VOLUME III OF III

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No: 2018-000117

JIMMY L. SESSIONS, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

APPENDIX

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INDEX

THE COURT: All right.

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

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

Ladies and gentlemen, go to your jury room.

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

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

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

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

MR. FREDERICK: Thank you.

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

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

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

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

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

the last two sentences of the Solicitor, please

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

THE COURT: Are you ready?

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

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

THE COURT: All right, sir.

Solicitor, your response.

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

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

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

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

THE COURT: Yes sir.

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

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

Thank you.

And you may continue.

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

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

Thank you very much.

You may proceed, Solicitor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

All right. Thank you very much.

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

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

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

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

please.

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

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

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

MR. FREDERICK: No objection, Judge.

THE COURT: Mr. Gardner.

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

THE COURT: Very good.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The 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.

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

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

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

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

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

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

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.

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

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

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

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

of each particular case.

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

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

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

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

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

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

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

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

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

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

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

Stephens. Regarding the verdict forms, has the caption of the case, **State of South Carolina versus Christopher Stephens**, count one, accessory before the fact of the felony of murder of Jamilla Hightower. On the charge of accessory before the fact of the felony of the murder of Jamilla Hightower we, the jury, by unanimous consent, find the Defendant, again, two choices, not guilty or guilty. Once you have reached a decision on that count you go to the next count, accessory before the fact of the felony of the murder of Monica Wall. On the charge of accessory before the fact of the felony of the murder of Monica Wall we, the jury, by unanimous consent, find the Defendant, again two choices, not guilty or guilty. Once you have reached a unanimous verdict on that particular one you proceed to the third count, accessory before the fact of the felony of armed robbery of Jamilla Hightower. On the charge of accessory before the fact of the felony of armed robbery of Jamilla Hightower we, the jury, by unanimous consent, find the Defendant, and again two choices, not guilty or guilty.

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

particular charge.

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

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

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

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

Thank you very much.

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

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

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

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

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

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

ALTERNATE: Your Honor, if ---

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

ALTERNATE: Thank you.

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

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

MS. ELDER: No sir, Your Honor.

THE COURT: From the Defendant, Sessions?

MR. GARDNER: None from me, Your Honor.

THE COURT: From the Defendant, Stephens?

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

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

MR. FREDERICK: Yes sir, 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.

THE COURT: All right, sir. Thank you.

All right. Anything else, gentlemen?

MS. ELDER: No, Your Honor.

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

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

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

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

Thank you very much.

MS. ELDER: Thank you, Your Honor.

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

(AFTER A REVIEW OF THE EXHIBITS BY COUNSEL FOR THE STATE AND C0UNSEL FOR BOTH DEFENDANTS THE EXHIBITS WERE PASSED INTO THE JURY ROOM AND THE JURY WAS INSTRUCTED TO BEGIN DELIBERATION AT 5:35 P.M.)

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

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

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

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

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

THE COURT: Is the Defendant, Sessions, ready to

receive it?

MR. GARDNER: Yes sir.

THE COURT: The Defendant, Stephens.

MR. FREDERICK: Yes, Your Honor.

THE COURT: All right. Very good.

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

verdict in silence.

If anyone wants to leave, leave now.

Thank you very much.

Ask the jury to come in.

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

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

FOREMAN: All counts, yes sir.

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

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

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

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

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

6, 2009.

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

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

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

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

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

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

THE COURT: Thank you, Ma'am.

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

MS. ELDER: No sir, Your Honor.

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

MR. GARDNER: Yes sir, Your Honor.

THE COURT: All right. Very good.

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

DEPUTY CLERK OF COURT: Did you say juror number?

THE COURT: Juror number, please Ma'am.

DEPUTY CLERK OF COURT: One thirty -- I'm sorry. Whenever I call your name please stand, and I will ask you two questions. After you answer please be seated.

Juror 130, is this your verdict?

JUROR NUMBER 130: Yes.

DEPUTY CLERK OF COURT: Is it still your verdict?

JUROR NUMBER 130: Yes.

DEPUTY CLERK OF COURT: Thank you.

One ten, is this your verdict?

JUROR NUMBER 110: Yes.

DEPUTY CLERK OF COURT: Is this still your verdict?

JUROR NUMBER 110: Yes.

DEPUTY CLERK OF COURT: Thank you.

Three thirty-seven, is this your verdict?

JUROR NUMBER 337: Yes.

DEPUTY CLERK OF COURT: Is this still your verdict?

JUROR NUMBER 337: Yes.

DEPUTY CLERK OF COURT: Thank you.

Forty-one, is this your verdict?

JUROR NUMBER 41: Yes.

DEPUTY CLERK OF COURT: Is this still your verdict?

JUROR NUMBER 41: Yes.

DEPUTY CLERK OF COURT: One seventy-four, is this your verdict?

JUROR NUMBER 174: Yes.

DEPUTY CLERK OF COURT: Is this still your verdict?

JUROR NUMBER 174: Yes.

DEPUTY CLERK OF COURT: Thank you.

Three fifty-five, is this your verdict?

JUROR NUMBER 355: Yes.

DEPUTY CLERK OF COURT: Is this still your verdict?

JUROR NUMBER 355: Yes.

DEPUTY CLERK OF COURT: Thank you.

Three twenty, is this your verdict?

JUROR NUMBER 320: Yes.

DEPUTY CLERK OF COURT: Is this still your verdict?

JUROR NUMBER 320: Yes.

DEPUTY CLERK OF COURT: Thank you.

Two Sixty-one, is this your verdict?

JUROR NUMBER 261: Yes.

DEPUTY CLERK OF COURT: Is this still your verdict?

JUROR NUMBER 261: Yes.

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

JUROR NUMBER 151: Yes.

DEPUTY CLERK OF COURT: Is this still your verdict?

JUROR NUMBER 151: Yes.

DEPUTY CLERK OF COURT: Thank you.

Twenty-five, is this your verdict?

JUROR NUMBER 25: Yes.

DEPUTY CLERK OF COURT: Is this still your verdict?

JUROR NUMBER 25: Yes.

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

JUROR NUMBER 245: Yes.

DEPUTY CLERK OF COURT: Is this still your verdict?

JUROR NUMBER 245: Yes.

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

verdict?

JUROR NUMBER 173: Yes.

DEPUTY CLERK OF COURT: Is this still your verdict?

JUROR NUMBER 173: Yes.

DEPUTY CLERK OF COURT: Thank you.

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

MR. GARDNER: No, Your Honor.

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

MR. FREDERICK: No, Your Honor.

THE COURT: Very good. Thank you.

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

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

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

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

Thank you very much.

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

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

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

THE COURT: Motion for a new trial.

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

THE COURT: All right, sir.

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

MR. FREDERICK: We do.

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

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

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

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

Thank you very much.

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

MR. RICHARDSON: We are, Your Honor.

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

MR. RICHARDSON: Your Honor, may I approach?

THE COURT: Yes sir.

MR. GARDNER: Yes sir.

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

MR. FREDERICK: Yes sir.

THE COURT: Yes sir.

(SOLICITOR PASSES DOCUMENTS TO THE COURT.)

THE COURT: All right, sir. Thank you.

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

THE COURT: Yes sir. Yes sir.

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

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

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

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

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

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

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

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

He also has a 2004, conviction for manufacturing drugs

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

He got another unlawful carrying of a weapon.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: All right, sir.

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

BARBARA HIGHTOWER: My name is Barbara Hightower.

THE COURT: Yes Ma'am.

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

THE COURT: Thank you, Ma'am.

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

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

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

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

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

THE COURT: Thank you, Ma'am.

Anything further, Solicitor?

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

THE COURT: Very good.

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

MR. GARDNER: Thank you, Judge.

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

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

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

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

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

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

THE COURT: Thank you very much.

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

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

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

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

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

THE COURT: Thank you, sir.

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

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

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

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

THE COURT: Thank you, sir.

MR. FREDERICK: Judge ---

THE COURT: Yes sir.

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

maintain his innocence.

THE COURT: Yes sir.

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

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

MR. FREDERICK: Thank you.

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

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

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

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

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

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

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

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

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

Thank you very much.

MS. ELDER: Thank you, Your Honor.

MR. RICHARDSON: Thank you, Your Honor.

----------END OF REQUESTED TRANSCRIPT OF RECORD---------

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

1047

STATE OF SOUTH CAROLINA)
COUNTY OF Horry)
STATE VS.)
Jimmy Lee Sessions)
AKA:)
Race: [redacted])
DOB:)
Address:)
City, State, Zip)
DL# SID#)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2007 -GS- 26 - 2967
AW#: 1663414
Date of Offense: 6/9/06
S.C. Code §: 16-11-330(A)
CDR Code #: 0 1 1 3 19
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Armed Robbery 10-30
in violation of § 16-11-330(A) of the S.C. Code of Laws, bearing CDR Code # 0 1 1 3 9
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor | Defendant | Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 07-GS-26-2962

☒ 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:		
§14-1-208 (Assessments 107.5%)		$
§14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§73.3, 1B TP (Law Enforce. Funding)	$25	$ 25.00
§33.7, 1B TP (Drug Court Surcharge)	$100	$
§50-21-114(BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$ 390
3% to County (if paid in installments)		$ 5.00
TOTAL		$ 133.90

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 $_____ beginning _____
$_____ paid to Public Defender Fund
Other:

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

Melanie Huggins
Clerk of Court/Deputy Clerk
Court Reporter: Dixie Bobbank

PRESIDING JUDGE
Judge Code:
Sentence Date: 2/6/09

SCCA/217 (2/2006) *White* – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant

1048 NN/MBPD

WITNESSES

DOCKET NO. 2007-GS-26- 2961

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

BCR 85448-001

COURT OF GENERAL SESSIONS

JULY TERM 2007

THE STATE
VS

ARREST WARRANT NO. K003414

(CDR: 0139 16-11-0330(A)

JIMMY LEE SESSIONS B/M

[redacted]

DOA: 05-01-07

ACTION OF GRAND JURY

TRUE BILL

SEP 2 0 2007

Foreman of Grand Jury

VERDICT

ATTORNEY: JAMES GALMORE

INDICTMENT FOR:

ARMED ROBBERY

ORIGINAL

Foreman of Petit Jury Date:

J. GREGORY HEMBREE, SOLICITOR

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR:
	)	
COUNTY OF HORRY	)	ARMED ROBBERY

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

ARMED ROBBERY

(CDR: 0139 16-11-0330(A)

That JIMMY LEE SESSIONS did in Horry County on or about June 8, 2006, while armed with a deadly weapon, to wit: a handgun, take and carry away personal property from or in the immediate presence of Jamilla Hytower with intent to deprive her of possession by use of force, threats or intimidation, in violation of Section 16-11-330(A), 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.

J. Gregory Hembree

SOLICITOR

1050

STATE OF SOUTH CAROLINA)
COUNTY OF Horry)
STATE VS.)
Jerry Lee Sessions)
AKA:)
Race: [redacted])
DOB:)
Address)
City, State, Zip)
DL# _____ SID# _____)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2007 GS 26 - 2962
A/W#: K003419
Date of Offense: 6/8/06
S.C. Code §: 16-3-10,20
CDR Code #: 0 1 1 1 1 16
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Murder 30 Life
in violation of § 16-3-10,20 of the S.C. Code of Laws, bearing CDR Code # 0 1 1 1 16
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor | Defendant | Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☐ 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	$
§56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§73.3, 1B TP (Law Enforce. Funding)	$25	$ 25.00
§33.7, 1B TP (Drug Court Surcharge)	$100	$
§50-21-114(BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$ 3.90
3% to County (if paid in installments)		$ 3.00
TOTAL		$ 133.90

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 $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

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

Melanie Huggins
Clerk of Court/ Deputy Clerk
Court Reporter: Dixie Eubank

PRESIDING JUDGE _____
Judge Code: _____
Sentence Date: 2/6/09

SCCA/217 (2/2006) *White* – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant

MANN/MBPD
WITNESSES

DOCKET NO. 2007-GS-26- 2962

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

BCR 85448-001

COURT OF GENERAL SESSIONS

JULY TERM 2007

THE STATE
VS

ARREST WARRANT NO. K003419

(CDR: 0116 16-03-0010,0020)

JIMMY LEE SESSIONS B/M

[redacted]

DOA: 05-01-07

ACTION OF GRAND JURY

TRUE BILL

SEP 2 0 2007

Foreman of Grand Jury

ATTORNEY: JAMES GALMORE

VERDICT

INDICTMENT FOR:

MURDER

ORIGINAL

Foreman of Petit Jury Date:

J. GREGORY HEMBREE, SOLICITOR

1052

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR:

MURDER

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

MURDER

(CDR: 0116 16-03-0010,0020)

That JIMMY LEE SESSIONS did in Horry County, on or about June 8, 2006, willfully, feloniously, and intentionally kill the victim, Monica Wall, with malice aforethought, either express or implied, by means of shooting the victim, and the victim did die as a proximate result thereof on or about June 8, 2006 in Horry County, in violation of Section 16-3-10, 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.

J. Gregory Hembree

SOLICITOR

1053

STATE OF SOUTH CAROLINA

COUNTY OF Lee

STATE VS. Jimmy Lee Sessions

AKA:

Race: B Sex: M Age:

DOB: [redacted] SS#: [redacted]

Address:

City, State, Zip

DL# SID#

FILED
FLORRY COUNTY
2009 FEB 19 PM 2:15
MELANIE HUGGINS
CLERK OF COURT

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

-GS- 26 - 2763

A/W#: KGC3413

Date of Offense: 6/3/06

S.C. Code §: 16-3-10 .20

CDR Code #: 0 1 1 1 1 16

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL

2009 FEB 19 PM 2:15

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS TO: Murder 20-246

in violation of § 16-3-10 .20 of the S.C. Code of Laws, bearing CDR Code # 0 1 1 1 1 16

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

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor Defendant Attorney for Defendant

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

☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: 07-GS-26296

☑ 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.

☐ 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	$
56-5-2995 (DUI Assessment)	$12	$
35.13 (Public Def/Prob)	$500	$
73.3, 1B TP (Law Enforce. Funding)	$25	$ 25.00
33.7, 1B TP (Drug Court Surcharge)	$100	$
50-21-114(BUI Breath Test Fee)	$50	$
56-5-2942(J) (Vehicle Assessment)	$40/ea	$ 2.90
% to County (if paid in installments)		$ 5.00
OTAL		$ 133.90

SPECIAL CONDITIONS:

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 $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other:

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

Melanie Huggins
Clerk of Court/Deputy Clerk

Court Reporter: Dixie Dehart

PRESIDING JUDGE
Judge Code:
Sentence Date: 2/16/09

CCA/217 (2/2006) *White* – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant

MANN/MBPD

WITNESSES

1054

DOCKET NO. 2007-GS-26- 2963

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

BCR 85448-001

COURT OF GENERAL SESSIONS

JULY TERM 2007

THE STATE
VS

ARREST WARRANT NO. K003413

(CDR: 0116 16-03-0010.0020)

JIMMY LEE SESSIONS B/M
[redacted]
MYRTLE BEACH, SC 29588-[redacted]
DOB: [redacted]
SS#: [redacted]

DOA: 05-01-07

ACTION OF GRAND JURY

TRUE BILL

SEP 2 0 2007

Foreman of Grand Jury

ATTORNEY: JAMES GALMORE

INDICTMENT FOR:

VERDICT

MURDER

ORIGINAL

Foreman of Petit Jury Date:

J. GREGORY HEMBREE, SOLICITOR

1057

1058

1055

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR:

MURDER

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

MURDER

(CDR: 0116 16-03-0010,0020)

That JIMMY LEE SESSIONS did in Horry County, on or about June 8, 2006, willfully, feloniously, and intentionally kill the victim, Jamilla Hytower, with malice aforethought, either express or implied, by means of shooting the victim, and the victim did die as a proximate result thereof in Horry County, in violation of Section 16-3-10, 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.

J. Gregg Hembree

SOLICITOR

1056

'ATE OF SOUTH CAROLINA)
)
)UNTY OF Horry)
'ATE VS.)
Jimmy Lee Sessions)
:A:)
ice:)
)B:)
dress:)
y, State, Zip)
.# SID#)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2008 -GS- 26 - 7698
A/W#: 2008GS2607698
Date of Offense: June 8, 2006
S.C. Code §: 16-11-311
CDR Code #: 0 1 0 1 7 1 9
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
): Burg 1st 15-20yr
violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 0 1 0 1 7 1 9
NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

e charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
e 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,
a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
d/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 _____
nths/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation,
ich are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: 07-GS-26-2962
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
partment 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
tal: $_____ plus 20% fee: $_____
yment Terms:
set by SCDPPPS
cipient:
ne:

4-1-206 (Assessments 107.5%)		$
4-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
4-1-211(A)(2) (DUI Surcharge)	$100	$
6-5-2995 (DUI Assessment)	$12	$
15.13 (Public Def/Prob)	$500	$
3.3, 1B TP (Law Enforce. Funding)	$25	$ 25.00
3.7, 1B TP (Drug Court Surcharge)	$100	$
0-21-114(BUI Breath Test Fee)	$50	$
6-5-2942(J) (Vehicle Assessment)	$40/ea	$ 3.90
to County (if paid in installments)		$ 5.00
OTAL		$ 133.90

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 $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other:

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

Melanie Huggins
Clerk of Court/ Deputy Clerk
urt Reporter: Dixie Bimbank

PRESIDING JUDGE
Judge Code:
Sentence Date: 2/6/09

CA/217 (2/2006) *White* – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant

DOCKET NO. 2008-GS-26- 02698

The State of South Carolina

County of Horry

Brad Richardson 85448-1

COURT OF GENERAL SESSIONS

July, 2008 TERM

THE STATE

vs.

Jimmy Lee Sessions B/ M

[redacted]

ATTORNEY: Gardner, Johnny

Indictment for

Burglary 1st degree

J. Gregory Hembree, Solicitor

ORIGINAL

WITNESSES

ARREST WARRANT NUMBER

2008GS2602698
CDR: 0079 16-11-0311
DOA: 5/1/2007

ACTION OF GRAND JURY

TRUE BILL
Jamie Wilson
Foreperson of Grand Jury
Date: JUL 10 2008

VERDICT

Foreperson of Petit Jury
Date:

1058

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

BURGLARY, 1ST DEGREE

At a Court of General Sessions, convened on July 10, 2008, the Grand Jurors of Horry County present upon their oath:

BURGLARY, 1ST DEGREE

CDR: 0079 16-11-0311

That Jimmy Lee Sessions did in Horry County on or about June 8, 2006 through June 9, 2006, enter the dwelling of Monica Wall and Jamelia Hytower located at [redacted] Pridgen Road, Myrtle Beach, SC without consent and with the intent to commit a crime therein and the defendant did so in the nighttime, and/or did so while armed with a deadly weapon, and/or used or threaten use of a dangerous instrument, and/or displayed what is or appears to be a firearm, in violation of Section 16-11-0311(A), Code of Laws of South Carolina, 1976, as amended.

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

J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Senior Appellate Defender

LANELLE C. DURANT
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

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

1.

The trial judge committed reversible error by allowing into evidence a pair of tennis shoes alleged to connect Sessions with prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were taken from a bag at the detention center purported to contain Session's personal belongings.

2.

The trial judge committed reversible error by allowing SLED "victimologist" Mike Prodan to testify about the "victiomology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and – on point as a case can be, since it involves the same witness— *State v. Tapp*, S.C. Ct. App. Opinion No. 4529, refiled February 18, 2010.

STATEMENT OF THE CASE

On February 2 through 6, 2009, Jimmy Lee Sessions and Christopher Stephens stood trial in Horry County, before Judge Stephen H. John and a jury, on indictments charging Sessions with two counts of murder and one count each of first-degree burglary and armed robbery and Stephens accessory before the fact of the two murders and armed robbery. The State alleged that in June 2006 Sessions, with the assistance of Stephens, had robbed and murdered a mid-level drug dealer, Jamilla Hytower, and her roommate, Monica Wall.

The first trial of these charges in November 2008 ended with the judge declaring a mistrial (and dismissing accessory charges against Christopher Stephens' brother, Marshall, for lack of evidence) after the jury deadlocked. The State's case against Sessions and Stephens depends almost entirely upon the testimony of James Pearl, who claims he opted out of their plan to rob and murder Hytower. R. p. 122, line 22 – R. p. 125, line 18.

On trial, the defense focused upon the unreliability of the State's evidence against Sessions and Stephens and pointed out that several other suspects had motives to murder Hytower and Wall as well. The jury convicted both defendants as charged, and the judge sentenced Sessions to concurrent terms of life imprisonment for the two murders, thirty years for first-degree burglary and thirty years for armed robbery, and Stephens to concurrent terms of forty years on each of the two accessories before the fact of murder and thirty years for accessory before the fact of armed robbery.

ARGUMENT

1.

The trial judge committed reversible error by allowing into evidence a pair of tennis shoes alleged to connect Sessions with prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were taken from a bag at the detention center purported to contain Session's personal belongings.

The person who murdered Jamilla Hytower and Melissa Gomez quite possibly left shoeprints in a bathroom and in the kitchen. R. p. 416, lines 14-19; R. p. 459, line 22- R. p. 460, line 10. The murders occurred in July 2006. Sessions was arrested in Connecticut three months later. R. p. 430, lines 8-19. A private extradition company transported him to Horry County on November 27, 2006. R. p. 434, lines 9-15.

On May 11, 2007, the detention center issued a memo stating that inmates would no longer be allowed to possess their own shoes. R. p. 436, lines 8-10. A captain with the detention center testified:

> The memo instructed the officers to begin on the following Sunday collecting them and placing them in the property bag. ... The officers would have collected them. They put them in a clear plastic bag and then they put them in the inmates' property bag.

R. p. 436, lines 10-17. "[W]e have no way of knowing that these are the ones [Sessions] wore in," she admitted, nor was she present "when they were collected." R. p. 490, lines 12-22. Moreover, "[a]ny officer" at the detention center had access to the room where the inmates' personal belongings were kept. R. p. 438, lines 20-25. The State seized the pair of shoes alleged to belong to Sessions from the property room in December 2008. R. p. 429, line 24 – R. p. 430, line 6.

Defense objected to the admission of the shoes on the ground that "we would need to have somebody to say how they got into this chain and I don't think we have that." R. p. 431, lines 5-22; R. p. 474, lines 22-24; R. p. 486, line 23- R. p. 487, line 3. The judge overruled the objection and the shoes were admitted into evidence. R. p. 487, line 20 – R. p. 489, line 25.

A SLED expert in footwear impression examination testified that the tennis shoes taken from the detention center were consistent with the prints found in the kitchen and the bathroom at the crime scene. R. p. 498, lines 19-24; R. p. 505, line 23- R. p. 506, line 20. The Assistant Solicitor exploited this evidence in closing:

> Told you these shoes came off Jimmy Lee Sessions... [T]hey are consistent with a print left where no print should be. ... Don't reward him because he was not smart enough to get rid of those shoes.

R. p. 1009, lines 1-20.

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997), succinctly summarizes the chain-of-custody law:

> Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party offering such items into evidence must establish a chain-of-custody as far as practicable. [Citations omitted.] Where the analyzed substance is passed through several hands, the evidence must not leave it to conjecture as to had it and what was done with it between the taking an analysis. However, the proof of chain-of-custody need not negate all possibility of tampering, but instead must only establish a complete chain of evidence as far as practicable. [Citations omitted.]
>
> While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is evidence that is unique and identifiable – the establishment of a strict chain

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

See, also, *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2006).

