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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

R. Keith Kelly, Circuit Court Judge

WILLIAM BROCKMEYER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000695

APPENDIX

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This staggering weight of authority confirms the rule indicated by South Carolina precedent. This court should apply a *de novo* standard to the Confrontation Clause issue.

ARGUMENT

I. The Trial Court erred by denying Mr. Brockmeyer's pre-trial subpoena to discover the identity of a witness.

Before trial, Mr. Brockmeyer's counsel served a subpoena on a local television station seeking the identity of a potential witness who had posted a pseudonymous comment on the station's website. The posted comment indicated that its author had witnessed Mr. Rae's accidental death. (R. 2:5-3:5.) The trial court orally denied Mr. Brockmeyer's motion to enforce the subpoena. (R. 16:13-14.) This ruling was never formalized in a written order.[4] As explained in Mr. Brockmeyer's initial brief, this ruling

(Ill. 2010)); *State v. Lee-Riveras*, 23 A.3d 1269, 1279-80 (Conn. Ct. App. 2011) (noting that whether a trial court's ruling is "'so severe as to violate the confrontation clause of the sixth amendment is a question of law reviewed *de novo*.'") (quoting *State v. Abernathy*, 806 A.2d 1139 (Conn. Ct. App. 2002); *State v. Rainsong*, 807 N.W.2d 283, 286 (Iowa 2011) ("[W]e review claims brought under the Confrontation Clause *de novo*.") (citation omitted); *State v. Snelling*, 236 P.3d 409, 414 (Ariz. 2010) ("'Evidentiary rulings that implicate the Confrontation Clause, however, are reviewed *de novo*.'") (quoting *State v. Ellison*, 140 P.3d 899, 912 (Ariz. 2006)); *McWaters v. State*, 36 So.3d 613, 637 (Fla. 2010) ("'In considering a trial court's ruling on admissibility of evidence over an objection based on the Confrontation Clause, our standard of review is *de novo*.'") (quoting *Milton v. State*, 993 So. 2d 1047, 1048 (Fla. Ct. App. 2008)); *State v. Swaney*, 787 N.W.2d 541, 551-52 (Minn. 2010) ("We have said that 'whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law this court reviews *de novo*.'") (quoting *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006)); *State v. Brown*, 173 P.3d 612, 628 (Kan. 2007) ("Issues related to confrontation under the Sixth Amendment to the United States Constitution . . . raise questions of law over which this court exercises *de novo* review.") (citation omitted); *Pena v. People*, 173 P.3d 1107, 1111 (Colo. 2007) ("'Appellate review of a possible Confrontation Clause violation is *de novo*.'") (citation omitted); *Snowden v. State*, 846 A.2d 36, 39 n.4 (Md. 2004) ("We . . . apply the *de novo* standard of review to the issue of whether the Confrontation Clause was violated in this case.").

[4] After its oral ruling, the court directed Mr. Bender—counsel for the news station—to prepare and submit an order memorializing the decision. No such order was ever forthcoming.

was legally incorrect. In response, the State argues that the issue is not preserved for appeal, that the information was protected by the First Amendment and the "Reporter's Shield" law, and that the information was unnecessary and cumulative. As explained in detail below, each of these contentions is incorrect.

A. The issue was preserved for appeal.

The State questions whether this issue was preserved for appellate review. The controlling law, however, makes clear that the issue is preserved and is properly before this court. The South Carolina Supreme Court has held that a pre-trial ruling is preserved if it is a final ruling and if the defendant renews his objection at the appropriate time. *See State v. Wiles*, 383 S.C. 151, 156-57, 679 S.E.2d 172, 175 (2009). These conditions are unquestionably met here.

In *Wiles*, the defendant made a pre-trial motion to exclude certain testimony. *Id.* The judge denied the motion. *Id.* The defendant did not renew his objection at the beginning of trial, but he did renew his objection at the appropriate time, namely during trial when the testimony was introduced. *Id.* On appeal, the Court of Appeals held that the issue was not preserved. *Id.* The Supreme Court reversed. *Id.* The court noted that "when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection." *Id.* (citing *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)); *see also Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review.").

Here, the trial court's pre-trial ruling on the subpoena fits neatly within the rule set out in *Wiles*. It was clearly a final ruling. Furthermore, at the time of the ruling, Mr.

Brockmeyer's counsel expressed their objection to it. (R. 16:15-18) His counsel renewed their objections and motions during trial before beginning the defense case. (R. 631:14-15.) As in *Wiles*, this was the appropriate time to renew the objection because it is the point at which the wrongly excluded testimony would have appeared. In short, where a pre-trial ruling is final and the defense counsel renews their objection at the point the evidence should have appeared, "this issue is preserved." *Wiles*, 383 S.C. at 156, 679 S.E.2d at 175; *see also State v. Atieh*, 397 S.C. 641, 647, 725 S.E.2d 730, 733 (Ct. App. 2012) ("[I]f the trial court clearly indicates its [pre-trial] ruling is final, rather than preliminary, the issue is preserved for appellate review.") (citation omitted).

Additionally, the State argues that the defense failed to make a showing of what the excluded testimony would have been, and that this supposed failure affects both preservation and the denial of his constitutionally guarantee compulsory process to obtain witnesses. The State's argument falls flat. The content of the testimony sought was glaringly obvious in the context of the subpoena: that Mr. Rae's death was accidental and that Mr. Brockmeyer was genuinely sorrowful in its aftermath. In light of the trial court's ruling, the defense could hardly have made a more explicit showing of what the unknown witness might say. This contextual showing was sufficient. *See* S.C. R. Ev. 103(a)(2) (noting that an offer of proof is unnecessary where the substance of the evidence excluded was apparent from the context).

B. <u>The information sought is not protected by the First Amendment.</u>

In his initial brief, Mr. Brockmeyer set out the proper legal rule to apply to this issue of first impression in South Carolina and explained the inapplicability of the First Amendment of the United States Constitution. Nevertheless, as it did before the trial

court, the State again raises this theory in its responsive brief. Much of the State's argument is preemptively rebutted in Mr. Brockmeyer's prior brief. Other notable aspects of the State's arguments are briefly rebutted here.

The First Amendment cases cited by the State are easily distinguishable. Specifically, the State relies on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) and *Reno v. ACLU*, 521 U.S. 844 (1997). Both of these cases consider the constitutionality of statutes prohibiting anonymous speech and held that the government may not criminalize or penalize anonymous speech.[5] Clearly, these two cases are significantly different from the situation presented here. In this case, no government actor seeks to prevent free speech, and no punitive fate awaits the anonymous commenter. Rather, the defense counsel merely wishes to ascertain his identity and seek his testimony. Thus, the cases relied on by the State are inapplicable here.

Incidentally, even if the First Amendment is relevant here, the anonymous commenter waived any expectation of privacy when he agreed to the terms and conditions of the news website on which he commented. Indeed, the State's brief concedes that the anonymous commenter was informed prior to posting his comment that WLTX could disclose his identity in its discretion, if required by law, or if necessary to comply with legal process. *See* Resp. Brief at 11-12; *see also* WLTX "Terms of Service" and "Privacy Notice," R. 804-810. These warnings removed any expectation of privacy for the commenter who agreed to the terms.

[5] Specifically, in *McIntyre*, an Ohio statute prohibited the distribution of anonymous political literature. In *Reno*, a federal statute criminalized the transmission of obscene or indecent messages to anyone under age 18.

C. <u>The information sought is not protected by the "Reporter's Shield" law.</u>

Mr. Brockmeyer's initial brief explained the inapplicability of the "Reporter's Shield" law, S.C. Code. Ann. § 19-11-100. The State, however, relies on this statute to argue that the anonymous commenter's identity was protected. The anonymous comment at issue here was voluntarily posted on a publicly-viewable internet forum, does not fall within the statute's scope and,[6] even if it did, a statutory exception applies.

The State essentially argues that the Reporter's Shield protects the news station from disclosing the commenter's identity because the information sought was otherwise available. The truth, however, is that the information was *not* otherwise available. The bar's sign-in sheet consisted primarily of illegible signatures. (R. 12:14-21.) In addition, there is no guarantee that everyone present at the bar signed the sheet or used their given name to do so.[7] Furthermore, various people present at the bar slipped away immediately and surreptitiously after the shot. (*See* R. 140:8-13 (testimony that Ms. Kabar and her associates quickly exited through the bar's back door after the shot despite the proprietor's attempt to stop them).) Even the prosecutor admitted he had doubts as to the lists accuracy and noted that "[a] lot of these people obviously . . . did not want to talk to law enforcement." (R. 14:14-17.) In short, the information sought by the subpoena was not reasonably available by other means, and the trial court erred in denying Mr. Brockmeyer's attempt to locate witnesses in his defense.

[6] The trial court noted that "I don't think the shield law is applicable in this case because this is not a source of information. This was a voluntary expression by an anonymous person." (R. 9:2-5.)

[7] The State admits that there was "no guarantee that it listed all who were present." Resp. Brief at 13.

D. Even if the First Amendment and "Reporter's Shield" law applied, enforcement of the subpoena is nonetheless warranted.

As explained above, the First Amendment and "Reporter's Shield" are inapplicable here. However, even if they were applicable, enforcement of the subpoena is nonetheless warranted. Very recently, a Kansas state court considered an issue that is in some respects similar to the one presented here and held that the news website was required to disclose the identity of an anonymous commenter.[8]

The Kansas case arose from a prosecution for murder and robbery. During jury deliberations, a person believed to be a juror accessed and anonymously commented on an online news story about the murder. The prosecutor subpoenaed the new organization to uncover the identifying information of the anonymous commenter. The Kansas trial court found that because a punitive government sanction possibly awaited the juror, the First Amendment and state "Reporter's Shield" law applied.[9] Nevertheless, the court enforced the subpoena, holding that the information sought was material and relevant, was necessary, was unavailable from any other source, and that the disclosure would prevent a miscarriage of justice. *See In re Inquisition* at 5-6, 9-10. The court noted that "'a news reporter's privilege is more tenuous in a criminal proceeding than in a civil case.'" *Id.* at 9 (quoting *In re Pennington*, 581 P.2d 812 (Kan. 1978)). Accordingly, the

[8] A copy of the Kansas state court's Oct. 26, 2012 order, titled *In re Inquisition*, is being submitted via a supplemental citation letter filed concurrently with this brief. *See also* http://stlouis.cbslocal.com/2012/10/31/judge-orders-kan-newspaper-to-reveal-name-of-commenter/ (providing background and summary of the facts of the case) (last visited November 19, 2012).

[9] As explained above, in Mr. Brockmeyer's case no punitive fate awaited the anonymous commenter, and thus these protections are inapplicable here. Even if they did apply, however, the Kansas case indicates that the subpoena should have been enforced.

court enforced the subpoena and required the news station to disclose the commenter's identity.

Likewise, here, even if the First Amendment and "Reporter's Shield" law apply, the information sought by Mr. Brockmeyer is material, necessary, otherwise unavailable, and will avoid a miscarriage of justice by allowing him to mount an adequate defense and receive a fair trial.

E. The information sought is not cumulative.

Finally, the State argues that the information sought in the subpoena was cumulative to other evidence at trial. This simply is not so. The anonymous commenter indicated that the fateful shot was accidental and that Mr. Brockmeyer wept in response. The potential testimony stands in stark contrast to the State's evidence and arguments at trial. Specifically, the prosecutors alleged that the shooting was intentional; they presented witnesses who repeatedly denigrated the genuineness of Mr. Brockmeyer's grief—some discussing the absence of tears—(R. 64:17-18, 209:15-16, 224:23-24, 237:7); and their closing argument reiterated this theme (R. 767:16-768:3, 769:19-22). Obviously, the anonymous commenter's testimony was completely the *opposite* of all this.[10] To now argue that his testimony would have been cumulative is simply incorrect.

[10] The fact that one witness testified that Mr. Brockmeyer was "frantic, like weeping" (R. 102:19) hardly makes the anonymous witness' testimony cumulative. The Record is replete with the State's emphasis on the lack of tears and the supposedly intentional nature of the shot. The anonymous witness could have testified to the contrary.

II. The Trial Court erred and violated the Confrontation Clause by permitting the State to use a mere computer log to establish the chain of custody.

At trial, the State relied on numerous pieces of evidence, the authenticity of which was established primarily by having witnesses read aloud from computer generated logs documenting who had handled the evidence and what had been done with it. Mr. Brockmeyer's counsel objected because various people listed in the log did not appear at trial, thus he was unable to cross-examine them. The trial court overruled this objection. On appeal, Mr. Brockmeyer argues that this ruling violated the guarantee of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

The State's brief discusses the issue at great length. The issue, however, is a relatively simple one. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The United States Supreme Court has made clear that the Confrontation Clause applies to testimony used to establish a chain of custody. *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). Specifically, where the government elects to introduce testimony to establish the chain of custody, that testimony *must* be live:

> It 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.*

Melendez-Diaz, 557 U.S. at 322 n.1 (emphasis added). Here, the computer log purported to prove that each piece of evidence was untainted and properly transferred and handled. It was thus testimonial—"functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Melendez-Diaz*, 557 U.S. at 321

(citation omitted);[11] *see also State v. Cribb*, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992) ("Where the analyzed substance has passed through several hands, the evidence must not leave it to conjecture as to who had the substance and what was done with it between the taking and the analysis.") (citation omitted).

Nearly all of the cases relied on by the State predate the High Court's ruling in *Melendez-Diaz*, and thus cannot overcome the clear rule enunciated in that case. The only post-*Melendez-Diaz* case from South Carolina cited by the State is *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011). In *Hatcher*, however, the issue of the Confrontation Clause was neither raised nor ruled upon. Thus it cannot dispose of the issue.

Additionally, the State argues that any Confrontation Clause violation was harmless because it did not contribute to the jury's verdict. This is not the case. The cumulative effect of this evidence was to give the impression that the State had presented a substantial body of evidence. In fact, however, in the absence of the ability to cross-examine the custodians and technicians, all that this evidence did was violate the Constitution. Ultimately, because Mr. Brockmeyer was denied the right to confront and cross-examine these absentee witnesses, the Constitution demands that his conviction be overturned.

