STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Edward Cottingham, Circuit Court Judge
2011-GS-32-1255, 2011-GS-32-1257
Appellate Case No. 2011- 198266

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

WILLIAM MARK BROCKMEYER,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

1. Did the trial court err by applying the wrong legal standard and denying the defendant's motion to enforce a subpoena where the information was clearly relevant, unavailable from other sources, and not otherwise protected ?

2. Did the trial court err and violate the Confrontation Clause of the Sixth Amendment to the United States Constitution by permitting the State to establish the chain of custody of its evidence through the use of a computer log read aloud by a witness rather than by live testimony from the parties handling the evidence ?

3. Did the trial court err by permitting the State to introduce a photograph for the illicit purpose on implying that the defendant was guilty ?

4. Did the trial court err by permitting the State to introduce hearsay testimony taken from the decedent's cell phone ?

STATEMENT OF THE CASE

The Appellant, William Mark Brockmeyer is presently confined at the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Lexington County. The Appellant was indicted at the May 11, 2011 term of the Court of General Sessions for Lexington County for murder and possession of a weapon during the commission of a violent crime. 2011-GS-1255, 1257. ROA 826-29. The charges arose from the July 10, 2010 death of Nicholas Rae. A hearing was held on June 23, 2011. A pretrial hearing was held on August 3, 2011. The matter was called to trial before the Honorable Edward Cottingham on August 22, 2011. The Appellant was present and represented by Robert M. Madsen, Circuit Public Defender and Senior Assistant Public Defender David M. Mauldin of the 11th Circuit Public Defenders Office. The matter was prosecuted by Deputy Solicitor Samuel "Rick" Hubbard and Deputy Solicitor Shawn Graham of the 11th Circuit Solicitor's Office.

On August 26, 2011, the jury returned a verdict of guilty on each indictment. August 26, 2011 Verdict Tr. R. 777-782. Judge Cottingham sentenced Appellant to terms of imprisonment of thirty-five (35) years on murder and five (5) years consecutive on possession of a weapon during the commission of a violent crime for an aggregate sentence of forty (40) years. R.p. 793, Verdict Tr. p. 20, ll. 13-21. The

Appellant made a timely notice of appeal on August 31, 2011. This appeal follows.

RESPONDENT'S STATEMENT OF THE FACTS

This case involves the early morning death of Nicholas Rae by William Brockmeyer on July 11, 2010. Brockmeyer and Rae were attending a birthday held at Jager's, a private bar in Lexington County that began on July 10. Rae and Brockmeyer had met each other while in prison and moved together and were living together in Lexington County. On that night, they arrived together to the bar - Brockmeyer armed with a small Ceska .380 pistol and Rae with a large pellet B.B. gun, allegedly for protection. Brockmeyer keeps his in his front waistline, while Rae keeps the large B.B. gun in his back waistline. Each gun was displayed at various times to the patrons of the club to the consternation of the members. The victim spent the evening drinking and playing pool- losing bets with a better pool player and borrowing money from Brockmeyer to pay his building pool debt. At one point, Brockmeyer comes up to the pool players beating Rae and pulls his gun out and displays it in an intimidating manner.

Rae, having become ill and further inebriated goes out to the porch. He becomes ill and is then seated outside the bar area. At some time, Brockmeyer after a period of making out with a patron, then goes to Rae, kneels down while Rae has his arms having by his side with his head down. Brockmeyer is seen placing his head next to the victim, with his hand in trigger position against the victim's neck. A pop is heard, a casing goes into the air, and Brockmeyer is next seen shoving the victim and briefly leaved the area headed off to the woods. The victim - shot in the neck - crumples over to the floor. His death likely occurred within 30 seconds of the shot.

Brockmeyer, having thrown the small Ceska pistol and a magazine into the woods, returns and gives a variety of stories and versions to the patrons. He later admits giving a false version to the police as well in his testimony.

Critical evidence to the issues presented are set out within the arguments.

ARGUMENT

I. The trial judge did not err in denying a pre-trial discovery subpoena request to a news organization to compel the disclosure of an anonymous commenter on an internet news site concerning the crime where the court reasonably concluded under the circumstances that the identity of the commenter could be likely determined from other sources where the crime happened at a private club where the patrons had to sign in. A new trial is not warranted where the sought after information was cumulative to some evidence presented concerning the demeanor of the Appellant after the shooting.

This issue concerns the disclosure of the identity of an anonymous comment to a story posted on the WLTX website. As set out below, WLTX opposed the disclosure of the identity to the defense based upon First Amendment and grounds of statutory report privilege. Where there was an alternative manner of seeking and verifying the identities of the attendees at the private bar, the trial judge properly concluded that disclosure by the news organization was protected.

How The Issue Was Raised

On August 3, 2011 (about three weeks before the trial), a motion hearing was held before Judge Cottingham concerning a December 10, 2010 subpoena served by Brockmeyer's counsel on WLTX seeking information about a commenter on their website. In particular, the subpoena sought the production of

> ANY AND ALL REGISTRATION INFORMATION FOR THE USERNAME "**AndTheTruth**" THAT REPLIED ON JULY 12, 2010 @ 1:36 AM EDT TO THE NEWS ARTICLE REGARDING **WILLIAM MARK BROCKMEYER** BEING CHARGED WITH THE SHOOTING DEATH OF **NICHOLAS ALTON RAE**.

Court Exhibit 1, p. 6., R. 800. The record reflects that on the comments to the website article of July 11, 2010 concerning the shooting of Rae and arrest of Brockmeyer, the particular comment:

> AndTheTruth
> 1:36 AM on July 12, 2010
>
> **Were you there, did you see what happened, did you see the tears on his young confused face when he realized he had just accidently killed his friend....**
> - God makes provision for an accidental or carelessly caused death. Judge not, and ye shall not be judged: condemn not, and ye shall not be condemned; forgive, and ye shall be forgiven

> Corinthians 15:54-55:
> So when this corruptible shall have put on incorruption, and this mortal shall have put on immortality, then shall be brought to pass the saying that is written, Death is swallowed up in victory.
> O death, where is thy sting? O grave, where is thy victory?
> - My Heart & Prayers go out to both families & all of my friends who had to see this happen, may God be with you all...

Court Exhibit 1, p. 4. R. 798. (emphasis added).

On January 7, 2011, WLTX, through counsel Jay Bender objected to the subpoena on the grounds that the information sought was constitutionally protected as anonymous internet comment and not subject to disclosure. *January 7, 2011 Letter - Bender to Mauldin, Court Exhibit 1*, p. 9. R. 803. On July 28, 2011, counsel for WLTX (Pacific and Southern Co., Inc.) made another written response additionally asserting the subpoena was not authorized by Rule 13 of the S.C. Rules of Criminal Procedure and that it was protected under S.C. Code Ann., § 10-11-100, described as the news media shield law. *Memorandum of Points and Authorities*, filed July 28, 2011. R. 811-17. In the memorandum, WLTX asserted that there was a constitutional protection for anonymous speech which extends to Internet speech, citing Reno v. ACLU, 521 U.S. 844 (1997). The company argued the sanctity of such speech was protected by Legislation requiring warrants for obtaining Internet communications, citing 18 U.S.C.A. § 2703. The company argues that before the subpoena can be enforced, that he should demonstrate the compelling governmental interest at play, that the interest will be irreparably injured if the speaker's identity is not divulged, the disclosure of the identity would serve the government interest and that no alternatives to disclosure exist. Memo., p. 4. R. 814.

In addition, the company contended that the information was privileged under § 19-11-100. This qualified privilege extended to information, documents, and items obtained in disseminating news. The company asserted that compelled disclosure was not required unless the seeker of the information establishes by clear and convincing evidence that the privilege has been waived or that the production sought:

(1) is material and relevant to the controversy for which the testimony or production is sought;

(2) **cannot be reasonably obtained by alternative means; and**

(3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

S.C. Code Ann. § 19-11-100(B) (emphasis added). He concluded that a failure to make the showing bars the disclosure. The company relied upon a recent order in North Carolina, State of N.C. v. Mead where the disclosure of an internet poster was not compelled under a similar law where the burden had not been met. Memorandum, p. 6, Exhibit D. R. 816.

At the August 3, 2011 hearing, counsel Bender appeared on behalf of WLTX in opposition to the subpoena. Counsel Mauldin asserted that the defense sought the internet poster information so that they could potentially talk to them to see if they would be a potential defense witness. R.p. 3, ll. 1-5. The defense urged that they were entitled to the information under the Sixth and Fourteenth Amendments and S. C. Constitutional right to present a defense which should override the First Amendment right to anonymous internet comment of an internet poster. R. 15-17. He further claimed that under WLTX's terms of service the information could be released. R. 17.

Judge Cottingham noted that at an earlier conference he because aware that there was a plethora of witnesses available and known. He stated if the information exists it could be found by discovery without violation of any privacy rights. Id. Counsel Mauldin confirmed that there were around 20 witnesses at the bar and "I had an investigator that talked to practically all of them." He stated only one witness indicated that they may have seen the shooting and they did not indicate that it was an accident. He claimed that the internet poster claimed that it was an accident which was different than the witnesses they interviewed or that the State had spoken with. R.p. 6, ll. 12-16. He felt this information was different. R. 6.

Judge Cottingham questioned the credibility of the posting where none of the twenty witnesses had

not made a statement that it was an accident. R. 6-7.

Counsel Bender for WLTX asserted that there were three objections to the subpoena. He maintained that it was protected anonymous speech under the First and Fourteenth Amendments, that subpoena seek to expand Criminal Rule 13 for witnesses to be a discovery subpoena under Civil Rule 45 which is not authorized, and that the South Carolina Shield law protects news organizations from being compelled to provide information obtained in the gathering and dissemination. R. 8-9. Bender asserted the anonymous speech protection leads to the question of whether it is a comment on a matter of public interest. R. p. 9, ll. 12-13.

Bender asserted the Court in Doe v. Berkeley Publishers, 329 S.C. 412, 496 S.E.2d 636 (1998) indicated that the commission of a violent crime is as a matter of law a matter of public interest. Counsel Bender contended that with the 20 witnesses, if the information exists, it can be found by interviewing these witnesses. He maintained the fact that it cannot be found calls into question the veracity of the posting. R. 9. He concluded that what is asked is for a news organization to divulge the identity of someone who has posted on a matter of public interest when the information may not be credible, may not be helpful, and is available from other sources. R.p. 10, ll. 6-10. He asked the subpoena to be denied. Id. Counsel Mauldin asserted that the crime occurred at a bar. He said not everyone could have hung around, claiming people could have left. He urged there was no other way for the information. R.p. 11, ll. 6-10.

Judge Cottingham addressed the Solicitor's Office about his concerns. The judge stated that he would like the defense to get the information, even though he questioned the validity of an anonymous person saying they saw it as an accident. However, the judge also was concerned about it as a privacy issue. R.p. 11, ll. 16-23. The court then inquired about the number of witnesses.

Deputy Solicitor Hubbard responded that every witness that they had has been talked to and the defense was provided the names. He described that Jager's Bar had a sign-in list where the members and their guest would sign in. Hubbard stated that they gave them the list and the defense could talk to

everyone who signed in. R.p. 12, ll. 9-13. Counsel Mauldin confirmed that they had been provided the sign-in list. He complained that the signatures were illegible and did not include an address or phone number information. R.p. 12, ll. 16-21. The prosecution, when asked by the court if it could assist, the Solicitor stated it was inquiring if the Sheriff's Department had a computer at the scene to check drivers licenses and identification, but they were not aware if that was done here yet. R. 13.