In short, the State was unable to account for these tennis shoes until after they were removed from personal-property room in December 2008, one month after the case against Sessions and Stephens ended in a mistrial. No witness testified that those shoes were ever worn by Sessions.

Due to this failure in the chain of custody, the Court should reverse Sessions' convictions and remand for a new trial.

2.

The trial judge committed reversible error by allowing SLED "victimologist" Mike Prodan to testify about the "victiomology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and – on point as a case can be, since it involves the same witness— *State v. Tapp*, S.C. Ct. App. Opinion No. 4529, refiled February 18, 2010.

In February 2009, SLED "victimologist" Mike Prodan testified about "victimology, method of operation, motive, things like that" – the Assistant Solicitor's description of his content—in an effort to bolster the State's forensically-troubled prosecution of Sessions and Stephens. On April 9, 2009 the Court of Appeals, in an opinion since withdrawn, found Prodan's testimony about "victimology" to be both irrelevant and unduly prejudicial. *State v. Tapp*.

Shortly afterwards, the Supreme Court decided *State v. White*, 676 S.E.2d 687, which held, "All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's singular gatekeeping function in insuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." The Court of Appeals then granted rehearing in *Tapp*, and in its refiled opinion, found that it was error to qualify Prodan as an expert witness because:

> [W]ithout the guidance of the *White* decision, Tapp was not able to sufficiently develop and pursue theories in 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.

In the present case, the State gave the defense no notice that they intended to call Prodan as an expert witness in victimology. R. p. 572, line 21 – R. p. 573, line 16.

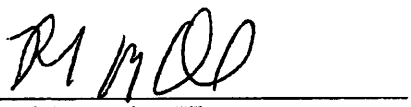
The defense objected to Prodan's testimony on the grounds of relevance and as speculative. R. p. 582, lines 8-18; R. p. 602, lines 6-18. The judge overruled the objections and allowed Prodan to testify. He essentially took the facts as presented by the State and constructed a narrative supporting the State's theory of the case. Prodan's testimony is reproduced in the Record on Appeal at pages 568 through 611. A sense of its content is given by the following exchange:

> Assistant Solicitor: What is the significance of finding no drugs [and] no money in the house of [a] mid-level drug dealer?
>
> Prodan: It's a reasonable conclusion that the motive was... the forcible taking of the money and the drugs and that the individual was willing to kill to do that.

R. p. 605, lines 13-17. The Assistant Solicitor exploited Prodan's testimony in closing to bolster the State's case. R. p. 1010, lines 17-20.

In short, Prodan's testimony violated Rule 702, *State v. White* and –obviously— *State v. Tapp*. For this reason as well, the Court should reverse Sessions' convictions and remand for a new trial.

Respectfully submitted,



Joseph L. Savitz, III
Senior 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."

By: _____
JOSEPH L. SAVITZ, III
Senior Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

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, Room 519, Columbia, SC 29201, this 29th day of December, 2010.

By: _____

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

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

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017 .

STATE OF SOUTH CAROLINA IN
THE COURT OF APPEALS

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

THE STATE,

RESPONDENT, V.

JIMMY LEE SESSIONS,

APPELLANT.

FINAL BRIEF OF RESPONDENT

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA Assistant
Deputy Attorney General

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Senior Assistant Attorney General

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Fifteenth Judicial Circuit

P.O. Drawer 1276
Conway, SC 29528-1276
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ATTORNEYS FOR RESPONDENT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL RULES

STATE RULES

OTHER AUTHORITIES

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1. The trial judge committed reversible error by allowing into evidence a pair of tennis shoes alleged to connect Sessions with prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were taken from a bag at the detention center purported to contain Sessions' personal belongings.

2. The trial judge committed reversible error by allowing SLED "victimologist" Mike Prodan to testify about the "victimology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and - on point as a case can be, since it involves the same witness - *State vs. Tapp*, S.C. Ct. App. Opinion No. 4529, refiled February 18, 2010.

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge properly allowed the State to introduce **State's Ex. 88**, Sessions' tennis shoes, into evidence because the State established an adequate foundation for their admission, and Sessions' argument about the insufficiency of the chain of evidence goes more to the weight he feels that the jury should have accorded to these non-fungible items and not to their admissibility?

II. Whether Sessions' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because his relevancy objection is too general to preserve any issue for appellate review. Alternatively, whether the trial judge abused his discretion by allowing the State to introduce the evidence; or, if there was error, any error was harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

The Horry County Grand Jury indicted Appellant, 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). Stephens was indicted for two counts of accessory before the fact of the two murders and armed robbery. The charges stemmed from the homicides of Jamilla Hightower and Monica Wall. Johnny Gardner, Esquire, represented him on these charges. Bobby G. Frederick and Laura L. Hiller, Esquires represented Stephens. 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.

He received a second jury trial on these charges before the Honorable Stephen H. John on February 2-6, 2009. Stephens was jointly tried with him. The jury found Sessions guilty of all three charges and Stephens guilty of the charges against him.

Sessions received concurrent sentences of life imprisonment for the murders and concurrent thirty year sentences on the other offenses. Sessions received current sentences of forty years imprisonment for the accessory convictions. A timely Notice of Appeal was served and filed y each defendant. This appeal follows.

ARGUMENTS

I. The trial judge properly allowed the State to introduce State's Ex. 88, Sessions' tennis shoes, into evidence because the State established an adequate foundation for their admission, and Sessions' argument about the insufficiency of the chain of evidence goes more to the weight he feels that the jury should have accorded to these non-fungible items and not to their admissibility.

Sessions maintains that the trial judge erroneously allowed the State to introduce his tennis shoes, **States' Ex. 88**, since the State allegedly failed to establish an adequate chain of custody before they were removed from a bag containing his personal belongings at the J. Reuben Long Detention Center. Respondent submits that his argument lacks merit because the State established an adequate foundation for the introduction of the tennis shoes, and that his argument about the supposed inadequacy of the chain of custody goes more to the weight he felt that the jury should have accorded to these non-fungible items and not to their admissibility. Alternatively, any error was harmless beyond a reasonable doubt.

A. How the issue arose at trial.

1. The crime scene.

Officer John Iannone, of the City of Myrtle Beach Police Department's Crime Scene Unit, processed the crime scene: the Myrtle Beach, South Carolina resident of Jamilla Hightower and Monica Walls. Jamilla was found face-down in her bedroom. She had pillowcase over her head with a single gunshot wound to the head. Monica was found in the bathroom adjacent to her bedroom in an identical manner. The primary differences were that Monica was nude, that she had defecated in her bedroom and that there was some feces on the bathroom floor. **R. pp. 390-417.** *See also* **R. pp. 370-404.**

In Monica's bathroom, Officer Iannone found "fecal matter" on the floor and footprints that

appeared to have been left by someone stepping in it. He photographed what he had found. **State's Ex. 82**. He photographed it again after he had applied black magnetic power on the floor. **State's Exs. 63-64; State's Exs. 77-81; State's Exs. 83-84**. He then lifted the prints by using "gel lifts." **R. pp. 416-21**.

2. Hearing on admissibility of Sessions' shoes.

The trial judge held an *in camera* hearing on the admissibility of Sessions' tennis shoes immediately after Officer Iannone's testimony. The State proffered that Capt. Susan Safford would testify that **State's Ex. 88**, the tennis shoes, were taken from him sometime after he arrived at the Detention Center and that they were placed in a bag containing his personal belongings. When she received a search warrant, in December 2008, she retrieved the shoes from a bag containing Sessions' personal property. **R. p. 429**.

Sessions objected on the grounds of relevance. "I believe these shoes were taken last month, or maybe even in December, for this crime that occurred two and a half years ago. I don't see any direct probative correlation to these shoes." **R. p. 430, ll. 3-7**. The trial judge ascertained from the State that Sessions had been arrested three months after the crime (in September 2006) in Connecticut. He remained in custody until he was transported to South Carolina. The shoes came with him and were later seized. **R. p. 430, ll. 8-24**.

Sessions argued that his objection was "even clearer now, because we don't have any Connecticut folks here. . .to testify about that." **R. p. 431, ll. 4-7**. The trial judge found that a defendant's shoes, unlike blood, semen or other similar articles, were "not such that they can be destroyed or diminished"; and that Sessions' chain of custody argument was something he could advance on cross-examination but did not bar their introduction. **R. p. 431, ll. 11-19**. Sessions,

however, asserted that someone needed to testify as to how the shoes got into the chain of evidence, which was not present. **R. p. 431, ll. 20-23.**

Capt. Susan Safford then testified *in camera* that she is employed at the J. Reuben Long Detention Center. Her responsibilities include overseeing operations at that facility. Also, she has access to the inmates' personal property. Under Detention Center policy, officers confiscate "any items [that inmates] are not allowed to have in the back of the facility" at booking. The property is then placed into a hanging bag on a conveyor system, much like one would see in a laundromat. Each bag is unique to the defendant and the room where these bags are kept is locked. Although Detention Center staff have access to the room, the defendants do not. If an inmate wishes to release an item of personal property, they have to execute a property release form.[1] **R. pp. 433-37.**

An extradition company brought Sessions to the Detention Center on November 26, 2006. His shoes were not confiscated at that time because they were not deemed contraband. However, a memorandum was issued on May 11, 2007 stating that inmates were no longer able to wear their personal shoes. So officers began collecting inmates' shoes the following Sunday. Sessions' shoes would have been seized at that time, placed into a clear plastic bag and placed into his personal property bag. Based upon an inquiry from the Solicitor's Office, she later pulled up the bag number assigned to Sessions, she retrieved **State's Ex. 88** (the tennis shoes) from his personal property bag; and she gave the tennis shoes to an investigator from the Solicitor's Office. **R. pp. 434-39.**

Sessions elicited on cross-examination that the May 11th memorandum was issued because

[1] Officers thereafter check the identification of the person who retrieves the property and that passes must be signed for it.

"[a] lot of contraband was coming [into the Detention Center] inside shoes."[2] He also established that some inmates traded their shoes in the jail, but there was no evidence that Sessions' shoes had been traded. **R. pp. 437-38.**

Following additional cross-examination by Stephens, Stephens argued that the shoes could not be admitted because the State could not establish that the shoes were, in fact, Sessions' shoes. **R. pp. 440-41.** However, the trial judge found that Sessions had been transported by the transportation company to the jail in November. Then, in May 2006, there was a "change in policy," and Sessions' shoes were seized. The Detention Center then kept the shoes "until they [were] given over according to the Subpoena, so they are the Defendant's shoes, they were seized from him." While he noted that the defendants "have a lot of questions y'all can ask on cross-examination," he found that "there is no question they are the defendant's shoes, and they were seized from him." **R. p. 441, ll. 6-19.**

Stephens then argued that the shoes were irrelevant. However, the trial judge found that the shoes were relevant and that there "probative value outweighs any prejudice to the defendant." Also, he found that the matters raised by Stephens could be addressed on cross-examination. **R. p. 441, l. 20 - p. 442, l. 9.**

Finally, Gardner argued that the prejudicial effect out-weighted the probative value of the shoes because to cross-examine Officer Safford about the matters raised *in camera*, he would have to elicit that he had been incarcerated in Connecticut and he would have to establish that he was "in prison." The trial judge disagreed and, again, found that "the probative value of the evidence out-

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[2] She explained that it is difficult to property search shoes. "With inserts and soles and things." Therefore, the decision was made to no longer permit inmate's to wear their own shoes. **R. pp. 437-38.**

weighs any prejudice to [Sessions]." So, he allowed the State to admit the tennis shoes. **R. p. 442, l. 11 - p. 443, l. 3.**

Despite this ruling, the trial judge offered to restrict the State from eliciting prejudicial matters if Sessions wanted him to do so. Defense counsel and Sessions were permitted to discuss this but the *in camera* hearing concluded without any further discussion of Sessions' desire in this regard. **R. pp. 443-44.**

3. Additional testimony before the judge.

Officer Bobby Jordan, who is employed by Myrtle Beach Police Department's Crime Scene Unit, then testified about his involvement in the case. On June 10, 2006, at which time he recovered a projectile, pursuant to a search warrant from underneath the shower stall of Monica's bathroom. **R. pp. 445-49.** Det. Vincent Dorio also testified about his involvement in the case. **R. pp. 451-55.**

Then, Investigator Carol Allen, who was the shift supervisor over the Myrtle Beach Police Department's Crime Scene Unit in June 2006, testified that she had processed the kitchen floor of the residence on June 9, 2006. At that time, she dusted the kitchen floor, using two different types of powders, in an effort to develop possible prints. She was able to observe "two partial" shoe prints (*see* **State's Ex. 52**) and, using "pro lifts" (**State's Exs. 53-54**) she lifted each of the prints that she saw. **R. pp. 458-62.**

4. Capt. Safford's testimony.

Capt. Safford was the next witness. Immediately before her testimony, Sessions' counsel informed the trial judge that Sessions "wants to raise the shoe issue, so I won't be able to stipulate that the shoes come in." The trial judge instructed the State to establish "as complete a foundation as you can" because, although the trial judge anticipated ruling that they were admissible, he

expressly stated that he would hear any further arguments that Sessions had against their admissibility. He also instructed the defense that if there was any objection when the State sought to admit the shoes, he would send the jury out and he would hear any additional objection. **R. pp. 474-75.**

Capt. Safford then testified in the presence of the jury. Her testimony before the jury was almost identical to her earlier, *in camera* testimony. When the State offered the tennis shoes into evidence as **State's Ex. 88**, both defendants objected. The trial judge permitted both defendants to cross-examine Capt. Safford before he ruled on their objections. **R. pp. 476-72.**

Sessions' cross-examination established that Capt. Safford did not personally collect the tennis shoes and that she did not have personal knowledge about the their collection. The May 2007 memorandum addressing inmate footwear "was prompted to reduce contraband coming into the facility." Although she did not have any knowledge of inmates within the Detention Center selling shoes, she was aware that inmates traded their shoes. She was unable to determine whether the shoes collected from Sessions were the shoes that he had when he first arrived at the Detention Center. **R. pp. 482-84.**

Stephens again elicited that shoes had been used in the jail as a form of currency when traded. Also, all of the Officers at the Detention Center have access to the property room. **R. pp. 484-85.**

The State, on re-direct, elicited that her duties include making sure that standard operating procedures are followed. Officers were instructed to bag the shoes, place the defendant's name on the bag and place the bag in the defendant's personal property bag in the evidence room. The State also elicited that the defendants do not have access to the property room. **R. pp. 485-86.** Finally, Sessions, again, established that Capt. Safford did not personally take the shoes from Sessions. **R.**

p. 486.

5. **Further *in camera* arguments and the trial judge's ruling.**

Sessions then renewed his earlier objection *in camera*. Stephens joined in the objection and added that there was not a sufficient foundation to establish that the shoes were Sessions because the shoes were traded as a form of currency. **R. p. 487.**

The trial judge found that an adequate foundation had been established because the evidence supported the inference that Sessions was in possession of the shoes and that the shoes were his. Thus, the threshold requirement for admitting the tennis shoes had been met. **R. p. 487, l. 19 - p. 488, l. 1.**

In his further findings, he again found that the shoes were non-fungible items, unlike blood, semen or other bodily fluids; that the chain of custody requirements for non-fungible items was not as strict as it is for fungible items; and that the State had "shown a proper chain of custody in this particular case." Likewise, he again found that the defendants' arguments raised issues that were proper for cross-examination but that they did not bar the admission of the tennis shoes. Additionally, he found that "the shoes themselves are certainly relevant to the issues at hand, any prejudice to the defendants is more than out-weighed by the probative value regarding this particular piece and type of evidence, and therefore I am going to allow the shoes into evidence." **R. p. 488, ll. 2-17.**

However, he stressed that his ruling did not prevent the defendants from fully exploring all issues on cross-examination. He then indicated that he would tell the jury that he had allowed **State's Ex. 88** into evidence, and that Sessions would be permitted to continue with this cross-examination. **R. p. 488, l. 18 - p. 489, l. 7.** This procedure was followed when the jury was brought

back into the courtroom.

6. Expert testimony regarding State's Ex. 88.

S.L.E.D. Agent Thomas Darnell is assigned to the Forensic Service Laboratory, where he is the Supervisor of the Latent-Print Department. He was qualified, without objection, as an expert in the area of footwear impressions. **R. pp. 494-96.**

In connection with this case, he received the gel lifters (**State's Exs. 57-62**) taken from the bathroom and the taped lifts (**State's Exs. 53-54**) that were taken from the kitchen. He was also given five pairs of shoes and asked to compare the shoes to the questioned impressions.[3] He concluded that the heal of Sessions' left shoe was consistent with the gel lift from Monica's bathroom floor that was introduced as **State's Ex. 61**. "In other words, it corresponded in physical design, size and shape with the left shoe of **State's 88**." He also compared the other shoes that had been submitted with **State's Ex. 61**, but they were not consistent with the unknown impression. **R. pp. 496-504; 508-09.**

Another gel lift from the bathroom was too "partial to render any sort of conclusion." One of the taped lifts from the kitchen corresponded to four of the pairs of shoes that had been submitted - including **State's Ex. 88** - because all four pairs "had the same outsole design." He added that this lift "was extremely partial, which means that all I could say about that particular impression was that . . . it corresponded in physical design and I couldn't go any further, such as the size or shape or anything such as that, just because of the amount of impression was so limited." **R. pp. 504-09; 513.**

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[3] In addition to **State's Ex. 88**, he received four pairs of shoes belonging to Antwann Higgins, **State's Ex. 17** and **State's Exs. 85-87**, for comparison. **R. pp. 331-32; 422; 503.**

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). 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. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); *State v. Martin*, 347 S.C. 522, 533, 556 S.E.2d 706, 712 (Ct. App. 2001).

Contrary to Sessions' argument, the State was not required to establish a strict chain of custody for **State's Ex. 88** because tennis shoes are non-fungible. As the Supreme Court has explained,

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

State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741-742 (2005) ("Given the serial number and markings on the gun, and the fact that a gun is a non-fungible item, we find the chain of custody

established by the state in this case was sufficient."). The Court of Appeals reached the same result in *State v. Glenn*, 328 S.C. 300, 305-06, 492 S.E.2d 393, 395 (Ct. App. 1997):

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

(quoting John W. Strong, 2 *McCormick on Evidence* § 212 at 527 (4th ed. 1992)). *See also State v. Rogers*, 361 S.C. 178, 186-187, 603 S.E.2d 910, 914-15 (Ct.App. 2004).

Here, the State established a sufficient foundation to permit introduction of Sessions' tennis shoes through Capt. Safford's testimony. As discussed, she testified that Sessions would have had his shoes when hee was received on November 27, 2006. His shoes would have been taken from him after the May 11, 2007 memorandum made inmates' shoes contraband. Consistent with Detention Center policy, the shoes then would have been placed into a clear plastic bag, and placed into his personal property bag. The shoes remained there until Capt. Safford retrieved them at the request of the Solicitor's Office. **R. pp. 434-39.**

Further, each inmate's personal property bag is given a number that is unique to the inmate, and the property room is locked. Although Detention Center officers can access the property room, the inmates cannot. **R. pp. 434-39**. Moreover, there was no evidence presented that Sessions had traded his shoes that he was wearing when he was received at the Detention Center from the

transportation company or that he had acquired **State's Ex. 88** through trade, or otherwise, after he arrived at the Detention Center.

As a result, a extremely strong, reasonable inference from her testimony is that **State's Ex. 88** are Sessions' tennis shoes. Thus, the State satisfied the requirements of *Freiburger* and *Glenn*. Also, Agent Darnell's expert testimony makes **State's Ex. 88** probative of Sessions' guilt because the shoe print was left in Monica's fecal matter that, inferably was excreted at or near the time of her death.[4] Because Sessions has abandoned his Rule 403, SCRE, argument on appeal, by not raising it on appeal, *see 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), the trial judge's ruling must be affirmed.

Finally, and to the extent that the Court finds that the trial judge erroneously allowed the prosecution to introduce **State's Ex. 88**, Respondent submits that the ruling 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 **State's Ex. 88** was both relevant and probative of Sessions' 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,

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[4] As noted, Monica was found nude. Although not previously discussed, the State presented evidence that there was feces in Monica's bedroom. **R. pp. 376-79; 393-94.** Thus, a reasonable inference is that she defecated, at or near her death, out of fear.

2006, since 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 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, discussed in **Argument II**, *infra*, 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 8th. 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 voluntarilty 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 10th, 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 8th. 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 10th.

- While Turner was there, Stephens came to the house between 9:30 an 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. pm. on Thurday June 9th, 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 9th, 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 10th. 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 either the evidence connecting Sessions to the shoe print or Agent Prodan's testimony. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584. Moreover, Sessions presented testimony from his own expert in footwear identification, Donald Girndt. Girndt did not dispute Agent Darnell's findings, except as to the partial shoe print in the bathroom that Agent Darnell had opined was not sufficient for comparison purposes. Girndt opined that this print was inconsistent with **State's Ex. 88. R. pp. 666-73.** Particularly in light of Girndt's testimony, 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. Sessions' challenge to the State's expert testimony on crime scene analysis and victimology, given by SLED Agent Michael Prodan, is procedurally barred because his relevancy objection is too general to preserve any issue for appellate review. 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, Sessions 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 Sessions' challenge to Agent Prodan's testimony is procedurally barred because his relevancy objection is too general to preserve any issue for appellate review. 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 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 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. 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 then 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.[5] Here, the murders occurred in Jamilla's residence, which is where law enforcement

[5] 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.**

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,[6] 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.**[7]

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

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[6] For example, the crime scene reports did not reflect that the victims' bodies and had been washed or that any effort was made to wipe for prints. **R. p. 592.**

[7] 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.**

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. 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. Sessions' relevancy objection does not preserve issue for appellate review.

As shown, Sessions' only objections were that the State had committed a discovery violation

and that the testimony was not relevant. **R. pp. 572-73; 579; 582.** On appeal, he has not challenged the trial judge's ruling that there was no *Brady* violation. Therefore, that argument has been abandoned. *Sullivan, supra.*

In arguing that Prodan's proffered testimony was not relevant, Sessions merely stated, "[n]ow the objection is relevance." **R. p. 582, l. 18.** He did not argue either how or why the proffered testimony was supposedly irrelevant. He also 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.[8]

Here, 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.[9] His only objection was the unspecified lack of relevancy.[10] Thus, his argument on appeal is procedurally barred. *See State v.*

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[8] 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.

[9] This is hardly surprising, in light of the fact that Sessions had his own expert in the area of crime scene analysis, Mr. Girndt. *See* **R. p. 665.**

[10] He suggests that he objected to Prodan's testimony as speculative. However, that was part of *Stephens'* objection and he cannot avail himself of that objection because he did not join in it. *E.g., State v. Carriker*, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (holding that the appellant's assertion of error

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 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 for a new trial, after the verdict in the sentencing phase, based on prejudice arising from various items contained in the wallet).[11] 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.

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was not preserved because "appellant's counsel made no objection ... at trial. While appellant's co-defendant did object, the appellant may not utilize the objection of another defendant to gain review"); *State v. Brannon*, 347 S.C. 85, 89, 552 S.E.2d 773, 775 (Ct.App.2001) (trial judge's failure to suppress evidence not preserved where appellant did not join in co-defendant's motion to suppress); *State v. Nichols*, 325 S.C. 111, 123, 481 S.E.2d 118, 124 (1997) ("Finally, the remaining issues raised by appellant are not preserved for review since appellant failed to object during trial or join in his co-defendant's objections.").