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[11] The recent case of *Williams v. Illinois*, __ U.S. __, 132 S. Ct. 2221 (2012), does not affect this rule and it provides little guidance here. First, that case was a bench trial, which "makes a big difference in evaluating the likelihood that the factfinder mistakenly based its decision on inadmissible evidence." *Id.* at 2237 n.4. Second, the Court's holding—that an expert witness' explanation of the assumptions underlying her opinion fell outside the scope of the Confrontation Clause—does not apply here. *Id.* at 2228.

III. The Trial Court erred by permitting the State to introduce an unnecessary and prejudicial photograph of the defendant.

At trial, the State introduced an unnecessary photo of Mr. Brockmeyer to imply that he was cold, heartless, and, ultimately, guilty. The law is clear that such photos should be excluded. *See State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) ("Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions."). The State's brief concedes as much. *See* Resp. Brief at 35 ("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 the facts.") (citing *State v. Johnson*, 338 S.C. 160, 169, 727 S.E.2d 740, 745 (2012)). Here, as explained in Mr. Brockmeyer's initial brief, the photo was unnecessary and prejudicial, and should have been excluded.

Both at trial and in its appellate brief, the State argues that the photo is relevant to show "how he was acting." *See* R. 256:15-18; Resp. Brief at 36. A photograph of someone's face, however, cannot show his actions. It can merely show what he looks like, which, in this case, the State exploited for illicit purposes.[12] The State also claims that the photo corroborated other testimony and evidence. Resp. Brief at 36-38. In other words, the photo was cumulative and unnecessary. In light of the risk for unfair prejudice, it should have been excluded.

[12] The State's motivation in introducing the photograph was revealed by its repeated use (*see, e.g.*, R. 697:3-6), including in closing arguments (R. 769:19-22), to imply Mr. Brockmeyer's guilt and to prejudice the minds of the jury.

IV. The Trial Court erred by allowing the State to introduce hearsay taken from the decedent's cell phone.

At trial, the State introduced a photograph from Mr. Rae's cell phone, including a caption—written by an unknown author—purporting to identify the ownership of two firearms pictured. (*See* R. 439:19-25, 448:18-19.) The State could not establish when this photograph was taken, by whom, or who captioned it. Despite the defense's objection on hearsay grounds, the trial court admitted the photo without addressing the rule prohibiting hearsay or explaining why it did not apply. The Trial Court thus permitted hearsay evidence to establish a disputed issue: the ownership of the weapon that shot Mr. Rae.

The State's responsive brief reviews much of the record evidence as to a single undisputed and unrelated point, namely that Mr. Brockmeyer had temporary possession of the firearm at some points during the evening. *See* Resp. Brief at 43-48. Mr. Brockmeyer acknowledged this fact, both at trial (R. 647:9-12) and in his initial brief to this court. The hearsay caption, however, addressed a different question: the ownership of the weapon. Clearly, the prosecutor thought it was a significant issue. His closing argument emphasized both the ownership of the weapon and the content of the photo caption. (R. 753:12-15.) The inclusion of hearsay evidence in the prosecutor's closing argument indicates that this issue was "a crucial piece of evidence" that "almost certainly affected the result of the trial and therefore could not be harmless." *State v. Davis,* 371 S.C. 170, 182, 638 S.E.2d 57, 63 (2006).

The State's responsive brief concedes the uncertainty as to the caption's author,[13] and acknowledges that it is subject to the hearsay rule, but argues that the error was harmless. Resp. Brief at 49. The record, however, indicates otherwise. As noted above, the prosecutor thought the issue was significant enough to merit discussion in his closing argument. Furthermore, if the hearsay evidence was cumulative, as the state claims, then it was not harmless. *State v. Jennings*, 394 S.C. 473, 478-79, 716 S.E.2d 91, 94 (2011) ("'[I]t is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'") (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)). Because the title of the photograph was prejudicial, inadmissible hearsay admitted to prove the truth of a substantial issue in the case, its admission into evidence was error and warrants reversal.

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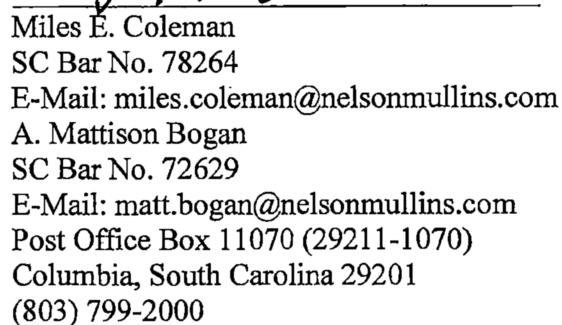
[13] "The caption . . . was *presumably* placed there by someone other than the defendant (Will) and *probably* the victim." Resp. Brief at 49 (emphasis added).

CONCLUSION

The trial court erred by denying Mr. Brockmeyer the ability to identify a witness in his favor, by permitting a violation of the Confrontation Clause, by admitting an unnecessary and improperly used photo, and by admitting hearsay. For the foregoing reasons, Appellant requests that this court reverse and remand for a new trial.

Respectfully submitted,

Nelson Mullins Riley & Scarborough, LLP



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Columbia, South Carolina
January 3, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

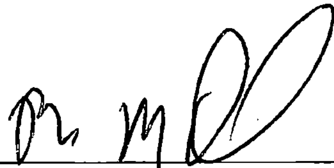
V.

WILLIAM MARK BROCKMEYER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 3rd day of January, 2013.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of January, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013 .

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William Mark Brockmeyer, Appellant.

Appellate Case No. 2011-198266

Appeal from Lexington County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 27333
Heard May 15, 2013 – Filed November 27, 2013

AFFIRMED

A. Mattison Bogan and Miles E. Coleman of Nelson Mullins Riley & Scarborough, LLP, and Chief Appellate Defender Robert M. Dudek, all of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Donald V. Myers of Lexington, for Respondent.

JUSTICE KITTREDGE: Appellant William Mark Brockmeyer appeals his convictions for murder and possession of a weapon during a violent crime, raising

constitutional challenges to both the trial court's refusal to enforce a subpoena concerning the identity of an internet commenter and the admission of certain chain-of-custody testimony and other photographic evidence at trial. We affirm.

I.

Appellant William Mark Brockmeyer and Nicholas Rae (the victim) knew each other for seven or eight years before the shooting; the two met while working together at a tree service company, and thereafter, they both served time in the same prison facility.[1] On the night of the shooting, Brockmeyer, the victim, and several mutual friends attended a house party and then visited a bar known as Jager's Private Club in Lexington County, South Carolina. Because Jager's was a private bar, only members and their guests were permitted to enter, and every person who entered the bar was required to sign in. Among the group of friends was Gina Brakefield, who saw both Brockmeyer and the victim carrying guns—the victim had a large pellet gun and Brockmeyer carried a .380 caliber pistol.[2] According to several witnesses, Brockmeyer's demeanor at Jager's was agitated and aloof.

Upon arriving at Jager's, the group bought drinks, sat down at a table near the dance floor and began talking, dancing, and hanging out. Thereafter, the victim separated from the group and headed across the bar to challenge another patron, Amera Kabar, to a game of billiards. Although the victim claimed to be more skilled than Kabar, the victim lost four consecutive games of pool[3] and a total of three hundred dollars in wagers to Kabar.[4] According to Kabar, the victim left the

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[1] About three weeks before the shooting, the victim moved to Lexington County from Florida to live with Brockmeyer. At the time of the shooting, Brockmeyer and the victim were living together in a hotel.

[2] Brakefield also testified that, after the group arrived at Jager's and began dancing, she felt a small gun tucked in the waistband of Brockmeyer's pants and that Brockmeyer commented, "it is hard to dance with a pistol in your pants." Additionally, at least three other witnesses testified they saw the victim with a large pellet gun and Brockmeyer with a smaller pistol.

[3] Kabar admitted she "kept [the games] close to keep him wanting to play me."

[4] Brockmeyer denied giving the victim three hundred dollars, claiming he gave the victim just forty dollars.

pool table area to have a discussion with Brockmeyer before agreeing to the stakes for each game. During the fourth game, Brockmeyer approached the pool table and lifted his shirt to reveal the gun tucked into his waistband, threatening Kabar, "This is how we do it." However, instead of becoming frightened, Kabar dropped all pretense of unskillfulness and "ran the table," sinking all the remaining balls without giving the victim another turn. Kabar testified that by the last game of pool, the victim was intoxicated, and although he appeared disappointed, he remained polite, thanking her and congratulating her on a "great game."

After finishing the pool games, the victim, clearly intoxicated,[5] rejoined his friends at their table. The victim was helped outside by a female friend. Several people smoking outside the bar entrance saw the victim vomit and then sit down in a chair on the front porch. Brockmeyer followed the victim through the bar and watched him through the front doors of the bar. Still inside the bar, Brockmeyer pulled the gun from his waistband, despite the attempts of another female friend to stop him.

Brockmeyer walked outside and knelt in front of the victim, who was slumped over in a chair, asleep with his hands by his side. Brakefield saw Brockmeyer whisper in the victim's ear, raise his hand toward the victim's neck, and fire a shot. Brakefield screamed, ran inside the bar, and shouted for someone to call 9-1-1. Brockmeyer immediately exited the front porch and headed towards the wooded area behind the bar. The other people on the porch heard the shot and saw Brockmeyer walking towards the woods immediately afterwards. Upon realizing the victim had been shot, the witnesses left the porch, running through the bar and out the back exit before the police arrived.

Commotion ensued, both inside and outside the bar. Several patrons surrounded the victim and attempted to administer first aid. Brockmeyer reappeared several minutes later, having removed his white Sean John brand t-shirt and wearing only a tank-top undershirt. Police officers arrived shortly and began collecting evidence and interviewing witnesses. That night, Brockmeyer offered several conflicting explanations about what had happened, including that he was inside when the victim was shot, that the victim committed suicide, and that "black guys" shot the victim. Brockmeyer was taken to the police station for questioning where he eventually admitted shooting the victim but claimed the gun went off accidentally. Brockmeyer was arrested and charged with murder and one count of possession of a weapon during the commission of a violent crime.

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[5] The autopsy revealed the victim's blood alcohol concentration was 0.227 at the time of death.

At trial, Brockmeyer contended the shooting was an accident—he saw the victim slumped over with the .380 pistol in his lap, and when Brockmeyer claimed he reached for the gun, a shot went off. Brockmeyer admitted possessing the gun earlier in the evening and disposing of it in the woods behind the bar after the shooting. However, Brockmeyer claimed he only temporarily held onto the .380 pistol while the victim played pool (at the victim's request) and that he was unarmed at the time he followed the victim outside. Brockmeyer contended he did not realize the victim was hurt until after he disposed of the gun, and upon hearing the victim was injured, he became very emotional because the two were close friends. One witness, Mariko Clack, testified Brockmeyer was weeping and was "really shaky and frantic" after he was told the victim had been shot.

The autopsy revealed the victim died as a result of a .380 caliber gunshot wound to the neck. The pathologist testified the gunshot wound was a "hard contact" wound, meaning the weapon was pushed firmly against the skin at the time the shot was fired—so firmly as to leave a visible a muzzle imprint.

A jury convicted Brockmeyer of murder and the weapon charge, and Brockmeyer was sentenced to an aggregate term of forty years in prison. Brockmeyer appealed, and this matter was transferred to this Court from the court of appeals pursuant to Rule 204(b), SCACR.

II.

Brockmeyer argues the trial court committed reversible error in failing to grant his motion to enforce a subpoena directed at a news media outlet. We disagree.

"[C]riminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). However, "the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses.'" *United States v. Valenzuela-Bernal* 458 U.S. 858, 867 (1982). Rather, to demonstrate a Compulsory Process Clause violation, an appellant must make some plausible showing of how the testimony of an absent witness would have been both material and favorable to his defense. *Id.*

Less than twenty-four hours after the shooting, a news article about the shooting was published on a website operated by WLTX, a local television station. The WLTX website allows users to establish an account which they may use to post

comments and exchange messages on the WLTX website. The online registration process requires a person to submit his or her gender, year of birth, and zip code, and, for users who wish to access discussion forums and sharing pages, the user's name and email address are also required. The WLTX Privacy Notice, which all users had to accept, included a notification that WLTX could release user information "if required to do so by law or if, in [WLTX's] business judgment, such disclosure is reasonably necessary to comply with legal process."

The day after the shooting, someone using the pseudonym "AndTheTruth" posted the following comment on the WLTX website in response to the online article about the shooting:

> Were you there, did you see what happened, did you see the tears on his young confused face when he realized he had just accidentally killed his friend...
>
> -God makes provision for an accidental or carelessly caused death. Judge not, and ye shall not be judged:
>
> . . . .
>
> -My Heart & Prayers go out to both families & all of my friends who had to see this happen, may God be with you all...

The theory of Brockmeyer's defense was that the shooting was an accident. Brockmeyer wanted evidence supporting his claim of accident and being emotionally upset after the shooting. Brockmeyer contends the anonymous comment suggests its author had direct knowledge of the incident and supports Brockmeyer's claim of an accidental shooting. Accordingly, Brockmeyer wished to explore the possibility that the commenter might be a potential defense witness and served WLTX with a subpoena seeking the following information:

> 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 [the victim].

WLTX objected to the subpoena, arguing the commenter's identity was protected anonymous speech under the First and Fourteenth Amendments.[6] Brockmeyer acknowledged the position of WLTX in the abstract, but insisted that his constitutional right to a fair trial required disclosure of the identity of the anonymous commenter.[7]

Based on WLTX's objection, Brockmeyer thereafter filed a motion to enforce the subpoena, contending he was entitled to explore potential witnesses and present a defense by virtue of the Sixth and Fourteenth Amendments. At the pre-trial motion hearing, defense counsel explained:

> Basically the defense, in exploring [Brockmeyer's] defense in this case, wanted to have the information about this witness so we could potentially talk to them [sic] to see if they [sic] could be a mitigating witness or a defense witness in this matter.

Brockmeyer argued his right to present an accident defense was "way more important" than any right asserted by WLTX, including the anonymous

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[6] "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]" U.S. Const. amend. I. "'[A]n author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.'" *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782, 787 (M.D. Pa. 2008) (quoting *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 342 (1995)). "This is because 'the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.'" *Id.* Indeed, "[i]t is clear that speech over the internet is entitled to First Amendment protection" and that "[t]his protection extends to anonymous internet speech." *Doe v. Cahill,* 884 A.2d 451, 456 (Del. 2005). While the position of WLTX has merit, the present situation was not easily resolved, for Brockmeyer's right to a fair trial was implicated, thus creating a tension between constitutional protections.

