped, he looked  
5 defeated, and he repeated verbatim what DeLorenzo had  
6 been telling him to say. On that video, as DeLorenzo  
7 was doing that, Assistant Solicit Brad Richardson was  
8 standing in the room as well. At the first trial -- I  
9 thought this happened at the second trial as well, but  
10 at the first trial I made a motion to dismiss for  
11 prosecutorial misconduct, and we argued that  
12 vigorously.

13 Before we got to the trial, Eddie Lee Washington  
14 sent a letter, I think to myself and Mr. Gardner,  
15 telling us that his original statement was not true.  
16 We sent our investigator to interview him. He told  
17 our investigator the same thing that he testified to  
18 at trial, which was that he had been forced to say  
19 what he said by DeLorenzo. They called him at trial,  
20 anyway. He testified to the same thing at trial, that  
21 DeLorenzo forced him to say what he said, and the  
22 video was place and played for the jury in the first  
23 trial, which clearly showed what happened.

24 In my opinion, DeLorenzo and Assistant Solicitor  
25 Brad Richardson committed subordination of perjury.

1234

## BOBBY FREDERICK - DIRECT EXAMINATION

1 They committed obstruction of justice, and tampering  
2 with a witness. I think the judge at the first  
3 trial -- I thought it was the second trial, but I  
4 don't see it in the transcript -- made a specific  
5 finding that there was no prosecutorial misconduct.

6 At the second trial, we called Eddie Lee  
7 Washington as our witness to testify what DeLorenzo  
8 did to him to make him lie under oath, or try to.

9 Q How long had you been practicing in Horry County  
10 at that time? Is this common practice? Is this the  
11 way it works up here?

12 A With certain prosecutors and certain  
13 investigators, it is common practice. The problem with  
14 it is when we come into court and have a video where we  
15 have a cop threatening to take someone's children and  
16 trumping up charges against his wife and telling him  
17 what to say, and we come in court and show it to the  
18 Court and show it to judge, other police officers are  
19 watching it in court, the jury saw it, and nobody does  
20 anything. When nobody -- the case went up on appeal.  
21 I don't think it was raised as an issue on appeal, but  
22 the court of appeals and the supreme court, if they  
23 read the transcript, also saw it, and nobody did  
24 anything. Yeah, it is common practice, not just here,  
25 but probably nationwide.

## BOBBY FREDERICK - DIRECT EXAMINATION

**1235**

1 Q If you could, look at Page 111 of the trial  
2 transcript. I think this is part of your opening  
3 statement?

4 A Yes, sir. Can I add one more thing?

5 Q Absolutely.

6 A I didn't file a grievance on Assistant Solicitor  
7 Brad Richardson for committing subornation of perjury  
8 and witness tampering because, again, I don't think  
9 disciplinary counsel would have done anything. They  
10 never have done anything when I file a grievance on a  
11 prosecutor, but there is a lot of attorneys in the room  
12 right now, and I just want to say, it is there, it is  
13 in the first trial transcript, it is outlined in this  
14 trial transcript, there is a video of it.

15 Judge, I'm quitting the practice of law. I'm  
16 done. I'm going into inactive status after this year.  
17 If any lawyer in this room cares, you have a duty to  
18 report that yourself. You all know about it now.

19 What was the question?

20 Q Thank you. If you would, look at Page 111 and  
21 Page 114 record of appeal, Lines 11 through 19.

22 A Yeah.

23 Q This is part of your opening argument. This sort  
24 of summarizes your concern about Eddie Lee Washington's  
25 testimony?

1236

## BOBBY FREDERICK - DIRECT EXAMINATION

1 A I did. I talked about it in the opening.

2 Q Would there have been a basis to move for a  
3 mistrial with this perjured testimony being offered?

4 A We raised it pretrial. Actually, I don't know if  
5 we did in this trial, we did in the first trial. We  
6 moved for a dismissal in the first trial based on the  
7 prosecutorial misconduct and investigatory misconduct,  
8 which was clear. We had a Court that said there is no  
9 prosecutorial misconduct. The Court is sanctioning  
10 what the investigator did. So at least in this trial,  
11 at this point, I don't think there was.....

12 Q In the second trial, you didn't make another  
13 motion because it was shot down at the first one?

14 A I called Eddie Lee Washington as a witness in  
15 this trial, in the second trial.

16 Q Did you have concerns also about the testimony of  
17 James Pearl?

18 A Yes.

19 Q I mean, Officer DeLorenzo knew that Mr. Pearl  
20 didn't pass a polygraph test; is that correct?

21 A Yes.

22 Q What part of the polygraph did he not pass?

23 A And the prosecutor did. I cannot testify to the  
24 specifics of it. I would have to have the polygraph in  
25 front of me. They gave him two polygraphs. I think he

## BOBBY FREDERICK - DIRECT EXAMINATION

1237

1 failed the first one. They tried to rehabilitate him  
2 with a second polygraph, and I think it was inclusive.  
3 I think we go through that somewhere in the transcript,  
4 but I don't remember the details.

5 Q And there is another witness that the State is  
6 having testify?

7 A Yes.

8 Q Now, can you summarize -- obviously, you remember  
9 the trial. Can you summarize what the evidence was  
10 against -- specifically what implicated either  
11 Mr. Sessions or Mr. Stephens?

12 A As to Christopher, it was James Pearl.

13 Q That was it?

14 A Pretty much.

15 Q Okay. So this is kind of a case that might be a  
16 close call. If you have one witness -- and in the  
17 transcript there is an indication -- well, you already  
18 talked about -- excuse me, did Officer DeLorenzo  
19 promise Mr. Pearl anything if he testified?

20 A I don't know how long it was after the murders.  
21 I think it may be in here in the testimony, but maybe a  
22 year, year-and-a-half after the murder. James Pearl  
23 was arrested on a drug charge. On his way to the jail,  
24 on the audio tape in the car, he is repeatedly telling  
25 the officer that they need to help him, they need to

1238

## BOBBY FREDERICK - DIRECT EXAMINATION

1 help him get home for Christmas, the holidays were  
2 coming up. He says almost verbatim, more than once, I  
3 will tell you anything that you want to hear if you  
4 help me, and we went into that at trial as well.

5 Q You conducted -- you obviously cross-examined  
6 Mr. Pearl, whether or not he was promised anything or  
7 if he had gotten any benefit from testifying?

8 A We did.

9 Q I guess my question is, there was no upstanding  
10 citizen here, you know, banker, whoever, who was  
11 implicating my client? The State's witnesses were --

12 A I mean.....

13 Q The creditability could be called into question?

14 A Regardless who they were, their testimony was not  
15 credible. Under the circumstances, with James Pearl, I  
16 do not think he should have been permitted to testify  
17 at all without corroboration. I made a motion  
18 pretrial, asked the Court to have -- I don't remember  
19 what we called it -- a creditability hearing to have  
20 some kind of a threshold before we let him testify. I  
21 knew when I made the motion there is no precedent for  
22 that in South Carolina. There is other states that do  
23 it, which is why I made the motion.

24 Q Similar almost to a Biggers as far as the judge  
25 being the gatekeeper on the credibility? Maybe not,

## BOBBY FREDERICK - DIRECT EXAMINATION

**1239**

1 but that is aside.

2 A Yeah. I think in California they can have a  
3 hearing and there has to be some corroboration before a  
4 jailhouse snitch can testify as to the gist of it.

5 Q James Pearl's testimony places both of them  
6 together, right, Mr. Sessions and Mr. Stephens; is that  
7 correct?

8 A I think so.

9 Q What do you think -- if you could speculate --  
10 and I'm asking for speculation -- in your opinion, if  
11 the jury heard that Mr. Sessions was not even in the  
12 state at the time, would that have made a difference in  
13 the case? In your opinion, was there overwhelming  
14 evidence of guilt in this case?

15 A No. The case barely got past directed verdict.  
16 And, yes, that would have made a huge difference, in my  
17 opinion.

18 Q Not only from Mr. Sessions, but for Mr. Stephens,  
19 because if this person says they were both together --

20 A Well, he's charged with accessory. He is not  
21 charged with murder or being present at the scene. He  
22 is charged with accessory before the fact. If  
23 Mr. Sessions was not there and didn't commit the  
24 murder, obviously Chris didn't help him before he  
25 committed the murder that he didn't commit. So, sure,

1240

## BOBBY FREDERICK - DIRECT EXAMINATION

1 it would have been helpful.

2 Q Did you have any concerns that the prosecutor was  
3 bolstering the testimony of Mr. Pearl? And let me call  
4 your attention to a couple of pages.

5 A Please.

6 Q What is easiest for me to tell you, transcript  
7 page?

8 A Please.

9 Q Transcript 984.

10 A Say the page?

11 Q Transcript 984, Line 14.. It is says James Pearl  
12 -- this is Mr. Richardson's closing argument. Does  
13 that not approach him bolstering that testimony?

14 A I don't know that it is my place to interpret the  
15 law from the witness stand, but I don't think so. I  
16 think he is just going over what the guy said.

17 Q How about the testimony of Rodney Turner, Page  
18 986, Lines 19 through 21. The door was closed, he  
19 can't -- he's telling the truth, he doesn't know.