[11] *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").

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 Sessions 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* 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").[12] 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,

[12] 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).

"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 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.[13] Likewise, through application of his expertise to the evidence 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.[14]

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,

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

[14] 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).

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 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*.[15]

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[15] 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 & Psychdl. 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. Morever, 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 he 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.

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 and the Court of Appeals' decision in *Tapp* must be reversed because any error in admitting Agent Prodan's testimony was harmless and non-prejudicial beyond a reasonable doubt for the reasons set forth in **Argument I**, *supra*. 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.

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 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.

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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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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By: _____
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

December 29, 2010

1110

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

APPELLANT.

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 29th day of December, 2010.

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
Office of Attorney General
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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

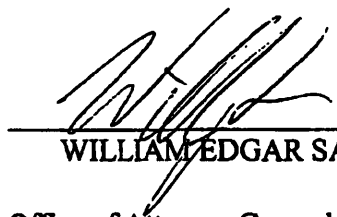
APPELLANT.

CERTIFICATE OF SERVICE

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, Joseph L. Savitz, 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 29th day of December, 2010.



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ATTORNEY FOR RESPONDENT

1112

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jimmy Lee Sessions, Appellant.

Appellate Case No. 2009-116987

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

Unpublished Opinion No. 2013-UP-063
Heard October 3, 2012 – Filed January 30, 2013

AFFIRMED

Joseph L. Savitz, III, and LaNelle Cantey DuRant, both of Columbia, for Appellant.

Senior Assistant Attorney General W. Edgar Salter, III, of Columbia, for Respondent.

PER CURIAM: Jimmy Lee Sessions and co-defendant Christopher Stephens were convicted in a joint trial on indictments charging Sessions with murder, first-degree burglary, and armed robbery and Stephens with various counts of accomplice liability. On appeal, Sessions argues the trial judge erred in admitting

certain physical evidence and in allowing a SLED employee to testify about victimology and related matters. We affirm.

1. The bodies of the two victims were found in the apartment they shared. Evidence at the crime scene included shoe prints that were left in fecal matter on the floor of the bathroom where one of the victims was found. About five months after Sessions was arrested and charged, the Horry County Detention Center, where Sessions was in custody awaiting trial, instructed its staff to collect all inmates' shoes and place them in the property bag assigned to the respective inmate. Pursuant to a search warrant, the State seized a pair of tennis shoes that had been taken from Sessions after they were confiscated by the Detention Center staff and placed into his property bag. Over Sessions's objections, the trial judge allowed the State to introduce the shoes taken from his property bag so that the jury could compare them with the impressions found at the crime scene. On appeal, Sessions argues this evidence should have been excluded because the State failed to establish an adequate chain of custody. We disagree. There was no dispute that this evidence was non-fungible and that Sessions had the shoes in his possession when all inmates' shoes were taken by the Detention Center staff. *See State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741-42 (2005) ("[W]here the issue is the admissibility of non-fungible evidence--that is, evidence that is unique and identifiable--the establishment of a strict chain of custody is not required."). Furthermore, we agree with the trial judge that any arguments about the ownership or possession of the shoes would go to the weight of the evidence rather than its admissibility. *Cf. State v. Rogers*, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004) ("South Carolina law does not require testimony as to the exclusion of any possibility of tampering.").

2. Sessions 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, Sessions objected to Prodan's testimony, arguing among other grounds that it was not relevant. The trial judge qualified Prodan as an expert in the areas of behavioral science and violent crime without evaluating the reliability of the substance of his testimony. Although Sessions did not specifically request the trial judge to exercise a gatekeeping role in determining whether Prodan's testimony was admissible, we hold Sessions's 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 Sessions'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 Sessions. *Id.* at 390, 728 S.E.2d at 475. Here, Prodan's testimony concerned only the victims and the crime scene. He never identified Sessions, 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*, the jury made numerous factual

determinations in arriving at its verdict, including (1) whether shoe prints found at the crime scene matched the shoes taken from Sessions's property bag, (2) whether the shoes taken from Sessions's property bag were the same shoes he had on his person when he was initially taken into custody, (3) the reliability of a witness who allegedly heard Sessions and his co-defendant discussing how they would rob and possibly kill one of the victims, (4) the same witness's claims that the defendants requested his assistance in the crime, (5) the reliability of the testimony of Sessions's own expert in the field of footwear identification. Given these and other factual questions, we hold that any error in the trial judge's failure to properly vet Prodan's testimony for its reliability was harmless, and (6) 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.

1116

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

APPELLANT

APPELLATE CASE NO. 2009-116987

Appeal from Horry County

Steven H. John, Circuit Court Judge

Opinion No. 2013-UP-063

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on January 30, 2013. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Sessions argued two issues on appeal: (1) the trial judge committed reversible error by allowing into evidence a pair of tennis shoes alleged to connect Sessions with prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were taken from a bag at the detention center purported to contain Session's personal belongings;

(2) the trial judge committed reversible error by allowing SLED "victimologist" Mike Prodan to testify about the "victiomology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and – since it involves the same witness—*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.

The Court of Appeals affirmed the trial court on both issues. On Issue One, the Court held that where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable, the establishment of a strict chain of custody is not required, and that the possession of the shoes would go to the weight of the evidence. On Issue Two, the Court held that the trial judge erred in admitting Prodan's testimony without making his own determination as to whether it was reliable. However, the Court found no reversible error because beyond a reasonable doubt the trial error did not contribute to the guilty verdict.

The court misapprehended the issues.

ISSUE ONE: The State alleged that in June 2006, Sessions, with the assistance of his co-defendant Christopher Stephens, had robbed and murdered a mid-level drug dealer, Jamilla Hytower, and her roommate, Monica Wall. The State's case against Sessions and Stephens depends almost entirely upon the testimony of James Pearl, who claims he opted out of their plan to rob and murder Hytower. R. p. 122, line 22 – R. p. 125, line 18.

On trial, the defense focused upon the unreliability of the State's evidence against Sessions and Stephens and pointed out that several other suspects had motives to murder Hytower and Wall as well. The person who murdered Jamilla Hytower and Melissa Gomez quite possibly left shoeprints in a bathroom and in the kitchen. R. p. 416, lines 14-19; R. p. 459, line 22- R. p. 460, line 10. The murders occurred in July 2006. Sessions was arrested in Connecticut three months later. R.

p. 430, lines 8-19. A private extradition company transported him to Horry County on November 27, 2006. R. p. 434, lines 9-15.

On May 11, 2007, the detention center issued a memo stating that inmates would no longer be allowed to possess their own shoes. R. p. 436, lines 8-10. A captain with the detention center testified:

> The memo instructed the officers to begin on the following Sunday collecting them and placing them in the property bag. ... The officers would have collected them. They put them in a clear plastic bag and then they put them in the inmates' property bag.

R. p. 436, lines 10-17. "[W]e have no way of knowing that these are the ones [Sessions] wore in," she admitted, nor was she present "when they were collected." R. p. 490, lines 12-22. Moreover, "[a]ny officer" at the detention center had access to the room where the inmates' personal belongings were kept. R. p. 438, lines 20-25. The State seized the pair of shoes alleged to belong to Sessions from the property room in December 2008. R. p. 429, line 24 – R. p. 430, line 6.

Defense objected to the admission of the shoes on the ground that "we would need to have somebody to say how they got into this chain and I don't think we have that." R. p. 431, lines 5-22; R. p. 474, lines 22-24; R. p. 486, line 23- R. p. 487, line 3. The judge overruled the objection and the shoes were admitted into evidence. R. p. 487, line 20 – R. p. 489, line 25.

A SLED expert in footwear impression examination testified that the tennis shoes taken from the detention center were consistent with the prints found in the kitchen and the bathroom at the crime scene. R. p. 498, lines 19-24; R. p. 505, line 23- R. p. 506, line 20. The Assistant Solicitor exploited this evidence in closing:

> Told you these shoes came off Jimmy Lee Sessions... [T]hey are consistent with a print left where no print should be. ... Don't reward him because he was not smart enough to get rid of those shoes.

R. p. 1009, lines 1-20.

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997), succinctly summarizes the chain-of-custody law:

> Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party offering such items into evidence must establish a chain-of-custody as far as practicable. [Citations omitted.] Where the analyzed substance is passed through several hands, the evidence must not leave it to conjecture as to had it and what was done with it between the taking an analysis. However, the proof of chain-of-custody need not negate all possibility of tampering, but instead must only establish a complete chain of evidence as far as practicable. [Citations omitted.]
>
> While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is evidence that is unique and identifiable – the establishment of a strict chain of custody is not required ... [i]f the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit nearly on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering of contamination, the sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain-of-custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with. [Citations and quotation marks omitted.]

See, also, *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2006).

In short, the State was unable to account for these tennis shoes until after they were removed from personal-property room in December 2008, one month after the case against Sessions and Stephens ended in a mistrial. No witness testified that those shoes were ever worn by Sessions.

The Court of Appeals held that that where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable, the establishment of a strict chain of

custody is not required, and that the possession of the shoes would go to the weight of the evidence. The Court misapprehended th issue in this case because there was no way to prove that the shoes were Sessions' based on all that had happened in between as described above.

Due to this failure in the chain of custody, the Court should reverse Sessions' convictions and remand for a new trial.

ISSUE TWO: In February 2009, SLED "victimologist" Mike Prodan testified about "victimology, method of operation, motive, things like that" – the Assistant Solicitor's description of his content—in an effort to bolster the State's forensically-troubled prosecution of Sessions and Stephens. On April 9, 2009 the Court of Appeals, in an opinion since withdrawn, found Prodan's testimony about "victimology" to be both irrelevant and unduly prejudicial. *State v. Tapp,* 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2010).

Shortly afterwards, the Supreme Court decided *State v. White*, 676 S.E.2d 687, which held, "All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's singular gatekeeping function in insuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." The Court of Appeals then granted rehearing in *Tapp*, and in its refiled opinion, reversed and remanded for a new trial finding that it was error to qualify Prodan as an expert witness because:

> [W]ithout the guidance of the *White* decision, Tapp was not able to sufficiently develop and pursue theories in 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.

The Supreme Court granted the state's petition for certiorrai, and issued an opinion in 2012 reversing the Court of Appeals and reinstating Tapp's convictions. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012).

In the present case, the State gave the defense no notice that they intended to call Prodan as an expert witness in victimology. R. p. 572, line 21 – R. p. 573, line 16.

The defense objected to Prodan's testimony on the grounds of relevance and as speculative. R. p. 582, lines 8-18; R. p. 602, lines 6-18. The judge overruled the objections and allowed Prodan to testify. He essentially took the facts as presented by the State and constructed a narrative supporting the State's theory of the case. Prodan's testimony is reproduced in the Record on Appeal at pages 568 through 611. A sense of its content is given by the following exchange:

> Assistant Solicitor: What is the significance of finding no drugs [and] no money in the house of [a] mid-level drug dealer?
>
> Prodan: It's a reasonable conclusion that the motive was... the forcible taking of the money and the drugs and that the individual was willing to kill to do that.

R. p. 605, lines 13-17. The Assistant Solicitor exploited Prodan's testimony in closing to bolster the State's case. R. p. 1010, lines 17-20.

The Court of Appeals held that the trial judge erred in admitting Prodan's testimony without making his own determination as to whether it was reliable. However, the. Court found no reversible error because beyond a reasonable doubt the trial error did not contribute to the guilty verdict. 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).

The Court misunderstood the issue as Prodan's testimony was unduly prejudicial to Sessions without a finding of its reliability. In short, Prodan's testimony violated Rule 702, *State v. White* and

—obviously—*State v. Tapp*. 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.

The Supreme Court held in State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) that "under *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." Although the Supreme Court found that admitting Prodan's testimony before vetting it for its reliability was error, they found the error to be harmless. The Supreme Court found no reversible error because beyond a reasonable doubt the trial error did not contribute to the guilty verdict.

The admission of Prodan's testimony in Sessions' case was error and was not harmless.

THEREFORE, we respectfully ask the Court of Appeals to reconsider its ruling.

Respectfully submitted,

LaNelle Cantey DuRant
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.

JIMMY LEE SESSIONS,

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 Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of February, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day of February, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

1124

The South Carolina Court of Appeals

The State, Respondent,

v.

Jimmy Lee Sessions, Appellant.

Appellate Case No. 2009-116987

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.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
W. Edgar Salter, III
LaNelle Cantey DuRant
Melanie Huggins-Ward

FILED
March 20, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 2013-UP-063 (S.C. Ct. App. filed 1/30/2013)

07-GS-26-2961, 2962, 2963, 08-GS-26-2698

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

PETITIONER

APPELLATE CASE NO. 2013-000805

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
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(803) 734-1343

ATTORNEY FOR PETITIONER

1126

INDEX

CERTIFICATE OF COUNSEL

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

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court allowing into evidence a pair of tennis shoes alleged to connect Sessions with sole prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were removed from a bag at the detention center purported to contain Session's personal belongings.

2. Whether the Court of Appeals erred in affirming the trial court allowing SLED "victimologist" Mike Prodan to testify about the "victiomology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), and - since it involves the same witness—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).

STATEMENT OF THE CASE

On February 2 through 6, 2009, Petitioner Jimmy Lee Sessions and Christopher Stephens stood trial in Horry County, before Judge Stephen H. John and a jury, on indictments charging Sessions with two counts of murder and one count each of first-degree burglary and armed robbery and for co-defendant Stephens accessory before the fact of the two murders and armed robbery. The State alleged that in June 2006 Sessions, with the assistance of Stephens, had robbed and murdered a mid-level drug dealer, Jamilla Hytower, and her roommate, Monica Wall.

The first trial of these charges in November 2008 ended with the judge declaring a mistrial (and dismissing accessory charges against Christopher Stephens' brother, Marshall, for lack of evidence) after the jury deadlocked. The State's case against Sessions and Stephens depends almost entirely upon the testimony of James Pearl, who claims he opted out of their plan to rob and murder Hytower. R. p. 122, line 22 – R. p. 125, line 18.

On trial, the defense focused upon the unreliability of the State's evidence against Sessions and Stephens. Counsel pointed out that several other suspects had motives to murder Hytower and Wall as well. The jury convicted both defendants as charged, and the judge sentenced Sessions to concurrent terms of life imprisonment for the two murders, thirty years for first-degree burglary and thirty years for armed robbery, and Stephens to concurrent terms of forty years on each of the two accessories before the fact of murder and thirty years for accessory before the fact of armed robbery.

Sessions filed a notice of appeal which the Court of Appeals affirmed on January 30, 2013. State v. Sessions, Op. No. 2013-UP-063 (Ct. App. filed January 30, 2013). App. 1 – 4. Appellate counsel filed a petition for rehearing which the Court of Appeals denied on March 20, 2013. App. 13. This petition for a writ of certiorari follows.

QUESTION

I.

The Court of Appeals erred in affirming the trial court allowing into evidence a pair of tennis shoes alleged to connect Sessions with sole prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were removed from a bag at the detention center purported to contain Session's personal belongings.

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On May 11, 2007, the detention center issued a memo stating that inmates would no longer be allowed to possess their own shoes. R. p. 436, lines 8-10. A captain with the detention center testified:

> The memo instructed the officers to begin on the following Sunday collecting them and placing them in the property bag. ... The officers would have collected them. They put them in a clear plastic bag and then they put them in the inmates' property bag.

R. p. 436, lines 10-17. The captain continued: "[W]e have no way of knowing that these are the ones [Sessions] wore in," she admitted, nor was she present "when they were collected." R. p. 490, lines 12-22. Moreover, "[a]ny officer" at the detention center had access to the room where the inmates' personal belongings were kept." R. p. 438, lines 20-25. The State seized the pair of shoes alleged to belong to Sessions from the property room in December 2008, a year and a half after the memo and nearly two years after the arrest. R. p. 429, line 24 – R. p. 430, line 6.

Defense counsel objected to the admission of the shoes on the ground that "we would need to have somebody to say how they got into this chain and I don't think we have that." R. p. 431, lines 5-22; R. p. 474, lines 22-24; R. p. 486, line 23- R. p. 487, line 3. The judge overruled the objection and the shoes were admitted into evidence. R. p. 487, line 20 – R. p. 489, line 25.

A SLED expert in footwear impression examination testified that the tennis shoes taken from the detention center were consistent with the sole prints found in the kitchen and the bathroom at the crime scene. R. p. 498, lines 19-24; R. p. 505, line 23- R. p. 506, line 20. The Assistant Solicitor exploited this evidence in closing:

> Told you these shoes came off Jimmy Lee Sessions... [T]hey are consistent with a print left where no print should be. ... Don't reward him because he was not smart enough to get rid of those shoes.

R. p. 1009, lines 1-20.

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997), succinctly summarizes the chain-of-custody law:

> Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party

> offering such items into evidence must establish a chain-of-custody as far as practicable. [Citations omitted.] Where the analyzed substance is passed through several hands, the evidence must not leave it to conjecture as to had it and what was done with it between the taking an analysis. However, the proof of chain-of-custody need not negate all possibility of tampering, but instead must only establish a complete chain of evidence as far as practicable. [Citations omitted.]
>
> While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is evidence that is unique and identifiable – the establishment of a strict chain of custody is not required ... [i]f the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit nearly on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering of contamination, the sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain-of-custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with. [Citations and quotation marks omitted.]

See, also State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2006).

In short, the State was unable to account for these tennis shoes until after they were removed from personal-property room in December 2008, one month after the case against Sessions and Stephens ended in a mistrial. No witness testified that those shoes were ever worn by Sessions.

The Court of Appeals held that that where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable, the establishment of a strict chain of custody is not required, and that the possession of the shoes would go to the weight of the evidence. App. 2. The Court misapprehended the issue in this case because there was no way to prove that the shoes were Sessions' based on all that had happened in between as described above.

Tennis shoes are hardly unique. It is not as though they have serial numbers. The law should not be read, as the Court of Appeals did, to utterly do away with a chain requirement in the disturbing vague factual context here. Due to this failure in the chain of custody, the Court should reverse Sessions' convictions and remand for a new trial. The shoes were significant evidence against Sessions and were not reliable evidence due to the lack of a chain of custody.

QUESTION

II.

The Court of Appeals erred in affirming the trial court allowing SLED "victimologist" Mike Prodan to testify about the "victiomology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), and - since it involves the same witness—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).

In February 2009, SLED "victimologist" Mike Prodan testified about "victimology, method of operation, motive, things like that" – the Assistant Solicitor's description of his content—in an effort to bolster the State's forensically-troubled prosecution of Sessions and Stephens. On April 9, 2009 the Court of Appeals found Prodan's testimony about "victimology" to be both irrelevant and unduly prejudicial. 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).

Shortly afterwards, the Supreme Court decided State v. White, 676 S.E.2d 687, which held, "All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's singular gatekeeping function in insuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." The Court of Appeals then granted rehearing in *Tapp*, and in its refiled opinion, reversed and remanded for a new trial finding that it was error to qualify Prodan as an expert witness because:

> [W]ithout the guidance of the White decision, Tapp was not able to sufficiently develop and pursue theories in 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.

The Supreme Court granted the state's petition for certiorari, and issued an opinion in 2012 reversing the Court of Appeals and reinstating Tapp's convictions. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). This Court elsewhere agreed with the Court of Appeals regarding the inadmissibility of the evidence under challenge.

In the present case, the State gave the defense no notice that they intended to call Prodan as an expert witness in victimology. R. p. 572, line 21 – R. p. 573, line 16.

The defense objected to Prodan's testimony on the grounds of relevance and as speculative. R. p. 582, lines 8-18; R. p. 602, lines 6-18. The judge overruled the objections and allowed Prodan to testify. He essentially took the facts as presented by the State and constructed a narrative supporting the State's theory of the case. Prodan's testimony is reproduced in the Record on Appeal at pages 568 through 611. A sense of its content is given by the following exchange:

> Assistant Solicitor: What is the significance of finding no drugs [and] no money in the house of [a] mid-level drug dealer?
>
> Prodan: It's a reasonable conclusion that the motive was... the forcible taking of the money and the drugs and that the individual was willing to kill to do that.

R. p. 605, lines 13-17. The Assistant Solicitor exploited Prodan's testimony in his closing to bolster the State's case.

> He[Sessions]takes Jamilla [Hytower] back to the bedroom. Doesn't know Monica is in bathroom yet. And he takes her and he put her down on the floor. He grabs these pillows, grabs it, slams down on her head, puts the gun to the back of her head because as Mike Prodan said, "it's a lot easier to shoot that pillow than to shoot Jamilla Hytower."

R. p. 1010, lines 17-20.

The Court of Appeals held that the trial judge erred in admitting Prodan's testimony without making his own determination as to whether it was reliable. However, the. Court found no reversible error because beyond a reasonable doubt the trial error did not contribute to the guilty verdict. App. 2-4. 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).

The Court misunderstood the issue as Prodan's testimony was unduly prejudicial to Sessions without a finding of its reliability. In short, Prodan's testimony violated Rule 702, State v. White and –obviously—State v. Tapp. 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.

The Supreme Court held in State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) that "under 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." Although the Supreme Court found that admitting Prodan's testimony before vetting it for its reliability was error, they found the error to be harmless. The Supreme Court found no reversible error because beyond a reasonable doubt the trial error did not contribute to the guilty verdict.

The admission of Prodan's testimony in Sessions' case was certainly error and was certainly not harmless. Sessions' case is distinguished from Tapp because Prodan testified in Tapp that the victim had a low risk for encountering a violent crime. Prodan said the decedent Hytower had a moderate risk of encountering a violent crime due to her drug sales. R. 589,ll. 16 - 590, ll. 5. Prodan said Hightower only sold drugs if there were previous notification. R. 595, ll. 1 – 596, ll. 14. Tapp confessed to a cellmate that he murdered the decedent in that case.

The Supreme Court held in Tapp, Id., that whether an error is harmless depends on the circumstances of the particular case.

Prodan's testimony in Sessions' case was not harmless because he also testified that both decedents were controlled by the murderer. R. 597, ll. 14 – 598, ll. 21. Prodan stated 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.

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. The Supreme Court wrote in Tapp, *supra*,: " engaging in the harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict."

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, that murder without motive was also a media myth. The solicitor argued for Prodan in his closing argument. 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.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,

LaNelle Cantey DuRant
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-063 (S.C. Ct. App. filed 1/30/2013)

07-GS-26-2961, 2962, 2963, 08-GS-26-2698

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

PETITIONER

APPELLATE CASE NO. 2013-000805

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, and the S.C. Court of Appeals this 19th day of June, 2013.

LaNelle Cantey DuRant
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: July 24, 2022.

1140

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JUL 18 2013

S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2013-000805

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

PETITIONER.

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TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL

1. The trial judge committed reversible error by allowing into evidence a pair of tennis shoes alleged to connect Sessions with prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were taken from a bag at the detention center purported to contain Sessions' personal belongings.

2. The trial judge committed reversible error by allowing SLED "victimologist" Mike Prodan to testify about the "victimology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and - on point as a case can be, since it involves the same witness - *State vs. Tapp*, S.C. Ct. App. Opinion No. 4529, refiled February 18, 2010.

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the Court of Appeals correctly upheld the trial judge's admission of Sessions' tennis shoes (**State's Ex. 88**) into evidence because the State established an adequate foundation for their admission, and Sessions' argument about the insufficiency of the chain of evidence goes more to the weight he feels that the jury should have accorded to these non-fungible items and not to their admissibility?