[7] Although neither of the parties addresses the issue of whether WLTX had standing to assert a First Amendment challenge on behalf of the anonymous commenter, other courts have found a news station has standing in similar circumstances. *See, e.g., Enterline*, 751 F.Supp.2d at 784-86 (finding, as a matter of first impression, that a newspaper had third-party standing to assert free speech rights of individuals posting to (a or the) newspaper's online forums).

commenter's First Amendment rights. Brockmeyer contended he had no other means to procure the information sought.[8] WLTX countered that to the extent the anonymous commenter actually witnessed the shooting, his or her identity was ascertainable from other sources, given the exhaustive witness list the State provided to Brockmeyer.

In this regard, Jager's, a private bar, required each customer sign in upon entering the bar. Law enforcement obtained the sign-in list of everyone who entered the bar on the night of the shooting. At the motion hearing, defense counsel admitted the State had provided the defense with a copy of the sign-in list from the night of the shooting.

The trial judge noted the competing interests at issue— specifically, Brockmeyer's constitutionally guaranteed rights and an anonymous speaker's First Amendment right not to reveal his or her identity. However, because disclosure of the anonymous commenter's identity could potentially produce testimony only if the commenter was present at the scene, and because the defense had previously been given a list of all persons who signed in as a client at the bar on the night of the shooting, the trial court concluded that, if the information exists, it was readily available through other means. As a result, the trial judge declined to enforce the subpoena at that time.[9] However, the trial court directed the State to further assist the defense following the hearing to ascertain the identity of certain witnesses whose signatures were illegible on the bar sign-in list. The State agreed, promising to do so by the end of that day. The issue was not mentioned again.

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[8] Brockmeyer also argued the anonymous commenter's acceptance of the terms of the WLTX Privacy Notice constituted a waiver of all privacy rights. Because the trial court did not rule on this argument, it is not preserved for appellate review and we do not reach it.

[9] We also note the trial court correctly held the commenter's privacy is not privileged under the news media shield law, finding the shield law was not applicable because the information was not source information but rather voluntary expression by an anonymous person. *See* S.C. Code § 19-11-100(A) (providing that a news reporter "has a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news.").

At trial, Brockmeyer did not renew his motion to enforce the subpoena or argue to the trial judge that he still required this information. On appeal, Brockmeyer asks the Court to reverse his conviction, arguing he is constitutionally guaranteed the right to compel witnesses in his favor and that he was denied that right by the trial court's refusal to enforce his subpoena directing WLTX to disclose the anonymous commenter's registration information.

This Court has not specifically addressed whether and under what circumstances the right to anonymity must give way to other constitutionally protected interests, such as a criminal defendant's rights under the Sixth Amendment's Compulsory Process Clause. Both parties urge the Court to adopt a four-part standard for evaluating a subpoena that seeks the identity of an anonymous Internet user who is not a party to the underlying litigation:

(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.

Doe v. 2TheMart.com Inc., 140 F.Supp.2d 1088, 1095 (W.D. Wash. 2001).[10]

Although Brockmeyer presents a compelling argument for the disclosure of the commenter under the circumstances presented, we decline to reach this issue on issue preservation grounds. We have no way of properly evaluating Brockmeyer's continuing need for the information he sought to subpoena following the trial

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[10] Courts have adopted varying iterations of this test, but, for the most part, they are similar—they involve striking a balance between competing interests and require the party seeking evidence to make a showing of good faith, materiality, relevancy and unavailability from another source. *See, e.g.*, *2TheMart.com Inc.*, 140 F.Supp.2d at 1095 (noting the adopted test "provides a flexible framework for balancing the First Amendment rights of anonymous speakers with the right of civil litigants to protect their interests through the litigation discovery process"); *Cahill*, 884 A.2d at 460 (setting forth "the appropriate test by which to strike the balance" between the right to exercise free speech anonymously and the right to obtain the identity of the anonymous speaker).

judge's instructions for the solicitor to take additional steps to assist the defense in identifying everyone at Jager's on the night of the shooting. This is so because Brockmeyer failed to renew his motion at the outset of trial. Thus, Brockmeyer has failed to provide this Court with a sufficient record on appeal to evaluate this assertion of error. *See Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (finding it impossible to evaluate the merits of certain issues because the Appellant failed to include the relevant material in the record on appeal); *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 215, 493 S.E.2d 826, 834 (1997) (noting an appellant bears the burden of providing a sufficient record to review his assertions of error).

However, even assuming the trial court erred in not requiring disclosure of the anonymous commenter's identity, the error would not be reversible. Brockmeyer is unable to show he was prejudiced by the trial judge's denial of his motion to enforce the subpoena. More to the point, evidence of an accidental shooting and Brockmeyer's distraught state was presented. Brockmeyer testified that the shooting was an accident and that he was "in shock" afterwards. More importantly, Mariko Clack, who was among the group of friends with Brockmeyer and the victim on the night of the shooting, testified that Brockmeyer was weeping and was "really shaky and frantic" after the shooting. Thus, any error was harmless because even assuming the anonymous commenter testified to that effect, it would have been cumulative.[11] *See State v. Commander*, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was

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[11] Assuming the anonymous commenter was present and actually witnessed the shooting, he or she would not have been able to testify that the killing "was an accident." Any testimony would have been limited to what the witness observed, with the ultimate decision of murder or accidental killing to be decided by the jury. *See* Rule 602, SCRE ("A witness may not testify to a matter unless . . . the witness has personal knowledge of the matter."); *State v. Commander*, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011) (finding testimony in the form of a legal conclusion is generally improper); *State v. Wise*, 359 S.C. 14, 27, 596 S.E.2d 475, 481 (2004) (a defendant is prohibited from directly eliciting the opinion of lay witnesses about the ultimate issue to be decided by the jury).

influenced by the challenged evidence or the lack thereof."). In sum, the issue is not properly preserved, but in any event, any error in the trial court's refusal to enforce the subpoena would not constitute reversible error.

III.

Brockmeyer argues statements of certain non-testifying evidence custodians found in computerized chain-of-custody logs were introduced indirectly at trial in violation of the Confrontation Clause of the Sixth Amendment. Brockmeyer argues this constitutional violation invalidated the chain of custody and rendered the related evidence inadmissible. We disagree.

"'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, 91, 708 S.E.2d 750, 753 (2011) (quoting *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.*

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This procedural protection applies in both federal and state prosecutions by virtue of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

In *Crawford v. Washington*, the Supreme Court unanimously found the criminal defendant's Confrontation Clause rights had been violated by the admission into evidence a tape recording of a nontestifying person's "testimonial" statement to police. 541 U.S. 36, 68-69 (2004). *Crawford* changed the law to prohibit the admission of testimonial, out-of-court statements unless two conditions are met: the witness is unavailable at trial and the defendant had a prior opportunity to cross-examine the witness. *Id.* at 68. Although *Crawford* applies whenever "testimonial evidence is at issue," the Supreme Court emphasized that "nontestimonial" evidence is exempted from Confrontation Clause scrutiny altogether. *Id.*

Thereafter, in *Melendez-Diaz v. Massachusetts*, the Supreme Court found sworn certificates from forensic analysts, which were admitted at trial to attest that the substance seized from the criminal defendant was cocaine, were testimonial in nature and thus subject to the Confrontation Clause. 557 U.S. 305, 311 (2009). The Supreme Court noted "the *sole purpose* of the affidavits was to provide 'prima

facie evidence of the composition, quality, and the net weight' of the analyzed substance," and held that the analysts were "witnesses" for the purposes of the Confrontation Clause and that the testimonial statements were "against" the criminally accused because they proved a fact necessary for his conviction—namely, that the substance he possessed was cocaine. *Id.* at 311-12. However, the Supreme Court also noted "[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, . . . must appear in person as part of the prosecution's case." *Id.* at 311 n.1. Although "'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." *Id.* Indeed, "'gaps in the chain of custody normally go to the weight of the evidence rather than its admissibility.'" *Id.* (quoting *United States v. Lott,* 854 F.2d 244, 250 (7th Cir. 1988)).

Two years later, the Supreme Court decided *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). Bullcoming was convicted of driving under the influence. The trial court admitted in evidence a lab report indicating his blood alcohol concentration (BAC) was at "an inordinately high level." *Id.* at 2710. The lab analyst who prepared the report was not available to testify, and counsel objected to the introduction of the lab report because it violated Bullcoming's right to confront his accuser. The Supreme Court agreed, rejecting New Mexico's reliance on the business record exception to rules against hearsay, and reversed the conviction. *Id.* at 2710-13.

Concurring separately in *Bullcoming*, Justice Sotomayor emphasized that the BAC report at issue was testimonial in nature because its "'primary purpose' is evidentiary," and therefore the Sixth Amendment's Confrontation Clause was triggered. *Id.* at 2719. Further, Justice Sotomayor noted that "in the Confrontation Clause context, business and public records 'are generally admissible *absent confrontation* 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*.'" *Id.* at 2720 (quoting *Melendez-Diaz*, 557 U.S. at 325) (emphasis added).

In short, the Confrontation Clause analysis turns on whether the challenged out-of-court statement is testimonial. Indeed, the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford*, 541 U.S. at 51 (citing 2 N. Webster, An American Dictionary of the English Language (1828)); *see Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011) ("We therefore limited the Confrontation Clause's reach to testimonial statements

. . . ."). Only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006) (citing *Crawford*, 541 U.S. at 51). "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id.*

Under the primary purpose analysis required by the Confrontation Clause, where the primary purpose of an out-of-court statement is to serve as evidence or "an out-of-court substitute for trial testimony," the statement is considered testimonial. *Bullcoming*, 131 S. Ct. at 2721-23 (Sotomayor, J., concurring). However, "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Michigan v. Bryant*, 131 S. Ct. at 1155; *see, e.g.*, *Melendez-Diaz*, 557 U.S. at 324 ("Business 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*." (emphasis added)); *Davis*, 547 U.S. at 822 ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.").

In determining the primary purpose of the out-of-court statement, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Bryant*, 131 S. Ct. at 1156. "In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.* at 1155. Thus, "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status." *Melendez-Diaz*, 557 U.S. at 321 (citing Fed. R. Evid. 803(6)).

Recently, the Fourth Circuit Court of Appeals examined the Supreme Court's Confrontation Clause jurisprudence—including *Crawford*, *Melendez-Diaz*, and *Bullcoming*—and concluded "'the chain of custody is not relevant when a witness identifies the object as the actual object about which he testified.'" *United States v. Summers*, 666 F.3d 192, 201 (4th Cir. 2011) (quoting *United States v. Phillips*, 640 F.2d 87, 94 (7th Cir. 1981)). "Establishing a strict chain of custody 'is not an iron-clad requirement, and the fact of a missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it

purports to be and has not been altered in any material respect.'" *Id.* (quoting *United States v. Ricco*, 52 F.3d 58, 61-62 (4th Cir. 1995)). "The [trial] court's role is merely to act as a gatekeeper for the jury, and the proponent of the evidence need only make a prima facie showing of its authenticity." *Id.* (citing *United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir. 2009)).[12]

On appeal, Brockmeyer challenges the admission of certain evidentiary items on the grounds that the State failed to call to the witness stand every evidence custodian to testify about the chain of custody. Specifically, Brockmeyer challenges the admission of (1) a t-shirt Brockmeyer was wearing on the night of the shooting (State's Exhibit #25); (2) a spent shell casing recovered near the victim's body (State's Exhibit #28); (3) a magazine from a .380 semiautomatic pistol recovered at the scene (State's Exhibit # 30); (4) a Ceska .380 semiautomatic pistol discovered near the back fence of the Jager's property (State's Exhibit #48); and (5) a fired projectile and jacket recovered from the victim's body during the autopsy (State's Exhibit #53).

At trial, the State called Investigator Day, who testified that during the course of his investigation he collected the following from the scene: Brockmeyer's t-shirt, the spent shell casing, the pistol magazine and the .380 caliber semiautomatic pistol. Following authentication by Investigator Day, photographs of each item were admitted without objection. Thereafter, the State moved for admission of the items into evidence. Defense counsel objected to the admission of the items, arguing the State failed to lay a "sufficient chain of custody or foundation." Notably, Brockmeyer's objection to the admission of these items was based solely on the allegedly insufficient foundation—not a Confrontation Clause violation.

The trial judge overruled the objections, finding a proper foundation was laid by Investigator Day's testimony identifying each item as the item he collected. Thereafter, outside the presence of the jury, the following colloquy took place between defense counsel and the trial judge:

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[12] Although phrased in slightly different terms, we find the Fourth Circuit's analysis in *Summers* is consistent with this Court's decision in *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011) (finding the State need not establish the identity of every person handling evidence items in all circumstances, but rather the appropriate standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable).

> The Court: I have overruled the defense objections to the chain of custody based on the State providing sufficient evidence to demonstrate a reasonable assurance that the items were the same as when collected. I do that based on State versus Hatchell[13] [sic]. . . . [I]n these various matters that you objected to, [the witness] testified that he himself collected it and testified that they were in the same condition when he put them in the sealed containers. So I have some concerns about what is the basis for your objection.
>
> [Defense Counsel]: Judge, he has absolutely no idea what has happened with any of these items. Our position would be that they are fungible items. In other words, there is not a big difference—
>
> The Court: My ruling is only as to this stage, you understand. We will deal with it as we go along as to what, if anything, occurred.
>
> [Defense Counsel]: Yes, sir. Quite honestly, I think at this point if they are in, that maybe chain of custody arguments in the future are inapplicable. That's why I objected to them at this point in time. I think they would have had to gone [sic] through the chain of custody before they ultimately introduced those.
>
> The Court: I respectfully disagree. I will not tell the solicitor how to try his case. Obviously, he has got to finish his chain of custody. The only thing I am telling you at this time it was appropriate that these items be introduced based on his testimony. He said he found them. He did it with the same thing. Now, I assume they will offer testimony as to what occurred in the interim. We will see.