20 A Saying he's telling the truth -- yeah, there is a  
21 bolstering. Absolutely.

22 Q Is that something you would have considered to  
23 object to?

24 A Yeah. I can't say why I didn't, I just.....

25 Q Just one last example. If you could, look at

## BOBBY FREDERICK - DIRECT EXAMINATION

1241

1 Page 989, Line 18. I think we're discussing the  
2 testimony of Christy Pearl?

3 A What line?

4 Q 18 through 20. She's like the little boy that  
5 cried wolf, like the little boy that cried wolf, there  
6 is one time that she has told the truth.

7 A He's talking about Felicia. He's basically  
8 calling her a liar. She didn't testify. They were  
9 going to try to have her testify, but it became  
10 painfully obvious that she was lying. Actually, I  
11 don't know if she testified or not, maybe she did, but  
12 the section you just pointed me to, he was calling  
13 Felicia a liar.

14 Q Well, who was -- what is the reference to -- on  
15 Line 20 where it says "she's told the truth," what is  
16 that in reference to?

17 A Line 20, he's talking about Rodney and bolstering  
18 Rodney's testimony by saying he told the truth.

19 Q I'm sorry, okay. All right.

20 A That is 986?

21 Q Yes.

22 A Yeah.

23 Q Now, there has been some discussion about a  
24 statement that the prosecutor made in his closing  
25 argument, Look at the lawyers, they know their clients

1242

## BOBBY FREDERICK - DIRECT EXAMINATION

1 are guilty. You have a recollection of that?

2 A Yes, I do. Can we go to the transcript so we get  
3 the wording right?

4 Q Yeah. It will take me a second to find it.

5 A Page 994.

6 Q Which line?

7 A Page 994 of the transcript, Line 22. Can you  
8 hear me okay?

9 Q Yes. Folks of the defense knows that this is a  
10 straight path that leads to the guilt of their  
11 defendant, so it is their jobs -- where is --

12 A That's it. That is the exact words that he used.  
13 Now, I objected. I think Mr. Gardner objected. The  
14 transcript doesn't really capture what happened after  
15 that, because as I objected, I was really upset. I was  
16 talking, Mr. Richardson was responding, Judge John was  
17 telling me to stop, and it went from me yelling at the  
18 Solicitor, to me and Judge John yelling at each other,  
19 and I mean it was very, very tense. I was screaming.  
20 I think Judge John was yelling at me, and we all had to  
21 stop and take a step back from it.

22 Q Did you consider a motion for mistrial then?

23 A I did not, and I should have. I was extremely  
24 upset at that moment. I was screaming. And I think I  
25 said in here when I was talking to the judge, I sat

## BOBBY FREDERICK - CROSS-EXAMINATION

1243

1 there that entire trial not being able to tell the jury  
2 that I believed my client is innocent. I'm not going  
3 to let the prosecutor tell them that I believe he is  
4 guilty. I should have moved for a mistrial at that  
5 point.

6 MR. FALK: No further questions.

7 MS. KINARD: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. KINARD:

10 Q Thank you for being here, Mr. Frederick, I know  
11 it was quite a trip.

12 A It was.

13 MS. KINARD: Beg the Court's indulgence. I lost  
14 my document.

15 Q (MS. KINARD) How long have you been practicing  
16 law?

17 A 12 years.

18 Q Approximately what percentage of that has been in  
19 criminal law?

20 A Almost all of it.

21 Q And you were appointed as a 608?

22 A Yes.

23 Q Do you remember how many times you met with your  
24 client?

25 A I really don't. I can't say how many times.

**1244**

## BOBBY FREDERICK - CROSS-EXAMINATION

1 Q Do you feel like you met with him an adequate  
2 number of times to prepare for trial?

3 A I think so, yes.

4 Q Do you recall discussing his charges?

5 A We did.

6 Q Do you recall dismissing the elements of the  
7 charges?

8 A We did. We tried the case two times. I spent a  
9 lot of time with him at the jail. We prepared for  
10 trial pretty extensively. A lot of our preparation, he  
11 was not there for because he was in jail, but I did  
12 meet with him, I just don't know how many times.

13 Q And you felt that he was adequately informed in  
14 his approaching trial and what he stood to gain or lose  
15 as a result?

16 A Sure.

17 Q And, of course, you discussed the State's burden  
18 of proving guilt beyond a reasonable doubt?

19 A Yes.

20 Q And you discussed his versions of the facts of  
21 the case?

22 A We discussed the facts of the case, yes.

23 Q Did you file a discovery motion?

24 A We did.

25 Q You received everything you expected to?

## BOBBY FREDERICK - CROSS-EXAMINATION

**1245**

1 A I think so.

2 Q Did you review all the discovery materials with  
3 him?

4 A As I recall, we had a lot of discovery. I'm sure  
5 we reviewed everything that I thought was relevant.

6 Q Did Mr. Stephens provide you any fact witnesses'  
7 names for you to interview?

8 A I'm going to say probably. I do not recall  
9 specifically what witnesses, you know, came from  
10 Christopher, which came from Jimmy Lee. I know that we  
11 talked to a lot of witnesses. Most of those came from  
12 the State's discovery materials, but I think that  
13 Christopher and Jimmy Lee provided names to us.

14 Q And you used an investigator to help you speak to  
15 these witnesses?

16 A Yes.

17 Q And that is typical in your practice?

18 A In a case like this, yes.

19 Q As a result of the information gained, you were  
20 able to prepare a defense?

21 A We did.

22 Q And I believe these gentlemen testified that the  
23 first trial you and Mr. Gardner, perhaps in  
24 conjunction, I'm not sure, decided not to present a  
25 defense; is that correct?

1246

## BOBBY FREDERICK - CROSS-EXAMINATION

1 A In the first trial, that's right.

2 Q And in the second trial, which we are talking  
3 about today, you did present witnesses on behalf of  
4 your clients?

5 A We did.

6 Q Can you describe the change in that decision?

7 A In the first trial, when the State rested, we  
8 were not sure -- we were pretty sure it was an  
9 acquittal. At that point, we all talked about it and  
10 we didn't want to rock the boat, because it looked like  
11 a very good chance that the jury would come back with  
12 an acquittal. So we decided not to call witnesses.  
13 When we ended up with a hung jury, some jurors believed  
14 he was guilty. At that point, we decided when they  
15 retried the case that we needed to just put everything  
16 in and go ahead and call our witnesses, too.

17 Q At any time, did you enter plea negotiations on  
18 behalf of Mr. Stephens?

19 A I don't think so. I don't know if there was a  
20 plea offer. If there was, I don't think we considered  
21 it. This was never going to be a guilty plea.

22 Q Did you have an overall trial strategy in this  
23 case? I realize it is a vague question. Did you have  
24 a picture you wanted to portray in terms of presenting  
25 the witnesses?

BOBBY FREDERICK - CROSS-EXAMINATION **1247**

1 A I think the one thing that we probably stressed  
2 the most at trial was the misconduct during the  
3 investigation, the pressure that was on the police  
4 department to solve this case and what they did as a  
5 consequence of that.

6 Q Do you recall any issues that arose during  
7 witness presentation testimony, did anything go not as  
8 planned?

9 A You are going to have to be more specific.

10 Q That was more of a general question.

11 A There were issues that came up throughout the  
12 trial, things came up.

13 Q Absolutely. Of course we discussed the jury  
14 charges, as you heard with Mr. Dudek, do you recall  
15 your objection to that?

16 A From my review of the transcript, I can tell you  
17 that I objected to it. It was a very general  
18 objection, and I heard the discussion with Mr. Dudek.  
19 I did not specifically object on the grounds of burden  
20 shifting, although, I mean, clearly that is the  
21 problem. I did not articulate that to the judge at the  
22 time. It was more of a general objection, and the  
23 point was by charging that to the jury, he is putting  
24 it on us to prove that someone else did the crime,  
25 which is burden shifting. I did not make that specific

1248

## BOBBY FREDERICK - REDIRECT EXAMINATION

1 objection, no.

2 Q I don't have any further questions, unless there  
3 is anything else you would like the Court to know in  
4 your representation.

5 A I don't have anything else if you don't have any  
6 more questions.

7 MS. KINARD: Thank you.

8 THE COURT: Redirect?

9 MR. FALK: If I may ask a couple.

10 REDIRECT-EXAMINATION

11 BY MR. FALK:

12 Q You thought there was evidence of third-party  
13 guilt in this case, right?

14 A Yes.

15 Q And you put on evidence that would have -- that  
16 you thought a jury could believe that; is that correct?

17 A Yes. And I think that if they prosecuted four,  
18 five different people that we referenced during the  
19 trial, if they prosecuted them the way they prosecuted  
20 Christopher, they could have gotten a conviction on any  
21 of those people.

22 Q So the instruction -- I mean, third-party guilt  
23 was an overall theme of the defense in this case?

24 A It was central.

25 MR. FALK: Thank you. Nothing further.

JOHNNY GARDNER - DIRECT EXAMINATION **1249**

1 THE COURT: Thank you. You may step down. You  
2 may be excused. Next witness.

3 MR. FALK: We call Mr. Gardner.

4 (JOHNNY GARDNER, having been duly sworn,  
5 testified as follows:)

6 DIRECT EXAMINATION

7 BY MR. FALK:

8 Q Could you state your name for the record?

9 A Johnny Gardner, G-A-R-D-N-E-R.

10 Q How did you become involved in this case?

11 A I was appointed to represent Jimmy Lee Sessions.

12 Q Thank you. You were here for Mr. Frederick's  
13 testimony?

14 A Yes, sir.

15 Q He characterized misconduct that he believed was  
16 going on as far as from the prosecutor and  
17 investigators in this case?