II. 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?

ALTERNATIVE SUSTAINING GROUND [Argued in Argument II].

III. Whether Sessions' challenge to the State's expert testimony on crime scene analysis and victimology is procedurally barred because his relevancy objection is too general to preserve any issue for appellate review?

STATEMENT OF THE CASE

The Horry County Grand Jury indicted Petitioner, Jimmy Lee Sessions, (Sessions) in July 2007 for two murders (07-GS-26-2962), burglary in the first degree (07-GS-26-2968) and armed robbery (07-GS-26-2961). Co-defendant Christopher Stephens was indicted for two counts of accessory before the fact of the two murders and armed robbery. The victims were Jamilla Hightower and Monica Wall. Johnny Gardner, Esquire, represented Sessions. Bobby G. Frederick and Laura L. Hiller, Esquires represented Stephens.[1]

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 Sessions guilty of all three charges and Stephens guilty of the charges against him. Sessions received concurrent life sentences for the murders and concurrent thirty year sentences on the other offenses. Sessions 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. Sessions*, 2013-UP-063 (S.C. Ct.App., Jan. 30, 2013), **App. 1-4**. A timely rehearing petition (**App. 5-12**) was denied on March 20, 2013. **App. 13**. The Petition for Writ of Certiorari was filed on June 19, 2013.

ARGUMENTS

I. The trial judge properly allowed the State to introduce State's Ex. 88, Sessions' tennis shoes, into evidence because the State established an adequate foundation for their admission, and Sessions' argument about the insufficiency of the chain of evidence goes

[1] 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.

more to the weight he feels that the jury should have accorded to these non-fungible items and not to their admissibility.

Sessions maintains that the trial judge erroneously allowed the State to introduce his tennis shoes, **States' Ex. 88**, since the State allegedly failed to establish an adequate chain of custody before they were removed from a bag containing his personal belongings at the J. Reuben Long Detention Center. Respondent submits that his argument lacks merit because the State established an adequate foundation for the introduction of the tennis shoes, and that his argument about the supposed inadequacy of the chain of custody goes more to the weight he felt that the jury should have accorded to these non-fungible items and not to their admissibility. Alternatively, any error was harmless beyond a reasonable doubt.

A. How the issue arose at trial.

1. The crime scene.

Officer John Iannone, of the City of Myrtle Beach Police Department's Crime Scene Unit, processed the crime scene: the Myrtle Beach, South Carolina resident of Jamilla Hightower and Monica Walls. Jamilla was found face-down in her bedroom. She had pillowcase over her head with a single gunshot wound to the head. Monica was found in the bathroom adjacent to her bedroom in an identical manner. The primary differences were that Monica was nude, that she had defecated in her bedroom and that there was some feces on the bathroom floor. **R. pp. 390-417**. *See also* **R. pp. 370-404**.

In Monica's bathroom, Officer Iannone found "fecal matter" on the floor and footprints that appeared to have been left by someone stepping in it. He photographed what he had found. **State's Ex. 82**. He photographed it again after he had applied black magnetic power on the floor. **State's Exs. 63-64; State's Exs. 77-81; State's Exs. 83-84**. He then lifted the prints by using "gel lifts."

R. pp. 416-21.

2. Hearing on admissibility of Sessions' shoes.

The trial judge held an *in camera* hearing on the admissibility of Sessions' tennis shoes immediately after Officer Iannone's testimony. The State proffered that Capt. Susan Safford would testify that **State's Ex. 88**, the tennis shoes, were taken from him sometime after he arrived at the Detention Center and that they were placed in a bag containing his personal belongings. When she received a search warrant, in December 2008, she retrieved the shoes from a bag containing Sessions' personal property. **R. p. 429.**

Sessions objected on the grounds of relevance.[2] **R. p. 430, ll. 3-7.** The trial judge ascertained from the State that Sessions had been arrested three months after the crime (in September 2006) in Connecticut. He remained in custody until he was transported to South Carolina. The shoes came with him and were later seized. **R. p. 430, ll. 8-24.** Sessions argued that his objection was "even clearer now, because we don't have any Connecticut folks here ... to testify about that." **R. p. 431, ll. 4-7.** The trial judge found that a defendant's shoes, unlike blood, semen or other similar articles, were "not such that they can be destroyed or diminished." Also, Sessions' chain of custody argument was something he could advance on cross-examination but did not bar their introduction. **R. p. 431, ll. 11-19.**[3]

Capt. Susan Safford then testified *in camera* that she is employed at the J. Reuben Long Detention Center. Her responsibilities include overseeing operations at that facility. Also, she has

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[2] "I believe these shoes were taken last month, or maybe even in December, for this crime that occurred two and a half years ago. I don't see any direct probative correlation to these shoes."

[3] Sessions, however, asserted that someone needed to but had not testified as to how the shoes got into the chain of evidence. **R. p. 431, ll. 20-23.**

access to the inmates' personal property. Under Detention Center policy, officers confiscate "any items [that inmates] are not allowed to have in the back of the facility" at booking. The property is then placed into a hanging bag on a conveyor system, much like one would see in a laundromat. Each bag is unique to the defendant and the room where these bags are kept is locked. Although Detention Center staff have access to the room, the defendants do not. If an inmate wishes to release an item of personal property, they have to execute a property release form.[4] **R. pp. 433-37.**

An extradition company brought Sessions to the Detention Center on November 26, 2006. His shoes were not confiscated at that time because they were not deemed contraband. However, a memorandum was issued on May 11, 2007 stating that inmates were no longer able to wear their personal shoes. So officers began collecting inmates' shoes the following Sunday. Sessions' shoes would have been seized at that time, placed into a clear plastic bag and placed into his personal property bag. Based upon an inquiry from the Solicitor's Office, she later pulled up the bag number assigned to Sessions, she retrieved **State's Ex. 88** (the tennis shoes) from his personal property bag and she gave the tennis shoes to an investigator from the Solicitor's Office. **R. pp. 434-39.**[5]

The trial judge rejected Stephens argument that the shoes could not be admitted because the State could not establish that the shoes were, in fact, Sessions' shoes (**R. pp. 440-41**). The trial judge found that Sessions had been transported by the transportation company to the jail in November. Then, in May 2006, there was a "change in policy," and Sessions' shoes were seized. The Detention

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[4] Officers thereafter check the identification of the person who retrieves the property and that passes must be signed for it.

[5] Sessions elicited on cross-examination that the May 11th memorandum was issued because "[a] lot of contraband was coming [into the Detention Center] inside shoes."She explained that it is difficult to property search shoes. "With inserts and soles and things." Therefore, the decision was made to no longer permit inmate's to wear their own shoes. **R. pp. 437-38.** He also established that some inmates traded their shoes in the jail, but there was no evidence that Sessions' shoes had been traded. **R. pp. 437-38.**

Center then kept the shoes "until they [were] given over according to the Subpoena, so they are the Defendant's shoes, they were seized from him." While he noted that the defendants "have a lot of questions y'all can ask on cross-examination," he found that "there is no question they are the defendant's shoes, and they were seized from him." **R. p. 441, ll. 6-19.**

Stephens then argued that the shoes were irrelevant. However, the trial judge found that the shoes were relevant, that their "probative value outweighs any prejudice to the defendant" and that the matters raised by Stephens could be addressed on cross-examination. **R. p. 441, l. 20 - p. 442, l. 9.**[6] Despite this ruling, the trial judge offered to restrict the State from eliciting prejudicial matters if Sessions wanted him to do so. Defense counsel and Sessions were permitted to discuss this but the *in camera* hearing concluded without any further discussion of Sessions' desire in this regard. **R. pp. 443-44.**

3. Additional testimony before the judge.

Officer Bobby Jordan, who is employed by Myrtle Beach Police Department's Crime Scene Unit, then testified about his involvement in the case. On June 10, 2006, at which time he recovered a projectile, pursuant to a search warrant from underneath the shower stall of Monica's bathroom. **R. pp. 445-49.** Det. Vincent Dorio also testified about his involvement in the case. **R. pp. 451-55.**

Then, Investigator Carol Allen, who was the shift supervisor over the Myrtle Beach Police Department's Crime Scene Unit in June 2006, testified that she had processed the kitchen floor of the residence on June 9, 2006. At that time, she dusted the kitchen floor, using two different types

[6] Sessions argued that the prejudicial effect out-weighted the probative value of the shoes because to cross-examine Officer Safford about the matters raised *in camera*, he would have to elicit that he had been incarcerated in Connecticut and he would have to establish that he was "in prison." The trial judge disagreed and, again, found that "the probative value of the evidence out-weighs any prejudice to [Sessions]." So, he allowed the State to admit the tennis shoes. **R. p. 442, l. 11 - p. 443, l. 3.**

of powders, in an effort to develop possible prints. She was able to observe "two partial" shoe prints (*see* **State's Ex. 52**) and, using "pro lifts" (**State's Exs. 53-54**) she lifted each of the prints that she saw. **R. pp. 458-62.**

4. Capt. Safford's testimony.

Immediately before Capt. Safford's testimony, Sessions' counsel informed the trial judge that Sessions "wants to raise the shoe issue, so I won't be able to stipulate that the shoes come in." The trial judge instructed the State to establish "as complete a foundation as you can" because, although the trial judge anticipated ruling that they were admissible, he expressly stated that he would hear any further arguments that Sessions had against their admissibility. He also instructed the defense that if it had any objection when the State sought to admit the shoes, he would send the jury out and he would hear any additional objection. **R. pp. 474-75.**

Capt. Safford then testified in the presence of the jury. Her testimony before the jury was almost identical to her earlier, *in camera* testimony. When the State offered the tennis shoes into evidence as **State's Ex. 88**, both defendants objected. The trial judge permitted both defendants to cross-examine Capt. Safford before he ruled on their objections. **R. pp. 476-72.**[7]

5. Further *in camera* arguments and the trial judge's ruling.

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[7] Sessions' cross-examination established that Capt. Safford did not personally collect the tennis shoes and that she did not have personal knowledge about the their collection. The May 2007 memorandum addressing inmate footwear "was prompted to reduce contraband coming into the facility." Although she did not have any knowledge of inmates within the Detention Center selling shoes, she was aware that inmates traded their shoes. She was unable to determine whether the shoes collected from Sessions were the shoes that he had when he first arrived at the Detention Center. **R. pp. 482-84.** Stephens again elicited that shoes had been used in the jail as a form of currency when traded. Also, all of the Officers at the Detention Center have access to the property room. **R. pp. 484-85.**

The State, on re-direct, elicited that her duties include making sure that standard operating procedures are followed. Officers were instructed to bag the shoes, place the defendant's name on the bag and place the bag in the defendant's personal property bag in the evidence room. The State also elicited that the defendants do not have access to the property room. **R. pp. 485-86.** Finally, Sessions, again, established that Capt. Safford did not personally take the shoes from Sessions. **R. p. 486.**

Sessions then renewed his earlier objection *in camera*. Stephens joined in the objection and added that there was not a sufficient foundation to establish that the shoes were Sessions because the shoes were traded as a form of currency. **R. p. 487**. The trial judge found that an adequate foundation had been established because the evidence supported the inference that Sessions was in possession of the shoes and that the shoes were his. Thus, the threshold requirement for admitting the tennis shoes had been met. **R. p. 487, l. 19 - p. 488, l. 1**.

In his further findings, he again found that the shoes were non-fungible items, unlike blood, semen or other bodily fluids; that the chain of custody requirements for non-fungible items was not as strict as it is for fungible items; and that the State had "shown a proper chain of custody in this particular case." Likewise, he again found that the defendants' arguments raised issues that were proper for cross-examination but that they did not bar the admission of the tennis shoes. Additionally, he found that "the shoes themselves are certainly relevant to the issues at hand, any prejudice to the defendants is more than out-weighed by the probative value regarding this particular piece and type of evidence, and therefore I am going to allow the shoes into evidence." **R. p. 488, ll. 2-17.**[8]

6. Expert testimony regarding State's Ex. 88.

S.L.E.D. Agent Thomas Darnell is assigned to the Forensic Service Laboratory, where he is the Supervisor of the Latent-Print Department. He was qualified, without objection, as an expert in the area of footwear impressions. **R. pp. 494-96.** He had received the gel lifters (**State's Exs. 57-62**)

[8] However, he stressed that his ruling did not prevent the defendants from fully exploring all issues on cross-examination. He then indicated that he would tell the jury that he had allowed**State's Ex. 88** into evidence, and that Sessions would be permitted to continue with this cross-examination.**R. p. 488, l. 18 - p. 489, l. 7.** This procedure was followed when the jury was brought back into the courtroom.

taken from the bathroom and the taped lifts (**State's Exs. 53-54**) that were taken from the kitchen. He was also given five pairs of shoes and asked to compare the shoes to the questioned impressions.[9] He concluded that the heal of Sessions' left shoe was consistent with the gel lift from Monica's bathroom floor that was introduced as **State's Ex. 61**. "In other words, it corresponded in physical design, size and shape with the left shoe of **State's 88**." He also compared the other shoes that had been submitted with **State's Ex. 61**, but they were not consistent with the unknown impression. **R. pp. 496-504; 508-09.**[10]

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). 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. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); *State v. Martin*, 347 S.C. 522, 533, 556

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[9] In addition to **State's Ex. 88**, he received four pairs of shoes belonging to Antwann Higgins,**State's Ex. 17** and **State's Exs. 85-87**, for comparison. **R. pp. 331-32; 422; 503.**

[10] Another gel lift from the bathroom was too "partial to render any sort of conclusion." One of the taped lifts from the kitchen corresponded to four pairs of the shoes that had been submitted - including**State's Ex. 88** - because all four pairs "had the same outsole design." This lift "was extremely partial," which meant that he could only say that "it corresponded in physical design and I couldn't go any further, such as the size or shape or anything such as that, just because of the amount of impression was so limited." **R. pp. 504-09; 513.**

S.E.2d 706, 712 (Ct. App. 2001).

Contrary to Sessions' argument, the State was not required to establish a strict chain of custody for **State's Ex. 88** because, as the Court of Appeals correctly found, "[t]here was no dispute that this evidence was non-fungible and that Sessions had the shoes in his possession when all inmates' shoes were taken by the Detention Center staff." *Sessions*, at 2, **App. 2**, This Court has explained that

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

State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741-742 (2005). The Court of Appeals reached the same result in *State v. Glenn*, 328 S.C. 300, 305-06, 492 S.E.2d 393, 395 (Ct. App. 1997). *See also State v. Rogers*, 361 S.C. 178, 186-187, 603 S.E.2d 910, 914-15 (Ct.App. 2004); John W. Strong, 2 *McCormick on Evidence* § 212 at 527 (4th ed. 1992)).

Here, the State established a sufficient foundation to permit introduction of Sessions' tennis shoes through Capt. Safford's testimony, despite his contention that "the State was unable to account for these tennis shoes until after they were removed from personal-property room in December 2008, one month after the case against Sessions and Stephens ended in a mistrial."[11] Thus, the State

[11] As discussed, Capt. Safford testified that Sessions would have had his shoes when he was received on November 27, 2006. His shoes would have been taken from him after the May 11, 2007 memorandum made inmates' shoes contraband. Consistent with Detention Center policy, they then would have been placed into a clear plastic bag and placed into his personal property bag. The shoes remained there until Capt. Safford retrieved them at the request of the Solicitor's Office. **R. pp. 434-39.** Further, each inmate's personal property bag is given a number that is unique

satisfied the requirements of *Freiburger* and *Glenn*. Also, Agent Darnell's expert testimony makes **State's Ex. 88** probative of Sessions' guilt because the shoe print was left in Monica's fecal matter that, inferably, was excreted at or near the time of her death.[12] Therefore, there was no error.

Finally, and to the extent that the Court finds that the trial judge erroneously admitted **State's Ex. 88**, Respondent submits that the ruling 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); *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 **State's Ex. 88** was both relevant and probative of Sessions' 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, since this was when Jamilla and Monica's neighbor, Teresa Greene, heard several "pops" that sounded like fire crackers. **R. pp. 298-301.**[13]

In addition to SLED Agent Prodan's testimony, discussed in **Argument II**, *infra*, the State's

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to the inmate, and the property room is locked. Although Detention Center officers can access the property room, the inmates cannot. **R. pp. 434-39**. Also, there was no evidence presented that Sessions had traded his shoes that he was wearing when he was received at the Detention Center from the transportation company or that he had acquired **State's Ex. 88** through trade, or otherwise, after he arrived at the Detention Center. As a result, an extremely strong and very reasonable inference from her testimony is that**State's Ex. 88** are Sessions' tennis shoes.

[12] Sessions has abandoned his Rule 403, SCRE, argument on appeal, by not raising it on appeal,*see State v. Sullivan*, 277 S.C. 35, 42, 282 S.E.2d 838, 842 (1981) (an issue not argued in the appellant's brief is deemed abandoned).

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

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 8th. 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 10th, 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 8th.

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 10th.

- While Turner was there, Stephens came to the house between 9:30 an 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. pm. on Thurday June 9th, 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 9th, 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 10th. 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 either the evidence connecting Sessions to the shoe print or Agent Prodan's testimony. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584. Moreover, Sessions presented testimony from his own expert in footwear identification, Donald Girndt. Girndt did not dispute Agent Darnell's findings, except as to the partial shoe print in the bathroom that Agent Darnell had opined was not sufficient for

comparison purposes. Girndt opined that this print was inconsistent with **State's Ex. 88. R. pp. 666-73.** Particularly in light of Girndt's testimony, 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. Respondent submits that Sessions' challenge to the State's expert testimony on crime scene analysis and victimology is procedurally barred because his relevancy objection is too general to preserve any issue for appellate review. Alternatively, the Court of Appeals properly concluded that any error in the introduction of this evidence was harmless beyond a reasonable doubt.

Relying upon the Court of Appeals' decision 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) (*Tapp II*), Sessions 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 Sessions' challenge to Agent Prodan's testimony is procedurally barred because his relevancy objection is too general to preserve any issue for appellate review. Alternatively, Respondent submits that the Court of Appeals properly found that any error in the admission of this evidence 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.**[14] 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.**[15]

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.*

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[14] 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 f]irst 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.**

[15] 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.**

Once the trial judge had ascertained that Agent Prodan's notes had been provided to the defense,[16] 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 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

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[16] 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.**

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.[17] 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

[17] 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."

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.[18] 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,[19] 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. **R. pp. 592-93; 600-01**.[20]

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

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[18] 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**.

[19] For example, the crime scene reports did not reflect that the victims' bodies and had been washed or that any effort was made to wipe for prints. **R. p. 592**.

[20] 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**.

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. 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. Sessions' relevancy objection does not preserve issue for appellate review.

As shown, Sessions' only objections were that the State had committed a discovery violation and that the testimony was not relevant. **R. pp. 572-73; 579; 582.** On appeal, he has not challenged the trial judge's ruling that there was no *Brady* violation. Therefore, that argument has been abandoned. *Sullivan*, 277 S.C. at 42, 282 S.E.2d at 842. In arguing that Prodan's proffered testimony was not relevant at trial, Sessions merely stated, "Now the objection is relevance." **R. p. 582, l. 18.** He did not argue either how or why the proffered testimony was supposedly irrelevant. He also did not advance anything close to the argument that he now raises on appeal.

On appeal, he relies upon the reversed decision of the Court of Appeals in *Tapp I*, and asserts that the testimony was also inadmissible under this Court's decision in *Tapp II*. In *Tapp II*, this Court reversed the decision of the Court of Appeals in *Tapp I*. The Court in *Tapp I* 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.[21] This Court granted certiorari and reversed in *Tapp II*. See 398 S.C.

[21] 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

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 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.

This 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.[22] 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

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trier of fact." *Tapp I*, 387 S.C. at 164-69, 691 S.E.2d at 167-70.

[22] The argument in the Petition is somewhat confusing but, to the extent the current argument is that Prodan was not properly qualified as an expert, 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).

contribute to the guilty verdict." *Id* at 389-90, 728 S.E.2d at 475.

Here, 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 (which would be without merit as *Tapp II* makes clear) or, more importantly, to the trial judge's failure to fully vet the reliability of Prodan's testimony, which this Court based its decision on in *Tapp II*.[23] His only objection was the unspecified lack of relevancy.[24] 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 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 for a new trial, after the verdict in the sentencing phase,

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[23] This is hardly surprising, in light of the fact that Sessions had his own expert in the area of crime scene analysis, Mr. Girndt. *See* **R. p. 665.**

[24] He suggests that he objected to Prodan's testimony as speculative. However, that was part of *Stephens'* objection and he cannot avail himself of that objection because he did not join in it. *E.g.*, *State v. Carriker*, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (holding that the appellant's assertion of error was not preserved because "appellant's counsel made no objection ... at trial. While appellant's co-defendant did object, the appellant may not utilize the objection of another defendant to gain review"); *State v. Brannon*, 347 S.C. 85, 89, 552 S.E.2d 773, 775 (Ct.App.2001) (trial judge's failure to suppress evidence not preserved where appellant did not join in co-defendant's motion to suppress); *State v. Nichols*, 325 S.C. 111, 123, 481 S.E.2d 118, 124 (1997) ("Finally, the remaining issues raised by appellant are not preserved for review since appellant failed to object during trial or join in his co-defendant's objections.").

based on prejudice arising from various items contained in the wallet).[25] 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, 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 record supports the qualification of Prodan as an expert and 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 Sessions. *Id.* at 390, 728 S.E.2d at 475. Here, Prodan's testimony concerned only the victims and the crime scene. He never identified Sessions, 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*, the jury made numerous factual determinations in arriving at its verdict,

[25] *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").

> including (1) whether shoe prints found at the crime scene matched the shoes taken from Sessions's property bag, (2) whether the shoes taken from Sessions's property bag were the same shoes he had on his person when he was initially taken into custody, (3) the reliability of a witness who allegedly heard Sessions and his co-defendant discussing how they would rob and possibly kill one of the victims, (4) the same witness's claims that the defendants requested his assistance in the crime, (5) the reliability of the testimony of Sessions's own expert in the field of footwear identification. Given these and other factual questions, we hold that any error in the trial judge's failure to properly vet Prodan's testimony for its reliability was harmless, and (6) the credibility of testimony that certain individuals knew about the deaths of the victims before the police found their bodies.

See Sessions, at 4-5, **App. 4-5**.

Additionally, Respondent would point to the other, overwhelming evidence of guilt set forth in **Argument I**, *supra*. 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, this Court should deny certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

JIMMY A. RICHARDSON, II

Solicitor, Fifteenth Judicial Circuit

P.O. Drawer 1276
Conway, SC 29528-1276
(843) 915-5460

By: _____
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

July 18, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2013-000805

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

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 18th day of July, 2013.

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

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2013-000805

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

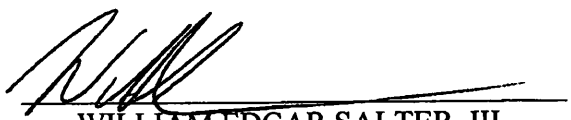
PETITIONER.

CERTIFICATE OF SERVICE

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

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

This 18th day of July, 2013.



WILLIAM EDGAR SALTER, III

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

The Supreme Court of South Carolina

The State, Respondent,

v.

Jimmy Lee Sessions, Petitioner.