Thereafter, the State offered the testimony of Investigator Troy Crump, who testified that he was present at the autopsy and collected a fired projectile recovered from the victim's body (State's Exhibit #53). After a photograph of the projectile was admitted without objection, the State submitted the projectile itself for admission into evidence. As with the previous items, defense counsel objected to the admission of the projectile based on "insufficient foundation because of the

[13] *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011).

chain of custody." Again, no Confrontation Clause objection was raised. The trial judge overruled the objection and the fired projectile was admitted.

Thereafter, to establish a foundation for later admitting forensic analyses of the items, the State further developed the chain of custody for each piece of evidence. Investigator Crump testified that the autopsy pathologist recovered the projectile, placed it in a bottle, heat-sealed the bottle inside a plastic bag, and initialed and dated the seal. Investigator Crump testified that, immediately upon the conclusion of the autopsy, he took custody of the sealed bag containing the projectile, transported it directly to the Lexington County Sheriff's Department (LCSD) facility, and stored it in a secure laboratory overnight.[14] Investigator Crump testified that, as soon as the evidence storage facility opened the following morning, he retrieved the projectile from the lab and gave it to an evidence custodian. Investigator Crump testified that, at the time he transferred custody to the evidence room, the plastic bag containing the projectile had not been opened, altered or manipulated.

Margaret Harmon, an LCSD evidence custodian, verified that she received the fired projectile from Investigator Crump along with various items from Investigator Day, including the t-shirt, the shell casing, the pistol and the magazine. Harmon testified that each item was sealed with tamperproof tape and that, at the time she received them, no one had opened, altered, or manipulated any of the containers.

The solicitor then asked Harmon to recite the chain of custody for each item. Referring to the LCSD chain-of-custody log, defense counsel objected to Harmon's testimony, arguing her testimony constituted inadmissible hearsay. Specifically,

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[14] Regarding the security of the laboratory, the State presented the testimony of Lieutenant Scottie Frier, the supervisor of the LCSD crime scene laboratory, who testified that the laboratory is secure and can be accessed only by himself, Investigator Day, Investigator Crump and seven other crime scene investigation employees. Lieutenant Frier testified he did not touch the fired projectile while it was stored overnight in the laboratory and that it is the practice of the crime lab employees not to touch or handle any evidence unless specifically involved in the investigation. Additionally, the State went so far as to present the testimony of each of the other seven LCSD crime scene investigation employees—Renee Strickland, Glen Ross, Michael Phipps, Shelby Derrick, D.I. Blackwell, and Duane Johnson—each of whom testified that they did not touch, handle, manipulate, or alter the plastic bag or fired projectile in any way while it was stored in the lab.

counsel asserted it was improper for Harmon to read from the custody logs because they were not subject to the business records exception of Rule 803(6), SCRE. Notably, as with Brockmeyer's objection to the admission of the items themselves, this objection failed to allege a Confrontation Clause violation.

The trial judge overruled Brockmeyer's hearsay objection, finding law enforcement agencies are entitled to avail themselves of the business records exception and that these chain-of-custody records were kept in the normal course of business. The trial judge concluded Harmon's testimony was admissible.

Regarding the pistol magazine, Harmon testified the item had remained in the continuous custody of the LCSD evidence facility from the time it was initially submitted by Investigator Day until it was brought to court for trial. Harmon testified that she or Candy Kyzer, another LCSD evidence custodian, released the t-shirt, the shell casing, the pistol, and the recovered projectile to Investigator Day, who transferred all four of those items to Amy Stephens of the South Carolina Law Enforcement Division (SLED) on July 14, 2010. Kyzer did not testify.

In further developing the chains of custody, the State offered the testimony of Amy Stephens, a forensic technician in the evidence control department at SLED. Referring to the SLED chain-of-custody report, Stephens testified that she accepted the t-shirt, the pistol, the shell casing, and the fired projectile from Investigator Day, and that she immediately transferred those items to the firearms evidence intake storage. Although the SLED chain-of-custody reports were not offered into evidence, defense counsel objected to Stephens' testimony reciting the information contained the reports on the basis that it was hearsay. Additionally, for the first time, defense counsel alleged a Confrontation Clause violation under the rule set forth in *Crawford*. The trial judge asked defense counsel to clarify the objection:

> The Court: I have ruled that [Stephens] is entitled to use these records. What other—what other objection? As an example, she has used about 15 names. Are you suggesting the State needs to call in every one of those witnesses?
>
> [Defense Counsel]: No, sir. Judge, I would think that the chain of custody would be complete for our purposes as to the last person who tests it. . . . . I don't have a problem if they stop with whatever forensic scientist in the end that they plan on calling to testify.

The trial judge overruled the objection, stating Stephens "is entitled to use the records, but that takes care of it," implicitly finding the testimony did not implicate

the Confrontation Clause. Thereafter, the relevant chains of custody were developed as follows.

T-Shirt

Stephens testified the t-shirt was retrieved from storage by Lisa Waananen[15] on July 15, 2010, and submitted to trace evidence examiner Ila Simmons to be tested for the presence of gunshot residue (GSR). Simmons testified she recognized the t-shirt because it was marked with her laboratory identification number, the item number, her initials, and the date she performed the analysis. Simmons further testified the t-shirt was in a sealed container when she received it and that she performed particle lifts from the t-shirt and examined those for the presence of GSR.[16] Stephens testified that Simmons returned the t-shirt to the SLED storage room on August 11, 2010, where it remained until it was released to forensic technician Betty Butler on October 20, 2010, for further testing.

Butler testified the t-shirt was in a properly sealed container when she received it and that it had not been tampered with. Butler testified she took DNA swabs from the t-shirt to test for possible blood or skin cells, then she re-sealed and initialed the box, and returned it to the evidence control department.[17]

Stephens confirmed that Butler returned the t-shirt to the evidence control department in a properly re-sealed container on October 25, 2010, following completion of the DNA testing, and the t-shirt was returned to Candy Kyzer of LCSD on December 1, 2010.

Pistol, Shell Casing, and Fired Projectile:

Again referring to the SLED chain-of-custody report, Stephens testified the .380 caliber pistol, the shell casing, and the fired projectile were retrieved from the evidence control department[18] for testing on July 23, 2010. Although all three

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[15] Lisa Waananen did not testify.

[16] Simmons' particle lift analysis (State's Exhibit #69) was admitted without objection, and the results of those tests are not the subject of this appeal.

[17] At trial, the DNA swabs Butler obtained were admitted over defense counsel's objection on the basis of *Crawford*; however, Brockmeyer does not challenge the admission of this DNA evidence on appeal.

[18] Stephens' testimony indicated that she did not personally transfer the items to

items—the pistol, the shell casing, and the fired projectile—were eventually transferred to forensic scientist Michelle Eichenmiller for ballistics testing, the pistol was first transferred to Butler for DNA testing. Butler testified the package containing the pistol was properly sealed and secured when she received it and that she swabbed the pistol for traces of DNA, re-sealed and initialed the container, then transferred the pistol to Michelle Eichenmiller for ballistics testing.

Michelle Eichenmiller, a firearms analyst for SLED, testified that she received the pistol, the shell casing, and the fired projectile, and at the time of her receipt, each item was in a sealed, taped package and had not been tampered with or altered. Eichenmiller testified that through laboratory testing, she was able to determine that the projectile recovered during the autopsy and the shell casing found near the victim's body were both fired by the pistol—State's Exhibit #48. Following Eichenmiller's examination, Stephens testified, the items were returned to the SLED evidence control department and were subsequently returned to Candy Kyzer at the LCSD.

Defense counsel objected to the testimony of both Stephens and Eichenmiller on the basis of hearsay and, for the first time, defense counsel alleged a Confrontation Clause violation under *Crawford*[19]:

> [Defense Counsel]: Judge, I would simply renew my previous objections under the chain of custody.
>
> The Court: With reference to this issue[], let me hear your specific objection.
>
> [Defense Counsel]: Under the chain of custody, under the proper foundation, and then also under Crawford versus Washington.
>
> The Court: Where is it that you allege is a deficiency in the chain of

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Eichenmiller; rather, SLED evidence technicians Nikki Perry Hughes and Doris Yarborough retrieved the items from storage and transferred them to Eichenmiller and Butler. Neither Hughes nor Yarborough testified.

[19] Although defense counsel specifically referenced *Crawford* in objecting to Stephens' testimony, counsel never identified the particular out-of-court statement alleged to violate the Confrontation Clause. Moreover, in overruling the objection, the trial judge ruled only that Stephens' testimony did not constitute hearsay; he did not rule on the constitutional issue and counsel did not bring that omission to the trial judge's attention.

> custody? . . . . . I want to hear with specificity what is your objection to this particular testimony?
>
> [Defense Counsel]: Just the laying of the foundation and the chain of custody on the items that she is testifying to.
>
> The Court: You keep referring to the chain of custody. Where is it in your opinion [deficient]?
>
> [Defense Counsel]: Judge, the same things I testified [sic] to as to hearsay and the business records exception that Your Honor had ruled upon previously. I believe I am required to renew it at this point in time.
>
> The Court: On the business [record exception] only. Okay. My ruling on that speaks for the record.

Brockmeyer now argues that various law enforcement personnel listed within the chain-of-custody logs did not testify at trial in violation of the Confrontation Clause, thus rendering the admission of the t-shirt, the shell casing, the magazine, the .380 pistol, and the fired projectile reversible error. We reject this argument for several reasons.

We first find Brockmeyer's claim is not preserved for appellate review. Although Brockmeyer objected to the admission of the t-shirt, the shell casing, the magazine, the .380 pistol, and the fired projectile, none of Brockmeyer's initial objections alleged a Confrontation Clause violation; rather, Brockmeyer challenged only the sufficiency of the foundation for admitting each item. The issue of whether evidence is admissible under "state-law requirements regarding proof of foundational facts" is distinct from the issue of whether a defendant's Sixth Amendment confrontation right was violated. *See Williams v. Illinois*, 132 S.Ct. 2221, 2243 (2012) ("[I]f a statement is not made for 'the primary purpose of creating an out-of-court substitute for trial testimony,' its admissibility 'is the concern of state and federal rules of evidence, not the Confrontation Clause.'" (quoting *Bryant*, 131 S.Ct. at 1155)). Thus, on appeal, Brockmeyer may not bootstrap a Confrontation Clause objection onto his objection to the State's proof of foundational facts. Although Brockmeyer eventually raised Confrontation Clause objections, those objections were untimely as to the admission of the items themselves and do not preserve for appellate review the issue of whether that evidence was properly admitted. *See State v. Aldret*, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (finding where a defendant failed to call an alleged error to

the trial judge's attention at the first opportunity to do so, the defendant is procedurally barred from raising the issue on appeal).

In any event, the challenged testimony referring to certain statements of other non-testifying evidence custodians in the chain-of-custody logs was admissible as a matter of state law and would not raise Confrontation Clause concerns. Therefore, the admission of the challenged non-fungible items was proper, notwithstanding Brockmeyer's inability to confront each custodian who handled the evidence.

"Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *In re Care & Treatment of Harvey*, 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003) (citing Rule 801, SCRE). "Hearsay is not admissible unless there is an applicable exception." *Id.* at 61-62, 584 S.E.2d at 897 (citing Rule 802, SCRE). The business record exception reads, in pertinent part:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . .

Rule 803, SCRE.

At trial, Harmon testified that she was responsible for storing, tracking the physical custody, and maintaining control of all of the evidence collected by investigators and crime scene personnel. She testified that the record of who possessed each piece of evidence is referred to as a chain of custody and that the chain of custody paperwork accompanies the evidence as it is transferred. Harmon testified that, when evidence is first submitted to the LCSD facility, an evidence custodian verifies the identity of each item and ensures it is accompanied by a chain of custody form. The evidence custodian then enters the tracking information into a computer system and stores the evidence until it is released for testing or sent to court. Harmon testified that the chain of custody form is "basically . . . keeping track of who touches it and what happens to the evidence," and that the custody forms and data are maintained in the normal course of business.

Stephens testified at trial that she is a forensic technician in the SLED evidence control department and that she is responsible for logging in, packaging, and

transferring evidence for forensic analysis in criminal cases. Stephens testified that it is SLED's practice to maintain electronic chain-of-custody records which document every location and person that handles or touches evidence.

We find the facts of this case demonstrate that the evidence logs were kept as business records for the purpose of identifying and storing evidentiary items. We find the trial judge properly determined the chain-of-custody reports fall within the hearsay exception in Rule 803(6), SCRE, and that the evidence custodians' testimony about the chains of custody was admissible. Critical to admissibility of the chain-of-custody records here is their non-testimonial nature. Regarding the Confrontation Clause analysis, these chains of custody were not created "for the *sole purpose* of providing evidence against the defendant." *Melendez-Diaz*, 557 U.S. at 323. Indeed, the evidence logs do not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items; thus, the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their "primary purpose" is not to constitute evidence in a criminal trial. Because we find these statements are not testimonial, they are exempt from Confrontation Clause scrutiny. *See Bullcoming*, 131 S.Ct. at 2270 (Sotomayor, J., concurring) ("[B]usiness and public records 'are generally admissible absent confrontation.'").

Having determined there was no Confrontation Clause violation, the issue of the admissibility of testimony regarding the chains of custody is purely a question of state law. In this case, the challenged evidence was unique and readily identifiable. Because the challenged evidence in this case is not fungible, unlike the cocaine in *Melendez-Diaz* or the blood sample in *Bullcoming*, here strict chains of custody are not required for admission into evidence. *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741-42 (2005) ("While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required: If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition."). Rather, readily identifiable items must merely be authenticated by a showing of "evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901, SCRE (listing as acceptable methods of authentication the testimony of a witness with knowledge

"that a matter is what it is claimed to be" and distinctive characteristics, such as "[a]ppearance, contents substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances"). "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." *State v. Hatcher*, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011).