18 A Yes.

19 Q Do you agree with his assessments?

20 A Yes.

21 Q Do you have anything you want to add?

22 A I got into it late. I believe Jimmy had a  
23 defender, okay. I don't know what happened. They got  
24 sideways or something. That happens a lot. So I  
25 missed the first few months of it, or maybe longer than

1250

## JOHNNY GARDNER - DIRECT EXAMINATION

1 that. You know, for example, when I got into it, one  
2 of the first things was Bobby had been trying to get a  
3 prelimin done. I think they put -- the State put the  
4 preliminary off because one of the police officers was  
5 unavailable. I think Bobby did research and found out  
6 that the police officer didn't even work there anymore.  
7 I think to characterize it in a friendly state, they  
8 were mistaken when they said she's unavailable.

9        Stuff like that happened all the time. But the  
10 truth of the matter is this case could be summed up  
11 how Jimmy Lee summed it up. One of the videotapes of  
12 the hours of interrogation that he did, I don't know  
13 how many hours it was, I think it was a good bit, ad  
14 they didn't offer any of that for the jury, but the  
15 police officers got him in there sweating and saying,  
16 you know, the word on the street, Jimmy, is you did  
17 this. Jimmy -- not an exact quote, but close to it --  
18 says something like, Word on the street? That is  
19 where you are getting your evidence from? You need to  
20 get out there and do investigation, fingerprints, do  
21 what you all do. I don't make that for comedy  
22 purpose, there was a lot of stuff going on with this  
23 case. This is the strangest case I've ever been a  
24 part of. One thing that isn't discussed is this case  
25 started out with three, and you were as guilty as that

JOHNNY GARDNER - DIRECT EXAMINATION **1251**

1 third guy. They were squeezing him. I think there  
2 was testimony today about you want to be a defendant,  
3 or do you want to be a witness, and you better believe  
4 that that was going on. Because one of the boys was a  
5 defendant, and the first trial judge directed a  
6 verified on him. Directed a verified on a murder  
7 case. I've heard of that, but I've never seen it; you  
8 know. That is pretty big. But there was no evidence  
9 that that guy, that I could ever tell, had anything to  
10 do with it, okay. The only evidence that I know of  
11 that even puts these guys there is by a bunch of  
12 people -- not even a bunch of people, but some, that  
13 their credibility is questionable, to say it in a  
14 friendly way.

15 We tried the case and I was questioning one of  
16 the guys, one of the State's witnesses, and I think  
17 this is the one that Bobby was talking about, but he  
18 flunked the polygraph. I didn't think you could put a  
19 witness on the stand to ask questions if you knew he  
20 flunked a polygraph, but, evidently, the State thought  
21 they could -- or did.

22 Q That was James Pearl?

23 A I think it was. I don't have the transcript in  
24 front of me, but he says something to the tune of I  
25 passed the polygraph or passed the test, something like

1252

## JOHNNY GARDNER - DIRECT EXAMINATION

1 that, and the judge said, okay, I want to see the  
2 lawyers in chambers, words to that effect. I think he  
3 offered a mistrial, but we didn't want a mistrial. We  
4 were winning the case, no doubt about it. When the  
5 jury was deliberating, there was nobody in that  
6 courtroom that thought it would be anything but an  
7 acquittal. Nobody thought these guys had anything to  
8 do with it. Nobody thought that the State laid a hand  
9 on them. Brad Richardson had a drug charge hanging  
10 over Jimmy Lee's head. I don't remember what it was,  
11 but there was talk, well, we'll get him on the drug  
12 charge, and I have nothing to do with that, so. It was  
13 a hung jury, so they declared a mistrial.

14 The Solicitor said he would try the case right  
15 away. We worked on it and said, you know, we can't  
16 prove who did it, but we can prove that these boys did  
17 not. We can clearly prove they did not do it. So we  
18 had a new session, went through everything. There was  
19 boxes. Someone asked about discovery, did you go over  
20 discovery. I think it was over 1100 pages of  
21 telephone records. Does that sound about right? And  
22 that had nothing to do with the case. Nothing  
23 basically had anything to do with this case. There  
24 was people wearing T-shirts and buttons, but that was  
25 before I got involved. That was bond hearings,

JOHNNY GARDNER - DIRECT EXAMINATION **1253**

1 preliminary hearings, things of that nature. There  
2 was pressure to find someone who did this. No one  
3 knew who did it. People were coming, people  
4 volunteering information. There was a guy that lied  
5 in a police car saying he would say whatever they  
6 wanted. One guy ultimately testified that he was in  
7 part of the jail and that Jimmy Lee just shouted  
8 across, with all of these people, like in a courtroom  
9 right here, Oh, by the way, I killed these two girls  
10 over at the beach. None of that made any sense.

11 So we put him up -- we called -- we had all of  
12 our evidence, ready to go. We got ready for Trial No.  
13 2. The State asked for a continuance. I never heard  
14 of the State -- I mean, I never had the State ask for  
15 a continuance because the Constitution says the State  
16 calls the case, but this was all for -- I don't know  
17 if it was for production purposes or whatever, but the  
18 courtroom was packed, Brad Richardson asked the judge  
19 to get a continuance, can't remember what his excuse  
20 was. I think he said he wanted to do a DNA analysis,  
21 I think it was. You know, Hey, Judge, we just tried  
22 this case, I think we tried it in November, and I  
23 think this was like in December, maybe October, but it  
24 was relatively quick. I never tried a murder case  
25 that quick. So the judge granted a continuation.

1254

## JOHNNY GARDNER - DIRECT EXAMINATION

1           What happened is the State called some guy to  
2 testify -- I mean, that was addressed by the supreme  
3 court, so I don't think that is relevant, but he  
4 didn't know anything about the case, but he testified  
5 about profiles and things. It caught me off guard.  
6 It was crazy. But I'll tell you what is not crazy, I  
7 put up the best guy in the State of South Carolina,  
8 about shoe prints. We don't know who the shoe prints  
9 were who killed these ladies, but it was not Jimmy Lee  
10 Sessions. The State's own witness, DNA on one of the  
11 victims, one of the lady's fingernails, that is  
12 consistent with the struggle with the killer. We  
13 don't know who it was, but it was not Jimmy Lee  
14 Sessions.

15           The State's theory was that Jimmy Lee went in  
16 there. There was no theory about anyone else doing  
17 it. So there was -- all of that stuff, if I could  
18 change anything, and I heard some interesting stuff  
19 today, and most of it brought back memories and  
20 everything. I don't remember the exact language, but  
21 Donna Elder, who was one of the prosecutors in the  
22 second trial, it was almost like she flipped the  
23 burden of proof on us. I should have objected to  
24 that. I don't remember what her language was, but it  
25 is probably in there somewhere. Almost like we didn't

JOHNNY GARDNER - DIRECT EXAMINATION **1255**

1 prove our innocence, you know. I don't know how much  
2 more you can go to prove your innocence by saying the  
3 DNA was not his. I know I told the jury, and it  
4 probably doesn't have anything to do with this PCR,  
5 but if the DNA matched someone, you better believe  
6 that the Solicitor's Office would say that is the  
7 person that did it. I should have objected to that.  
8 I should have asked for a mistrial, what you and Bobby  
9 were talking about earlier with Brad Richardson saying  
10 these lawyers know they are guilty, you know referring  
11 and the Golden Rule.

12 I told Madam Attorney General in the hallway, I  
13 don't know what incident they were referring to, but  
14 if there is a Golden Rule violation, I should have  
15 objected to that. The main thing I'm upset about in  
16 this trial is the whole way it was done. There was an  
17 atmosphere of the second trial that was not there for  
18 the first. There was a lot of people called, big  
19 courtroom, it was packed, you had jurors coming up  
20 saying I don't believe in the death penalty. It is  
21 not a death penalty case. I don't know what it was,  
22 but it was not -- someone said there is not an easy  
23 trial or regular trial, this was a big trial, big time  
24 trial, big time stuff going on. I think it lasted  
25 five days for Trial No. 1 and five days for Trial No.

1256

## JOHNNY GARDNER - DIRECT EXAMINATION

1 2, which is hard to believe, because the first trial  
2 we didn't put any witnesses because we didn't think we  
3 needed to. I mean, absolutely you could ask anyone in  
4 that courtroom while the jury was out and everybody  
5 said it is an acquittal. Second case, second trial,  
6 we put evidence up, you know. The Solicitor's Office  
7 put up flimsy evidence about boys were in a hotel room  
8 snorting cocaine, and all of this prejudicial  
9 information. We showed that these guys were not even  
10 registered or in the hotel. I think we called the  
11 manager or owner, and he testified, I have the  
12 records, these guys weren't there. You know, once  
13 again, Solicitor's Office reversed the burden of proof  
14 and put it on me, and I didn't object. They just  
15 said, well, these guys could have snuck in, they  
16 didn't have all the exits covered. I mean, that is a  
17 defense attorney's argument, right, not a Solicitor's?  
18 Anyway, I got distracted, I'm sorry.