Appellate Case No. 2013-000805
Lower Court Case Nos. 2007-GS-26-02961; 2007-GS-26-02698; 2007-GS-26-02963; 2007-GS-26-02962

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Sessions*, 2013-UP-063 (S.C. Ct. App. filed Jan. 30, 2013). The petition is denied.

C.J.

FOR THE COURT

Columbia, South Carolina

July 11, 2014

cc:
The Honorable Jenny Abbott Kitchings
The Honorable Melanie Huggins-Ward
LaNelle Cantey DuRant, Esquire
W. Edgar Salter, III, Esquire

1172

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 22, 2014

The Honorable Melanie Huggins-Ward
PO Box 677
Conway SC 29528-0677

REMITTITUR

Re: The State v. Sessions, Jimmy Lee
Lower Court Case No. 2007GS2602961, 2007GS2602698, 2007GS2602963, 2007GS2602962
Appellate Case No. 2009-116987

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,

V. Claire Allen

DEPUTY CLERK

Enclosure

cc: W. Edgar Salter, III, Esquire
LaNelle Cantey DuRant, Esquire

FORM 5 2014 CP26 1173

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF Horry)

Jimmy Lee Sessions)
Full name and prison number (if any) of Applicant.)

v.) APPLICATION FOR

State of South Carolina) POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay 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 _____

2. Name and location of Court which imposed sentence _____

3. Name(s) of co-defendant(s) (if any) Christopher M. Stephens

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

   (a) Murder

   (b) _____

   (c) 07-GS-26-2961 (3974)(2678)(2972)(2975)

5. The date upon which sentence was imposed and the terms of the sentence:

   (a) _____

   (b) _____

2014 DEC 16 AM 10:18
ELAINE [illegible]
CLERK OF COURT

Revised 3/2003

1174

(c) _____

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?

NO

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

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

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

(c) the date of each such result:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) first opportunity to raise these issues

(b) _____

(c) _____

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

(a) See Attach sheet

(b) _____

(c) _____

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

(a) See Attach sheet

(b) _____

(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? _____

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

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. _____

ii. _____

iii. _____

iv. _____

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

i. _____

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. No

ii. _____

iii. _____

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

i. _____

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) No

(b) _____

(c) _____

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

(a) your arraignment and plea? _____

(b) your trial, if any? _____

(c) your sentencing? _____

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

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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. _____

ii. _____

iii. _____

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

i. Johnny Gardner represented me at trial

ii. _____

iii. _____

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

New trial

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

No

1178

2014 CP 26 8318

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

I, JS, 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.

M. Jimmy Sessions
Applicant

SWORN or affirmed to and subscribed before me this 3rd day of December, 2014.

Ludrean Bryant
Notary Public

My Commission Expires: May 26, 2020

2014 DEC 16 AM 10:19
ELAINE L. WILLIAMS-WARD
CLERK OF COURT
COUNTY

Revised 3/2003

20 14 CP26 1179 318

STATE OF SOUTH CAROLINA)
)
County of Horry)

VERIFICATION

I, JLS, 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.

W. Jimmy S. Stevens

SWORN to and subscribed before me this 3rd day of December, 2014.

Lindsay Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

2014 DEC 16 AM 10:19
CLERK OF COURT
HORRY COUNTY

1180

Attachment

The Applicant set forth this cause of action pursuant to the Jurisdiction that are set forth in Chapter 17-27-20 (1)(6) Collateral Attack upon his conviction of any grounds of alleged Error heretofore Available under this Uniform Post Conviction Act that are being Submitted or Amended.

The Applicant asserts at this time (1) ineffective Assistance of Counsel during Applicant Criminal trial or Plea Applicant also assert that due to his lack of understanding of the Law Applicant request that Counsel be appointed Pursuant to 71.1 (d) SCRCiv.P. S.C. Code of Law 17-27-90.

Applicant asserts that there are further grounds to be raised but due to the lack of records and the Assistance of Counsel it would be Chronologically impassible for the Applicant to Carry Such burden to Show his entitlement for relief be a Preponderance of the Evidence and for the appointment of Counsel to insure that all available ground for relief are included in the Application.

Attachment

Therefore, Applicant request that this Court Appoint Counsel in the above mentioned Application, Applicant moves this Honorable Court to grant Leave to Amend this Application in this Cause of Action due to the lack of Counsel and Applicant is a Lay person at Law.

Applicant seeks this Court approval of this Application so that Applicant right to a PCR wont be deem abandon due to the fact Applicant has only one year to file this Application from the date of a final Judgment or from the remittitur to the Lower Courts which ever comes first.

Respectfully Submitted,

December ___, 2014

S/ Jimmy L. Sessions

1182

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Jimmy Lee Sessions, #215137, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2014-CP-26-8318 **RETURN**

Respondent, making its Return to the Application for Post-Conviction Relief filed December 16, 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 two counts of Murder (2007-GS-26-2962, 2007-GS-26-2963) and one count of Armed Robbery (2007-GS-26-2961). In July 2008, the Horry County Grand Jury indicted Applicant for Burglary, first degree (2008-GS-26-2698). Johnny Gardner, Esquire, represented Applicant on all charges. On February 2-6, 2009, Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty as indicted. Judge John sentenced Applicant to life imprisonment for Murder (2007-GS-26-2962) and another term of life imprisonment for Murder (2007-GS-26-2963) to run concurrently with the former Murder charge. Additionally, Judge John sentenced Applicant to a term of thirty (30) years imprisonment for Armed Robbery (2007-GS-26-2961) and a term of thirty (30) years imprisonment for Burglary, first degree

(2008-GS-26-2698) with both charges to run concurrently with the Murder charge (2007-GS-26-2962).

Applicant filed a timely notice of appeal. Joseph L. Savitz III, Esquire, and LaNelle C. DuRant, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 30, 2013. State v. Sessions, Op. No. 2013-UP-063 (S.C. Ct. App. filed January 30, 2013). By Order dated July 11, 2014, the South Carolina Supreme Court denied the Petition for a Writ of Certiorari to review the Court of Appeals' Opinion. The remittitur was returned to the circuit court on July 22, 2014.

II.

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

1. "Ineffective Assistance of 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, SCRCP.

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), SCRCP, to require Applicant to provide a more

definite statement of his allegation of ineffective assistance of counsel. 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), SCRCP, 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 fails to set forth any specific facts to explain his allegations. 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 counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their 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 counsel as a ground for relief, the applicant must prove "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 that 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 that 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 further 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. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

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

June 22, 2015

1188

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	2014-CP-26-8318
JIMMY LEE SESSIONS, #215137	)	
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 SouthCarolina 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:

Daniel A. Selwa, II, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

DATED this 22ND day of June, 2015.

Norma Bigbee, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF Horry	)	FOR THE 15th JUDICIAL CIRCUIT
	)	
Jimmy Lee Sessions	)	
Plaintiff	)	2014-CP-26-8318
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 filed to call witnesses that would have provided either alibi or other exculpating 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

1191

STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD
COUNTY OF HORRY)

PCR HEARING

B E F O R E: The Honorable Brooks P. Goldsmith
November 15, 2016

JIMMY LEE SESSIONS, CASE NO.: 2014-CP-26-8318
Petitioner/Applicant,
vs.
STATE OF SOUTH CAROLINA,
Respondent.

CHRISTOPHER STEPHENS, CASE NO.: 2014-CP-26-7977
Petitioner/Applicant,
vs.
STATE OF SOUTH CAROLINA,
Respondent.

APPEARANCES:

James Falk, Esq.
For the Petitioners.

Jessica Kinard, Esq.
For the Respondent.

Court Reporter:
Natalie Dahl, RPR

1192

I-N-D-E-X

WITNESSES

E-X-H-I-B-I-T-S

EXHIBITS MARKED & ADMITTED

(NO EXHIBITS MARKED)

P-R-O-C-E-E-D-I-N-G-S

MS. KINARD: We'll do together Christopher Stephens and Jimmy Lee Session versus South Carolina. Mr. Stephens is 2014-CP-26-7977. We're before the Court for an application for post-conviction relief filed September 4, 2014. Mr. Stephens is presently confined in the Department of Corrections of South Carolina pursuant to orders of commitment by the Horry County Clerk of Court. In July of 2007, the Horry County Grand Jury indicted him for three counts of accessory before the fact to two murders and an armed robbery. He was represented by Bobby Frederick and Laura Hiller. On February 2, 2009, he proceeded to trial along with Mr. Sessions before the Honorable Steven H. John, and a jury. On February 6, 2009, he was found guilty as indicted and he was sentenced to concurrent terms of 40 years imprisonment for each count of accessory before the fact of murder, and 30 years imprisonment for accessory before the fact of armed robbery. He did file a Notice of Appeal and was represented by Mr. Bob Dudek. The Court of Appeals affirmed his conviction on January 3, 2013, and the supreme court denied his petition for writ of certicrari on November 7, 2014, with the remittitur being returned on November 10, 2014. He also filed an

1194

amended application by and through Mr. Falk on November 7, 2016.

Turning to Mr. Sessions, his case number is 2014-CP-26-8318. His application for post-conviction relief was filed December 16, 2014. He also is confined to the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Also in July of 2007 he was indicted by the Horry County Grand Jury for two counts of murder and one count of armed robbery. In July 2008, he was indicted for burglary first degree and was represented by Johnny Gardner on all charges. He proceeded to trial along with Mr. Stephens on February 2 through the 6th, 2009 -- Your Honor, Mr. Gardner ran downstairs for a juvenile hearing, and they just started his hearing, so we might have to push this for a few minutes, if that is amenable, or we can start other testimony. What do you think, Jim?

THE COURT: Do you need that witness to begin with? I don't know.

MR. FALK: I'm not trying to delay things, but I think we need him.

MS. KINARD: I would like him to hear the testimony.

THE COURT: We have some guilty pleas we can do

in the meantime, that we can go ahead and get through. Stand this down for a few minutes.

(A recess was taken.)

MS. KINARD: We're back with Stephens and Sessions versus State, codefendants. I believe we read the entire history at this point. Both applicants are here and represented by Jim Falk.

MR. FALK: There is one matter, just so the record reflects, in an earlier hearing both of these clients already went on the record and said they would waive conflict of interest with me representing both of them. I think that is still their intention, and I've been in communication with them, and I just want you to know that that was addressed before and they did both waive.

THE COURT: All right.

MS. KINARD: One of the allegations raised by Mr. Falk is ineffective of appellant counsel. Because Mr. Dudek is in Columbia and under subpoena around the state this week, and Your Honor has been so gracious to allow telephone testimony, if we could go off the record to get him on, and then go back on.

THE COURT: Sure.

(A recess was taken.)

DIRECT-EXAMINATION

BY MR. FALK:

Q One of the issues that I've raised --

THE COURT: Do we need to put the witness under oath?

MS. KINARD: That's probably a good idea.

THE COURT: State your name for the record.

THE WITNESS: Robert M. Dudek, D-U-D-E-K.

(ROBERT DUDEK, having been duly sworn, testified as follows:) you may proceed

DIRECT-EXAMINATION

BY MR. FALK:

Q Were you appointment to represent Mr. Stephens or Mr. Sessions on the appeal of his -- of their trial here in Horry County?

A Right. I represented Mr. Stephens, and former case attorney, and later senior appellant defender, Joseph Savage represented the codefendant.

Q As part of reviewing -- in order to prepare for your appellant arguments, did you obviously review the transcript in this case?

A Yes. My habit, Mr. Falk, is to read the transcript, take notes as I go along on witness testimony, and then either at the top of the legal pad or on another sheet, I note any objections or exceptions.

Q So you note the objections or the exceptions that trial counsel made?

A That's correct.

Q Okay. Do you recall an objection to a jury charge in this case?

A Yes, I do. It has been brought to my attention again by both you and the attorney general.

Q Let me just make it for the record that what I'm referring to here appears on Page 1019 on the record of appeal, which was also 1010 of the trial transcript. Bob, I'll read what my concern was.

A Okay.

Q The Court charged 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 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 that the other person as the guilty party.

A All right. I do have that before me, Mr. Falk.

Q Okay. Do you think that accurately reflects the law as to what the South Carolina law is on the admissibility of evidence of third-party defense or third-party guilt?

A I think it is an accurate statement on the admissibility of third-party evidence. I, you know, do not -- there again, I can be in error in, whatever, my 26 years of doing this that I've ever seen it as a jury charge. That may be an extreme coincidence, but I think it is accurate as to admissibility. I'm not sure that I've seen it as a jury charge.

Q Are you familiar with the -- I've lost my glasses, excuse me.

A Hello?

Q Sorry, I lost my glasses. There is a case, I don't know if you are familiar with, Holmes versus South Carolina, United States Supreme Court case.

A Yes, I am.

Q And, you know, I've reviewed that case, and it looks to me that that is sort of the law that accurately reflects the current law as far as what the judge should do as far as considering the admissibility of the testimony.

A That is my understanding. Holmes abrogated State v. Donald Gaye, which was an old case of mine, but it said that, as I understand it, Mr. Falk, it stated that State v. Gregory was still good law in South Carolina, and I think that is a fair and accurate depiction of what Gregory would say as to the admissibility.

Q Okay. Now, if you would look at Page 1028 of the record on appeal, which is 1019 of the actual trial transcript. You'll see --

A I have it before me.

Q Okay. So would you agree that Mr. Frederick objected to the inclusion of that charge?

A He did. 1019, Lines 8 through 12. He said, The charge is given I feel as a rule of admissibility. Once it is admissible, the jury is free to consider it. And the judge noted his objection was it should not have been charged at all.

So as far as preserved, you know, I would say that it was preserved on, you know, what arguments that, you know, that there may be some leeway, but I will wait for follow-up questions.

Q Here is the problem. What I'm trying to find, it seems like to me that when we look at the charge we do burden shifting, as far as I think the jury could be confused by what the defendant's burden of proof is, if there is a discussion of third-party guilt, because there certainly is a reference in there that -- you know, evidence offered by an accused as to the commission of a crime must be limited to facts that are inconsistent with the accused's guilt?

A Right, I agree.

Q So it appears to be burden shifting as to whose job it is to prove the defendant guilty; is that correct?

A I mean, I think -- I think it is a confusing jury instruction, and I think, you know, Bobby Frederick, as far as the argument and objection at the time, was that it should not have been given. You know, in looking back at it over the past couple of days, when it was brought to my attention, I tend to find that, you know -- tend to agree very humbly that I don't think that instruction should have been given very respectively to the trial judge.

Q It also appears that based on this instruction you could have confusion of the jury in that it almost is asking the jury to make a determination as to the relevancy of the evidence, because the trial judge is supposed to determine what evidence a third-party guilt is relevant and what is too attenuated in order to be admissible. But it seems to me that where the statement says, There must be such connection with the crime such facts and circumstances which tend to point out others, it is almost asking the jury to weigh what evidence they should be considering?

A Right. I would agree it is confusing, and not to repeat myself, I don't think I ever have seen that

before. Now, whether it is in the judge's charge book, I simply don't know that fact. But all I can say is I honestly do not remember seeing that jury charge on the admissibility of evidence, maybe to give kind of a bad example, I guess it would be like, you know, talking about Rule 401 on when evidence is admissible. I thought Bobby Frederick was right in as much as Bobby said that, you know, once a judge determines that it comes in, that's the rule of admissibility and that it shouldn't be a part of the jury charge.

Q I guess here is the situation. It is my concern, and my client's concern, that the jury charge possibly confused the jury. This was a case where there was clearly discussions about third-party guilt, that was their focus. From my point of view, to be blunt, either appellant defense should have picked up the issue, or they didn't because they thought it wasn't well preserved?

A Well, the best I can do with that, Mr. Falk, I mean, I think that on your thoughts on its burden shifting, I do not respectively think that the court of appeals would find a burden shifting objection to be preserved from Page 1019, Lines 4 to 13, which is where this happens. Now, just an objection on it should not have been charged at all, I think that certainly is

preserved. Now, I do not -- on this day, frankly, recall why I didn't make that argument. I will say this. I thought I was going to win on the State v. Tapp issue, which was the victimology, because I think that is junk science. The supreme court later agreed after I briefed my brief on Mr. Stephens' case based on Tapp, State versus Tapp out of Charleston. Then the supreme court later in Tapp found that although it was erred to admit victimology testimony, very similar to what happened in this case, the Court found that it was harmless beyond a reasonable doubt. Ed Satler, Mr. Salter, Senior Assistant Attorney General, who argued this case in court of appeals mailed a letter to the court of appeals shortly before our oral argument in this particular case, Mr. Stephens' case, pointing out that Tapp had later been found to be harmless, and Mr. Salters stayed with beating on that argument through -- to the South Carolina Supreme Court on that particular issue.

Again, whether I thought the two issues I had were -- I do remember thinking that State versus Tapp was our ride home here to a new trial, and in the final analysis, that obviously turned out to be erroneous when the court found it harmless.

Q Is it your testimony that the decision not to

include this issue on appeal was part of your overall trial strategy for the appeal?

A You know, that is a bomb of a question, and I really don't, Mr. Falk, you know, remember the exact reason I didn't raise it. Again, it is -- I don't know. I just thought that the issues that I did raise, the hearsay regarding the -- Mr. Pearl, I believe it was, reflecting -- or saying what the decedent allegedly said to Mr. Stephens about you owe me money for drugs, and kind of that all going into the State's theory that this was a drug-related murder. Again, I do specifically remember thinking State v. Tapp was the winning issue for us, particularly because at the time of the initial brief in this case, when I wrote it, you know, State v. Tapp came out from the court of appeals and said, you know, this guy that testified in this case, that that evidence -- that victimology evidence should never have been admitted. And, like I say, that was a real hot issue at the time that I thought we would win on.

Q Okay.

A But I cannot -- part of that is the simply it should not have been charged objection, I would say would have been preserved. Maybe just -- maybe to push that, it should not have been given a little more that

it was confusing. In all candor, and respectively, I don't think that a burden-shifting objection -- I don't think that the court of appeals would have found that preserved.

Q Okay. But do you believe they may have found it preserved, that by his asking that it not be included at all, that an objection that it was confusing, that that would have been preserved?

A I think that it should not have been given with a little leeway to me as the appellant attorney to say that it should not have been given because it was a rule of admissibility and not a jury charge would have been preserved. And maybe pushing that a little extra step further of the reason you don't give -- you know, the purpose of jury charges are to enlighten the jury to come to a correct verdict and not to be confused under State v. Leonard and other cases. I think I could have gotten away, you know, with that -- with that -- certainly with that being preserved, but at a minimum it just should not have been given because it was a rule of admissibility for the Court and not a consideration for the jury. I absolutely think that that would have been preserved.

MR. FALK: No further questions. Thank you.

MS. KINARD: Ms. Falk asked all the questions I

had, so unless there is something else you would like to add for the Court.

MR. DUDEK: No. Hopefully I answered your questions.

MS. KINARD: Thank you for your time. I appreciate your cooperation.

MR. DUDEK: Thank you.

THE COURT: Now, where are we?

MR. FALK: There is a witness that -- potential alibi witness -- who is present today. My presentation may be out of order, but then she could leave. She's been here since 9 o'clock, so I would like to call her.

THE COURT: Any objection?

MS. KINARD: No, Your Honor.

THE COURT: All right. Present that witness.

MR. FALK: The applicants call Libby Pierce to the stand.

(LIBBY PIERCE, having been duly sworn, testified as follows:)

DIRECT-EXAMINATION

BY MR. FALK:

Q State your name and spell it, please.

A Libby Pierce, L-I-B-B-Y, P-I-E-R-C-E.

Q Could you describe what relationship you have or

do you know Mr. Stephens or Mr. Sessions?

A Yes. They are very good friends of mine.

Q What is your relationship with Mr. Sessions?

A We was dating at one time.

Q You were dating at one time?

A Uh-huh.

Q And where do you -- in 2006, 2007, 2008, where were you living in that area?

A I moved to Virginia.

Q When were you living in South Carolina?

A I'm from South Carolina.

Q Do you recall ever finding out anything about the murder of Jamilla Hightower and Monica Wall?

A Yes. When I left to go to Virginia and called back down here to let my friends know I made it back to Virginia okay, that is when they told me that she got killed, her and her girlfriend.

Q So you weren't in South Carolina when you found out?

A No, I wasn't here. I was in Virginia.

Q You were in Virginia?

A Uh-huh.

Q Who was with you in Virginia?

A (Indicates.)

Q You are pointing to Mr. Sessions?

A Uh-huh.

THE COURT: You need to speak up.

Q (MR. FALK) So it is your testimony when you found out Jamilla Hightower and Monica Wall had been killed, you were with Jimmy Sessions in Virginia?

A Yes.

Q How long had you been up there? A week? A month?

A No, like three, four weeks.

Q All right. Did you ever have an opportunity to speak to Mr. Sessions' lawyer about this or to Mr. Stephens' lawyer?

A I talked to a private investigator that came and talked to me, or whatever. I told him that, you know, it is impossible for them to do that because Christopher was home and Jimmy was with me. So I don't understand. I told him if they needed me, to come here I would come, you know, and give my testimony, you know, and I came here.

Q Let me take these in smaller pieces. You talked to an investigator?

A Uh-huh.

Q Was it your understanding you were talking to an investigator for one of the lawyers, or was that someone from Horry County Sheriff's Office?

A I guess from one of the lawyers.
Q So that person didn't show you a badge or something?
A Huh-huh, no, sir.
Q And you had given them a statement?
A Yes, sir.
Q And do you remember about when that was? I mean, so -- all right. Let's go back. You were living in Virginia?
A Uh-huh.
Q Who were you visiting?
A My friend. I have friends and stuff that stay in Virginia.
Q When did you come back in Horry County?
A Was probably like.....
Q This happened sometime around the first of June, so first of the summer.
A I would say probably around like -- I think like August, September, something like that.
Q And after you came back here, you talked to an investigator?
A Yes, sir, because he was looking for me. He came to my mother's, and my mother called and said an investigator wants to talk to me, and I was like for what, and she was telling me about Jamilla situation,

and I said I don't know nothing about that. She said I know, but the man keep coming by to talk to you, so I asked for his number. She gave me the number, and I called and talked to him and said I'll be down within a week and two, and when I get in town, I'll call him. I did, and he met me at my mother's house and I gave my statement to him then.

Q He met you at your mother's house and you gave a statement then?

A Yes.

Q Do you recall what that statement was?

A Basically saying that it is impossible for Jimmy to have anything to do with this because I know for a fact Jimmy was with me in Virginia. I told him that. He said I wasn't in trouble, he just wanted my statement to use for trial, and I said if he needed me, I would come, but nobody never contacted me. So I came here one day myself.

Q What was going on in the courtroom that day that you came? Did you know a trial was going on?

A Yes, I did know. I came to give my statement then, because I said why didn't no one contact me yet. I asked the guard or whatever about the case, and he told me which courtroom it was, and I came in. I told him I was here for Christopher Stephens and Jimmy

Sessions, and he said we don't need you, you can go back home. I said I am here to give my testimony because they did not do it. It is impossible.

Q Do you remember who you talked to?

A I don't remember the guy's name. I think it was one of the solicitors or something, because the way he gave me the attitude.

Q Do you know Mr. Frederick?

A You look sort of like the guy. I don't know.

Q Do you know Mr. Gardner?

A No. No. No.

Q So was it one of those two you talked to?

A No.

Q But you do recall talking to an investigator?

A Yeah. I came in here and he was on this side of the table. Put two and two together, you know.

Q Okay. Could the investigator's name be Bill Bean?

A Something like that. That sounds about right.

Q Now, did you know Jamilla Hightower and Monica Wall?