Judge Cottingham stated that he wanted a legible hard copy made of everyone who signed in as a client that night. R.p. 13, ll. 20-22. The judge further declared he was concerned about the right to privacy and he was not compelled to grant it. His second concern was that the requested information, if it exists, can be determined by interviewing of the witnesses and other discovery. He concluded that the information sought is not necessary in the defense of the case, particularly where there is a sign-in list of everybody who was there. R.p. 13, l. 24 - p. 14, l. 10.

The prosecution confirmed that it would continue to work on the names, but some of them did not want to talk with law enforcement. In further tracking down people who had fled, all the names were given to the defense. Deputy Solicitor Hubbard agreed to talk to the owner (Leslie Lawson) again and contact law enforcement to see if they can pull data lists. R. 15. he stated he would have the answer to the defense and the court later that date.

Judge Cottingham opined that the witness was constitutionally protected. He concluded that given the nature of the case and number of witnesses, if the party exists, it can be determined appropriate discovery without violating the constitutional privileges of the station and the named individual. R. 15-16.[1]

A review of proceedings subsequent to the August 3, 2011 hearing reveals no further mention of

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[1] Judge Cottingham requested counsel Bender to prepare a proposed order in the matter. R. 16-17. A review of the records of the Clerk of Court for Lexington County reveals no written order is on filed concerning the WLTX subpoena. Counsel for Respondent inquired of WLTX counsel Bender prior to preparation of this brief and was advised that he had no written order in his files on this matter.

this issue concerning the internet poster. There is no reference to any pretrial motion for a continuance and no mention of whether or not any additional witness was found or confirmed to the defense that they were the poster.

RECORD EVIDENCE OF TEARS AND LACK OF THEM

As stated, only one witness specifically confirmed she saw the shooting, Gina Brakefield. In the brief, the defense recognizes that there was inconsistent evidence presented concerning tears. The girl photographed with the Appellant who arrived at the bar with him, Mariko Clack, testified that she did not see the shooting, and stated when she saw the Appellant and stated she "saw him like weeping", in response to an inquiry as to whether he was crying that night. R.p. 100, ll. 1-2. She said hours later he was claiming to her he did not do it, although others had said they saw him shoot Nick. R.p. 103, l. 22- p. 104, l. 25, p. 113, ll. 19-25.

Brakefield declared that Brockmeyer "pretended to cry, but would not shed a tear." R.p. 64, ll. 17-20 ("no tears"); p. 79, ll. 2-13 ("wasn't crying", "no actual tears"). Marcus Lesesne stated he did not remember any tears. R.p. 224, ll. 23-24. Also, R.p. 237, ll. 7-9 (Shandon Lesesne) (not crying "it was just loud" screaming).

ANALYSIS

The Issue Is Not Preserved

At the outset, Respondents question whether this issue is preserved before this Court. At the conclusion of the August 3, 2011 hearing, other actions were going to be taken by the prosecution with the owner of the bar concerning the sign-in sheet and identification of others attending the party at Jager's that evening and whether law enforcement had gathered additional identifying information. The record is void of any renewed request for the information at the outset of the trial. As stated above, one witness with connections to Appellant, Mariko Clark, testified about Appellant's weeping after the crime. A reading of the internet comment reasonably was about the tears of Appellant after he realized that he accidentally

killed Rae, not that the commenter actually saw the accident. This is consistent with Mariko' testimony at trial concerning the Appellant running around "like weeping" frantic and holding his head screaming "my brother, my best friend." R. 102. However, no one asked her on the record if he had done the posting as "AndTheTruth." It should be noted that the January 10, 2011 subpoena was not for trial testimony, but was for discovery purposes. "It is well settled that a reviewing court may not consider error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been." State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979); see also State v. Cabbagestalk, 281 S.C. 35, 314 S.E.2d 10 (1984) (failure to make an offer of proof prevents the appellate court from determining whether the exclusion of testimony is prejudicial and thus precludes the appellant from raising the issue on appeal). Here there was no offer of proof at the August 22, 2011 trial during the defense of the case. Tr.p. 736-739. In fact, defense counsel Madsen declared in response to the Court at the outset of the defense case that there were no issues "out there" that needed to be resolved before the defense presented its case, in response to Judge Cottingham's question. Tr.p. 738-739. The WLTX matter is not preserved as a matter of trial error.

There Was No Compulsory Process Issue Presented.

The Appellant in his brief makes an assertion about the right to compulsory process. Initial Brief of Appellant, p. 9. However, he did not seek to subpoena any particular witness to the Court for the August 22, 2011 trial, only to have pretrial disclosure for discovery purposes on the basis of the January 10, 2011 subpoena. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). "This right is a fundamental element of due process of law." Id. State v. Inman, 395 S.C. 539, 561, 720 S.E.2d 31, 43 (2011).

The Supreme Court has explained, "more than mere absence of testimony is necessary to establish a violation of the right [to compulsory process]." United States v. Valenzuela-Bernal, 458 U.S. 858, 866,

102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982). "This language suggests that [a defendant] cannot establish a violation of his constitutional right to compulsory process merely by showing that [he was deprived of witnesses' testimony]. He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense." Valenzuela-Bernal, 458 U.S. at 867. Appellant has made no showing that WLTX could have offered any favorable, material, and noncumulative evidence in support of his defense. See Valenzuela-Bernal, 458 U.S. at 873 (defendant must show that the evidence "would have been material and favorable in ways not merely cumulative to the testimony of available witnesses."). In light of Ms. Clack's testimony, Brockmeyer has failed to make any showing of a compulsory process denial where the potential testimony, at most, would have been cumulative to her testimony. Further, there is no showing that the government impeded th disclosure in any manner. To the contrary, the prosecution agreed to seek the alternate ways to get the identity of all individuals who attended the party through the bar owner and law enforcement. As stated, it is not known whether the anonymous internet commentator actual testified on this record.

The Poster's Identity Was Reasonably Found to Be Protected

Anonymous speech has played an important role in the history of this country. "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy or of dissent." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 356, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). This First Amendment protection has been extended to material on the internet as well. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet]."). Unlike our Shield Law, this protection is a qualified privilege that requires the balancing of other rights against the right to anonymous speech, most commonly the right to seek redress for an injury. See, e.g., McIntyre, 514 U.S. at 353, 115 S.Ct. 1511 (balancing right to anonymity and right to protection from fraud).

The Appellant further claims that the anonymous poster had no right to privacy because of the comment about a crime. Our Supreme Court has defined the "right to privacy" as the right of an individual to be let alone and to live a life free from unwarranted publicity. Sloan v. South Carolina Dep't of Pub. Safety, 355 S.C. 321, 586 S.E.2d 108 (2003). However, " 'one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest.' " Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (quoting Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956)). Indeed, the Court has held that, as a matter of law, "if a person, whether willingly or not, becomes an actor in an event of public or general interest, 'then the publication of his connection with such an occurrence is not an invasion of his right to privacy.' " Doe v. Berkeley Publishers, 329 S.C. 412, 414, 496 S.E.2d 636, 637 (1998) (quoting Meetze, 230 S.C. at 337, 95 S.E.2d at 609). The counsel for WLTX conceded that the commission of a violent crime is a matter of public significance.

It does not follow that disclosure of identity of mere commenters about a crime must occur because the comment was about a crime. As WLTX noted, it is the because the event was in the public interest so the speech was in the public interest. Therefore his anonymous speech identity is protected by the First Amendment.

The Appellant incorrectly contends that internet commenter had no expectation of privacy because of the WLTX terms of service, which authorized WLTX to identify the postings by name, email address or screen name , as we [WLTX] deem appropriate. WLTX.com Terms of Service, Court Exhibit 1. ROA _ . The website's privacy notice informed the users that their personal data where it declared that they may disclose such content and materials if required to do so by law or if in their business judgment , such preservation or disclosure is reasonably necessary to "1) comply with legal process . . ." Court Exhibit 1, Terms of Service, p. 2. R. 805. Respondent submits that this term of service agreement does not remove the protections for the anonymous speech. It only stated the obvious, that it was up to WLTX to determine

whether to identify the posters in very limited circumstances. Like the situation in McVicker v. King with a similar argument being rejected, the terms of service policy created a reasonable expectation of privacy. His assertion in the Brief is without merit.

Disclosure Was Not Required Under Section 19-11-100(B).

At trial, WLTX argued that compelled pre-trial disclosure was not required unless the seeker of the information establishes by clear and convincing evidence that the privilege has been waived or that the production sought:

(1) is material and relevant to the controversy for which the testimony or production is sought;

(2) **cannot be reasonably obtained by alternative means; and**

(3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

S.C. Code Ann. § 19-11-100(B) (emphasis added). He concluded that a failure to make the showing bars the disclosure. The trial court found this argument compelling in rejecting the disclosure.

The Appellant failed to show that the information sought - the identity of a person who declared on the website "[W]ere you there, did you see what happened, did you see the tears on his young confused face when he realized he had just accidently killed his friend" - could not have been obtained from alternate sources other than disclosure of the WLTX anonymous internet speech material. At the pre-trial discovery motion hearing, it was presented that the club had a sign-in sheet with the names of the club members and guest who attended. The prosecution declared that they had provided the sign-in list of attendees that night to the defense and provided them with all of their interviews of the attendees. They also stated that they would contact the club owner to seek further assistance in identifying attendees as well as seeing if law enforcement acquired additional information at the scene. In addition, during the trial, the owner of Jager's Bar, Leslie Lawson testified that the club was a member only club. R.p. 243-44. She stated that they had a sign-in list of everyone coming in and that the guest had to sign in with a member. She stated, it was the

same people day in and day out that came in. R.p. 244-45.

The Appellant complained that the proffered sources were inadequate because few of the state witnesses actually witnessed the incident so the information from the commenter was not reasonably available from them. His claim that the sign-in sheet was essentially useless (Initial Brief of Appellant, p. 11) is a feckless assertion in light of Leslie Lawson's testimony that the same people came into the bar day in and day out and that they had to be members or their identified guest. Certainly, the defense had the ability to inquire of her concerning her knowledge of the membership and the sign-in sheet as to the members and guest present that night. Certainly the pool of potential witnesses about Appellant's demeanor when he realized he had killed his friend, in response to other negative postings on the WLTX internet site, could have been potentially located. While it was no guarantee that it listed all who were present, under the bar's policy, it should have included the names all who attended the party.

The Appellant asserts that the South Carolina Shield Law did not apply to the situation because it provides the qualified privilege to a news outlet or journalist against the disclosure of any information obtained or prepared in the gathering or dissemination of the news." S.C. Code Ann. Section 19-11-100(A). However, WLTX reasonably noted that the information sought was obtained in the dissemination of news which provided web dissemination of its news reports and an opportunity for that public to comment on the stories, even through pseudonyms or anonymously. Looking at legislative intent, in enacting the privilege, the General Assembly found that "the threat of compelled testimony or production of information , documents , or items obtained . . .in . . .disseminating news to the public interferes with the free flow of information to the public." Act No. 138, Acts and Joint Resolutions of the General Assembly of South Carolina (1993).