Here, the challenged evidence was admissible upon a proper showing of identification. Before the items were admitted into evidence, Investigators Day and Crump identified each item as the item they collected, and testified that the evidence was carefully marked and preserved so that it could be identified with absolute certainty. Additionally, as to the t-shirt in particular, both Brakefield and Clack testified that Brockmeyer was wearing the t-shirt at the time of the shooting. Moreover, two photographs depicting Brockmeyer wearing the t-shirt on the night of the shooting (State's Exhibits #3 and #4) were already admitted into evidence. Accordingly, the trial court's evidentiary rulings are readily sustainable, for there is ample evidence establishing that these items were, in fact, what they were purported to be. *See Hatcher*, 392 S.C. at 95, 708 S.E.2d at 755 (holding that although "every person handling the evidence need not be identified in all cases," the proponent of the evidence must nonetheless demonstrate "how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be"); *see also United States v. Summers*, 666 F.3d 192, 201 (4th Cir. 2011) (In determining whether real evidence is admissible, the trial judge need "only to satisfy itself that it was 'improbable that the original item had been exchanged with another or otherwise tampered with.'" (quoting *United States v. Jones,* 356 F.3d 529, 535 (4th Cir. 2004), and citing Fed. R. Evid. 901(a))).

We finally note the obvious—Brockmeyer admitted possessing the .380 pistol at the time it was fired and then throwing the gun and the magazine into the woods afterwards. Brockmeyer's self-authentication of the challenged items renders meritless his chain of custody and *Crawford* arguments. Having authenticated most of the items through his own testimony, Brockmeyer himself negates any possible prejudice by the admission of these items. *See State v. Commander*, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."); *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) ("'A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error' if the 'error was harmless beyond a reasonable doubt.'" (quoting *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994))). Accordingly,

we find the trial judge's admission of the challenged items of evidence did not constitute reversible error.

IV.

Brockmeyer argues the trial court committed reversible error in admitting two photographs during his trial—specifically, a photograph of Brockmeyer and a photograph taken from the victim's cell phone. We disagree.

"'A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.'" *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (quoting *State v. Kelley*, 319 S.C. 65, 173, 460 S.E.2d 368, 370 (1997)). "The determination of relevancy and materiality of a photograph is left to the sound discretion of the trial judge." *Id.* "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *Id.*

First, Brockmeyer argues the trial court erred in admitting a photograph of him taken shortly after the shooting because it suggests a decision on an improper basis in violation of Rule 403, SCRE. During the testimony of Leslie Lawson, the owner of Jager's Bar, the State introduced a photograph of Brockmeyer wearing no shirt. Brockmeyer objected on the grounds that the picture was irrelevant. The State contended the photograph was relevant to show Brockmeyer's agitated demeanor after the shooting, as contrasted with Brockmeyer's desire to portray himself as distraught and crying. The trial court overruled Brockmeyer's objection and admitted the photograph.

As an initial matter, it is our view this matter is not preserved for appellate review because the basis of the objection at trial was relevance, but Brockmeyer argues on appeal that the probative value was substantially outweighed by the prejudicial effect under Rule 403. Because a party may not argue one ground at trial and another on appeal, this issue is not preserved for appellate review.

Nevertheless, on the merits, we find no abuse of discretion in the admission of the photograph. The photograph depicted Brockmeyer close to the time of the shooting and was relevant to his demeanor at the time. Moreover, because other witnesses testified regarding Brockmeyer's demeanor being agitated following the

shooting, Brockmeyer cannot prove he was prejudiced by the admission of this photograph. *See State v. Griffin*, 339 S.C. 74, 77-78, 528 S.E.2d 668, 670 (2000) ("There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted.") (citing *State v. Williams,* 321 S.C. 455, 469 S.E.2d 49 (1996)). In this regard, it was Brockmeyer who sought to bolster his accident defense with evidence of his distraught and weeping demeanor. Surely the State is entitled to counter that evidence.

Lastly, Brockmeyer claims the trial court erred in admitting State's Exhibit #56, which is a photograph recovered from the victim's cell phone depicting the murder weapon and the victim's pellet gun side by side with the caption, "Wills gun on left my gun on righ[t]." Brockmeyer claims this photograph was offered for the truth of the matter asserted in the caption and, therefore, was inadmissible hearsay. We agree with Brockmeyer but do not find the error reversible.

The error was harmless because Brockmeyer admitted owning and possessing the .380 pistol at Jager's on the night of the shooting. Several witnesses saw Brockmeyer with the pistol and the victim with the pellet gun at Jager's on the night of the shooting, and the pellet gun was found tucked in the back of the victim's body immediately after the shooting. Additionally, Deserae Camacho, Brockmeyer's former girlfriend, testified Brockmeyer owned and frequently carried a .380 pistol and that the victim carried a "fake plastic BB gun" for protection. Thus, the caption on the photograph was cumulative to other evidence admitted at trial indicating the ownership of the guns. Because the improper admission of hearsay constitutes reversible error only when it results in prejudice, it is our view Brockmeyer has failed to show he was prejudiced, and thus, has failed to show reversible error. *See State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) ("Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless.").

V.

For the foregoing reasons, Brockmeyer's convictions and sentences are affirmed.

AFFIRMED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

ORIGINAL

FORM 5

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2014 FEB 25 P 2:56

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON CO.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
WILLIAM BROCKMEYER #347537 Full name and prison number (if any) of Applicant.	)	
v.	)	APPLICATION FOR
State of South Carolina	)	POST-CONVICTION RELIEF

2014CP3200689

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention McCormick Correctional Institution
2. Name and location of Court which imposed sentence Lexington County General Session
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 2011GS3201255
   (b) 2011GS3201257
   (c)
5. The date upon which sentence was imposed and the terms of the sentence:
   (a) August 26, 2011 35 yrs. consecutive
   (b) August 26, 2011 5 yrs. consecutive

Revised 5/2003

A TRUE COPY
Lex. Co. C.C.C.P., G.S. & F.C.

(c) ______

6. Check whether a finding of guilty was made:

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BETH A. C[illegible]
CLERK OF C[illegible]

(a) after a plea of guilty ______
(b) after a plea of not guilty ✓
(c) after a plea of nolo contendere ______

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

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

(a) the name of each Court to which you appealed:
i. S. C. Court of Appeals
S. C. Supreme Court
ii. ______
iii. ______

(b) the result in each such Court to which you appealed:
i. Transferred From S.C. Court of Appeals pursuant to
ii. Rule 204(B) SCACR to S.C. Supreme Court Affirmed
iii. ______

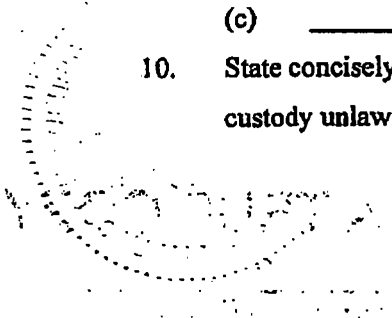
(c) the date of each such result:
i. S.C. Court of Appeals March 5, 2013
ii. S.C. Supreme Court November 27, 2013
iii. ______

(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. S.C. Supreme Court Opinion #27333
ii. ______
iii. ______

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

(a) ______
(b) N/A
(c) ______

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



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(a) INEFFECTIVE ASSISTANCE OF COUNSEL

(b) ______

(c) ______

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BETH A. CARRIGG
CLERK OF COURT

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

(a) COUNSEL FAILED TO PROPERLY PRESERVE APPELLANT ISSUES

(b) FOR APPEAL, COUNSEL FAILED TO SHOW HOW APPELLANT

(c) CONSTITUTIONAL RIGHTS WERE VIOLATED WHICH DENIED APPELLANT DUE PROCESS OF LAW.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. ______

iii. ______

iv. ______

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

i. N/A

ii. ______

iii. ______

iv. ______

(c) the disposition thereof:

i. N/A

ii. ______

iii. ______

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2014 FEB 25 P 2:56
SETH A. CARPENTER
CLERK OF COURT

iv. ______

(d) the date of each such disposition:

i. N/A

ii. ______

iii. ______

iv. ______

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

i. N/A

ii. ______

iii. ______

iv. ______

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

yes

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

(a) which grounds have been presented:

i. TRIAL COURT FAILURE TO GRANT DEFENDANTS MOTION

ii. TO ENFORCE SUBPOENA DIRECTED AT NEWS MEDIA

iii. CONFRONTATION AND COMPULSORY RIGHTS

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

i. DIRECT APPEAL

ii. ______

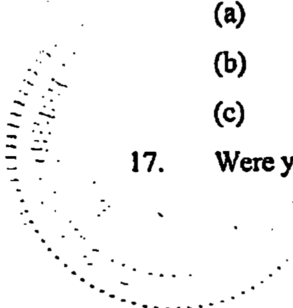
iii. ______

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

(a) INEFFECTIVE ASSISTANCE OF COUNSEL

(b) FIRST (PCR)

(c) ______



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

(a) your arraignment and plea? ______

(b) your trial, if any? yes

(c) your sentencing? yes

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

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

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

(a) the name and address of each attorney who represented you:

i. DAVID MAULDIN / ROBERT MADSEN

ii. A. MATTISON BOGAN / MILES E COLEMAN

iii. ROBERT McCLUSEK

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

i. TRIAL / SENTENCING

ii. DIRECT APPEAL

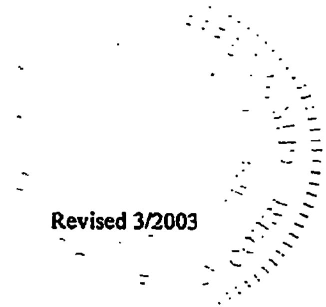
iii. DIRECT APPEAL

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

THAT CONVICTION BE REVERSED AND REMANDED

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

No



Revised 3/2003

STATE OF SOUTH CAROLINA)
)
County of Lexington)

VERIFICATION

FILED 2014 FEB 25 P 2:56

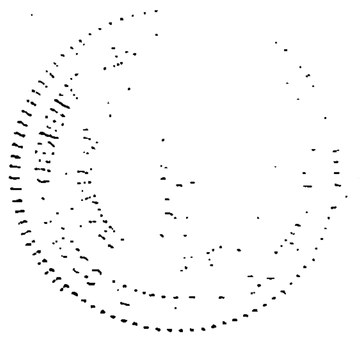
I, WB, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters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

SWORN to and subscribed before me this 18 day of Feb, 2014

(L.S.)
Notary Public

My Commission Expires: 12.16.2019

2014CP3200689



Revised 3/2003

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

FILED
2014 FEB 25 P 12:50

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

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

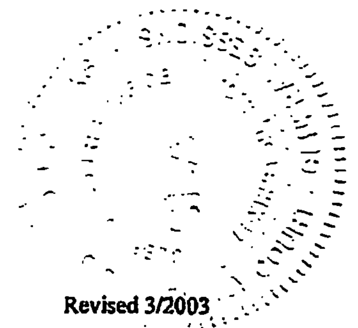
____
Applicant

SWORN or affirmed to and subscribed before me this 18 day of Feb, 2014.

____
Notary Public

My Commission Expires: 12-16-2019

2014CP3200689



Revised 3/2003

2014CP3200689

STATE OF SOUTH CAROLINA — IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

FILED
2014 FEB 25 P 12:51
BETH A. CARRIGG
CLERK OF COURT
CLOCK IN ERROR
ORIGINAL

WILLIAM BROCKMEYER #347527

APPLICANT

V

AN AMENDMENT TO THE POST-CONVICTION RELIEF APPLICATION

STATE OF SOUTH CAROLINA

RESPONDENT

{PRESENTATION OF THE ISSUES WITH CITATION OF LAW IN SUPPORT}

1.) {INEFFECTIVE ASSISTANCE OF COUNSEL}

COUNSEL WAS INEFFECTIVE BY FAILING TO PROPERLY PRESERVE MOTION TO ENFORCE SUBPOENA FOR APPELLATE REVIEW.

THE APPELLANT ARGUED THE ANONYMOUS COMMENTERS ACCEPTANCE OF THE TERMS OF THE {WLTX} PRIVACY NOTICE CONSTITUTED A WAIVER OF ALL PRIVACY RIGHTS.

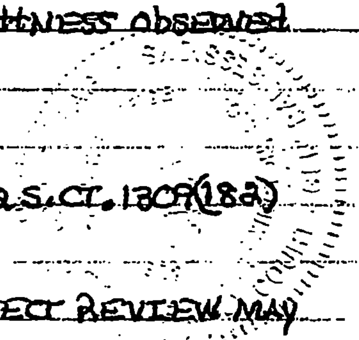
THE TRIAL COURT DID NOT RULE ON THIS ARGUMENT AND COUNSEL WAS INEFFECTIVE BY NOT PRESERVING THIS ISSUE FOR APPELLATE REVIEW WHAT IS FURTHER COUNSEL FAILED TO RENEW HIS MOTION TO ENFORCE THE SUBPOENA OR TO ARGUE TO THE TRIAL COURT THAT THIS INFORMATION WAS REQUIRED AND NECESSARY. THIS INFORMATION WAS RELEVANT AND CRIMINAL DEFENDANTS HAVE THE RIGHT TO THE GOVERMENT'S ASSISTANCE IN COMPELLING THE ATTENDANCE OF FAVORABLE WITNESSES

AT TRIAL AND THE RIGHT TO put BEFORE A JURY EVIDENCE THAT MIGHT INFLUENCE THE DETERMINATION OF GUILT OR INNOCENCE.
{PENNSYLVANIA V. RITCHIE} 480 U.S. 39, 56 (1987)

FILED 2014 FEB 25 P 12:57 BETH A. CARR CLERK OF ...

{PROBATIVE FACT}

THIS INFORMATION WAS REQUIRED BY LAW AND SUCH DISCLOSURE IS REASONABLY NECESSARY TO COMPLY WITH THE LEGAL PROCESS. THIS INFORMATION SHOWS THAT ITS AUTHOR HAD DIRECT KNOWLEDGE OF THE INCIDENT AND SUPPORTS APPELLANTS CLAIM OF AN ACCIDENTAL SHOOTING. THE APPELLANT WAS DENIED A CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY BEING DENIED DISCLOSURE OF THE IDENTITY OF THE ANONYMOUS COMMENTAR AND APPELLANT WAS DENIED DUE PROCESS BY VIRTUE OF THE SIXTH AND FOURTEENTH AMENDMENT.
COUNSEL WAS INEFFECTIVE FOR FAILING TO RENEW MOTION TO ENFORCE SUBPOENA, COUNSEL FAILED TO ASK FOR A CONTINUANCE AND COUNSEL FAILED TO INFORM THE COURT THAT THE APPELLANT STILL REQUIRED THAT INFORMATION, COUNSEL FAILED TO PROPERLY PRESERVE ISSUE FOR APPELLATE REVIEW AND THE APPELLANT WAS PREJUDICED THEREBY AND THERE IS A REASONABLE PROBABILITY THE JURY'S VERDICT WAS INFLUENCED BY THE LACK OF WITNESS TESTIMONY CONCERNING WHAT THEY OBSERVED WHICH COULD HAVE CORROBORATED THE DEFENDANTS TESTIMONY OF AN ACCIDENTAL SHOOTING WHICH COULD HAVE REFUTED ANY EYEWITNESS TESTIMONY IF THE EXCLUDED WITNESS OBSERVED GUN IN VICTIM HAND.