19 Q When you were talking about you didn't want a  
20 mistrial, that was in the first one?

21 A First trial. First trial.

22 Q Mr. Frederick talked about a mistrial after the  
23 look-at-the-lawyers-they-look-guilty?

24 A That never entered my mind because I was so  
25 livid. It never entered my mind to ask for a mistrial.

JOHNNY GARDNER - DIRECT EXAMINATION **1257**

1 I don't know where that came from. Why would you say  
2 even the lawyers know the guy is guilty, if that is  
3 what he said?

4 Q There was testimony about Ms. Wall being upset  
5 and a juror seeing her?

6 A See, I don't recall that. I know there was some  
7 stuff happening. I heard people talking about it, but  
8 I didn't have anything to do about.

9 Q I believe Mr. Frederick's testimony was that he  
10 considered asking for a mistrial or possibly asking to  
11 voir dire the jurors if they were influenced by --

12 A Yeah, that should have happened, especially with  
13 the atmosphere going on with the trial, with the  
14 jurors. It is one thing to be called for jury duty for  
15 a routine criminal case, even murder case, it is  
16 another thing to be called into an electric atmosphere  
17 where media or the death penalty is involved or things  
18 like that.

19 Q Mr. Frederick characterized the prosecution's  
20 case against Mr. Stephens as very thin, I think. Was  
21 there a trial strategy not to call Libby Pierce, an  
22 alibi?

23 A That was not strategy, unless it was the first  
24 trial. The first trial was designed after the State  
25 rested to not put up any evidence.

1258

## JOHNNY GARDNER - DIRECT EXAMINATION

1 Q To get the last word in?

2 A To close last and point out all of this stuff.

3 The second trial, if we could have a witness that said  
4 Jimmy Lee was in Virginia, we should have had her  
5 testify.

6 Q Do you recall him telling you about that?

7 A I don't believe -- Jimmy or Bobby, or both,  
8 testified today how the witness list went and the  
9 strategy and stuff like that. I think it was Jimmy Lee  
10 that said that Bobby was doing all of that. Remember,  
11 Bobby was involved in this case a lot longer than me.  
12 I have 23 boxes of discovery and went through it as  
13 best as I could, but most of it had nothing -- I mean,  
14 it had something to do with the case technically, but  
15 it was like 1100 pages of phone records never  
16 introduced in testimony, didn't have anything to do  
17 with the case.

18 There was an example of the police department  
19 frustration. I never had the police in a state  
20 criminal case give me 1100 pages of phone records  
21 involved in a murder case. It was just a frustration  
22 level, and I guess it was the victims, or whoever's  
23 family, putting pressure on the police to solve the  
24 crime. I heard there was vigils, and I remember  
25 pictures taken of people in the audience of these --

JOHNNY GARDNER - DIRECT EXAMINATION **1259**

1 whatever they were -- trying to grasp at straws trying  
2 to make an arrest on someone.

3 So I don't exactly remember Jimmy or Bobby saying  
4 this is the girl that could testify. I did not talk  
5 to her. I remember talking with you in the hallway  
6 out there about an alibi witness. I thought you were  
7 talking about another lady who -- after awhile -- I  
8 thought that is who we talked about, and I didn't  
9 think she was an alibi witness. An alibi is someone  
10 that says he didn't do this crime because he was with  
11 me in Virginia. That lady wasn't that witness. In  
12 fact, it was a different person. That person, I can't  
13 remember if she was called or not. I don't think she  
14 was. I think that is the one that Bobby said was  
15 called or may have been called. It was a different  
16 lady. The lady you're talking about, to the best of  
17 my memory, I never talked to her. But we, the defense  
18 team, Jimmy Lee and Christopher, Bobby and myself were  
19 sharing information, and I don't have an excuse why we  
20 did not call an alibi witnesses. It had nothing to do  
21 with strategy, because we put all the other evidence  
22 up. It would have made sense to put that one up.

23 Q It was a third-party guilt case; is that correct?

24 A Yes, sir.

25 Q And so if there was a witness that would say one

1260

## JOHNNY GARDNER - CROSS-EXAMINATION

1 person was 500 miles away in Virginia, they certainly  
2 would have gone into that trial strategy that someone  
3 else did it?

4 A Absolutely.

5 MR. FALK: One moment, Your Honor. No further  
6 questions.

## 7 CROSS-EXAMINATION

8 BY MS. KINARD

9 Q Thank you for being here, Mr. Gardner. I'll  
10 start with basic background information. How long have  
11 you been practicing law?

12 A I started in '92, so about 20 years, 25 years.

13 Q How many of that has been in criminal law?

14 A Just about all of it. I started as assistant  
15 solicitor, and then started my own practice.

16 Q You were appointed to this case?

17 A Yes, ma'am.

18 Q Do you recall meeting with the Applicant?

19 A Yes, ma'am.

20 Q Many times?

21 A Not many, but enough. I don't remember how many  
22 it was.

23 Q Between meeting with him and preparing with  
24 Mr. Frederick, do you believe that you were adequately  
25 prepared for these trials?

JOHNNY GARDNER - CROSS-EXAMINATION **1261**

1 A Yes, ma'am, no doubt.

2 Q When you did meet with your client, did you  
3 discuss the offenses and indictments that he faced?

4 A I think it was just two murder charges. I don't  
5 know if he had any other charges or not. I wouldn't  
6 disagree with you if he did.

7 Q One armed robbery and one burglary first.

8 A That's right, the burglary. Yes, we talked about  
9 the charges.

10 Q So he understood what he faced up front?

11 A Yes, ma'am.

12 Q And you discussed the State's burden to prove  
13 beyond a reasonable doubt?

14 A Yes.

15 Q Do you remember if he was comfortable heading  
16 into trial?

17 A I think so. I mean as comfortable as you could  
18 be with a packed room saying you killed two people.

19 Q Did you discuss his version of the facts of the  
20 case?

21 A I don't recall if we did.

22 Q Regardless, did he help in the defense theory?

23 A It was one of the most complicated cases I have  
24 ever been on. It was complicated, as well as real  
25 simple. These guys weren't there. There was no

**1262**

## JOHNNY GARDNER - CROSS-EXAMINATION

1 evidence that they were there, except people that were  
2 not credible. That was it. That was pretty much the  
3 whole case.

4 Q In preparation for this case, you received a  
5 great deal of discovery?

6 A Yes, ma'am.

7 Q You reviewed all of that?

8 A Yes. But I didn't read the whole 1100 pages of  
9 telephone numbers, but I need that -- it didn't have  
10 anything to really do with the case.

11 Q And you reviewed the relevant information?

12 A Oh, yeah, absolutely.

13 Q Did he provide you any fact witnesses?

14 A I don't know if it was him or Bobby or a  
15 combination, but we had all of the witnesses, you know.  
16 We called some of them ourselves.

17 Q Do you agree with Mr. Frederick's testimony that  
18 between the Applicants and the two attorneys, you came  
19 up with a witness list and investigated those fully?

20 A Yes. Bobby already had an investigator on the  
21 case, so I didn't have to do that. His name was Jim  
22 Beam or Bill Beam, or something like that. He had done  
23 the work on the case already, but when we did the  
24 second trial, we had a big meeting. He went out and  
25 did the final stuff to do that. I went and got the

JOHNNY GARDNER - CROSS-EXAMINATION **1263**

1 shoe print expert guy. That was the only expert I  
2 think we had. The State had the DNA guy, I think.

3 Q Do you recall entering any plea negotiations?

4 A There was no plea negotiations. My client  
5 maintained his innocence from the day I met him, and  
6 the Solicitor never offered him anything. I think he  
7 offered him 15 years on an unrelated drug case, I  
8 think. I think 15 years, but never discussion about a  
9 plea on this case.

10 Q I might be repeating, forgive me for that, but do  
11 you remember -- you spoke with Mr. Falk about the  
12 issues of people wearing buttons or T-shirts, and you  
13 believe, with Mr. Frederick, that that happened before  
14 the trial?

15 A I have to agree with him, because I can't  
16 disagree because I don't have enough information. I  
17 did hear about that, and my recollection was that that  
18 was before I got involved in it, and it did not happen  
19 out here. I think Bobby read from the transcript that  
20 he made a motion not to do that.

21 Q He did. And regarding the different issues that  
22 Mr. Falk asked you about in terms of closing arguments,  
23 I believe you testified in kind of a blanket statement  
24 that you should have objected to any of those issues;  
25 is that correct?

1264

## JOHNNY GARDNER - EXAMINATION BY THE COURT

1 A Yeah. And I know there was specifics brought  
2 out, like a lot of bolstering that I, apparently,  
3 didn't catch on during the trial. But, yeah, we should  
4 have objected, because that is the crux of this case.  
5 You know, there was no DNA -- in fact, the DNA said  
6 they were not guilty. The shoe print of the person  
7 that did the killing -- the allegation was that Jimmy  
8 Lee was charged with murder, and Christopher was  
9 charged with accessory. That shoe print was neither  
10 one of theirs, and it couldn't be Christopher's because  
11 he wasn't charged with murder, and it wasn't Jimmy Lee  
12 either. So if there is no forensic evidence  
13 establishing that they did it; in fact, the forensic  
14 evidence established someone else did it, then the only  
15 evidence that gets us to the jury, like the old lawyers  
16 used to joke, if I can just get past directed verdict,  
17 I can get a guilty verdict. The only evidence that the  
18 jury could consider was the testimony of the police  
19 witnesses.