A I know of them.

Q Did you kind of run in the same circles?

A No.

Q Well, why would it have been important that they

were shot or that they had been murdered?

A You know, at any day that is something that -- I mean I knew of them. That is when I called down here and let everybody know I was here safe and everyone was telling me what happened, and I said, wow, really. I didn't hear anything about it until I was in Virginia. It just stuck out to me. Like why would they say it was him, I know Christopher was at home for a fact, and he was with me.

Q But you knew Jamilla Hightower?

A I knew of her.

Q What did you know of her?

A She sold drugs, used to sell cocaine, marijuana.

MS. KINARD: Objection. That's not in the record?

A It is a fact.

THE COURT: Sustain the objection.

MR. FALK: No further questions.

MS. KINARD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. KINARD:

Q You said that Mr. Sessions was with you in Virginia?

A Yes.

Q And what did you know about Mr. Stephens?

A He was home with his kids.
Q How do you know that?
A Because his baby mama works at nights. I know that for the fact he had to be with the kids.
Q Were you friends with him at that time?
A Yes.
MS. KINARD: Thank you. No further questions.
THE COURT: Thank you. You may step down.
MR. FALK: Could the witness be excused?
MS. KINARD: No objection.
THE COURT: You may be excused.
MR. FALK: I'll call Chris Stephens to the stand.
(CHRISTOPHER STEPHENS, having been duly sworn, testified as follows:)
THE WITNESS: Christopher Maurice Stephens, S-T-E-P-H-E-N-S.

DIRECT-EXAMINATION

BY MR. FALK:
Q State your name?
A Christopher Maurice Stephens.
Q Last name?
A S-T-E-P-H-E-N-S.
Q And you and I had a conversation about this case?
A Yes, sir.
Q I filed an amended PCR on behalf of you and

Mr. Sessions. I would like to read over the allegations to make sure that these are -- we're on the same page.

First issue that I raised was the issue we discussed with appellant counsel and the jury charge on third-party guilt. Second issue that I discussed was I said 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, and that this was something that your lawyers knew about. They knew that they were there, and they had maybe confronted some of the witnesses or some of the jurors; is that correct?

A Right. I think Ms. Williams, she addressed Bobby about the situation. They had an altercation out in the hallway where Ms. Wall was making derogatory statements in front of the jurors before they were even polled, okay. So she mentioned that to Bobby and Bobby said something to the judge. The judge, in my opinion, just blew it off. That was one of the issues we were trying to bring forth.

Q Do you feel that the issue you are raising that your lawyer should have asked to voir dire the jurors to make sure they weren't persuaded by that?

A Right. You know, being a layman, not knowing

much of the law, I didn't know that we should have asked the judge to give a better or more clear defined ruling, but that didn't occur, so.

Q Because there was a lot of -- was there a lot of publicity? This wasn't your run-of-the-mill case?

A No. This case was -- it was everywhere, newspapers, television, you know. Everyone was talking about it. It wasn't something that -- it wasn't an ordinary case.

Q And, actually, on the day of trial, that was not the first time this case was in court, was it?

A No. It was our second trial.

Q What happened in the first trial?

A First trial was a hung injury. We actually had the same situation in the first trial, but, you know, Mr. Larry Hyman, Judge Hyman, excuse me, he corrected the issue the first time, you know.

Q How did he correct the issue?

A He addressed the court -- well, they didn't do it in front of the jury in the first trial, but did it in the courtroom, so he addressed it in court, and it didn't happen anymore.

Q What were they doing? Wearing the shirts with the victims?

A Shirts, buttons, things like that.

Q Can you describe the shirts?
A Well, you know, RIP shirts and, you know, buttons with, you know, the victims' pictures and stuff on it.
Q So you said there was a first trial?
A Right.
Q Did any of the -- Mr. Pearl testified at the first trial; did he not?
A Yes, sir.
Q And he testified at the second trial?
A Yes, sir.
Q Do you recall his testimony differing from one trial to the other?
A Yes, sir.
Q What is your recollection of it?
A Well, in the first trial he -- I guess he left out a few things that he forgot to say in the second trial, but in the first trial -- he didn't say as much as in the first trial as in the second trial, and it was very much different.
Q Do you recall any specifics or topics he left out the first time?
A I think in the first trial -- and I don't have it here, but the first trial he was saying -- I think I have it here.

(A brief pause in the proceedings.)

A I didn't bring my transcripts with me.

Q Did you have concerns about -- with how the case was investigated by Officer DeLorenzo?

A With regard to Officer DeLorenzo, he pretty much forced all the witnesses against us to say what he wanted them to say in order to fit his investigation. He went so far as to threatening one particular witness with either you take the witness stand or the defendant's stand.

MS. KINARD: Objection, hearsay.

A No, it is not hearsay.

MR. FALK: I think it is in part of the record. I think he is just referring to portions.

MS. KINARD: I'll defer to the transcript, if it is in there.

THE COURT: Sorry?

MS. KINARD: I'm defer to the transcript, if it is in there, but I wasn't aware of that.

MR. FALK: I think he's recollecting sections of the transcript, but the record is what it is.

THE COURT: Okay.

Q (MR. FALK) So in general terms, you thought that Mr. DeLorenzo was intimidating some of the witnesses or forcing them?

A I do.

Q Did you bring that to your lawyer's attention?

A I did.

Q Do you think they were aware of that fact?

A I think he was, and he was -- he mentioned it in trial about the investigator's misconduct as far as intimidating the witnesses to say whatever he wanted them to say.

Q Do you know Libby Pierce?

A Yeah, of course.

Q Did you tell your lawyer to contact her?

A I did. I told Bobby to contact her right when I first met him.

Q And that is Bobby Frederick?

A Right. Yes.

Q Did you give him her contact information?

A I didn't have it at the time. I told him that, you know, he could pretty much find her. I came from prison to the jailhouse, you know. I was doing a probation violation, and I never went home. I went straight from prison to the county jail, and when he came to meet me, I told him that maybe he should talk to her about the situation because, you know -- but I didn't have any contact information for anyone.

Q Could you describe her? Did you know how old she was, where she worked, where she lived?

A Yeah. I told him pretty much where she lived or where he could find her maybe.

Q Did you ask him to call her as a witness?

A I was under the impression that she was going to testify at our first trial; however, we didn't put up a defense in the first trial, so we didn't need her. So she was told to leave, okay. Now, in the second trial, I didn't know why she didn't come back, because we did put up a defense and using our own witnesses. I thought it was important, but, you know, obviously she didn't -- I didn't think that he thought she was important enough to use, so.

Q This amended PCR, you told me concerns you had about the solicitor bolstering the testimony of some of the witnesses; is that correct?

A Right.

Q I'm not asking you to get into specifics, but we covered all the claims.

A Right.

Q You had concerns about bolstering of the witnesses by the Solicitor?

A Right.

Q And you had concerns about the State's impermissible Golden Rule arguments in opening and closing?

A Yes.

Q And you had concerns that at some point in the closing argument the Solicitor told trial counsel that -- excuse me, that the Solicitor in that case told the jury, Look at their lawyers, they know their guys are guilty?

A Right.

Q And that was brought to the Court's attention, wasn't it?

A Right.

Q But you thought you should have moved for a mistrial?

A I thought we were going to go for a mistrial, obviously, because during the whole closing arguments he was playing on the passion of the jury, screaming at the top of his voice. He was making them gasp for air and he was being very, very dramatic with it. So he had a couple jurors crying and things like that. So when he made the mistake, I thought that, you know, we would start over, you know. We had the opportunity to do so, so I thought we would.

Q Is there any other issues you think we should have raised?

A I think that was Ground 7. You did ask me about the prosecutor and investigator misconduct, so I think

that would be all.

MR. FALK: No further questions.

THE COURT: Cross-examination.

MS. KINARD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. KINARD:

Q Good afternoon.

A Good afternoon.

Q Was Mr. Frederick appointed to your case?

A Yes.

Q Did you have a pretty good working relationship with him?

A I did.

Q Did you all thorough discuss all of the facts that the State had against you?

A I think -- well, I never received the discovery packet, so I didn't know what was there and not there. I understand there was some phone records that weren't -- that was never gone through, so I don't know exactly the extent of the evidence against me.

Q Did you review a lot of evidence with him in preparation for trial?

A A few strategy notes, but that's about it.

Q In terms of strategy, did you discuss the defenses he would be using on your behalf?

A As far as the second trial, no. First trial we had a clear understanding what we would be doing. The second trial, not so much.

Q Do you know why it was different?

A I don't know.

Q Did you all talk about the need to change anything from the first trial to the second trial?

A Other than we were going to put witnesses on the stand this time, no.

Q Did you have any trouble communicating with Mr. Frederick?

A No.

Q You felt that you met enough times and prepared for trial?

A I don't know how many times you are supposed to meet before you are ready for trial. This is a big case and I'm fighting for my life. I don't know. I don't think I could ever be prepared for that. I don't know how I could answer that.

Q That is a fair answer. Did you have any questions that he hadn't answered?

A That Bobby didn't answer?

Q Correct.

A As far as what?

Q Anything. Anything for preparing for trial.

A I mean, there was tons of questions, you know, that I had, but, you know, time didn't permit us to do a lot of things, so I guess, as you can see, we went to trial in November and then again in February, so we didn't have a whole lot of time to do a whole of stuff.

Q What witnesses did you provide Mr. Frederick?

A In the second trial, I don't recall -- I think he just picked and chose who he wanted to. The first trial I had was Nancy Gause and Libby, of course. I knew she was supposed to be here. I think that is about it that I knew about, that would testify on my behalf. Eddie Lee Washington. I guess he figured he would tell the truth.

Q Did you talk about -- sorry, strike that please.

MS. KINARD: I believe that is all I have. Thank you.

REDIRECT-EXAMINATION

BY MR. FALK:

Q During the trial, did you ask why he wouldn't call Libby Pierce to the stand?

A In the second trial I did. I asked, and he just said, you know -- I don't think -- I don't know why. I think I asked, but I can't remember an answer. I can just remember the first trial.

MR. FALK: No further questions.

THE COURT: Thank you. You may step down. Call your next witness.

MR. FALK: We call Jimmy Lee Sessions.

(JIMMY LEE SESSIONS, having been duly sworn, testified as follows:)

DIRECT EXAMINATION

BY MR. FALK

Q What is your name?

A Jimmy Lee Sessions, S-E-S-S-I-O-N-S.

Q Who represented you at your trial?

A Johnny Gardner.

Q What is your relationship with Libby Pierce?

A Me and her used to go together.

Q Did you ever tell Mr. Gardner to get ahold of Libby Pierce?

A Yes, sir.

Q Were you in custody at the time?

A Yes, sir.

Q Did you give her any contact information on how to reach her?

A I ain't have the contact number at that time, because at that time I was on the run for my trafficking drug charge, so I ain't have no information to get to her.

Q Did you have any information where you might find

her, where she works and her family?

A I know her family stays in Aynor, but that is about it.

Q Aynor?

A Yes, sir.

Q Did you give that information to your lawyer?

A Yes, sir.

Q Why did you want your lawyer to contact Ms. Pierce?

A Because, therefore, I know me and her were staying in Virginia at that time. I was trying to get someone to talk to her, but ain't happened.

Q So it is your testimony that on June 8 you were in Virginia with Ms. Pierce?

A Yes, sir.

Q Is that how you found out that Jamilla Hightower and Monica Wall had been killed?

A Yes, sir.

Q Did you ask your lawyer why he didn't call her to testify in the second trial?

A You know, during the second trial -- during the first trial, I didn't think she would come, but like I said, we didn't put up a defense. But the second trial they said they were going to use her, and I don't know why they didn't use her.

Q Was it your understanding that either Mr. Frederick or Mr. Gardner had spoken with her or had an investigator speak with her?

A Yes, sir.

Q Do you remember whether or not Mr. Pearl's testimcny changed from the first trial to the second trial?

A Yeah, in a way it changed. Certain things in the first, he didn't say in the second trial. He was saying something.....

Q Do you have any specifics?

A No, sir. I ain't got my paperwork with me, didn't bring it.

Q I mean, it is just that it was raining today or tomorrow, it was specifics about your identification or Mr. Stephens' identification?

A Yeah. In a way, when he was saying that -- I don't know where -- he was saying he came to a motel I was at and the records show that I ain't never been at this motel, so that is a conflict right there. He said I told him something in the hotel, and the records showed I ain't never been there.

Q Did he testify about the motel in both trials?

A Yeah, he talked about it. The owner of the records came in, and the owner came. The man said it

was a white family staying in this room. How can I tell you something in this room, and there was another family staying in the room, you know, so.

Q Rodney was the other fact witness against you?

A Who?

Q The second witness, who was that?

A Washington?

Q Yeah?

A Eddie Lee Washington.

Q Did his testimony change from one to the other?

A His testimony changed as far as -- well, he talked to the investigators about -- because once he came to -- you know, I guess he was scared. He got locked up and came to J. Reuben Long. Only thing I ever told him, Man, you go to court, just tell the truth. That is the only thing I say from the get-go, from the beginning. Anyone just tell the truth, man. That is all I ask.

Q Can you tell us -- what is your recollection of the courtroom as far as what the victims' family was wearing?

A You know, they had T-shirts with pictures and little buttons with the little pictures on them and everything.

Q And do you believe the jurors saw it?

A I know one time the juror was crying, and I told Mr. Gardner, Look at the jury, the jury is crying. How am I going to get a fair trial when they are crying by seeing certain things in the courtroom?

Q This was a juror that saw --

A Yeah. When some of the family was crying in the court, they ran out of the courtroom, and I told my lawyer, Johnny Gardner, Look, man, jury crying, how can I get a fair trial when you have the jury crying already?

Q This was at the second trial?

A Yes, sir.

Q Did you ask your lawyer to ask the judge to intervene, either ask for some kind of instruction to the jury or orders for the jury or for a mistrial?

A I know when Mr. Rich said when he made a statement at the end, look, even their lawyers know they are guilty. Both lawyers stood up and objected, and I understand the judge asked about the mistrial, and I told my lawyer right there, he asked me what I think about it, and I said a mistrial. I agree with a mistrial instead of going with it.

Q Did you have concerns with the way that Officer DeLorenzo was investigating the case?

A Yes, sir.

Q Can you say generally what the concerns were?

A My concerns was hearing people telling me, yo, the investigator telling me if we don't do this -- you can be a witness or you can be a defendant. I was like I don't understand why people telling me -- the investigator coming and visiting them in jail and telling them if you don't say this about Sessions, you are going to be on the defense side, you are going to sit where they are sitting at. So there was a big concern, because it was like -- I don't understand. Like I told everybody, you know, I was ready to do anything with the prosecutor, because they was telling me about taking a polygraph, and I said I would take one, but they refused to give me that, but everyone else is taking one and they are failing theirs and you still use the same people against me.

Q As far as you having information that Officer DeLorenzo was putting words in the witnesses' -- intimidating them, did you make your lawyers aware of that fact?

A Yes, sir.

Q Did you ask them to either get orders from the judge or --

A My lawyer went to visit, I guess, with the investigator, or someone. He went to see Eddie Lee

Washington in the county jail, so I didn't know what he told him or whatever, but he did go see him.

Q Did you have concerns about the closing arguments?

A I definitely had concerns about that. Any time a prosecutor can tell the jury, who are supposed to be peers and look through everything, you can tell them, look, even their lawyers know they are guilty, you know, I knew that was wrong. I knew that was a big impact in the closing arguments.

Q Did you have concerns that the prosecutor was bolstering the witnesses?

A Yes, sir.

Q What does "bolstering" mean?

A Meaning me sitting here now and you telling me something, but at the same time you are coercing me with that.

MR. FALK: No further questions for this witnesses.

CROSS-EXAMINATION

BY MS. KINARD:

Q Was Mr. Gardner appointed to your case?

A At first James Gilmore (sic) was appointed, but then, you know, there was a conflict between me and him, and then they appointed me Johnny Gardner.

Q Did you get along with Mr. Gardner?
A Yes, ma'am.
Q Did he go over the discovery with you?
A Somewhat. Like I said, I had James Gilmore, and when I did get him, I saw him a few times.
Q So you met with Mr. Gardner several occasions?
A Yes, ma'am.
Q And did you discuss your understanding of what happened at the incident with Mr. Gardner?
A Yeah, I discussed it with him.
Q Your version of the facts?
A Yes, ma'am.
Q And you thought he understood that and understood your case?
A I thought he did.
Q Did you discuss a possible defense with him?
A Not really. Because at that time, to me, I thought Bobby was talking to him about what they were doing with the case.
Q You thought the two attorneys were working together?
A Yes, ma'am.
Q Did you feeld you understood everything you discussed with Mr. Gardner?
A No, I don't know. I don't know too much about

the law, so I don't know. I'll tell you straight up, no.

Q Did you ask him a lot of questions?

A Yeah, I asked him some question.

Q Did he answer your questions?

A To the best of his knowledge, I think he did.

Q The first trial and second trial, let me clarify that, did you know of any difference in strategy between the first trial and the second trial?

A The first trial, we didn't put up no strategy. Second one, that is the one we put up the strategy in.

Q Meaning you presented witnesses on your behalf?

A We did, but not who I wanted.

Q Who did you want?

A Libby Pierce, who I was with at that time and in Virginia.

Q You testified that you gave Mr. Gardner her information?

A Yeah, the information I know.

Q Who else's information did you give to him?

A Which I gave him, Eddie Lee Washington. I gave him some information about James Pearl was staying at. He was saying he was staying in Dunbar, I ain't never came to his house at no Dunbar. To me, he never stay at no Dunbar when I met him.

Q Do you know -- did Mr. Gardner or anyone on his behalf talked to his witnesses?

A I don't know if Mr. Gardner did, but I know whoever the investigator was from Bobby talked to some of them.

MS. KINARD: Nothing further.

MR. FALK: No redirect.

MR. FALK: We call Bobby Frederick to the stand.

(BOBBY FREDERICK, having been duly sworn, testified as follows:)

DIRECT-EXAMINATION

BY MR. FALK:

Q State your name for the record?

A Bobby Frederick, F-R-E-D-E-R-I-C-K.

Q And can you tell me how you got involved in this case?

A I was appointed to the case.

Q Are you a 608 appointment?

A Yes.

Q Sorry, are you in the -- are you a public defender?

A I was not a public defender or a contract defender, so it is a Rule 608 appointment.

Q Okay. Thank you. Do you have an investigator you work with?

A His name is Bill Beam.
Q Do you recall asking him to look for Libby Pierce, I guess they called her "Poo"?
A He did. He did. I believe -- here is all I can tell you about Libby. I believe he found her and interviewed her. I believe she was here. I don't know if it was the first trial or second trial, and I really can't remember why we did not call her as a witness. I recognized her when she testified, that is really all I can remember.
Q And do you recall that she was providing an alibi for Mr. Sessions?
A I really don't remember. When I heard she would be here today, I recognized her name, and that was it.
Q Okay. And the first trial ended in a hung jury; is that correct?
A That's right.
Q And then there was a second trial, that is the one we are talking about here today?
A Yes.
Q And you're representing them both -- Mr. Stephens on both of those cases; is that correct?
A In both trials.
Q In both trials, yes?
A Yes.

Q You heard them characterize the pictures, the family being in the courtroom; is that correct?

A Yes.

Q And is that an accurate representation, that they -- victims were here and wearing -- family of the victims were wearing shirts of the victims like RIP and other commemorations for the victims in the case?

A No, they weren't. If you are reading the transcript, at the beginning of the trial we made a motion asking the Court to suppress anything like that, and we did the same thing at the first trial. At both trials, no one was in the courtroom wearing buttons with T-shirts. I think at the first trial someone may have been downstairs with the buttons and T-shirts on. They did not show up wearing buttons and T-shirts at this trial. They had done that at almost every hearing that we had in the case, which is why we brought it up pretrial. In this trial, there was an incident with I think Monica Walt's mother that I brought to the Court's attention, and I think, absolutely, that I should have requested a mistrial based on that, and I did not. I brought it to the Court's attention, and the judge said that is not going to happen again, and we let it go. There weren't -- during the trial, in this trial, there were no T-shirts or buttons, though.

Q Okay. What do you have? Do you have the record on appeal, or trial transcript?

A Just the transcript.

Q Could you look at 47 of the transcript?

MR. FALK: Your Honor, I'm not sure what you have, but is there a --

THE COURT: Record of appeal.

MR. FALK: I'll call his attention to Page 50 on the record of appeal, which is a copy of Page 47 for the trial transcript. Look around Line 15, Page 47.

A That is what I was talking about.

Q (MR. FALK) And Ms. Wall, you are talking about, what was her relationship to the case?

A Monica Walt's mother.

Q Victim's mother, okay. And do you know anything about this incident, I mean what happened?

A I don't remember specifics, but I remember she was saying something about the case that was very negative, and she was doing it loudly, and there were jurors present.

Q And it is your testimony that you should have asked for a mistrial at that point?

A Yeah. Yeah. I probably should have. I don't think I asked the judge for anything. I don't think I asked him to question the jurors.

Q Of course, because that is another choice, you could have had the individual voir dire to see if they heard or --

A Yeah, I think I should have moved for a mistrial. I think the judge probably would have done that, instead of granting a mistrial, voir dire the jurors, we didn't do any of that though.

Q Mr. Stephens described this as not just any ole case in Horry County, there was publicity built about this case?

A There was a good bit of pretrial publicity, things like candlelight vigils at the police department. The reason for it is because they couldn't find who did it, and the longer it went on, the more pressure, I think, was put on them.

Q How many of the victims' family and friends were present during the trial?

A The courtroom was packed to capacity.

Q Was it this courtroom or in another?

A It was in the big courtroom, and I think it was split half-and-half pretty evenly.

Q So kind of a highly-charged thing?

A It was.

Q My clients discussed some concerns they had about Investigator DeLorenzo.

A Uh-huh.

Q Were you aware that he was maybe putting words or threatening witnesses?

A If you read the transcript, the answer is, yes, absolutely. If I can direct you to Page 757 in the actual transcript, my cross-examination of Eddie Lee Washington begins there, where we went into that in great detail. What happened is at the first trial they called Eddie Lee Washington as a witness. Let me back up. What DeLorenzo did is he interviewed Eddie Lee Washington on videotape, and in the video, during the interrogation, he told Eddie Lee Washington -- DeLorenzo told Eddie Lee Washington what DeLorenzo believed happened. Eddie Lee Washington said, no, that didn't happen, and he candidly told him what he did know. Then DeLorenzo began threatening him angrily, and DeLorenzo told him if he didn't tell him the truth -- is what he kept saying -- then he was going to arrest Eddie Lee Washington and charge him with either murder or accessory to the murder. He told him that he would then arrest his wife, and charge her with an unrelated robbery, that she had nothing to do with, and then he told him he needed to think about his children, because obviously at that point DSS is going to have to get involved and take his children.

He did that for sometime, berating him on the video, and then the video turned off. Then, when the video turned back on, Eddie Lee Washington's demeanor completely changed, shoulders slumped, he looked defeated, and he repeated verbatim what DeLorenzo had been telling him to say. On that video, as DeLorenzo was doing that, Assistant Solicit Brad Richardson was standing in the room as well. At the first trial -- I thought this happened at the second trial as well, but at the first trial I made a motion to dismiss for prosecutorial misconduct, and we argued that vigorously.