{LUIS MARIANO MARTINEZ V. CHARLES L. RYAN} 132 S.CT. 1309 (182) L.Ed 272; 2012

AN ATTORNEY ERRORS DURING AN APPEAL ON DIRECT REVIEW MAY

PROVIDE CAUSE FOR A PROCEDURAL DEFAULT, FOR IF THE ATTORNEY APPOINTED BY THE STATE TO PURSUE THE DIRECT APPEAL IS INEFFECTIVE THE PRISONER HAS BEEN DENIED FAIR PROCESS AND THE OPPORTUNITY TO COMPLY WITH THE STATE PROCEDURES AND OBTAIN ADJUDICATION ON THE MERIT OF HIS CLAIM. WHEN THE ISSUE CANNOT BE RAISED ON DIRECT REVIEW, A PRISONER ASSERTING AN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM IN AN INITIAL COLLATERAL REVIEW PROCEEDING CANNOT RELY UPON A COURT OPINION OR THE PRIOR WORK OF AN ATTORNEY ADDRESSING THAT CLAIM. TO PRESENT A CLAIM OF INEFFECTIVE ASSISTANCE AT TRIAL IN ACCORDANCE WITH STATE PROCEDURES, THEN A PRISONER LIKELY NEEDS AN EFFECTIVE ATTORNEY. THE SAME WOULD BE TRUE IF THE STATE DID NOT APPOINT AN ATTORNEY TO ASSIST THE PRISONER IN THE INITIAL REVIEW COLLATERAL PROCEEDING.

THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IS A BEDROCK PRINCIPLE IN THE AMERICAN JUSTICE SYSTEM IT IS DEEMED AS AN OBVIOUS TRUTH THAT THE IDEAL THAT ANY PERSON HALED INTO COURT WHO IS TO POOR TO HIRE A LAWYER CANNOT BE ASSURED A FAIR TRIAL UNLESS COUNSEL IS PROVIDED FOR HIM, INDEED THE RIGHT TO COUNSEL IS THE FOUNDATION FOR THE ADVERSARY SYSTEM. DEFENSE COUNSEL TESTS THE PROSECUTION CASE TO ENSURE THE PROCEEDING SERVE THE FUNCTION OF ADJUDICATING GUILT OR INNOCENCE, WHILE PROTECTING THE RIGHTS OF THE PERSON CHARGED. EFFECTIVE TRIAL COUNSEL PRESERVES CLAIMS TO BE CONSIDERED ON APPEAL AND IN FEDERAL HABEAS PROCEEDING.

WHEN A STATE REQUIRES A PRISONER TO RAISE AN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM IN A COLLATERAL PROCEEDING A PRISONER MAY ESTABLISH CAUSE FOR A DEFAULT OF AN INEFFECTIVE ASSISTANCE CLAIM IN TWO CIRCUMSTANCES.

THE FIRST IS WHERE THE STATE COURT did NOT APPOINT COUNSEl IN THE INITIAl REVIEW COllATERAl proceeding FOR A claim OF INEFFECTIVE ASSISTANCE AT TRIAl. THE SECOND IS WHERE APPOINTED COUNSEl IN THE INITIAl REVIEW collateral proceeding, WHERE THE claim should HAVE BEEN RAISED, WAS INEFFECTIVE UNDER THE STANDARDS OF {STRICKLAND}.

A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAl COUNSEl, WHEN AN Attorney ERROR {OR THE LACK OF AN Attorney} CAUSED A procedural DEFAULT IN AN INITIAl REVIEW COllATERAl proceeding ACKNOWledges AS AN Equitable MAtter, THAT THE INITIAl REVIEW COllATERAl proceeding IF undertaken WITHOUT COUNSEl OR WITH INEFFECTIVE COUNSEl {182 L.Ed 2d 286} MAY NOT HAVE BEEN SUFFICIENT TO ENSURE THAT proper CONSIDERATION WAS GIVEN TO A SUBSTANTIAl CLAIM.

2) INEFFECTIVE ASSISTANCE OF COUNSEl

COURT APPOINTED COUNSEl WAS INEFFECTIVE By FAILING TO properly preserve A VIOLATION OF THE CONFRONTATION ClAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THIS DENIED APPEllANT due process OF LAW And THIS WAS highly prejudicial And Rendered THE EVIDENCE INAdmissible.

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEES THAT IN All CRIMINAl proceeding THE ACCUSSED SHAll ENjoy THE RIGHT... TO BE CONFRONTED WITH THE WITNESSES AGAINST him" THIS procedural protection Applies IN BOTH STATE And Federal prosecution By VIRTUE OF THE FOURTEENTH AMENDMENT.

{POINTER V. TEXAS} 380 U.S. 400, 406 (1965)

COURT APPOINTED COUNSEL WAS UNDULY INEFFECTIVE BY FAILING TO OBJECT TO THE ADMISSION OF THIS EVIDENCE, COUNSEL WAS INEFFECTIVE BY FAILING TO SHOW A CONFRONTATION CLAUSE VIOLATION, COUNSEL FAILED TO SHOW THE BASIS OF HIS OBJECTION AND THIS WAS HIGHLY PREJUDICIAL TO APPELLANT, COURT APPOINTED COUNSEL WAS IN EFFECTIVE BY FAILING TO CLARIFY A CONFRONTATION CLAUSE VIOLATION UNDER THE RULE SET FORTH IN {CRAWFORD}.

FILED 2014 FEB 25 2:57 6TH A. CAR. CLERK OF COURT

COUNSEL FAILED TO MAKE A TIMELY AND PROPER CONFRONTATION CLAUSE VIOLATION UNDER {CRAWFORD} AND COUNSEL WAS UNDULY INEFFECTIVE BY INDICATING ON RECORD THE OBJECTION WAS MADE UNDER CHAIN OF CUSTODY INSTEAD OF A CONFRONTATION CLAUSE VIOLATION.

DEFENSE COUNSEL: UNDER CHAIN OF CUSTODY UNDER THE PROPER FOUNDATION AND UNDER {CRAWFORD V WASHINGTON}

COUNSEL WAS INEFFECTIVE BY FAILING TO IDENTIFY THE PARTICULAR OUT OF COURT STATEMENT ALLEGED TO VIOLATE THE CONFRONTATION CLAUSE WHICH WAS HIGHLY PREJUDICIAL TO APPELLANT, BECAUSE THE TRIAL COURT DID NOT RULE ON THIS CONSTITUTIONAL ISSUE AND COUNSEL WAS FURTHER INEFFECTIVE BY FAILING TO BRING THIS OMMISSION TO THE TRIAL COURT ATTENTION.

COUNSEL FAILED TO PRESERVE APPELLANT CLAIM FOR APPELLATE REVIEW

COUNSEL FAILED TO ALLEGE A CONFRONTATION CLAUSE VIOLATION

COUNSEL WAS INEFFECTIVE BY CHALLENGING ONLY THE FOUNDATION FACTS WHICH IS DISTINCT FROM THE ISSUE OF WHETER A DEFENDANT SIXTH AMENDMENT CONFRONTATION RIGHT WAS VIOLATED

{WILLIAMS V ILLINOIS} 132 S. CT. 2221 2242 (2012)

WHEN FACED WITH THE QUESTION WHETER THERE IS CAUSE FOR A DEFAULT A STATE MAY ANSWER THAT AN INEFFECTIVE ASSISTANCE CLAIM IS SUBSTANTIAL (I.E.) IT DOES NOT HAVE ANY MERIT OR THAT IT IS WHOLLY WITHOUT FACTUAL SUPPORT, OR THAT THE ATTORNEY IN

THE INITIAL REVIEW COLLATERAL PROCEEDING did NOT PERFORM TO CONSTITUTIONAL STANDARDS.
{132 S. CT. 182 L. Ed 2d 286}

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2014 FEB 25 P 2:57
BETHA CARRIER
CLERK OF COURT

{COLEMAN V THOMPSON} 111 S. CT. 2546 115 L. Ed 2d 640
COLEMAN IS NOW QUALIFIED BY RECOGNIZING A NEW EXCEPTION INADEQUATE ASSISTANCE OF COUNSEL AT TRIAL/INITIAL REVIEW COLLATERAL PROCEEDING MAY ESTABLISH CAUSE FOR A PRISONER PROCEDURE DEFAULT OF A CLAIM OF INEFFECTIVE ASSISTANT AT TRIAL.
CLAIMS OF INEFFECTIVE ASSISTANCE OFTEN REQUIRES INVESTIGATIVE WORK AND AN UNDERSTANDING OF TRIAL STATEGY
{DOUGLAS} SUPRA AT 357-358 83 S. CT. 814 9 L. Ed. 2d 811

{GIDEON V WAINWRIGHT} 372 US 335 344 83 S. CT. 792 182 L. Ed 2d 285 9 L. Ed 2d 799 (1963)
THE RIGHT TO EFFECTIVE ASSISTANT OF COUNSEL AT TRIAL IS A BED ROCK PRINCIPLE IN OUR JUSTICE SYSTEM IT IS deemed AN OBVIOUS TRUTH THAT ANY PERSON haled INTO COURT WHO IS TO POOR TO HIRE A LAWYER CANNOT BE ASSURED A FAIR TRIAL UNLESS COUNSEL IS PROVIDED FOR HIM.

{POWELL V. ALABAMA} 287 US 45, 68-69 53 S. CT. 55, 77 L. Ed 158 (1932)
THE DEFENDANT REQUIRES THE GUIDING hands OF COUNSEL AT EVERY STEP IN THE PROCEEDING AGAINST him, WITHOUT IT THOUGH HE BE NOT GUILTY HE FACES THE DANGER OF CONVICTION BECAUSE HE does NOT KNOW HOW TO ESTABLISH his INNOCENCE.

EFFECTIVE TRIAL COUNSEL PRESERVES CLAIMS TO BE CONSIDERED ON APPEAL.
SEE (E.g.) Fed Rule CRIM. proc. 52(b) {132 S. CT. 1318

FILED
2014 FEB 25 P 12:57
DETROIT
CLERK OF THE COURT

{WALKER V CALDWELL} 476 F. 2d 213-218 (5th CIR 1973)
Holding THAT PROVIDING AN UNDERSTANDING OF THE LAW IN RELATION TO THE FACTS IS THE FUNCTION OF THE ACCUSED APPOINTED COUNSEL.

{MCCARTHY} 394 US 46, 89 S. CT. 1166
{ARGERSINGER V HAMLIN} 407 US 25, 34 S. CT. 2006 32 L. Ed 2d 530 (1972)
COUNSEL IS NEEDED SO THAT THE ACCUSED MAY KNOW PRECISELY WHAT HE IS DOING, SO THAT HE IS FULLY AWARE OF THE PROSPECT OF GOING TO JAIL OR PRISON AND TO ENSURE THAT HE IS TREATED FAIRLY BY THE PROSECUTION.

{PROBATIVE FACT}
COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE JURY FOREMAN STATED THAT JURY FOUND DEFENDANT OF WEAPON/ POSSESSION WEAPON DURING A VIOLENT CRIME ON 8/25/11 THE DAY BEFORE JURY FOUND DEFENDANT GUILTY OF MURDER ON 8/26/11 THE TRIAL COURT ASSUMED THE FOREMAN WROTE THE WRONG DATE AND UPON THE COURT'S INSTRUCTION THE FOREMAN WAS INSTRUCTED TO CHANGE THE DATE THE FOREMAN THEN STATES JURY FOUND DEFENDANT GUILTY AROUND 7:00 P.M. THE PREVIOUS NIGHT WHICH IS NOT IN ACCORD WITH THE ELEMENTS OF THE CHARGE WHICH REQUIRES A CONVICTION OF A VIOLENT

CRIME PRIOR TO A CONVICTION OF POSSESSION OF A WEAPON DURING A VIOLENT CRIME.

SEE TR. pg. 10 L-8-18 8/26/11

SEE {TRUE BILL INDICTMENT WITH VERDICT AND DATES WRITTEN BY MICHEAL J. LAW FOREMAN OF PETIT JURY}

FILED
2014 FEB 25 P 3:57
BETHANY [illegible]
CLERK OF APPEALS

COUNSEL WAS FURTHER INEFFECTIVE BY FAILING TO RAISE A PROPER OBJECTION IN REGARD TO A PREJUDICIAL PHOTO ADMITTED BY STATE. COUNSEL WAS INEFFECTIVE BY FAILING TO CALL ANY EXPERT WITNESS FOR THE DEFENSE.

{STRICKLAND V WASHINGTON} 466 US AT 694 104 S. CT. 2052 801 L. Ed. 2d 694 (1984)

{CONCLUSION}

THE APPELLANT HAS DEMONSTRATED THAT COUNSEL WAS INEFFECTIVE AND COUNSEL'S PERFORMANCE WAS NOT REASONABLE UNDER PREVAILING NORMS, AND APPELLANT HAS DEMONSTRATED THAT HE WAS PREJUDICED THEREBY AND THERE EXISTS A REASONABLE PROBABILITY THAT BUT FOR COUNSEL'S ERRORS, THE OUTCOME WOULD HAVE BEEN DIFFERENT. THE APPELLANT RESPECTFULLY SUBMITS THAT HIS CONVICTION SHOULD BE REVERSED AND REMANDED.