The Appellant contends that the anonymous comment was unsolicited and made on a publicly viewable website. What the Appellant fails to recognize that the very essence of the anonymous source evident in the comment on the news website on matters of public concern is precisely what the Report's

Shield law is designed to protect. His argument otherwise must be denied.[2] Judge Cottingham did not abuse his discretion in denying the motion to compel disclosure in the of the available alternatives.

Alternately, the Appellant requests this Court to adopt a new test, based upon McVicker v. King, 266 F.R.D. 92 (W.D. Pa. 2010) and apply it to this case because South Carolina has not specifically addressed this issue before. The McVicker test is not much different that the Section 19-11-100 test stated above. In McVicker, the district court applied the following similar standard:

(1) The subpoena seeking the information was issued in good faith and not for any improper purpose;
(2) the information sought relates to a core claim or defense,
(3) the identifying information is directly and materially relevant to that claim or defense, and
(4) the information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

Enterline v. Pocono Med. Ctr., 751 F.Supp 2d 782, at 787 (M.D. Pa. 2008) (quoting Doe v. 2TheMart.com Inc., 140 F.Supp.2d 1088, 1095 (W.D.Wash.2001)). Other courts have considered similar factors. See, e.g., Highfields Capital Management, L.P. v. Doe, 385 F.Supp.2d 969 (N.D.Cal.2005); 2TheMart.com, 140 F.Supp.2d at 1091-92, Mobilisa, Inc. v. Doe, 217 Ariz. 103, 170 P.3d 712, 721 (Ariz.App.Div.2007); Dendrite Int'l, Inc. v. John Doe No. 3, 342 N.J.Super. 134, 775 A.2d 756, 760–61 (App.Div.2001). In each of these standards, it includes an equivalent requirement that the information is unavailable from any other source. As set out above, critical to Judge Cottingham's denial was his conclusion that the information was

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[2]Similarly, in Colt v. Freedom Communications, Inc, 109 Cal.App.4th 1551, 1 Cal.Rptr.3d 245 (2003), the appellate court held the privilege applied to a newspaper's published articles and internet postings on its own Web site that "fairly described the nature of" a stock manipulation scheme detailed in an SEC complaint. (Id. at pp. 1554–1555, 1559, 1 Cal.Rptr.3d 245.). "As news organizations have experimented with ways to encourage their readers to interact with their online news products, one of the most popular options has been to allow readers to post comments adjacent to a story." Jane E. Kirtley, *Mask, Shield, and Sword: Should the Journalist's Privilege Protect the Identity of Anonymous Posters to News Media Websites?*, 94 Minn. L.Rev. 1478, 1488 (2010). As many of these cases illustrate, news organizations that host websites recognize that permitting anonymous (or pseudonymous) postings encourages robust debate and helps promote the First Amendment interest of "protect[ing] unpopular individuals from retaliation--and their ideas from suppression." See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

available from other sources. This conclusion is well supported by the record before this Court.

II. The Confrontation Clause was not violated by the testimony of various witnesses concerning the chain of custody of numerous items. Crucial steps in the chain were testified by witnesses present at trial. Further, any alleged error was harmless where the Appellant testified about the fact of the shooting with the weapon which he disposed of in the woods.

The State presented a series of witnesses to establish the chain of custody of various items recovered at the scene and tested by SLED forensics. The prosecution's presentation included the presences of the witnesses who participated in the chain and were crucial. Each of the witnesses testified about the fact of their own review of the items and whether they found them sealed properly from tampering. The only witnesses in the chain not called were incidental transfer witnesses within the evidence chain who either delivered or received the sealed item from a witness who testified. Although a log was used by the evidence custodians to report transfers, as a business record, the log was not introduced nor did it indicate any "testimonial" matter about whether the non-called witnesses reported the items sealed or the test results. Since no "testimonial" matter was presented, under Melendez-Dias v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), there was no confrontation clause violation. The Appellant had the opportunity to examine each of the crucial witnesses in the chain who testified. The Constitution does not require more.

The Appellant contends that the trial court committed a violation of the Confrontation Clause in permitting the State to establish the chain of custody of five (5) items of evidence through the use of computer log by the SLED evidence custodian, rather than placing each witness in the chain on the witness stand. The trial court relied upon State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) to authorize the witness's reliance on the business record of the agency used to track evidence within each agency, the South Carolina Law Enforcement Division and Lexington County Sheriff's Department in denying each of the Appellant's objections to the evidence. R.p. 424, ll. 19-24, p. 499-501, 537, 542, 555, 585, 572, 717. Respondent submits that the trial court did not abuse its discretion in the admission of the evidence where the records that Lexington and SLED evidence custodians relied were kept in the regular course of business

for tracking the location of material within the agency, not for use essentially in court and that the prosecution presented the crucial witnesses to the chain of custody, consistent with the Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). Further, as revealed below, any error in the admission of the exhibits chain of custody was harmless.

In his brief before this Court, the Appellant identified five (5) items that he is apparently challenging concerning the testimony of Margaret Harmon, the evidence custodian of Lexington Sheriff's Department, and Amy Simmons, the evidence custodian at SLED. In particular, he notes the admission of a white Sean John T-shirt (State Exhibit 25), a shell casing recovered at the Jager's Bar (State Exhibit 28), a pistol magazine (State Exhibit 30), a pistol [Ceska .380 pistol] (State Exhibit 48), and a bullet (recovered at the autopsy) (State Exhibit 53). Respondent submits that consistent with Melendez-Diaz, the crucial steps and witnesses to those steps were presented as to each item and they were presented live and subject to examination. At no time during the trial did the Appellant contend that any witness to a crucial step in the chain was not called - instead he asserted that every chain step witness had to be called. This is not required under state procedure (Hatcher) or the constitution (Melendez-Diaz).

In his argument before this Court, he complains that the State failed to call "witnesses whose testimony was contained in the log and stated the could have been called and been cross-examined. Tr. 16. While he states the unintroduced "log purported to prove each piece of evidence was untainted". He is in error because the log merely showed the existence of a transfer. The proof that it was not tainted was presented through the actual witnesses who testified at the trial. The Appellant suggests that because he objected that under Crawford v. Washington and Melendez-Diaz the prosecution had to present every witness. We disagree. As stated, the evidence presented mut be presented live, not merely through a document. In this case, the crucial steps of each exhibit's custody was presented from receipt through the testing by live witnesses, just not every custodian. The Confrontation Clause does not demand it.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011). State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

Chain of Custody

The issue before this court is not a claim that the chain of custody was not shown. It is only that the Confrontation Clause was violated. The trial judge relied upon State v. Hatcher, supra., concerning th chain. "[T]his Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Hatcher, supra., citing State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). "Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." Benton, 232 S.C. at 33–34, 100 S.E.2d at 537 (citation omitted). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." Sweet, 374 S.C. at 7, 647 S.E.2d at 206 (citing State v. Taylor, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct.App.2004)). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." Id. "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession *because the identity of those who handled the [substance] was not established at least as far as practicable.*" Id. (emphasis added). In Hatcher, the Court stated: "It is unnecessary ... that the police account for 'every hand-to-hand transfer' of the item; **it is sufficient if the evidence demonstrates a reasonable assurance the condition of the item**

remains the same from the time it was obtained until its introduction at trial." State v. Hatcher, supra. 392 S.C. at 94, 708 S.E.2d at 754.(emphasis added). As stated therein,

> The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable. This determination will necessarily depend on the unique factual circumstances of each case.

Hatcher, supra. "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '... the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.' " Id. (citation omitted). "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." Id, at 392 S.C. 94-95, 708 S.E.2d at 754-755. As the court concluded:

> The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable. This determination will necessarily depend on the unique factual circumstances of each case.

Hatcher, id.

CONFRONTATION CLAUSE ISSUE

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Confrontation Clause guarantees a defendant's right to confront those "who 'bear testimony' " against him. Id. at 51. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. Id. at 54. The Crawford opinion described the class of testimonial statements covered by the Confrontation Clause as follows:

> Various formulations of this core class of "testimonial" statements exist: " ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,";

> "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]"

Id. at 51–52 (internal citations omitted). In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), the prosecution introduced affidavits reporting the results of forensic analysis, which confirmed that the substance seized by the police and connected to the defendant was cocaine. The Supreme Court held that the affidavits were testimonial in nature, as they had been created for the sole purpose of providing evidence against the defendant and were "functionally identical to live, in-court testimony." Id. at 310-11. Thus, the affiants were witnesses subject to the defendant's right of confrontation, and without a showing that the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them, the defendant was entitled to cross-examine the analysts at trial. The Court also rejected the claim that no Confrontation Clause violation had occurred because the defendant had the ability to subpoena the analysts:

> Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he chooses.

Melendez–Diaz, 557 U.S. at 324–25.

Justice Scalia, writing for the majority, made the point that not all documents produced by a business fall within the business records exception. He cited Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943) (Palmer) as a case that makes this distinction clear. In Palmer, a railroad employee wrote an accident report as part of his job. Justice Scalia noted that the accident report "did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was 'calculated for use essentially in the court, not in the business.' [Citation.]" Melendez–Diaz, supra, 557 U.S.

at p. 321, 129 S.Ct. 2527.

In making this point, Justice Scalia noted that documents kept in the regular course of business may ordinarily be admitted under the business records hearsay exception, but "not ... if the regularly conducted business activity is the production of evidence for use at trial." (Melendez–Diaz, supra, 557 U.S. at p. 321, 129 S.Ct. 2527.) This sentence should not be read to mean that if the nature of the business is producing forensic evidence, as in the case of a testing laboratory, none of its records can ever qualify as a business record. Close reading of Melendez-Diaz reveals this to be a misinterpretation. In relying on Palmer, supra, 318 U.S. 109, 63 S.Ct. 477, Justice Scalia drew a distinction between those routine documents and notations created as part of the business's direct operations, as opposed to documents written for the external purpose of defending a court case. Although the Palmer litigation report was written to serve the business's interest, it was not the kind of routine document encompassed by the business records exception. It was not a document created as part of the day-to-day running of the railroad. The application of the Palmer distinction, focusing on why a document was produced, foreshadowed the "primary purpose" analysis later employed in Sixth Amendment confrontation cases.

The Melendez-Diaz majority contrasted the railroad accident report in Palmer, supra, 318 U.S. 109, 63 S.Ct. 477, with records "prepared for the administration of an entity's affairs, and not for use in litigation," citing as examples cases involving admission of a ship's muster book, a vestry book, and a prison logbook. (Melendez-Diaz, supra, 557 U.S. at p. 321, fn. 7, 129 S.Ct. 2527.)

The Melendez–Diaz majority explained that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because - having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -they are not testimonial." Melendez–Diaz, supra, 557 U.S. at p. 324, 129 S.Ct. 2527.

More particularly, the Court held that chain of custody documents alone does not implicate the

Confrontation Clause. See Melendez-Diaz v. Mass., 557 U.S. 305, 129 S.Ct. 2527, 2532 n. 1, 174 L.Ed.2d 314 (2009) ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While ... it is the obligation of the prosecution to establish the chain of custody, this does not mean that everyone who laid hands on the evidence must be called.... [G]aps in the chain of custody normally go to the weight of the evidence rather than its admissibility.") (internal quotation marks and citations omitted).