20 MS. KINARD: Thank you. I have nothing further.

21 A I can't think of anything else.

22 MS. KINARD: Thank you.

23 THE COURT: Anything further?

24 MR. FALK: No further witnesses.

25

EXAMINATION

## JOHNNY GARDNER - EXAMINATION BY THE COURT

T265

1 BY THE COURT:

2 Q Mr. Gardner, I'm confused about something. Let  
3 me ask you a question. It's obvious to me, to the  
4 Court, that you and Mr. Frederick were very involved in  
5 this case and worked hard on the case and still  
6 passionate about the case, and that your defense, as  
7 you said a moment ago, is that there is no evidence to  
8 put either of the defendants at the scene.

9 A Yes, sir.

10 Q If you would have known you had an alibi witness,  
11 would you have called --

12 A I would have had to. I mean, that would have  
13 been -- yes, sir. I would have called the alibi, is  
14 the short answer. Yes, sir. I mean, I would have had  
15 to.

16 Q Does that mean you were not aware that there was  
17 an alibi?

18 A If Bobby said that we knew about it, I trust  
19 Bobby. I just -- like I said awhile ago, I don't have  
20 an excuse. I don't know why. I have done PCRs before  
21 where people say things that are not -- I have no  
22 recollection or are not possible, but this one....

23 Q My real question is you were representing  
24 Mr. Sessions?

25 A Yes, sir.

1266

## JOHNNY GARDNER - EXAMINATION BY THE COURT

1 Q And Ms. Pierce is the witnesses who said that she  
2 was involved with Mr. Sessions?

3 A Yes, sir.

4 Q And that she was the alibi witness?

5 A Yes, sir.

6 Q And you don't know anything about her?

7 A I don't recall talking with her, Your Honor. I  
8 know that makes no sense at all, but if she was living  
9 in Virginia at the time of this trial, then I don't  
10 know if Bill Beam went up to Virginia, or if she came  
11 down here and met with him. You know, that is the way  
12 I would have done it. Because if something went  
13 sideways, I want someone else to testify what she said,  
14 but I can't -- I don't know -- I believe she showed up  
15 and was sent home, or something along those lines. I  
16 have no answer for you on why that happened.

17 DEPUTY: Judge.

18 (A brief pause in the proceedings.)

19 THE COURT: Deputy says we need a five-minute  
20 recess.

21 (A recess was taken.)

22 THE COURT: If you have any additional questions  
23 of the witness following my questions of the witness?  
24 Any additional questions of the witness following  
25 questions by the court?

JOHNNY GARDNER - REDIRECT EXAMINATION **1267**

1 MR. FALK: If I could, Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. FALK:

4 Q The way you described it, there was a division of  
5 labor, you and Bobby were both representing these two  
6 people?

7 A Yes, sir.

8 Q And you were splitting up the task?

9 A Yes, sir.

10 Q And you came into the case a little later, and so  
11 Bobby was the one that hired the investigator to talk  
12 to some of the witnesses?

13 A That's correct.

14 Q Is it possible that you just hadn't read the  
15 investigative reports, or not aware of it?

16 A It is possible. You know, that is a good way to  
17 describe it. I hired -- through the Court of course,  
18 but I hired the expert, and Bobby hired the private  
19 investigator way before I was on the case.

20 Q So you were focusing on the forensics?

21 A Yeah, because that was all Jimmy Lee. The State  
22 could see that they couldn't prove Christopher was  
23 there, and that is what they said, you know, but they  
24 ended up proving Jimmy Lee wasn't there because the  
25 footprint was someone else. That footprint is not

1268

## JOHNNY GARDNER - REDIRECT EXAMINATION

1 like -- this footprint was in the blood of one of the  
2 girls that was killed, so whoever made the footprint is  
3 the killer. But the way you described it was perfect,  
4 because when the witnesses were showing up, like the  
5 manager or owner of the hotel, I had to talk with them  
6 in the hallway. There was another witness that we had  
7 that Bobby was talking to. Bobby had Laura Hiller  
8 working for him, and John Hiller was a law student.  
9 They met with some of the people. John Hiller was the  
10 rock star of this case, because he took all of this  
11 evidence and put it on one of the things that plays  
12 music that these kids have, and you could -- instead of  
13 putting the name of the song, you could put the  
14 witness, her name or his name, and it had code,  
15 whatever. So he set that up on cross-examination, and  
16 so there was -- part of this was a drug deal, a girl  
17 that stole a safe that had the money in it, or drugs in  
18 it or whatever, and I can't remember her name. Did you  
19 take the safe? No, I don't know what you are talking  
20 about. He would hit the button and it would say, And  
21 then I took the safe. And then one of the cops -- we  
22 would say, Isn't it true that you talked to this guy  
23 blah-blah, and he said, no, I didn't, and he would hit  
24 the button and it would say, Then I talked to this guy.  
25 And it should be in the transcript. So everything was

## CLOSINGS

**1269**

1 thoroughly worked on. There was a division of labor.  
2 It could have been that -- I don't know who the lady  
3 said that she talked to, she could have talked to the  
4 investigator and not me. I don't know if that answers  
5 your questions.

6 MR. FALK: Nothing further.

7 MS. KINARD: No further questions.

8 THE COURT: Thank you. You may step down. Call  
9 your next witness.

10 MR. FALK: We rest.

11 MS. KINARD: No witnesses from the State, Your  
12 Honor.

13 THE COURT: Argument?

14 MR. FALK: Your Honor, couple of times both  
15 lawyers said that this was a case -- a third-party  
16 guilt case. It was a close case. They hung the jury  
17 the first time, but they thought they won it the first  
18 time. They testified that the witnesses against them,  
19 against my clients, certainly had creditability  
20 issues, and both of them testified that it would have  
21 made a difference had they called an alibi witness. I  
22 presented the testimony of what the alibi witness  
23 would have said. She said that she and Jimmy Lee were  
24 in Virginia. She said she was aware of Jamilla  
25 Hightower and Monica Wall, and she had called down

1270

## CLOSINGS

1 here, you know, to find out what is going on, and that  
2 is when she heard about this shooting. She and  
3 Mr. Sessions were in Virginia for a period of time,  
4 and then they came back down here.

5 This is not a case where I think the Court could  
6 find there was otherwise overwhelming evidence of  
7 guilt. It was a very narrow case, and one more  
8 witness could have played a difference. Certainly  
9 this alibi witness dove-tails in with the trial  
10 strategy. They had a consistent trial strategy as far  
11 as it wasn't them, they weren't there. I don't know  
12 what I could do about all the testimony that the Court  
13 heard about the Solicitor's misconduct and the  
14 investigator's misconduct. I know Mr. Frederick is  
15 very concerned about that. I think he certainly  
16 brought some of it to the Court's attention. Whether  
17 or not he should have made another motion to dismiss,  
18 at least so there would have been a record of that.

19 Both of the -- Mr. Frederick testified that he  
20 knew that Ms. Wall had been making a scene in front of  
21 the jurors. He said that he should have asked for a  
22 mistrial, and candidly said that he didn't think one  
23 would be granted, but at least possible that the  
24 jurors could have been voir dired to know whether or  
25 not they were influenced by this. We know this was a

## CLOSINGS

**1271**

1 highly charged case, and so it is easy to understand  
2 that the jurors could be influenced or intimidated by  
3 the family and friends of the victims being in front  
4 of them making a scene.

5 I believe there were instances of bolstering the  
6 testimony of James Pearl, Rodney Turner. Whether it  
7 was Christy Pearl or Rodney Turner again,  
8 Mr. Frederick testified he should have objected to  
9 that. There is the whole commotion at the end of the  
10 trial where the Solicitor says, Look at their face,  
11 even the lawyers know they are guilty. In both of  
12 them -- and it is certainly understandable in getting  
13 caught up in being stunned that you would hear  
14 Solicitor make that type of conduct, maybe they didn't  
15 think we should ask for a mistrial, but I think  
16 grounds for a mistrial could have been made there.  
17 Certainly that would have been something that could  
18 have gone up on appeal.

19 As we are talking about the appeal, we're coming  
20 back around to a significant issue in this case is the  
21 way that the jury was charged. I mean, I know we  
22 can't take experts as far as what the law is, but I  
23 think Bob Dudek is aware of what the law is. He was  
24 concerned by the fact -- his testimony was concerned  
25 by the fact that there was even a charge that the jury

1272

## CLOSINGS

1 was instructed on this third-party guilt charge, and  
2 it is a particular charge in that it I do think it  
3 accurately reflects what South Carolina case law is,  
4 but it is confusing for the jury as to whether or not  
5 they should be making some kind of determination that  
6 we should only consider this evidence if it is  
7 relevant to that. It is the judge's job as the  
8 gatekeeper, keep irrelevant evidence out, and the jury  
9 is entitled to do whatever they want with the relevant  
10 evidence that they heard. When the charge, in the way  
11 that they were instructed, you either look at it like  
12 you are going to confuse the juror, or that the judge  
13 was asking the jury to make this legal question about  
14 what evidence is relevant and what isn't. It was  
15 something that -- I also think it was burden shifting  
16 and that it intended to show that -- made it look like  
17 he had to prove third-party guilt evidence in order to  
18 prove that he's innocent, and he doesn't have to prove  
19 that he's innocent.