DATE: ____________________

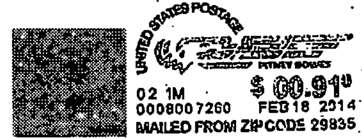
S____________________

RESPECTFULLY SUBMITTED

1054

William Brockmeyer #347527
M.C.I. F2-119
386 Redemption Way
Mc Cormick, S.C. 29899

#2014,CP3200689



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Beth Carrigg
Clerk of Court for Lexington County
Lexington County Courthouse
407½ W. Main St
Lexington, S.C. 29702

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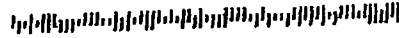

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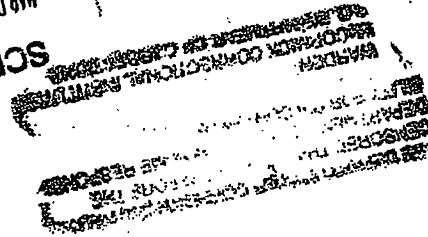

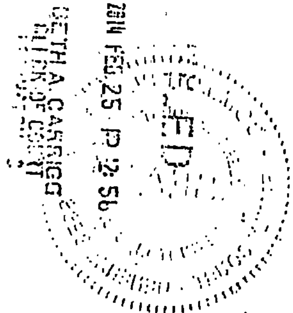

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
William Brockmeyer, S.C.D.C. No. 347527	)	C.A. No. 2014-CP-32-0689
Applicant,	)	
v.	)	RETURN
State of South Carolina,	)	
Respondent.	)	

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed February 25, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexingon County. Applicant was indicted at the May 2011 term of the Court of General Sessions for Lexington County for murder (2011-GS-32-1255) and possession of weapon during the commission of a violent offense (2011-CP-32-1257). He was represented by the Public Defender, Robert M. Madsen, Esq., and David Mauldin, Esq., On August 22, 2011, the State called its case to trial. Applicant was found guilty as indicted. The Honorable Edward Cottingham sentenced Applicant to a term of thirty-five (35) years imprisonment for murder and to a term of five (5) years imprisonment on the possession of weapon conviction. The sentences were to be served consecutively for an aggregate term of forty (40) years imprisonment.

A notice of appeal was filed on Applicant's behalf and was perfected by Robert Dudek, Esq., Chief attorney of the Division of Appellate Defense, A. Mattison Bogan, Esq., and Miles E.

Coleman, Esq. The South Carolina Supreme Court affirmed Applicant's convictions and sentencens in a published opinion. State v. William Mark Brockmeyer, Op. No. 27333 (filed on November 27, 2013). The remittitur soon followed.

Attached herewith and incorporated herein by reference are the records of the Lexington County Clerk of Court regarding the subject conviction(s), and the Applicant's records from the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records[1].

II.

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

1. Ineffective Assistance of Trial Counsel;
   a. Failure to preserve object regarding argument "anonymous commenters acceptance of terms of the [WLTV] privacy notice constituted a waiver of all privacy rights;"
   b. Failure to preserve argument concerning a purported "violation of the confrontation clause" regarding an out-of-court statement where counsel instead supported his argument on chain-of-custody instead;
   c. Failure to object to the manner in which the jury foreman announced the guilty verdict for possession of a weapon during a violent offense'"
   d. Failure to investigate the relevant facts and laws governing the Applicant's defense.

III.

The Applicant's first claim is an allegation of ineffective assistance of trial counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided

[1] Respondent intends to incorporate Applicant's trial transcript and his appellate records into the Record at Applicant's PCR hearing.

representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The

Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code ' 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: ______________________
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

July 30th, 2014

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) 2014-CP-32-0689

2014 SEP 29 PM 4:10
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

WILLIAM BROCKMEYER)
SCDC # 347527)
Applicant,)
)
vs.) AMENDED APPLICATION
) FOR POST CONVICTION RELIEF
)
STATE OF SOUTH CAROLINA,)
Defendant.)

COPY

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows:

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

(a) Ineffective assistance of trial counsel for failing to object to inadmissible hearsay testimony. Page 147 and 148.

(b) Ineffective assistance of trial counsel for failing to preserve the record clearly and have physical demonstrations done in Court described for the transcript.

(c) Ineffective assistance of trial counsel for failing to effectively present arguments regarding the angle of the gunshot wound and failure to allow the Applicant to demonstrate what happened.

(d) Ineffective assistance of counsel for failure to present evidence regarding reputation and use of a nickname prior to the incident.

(e) Ineffective assistance of counsel for failure to object when the trial judge provided instructions to the jury prior to the closing arguments of counsel.

(f) Ineffective assistance of counsel for failing to object when the Court did not emphasize to the jury that a conviction on a violent crime was a prerequisite for

a conviction on possession of a deadly weapon during commission of a violent crime.

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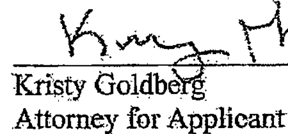
CLERK OF COURT
LEXINGTON SC

(g) Ineffective assistance of counsel for failing to object and/or request a mistrial and/or move for a new trial based on the fact that the jury reached a verdict on possession of a deadly weapon during commission of a violent crime prior to reaching a verdict on whether or not he committed a violent crime, and the Court instructed the jury to re-date the verdict on the indictment.



Kristy Goldberg
Attorney for Applicant

Kristy Goldberg
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803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This ~~28th~~ day of September, 2016

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF LEXINGTON)	**2014-CP-32-0689**
)	
WILLIAM BROCKMEYER)	
SCDC # 347527)	
Applicant,)	
)	
vs.)	**AMENDED APPLICATION**
)	**FOR POST CONVICTION RELIEF**
)	
STATE OF SOUTH CAROLINA,)	
Defendant.)	

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CLERK OF COURT

COPY

I certify that on this date I served an Amended Application for Post-Conviction Relief in this case on The State of South Carolina by delivering a copy of this application to the Office of the Attorney General via hand delivery.

Kristy Goldberg
Attorney for Applicant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This ~~28th~~ 29th day of September, 2016

1 State of South Carolina — Court of Common Pleas
2 County of Lexington — Eleventh Judicial Circuit
3
4 William Brockmeyer,) Transcript of Record
)
5 Applicant,)
vs.) 2014-CP-32-00689
6)
State of South Carolina,)
7)
Defendant.)
8
9
November 9, 2016
10
Lexington, South Carolina
11
12 B E F O R E:
13 The Honorable R. Keith Kelly, Judge
14
15 A P P E A R A N C E S:
16 Kristy G. Goldberg, Esquire
On behalf of the Applicant
17
18 Johanna C. Valenzuela, Esquire
On behalf of the State of South Carolina
19
20
21
Stacy S. Johnson
22 Circuit Court Reporter
23
24
25

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Redirect Examination by Ms. Goldberg	25
David Mauldin	
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EXHIBTS

NO EXHIBITS WERE INTRODUCED

2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

1 (Whereupon, the following proceedings were held
2 November 9, 2016, beginning at 10:34 AM.)
3 **THE COURT:** Are we ready?
4 **MS. GOLDBERG:** Yes, sir.
5 **MS. VALENZUELA:** Your Honor, this is William
6 Brockmeyer versus the State of South Carolina. Case
7 Number 2014-CP-32-00689. Mr. Brockmeyer filed the current
8 PCR application in February of 2014. He's currently
9 incarcerated and this is after a Lexington County Grand
10 Jury indicted him for murder and possession of a weapon
11 during the commission of a violent crime. After he was
12 indicted for those, he went forward to trial. He was
13 represented by public defenders Robert Madsen and David
14 Mauldin. That trial was called on August 22nd of 2011.
15 After the trial the jury ended up finding the Applicant
16 guilty as indicted on both charges and Judge Cottingham
17 sentenced the Applicant to a term of thirty-five years
18 for murder and five years for possession of a weapon
19 conviction. Both sentences to be served consecutively
20 for an aggregate term of forty years.
21 A notice of appeal was filed on the Applicant's behalf
22 and the Supreme Court ended up affirming those convictions
23 and the remittitur followed somewhere around November of
24 2013.
25 The Applicant is represented by Ms. Goldberg. She

1 has submitted amended allegations and she has filed those,
2 Your Honor. Do you have those as part of the --
3 **THE COURT:** I do, and I'm looking at them now.
4 **MS. VALENZUELA:** Okay. I will not read those out
5 loud and I'll turn it over now to Applicant.
6 **THE COURT:** Yes, ma'am.
7 **MS. GOLDBERG:** Thank you, Your Honor. May it please
8 the Court? The Applicant did file -- or I filed on behalf
9 of the Applicant an amended application on September 29th
10 with several allegations. You have that in front of you?
11 **THE COURT:** Yes, ma'am. On the screen.
12 **MS. GOLDBERG:** Okay. Very good. We are going forward
13 on all of those except for Allegation D. We're actually
14 gonna withdraw that at this time. Otherwise, I'm prepared
15 to call my first witness.
16 **THE COURT:** Yes, ma'am.
17 **MS. GOLDBERG:** At this time I'd call William
18 Brockmeyer.
19 **THE COURT:** Sir, come up and be sworn, please.
20 (Whereupon, William Brockmeyer was duly sworn by the
21 Clerk of Court.)
22 **THE COURT:** Sir, tell us your full name and spell your
23 last name for my court reporter, please.
24 **THE WITNESS:** William Brockmeyer, B-R-O-C-K-M-E-Y-E-R.
25 **THE COURT:** Thank you. Yes, ma'am.

1 **MS. GOLDBERG:** Thank you, Your Honor. May it please
2 the Court?
3 **THE COURT:** Yes, ma'am.
4 WILLIAM BROCKMEYER,
5 having been duly sworn, testified as follows:
6 DIRECT EXAMINATION
7 BY MS. GOLDBERG:
8 Q. Mr. Brockmeyer, where are you currently housed?
9 A. Kirkland.
10 Q. What sentence are you serving?
11 A. Forty years.
12 Q. For what charge?
13 A. Thirty-five years for murder and five years for
14 possession of a weapon during a violent crime.
15 Q. And that five is consecutive, right?
16 A. Yes, ma'am.
17 Q. When were you arrested?
18 A. July 11, 2010.
19 Q. And after you were arrested, did you stay in jail?
20 A. Yes, ma'am.
21 Q. Okay. You were never able to bond out?
22 A. No, ma'am.
23 Q. Who was your lawyer?
24 A. Robert {sic} Mauldin.
25 Q. Was he your lawyer your entire time?

1 A. At trial I was represented also by Robert Madsen.
2 Q. Okay. Your trial was in August of 2011?
3 A. Yes, ma'am.
4 Q. So you were in jail a little over a year?
5 A. Yes, ma'am.
6 Q. Were your attorneys appointed or retained?
7 A. Appointed.
8 Q. And basically Mr. Mauldin represented you the entire
9 time you were in jail?
10 A. Yes, ma'am.
11 Q. Did he come to the jail, meet with you and go over
12 discovery and prepare the trial with you?
13 A. Yes, ma'am.
14 Q. Now the amended application in this case that I've
15 filed, you've seen a copy of that, correct?
16 A. Yes, ma'am.
17 Q. Would you agree that several of those allegations are
18 legal issues that you don't have any factual testimony to
19 present?
20 A. Yes, ma'am.
21 Q. Okay. I do want to ask you about some of your
22 allegations specifically. Allegation B in the application
23 states that counsel was ineffective for failing to preserve
24 the record clearly and have physical demonstrations done in
25 court described for the transcript. Tell me what physical

1 demonstrations were done in court.
2 A. There was a physical demonstration done in regards
3 to the positioning of -- well, there was an eyewitness,
4 Ms. Brakefield, who testified that she observed what
5 happened, and the State heavily relied on her testimony
6 as far as being the only witness and when the pathologist
7 did a demonstration of like the angle of the gun and
8 everything like that, he did it in agreement with her
9 where basically it would have made my testimony look like
10 I was lying.
11 Q. All right. Let me back up there a little bit. Are we
12 talking about Gina Brakefield?
13 A. Yes, ma'am.
14 Q. She was a witness in this case, correct?
15 A. Yes, ma'am.
16 Q. She testified during your trial?
17 A. Yes, ma'am.
18 Q. And she was allegedly an eyewitness to the shooting
19 that you were charged with?
20 A. That's correct.
21 Q. She did a demonstration in court?
22 A. Yes, ma'am. They --
23 Q. How would you describe that? What did she do?
24 A. She got down from the stand and they had two people --
25 you know, she put them in position as far as what she said

1 she seen, and obviously in this case it was a contact range
2 gunshot wound so the gun touched the person's skin and she
3 put the gun up to the skin in a certain way saying that she
4 seen me like that but it was not actually how it lined up,
5 but we weren't aware of it at the time. We didn't become
6 aware of it until later, until the pathologist testified.
7 Q. Okay. So she arranged two people to show the jury
8 what she saw?
9 A. Yes, ma'am.
10 Q. Did she use a prop gun or something?
11 A. Yes, ma'am.
12 Q. Okay. And she tried to show the jury what she saw as
13 far as the angle of the gun and the way the people were
14 positioned?
15 A. Correct. She said she was standing, I think, three or
16 four feet away and was looking over my shoulder, so.
17 Q. Okay. Is -- what she demonstrated to the jury, is
18 that described in the transcript at all?
19 A. No, ma'am, it's not.
20 Q. So there would be no way for any appellate court or
21 any later court to review exactly what information the jury
22 received?
23 A. Correct.
24 Q. Now did the pathologist also do a demonstration?
25 A. No.