In Melendez–Diaz, the Supreme Court cautioned that "[i]t is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live." 129 S.Ct. at 2532 n. 1. Accord, State v. Gomez, 226 Ariz. 165, 168, 244 P.3d 1163, 1166 (Ariz.,2010) The chain of custody testimony did not violate the Confrontation Clause simply because every technician who handled and processed the samples did not testify. See Melendez–Diaz, 129 S.Ct. at 2532 n. 1.

Jamerson v. State, 2012 WL 5333412, 4 (Tex.App.-Dallas) (Tex.App.-Dallas,2012). The Confrontation Clause does not mandate "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case"); State, ex rel. Roseland v. Herauf, 819 N.W.2d 546, 556 (N.D., 2012) (cites Melendez chain of custody statement); State v. Nez, 148 N.M. 914, 918, 242 P.3d 481, 485 (N.M.App.,2010) (a person who draws a blood sample for a test whose results are introduced into evidence need not testify at trial).

While it is true the prosecution in this case had evidence custodian witnesses testify in reliance upon their chain of custody forms live, the actual forms were not introduced. Instead, it was the defense who repeatedly raised the chain of custody, noting there were numerous people who would have had access to

the evidence. Respondent submits that this court should hesitate to label this as the kind of case the Supreme Court was referencing when it noted that the prosecution may sometimes deem "the chain of custody crucial so as to require evidence." Id.; see also United States v. Summers, 666 F.3d 192, 197–201 (4th Cir.2011) (distinguishing Bullcoming v. New Mexico, _U.S. _, 131 S.Ct. 2705, 2713–16, 180 L.Ed.2d 610 (2011)[3] and Melendez–Diaz, 129 S.Ct. at 2531–32, and find no Confrontation Clause violation where the witnesses who sealed placed the material from the scene into the hand of the custodian and the persons who unsealed the exhibits testified, and the prosecution did not put on each witness who handled the items of evidence. In State v. Cutro, 365 S.C. 366, 378, 618 S.E.2d 890, 896 (2005), the Court determined that the a public business record, very much like a business record, is not testimonial and its admission similarly does not violate the defendant's confrontation rights.

Shell Casing at Scene (State Exhibit 28)

The shell casing found at Jager's Bar (State Exhibit 28) was photographed in State Exhibit 23. R. 304. Investigator Day testified that the spent cartridge was placed by him into a film canister then placed it in a brown bag. R. 305-06. He stated that he sealed the bag with security tape and then dated it and signed it. R. 306. He testified after he packaged it, he turned the item into the property room to the custodian, Margaret Harmon on July 12, 2010 at 14.33. R.p. 332, l. 4 - p. 333, l. 13.

Evidence custodian Harmon testified that she received the item sealed. R. 418. She stated she signed it in evidence at 16.43. She stated on July 14, 2010, evidence custodian Candy Kyzer released the item back to Investigator Day at 9:16. R.p. 431, ll. 5-7. Day released the item to SLED control technician Amy Stephens at 10:19. R.p. 431, ll. 8-10.

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[3]In Bullcoming v. New Mexico, _U.S. _, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), the Court held a scientific report could not be used as substantive evidence against a defendant unless the analyst who prepared and certified the report was subject to confrontation. The Court also reiterated that an analyst's certification prepared in connection with a criminal investigation or prosecution is testimonial and therefore within the compass of the Confrontation Clause. Id. at 2713–14.

Amy Stephens testified she received the item from Day. R.p. 489, ll. 10-20. She stated she accepted this item on July 14, 2010 at 10:19 from Day and transferred the item to the firearms evidence intake storage at the same time. R.p. 491, ll. 12-16. She testified that on July 20, 2010, at 3:59, forensic technician retrieved it from firearms intake and transferred it at 3:39 p.m. to forensic scientist Michelle Eichenmiller. (Testified). R.p. 491, ll. 17-24.

Michelle Eichenmiller testified that when she receives items from log in it will be in a sealed container. R.p. 551, ll. 16-25. She described that she would open it and view it and take pictures of the markings. R. 552. She states she will mark what she receives with the case number, item number and her initials. R. 553. She testified she examined State Exhibit 28. She opined that the cartridge casing was fired by the Ceska pistol. R. 554-55.

On August 13, 2010, the item was returned from Eichenmiller to evidence custodian Yarborough who transferred it to shelf 3-C at 3:39. R. 491-92. On September 1, 2010, Stephens (testified) transferred the item to Lexington County Sheriff's Department. R. 491-92, p. 431, ll. 10-13 (Harmon).

Stephens testified that they work on a "said to contain" policy and go on the documentation. They do not open packages and do not inventory the evidence. R.p. 492, ll. 13-17, p. 493, l. 24 - p. 494, l. 16. The officer will seal the items and sign the signature pad. She said her department does not open exhibit items, unless they have to open it to separate items for different departments. R. 494.

Stephens described the computer printout is created so the department can audit the evidence it has received. R.p. 495, ll. 1-7.

Respondent submits the critical steps were reported by live testimony and witnesses presence consisted with Crawford and Melendez-Diaz, the recovery and transfer by Day, transfer to Lexington, receipt by Harmon, receipt by Stephens and receipt and testing by Eichenmiller. The incidental transfers by Kyzer was to a witness (Day) and by forensic tech Yarborough was to witness Eichenmiller who tested

it. The confrontation concerns have been satisfied by the crucial witnesses testimony and presence.

Sean John Shirt

The chain of custody of Exhibit 25, the Sean John shirt worn by the Appellant was presented through witnesses at trial. Initially shown being worn by Appellant in State Exhibit 3 and 4, Investigator Day testifies about his discovery of the shirt on the car (R. 296) (State Exhibit 15). He described boxing and sealing the exhibit. R. 331-32. He stated that he handed it over to the custodian, Margaret Harmon. R.p. 332, l. 25. He stated this occurred on July 12, 2010 at 14:33. R.p. 333 ll. 1-13.

Ms. Harmon testified about her records of the chain of custody within the Sheriff's Department. R. 429-30. She testified she received from Day on July 11, 2010 at 4:30, provided to Day on July 14. R. 429. SLED evidence technician Amy Stephens testified she received it (consistent with Harmon's testimony) from Day on July 14, 2010. R. 496. She testified that Ila Simmons received the item July 15, 2010 at 2:30 p.m.

Ila Simmons testified that she received the sealed box with the T-shirt and opened it. R.p. 525, l. 6. She testified she performed gunshot residue analysis on the shirt. R.p. 526, ll. 1-18. She stated she did particle lifts from the shirt. R.p. 530, ll. 1-23.

Agent Stephens stated on August 11, Lisa Waananen received the evidence from Simmons. R.p. 498, ll. 12-13. [Note Simmons testified]. Agent Stephens testified further about the item being transferred from Waananen to Patricia Crooks who placed it on an intake shelf on August 11, 2010.

On October 20, 2010, forensic tech Doris Yarborough removed the item from the shelf and gave it to forensic technician Betty Butler (who testified). R.p. 498, ll. 17-23.

Agent Butler testified she received the t-shirt sealed and not tampered with in a container. R. 536-37. She testified that she took cuttings from the shirt (items 9.1, 9.2, 9.3, 9.4, 9.5, 9.6). R. 537-542. She described the sealing of the envelopes in the matter. R. 541-42. she described returning the sealed items

into the box and sealing the box and then returning it to the evidence control department. R.p. 543, ll. 10-19.

Amy Stephens testified that on October 25, 2010 at 3:37 Nikki Perry Hughes received the evidence from Betty Butler and transferred it to a shelf in the evidence control room at the same time. The shirt was transferred on Dec. 1, 2010 by Crooks to Candy Kyzer with the Sheriff's Department. Lexington custodian Harmon testified the items were returned on December 1, 2010. R.p. 430, ll. 5-6.

Harmon stated on July 8, 2011, she released the item to Investigator Day (who testified) who released it to Nikki Perry at SLED. R.p. 430, ll. 10-12. SLED Agent Simmons testified Perry received it on July 8, 2011 and on the same day provided it to Melissa Wallace (who testified). R.p. 499, ll. 8-13.

Melissa Skipper Wallace testified she received the shirt items and shirt cuttings. R. 569-70. She stated when she received them they were sealed and had not been tampered with. R.p. 570, ll. 8-15. She stated she made additional swabs from the shirt and sealed and sent them to DNA. R. 571-72, 578.

The cuttings from the shirt (items 9.2, 9.3, 9.4) were made by Betty Butler were transferred into a container on October 20, 2010 in DNA Dept. drawer. On January 19, 2011, DNA forensic scientist Paul Meeh received the evidence from the drawer. (Paul Meeh testified).

As to swabs 9.5 and 9.6 made by Melissa Skipper Wallace, she transferred 9.5 in container J gave it to Perry (evidence control) who transferred it to DNA intake shelf. On July 19, Stephens retrieved it and transferred it to Meeh. R.p. 503, ll. 9-20.

Paul Meeh testified that when he received the items for testing they were all sealed. Tr. 643-45.

Pistol Magazine (State Exhibit 30)

The pistol magazine was found by Investigator David Day the morning they were processing the scene. R. 307. He went over on the other side of the privacy fence to look for a weapon. He located the magazine which is shown in State Exhibit 29. R. 307-08. He testified that he placed the magazine in a bag

that was sealed shut with tamper proof tape. He testified that he examined it for fingerprints using low lighting without success. R. 310. Rather than dusting for fingerprints, Investigator Day made contact with Det. Grant and they decided to send it to SLED to have it tested for "touch DNA." R. 310-11. In addition, Day testified that he swabbed the entire magazine, put it in a special contained, then put it in a box and sealed it. R. 313. Day testified that when they found the magazine tow live rounds were in the magazine. R. 320-21.

Evidence custodian Harmon testified that magazine was turned in by Day at 4:30, July 11, 2010 and had remained in custody until it was introduced in court. R. 431.

The two bullets from the magazine (item 21) (State Exhibit 42) was placed by Day in a canister and a bag and secured with tape. R. 321-23. Lexington custodian Harmon testified it was received from Day by her on July 12 at 16:43. It was then released by custodian Kyzer to Day on July 14, 2010. On July 14, 2010 at 10:19, Day released it to SLED evidence custodian Stephens. R. 432.

Stephens testifies that she received it sealed on July 14, 2010. The chain of custody at S.L.E.D. is the same as the shell casing recovered at the scene (State's Exhibit 28) set forth above. Like that item, the crucial witnesses concerning the dealing of the exhibit were Day, Harmon, Stephens and Eichenmiller, each of whom testified in court. R. 554, 557.

The swab from the magazine by Day sealed in the canister and identified (State's Exhibit 31) was introduced by stipulation. R.p. 495, l. 23 - p. 496, l. 12. *See also*, R.p. 432, ll. 10-24. (Harmon testimony concerning Lexington chain).

Ceska .380 Pistol (Exhibits 45, 48)

The Ceska .380 pistol, State's Exhibit 48 was discovered by Investigator David Day on July 13, 2010. R. 323-24[4] and was located without a magazine, but with one live round. R. 328-29. Day stated the

[4] Day stated that they had searched for the weapon in the woods on July 11th, but were unable to locate it. R. 319-20. They returned on July 13th after a rainstorm. R. 319.

weapon was still wet when recovered and started rusting. R. 331. He stated that it was photographed (State's Exhibits 45, 46, and 47). He stated that he placed the pistol inside a white box, sealed it with evidence tape, closed it, wrapped it and signed it. R.p. 331, ll. 20-24. Once packaged, he stated he delivered to Ms. Harmon at the Lexington Sheriff's Department on July 13, 2010 at 4:30. R. 332-33. He noted he had the items secured in a container, wrapped in tape, signed and dated. R. 333-34.