Before we got to the trial, Eddie Lee Washington sent a letter, I think to myself and Mr. Gardner, telling us that his original statement was not true. We sent our investigator to interview him. He told our investigator the same thing that he testified to at trial, which was that he had been forced to say what he said by DeLorenzo. They called him at trial, anyway. He testified to the same thing at trial, that DeLorenzo forced him to say what he said, and the video was place and played for the jury in the first trial, which clearly showed what happened.

In my opinion, DeLorenzo and Assistant Solicitor Brad Richardson committed subordination of perjury.

They committed obstruction of justice, and tampering with a witness. I think the judge at the first trial -- I thought it was the second trial, but I don't see it in the transcript -- made a specific finding that there was no prosecutorial misconduct.

At the second trial, we called Eddie Lee Washington as our witness to testify what DeLorenzo did to him to make him lie under oath, or try to.

Q How long had you been practicing in Horry County at that time? Is this common practice? Is this the way it works up here?

A With certain prosecutors and certain investigators, it is common practice. The problem with it is when we come into court and have a video where we have a cop threatening to take someone's children and trumping up charges against his wife and telling him what to say, and we come in court and show it to the Court and show it to judge, other police officers are watching it in court, the jury saw it, and nobody does anything. When nobody -- the case went up on appeal. I don't think it was raised as an issue on appeal, but the court of appeals and the supreme court, if they read the transcript, also saw it, and nobody did anything. Yeah, it is common practice, not just here, but probably nationwide.

Q If you could, look at Page 111 of the trial transcript. I think this is part of your opening statement?

A Yes, sir. Can I add one more thing?

Q Absolutely.

A I didn't file a grievance on Assistant Solicitor Brad Richardson for committing subornation of perjury and witness tampering because, again, I don't think disciplinary counsel would have done anything. They never have done anything when I file a grievance on a prosecutor, but there is a lot of attorneys in the room right now, and I just want to say, it is there, it is in the first trial transcript, it is outlined in this trial transcript, there is a video of it.

Judge, I'm quitting the practice of law. I'm done. I'm going into inactive status after this year. If any lawyer in this room cares, you have a duty to report that yourself. You all know about it now.

What was the question?

Q Thank you. If you would, look at Page 111 and Page 114 record of appeal, Lines 11 through 19.

A Yeah.

Q This is part of your opening argument. This sort of summarizes your concern about Eddie Lee Washington's testimony?

A I did. I talked about it in the opening.
Q Would there have been a basis to move for a mistrial with this perjured testimony being offered?
A We raised it pretrial. Actually, I don't know if we did in this trial, we did in the first trial. We moved for a dismissal in the first trial based on the prosecutorial misconduct and investigatory misconduct, which was clear. We had a Court that said there is no prosecutorial misconduct. The Court is sanctioning what the investigator did. So at least in this trial, at this point, I don't think there was.....
Q In the second trial, you didn't make another motion because it was shot down at the first one?
A I called Eddie Lee Washington as a witness in this trial, in the second trial.
Q Did you have concerns also about the testimony of James Pearl?
A Yes.
Q I mean, Officer DeLorenzo knew that Mr. Pearl didn't pass a polygraph test; is that correct?
A Yes.
Q What part of the polygraph did he not pass?
A And the prosecutor did. I cannot testify to the specifics of it. I would have to have the polygraph in front of me. They gave him two polygraphs. I think he

failed the first one. They tried to rehabilitate him with a second polygraph, and I think it was inclusive. I think we go through that somewhere in the transcript, but I don't remember the details.

Q And there is another witness that the State is having testify?

A Yes.

Q Now, can you summarize -- obviously, you remember the trial. Can you summarize what the evidence was against -- specifically what implicated either Mr. Sessions or Mr. Stephens?

A As to Christopher, it was James Pearl.

Q That was it?

A Pretty much.

Q Okay. So this is kind of a case that might be a close call. If you have one witness -- and in the transcript there is an indication -- well, you already talked about -- excuse me, did Officer DeLorenzo promise Mr. Pearl anything if he testified?

A I don't know how long it was after the murders. I think it may be in here in the testimony, but maybe a year, year-and-a-half after the murder. James Pearl was arrested on a drug charge. On his way to the jail, on the audio tape in the car, he is repeatedly telling the officer that they need to help him, they need to

help him get home for Christmas, the holidays were coming up. He says almost verbatim, more than once, I will tell you anything that you want to hear if you help me, and we went into that at trial as well.

Q You conducted -- you obviously cross-examined Mr. Pearl, whether or not he was promised anything or if he had gotten any benefit from testifying?

A We did.

Q I guess my question is, there was no upstanding citizen here, you know, banker, whoever, who was implicating my client? The State's witnesses were --

A I mean.....

Q The creditability could be called into question?

A Regardless who they were, their testimony was not credible. Under the circumstances, with James Pearl, I do not think he should have been permitted to testify at all without corroboration. I made a motion pretrial, asked the Court to have -- I don't remember what we called it -- a creditability hearing to have some kind of a threshold before we let him testify. I knew when I made the motion there is no precedent for that in South Carolina. There is other states that do it, which is why I made the motion.

Q Similar almost to a Biggers as far as the judge being the gatekeeper on the credibility? Maybe not,

but that is aside.

A Yeah. I think in California they can have a hearing and there has to be some corroboration before a jailhouse snitch can testify as to the gist of it.

Q James Pearl's testimony places both of them together, right, Mr. Sessions and Mr. Stephens; is that correct?

A I think so.

Q What do you think -- if you could speculate -- and I'm asking for speculation -- in your opinion, if the jury heard that Mr. Sessions was not even in the state at the time, would that have made a difference in the case? In your opinion, was there overwhelming evidence of guilt in this case?

A No. The case barely got past directed verdict. And, yes, that would have made a huge difference, in my opinion.

Q Not only from Mr. Sessions, but for Mr. Stephens, because if this person says they were both together --

A Well, he's charged with accessory. He is not charged with murder or being present at the scene. He is charged with accessory before the fact. If Mr. Sessions was not there and didn't commit the murder, obviously Chris didn't help him before he committed the murder that he didn't commit. So, sure,

it would have been helpful.

Q Did you have any concerns that the prosecutor was bolstering the testimony of Mr. Pearl? And let me call your attention to a couple of pages.

A Please.

Q What is easiest for me to tell you, transcript page?

A Please.

Q Transcript 984.

A Say the page?

Q Transcript 984, Line 14. It is says James Pearl -- this is Mr. Richardson's closing argument. Does that not approach him bolstering that testimony?

A I don't know that it is my place to interpret the law from the witness stand, but I don't think so. I think he is just going over what the guy said.

Q How about the testimony of Rodney Turner, Page 986, Lines 19 through 21. The door was closed, he can't -- he's telling the truth, he doesn't know.

A Saying he's telling the truth -- yeah, there is a bolstering. Absolutely.

Q Is that something you would have considered to object to?

A Yeah. I can't say why I didn't, I just.....

Q Just one last example. If you could, look at

Page 989, Line 18. I think we're discussing the testimony of Christy Pearl?

A What line?

Q 18 through 20. She's like the little boy that cried wolf, like the little boy that cried wolf, there is one time that she has told the truth.

A He's talking about Felicia. He's basically calling her a liar. She didn't testify. They were going to try to have her testify, but it became painfully obvious that she was lying. Actually, I don't know if she testified or not, maybe she did, but the section you just pointed me to, he was calling Felicia a liar.

Q Well, who was -- what is the reference to -- on Line 20 where it says "she's told the truth," what is that in reference to?

A Line 20, he's talking about Rodney and bolstering Rodney's testimony by saying he told the truth.

Q I'm sorry, okay. All right.

A That is 986?

Q Yes.

A Yeah.

Q Now, there has been some discussion about a statement that the prosecutor made in his closing argument, Look at the lawyers, they know their clients

are guilty. You have a recollection of that?

A Yes, I do. Can we go to the transcript so we get the wording right?

Q Yeah. It will take me a second to find it.

A Page 994.

Q Which line?

A Page 994 of the transcript, Line 22. Can you hear me okay?

Q Yes. Folks of the defense knows that this is a straight path that leads to the guilt of their defendant, so it is their jobs -- where is --

A That's it. That is the exact words that he used. Now, I objected. I think Mr. Gardner objected. The transcript doesn't really capture what happened after that, because as I objected, I was really upset. I was talking, Mr. Richardson was responding, Judge John was telling me to stop, and it went from me yelling at the Solicitor, to me and Judge John yelling at each other, and I mean it was very, very tense. I was screaming. I think Judge John was yelling at me, and we all had to stop and take a step back from it.

Q Did you consider a motion for mistrial then?

A I did not, and I should have. I was extremely upset at that moment. I was screaming. And I think I said in here when I was talking to the judge, I sat

there that entire trial not being able to tell the jury that I believed my client is innocent. I'm not going to let the prosecutor tell them that I believe he is guilty. I should have moved for a mistrial at that point.

MR. FALK: No further questions.

MS. KINARD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. KINARD:

Q Thank you for being here, Mr. Frederick, I know it was quite a trip.

A It was.

MS. KINARD: Beg the Court's indulgence. I lost my document.

Q (MS. KINARD) How long have you been practicing law?

A 12 years.

Q Approximately what percentage of that has been in criminal law?

A Almost all of it.

Q And you were appointed as a 608?

A Yes.

Q Do you remember how many times you met with your client?

A I really don't. I can't say how many times.

Q Do you feel like you met with him an adequate number of times to prepare for trial?

A I think so, yes.

Q Do you recall discussing his charges?

A We did.

Q Do you recall dismissing the elements of the charges?

A We did. We tried the case two times. I spent a lot of time with him at the jail. We prepared for trial pretty extensively. A lot of our preparation, he was not there for because he was in jail, but I did meet with him, I just don't know how many times.

Q And you felt that he was adequately informed in his approaching trial and what he stood to gain or lose as a result?

A Sure.

Q And, of course, you discussed the State's burden of proving guilt beyond a reasonable doubt?

A Yes.

Q And you discussed his versions of the facts of the case?

A We discussed the facts of the case, yes.

Q Did you file a discovery motion?

A We did.

Q You received everything you expected to?

A I think so.

Q Did you review all the discovery materials with him?

A As I recall, we had a lot of discovery. I'm sure we reviewed everything that I thought was relevant.

Q Did Mr. Stephens provide you any fact witnesses' names for you to interview?

A I'm going to say probably. I do not recall specifically what witnesses, you know, came from Christopher, which came from Jimmy Lee. I know that we talked to a lot of witnesses. Most of those came from the State's discovery materials, but I think that Christopher and Jimmy Lee provided names to us.

Q And you used an investigator to help you speak to these witnesses?

A Yes.

Q And that is typical in your practice?

A In a case like this, yes.

Q As a result of the information gained, you were able to prepare a defense?

A We did.

Q And I believe these gentlemen testified that the first trial you and Mr. Gardner, perhaps in conjunction, I'm not sure, decided not to present a defense; is that correct?

A In the first trial, that's right.

Q And in the second trial, which we are talking about today, you did present witnesses on behalf of your clients?

A We did.

Q Can you describe the change in that decision?

A In the first trial, when the State rested, we were not sure -- we were pretty sure it was an acquittal. At that point, we all talked about it and we didn't want to rock the boat, because it looked like a very good chance that the jury would come back with an acquittal. So we decided not to call witnesses. When we ended up with a hung jury, some jurors believed he was guilty. At that point, we decided when they retried the case that we needed to just put everything in and go ahead and call our witnesses, too.

Q At any time, did you enter plea negotiations on behalf of Mr. Stephens?

A I don't think so. I don't know if there was a plea offer. If there was, I don't think we considered it. This was never going to be a guilty plea.

Q Did you have an overall trial strategy in this case? I realize it is a vague question. Did you have a picture you wanted to portray in terms of presenting the witnesses?

A I think the one thing that we probably stressed the most at trial was the misconduct during the investigation, the pressure that was on the police department to solve this case and what they did as a consequence of that.

Q Do you recall any issues that arose during witness presentation testimony, did anything go not as planned?

A You are going to have to be more specific.

Q That was more of a general question.

A There were issues that came up throughout the trial, things came up.

Q Absolutely. Of course we discussed the jury charges, as you heard with Mr. Dudek, do you recall your objection to that?

A From my review of the transcript, I can tell you that I objected to it. It was a very general objection, and I heard the discussion with Mr. Dudek. I did not specifically object on the grounds of burden shifting, although, I mean, clearly that is the problem. I did not articulate that to the judge at the time. It was more of a general objection, and the point was by charging that to the jury, he is putting it on us to prove that someone else did the crime, which is burden shifting. I did not make that specific

objection, no.

Q I don't have any further questions, unless there is anything else you would like the Court to know in your representation.

A I don't have anything else if you don't have any more questions.

MS. KINARD: Thank you.

THE COURT: Redirect?

MR. FALK: If I may ask a couple.

REDIRECT-EXAMINATION

BY MR. FALK:

Q You thought there was evidence of third-party guilt in this case, right?

A Yes.

Q And you put on evidence that would have -- that you thought a jury could believe that; is that correct?

A Yes. And I think that if they prosecuted four, five different people that we referenced during the trial, if they prosecuted them the way they prosecuted Christopher, they could have gotten a conviction on any of those people.

Q So the instruction -- I mean, third-party guilt was an overall theme of the defense in this case?

A It was central.

MR. FALK: Thank you. Nothing further.

THE COURT: Thank you. You may step down. You may be excused. Next witness.

MR. FALK: We call Mr. Gardner.

(JOHNNY GARDNER, having been duly sworn, testified as follows:)

DIRECT EXAMINATION

BY MR. FALK:

Q Could you state your name for the record?

A Johnny Gardner, G-A-R-D-N-E-R.

Q How did you become involved in this case?

A I was appointed to represent Jimmy Lee Sessions.

Q Thank you. You were here for Mr. Frederick's testimony?

A Yes, sir.

Q He characterized misconduct that he believed was going on as far as from the prosecutor and investigators in this case?

A Yes.

Q Do you agree with his assessments?

A Yes.

Q Do you have anything you want to add?

A I got into it late. I believe Jimmy had a defender, okay. I don't know what happened. They got sideways or something. That happens a lot. So I missed the first few months of it, or maybe longer than

that. You know, for example, when I got into it, one of the first things was Bobby had been trying to get a prelimin done. I think they put -- the State put the preliminary off because one of the police officers was unavailable. I think Bobby did research and found out that the police officer didn't even work there anymore. I think to characterize it in a friendly state, they were mistaken when they said she's unavailable.

Stuff like that happened all the time. But the truth of the matter is this case could be summed up how Jimmy Lee summed it up. One of the videotapes of the hours of interrogation that he did, I don't know how many hours it was, I think it was a good bit, ad they didn't offer any of that for the jury, but the police officers got him in there sweating and saying, you know, the word on the street, Jimmy, is you did this. Jimmy -- not an exact quote, but close to it -- says something like, Word on the street? That is where you are getting your evidence from? You need to get out there and do investigation, fingerprints, do what you all do. I don't make that for comedy purpose, there was a lot of stuff going on with this case. This is the strangest case I've ever been a part of. One thing that isn't discussed is this case started out with three, and you were as guilty as that

third guy. They were squeezing him. I think there was testimony today about you want to be a defendant, or do you want to be a witness, and you better believe that that was going on. Because one of the boys was a defendant, and the first trial judge directed a verified on him. Directed a verified on a murder case. I've heard of that, but I've never seen it, you know. That is pretty big. But there was no evidence that that guy, that I could ever tell, had anything to do with it, okay. The only evidence that I know of that even puts these guys there is by a bunch of people -- not even a bunch of people, but some, that their credibility is questionable, to say it in a friendly way.

We tried the case and I was questioning one of the guys, one of the State's witnesses, and I think this is the one that Bobby was talking about, but he flunked the polygraph. I didn't think you could put a witness on the stand to ask questions if you knew he flunked a polygraph, but, evidently, the State thought they could -- or did.

Q That was James Pearl?

A I think it was. I don't have the transcript in front of me, but he says something to the tune of I passed the polygraph or passed the test, something like

that, and the judge said, okay, I want to see the lawyers in chambers, words to that effect. I think he offered a mistrial, but we didn't want a mistrial. We were winning the case, no doubt about it. When the jury was deliberating, there was nobody in that courtroom that thought it would be anything but an acquittal. Nobody thought these guys had anything to do with it. Nobody thought that the State laid a hand on them. Brad Richardson had a drug charge hanging over Jimmy Lee's head. I don't remember what it was, but there was talk, well, we'll get him on the drug charge, and I have nothing to do with that, so. It was a hung jury, so they declared a mistrial.

The Solicitor said he would try the case right away. We worked on it and said, you know, we can't prove who did it, but we can prove that these boys did not. We can clearly prove they did not do it. So we had a new session, went through everything. There was boxes. Someone asked about discovery, did you go over discovery. I think it was over 1100 pages of telephone records. Does that sound about right? And that had nothing to do with the case. Nothing basically had anything to do with this case. There was people wearing T-shirts and buttons, but that was before I got involved. That was bond hearings,

preliminary hearings, things of that nature. There was pressure to find someone who did this. No one knew who did it. People were coming, people volunteering information. There was a guy that lied in a police car saying he would say whatever they wanted. One guy ultimately testified that he was in part of the jail and that Jimmy Lee just shouted across, with all of these people, like in a courtroom right here, Oh, by the way, I killed these two girls over at the beach. None of that made any sense.

So we put him up -- we called -- we had all of our evidence, ready to go. We got ready for Trial No. 2. The State asked for a continuance. I never heard of the State -- I mean, I never had the State ask for a continuance because the Constitution says the State calls the case, but this was all for -- I don't know if it was for production purposes or whatever, but the courtroom was packed, Brad Richardson asked the judge to get a continuance, can't remember what his excuse was. I think he said he wanted to do a DNA analysis, I think it was. You know, Hey, Judge, we just tried this case, I think we tried it in November, and I think this was like in December, maybe October, but it was relatively quick. I never tried a murder case that quick. So the judge granted a continuation.

What happened is the State called some guy to testify -- I mean, that was addressed by the supreme court, so I don't think that is relevant, but he didn't know anything about the case, but he testified about profiles and things. It caught me off guard. It was crazy. But I'll tell you what is not crazy, I put up the best guy in the State of South Carolina, about shoe prints. We don't know who the shoe prints were who killed these ladies, but it was not Jimmy Lee Sessions. The State's own witness, DNA on one of the victims, one of the lady's fingernails, that is consistent with the struggle with the killer. We don't know who it was, but it was not Jimmy Lee Sessions.

The State's theory was that Jimmy Lee went in there. There was no theory about anyone else doing it. So there was -- all of that stuff, if I could change anything, and I heard some interesting stuff today, and most of it brought back memories and everything. I don't remember the exact language, but Donna Elder, who was one of the prosecutors in the second trial, it was almost like she flipped the burden of proof on us. I should have objected to that. I don't remember what her language was, but it is prcbably in there somewhere. Almost like we didn't

prove our innocence, you know. I don't know how much more you can go to prove your innocence by saying the DNA was not his. I know I told the jury, and it probably doesn't have anything to do with this PCR, but if the DNA matched someone, you better believe that the Solicitor's Office would say that is the person that did it. I should have objected to that. I should have asked for a mistrial, what you and Bobby were talking about earlier with Brad Richardson saying these lawyers know they are guilty, you know referring and the Golden Rule.

I told Madam Attorney General in the hallway, I don't know what incident they were referring to, but if there is a Golden Rule violation, I should have objected to that. The main thing I'm upset about in this trial is the whole way it was done. There was an atmosphere of the second trial that was not there for the first. There was a lot of people called, big courtroom, it was packed, you had jurors coming up saying I don't believe in the death penalty. It is not a death penalty case. I don't know what it was, but it was not -- someone said there is not an easy trial or regular trial, this was a big trial, big time trial, big time stuff going on. I think it lasted five days for Trial No. 1 and five days for Trial No.

2, which is hard to believe, because the first trial we didn't put any witnesses because we didn't think we needed to. I mean, absolutely you could ask anyone in that courtroom while the jury was out and everybody said it is an acquittal. Second case, second trial, we put evidence up, you know. The Solicitor's Office put up flimsy evidence about boys were in a hotel room snorting cocaine, and all of this prejudicial information. We showed that these guys were not even registered or in the hotel. I think we called the manager or owner, and he testified, I have the records, these guys weren't there. You know, once again, Solicitor's Office reversed the burden of proof and put it on me, and I didn't object. They just said, well, these guys could have snuck in, they didn't have all the exits covered. I mean, that is a defense attorney's argument, right, not a Solicitor's? Anyway, I got distracted, I'm sorry.

Q When you were talking about you didn't want a mistrial, that was in the first one?

A First trial. First trial.

Q Mr. Frederick talked about a mistrial after the look-at-the-lawyers-they-look-guilty?

A That never entered my mind because I was so livid. It never entered my mind to ask for a mistrial.

I don't know where that came from. Why would you say even the lawyers know the guy is guilty, if that is what he said?

Q There was testimony about Ms. Wall being upset and a juror seeing her?

A See, I don't recall that. I know there was some stuff happening. I heard people talking about it, but I didn't have anything to do about.

Q I believe Mr. Frederick's testimony was that he considered asking for a mistrial or possibly asking to voir dire the jurors if they were influenced by --

A Yeah, that should have happened, especially with the atmosphere going on with the trial, with the jurors. It is one thing to be called for jury duty for a routine criminal case, even murder case, it is another thing to be called into an electric atmosphere where media or the death penalty is involved or things like that.

Q Mr. Frederick characterized the prosecution's case against Mr. Stephens as very thin, I think. Was there a trial strategy not to call Libby Pierce, an alibi?

A That was not strategy, unless it was the first trial. The first trial was designed after the State rested to not put up any evidence.

Q To get the last word in?

A To close last and point out all of this stuff. The second trial, if we could have a witness that said Jimmy Lee was in Virginia, we should have had her testify.

Q Do you recall him telling you about that?

A I don't believe -- Jimmy or Bobby, or both, testified today how the witness list went and the strategy and stuff like that. I think it was Jimmy Lee that said that Bobby was doing all of that. Remember, Bobby was involved in this case a lot longer than me. I have 23 boxes of discovery and went through it as best as I could, but most of it had nothing -- I mean, it had something to do with the case technically, but it was like 1100 pages of phone records never introduced in testimony, didn't have anything to do with the case.

There was an example of the police department frustration. I never had the police in a state criminal case give me 1100 pages of phone records involved in a murder case. It was just a frustration level, and I guess it was the victims, or whoever's family, putting pressure on the police to solve the crime. I heard there was vigils, and I remember pictures taken of people in the audience of these --

whatever they were -- trying to grasp at straws trying to make an arrest on someone.

So I don't exactly remember Jimmy or Bobby saying this is the girl that could testify. I did not talk to her. I remember talking with you in the hallway out there about an alibi witness. I thought you were talking about another lady who -- after awhile -- I thought that is who we talked about, and I didn't think she was an alibi witness. An alibi is someone that says he didn't do this crime because he was with me in Virginia. That lady wasn't that witness. In fact, it was a different person. That person, I can't remember if she was called or not. I don't think she was. I think that is the one that Bobby said was called or may have been called. It was a different lady. The lady you're talking about, to the best of my memory, I never talked to her. But we, the defense team, Jimmy Lee and Christopher, Bobby and myself were sharing information, and I don't have an excuse why we did not call an alibi witnesses. It had nothing to do with strategy, because we put all the other evidence up. It would have made sense to put that one up.