20 If you look at the standard -- I mean, there is a  
21 standard third-party charge that I found in New Jersey  
22 where it basically says, you know, there could be  
23 evidence of third-party guilt, and the defendant is  
24 under no obligation to prove his innocence, doesn't  
25 shift the burden to him and, you know, the case must

## CLOSINGS

**1273**

1 be proven against him beyond a reasonable doubt.

2 I'm just saying that had it been an issue that  
3 wasn't as central to the case, but I think third-party  
4 guilt was an essential issue to the case. I think the  
5 jury was given a confusing instruction and I think it  
6 was burden shifting. If we can say that maybe Mr.  
7 Frederick should have made the burden shifting  
8 argument so that issue would have been better  
9 preserved on appeal for Mr. Dudek to take care of, Mr.  
10 Dudek thought at least it was an issue that was  
11 preserved for appeal, whether or not it should have  
12 even be granted, Mr. Dudek thought it should not have  
13 been done, and he didn't really have a clear  
14 explanation as to why he didn't use that other than he  
15 thought there was other issues that he thought might  
16 have been stronger, but I don't think he necessarily  
17 articulated a clear appellate strategy that we don't  
18 want to use this because it will detract from our  
19 other two arguments.

20 I think there is a lot of problems with this  
21 case, and I think the three strongest points are the  
22 jury instruction -- I guess my two is the jury  
23 instruction and failure to call the alibi, and  
24 possibly not moving for a mistrial at the end after  
25 prejudicial remarks were made during closing

1274

## CLOSINGS

1 arguments.

2 THE COURT: All right. Thank you.

3 MS. KINARD: When it comes to calling an alibi  
4 witness, it certainly would fit into the third-party  
5 guilt theory of the case that both of these attorneys  
6 testified they were working under. Ms. Pierce, when  
7 she testified, we have no reason to find her more  
8 credible than any other witness that testified. Her  
9 testimony was here and said that these gentlemen could  
10 not have committed these crimes, but it seems to me  
11 that she was one less credible witness among a group  
12 of less than credible witnesses.

13 You heard the attorneys testify -- particularly  
14 Mr. Gardner -- that he wasn't sure why she wasn't  
15 there or called, and of course had he known about her,  
16 she would have been called. I don't think that is an  
17 issue that we can question at this time. Regardless,  
18 it is not possible to try a perfect case, and that is  
19 also mentioned in Strickland versus Washington. We  
20 need to try to remove the distorting effects of  
21 hindsight when it comes to trying a case. I think it  
22 is a uniquely strange situation, because we almost  
23 have two cases, not only are we looking at one before  
24 us, being the second trial, but also what happened at  
25 the first and how that affected other things. So we

## CLOSINGS

**1275**

1 have a strange accumulation of information that we are  
2 trying to sort through in order to assess these  
3 allegations. We have been able to compare the first  
4 and second trials, as well as the things that were  
5 presented by witnesses, between them. I think it is  
6 unfortunate, both for the Applicants and for the  
7 attorneys, that we have the ability to do that,  
8 partially because it does create the stressful  
9 environment for the second trial, the electric  
10 environment I think is the term that Mr. Gardner used.  
11 People were not quite acting normally. I think that  
12 is clear from all of the witnesses, so I believe there  
13 was understandable mistakes due to the overwhelming  
14 stress, and I don't think any of these mistakes ended  
15 up as something we could call deficient representation  
16 or prejudicial representation. These gentlemen  
17 conducted a thorough investigation, worked closely  
18 with their clients, developed a strong witness list  
19 and used the help of an investigator to interview all  
20 of the State's witnesses, all of the defense witnesses  
21 and decided on the presentation that they were going  
22 to make.

23 As you heard them testify, there was very slim  
24 evidence. I guess their clients, they worked with  
25 that, and in the process, they came up with the first

1276

## CLOSINGS

1 trial presentation that they thought was an acquittal.  
2 They were ready for that and saw the hung jury, so  
3 they beefed up the case for the second trial and put  
4 all the cards on the table. I believe that it is hard  
5 to say it is a mistake. That is certainly articulable  
6 trial strategy. They prepared their cases and put it  
7 all out there to best help their clients. Certainly,  
8 it gave opportunity for issues to arise, but most of  
9 the issues that we ended up talking about was in the  
10 State's closing argument, which would have happened no  
11 matter what, and these issues arise it is -- I think  
12 it is well known by most attorneys that it is  
13 uncomfortable to object during closing, but sometimes  
14 we do it anyway. We can say it was part of the  
15 atmosphere of the case or anything else that kept  
16 these gentlemen from objecting during closing  
17 arguments.

18 It's an overwhelming situation for all of these  
19 men. It is certainly not something that is desirable,  
20 but I don't think that when you look at each of these  
21 elements individually, you can say that any of them  
22 were truly deficient or that any of them or were  
23 prejudicial to the Applicants, so for that reason the  
24 State requests that you deny any relief they are  
25 seeking.

## CLOSINGS

**1277**

1 MR. FALK: If I could make one comment, not to  
2 object during her closing argument, but there was from  
3 evidence presented here that would have questioned the  
4 creditability of Ms. Pierce.

5 THE COURT: Alibi witness.

6 MR. FALK: Obviously that would be an issue, but  
7 her creditability was never challenged. She was a  
8 witness and came down here and testified, and she was  
9 not impeached as to her credibility.

10 MS. KINARD: No, and I would leave that to the  
11 Court's determination just as it would have been left  
12 to the jury's determination.

13 THE COURT: The only question is the personal  
14 relationship, you know. Let me ask this. What about  
15 addressing the issue of the jury instruction?

16 MS. KINARD: Yes, Your Honor. I don't know if  
17 there is any way to get around that. It appears to be  
18 burden shifting, and it is a confusing charge. As far  
19 as that goes, the presentation of it, I believe  
20 Mr. Frederick did object and the Court did not seem to  
21 agree with that. If you give me a moment, I'll put it  
22 up.

23 (A brief pause in the proceedings.)

24 MS. KINARD: He objected on Page 815 on the trial  
25 transcript, objects to it being test of admissibility,

1278

## CLOSINGS

1 and once evidence is admitted, they could consider it  
2 for any purpose they see fit and he doesn't think that  
3 a jury instruction outlining that would be  
4 appropriate. I think that is a proper objection, and  
5 I think, therefore, it was preserved. Then it becomes  
6 an appellant issue. Certainly Mr. Dudek has more  
7 experience than I do, but if he did not seem fit to  
8 provide that -- I don't know if we got the clearest of  
9 answers about that, because he did want to pursue the  
10 victimology issues. Whether he didn't think it was  
11 strong enough to pursue -- I think it was preserved. I  
12 really don't know. I don't know if that is an issue  
13 that would have won, but I heard him say because he  
14 didn't think it would win, and whether that is based  
15 on other issues or solely on its own merit, I'm not  
16 entirely sure. I think it was preserved regardless of  
17 what kind of issue it was, it's there for the Court to  
18 consider.

19 THE COURT: I thought he said he didn't remember  
20 why he didn't raise that issue on appeal?

21 MR. FALK: That was my recollection of his  
22 testimony also. Also my recollection was that he did  
23 not believe it was preserved as far as whether or not  
24 it was burden shifting, and that it could have --  
25 could have possibly been confusing or just a bad

## CLOSINGS

**1279**

1 charge and didn't have a recollection of why, but I  
2 don't think he said it was part of the trial strategy.

3 MS. KINARD: He doesn't recall why he argued it,  
4 that is correct, that is my error, I apologize.

5 THE COURT: Let me ask you a question as it  
6 concerns -- concerning the argument about misconduct,  
7 prosecutorial misconduct. As best as I understood it,  
8 wasn't all of that presented to the jury? Did the  
9 jury get to consider all of that? Didn't they hear  
10 both sides of the argument?

11 MR. FALK: I think that is what the testimony  
12 was.

13 MS. KINARD: I would agree with, and for what it  
14 is worth, prosecutorial misconduct was not raised as  
15 an allegation for this PCR. I realize there might be  
16 sua sponte issues that might be necessary, but we  
17 object.

18 THE COURT: I'll consider it, but I find that it  
19 was all presented to the jury and the jury decides the  
20 creditability of the witnesses and conduct of the  
21 parties involved. As to the issue of the alibi  
22 witness was specifically and directly relating to  
23 Mr. Gardner's client, and I realize there was other  
24 things that could have been construed as being  
25 beneficial to the other defendant, but I find that

1280

## CLOSINGS

1 Mr. Gardner was not informed by his client of such an  
2 alibi witness list existed, and I say that because he  
3 said he was unaware that there was such a witness in  
4 all the sessions they had. It would be illogical to  
5 find that his client would not -- it would be  
6 illogical to find that his client did not tell him  
7 about this alibi witness.