Evidence custodian Harmon testified that she received the sealed Ceska pistol on July 13, 2010 at 2:53 p.m. R.p.. 421, l. 9 - p. 422, l. 25. Also, R.p.. 433, ll. 3-6. She stated it was sealed when received and that they did not cut open the box. R. 422.

Harmon reported that on July 14th, evidence custodian Kyzer gave the exhibit to Day at 9:16 and reported Day released it to S.L.E.D. evidence control technician Amy Stephens on July 14, 2010 at 10:19. R.p. 433, ll. 3-11.

S.L.E.D. evidence technician Amy Stephens testified and confirmed receipt from Day on that date. R.p. 505, ll. 15-17. Stephens testified that she placed the evidence into the secured evidence processing intake area. She reported that on July 23, 2010, evidence tech Nikki Perry received from intake and transferred the item to forensic tech Betty Butler at 10:17. R.p. 505, ll. 21-24.

Forensic tech Betty Butler testified and confirmed she had received it. R. 543-44. She testified that when she received the box, it was properly sealed and secured. R.p. 544, ll. 14-16. She testified that she swabbed the pistol and created two items, 16.1 and 16.2 (State's Exhibit 74). That she placed in envelopes, sealed, and eventually placed in a heat-sealed bag. R. 545.

Butler also testified that after completing her processing of the pistol, she placed it into the same box, put the item number (16.0) on the handgun, her initials, and sealed it up and relinquished custody to Michelle Eichenmiller in S.L.E.D. firearms department. R.p. 546, ll. 1-13.

Amy Simmons reported that Butler relinquished custody to Eichenmiller on July 23, 2010 at 11:42

a.m. Tr. 563-64. Michelle Eichenmiller testified and confirmed receipt. R. 553-54. She described her processing of the evidence upon receipt. R. 551-52. She testified the weapon was delivered to her sealed, taped and packaged. R.p. 554, ll. 3-7. At that point, she opened it. R.p. 554, l. 7.

She reported on her testing and opined that a bullet recovered (State's 53) was fired by that pistol and the cartridge (State's Exhibit 28), had been fired by that pistol. R. 554-55, 557-58. She also opined that there was a 6 pound trigger pull on the weapon. R. 561-62. She further opined that the gun in the photo represented that it was jammed. R. 562-63.

Amy Stephens reported that the two swabs from the pistol created by Butler were transferred to the DNA department drawer on July 23, 2010 at 4:39 p.m. She reported that DNA forensic scientist Paul Meeh received the evidence on October 7, 2010 at 2:14 p.m. Paul Meeh testified at trial. R. 585. He stated that matters brought to him are in a heat-sealed pouch. R. 585. He stated all the items he received were all sealed and not tampered with, including the two swabs from the handgun. R.p. 586, ll. 11-15, p. 587, l. 10-13. He could not develop human DNA from the swabs. R.p. 597, ll. 4-10.

Recovered Bullet from Autopsy (State's Exhibit 53)

The recovered bullet from the victim at the autopsy (R. 364, 366, 368-69) was ultimately determined to be fired from the recovered Ceska pistol. (R. 557-58).

Respondent submits that the evidence of the chain of custody was presented through live witnesses of the crucial stages of recovery and transfer consistent with the Confrontation Clause. His suggestion of a requirement of witnesses who transferred the item to a witness who testified is not required under the Constitution.

The Pathologist, Dr. Bradley Marcus, testified that he located a bullet wound and felt the bullet under the victim's skin. R.p. 612, ll. 13-18. He recovered the bullet and plucked it out of skin. R.p. 615, ll. 12-16.

Lexington County Investigator Troy Crump attended the autopsy and collected items. Tr. 419. In particular, he collected the fired projectile from the pathologist. R.p. 365, l. 21 - p. 367, l. 17. This recovery of the item was reflected in photograph, Exhibit 52. Investigator Crump testified that he described the projectile being placed in a bottle and sealed and labeled by the pathologist and sealed. It was dated 7/11/10 (the day of the autopsy) and placed in a bag within a bag. The bag was heat sealed. R. 368-69. After the bag was heat sealed, Crump testified that he took the bag to the Sheriff's Department without tampering with it. R. 372-73. He stated that he placed it in his laboratory on Sunday, and Monday turned it over to the property evidence custodian. R. 373-74. It had not been tampered with when he had transferred it. [He noted at trial that the bag reflected it had subsequently been cut open.]. R. 374. He stated he turned the item over to Lexington evidence custodian Beth Harmon on July 12th. R.p. 374, l. 18 - p. 375, l. 7. It was in the same condition he had received it from the pathologist. R. 375.

Beth Harmon testified that she received the item (State's Exhibit 53) from investigator Crump and did not alter it. R.p. 415, l. 14 - p. 416, l. 7. Harmon reported that Crump had received the item at the Newberry Hospital on July 11, 2010 at around 11:09. R.p. 428, ll. 19-24. She testified that on July 12, 2010 around 9:47, the item was received by her from Crump and signed in. R.p. 428-29, l. 3. She stated on July 14, 2010, she transferred the item to Investigator Day. R.p. 429, ll. 3-8. Harmon reported that Day released the item to S.L.E.D. custodian Amy Stephens on July 14, 2010 at 10:19. R.p. 429, ll. 7-8.

S.L.E.D. evidence tech Amy Stephens testified and confirmed her receipt of the item. R.p. 488, l. 23 - p. 489, l. 10. Stephens declared she received the item at 10:19 on July 14, 2010 from Investigator Day and transferred it on July 14, 2010 at 10:19 to the firearms intake storage. Harmon reported on July 20, 2010 at 3:59 that custodian Doris Yarborough retrieved the item and transferred it to forensic firearms examiner Michelle Eichenmiller. R.p. 491, ll. 20-24.

Michelle Eichenmiller testified that she was delivered the projectile from the autopsy for testing.

R.p. 557, ll. 19-21. As with the earlier discussed casing (State's Exhibit 28), she described her processing of the items she received. R. 553-54. She opined the bullet was fired by the Ceska pistol. R. 554-55, p. 557, l. 19-25. It was reported by Stephens that State's Exhibit 53 was returned by Eichenmiller to evidence custodian Yarborough on August 13, 2010 at 3:37. R.p. 491, l. 22- p. 492, l. 2.[5]

As with the other items, chain of custody crucial witnesses were presented live, including Dr. Marcus, Investigator Crump, Lexington evidence custodian Harmon, Investigator Day, S.L.E.D. evidence custodian Stephens, and the forensic firearms examiner Eichenmiller. The non-crucial transfer witnesses - Doris Yarborough - was not crucial because the person she transferred it to Michelle Eichenmiller was available for examination and did testify.

Under Melendez-Diaz, the reliance by witness Stephens upon her documentation, a properly prepared business record, did not violate the Confrontation Clause where live testimony was presented concerning the critical stages and the critical stage witnesses testified. The opportunity to confront and cross-examine them was available, as required under Crawford. His claim must be denied.

HARMLESS ERROR

In any event, our inquiry into whether the government deemed the individual links of the chain of custody to be so crucial as to require evidence need not proceed any further because even if Appellant is able to convince this court that it was error, any alleged error was harmless. Confrontation Clause violations can be considered harmless. See United States v. Ignasiak, 667 F.3d 1217, 1235 (11th Cir.2012). "The test for determining whether a constitutional error is harmless is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 1235 (internal quotation marks omitted).

The Appellant's own testimony confirmed his possession and use of the gun at the time of the fatal

[5] The remainder of the post-testing chain is set out in the testimony of Stephens, R.p. 492, ll. 3-8 and Harmon, R.p. 429, ll. 9-12, concerning its return to Lexington County.

injury to the Appellant. R. 653, 676, 686. He described the magazine coming out of the gun and being through by him with the gun over the fence. R. 653-54. He admitted that he threw them away because he feared that he would go to jail if caught in possession of the weapon. R. 688. Independent evidence showed that he was wearing the Sean John shirt. State Exhibit 3, State Exhibit 4. The admission of the testimony concerning the chain of custody did not seriously affect the fairness, integrity or public reputation of judicial proceedings. See U.S. v. Johnson, 688 F.3d 494, 505 -506 (8th Cir 2012) (new trial not required where error in admission of lab report where defendant admitted that item on property was the drug); People v. Lopez, 147 Cal.Rptr.3d 559, 574 -575 (Cal.,2012) .[6] Any alleged error was harmless.

III. The trial court properly used its discretion in admitting a Photograph of the Appellant to corroborate the testimony of the club owner about the Appellant's appearance and demeanor after the shooting.

The State introduced, among other photographs of the defendant that night [State Exhibits 3 & 4], State Exhibit 8 showing the Appellant shirtless with his arms crossed, and without tears. The challenged photograph was used by witness Leslie Lawson, the owner of Jager's Private Bar, to describe the appearance and demeanor of the Appellant when she confronted him about the death of Nicholas Rae. Respondent submits the admission of the exhibit was within the court's discretion. Brockmeyer's demeanor after the crime was relevant where the words and actions of Brockmeyer were consistently inconsistent with the circumstances surrounding the death of his acquaintance, Nicholas Rae. The descriptions of the

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In Lopez, the California Court found other entries on the chain of custody logsheet are arguably more testimonial in character, specifically the notation that the sample was received in a sealed condition and the recordation of the specific blood-alcohol level of defendant's sample. These records are, arguably, created for later use at trial. If the notation of the sealed condition had been excluded, the prosecution would not have been able to establish that fact. However, such an omission would have gone to the weight of the evidence, not its admissibility. The expert witness would still have been able to lay sufficient foundation for the machine-generated graph and explain its significance. The sealed condition of the sample was never disputed. The California court concluded on the facts of this case, the admission of the sealed-condition notation was harmless.

Appellant's demeanor by Lawson were effectively shown through the use of the photograph. The use was also cumulative to other evidence describing his demeanor at the time. The probative value of the photograph was not substantially outweighed by any prejudicial effect.

In his brief, the Appellant contends that the trial court committed error in admitting the photograph of the Appellant, over objection, claiming it was irrelevant, unnecessary and prejudicial. He complains that it was used to imply that he was cold and heartless.[7] He further asserts that it was used "for the illicit purpose of implying that he was guilty." Initial Brief of Appellant, p. 18. Because the actual use of the photograph was used to corroborate the testimony of Lawson, its use in determining his guilt was appropriate.

How The Issue Was Raised at Trial

During the trial, the owner of Jager's Private Club, Leslie Lawson, testified about the events in her private club following the shooting of Nicholas Rae. In particular, she described the actions and demeanor of the Appellant after the shooting. Earlier, the Appellant had caught her attention when he kept opening the door to the private bar and tried to keep it open. Shortly after, there was panic in the bar with voices stating: "someone has been killed, someone actually shot themselves" and Lawson called 9-1-1. R. 248. Lawson attempted to keep people inside the bar, yet at one point the Appellant walked by her without his shirt on without responding to her request to not leave. R. 250-51. She stated she later saw Brockmeyer in the parking lot wearing plaid shorts and no shirt.