Q It was a third-party guilt case; is that correct?

A Yes, sir.

Q And so if there was a witness that would say one

person was 500 miles away in Virginia, they certainly would have gone into that trial strategy that someone else did it?

A Absolutely.

MR. FALK: One moment, Your Honor. No further questions.

CROSS-EXAMINATION

BY MS. KINARD

Q Thank you for being here, Mr. Gardner. I'll start with basic background information. How long have you been practicing law?

A I started in '92, so about 20 years, 25 years.

Q How many of that has been in criminal law?

A Just about all of it. I started as assistant solicitor, and then started my own practice.

Q You were appointed to this case?

A Yes, ma'am.

Q Do you recall meeting with the Applicant?

A Yes, ma'am.

Q Many times?

A Not many, but enough. I don't remember how many it was.

Q Between meeting with him and preparing with Mr. Frederick, do you believe that you were adequately prepared for these trials?

A Yes, ma'am, no doubt.

Q When you did meet with your client, did you discuss the offenses and indictments that he faced?

A I think it was just two murder charges. I don't know if he had any other charges or not. I wouldn't disagree with you if he did.

Q One armed robbery and one burglary first.

A That's right, the burglary. Yes, we talked about the charges.

Q So he understood what he faced up front?

A Yes, ma'am.

Q And you discussed the State's burden to prove beyond a reasonable doubt?

A Yes.

Q Do you remember if he was comfortable heading into trial?

A I think so. I mean as comfortable as you could be with a packed room saying you killed two people.

Q Did you discuss his version of the facts of the case?

A I don't recall if we did.

Q Regardless, did he help in the defense theory?

A It was one of the most complicated cases I have ever been on. It was complicated, as well as real simple. These guys weren't there. There was no

evidence that they were there, except people that were not credible. That was it. That was pretty much the whole case.

Q In preparation for this case, you received a great deal of discovery?

A Yes, ma'am.

Q You reviewed all of that?

A Yes. But I didn't read the whole 1100 pages of telephone numbers, but I need that -- it didn't have anything to really do with the case.

Q And you reviewed the relevant information?

A Oh, yeah, absolutely.

Q Did he provide you any fact witnesses?

A I don't know if it was him or Bobby or a combination, but we had all of the witnesses, you know. We called some of them ourselves.

Q Do you agree with Mr. Frederick's testimony that between the Applicants and the two attorneys, you came up with a witness list and investigated those fully?

A Yes. Bobby already had an investigator on the case, so I didn't have to do that. His name was Jim Beam or Bill Beam, or something like that. He had done the work on the case already, but when we did the second trial, we had a big meeting. He went out and did the final stuff to do that. I went and got the

shoe print expert guy. That was the only expert I think we had. The State had the DNA guy, I think.

Q Do you recall entering any plea negotiations?

A There was no plea negotiations. My client maintained his innocence from the day I met him, and the Solicitor never offered him anything. I think he offered him 15 years on an unrelated drug case, I think. I think 15 years, but never discussion about a plea on this case.

Q I might be repeating, forgive me for that, but do you remember -- you spoke with Mr. Falk about the issues of people wearing buttons or T-shirts, and you believe, with Mr. Frederick, that that happened before the trial?

A I have to agree with him, because I can't disagree because I don't have enough information. I did hear about that, and my recollection was that that was before I got involved in it, and it did not happen out here. I think Bobby read from the transcript that he made a motion not to do that.

Q He did. And regarding the different issues that Mr. Falk asked you about in terms of closing arguments, I believe you testified in kind of a blanket statement that you should have objected to any of those issues; is that correct?

A Yeah. And I know there was specifics brought out, like a lot of bolstering that I, apparently, didn't catch on during the trial. But, yeah, we should have objected, because that is the crux of this case. You know, there was no DNA -- in fact, the DNA said they were not guilty. The shoe print of the person that did the killing -- the allegation was that Jimmy Lee was charged with murder, and Christopher was charged with accessory. That shoe print was neither one of theirs, and it couldn't be Christopher's because he wasn't charged with murder, and it wasn't Jimmy Lee either. So if there is no forensic evidence establishing that they did it; in fact, the forensic evidence established someone else did it, then the only evidence that gets us to the jury, like the old lawyers used to joke, if I can just get past directed verdict, I can get a guilty verdict. The only evidence that the jury could consider was the testimony of the police witnesses.

MS. KINARD: Thank you. I have nothing further.

A I can't think of anything else.

MS. KINARD: Thank you.

THE COURT: Anything further?

MR. FALK: No further witnesses.

EXAMINATION

BY THE COURT:

Q Mr. Gardner, I'm confused about something. Let me ask you a question. It's obvious to me, to the Court, that you and Mr. Frederick were very involved in this case and worked hard on the case and still passionate about the case, and that your defense, as you said a moment ago, is that there is no evidence to put either of the defendants at the scene.

A Yes, sir.

Q If you would have known you had an alibi witness, would you have called --

A I would have had to. I mean, that would have been -- yes, sir. I would have called the alibi, is the short answer. Yes, sir. I mean, I would have had to.

Q Does that mean you were not aware that there was an alibi?

A If Bobby said that we knew about it, I trust Bobby. I just -- like I said awhile ago, I don't have an excuse. I don't know why. I have done PCRs before where people say things that are not -- I have no recollection or are not possible, but this one....

Q My real question is you were representing Mr. Sessions?

A Yes, sir.

Q And Ms. Pierce is the witnesses who said that she was involved with Mr. Sessions?

A Yes, sir.

Q And that she was the alibi witness?

A Yes, sir.

Q And you don't know anything about her?

A I don't recall talking with her, Your Honor. I know that makes no sense at all, but if she was living in Virginia at the time of this trial, then I don't know if Bill Beam went up to Virginia, or if she came down here and met with him. You know, that is the way I would have done it. Because if something went sideways, I want someone else to testify what she said, but I can't -- I don't know -- I believe she showed up and was sent home, or something along those lines. I have no answer for you on why that happened.

DEPUTY: Judge.

(A brief pause in the proceedings.)

THE COURT: Deputy says we need a five-minute recess.

(A recess was taken.)

THE COURT: If you have any additional questions of the witness following my questions of the witness? Any additional questions of the witness following questions by the court?

MR. FALK: If I could, Your Honor.

REDIRECT EXAMINATION

BY MR. FALK:

Q The way you described it, there was a division of labor, you and Bobby were both representing these two people?

A Yes, sir.

Q And you were splitting up the task?

A Yes, sir.

Q And you came into the case a little later, and so Bobby was the one that hired the investigator to talk to some of the witnesses?

A That's correct.

Q Is it possible that you just hadn't read the investigative reports, or not aware of it?

A It is possible. You know, that is a good way to describe it. I hired -- through the Court of course, but I hired the expert, and Bobby hired the private investigator way before I was on the case.

Q So you were focusing on the forensics?

A Yeah, because that was all Jimmy Lee. The State could see that they couldn't prove Christopher was there, and that is what they said, you know, but they ended up proving Jimmy Lee wasn't there because the footprint was someone else. That footprint is not

like -- this footprint was in the blood of one of the girls that was killed, so whoever made the footprint is the killer. But the way you described it was perfect, because when the witnesses were showing up, like the manager or owner of the hotel, I had to talk with them in the hallway. There was another witness that we had that Bobby was talking to. Bobby had Laura Hiller working for him, and John Hiller was a law student. They met with some of the people. John Hiller was the rock star of this case, because he took all of this evidence and put it on one of the things that plays music that these kids have, and you could -- instead of putting the name of the song, you could put the witness, her name or his name, and it had code, whatever. So he set that up on cross-examination, and so there was -- part of this was a drug deal, a girl that stole a safe that had the money in it, or drugs in it or whatever, and I can't remember her name. Did you take the safe? No, I don't know what you are talking about. He would hit the button and it would say, And then I took the safe. And then one of the cops -- we would say, Isn't it true that you talked to this guy blah-blah, and he said, no, I didn't, and he would hit the button and it would say, Then I talked to this guy. And it should be in the transcript. So everything was

thoroughly worked on. There was a division of labor. It could have been that -- I don't know who the lady said that she talked to, she could have talked to the investigator and not me. I don't know if that answers your questions.

MR. FALK: Nothing further.

MS. KINARD: No further questions.

THE COURT: Thank you. You may step down. Call your next witness.

MR. FALK: We rest.

MS. KINARD: No witnesses from the State, Your Honor.

THE COURT: Argument?

MR. FALK: Your Honor, couple of times both lawyers said that this was a case -- a third-party guilt case. It was a close case. They hung the jury the first time, but they thought they won it the first time. They testified that the witnesses against them, against my clients, certainly had creditability issues, and both of them testified that it would have made a difference had they called an alibi witness. I presented the testimony of what the alibi witness would have said. She said that she and Jimmy Lee were in Virginia. She said she was aware of Jamilla Hightower and Monica Wall, and she had called down

here, you know, to find out what is going on, and that is when she heard about this shooting. She and Mr. Sessions were in Virginia for a period of time, and then they came back down here.

This is not a case where I think the Court could find there was otherwise overwhelming evidence of guilt. It was a very narrow case, and one more witness could have played a difference. Certainly this alibi witness dove-tails in with the trial strategy. They had a consistent trial strategy as far as it wasn't them, they weren't there. I don't know what I could do about all the testimony that the Court heard about the Solicitor's misconduct and the investigator's misconduct. I know Mr. Frederick is very concerned about that. I think he certainly brought some of it to the Court's attention. Whether or not he should have made another motion to dismiss, at least so there would have been a record of that.

Both of the -- Mr. Frederick testified that he knew that Ms. Wall had been making a scene in front of the jurors. He said that he should have asked for a mistrial, and candidly said that he didn't think one would be granted, but at least possible that the jurors could have been voir dired to know whether or not they were influenced by this. We know this was a

highly charged case, and so it is easy to understand that the jurors could be influenced or intimidated by the family and friends of the victims being in front of them making a scene.

I believe there were instances of bolstering the testimony of James Pearl, Rodney Turner. Whether it was Christy Pearl or Rodney Turner again, Mr. Frederick testified he should have objected to that. There is the whole commotion at the end of the trial where the Solicitor says, Look at their face, even the lawyers know they are guilty. In both of them -- and it is certainly understandable in getting caught up in being stunned that you would hear Solicitor make that type of conduct, maybe they didn't think we should ask for a mistrial, but I think grounds for a mistrial could have been made there. Certainly that would have been something that could have gone up on appeal.

As we are talking about the appeal, we're coming back around to a significant issue in this case is the way that the jury was charged. I mean, I know we can't take experts as far as what the law is, but I think Bob Dudek is aware of what the law is. He was concerned by the fact -- his testimony was concerned by the fact that there was even a charge that the jury

was instructed on this third-party guilt charge, and it is a particular charge in that it I do think it accurately reflects what South Carolina case law is, but it is confusing for the jury as to whether or not they should be making some kind of determination that we should only consider this evidence if it is relevant to that. It is the judge's job as the gatekeeper, keep irrelevant evidence out, and the jury is entitled to do whatever they want with the relevant evidence that they heard. When the charge, in the way that they were instructed, you either look at it like you are going to confuse the juror, or that the judge was asking the jury to make this legal question about what evidence is relevant and what isn't. It was something that -- I also think it was burden shifting and that it intended to show that -- made it look like he had to prove third-party guilt evidence in order to prove that he's innocent, and he doesn't have to prove that he's innocent.

If you look at the standard -- I mean, there is a standard third-party charge that I found in New Jersey where it basically says, you know, there could be evidence of third-party guilt, and the defendant is under no obligation to prove his innocence, doesn't shift the burden to him and, you know, the case must

be proven against him beyond a reasonable doubt.

I'm just saying that had it been an issue that wasn't as central to the case, but I think third-party guilt was an essential issue to the case. I think the jury was given a confusing instruction and I think it was burden shifting. If we can say that maybe Mr. Frederick should have made the burden shifting argument so that issue would have been better preserved on appeal for Mr. Dudek to take care of, Mr. Dudek thought at least it was an issue that was preserved for appeal, whether or not it should have even be granted, Mr. Dudek thought it should not have been done, and he didn't really have a clear explanation as to why he didn't use that other than he thought there was other issues that he thought might have been stronger, but I don't think he necessarily articulated a clear appellate strategy that we don't want to use this because it will detract from our other two arguments.

I think there is a lot of problems with this case, and I think the three strongest points are the jury instruction -- I guess my two is the jury instruction and failure to call the alibi, and possibly not moving for a mistrial at the end after prejudicial remarks were made during closing

arguments.

THE COURT: All right. Thank you.

MS. KINARD: When it comes to calling an alibi witness, it certainly would fit into the third-party guilt theory of the case that both of these attorneys testified they were working under. Ms. Pierce, when she testified, we have no reason to find her more credible than any other witness that testified. Her testimony was here and said that these gentlemen could not have committed these crimes, but it seems to me that she was one less credible witness among a group of less than credible witnesses.

You heard the attorneys testify -- particularly Mr. Gardner -- that he wasn't sure why she wasn't there or called, and of course had he known about her, she would have been called. I don't think that is an issue that we can question at this time. Regardless, it is not possible to try a perfect case, and that is also mentioned in Strickland versus Washington. We need to try to remove the distorting effects of hindsight when it comes to trying a case. I think it is a uniquely strange situation, because we almost have two cases, not only are we looking at one before us, being the second trial, but also what happened at the first and how that affected other things. So we

have a strange accumulation of information that we are trying to sort through in order to assess these allegations. We have been able to compare the first and second trials, as well as the things that were presented by witnesses, between them. I think it is unfortunate, both for the Applicants and for the attorneys, that we have the ability to do that, partially because it does create the stressful environment for the second trial, the electric environment I think is the term that Mr. Gardner used. People were not quite acting normally. I think that is clear from all of the witnesses, so I believe there was understandable mistakes due to the overwhelming stress, and I don't think any of these mistakes ended up as something we could call deficient representation or prejudicial representation. These gentlemen conducted a thorough investigation, worked closely with their clients, developed a strong witness list and used the help of an investigator to interview all of the State's witnesses, all of the defense witnesses and decided on the presentation that they were going to make.

As you heard them testify, there was very slim evidence. I guess their clients, they worked with that, and in the process, they came up with the first

trial presentation that they thought was an acquittal. They were ready for that and saw the hung jury, so they beefed up the case for the second trial and put all the cards on the table. I believe that it is hard to say it is a mistake. That is certainly articulable trial strategy. They prepared their cases and put it all out there to best help their clients. Certainly, it gave opportunity for issues to arise, but most of the issues that we ended up talking about was in the State's closing argument, which would have happened no matter what, and these issues arise it is -- I think it is well known by most attorneys that it is uncomfortable to object during closing, but sometimes we do it anyway. We can say it was part of the atmosphere of the case or anything else that kept these gentlemen from objecting during closing arguments.

It's an overwhelming situation for all of these men. It is certainly not something that is desirable, but I don't think that when you look at each of these elements individually, you can say that any of them were truly deficient or that any of them or were prejudicial to the Applicants, so for that reason the State requests that you deny any relief they are seeking.

MR. FALK: If I could make one comment, not to object during her closing argument, but there was from evidence presented here that would have questioned the creditability of Ms. Pierce.

THE COURT: Alibi witness.

MR. FALK: Obviously that would be an issue, but her creditability was never challenged. She was a witness and came down here and testified, and she was not impeached as to her credibility.

MS. KINARD: No, and I would leave that to the Court's determination just as it would have been left to the jury's determination.

THE COURT: The only question is the personal relationship, you know. Let me ask this. What about addressing the issue of the jury instruction?

MS. KINARD: Yes, Your Honor. I don't know if there is any way to get around that. It appears to be burden shifting, and it is a confusing charge. As far as that goes, the presentation of it, I believe Mr. Frederick did object and the Court did not seem to agree with that. If you give me a moment, I'll put it up.

(A brief pause in the proceedings.)

MS. KINARD: He objected on Page 815 on the trial transcript, objects to it being test of admissibility,

and once evidence is admitted, they could consider it for any purpose they see fit and he doesn't think that a jury instruction outlining that would be appropriate. I think that is a proper objection, and I think, therefore, it was preserved. Then it becomes an appellant issue. Certainly Mr. Dudek has more experience than I do, but if he did not seem fit to provide that -- I don't know if we got the clearest of answers about that, because he did want to pursue the victimology issues. Whether he didn't think it was strong enough to pursue -- I think it was preserved. I really don't know. I don't know if that is an issue that would have won, but I heard him say because he didn't think it would win, and whether that is based on other issues or solely on its own merit, I'm not entirely sure. I think it was preserved regardless of what kind of issue it was, it's there for the Court to consider.

THE COURT: I thought he said he didn't remember why he didn't raise that issue on appeal?

MR. FALK: That was my recollection of his testimony also. Also my recollection was that he did not believe it was preserved as far as whether or not it was burden shifting, and that it could have -- could have possibly been confusing or just a bad

charge and didn't have a recollection of why, but I don't think he said it was part of the trial strategy.

MS. KINARD: He doesn't recall why he argued it, that is correct, that is my error, I apologize.

THE COURT: Let me ask you a question as it concerns -- concerning the argument about misconduct, prosecutorial misconduct. As best as I understood it, wasn't all of that presented to the jury? Did the jury get to consider all of that? Didn't they hear both sides of the argument?

MR. FALK: I think that is what the testimony was.

MS. KINARD: I would agree with, and for what it is worth, prosecutorial misconduct was not raised as an allegation for this PCR. I realize there might be sua sponte issues that might be necessary, but we object.

THE COURT: I'll consider it, but I find that it was all presented to the jury and the jury decides the creditability of the witnesses and conduct of the parties involved. As to the issue of the alibi witness was specifically and directly relating to Mr. Gardner's client, and I realize there was other things that could have been construed as being beneficial to the other defendant, but I find that

Mr. Gardner was not informed by his client of such an alibi witness list existed, and I say that because he said he was unaware that there was such a witness in all the sessions they had. It would be illogical to find that his client would not -- it would be illogical to find that his client did not tell him about this alibi witness.

On the issue of the jury charge, Counsel should have argued that the charge was burden shifting, and did not argue before the trial judge.

On the issue of appellant error, I find there was appellant error in failing to raise the issue of the charge being confusing. Does that make any sense?

MR. FALK: Yes, sir, Your Honor. I always have problems because a lot of times appellant defense doesn't pick it up because they say it wasn't preserved and we're going to fight the battles that we can win.

THE COURT: Does what I say make any sense to the Attorney General?

MS. KINARD: Yes, Your Honor.

THE COURT: You might not agree, but you understand? Therefore, I grant the application on those limited grounds.

MR. FALK: Thank you, Your Honor.

MS. KINARD: That means you specifically deny it on the other grounds?

THE COURT: Yes, I'm sorry.

MR. FALK: Do you want me to prepare an order, just a Form 4?

THE COURT: I think we need a detailed order on it. I assume both sides will appeal the ruling?

MR. FALK: I'll take a swing at a draft and give it to her.

THE COURT: I need it to me within 30 days.

(Whereupon, the proceedings concluded.)

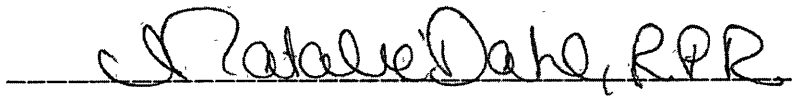
CERTIFICATE OF REPORTER

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

1288

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
Jimmy Lee Sessions, #215137,)	Case No. 2014-CP-26-8318
Applicant,)	
v.)	
State of South Carolina,)	
)	ORDER GRANTING PCR RELIEF
Respondent.)	
)	

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 two counts of Murder (2007-GS-26-2962, 2007-GS-26-2963) and one count of Armed Robbery (2007-GS-26-2961). In July 2008, the Horry County Grand Jury indicted Applicant for Burglary, first degree (2008-GS-26-2698). Johnny Gardner, Esquire, represented Applicant on all charges. On February 2-6, 2009, Applicant proceeded to a jury trial before the Honorable Steven H. John. The jury found Applicant guilty as indicted. Judge John sentenced Applicant to life imprisonment for Murder (2007-GS-26-2962) and another term of life imprisonment for Murder (2007-GS-26-2963) to run concurrently with the former Murder charge. Additionally, Judge John sentenced Applicant to a term of thirty (30) years imprisonment for Armed Robbery (2007-GS-26-2961) and a term of thirty (30) years imprisonment for Burglary, first degree (2008-GS-26-2698) with both charges to run concurrently with the Murder charge (2007-GS-26-2962).

Applicant filed a timely notice of appeal. Joseph L. Savitz III, Esquire, and LaNelle C. DuRant, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 30, 2013. State v. Sessions, Op. No. 2013-UP-063 (S.C. Ct. App. filed January 30, 2013). By Order dated July 11, 2014, the South Carolina Supreme Court denied the Petition for a Writ of Certiorari to review the Court of Appeals' Opinion. The remittitur was returned to the circuit court on July 22, 2014.

Applicant filed a timely Application for Post-Conviction Relief in which he alleged ineffective assistance of 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 argument trial counsel argued that the forensic evidence did not inculpate 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 part 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 ne neglected to so do.

4. The appeal that Mr., Savitz filed on Jimmy Lee Sessions' behalf was similar to the appeal filed by Mr. Dudek for Sessions' co-defendant Mr. Stephens. Both appellate counsel raised one of the same issues namely whether the court should have admitted testimony from the state's victimology expert Mike Prodan.

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)).

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 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. Savits raised the following issues: 1) that the court erred in admitting the introduction of defendant's tennis because the State failed to establish provenance of the shoes before December 2008; 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. Although this Court did not hear from Mr. Savits, at the PCR hearing, this Court notes that Mr. Dudek acknowledged that he could have included the third party guilt jury charge issue on appeal but that he believed that he would prevail on the issue of the inadmissibility of the victimology testimony.

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 (7th 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-26-2961, 2007-GS-26-2962, 2007-GS-26-2963, & 2008-GS-26-2698 shall be set aside.

IT IS SO ORDERED!

~~Hon.~~ Brooks P. Goldsmith
Presiding Judge Horry Circuit Court

_____, SC
February 7, 2017

STATE OF SOUTH CAROLINA COUNTY OF HORRY Jimmy Lee Sessions, #215137, Applicant, VS. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT Case No.: 2014-CP-26-8318 **STATE'S NOTICE OF MOTION AND MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(E), SCRCP**

Respondent now moves pursuant to Rule 59(E) and Rule 60, SCRCP, 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. 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 counsel for Mr. Stephens, Mr. Sessions' co-defendant, objected to the admissibility of the charge on page 1028 of the record on appeal.[1] 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, 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 trial courts should

[1] Respondent argues that this objection and argument preservation should stand for both co-defendants, as the ultimate effect at trial and on appeal was felt by both.

conduct in considering the admissibility of defendant's third party guilty 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 (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

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3727

February 21, 2017

1300

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JIMMY LEE SESSIONS, 215137,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

2017 FEB 23 PM 3:22

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, 15th 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, 2017.

Notary Public for South Carolina.
My Commission Expires: May 14, 2024

1301

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
	)	CASE NO. 2014-CP-26-8318
COUNTY OF HORRY	)	

FILED
HORRY COUNTY
2018 JAN -5 P 12:09
CLERK OF COURT

Jimmy Lee Sessions	)	
	)	
Applicant	)	
VS	)	ORDER
State of South Carolina	)	
Respondent	)	

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

MAILED
10-5-18 BG