8 On the issue of the jury charge, Counsel should  
9 have argued that the charge was burden shifting, and  
10 did not argue before the trial judge.

11 On the issue of appellant error, I find there was  
12 appellant error in failing to raise the issue of the  
13 charge being confusing. Does that make any sense?

14 MR. FALK: Yes, sir, Your Honor. I always have  
15 problems because a lot of times appellant defense  
16 doesn't pick it up because they say it wasn't  
17 preserved and we're going to fight the battles that we  
18 can win.

19 THE COURT: Does what I say make any sense to the  
20 Attorney General?

21 MS. KINARD: Yes, Your Honor.

22 THE COURT: You might not agree, but you  
23 understand? Therefore, I grant the application on  
24 those limited grounds.

25 MR. FALK: Thank you, Your Honor.

## CLOSINGS

**1281**

1 MS. KINARD: That means you specifically deny it  
2 on the other grounds?

3 THE COURT: Yes, I'm sorry.

4 MR. FALK: Do you want me to prepare an order,  
5 just a Form 4?

6 THE COURT: I think we need a detailed order on  
7 it. I assume both sides will appeal the ruling?

8 MR. FALK: I'll take a swing at a draft and give  
9 it to her.

10 THE COURT: I need it to me within 30 days.

11 (Whereupon, the proceedings concluded.)  
12  
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1282

## CERTIFICATE OF REPORTER

State of South Carolina)  
County of Horry )

I, Natalie Dahl, Official Court Reporter for the  
State of South Carolina, do hereby certify that the  
foregoing is a true, accurate and complete Transcript  
of Record of the proceedings had and evidence  
introduced in the matter of the captioned case, in the  
Court of General Sessions for Horry County, South  
Carolina, on the 15th day of November, 2017.

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

March 2, 2018



Natalie Dahl, RPR.

Court Reporter

1283

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )  
Christopher Stephens, #301767, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT  
Case No. 2014-CP-26-7977

ORDER GRANTING PCR RELIEF

2017 FEB 10 AM 8:58  
Horry County  
Clerk of Court  
Horry County, SC

### PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Circuit Court. In July 2007, the Horry County Grand Jury indicted Applicant for three counts of accessory before the fact to two murders and an armed robbery (2007-GS-26-2974, -2975, & 2976). Bobby G. Frederick, Esquire, and Laura L. Hiller, Esquire, represented Applicant. On February 2, 2009, Applicant proceeded to a jury trial before the Honorable Steven H. John. On February 6, 2009, the jury found Applicant guilty as indicted. Judge John sentenced Applicant to concurrent terms of forty years imprisonment for each count of accessory before the fact to murder and thirty years imprisonment for accessory before the fact to armed robbery.

Applicant filed a timely notice of appeal, and Robert M. Dudek, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 30, 2013. State v. Stephens, Op. No. 2013-UP-062 (S.C. Ct. App. filed January 30, 2013). The South Carolina Supreme Court



**1284**

denied Applicant's petition for writ of certiorari on November 7, 2014. The remittitur was returned to the circuit court on November 10, 2014.

Applicant filed a timely Application for Post-Conviction Relief in which he alleged ineffective assistance of counsel; investigative, prosecutorial & judicial misconduct; and, ineffective assistance of appellate counsel. James K Falk was appointed to represent applicant, and filed an Amended Application for Post-Conviction Relief setting forth additional specific grounds for relief to include:

1. Appellate Counsel was ineffective in failing to include in Applicant's appeal the issue of whether the Court erred in charging the Jury on the issue of Third Party Guilt.
2. Once certain jurors were exposed to prejudicial remarks from the victims; families and friends, Trial counsel was ineffective for not either moving for a mistrial or seeking to have those jurors subjected to individual voir dire.
3. Trial counsel was ineffective for not procuring a transcript of the first trial which ended in a hung jury before proceeding to Applicants' retrial.
4. Trial counsel was ineffective for not calling Libby Pierce as an alibi or witness.
5. Trial counsel was ineffective for not objecting to that portion of the prosecutions' closing argument which impermissibly bolstered the testimony of its own witnesses.
6. Trial counsel was ineffective for not objecting to the prosecutions' impermissible "golden rule" arguments during the State's opening and closing arguments.

7. Trial counsel was ineffective for merely asking that prejudicial remarks be stricken and not seeking a mistrial, when during the closing argument prosecutor told the jury that the defense lawyers knew their clients were guilty.

On November 15, 2016 Horry County Court of Common Pleas conducted a final hearing in this matter. Prior to the start of the hearing the parties agreed to conduct a joint hearing on cases Christopher Stephens v. State of South Carolina, 2014-CP-26-7977 and Jimmy Lee Sessions v. State of South Carolina, 2014-CP-26-8318. James K Falk Esq. was present representing both applicants. Jessica Kinard, Esq. was present representing the State of South Carolina. Present in person and testifying as witnesses were: Applicant Jimmy Lee Sessions, Applicant Christopher Stephens, Sessions' trial counsel Johnny Gardner, Esq., Stephens' trial counsel Bobby G. Frederick, Esq., and Libby Pierce, applicant's alibi witness. Present but testifying via telephone was Robert Dudek, Esq. Prior to the start of the hearing, both applicants were advised of the potential conflict of interest caused by James Falk's joint representation, and both applicants waived any objection to the joint representation.

Having heard the testimony of the witnesses and arguments of counsel the Court makes the following findings of fact and conclusions of law:

#### **FINDINGS OF FACT**

1. Trial counsel testified that a theory of third party guilt was a substantial part of their trial strategy. In his closing trial counsel argued that the forensic evidence did not inculcate their client and instead pointed to the presence of other individuals being present at the scene.



2. The trial judge charged the jury on the law of third party guilt as follows: *Evidence offered by an accused as to the commission of a crime by another person must be limited to facts that are inconsistent with the accused's guilt, and to such facts which raise an inference as to his innocence. There must be such connection with the crime, such facts or circumstances which tend to point out the other person as the guilty party.*

3. Mr. Frederick made a timely objection to the court's charge on third party guilt. Mr. Frederick asserted that the charge as stated should not have been given or the jury should have charged that it was free to consider evidence of third party guilt. At the hearing Mr. Frederick testified that he should also have objected to the charge on the grounds that it impermissibly shifted that Defendant's burden of proof, but that he neglected to so do.

4. Appellate Counsel, Robert Dudek Esq., raised the following issues: Whether the trial court erred by allowing James Pearl to testify that he heard the Decedent Jamilia Hightower scream that Applicant owed her money for drugs; and, whether the trial court erred by permitting SLED "victimologist" Mike Prodan testify as an expert about the "victimology, method of operation, motive, things like that".

5. Mr. Dudek testified that he believed that the third party guilt charge impermissibly shifted defendant's burden of proof, but that he believed that trial counsel failed to preserve the objection on that ground, which is why he did not raise the issue on appeal. Mr. Dudek testified that had trial counsel preserved as grounds for objection that the charge permitted impermissible burden shifting, then he would have included the issue in his appeal. Mr. Dudek acknowledged that there could have been additional grounds to argue that the third party guilt charge was erroneous, including that the charge as given could have confused the jury.



6. Applicant met his burden of proof that Appellate Counsel provided ineffective assistance of counsel by failing to assert on appeal the trial court's third party guilt jury charge erroneous as it was likely to have confused the jury.

7. Applicant met his burden of proof that Trial Counsel provided ineffective assistance of counsel by failing to preserve the objection that the court's third party guilt charge permitted impermissible burden shifting.

8. Regarding the other grounds for relief that Applicant set forth in his application and or raised at the hearing, the Court finds that Applicant did not meet his burden of proof.

### CONCLUSIONS OF LAW

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Ard v. Catoe, 372 S.C. 318 at 331, 642 S.E.2d 590 at 596. (S.C. 2007). "Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.' " Id. (quoting Strickland v. Washington, 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).



# 1288

## The Court's charge on Third Party Guilt was erroneous

The trial judge is required to charge the current and correct law of South Carolina. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991). The substance of the law is what must be instructed to the jury, not any particular verbiage. State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980).

The court's charge on third party guilt was erroneous on two grounds: 1) the jury was likely to have been confused whether they were to make their own relevancy determination before considering defendant's third party guilt evidence; and, 2) it impermissibly shifted the state's burden of proof by suggesting that defendant was required to proffer evidence to prove his innocence. Issues regarding the relevancy of evidence is left to the sound discretion of the trial court. Rules 401 & 402 SCRE, State v. Sweat, 362 S.C. 117, 606 S.E.2d 508, State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct.App.2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (S.C. Ct. App 2008). The language used in the court's third party guilt charge accurately reflected the relevancy determination that trial courts should conduct in considering the admissibility of defendant's third party guilt testimony. Holmes v. South Carolina, 547 U.S. 319, 328, 126 S.Ct. 1727, 1733 (2006) citing State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (S.C. 1941). However, by including this language in the court's jury charge, the court shifted this relevancy determination to the jury. The imposition of this relevancy determination upon the jury was likely to have caused confusion.