Lawson stated that she went over to Brockmeyer, knowing that his friend had been killed, and told him she was sorry and asked him what happened. R. 254. She stated Brockmeyer threw his hands down and said "my best friend was just shot and killed," and she put her arms around him. R.p. 254, ll. 9-11. After she asked him who [killed him] and if he was part of a gang and he just hung his head down, not

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[7]This is consistent with Lawson's testimony that "there was nothing inside him."

giving an answer.[8] She said Brockmeyer's eyes were focused on a girl he had been with earlier, on the Lexington County cars and what was going on. She thought his behavior was odd and described that there was "nothing there." R. 255-56.

At that point, Lawson was shown a photograph [State Exhibit 8] of the Appellant and confirmed it reasonably showed how he was dressed and his demeanor at that time. R.p. 256, ll. 2-12.

The defense objected to the relevance of State Exhibit 8. Tr. p. 309, l. 13. The prosecution stated: "[T]he relevance is it shows that he was not wearing a shirt and also how he was acting." R.p. 256, ll. 15-16. The photograph was received in as evidence.

The witness was asked what the particular photograph showed her. Similar to her prior testimony, she declared:

> When I look at that photograph, I feel that there was a man that stood there. There was just nothing inside him. There was nothing that he could say to me. ...

R.p. 257, ll. 1-6.[9] On cross-examination, Lawson admitted that when she first saw Brockmeyer, he had on a white dress T-shirt. R. 259. However, when he came back in, he did not have a shirt on at all.

During cross-examination of Brockmeyer, the Appellant claimed he took his shirt off when someone was screaming about getting something to apply pressure, but he could not get close. R.p. 689, ll. 22-25. He claims he then threw it at her. R. 690. No contemporaneous objection is made during the examination concerning the use of State Exhibit 8 by the prosecution and the record does not specifically reflect when and how it may have been used.[10]

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[8]Lawson felt she asked this question because she was concerned that whoever shot the victim may return causing danger to the patrons. Id.

[9] The Appellant, in his brief, describes State Exhibit 8 as depicting Brockmeyer in a state of extreme shock (inconsistent with Lawson's characterization). Initial Brief of Appellant, p. 18.

[10] During the examination, the prosecutor asked whether the same person out there that night and everybody asked what happened was the person standing in the courtroom that day. R. p.

After a recess, the defense noted that they had earlier objected to the introduction of State Exhibit 8. R. 697. The defense asserted that they wanted the record to reflect the prosecutor used it as a demonstrative aid when he was examining the defendant and show it to the jury. R.p. 697, ll. 1-6. Judge Cottingham stated: "I understand that", and that he had ruled on it. R.p. 697, ll. 7-9.

In his brief, the Appellant points out the following portion of the State's closing argument:

> Does this look like a man whose friend had just been shot? Does that look even - as he testified today - somebody [sic] who is numb? Or does that look like anger and defiance? You are looking at a killer.

R.p. 769, ll. 19-22.

Although no timely objection was made during the argument, the defense belatedly made an objection to the State's use of State Exhibit 8 as a demonstrative aid during their closing. R.p. 775, ll. 14-20.

Subsequent to the verdict, the defense made a motion for a new trial based upon "all our prior motions and objections." R.p. 788, Verdict Tr. p. 15, ll. 6-8, 16-17. The motion was denied. R.p. 788, Verdict Tr. p. 15, ll. 9-24.

STANDARD OF REVIEW

The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986); State v. Green 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012). "Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 101 (1999) (citing Rule 401, SCRE).[11] If the offered photograph serves to corroborate

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691, ll. 1-9.

[11]In Langley, the Court found the admission of a photograph of the victim, taken in his high school band uniform, was reversible error because it was not relevant in proving the guilt of the

testimony, it is not an abuse of discretion to admit it. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986); State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000) (citation omitted). Accord State v. Salley, 398 S.C. 160, 169, 727 S.E.2d 740, 745 (2012). "A photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts." Id. (citation omitted). "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are ... not necessary to substantiate material facts or conditions." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). "[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." State v. Collins, 398 S.C. 197, 727 S.E.2d 751, 754 (Ct.App. 2012).

ANALYSIS

The challenged exhibit was presented to corroborate the testimony of Leslie Lawson concerning her view of the demeanor of the Appellant after the shooting. The Appellant contends it was not necessary to present the photograph because evidence was already presented that he had removed his shirt and the Appellant subsequently confirmed it. Initial Brief of Appellant, citing R.p. 225, l. 24, p. 237, ll. 15-16, p. 689, ll. 22-25. What the Appellant fails to recognize is that Lawson declared the photograph, in contrast to the Appellant's theory, corroborated to Lawson more than the mere fact that he was not wearing a shirt, but accurately showed Brockmeyer's present demeanor that there was "just nothing inside him" and that he had nothing to say. This impression was that this was consistent with her testimony.

The relevance of the photograph was that it corroborated the evidence from her about the odd and inconsistent behavior of the Appellant. Simply put, different witnesses gave varying accounts of

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appellant in that case. Id. at 648, 515 S.E.2d at 100. In so finding, the Court discounted the State's argument that the photograph was admitted to establish the identity of the victim because the identity of the victim was not an issue in that case. Id. at 648 n. 3, 515 S.E.2d at 100 n. 3. "[T]he only possible purpose of ... [the] introduction of the photograph was to distance the victim from the drug dealing ... and to neutralize testimony by the State's witnesses regarding his drug use." Id.

Appellant's demeanor at the time of the shooting. The reflections of remorse, fake crying, belligerence and the presence of or lack of tears were relevant to resolve the intent in the action of Brockmeyer. By his own accounts, he had declared at various times that the victim had shot himself,[12] that black guys did it and left[13], somebody shot his brother[14], that he did not know he had shot himself[15], that he had denied the shooting although others had said he did it or that he may have shot the gun accidentally.[16] This evidence contrasted with the evidence of a witness viewing the Appellant with a trigger position to the victim's neck with the forensic evidence of a hard contact wound.

Contrary to the claim of Appellant, the photograph was admitted not only to show that he was without a shirt after the events, but also "how he was acting." R.p. 256, ll. 15-16. The trial judge did not abuse his discretion in the admission. The evidence did assist the jury in determining guilt.

The probative value was not limited to the fact that he had no shirt on in the photograph. Respondent would agree that there was other evidence in the record concerning the Appellant removing his shirt or having no shirt on. R. 62-63, 100, 108-09, 208-09, p. 225, l. 21 - p. 226, l. 2, p. 237, ll. 14-16. However, in addition to the lack of the shirt, the photograph corroborated Lawson's impression of Appellant's demeanor which was inconsistent with his friend being shot providing enhanced value to the jury to understand Lawson's description.

At trial, a series of photographs of the Appellant during the evening at Jager's Bar on July 11, 2010

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[12]Shot himself - R.p. 63, ll. 10-17 (Brakefield); R.p. 207, l. 25- p. 208, l. 1 (Ainsworth);

[13]Black guys did it - R.p. 63, l. 25 - p. 64, l. 6 (Brakefield); Tr.p. 659, ll. 11-17 (Brokington)(told Det. Grant that black guys he was playing pool with did it); p. 694, ll. 2-8 (Brockington) (admits lied to police about three black guys).

[14]R.p. 208, ll. 11-22 (Martin Lesesne);

[15]Did not know he shot himself -R.p. 98, l. 24 (Clack) (asked what happened); R. 655-56 (Brockington) ("what happened" "didn't think it was serious").

[16] R.p. 103, l. 22- p. 104, l. 4 (Clack); R.p. 113, ll. 21-25 (Clack).

were introduced. During the testimony of Gina Brakefield, she presented two photographs she took of the Appellant and Mariko earlier that evening at a table at Jagers. R. 61-62. State Exhibit 3 clearly shows the white "Sean John" shirt the Appellant wore that date. State Exhibit 4 shows the Appellant similarly with his eyes open, though the Sean John title is covered. She stated she re-took the photo because his eyes were closed in the first photo. R.p. 61, ll. 11-23. Brakefield stated that after she saw Appellant appear to be whispering in the victim's ear with his hand up in a trigger finger position in the neck of the victim, she heard a loud pop, a flash, and a casing fly out. R. 59. She described Will standing up, grab the victim's shoulder and give him a shove. R. 59.

Brakefield described the Appellant then turned and walked to the woods. Tr. 103. At a later point, Will returns to the porch, but wearing a grey wife-beater undershirt. R. 63, 78. She described him as acting "hysterical", initially claiming that the victim had told him he was going to do it, meaning shoot himself. When questioned that if he shot himself, where was the gun, Brockmeyer declared "the black guys" shot him and left. R. 63-64. Brakefield described Appellant as really upset and belligerent. "He would pretend to cry, but he wouldn't shed a tear." R.p. 64, ll. 17-18. she described it a fake crying and screaming.

Mariko Clack described him initially wearing the white Sean John shirt.[17] She stated he took off the shirt when he came back from the woods after the shooting and tossed it to Mariko, wearing the wife-beater underneath. R. 100, 108. She said he later put the shirt around his neck and it ended up balled up on her car. R. 108-09. Clack noted that Appellant, after the shooting was, was acting frantically and "weeping." R. 96-100, 102. Justin Ainsworth testified that Appellant was not acting like his friend had just got shot. R. 207-09. Martin Lesesne said that although Appellant had said somebody had shot his brother, Appellant did not appear to act like someone who had just lost a friend, seeming more aggravated or mad, than having sadness. Tr. 224-25. Lesesne did not remember any tears from the Appellant. R.p. 224, ll.

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[17]This is evident in Exhibit 3 and 4 showing Mariko and the Appellant.

23-24. Lesesne opined that before law enforcement got there, Appellant was "pretty hysterical." R.p. 226, ll. 5-8. Shandon Lesesne similarly described Appellant's demeanor after the shooting as not acting like someone whose friend had been shot, but more mad and oddly lacking any actual concern. R.p. 234, ll. 5-11. She also denied that he was crying, although he was screaming. R. . 240, ll. 16-23.

Investigator Grant described the Appellant's demeanor as agitated, a very defensive appearance with his arms crossed. R.p. 269, ll. 4-14. The appearance is similar to that evidenced in State Exhibit 8.

CONCLUSION

The trial court did not abuse its discretion in allowing the admission of the photograph used by witness Lawson to corroborate her testimony about the Appellant. Further, the photograph is cumulative to similar testimony presented by Investigator Grant in the manner that Appellant presented held himself that evening - arms crossed, defensive and agitated. The evidence of the photograph had probative value and slight prejudicial effect in light of the evidence presented by the numerous witnesses. The Appellant fails to point out a true prejudicial effect to the photograph, claiming merely that it was use to support his guilt. This claim of prejudice is a red herring because the admitted evidence was allowed to show guilt by reflecting his demeanor at the time of the event. There was no abuse of discretion in its introduction or its use after admission to refer to his contemporaneous demeanor as testified to by the witnesses.

IV. Where Appellant admitted purchasing the .380 semiautomatic pistol and possessing it during the evening, any alleged error in the admission of a caption "Wills gun on left my gun on righ[t]" as hearsay was harmless. In light of his admission and numerous witnesses testimony, a new trial is not warranted.

In his final claim, the Appellant asserts that the trial court erred in admitting State Exhibit 56, a photograph recovered from a cell phone in the Appellant's possession at the time of his arrest which showed the murder weapon and the pellet gun together because it included a caption on the photograph. He claims in this appeal the caption "Wills gun on left my gun on right]" was inadmissible hearsay. Brockmeyer claims the caption was offered for the truth of the matter asserted and therefore was

inadmissible hearsay. He contends the admission was reversible error because "the ownership of the weapon was significant issue at trial." Initial Brief of Appellant, p. 20.

Contrary, to assertion of Appellant, "ownership of the weapon" was not a significant factor. However, "possession" of the weapon was a significant factor at the trial. As set forth more fully below, the admission of the photograph with the caption was not reversible error where:

1. Evidence revealed the Victim showed the photograph of the guns from a cell phone on the way to bar that night. R. 44.

2. Appellant admitted that he had purchased the .380 semiautomatic pistol, not the victim. R.p. 676, ll. 6-11.

3. Appellant admitted that he was in actual possession of the .380 pistol at the bar. R. 647-51.

4. Appellant admitted taking the gun and throwing it over the privacy fence. R. 654-55.

5. Numerous people saw the Appellant in possession of the .380 during the evening.

6. The victim was found in possession of the pellet gun after he was shot. R. 300.

Where the actual ownership of the .380 was not a significant issue at trial and the fact of his possession of the .380 during the night was admitted by Appellant, any error in the admission of the caption, if error, was harmless error because it had no effect on the outcome of the trial, particularly where Appellant admitted he had purchased the weapon.

STANDARD OF REVIEW

The admission of evidence is based upon whether the trial judge abused his discretion. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801 (c), SCRE. Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute. Rule 802, SCRE.

"Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct.App. 2010). Such error is

deemed harmless when it could not have reasonably affected the result of trial, and an appellate court will not set aside a conviction for such insubstantial errors. Id. Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). See State v. Simmons, 384 S.C. 145, 171–72, 682 S.E.2d 19, 33 (Ct.App. 2009) (holding any error in admitting eye witness testimony was harmless because it was cumulative to other overwhelming evidence that established defendant's guilt); State v. Lindsey, 394 S.C. 354, 362, 714 S.E.2d 554, 558 (S.C.App. 2011)(the investigator's improperly admitted notes of the interview were merely cumulative to the investigator's own testimony, the defendant's statement, and another investigator's testimony); State v. Sims, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010) (An insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached).

How The Issue Was Raised At Trial

At trial, the State sought to introduce State Exhibit 56. The prosecution described the photograph as a photograph and file name downloaded from the Motorola Boost cell phone which had been introduced as State Exhibit 10, the cell phone found on the Appellant. R.p. 438, l. 19 - p. 439, l. 1. Deputy Solicitor Graham asserted that the photograph showed two guns and it was the State's contention that the gun on the left was the .380 murder weapon and the gun on the right was the black pellet pistol (found on the victim). R.p. 439, ll. 4-16. Deputy Solicitor Graham stated that the file name associated with the photograph was labeled: "Wills Gun on Left My Gun on Righ.jpg @ 100% (RGB/8#)*." R.p. 439, ll. 19-25. State Exhibit 56. ROA__. It was noted that both of the guns and the cell phone were already admitted into evidence. R.p. 440, ll. 1-7.

The defense objected to the admission of the photographic exhibit. R.p. 440, ll. 8-11. The objection was since "there's writing on the top of the that picture that identifies one as Wills gun and the

other assumably being Rae's gun" it is hearsay.

The prosecution responded that the picture was on Appellant's phone (in his possession, but belonging to the victim) and the file name is an indication of which gun belonged to which individual. R. p. 440, ll. 15-18.

Judge Cottingham concluded that the guns are in evidence and that he would admit the picture. R. p. 440, ll. 19-21. The prosecution re-affirmed that it felt hearsay did not apply because the file name was typed in on the [Appellant's] phone and named the picture with the phone. Judge Cottingham responded that he saw nothing wrong with the picture since both guns were in evidence. R.p. 441, ll. 2-8. Judge Cottingham further stated:

> I note the language on the top, but there is evidence all over the courthouse as to which gun belonged to who... Let the record reflect that the issue will be of help to the jury in comparison.

R.p. 441, ll. 10-15.

Detective Shawn Grant then testified that the retrieved State Exhibit 10, the Black Motorola Boost cell phone from the evidence custodian on July 12, 2010. R.p. 442, ll. 5-19. He stated he delivered it to Crime Scene Investigator Mike Phipps of the Lexington County Sheriff's Department. R. 442-43. He stated on July 13, 2010, he retrieved the exhibit from Phipps and returned it to Evidence Custodian Beth Harmon. R. 443.

C.S.I. Investigator Phipps testified that he executed a search warrant for the contents of State Exhibit 10, the black Motorola cell phone on July 12, 2010 after he received the cell phone from Det. Grant. He used the CelleBrite "Uniform Forensic Extraction Device" to extract material from the cell phone including text messages, call logs, photographs, and multi-media files. R. 446. He identified State Exhibit 56 as a photograph he retrieved from the cell phone.

> The printing at the top of this image is the file name that was given to the image, along with some other information that prints

when the image is printed....

R,p. 446, ll. 22-25. He stated that the file name on the photograph was changed to text because someone had actually labeled it, rather than the device. R. 447.

Upon a motion to introduce the item, the defense objected under hearsay and S.C. Rules of Evidence 401, 402, and 403. R. 447. The trial judge again admitted it stating the photograph will assist the jury in their determination of whose gun was whose. R.p. 447, ll. 22-25.

After the admission, Investigator Phipps describes State Exhibit 56 as a color photograph saved on the camera phone with a text label that reads "Wills gun on left and my gun on right" and other artifacts assigned to the image at printing.[18]

On cross-examination, Investigator Phipps acknowledged that there were a number of photographic images on the phone, including family photographs or some off color photos. He stated that the cell phone was identified in the search warrant as the victim's cell phone, but it found on Brockmeyer at the arrest. R.p. 451, ll. 1-18. Investigator Phipps also identified Defense Exhibit 1, another photograph taken off the cell phone with a file name "I love this gun" showing an individual holding a gun in their left hand with a silver watch. R. 453. He noted that no tattoos were evident in the photograph.[19] He further noted that the ejection port in the Defense Exhibit 1 photo has the same shape as the gun in State Exhibit 48. Further, a photograph of the items recovered from the victim at the autopsy included a silverish watch. R. 454-55.

1. How the Ownership and Possession of the Murder Weapon Was Addressed by Brockmeyer at Trial

In his direct testimony, Appellant testified that on the night of the incident, he saw the victim with

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[18] He stated the "jpg" reflected the type of image. He stated that "R.G.B. 18#" meant it was printed at 100% of image size with red, blue, green color image at 8 bits. R. 448-49.

[19] The Appellant was trying to assert that the person holding the gun in the defense Exhibit 1 photograph was the victim rather than Appellant because of the watch and the lack of tattoos, thus asserting the use of this caption reflecting the victim's feelings about the gun.

the gun out at the back of the car, which he did not think was a big deal because it was for protection. R. p. 647, ll. 4-6. He noted that Karmen freaked out when she saw it so Brockmeyer gave it back to the victim and he put it up. Brockmeyer stated that when they got to the bar, the victim asked him to hold the gun while the victim played pool. R.p. 647, ll. 7-12. Brockmeyer denied that he knew whether the victim had a pellet gun, stating the victim had on a long sleeve shirt. He stated the gun that the victim gave his was a .380. R.p. 647, ll. 14-20. Brockmeyer claimed that the victim had come to him twice for money. He stated that after the victim stopped playing he told Brockmeyer that he lost the money and then asked for his gun back. R. 649-50.

In his testimony, Brockmeyer speculated that the victim wanted the gun back to try to get his money from the people. R.p. 650, ll. 1-15. Brockmeyer stated that after the victim got the gun back, the victim walked back to the pool tables and then into the bathroom, then returned and sat down at their table. R. 651. The victim later left the table, acting like he was going to pass out. R. 651. The victim got up and walked fast outside and Brockmeyer heard last call.

Brockmeyer claims he went outside and stumbled on the ledge, catching himself on a pole. He asserted that he heard someone say "gun" and saw the victim leaning in a chair with his head down. Brockmeyer stated he did not see a gun at first, but claimed when he put the victim's head up, he saw the victim was holding a gun in his lap. Brockmeyer stated that he leaned in and tried to grab the gun. R.p. 653, ll. 11-18. Brockmeyer stated that he could not recall if he touched it, but the gun went off, dropped, and the clip fell out. R. 653. Brockmeyer said he picked the gun up, ran out into the parking lot and threw the gun into the woods. R. 653-54. Brockmeyer admitted that earlier that evening he put Gina's hand on the gun before they went on the dance floor and when there were in the car. R.p. 654, ll. 9-23.

Brockmeyer stated that he took the gun and threw it over the fence to get rid of it. R.p. 655, ll. 7-9, p. 656, ll. 9-10.

On cross-examination, Brockmeyer admitted that he had purchased the little gun (.380), not the victim. R.p. 676, ll. 6-11. Brockmeyer claimed that he had never seen the big gun (the pellet gun) on the victim that night, even though the victim was wearing a black tank top. R.p. 676, ll. 14-25.

Brockmeyer admitted that he had the smaller pistol that night and was wearing it "for protection." R. 677. However, he claimed he did not bring it to the birthday party, but admitted that once there, he had put it in his waistline. R. 677-78. He stated again that he only held the pistol for the victim while the victim was playing pool and denied any knowledge of the victim's big black pellet gun. R. 678.

Brockmeyer denied that he was flashing the gun in the bar. He denied making a statement "this is how we do it" pulling up his shirt and showing the gun to the people who were beating the victim out of money in pool. R. 679.

Brockmeyer stated that he grabbed the pistol, after the shot, because they were both convicted felons and then ran and tried to get rid of the gun. R. 688. He stated he did not know where it had shot and knew if they got caught with a gun they were both going to jail. R. 688.

On reply, Deserae Camacho, the Appellant's former girlfriend, testified that she had seen Brockmeyer with a small handgun that you could hold in your hand, with a top part that you pull back. R. 705. She stated that she had seen the victim with a big fake plastic B.B. gun. She said that Brockmeyer was aware of the victim's B.B. gun and joked about it "plenty of times." R. 705.[20]

Grady Howell, Ms. Camacho's brother, testified that Brockmeyer had initially told him that he was unaware of what happed, claiming he was inside the bar. R. 711-12. However, at another time Brockmeyer told him that the victim initially had the gun and turned it around and handed it to Brockmeyer where it discharged and hit the victim in the neck. R. 712. He told Howell that the victim was sitting down and had

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[20] On cross-examination, Ms. Camacho testified that the Appellant had tattoos all over his body and that the victim had some tattoos, but not on the inside of his arms. R. 708-09. She admitted that she had seen the victim handle the Petitioner's gun. R. 709.

handed him the gun where the victim was holding the barrel. Brockmeyer claimed that when the victim handed it to him, the trigger discharged. R. 712-13.

2. How the Evidence of Brockmeyer's Possession of the Murder Weapon Was Presented by the State at Trial Through the Witnesses.