In addition to its likelihood to have confused the jury, the court's third party guilt evidence impermissibly shifted the state's burden of proof. Jury charges that cause burden shifting presumptions are unconstitutional. State v. Neva, 300 S.C. 450, 388 S.E.2d 791 (S.C. 1990); Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (S.C. 1993). A defendant is not required to present a defense and can rely entirely on the weakness of the State's case since the state has the burden of proving guilt beyond a reasonable doubt. State v. Adkins, 353 S.C. 312 577 S.E.2d 460; State v. Posey, 269 S.C. 500, 238 S.E.2d 176 (1977). The inclusion of the phrase: *and to such facts which raise an inference as to his innocence* in the jury charge was likely to have led the jury to believe that defendant had some burden of proof or production on this issue. Therefore the court's charge is likely to have lead the jury to believe that since defendant asserted a third party guilt defense, the defendant had burden of proving his innocence by showing that a third party committed the offense. Defendant was under no obligation to proffer any evidence proving his innocence.

***Trial Counsel was ineffective for failing to preserve issue for appeal***

Trial counsel can be held ineffective for failure to object to erroneous and or burden shifting jury charge. Gibson v State, 416 S.C. 260, 786 S.E.2d 121 (S.C. 2016); (finding that was deficient for not objecting to jury charge that malice may be inferred from use of a deadly weapon) Taylor v. State, Id., (finding that counsel was deficient in failing to object to a jury charge on intent element which shifted the burden of proof to the defendant); and, Dandy v. State, 301 S.C. 303 391 S.E.2d 581, (S.C. 1990), (finding that trial counsel was ineffective for failing to object to jury charge requiring defendant to prove self-defense by a preponderance of evidence). Although trial counsel objected to the court's jury

## 1290

charge on the general ground that it was improper. Trial counsel's failure to assert that the court's charge was burden shifting was ineffective performance. Defendant was prejudiced by trial counsel's performance because the failure to preserve the issue on those grounds is the reason why the issue was not raised on appeal.

### ***Appellate counsel was ineffective for not raising erroneous jury charge as grounds for appeal***

On appeal Mr. Dudek raised the following issues: 1) that the court erred in admitting James Pearl's hearsay statements of the decedent; and, 2) that the court erred in admitting testimony from SLED's victimology expert. Although trial counsel did preserve a general objection to the court's third party guilt charge, appellate counsel did not include the issue in the appeal. Mr. Dudek acknowledged that he could have included the third party guilt jury charge issue on appeal but that he believed that the issues he raised were stronger.

Defendants are constitutionally entitled to effective appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, (1985), Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). When a claim for ineffective assistance of counsel is based upon appellate counsel's failure to raise viable issues, the court must determine whether appellate counsel failed to present significant and obvious issues on appeal. Gray v. Greer, 800 F.2d 644, 646 (7<sup>th</sup> Cir 1986). Having found that the court's third party guilt charge was likely to have confused the jury; and that trial counsel did preserve a general objection to the inclusion of the charge, appellate counsel was ineffective for not including the issue in his appeal. This court finds there is a reasonable probability that had appellate

counsel included this issue on appeal, the appellate court would not have affirmed defendant's conviction.

Wherefore, I find Applicant has carried his burden of proof on ineffective assistance of trial counsel and ineffective assistance of appellate counsel.

Therefore, Applicant's application for Post-Conviction Relief is granted and Applicant's convictions for 2007-GS-26-2974, 2007-GS-26-2975, & 2007-GS-26-2976 shall be set aside.

IT IS SO ORDERED!

  
\_\_\_\_\_  
Hon. Brooks P. Goldsmith  
Presiding Judge Horry Circuit Court

\_\_\_\_\_, SC  
February 3, 2017

**1292**

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Christopher Stephens, #301767,

Applicant,

VS.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case NO.: 2014-CP-26-7977

**STATE'S NOTICE OF MOTION  
AND MOTION TO ALTER  
OR AMEND JUDGMENT PURSUANT  
TO RULE 59(E), SCRPC**

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Respondent now moves pursuant to Rule 59(E) and Rule 60, SCRPC, and all other applicable rules to alter or amend the judgement.

This matter is before this Court by way of an application for post-conviction relief (PCR). Following a hearing on the matter, this Court granted relief by order dated February 3, 2017, and filed February 10, 2017. Respondent received the order on the same day via hand delivery. The Court granted relief on the basis that:

- (1) Trial counsel was ineffective for failing to object to a burden-shifting jury charge, thus not preserving the matter for appeal.
- (2) Appellate counsel was ineffective for failing to appeal on the ground of an improper third party guilt charge.

#### **DISCUSSION**

In making this motion, Respondent reserves and incorporates all previous arguments and authority presented to this Court. The Respondent would submit that the judgment should be altered or amended based on the following:

First, this Court erred in finding that there was no objection that would function to preserve

the issue of the propriety of the third-party guilty charge. It is clear from the record that Applicant's counsel objected to the admissibility of the charge on page 1028 of the record on appeal. He objected, stating that he did not think it should have been charged or, "if it is charged I think the charge would be that the jury is free to consider it. The charge as given I feel is a rule of admissibility, and the fact is, once it's admissible the jury is free to consider it in any way that they think is appropriate." ROA, p. 1028. This is clearly an objection and, therefore, preserves the issue for appeal. Though the order of dismissal states that the objection should have asserted that the charge was burden-shifting, Respondent argues that an overruled objection to the matter, regardless of the specifics, is enough to preserve it for appeal. See Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993).

Alternatively and additionally, Respondent argues that Applicant has failed to meet his burden of proving prejudice by this alleged failure on the part of trial counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Likewise, appellate counsel's performance cannot be prejudicial as Applicant has failed to present any evidence that the Court of Appeals would have reversed Applicant's convictions and granted him a new trial. Respondent submits that the jury charge, as given, amounts to harmless error. There was no evidence produced at the post-conviction relief hearing showing a likelihood of the jury finding differently than they did, other than a speculative offering that the charge may have confused the jury. This Court and appellate counsel agreed that the language used in the "charge accurately reflected the relevancy determination that that trial courts should conduct in considering the admissibility of defendant's third party guilty testimony.

**1294**

Holmes v. South Carolina, 547 U.S. 319, 328, 126 S.Ct. 1727, 1733 (2006), citing State v Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941).” Presenting the accurate state of the law to the jury and allowing them to consider all factors in their determination is an appropriate action by the Court, and a failure to object at trial or present these issues on appeal is not prejudicial under Strickland, supra.

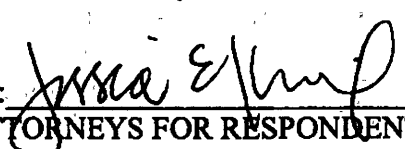
Accordingly, neither trial nor appellate counsels’ performance was ineffective. For the foregoing reasons, Respondent would request that the order be altered or amended.

Respectfully submitted,

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

JESSICA E. KINARD  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

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Post Office Box 11549  
Columbia, South Carolina 29211  
Telephone: (803) 734-3727

February 21, 2017

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY  
IN THE COURT OF COMMON PLEAS

1295

CHRISTOPHER STEPHENS, 301767,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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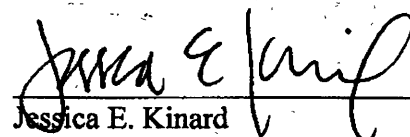
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the **Motion to Alter or Amend the Order Granting PCR** has been served upon the following persons, by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**James K. Falk, Esquire**  
**Falk Law Firm, LLC**  
**PO Box 1058**  
**Charleston, SC 29402**

**The Honorable Brooks P. Goldsmith**  
**Presiding Judge, 15<sup>th</sup> Judicial Circuit**  
**Post Office Box 895**  
**Edisto Island, SC 29438**

This 21st day of February, 2016.

  
\_\_\_\_\_  
Jessica E. Kinard  
Assistant Attorney General  
Attorney for Respondent

SWORN to before me this 21st day of February, 2016.

  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: May 14, 2024

**1296**

STATE OF SOUTH CAROLINA )  
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COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT  
CASE NO. 2014-CP-26-7977

Christopher Stephens )  
 )  
 )  
Applicant )  
VS )  
State of South Carolina )  
 )  
Respondent )

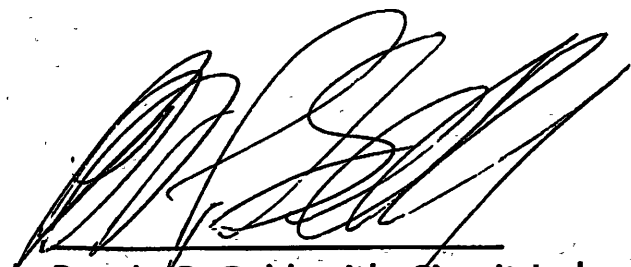
ORDER

FILED  
HORRY COUNTY  
2016 JAN -5 PM 12 09  
CLERK OF COURT  
JENNIFER L. BROWN

This matter comes before the court upon Respondent's Motion To Alter Or Amend the order of this court dated February 3, 2017. After considering the matters contained in said Motion I find no reason to alter or amend this order.

ACCORDINGLY , the Motion of Respondent is HEREBY DENIED.

December 21, 2017

  
\_\_\_\_\_  
Brooks P. Goldsmith, Circuit Judge