In the State's case, Gina Brakefield was describing the ride to Jager's bar with Mariko Clack, Jennifer McFarland, the Appellant and Nick Rae. R. 43. Gina described seeing Nick pull out a black gun wrapped in a black shirt tucked from under the seat. R. 43-44. She stated that Nick also showed her pictures from a cell phone with a big gun and a small gun. R.p. 44, ll. 9-17.

Later while dancing with the Appellant, someone said something about Will's dancing and Appellant stated "it was hard to dance with a pistol in his pants." R.p. 50, ll. 22-25. At that point, Gina said she reached behind him for a gun, but there wasn't one there. She described Appellant taking her hand and moving it to the front of his pants, where she felt a small gun. R.p. 51, ll. 1-8.

Mariko Clack testified that after the incident, she saw Brockmeyer coming from the parking lot and asked him what happened. She said he told her that Nick asked for the gun back so he could rob somebody and the Appellant then appeared to begin shaking. Mariko stated that she saw him "like weeping" and acting frantic. R. 99-100, 102.[21]

Amera Kabar who was playing pool with Nick described noticing a gun in the small of his back during the first game. R. 122. She stated that Nick wasn't concealing it. She said when he passed a knife that fell earlier, that he showed her the gun, although she had noticed it before. R. 122-24. She thought he was sweet and that she did not feel threatened by it. R. 124.

Amera testified that her impression of Brockmeyer was different. She described Brockmeyer also

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[21] On cross-examination, Mariko testified that the victim told her that he had been robbing people to get money. She said that the victim had asked here if he could put his gun in her car and she told him no, before he had gotten sick. R. 107-08. She was not aware he had a gun when they drove over.

having a gun and appearing hostile the entire night, acting like he was the "big man in the bar." She stated they were not discreet about showing the guns and that Brockmeyer picked up his shirt showing that his gun was in the front. R.p. 128, ll. 14-24. Amera stated that she did not like Brockmeyer. She stated Brockmeyer came up to the table yelling: "[T]his is how we do it", with one hand down on the gun, that she perceived as a threat based upon her pool playing success. R. 130, 133. After seeing the display of the gun by Brockmeyer, Amera wanted to leave the bar. R. 133.

Amera confirmed that in her statement, she had stated that after the shot, she noticed the victim's gun in the back of his pants and assumed he shot himself. R. 149. However, she knew her initial thought was not the case when she saw a girl freaking out. R. 149. Her initial thought was based upon the fact that she had seen the gun stuffed in the back of his pants while they were playing pool. Id.

Amera's boyfriend, Jamie Spencer, similarly described seeing the big gun in the back of Rae's pants, which looked like a .40 or. 45. R. 159. Spencer stated that Nick was not acting like a threat. R. 160. In contrast, Spencer described the Appellant as acting like a "hot head." He stated that after Rae's second loss, Brockmeyer came up and pulled out his gun, cocked it and said" "[T]his is how we do it", and then stuck it back in his pants. R.p. 163, ll. 7-14, p. 164, ll. 10-11. He felt he was trying to intimidate Amera. R.p. 163, ll. 15-18.

Spencer described later walking over to table trying to ease the tension with Appellant and telling them that we are good people here and don't need guns. R. 165. Later he saw the victim in a breeze way leaning against a wall and throwing up. R. 167. Spencer saw the Appellant with a bigger girl appearing angry. He then saw Brockmeyer trying to pull his gun out and the girl was trying to hold her hands on the gun. R. 169-70. Spencer said he returned inside the bar and then heard the "pop." R. 171.

Spencer described the gun that Brockmeyer had as a smaller gun, like a .380 and when he cocked it his hands were covering it. It was not as big as Nick's. R.p. 174, l. 19.

On cross-examination, Spencer confirmed that he saw Brockmeyer in the breeze way trying to pull

out a gun and then he went inside and never saw Brockmeyer again. R. 179.

Amera's brother, "Keith" Bassam Kabar, stated that as soon as he got to the bar "I had people coming up to me explaining about these boys had guns" and he told them to not bother them. R. 184. Keith described the victim's clothes with a pistol hanging out his back. R. 184-85. He described Brockmeyer acting rowdy. R. 185. He described Brockmeyer standing by the pool table with his shirt pulled up and he had a black firearm in the front of his pants. R. 186. Keith stated that there were two guns and opined the victim's was a large caliber big gun stuck in his back in the middle. R. 187. He described Brockmeyer as a small semiautomatic. R. 187. Keith described seeing the victim sitting in a chair and Appellant knelt down with his hand on the shoulder, hearing a pop, and then seeing Brockmeyer exit around the building. R. 189-90, 192. He said he could not see if he had a gun in his hand or not. R. 192. He stated that Nick sat there for about 10 seconds after the pop and then started to lean over and fall. R. 194. At that point they realized he was shot. Keith testified that after the victim he saw a gun in the victim's waistband. R. 196.

Justin Ainsworth also described Brockmeyer and Rae arriving at the bar with Mariko with pistols in their waistline. R. 205. He stated the victim in the black shirt had a big gun not hidden at all sticking out of his waistline. R. 203-04. He stated they confronted him (the victim) about having the gun and told him to put it up. R. 204. Ainsworth described the Appellant as wearing a white shirt and it was pointed out to him that he had a gun covered by his shirt, but he could tell it was a pistol. R. 205.

Marcus Lesesne testified that he saw the victim wearing a black tank top with a larger size pistol in his back waistband. R. 219. Lesesne stated he asked the victim to put the gun away, but seemed OK with that. R. 219. Lesesne did not see any weapons on the Appellant. R. 220.

Shandon Lesesne testified after the shooting, she stated she saw the person on the floor with a hole in his neck and attempted to provide aid. She stated that Brockmeyer was screaming for someone to save his brother. R. 237. She said Brockmeyer appeared more mad, rather than concerned. R. 238. She described it more as screaming than crying. R. 240. Shandon Stated that she did not noticed any gun

around. R. 240-41.

Investigator Shawn Grant testified that when he arrested Appellant later that morning, he took a cell phone, State Exhibit 10, that he had on his possession. R. 272-73.

Investigator David Day testified that when he rolled the victim over looking for injuries, he located a pellet gun tucked in the back of his pants. R.p. 300, ll. 9-11. See State Exhibit 17. The pellet gun recovered from the victim was introduced as State Exhibit 26. Investigator Day further stated that he located a pistol magazine (State Exhibit 30) on the other side of a privacy fence. R. 307-08. State Exhibit 29. Day testified on the 13th, they located the pistol, State Exhibit 48, depicted in Exhibit 47. The gun is a Ceska .380 semiautomatic. Tr. 383. When it was recovered, it did not have a magazine, but had one live round. R. 329. Investigator Shelby Derrick testified that she participated in the search for the weapon and saw it when the trees were moved. R. 389-391.

It was determined that the bullet was fired by the pistol and the cartridge case (found at the scene) was fired by the same weapon. R.p. 555, l. 5 - p. 556, l. 8.

Dr. Bradley Marcus, the forensic pathologist, testified that the semiautomatic pistol was consistent with the fatal wound on the neck of the victim. R. 620-25. He stated that the soot on the wound reflected a hard-contact gunshot wound. He declared that he knew for a fact that the gun was pushed up against the neck. R.p. 622, ll. 1-14. See Exhibits 55-61.[22]

ANALYSIS

The trial court admitted the photograph of the two weapons captured from the telephone found in the Appellant's possession at his arrest concluding that the guns were already in evidence and there was already evidence showing which gun belonged to who and that it would help the jury in comparison. R.

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[22]This hard contact wound is completely inconsistent with the Appellant's version of the gun's location when he may have touched it. R. 653-54. In fact, Brockmeyer once claimed that he did not think the injury to the victim was even serious. R. 655-56. The pathologist testimony is consistent with the testimony of Gail Brakefield. R. 55-59.

441. The caption: "Wills gun on left my gun on right" was presumably placed there by someone other than the defendant (Will) and probably the victim. Since it appears the caption could be read to show the ownership of the pellet gun belonged to someone other than Will, that would appear to be for the truth of the matter asserted. Though not squarely addressed by state courts in South Carolina, other courts have found captions of photographs to be subject to hearsay rules. See, Allen v. State, 925 N.E.2d 469 (Indiana 2010) (error, if any in admitting photographs with captions, was harmless); State v. O'Leary, 25 N.J. 104, 135 A.2d 321 (1957) (in dicta. caption on photograph properly removed due to hearsay character); cf Redinburg v. State, 315 Ga.App. 413, 727 S.E.2d 201 (2012) (undated photographs downloaded from website after killing not relevant to show their gun ownership); Black v. State, 358 S.W.3d 823 (Texas Ct. App. 2012) (context of text messages found on cell phone hearsay, but admission was harmless). But see, State v. Franklin, 280 Kan. 337, 121 P.3d 447 (Kan. 2005) (text message admitted as hearsay exception).

Assuming arguendo that the "caption" was improperly admitted, any error in the admission is harmless. Most importantly, the Appellant testified that he had purchased the gun identified as Wills in the photograph. R.p. 676, ll. 6-11. Therefore, there can be no prejudice from the caption in the photograph of "Wills gun on left." Contrary to the assertion of Appellant, "ownership" of the gun was not a significant issue at trial.

As the trial judge correctly noted, in addition to the actual admission of the .380 pistol and the pellet gun numerous witnesses identified appellant as being in possession of a small pistol while in the bar. Further, Brockmeyer admitted that he was in possession of the .380 pistol while in the bar, albeit at the request of the victim. Plainly, the claim of "ownership" did not dictate exclusive possession of the .380 pistol. Further, Brockmeyer admitted that he was the last person in possession of the pistol and cartridge, as he threw it over the fence after the shooting.

The photograph from the cell phone was relevant evidence. At the outset of the trial, testimony was presented that on the way to the bar that evening, the victim had show pictures from a cell phone showing

the two guns. R.p. 44, ll. 9-17. Further, evidence was presented that Brockmeyer had been seen with the smaller pistol prior to the day of the incident. R. 705. Contrary to Brockmeyer's claim of knowledge of the victim's pellet gun, testimony was presented that Brockmeyer was aware that the victim had a plastic B.B. gun. R. 705. Where the pellet gun was seen in the victim's waistband during the evening and removed from him after his death, any error in the admission of the caption related to Rae's ownership of a black pellet gun was similarly harmless.

CONCLUSION

For all the foregoing reasons, the appeal and judgment must be affirmed.

Respectfully Submitted,

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December 28, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Edward Cottingham, Circuit Court Judge
2011-GS-32-1255, 2011-GS-32-1257
Appellate Case No. 2011- 198266

THE STATE OF SOUTH CAROLINA,

Respondent,

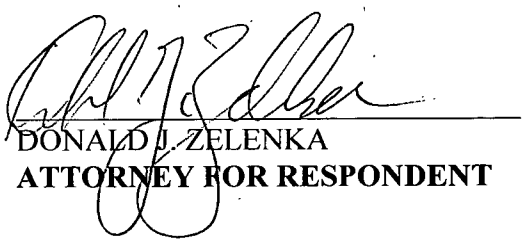
v.

WILLIAM MARK BROCKMEYER,

Appellant.

CERTIFICATE OF COMPLIANCE

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



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December 28, 2012.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the United States Mail, postage prepaid to:

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