1 Q. Okay.
2 A. He did -- he didn't do a demonstration like she did as
3 far as a physical demonstration like in front of the jury,
4 but he had slides of the -- of the muzzle imprint and the
5 overlay of the barrel of the gun and just put it on a
6 projector and just showed that it had lined up, that it was
7 a match as far as lining up.
8 Q. That a photograph of the injury --
9 A. Yes, ma'am.
10 Q. -- lined up with?
11 A. With the muzzle of the gun.
12 Q. And understanding that that's what the pathologist
13 did, explain again how that relates to what Ms. Brakefield
14 did.
15 A. Well, I can't remember exactly if it was the opening
16 argument or the closing argument, but the State said that
17 my statement was wrong because there was no way the gun was
18 in my hand -- I mean, excuse me. There was no way the gun
19 was in Nick's hand whenever it went off, which would have
20 been in accord with what Gina testified to because if the
21 muzzle imprint would have lined up how she had it, it would
22 have been no way it could have been in his own hand, but it
23 was actually completely reversed all the way around where
24 it would be consistent with being in his own hand. But
25 there was never another demonstration done to show -- you

1 know, how Gina did her demonstration, there was never
2 another one done to show how it really actually lined up or
3 that it actually, in fact, could have been in his own hand.
4 Q. Okay. The State's allegation in this case was that
5 you had possession of the gun, correct?
6 A. Yes, ma'am.
7 Q. And that you had the gun in your hand and you fired
8 the weapon at the individual who was killed, correct?
9 A. Yes, ma'am.
10 Q. And your testimony was what in contrast to that?
11 A. My testimony was that I tried to grab the gun from
12 him, that I wasn't in possession of it.
13 Q. Okay. And that he was actually the one in possession?
14 A. Yes, ma'am. That it was in his hand, yes, ma'am.
15 Q. So that's why all of this matters to you; is that
16 correct?
17 A. Correct.
18 Q. Is there anything that you can do or -- or use to show
19 the Court -- to explain this to the Court a little more
20 clearly?
21 A. Yes, ma'am. If it's possible to do a demonstration,
22 I can show you what was done and what I feel should have
23 been done to clarify the --
24 **MS. GOLDBERG:** All right. Your Honor, for the record,
25 what I've done here in lieu of bringing a prop gun because

1 of the security concern, I've fashioned some highlighters
2 kind of at a right angle for him to hold and we'll do our
3 best for him to present to Your Honor what he believes the
4 problem is.
5 **THE COURT:** Okay.
6 **MR. GOLDBERG:** Okay. Do you need to step down to this
7 area or are you okay?
8 **THE COURT:** If you just want to turn, I can see.
9 **THE WITNESS:** Okay. Like if you're holding a gun,
10 the handle would be here, the muzzle would be here. Gina
11 testified that she seen me -- if I could use you. Well,
12 he was sitting down. She said she seen me leaning, holding
13 the gun like this, which if he would have lifted his hand
14 up there was no way it could be in his hand, but it
15 actually lines up the other way. So if you could grab it,
16 put it in your left hand. If you were holding it up to
17 your neck, it would be exactly consistent like that.
18 That's how it actually lines up. The muzzle imprint with
19 the imprint of the wound, but she said that she seen me
20 completely the opposite way, like this, which -- can have
21 I have it one more time? If she was correct in this,
22 there's no way it could have fit in no hand and that's what
23 the State relied on saying that my testimony couldn't have
24 been right because of that fact.
25 **THE COURT:** Okay.

1 BY MS. GOLDBERG:
2 Q. Okay. And I'm gonna try and do this as best as I can
3 for the record. Your demonstration just now, you were
4 holding a device that's a right angle, kind of like a gun.
5 Your testimony is that the way witness, Gina Brakefield
6 demonstrated it was not possible?
7 A. She -- yes, ma'am. She demonstrated it with a gun
8 being in my right hand with my palm facing down --
9 Q. Okay.
10 A. -- which the actual muzzle imprint lines up with the
11 wound as far as either it being in someone -- like Nick's
12 hand, who was sitting down, it could have been in his left
13 hand with palm facing down or if it was, in fact, in my
14 hand, my hand would have been supinated with my palm facing
15 upward.
16 Q. Okay. So that -- that is your -- so let me back up a
17 little bit. First of all, you believe that the record
18 doesn't clearly reflect what Ms. Brakefield did, correct?
19 A. Right, because on my transcript it just says
20 "indicating". Like it didn't give no -- no explanation as
21 far as what was actually done.
22 Q. Okay. And then based on what you've just explained to
23 the Court, you believe that your lawyers didn't effectively
24 present that issue; is that correct?
25 A. Correct. Yes, ma'am. I believe that another

1 demonstration would have been done -- or, excuse me, should
2 have been done. Mr. -- Mr. Madsen did call the pathologist
3 out on the fact that -- you know, because he said he was a
4 hundred percent sure it was right, but when Mr. Madsen
5 called him out all the pathologist said was okay, I'm
6 sorry, I held it in error. So further in closing argument
7 Mr. Mauldin -- in closing argument he said that another --
8 another demonstration was never done so, therefore, we
9 don't know if this could have been done or not. So my
10 opinion is that if my counsel was confused about, you know,
11 the -- the physical proof, then obviously the jury would
12 have been, too, and wouldn't have been able to make a
13 proper decision based upon the evidence presented because
14 it wasn't presented enough to them for them to make an
15 educated decision.
16 Q. So you believe in closing Mr. Mauldin was essentially
17 admitting that another presentation should have been done?
18 A. Yes, ma'am.
19 Q. And that would have given the jury clarity regarding
20 if it was possible for you to have been the one holding the
21 weapon or not?
22 A. Yes, ma'am. Because like I mentioned before, the
23 State consistently said that there was no way the gun was
24 in Nick's hand and then I feel like what it came down to
25 was my credibility or my believability as opposed to Gina's

1 and Gina said she was only three to four feet away, so
2 obviously here -- she wouldn't be lying, but the proof
3 shows that what she's saying couldn't have -- was not
4 possible.
5 Q. Okay. Now at the end of your -- and she was the only
6 witness, by the way, who testified regarding actually
7 witnessing the shooting itself, correct?
8 A. Yes, ma'am.
9 Q. Okay. At the end of the trial, the jury came back
10 with verdicts resulting in your convictions and I believe
11 there are some issues there with the timing of those. Can
12 you explain that -- what your concerns are to the Court?
13 A. Yes, ma'am. Whenever they came back with the verdict
14 sheets, they presented them to the judge and on possession
15 of a weapon during a violent crime it was dated for the
16 25th, so the judge instructed them to re-date it, but when
17 he tells them to re-date it -- like my transcript doesn't
18 go -- doesn't say everything that was said, but it does say
19 that the foreman says Your Honor, we found him guilty at
20 7:00 last night and then it cuts off and my -- my concern
21 was that I don't feel like they were properly instructed
22 on the -- I guess you would say the -- the order that the
23 charges go in or the fact that it's a prerequisite to a
24 violent crime and if they didn't follow the instructions
25 on that, how an we be sure they followed the instructions

1 and did what a competent jury should have done throughout
2 the whole trial?
3 **THE COURT:** Let me ask a question.
4 **MS. GOLDBERG:** Yes, sir.
5 **THE COURT:** I'm sorry. I want to be clear about that
6 because I had that already written down. The jury returned
7 a verdict on the 25th or is it the 24th or --
8 **MS. GOLDBERG:** What I will do, Your Honor, when
9 Mr. Brockmeyer's finished with his cross-exam, I'm gonna
10 call Mr. Mauldin and I'm gonna go through the transcript
11 line by line as to what's said.
12 **THE COURT:** Okay.
13 **MS. GOLDBERG:** And just so that you're aware, the jury
14 actually returned a verdict written on the indictment for
15 that particular charge, not a verdict form. The indictment
16 does show both dates written, the 25th and 26th.
17 **THE COURT:** 25th and 26th. Okay.
18 **MS. GOLDBERG:** Please answer any questions from
19 opposing counsel.
20 **THE WITNESS:** Yes, ma'am.
21 CROSS-EXAMINATION
22 BY MS. VALENZUELA:
23 Q. Okay, Mr. Brockmeyer. The testimony that you were
24 referring to by Gina, correct --
25 A. Yes, ma'am.

1 Q. -- she was the first State's witness?
2 A. Correct.
3 Q. And she ended up testifying that she was the one who
4 observed you crouching down in front of the victim --
5 A. Yes, ma'am.
6 Q. -- with the victim's hand down beside him almost as if
7 he were passed out?
8 A. Yes, ma'am.
9 Q. And that you pulled the gun up to his neck and shot
10 him, right?
11 A. Right. Yes, ma'am.
12 Q. Okay. So her testimony was consistently that his
13 hands were never up and his hands never had -- had the gun
14 at all?
15 A. Right.
16 Q. Okay. And you're arguing that while the jury saw the
17 way that she was envisioning you holding the gun -- so, for
18 example, Gina demonstrated in front of the jury that the
19 way she saw you doing it was with your palm up?
20 A. Correct.
21 Q. That you have a problem with the transcript not saying
22 that it was demonstrated with the palm up?
23 A. Well, that's in regards to having it preserved because
24 there's no way for any other court or attorneys to -- to
25 know what happened when it just says "indicating".

1 Q. Okay. And what issue do you think if that had been
2 preserved for the transcript that she indicated palm up
3 versus palm down and then that one of your counsel ended up
4 cross-examining and calling out one of the State's expert
5 witnesses on that inconsistency? What issue do you think
6 would have gone up on appeal if that had been preserved
7 correctly?
8 A. I'm not an attorney, so I don't exactly know what that
9 would constitute right there.
10 Q. Do you think it would have been a factual question?
11 A. I can't really answer that.
12 Q. Well, let's talk about factual issues and your jury,
13 okay? You gave statements that night that your -- your
14 friend was killed, right?
15 A. No.
16 Q. You did not talk to the police?
17 A. Yes, I did talk to the police.
18 Q. You did. Okay. And so you also talked to different
19 people who were at the club that night, right, after your
20 -- your friend was -- was shot?
21 A. Correct.
22 Q. Okay. And so you told one of the people that your
23 friend had killed himself?
24 A. No, I never said that.
25 Q. Was there testimony presented to the jury that you had

1 told some of the people that your friend shot himself?
2 A. Somebody said that they heard someone say he shot
3 himself, yes.
4 Q. Well, let's get our pronouns right. I want to make
5 sure that this is right. There was testimony by other --
6 by State's witnesses that they heard you say that your
7 friend had -- that the victim had shot himself?
8 A. I don't recall that, no.
9 Q. Okay.
10 **MS. VALENZUELA:** And, Your Honor, those are pages 259
11 through 261. It's the testimony of Bassam Kabar. On
12 cross-examination Brockmeyer said he shot himself before he
13 walked away. Okay. And then pages 289 to 291, Your Honor,
14 under Shannon Ledesma's direct. She says that Brockmeyer
15 sometimes said save my brother, someone shot him or he shot
16 himself.
17 BY MS. VALENZUELA:
18 Q. And let's continue talking about that. Was -- was
19 there testimony presented that you said that someone else
20 shot the victim --
21 A. Yes.
22 Q. -- other than you and other than the victim himself?
23 A. Yes.
24 Q. Okay. And then additionally in your statement to
25 police did you not end up telling police that there was a

1 group of black men who you had been -- that had been
2 involved in a pool game earlier that night who were angry
3 and ended up shooting the victim?
4 A. No, I never said that they shot the victim, no.
5 Q. You never said that they shot him?
6 A. No.
7 Q. Okay. What did you say to the police?
8 A. I told them that it was their fault.
9 Q. That it was their fault? Okay.
10 **MS. VALENZUELA:** Your Honor, I'm looking at pages 708
11 and 709.
12 BY MS. VALENZUELA:
13 Q. And this is testimony by Shawn Graham. Graham asked
14 Brockmeyer what happened at the bar, Brockmeyer responded
15 -- I'm gonna use the "N" word because everybody knows what
16 that means. I'm not gonna say it. Those F'ing -- I
17 believe it would also be the whole word -- "N" word did
18 it. Actual words will not be used in front of the jury
19 because of the same, they thought that it was gonna be
20 prejudicial, and then there was a description that you gave
21 police. Dreadlocks, one had red and white bandana, right?
22 A. That was playing pool, yes.
23 Q. And then at trial you -- you claimed what you're
24 claiming today, was that when you said that they had shot
25 him, you just meant that they had caused him to be shot

1 because --

2 A. No.

3 Q. Why was that?

4 A. I had the gun earlier in the night and I gave it back

5 to him because he lost.

6 Q. Uh-huh. Because he lost at pool?

7 A. Uh-huh.

8 Q. And if he hadn't lost at pool he wouldn't be dead?

9 A. He wouldn't have had the gun, no.

10 Q. Okay. So let me get this straight. If he hadn't lost

11 at pool because of the black men he was playing against,

12 you would not have returned the gun to him and then he

13 wouldn't have had a gun to get shot with?

14 A. In the first place, yeah.

15 Q. And then you had a different story at trial for the

16 jury about how your friend actually ended up getting shot,

17 right?

18 A. Yeah, I was afraid that nobody would believe me, but

19 when it came to trial they told me that there was only

20 gonna be one witness and so the only way for the people to

21 know the truth would be for me to tell them.

22 Q. Okay. And so we're on a different version of truth,

23 but you say that once you get to trial that's the -- the

24 version that you go with and that version that you tell the

25 jury to ask you to believe is that you are standing near

1 your friend, right, right before the shooting?
2 A. Right.
3 Q. And you see him pull out the gun and that you're
4 trying to help him and you -- you lean forward and y'all
5 grapple and somehow the gun goes off and shoots him?
6 A. I mean, I was kind of intoxicated, but he had the gun
7 sitting in his lap and then whenever he lifted it up I just
8 went to grab it not thinking like -- I don't know. Not
9 thinking it was loaded or anything.
10 Q. So he's sitting, right? This is the consistent story
11 from every witness is that he is sitting outside and that
12 he is severely intoxicated, right?
13 A. Right.
14 Q. And that he has this gun in his hand and then you go
15 to reach for the gun in his hand and that gun -- that
16 bullet ends up hitting him in the neck?
17 A. No, he had lifted the gun up. I believe if you look
18 at Keith Kabar's statement -- his testimony, he also said
19 that he had lifted his arm up.
20 Q. Okay. So -- and I'm trying to understand it, so help
21 me understand it. He's sitting here completely intoxicated
22 and he has a gun in his lap and then you say that he lifts
23 the gun up and then this is when you grapple with him?
24 A. Yes.
25 Q. And you're actually grappling with the gun at this

1 point?
2 A. No.
3 Q. No? Okay.
4 A. I'm reaching trying to grab it and it went off.
5 Q. Okay. And did you actually make contact with his
6 hand?
7 A. Yeah.
8 Q. So you made contact with his hand just to pull the gun
9 away?
10 A. Yeah.
11 Q. Okay. So the gun would not have been touching him
12 when it went off?
13 A. I mean, yeah, it was right there at his neck.
14 Q. Okay. And then --
15 A. It happened so fast. I mean, I don't -- I don't
16 recall all the exact details, but, yeah.
17 Q. And the gun goes off and what is your immediate
18 response?
19 A. I didn't know that he had got shot at first because
20 -- well, I didn't know until my trial that it had hit his
21 spinal cord and made him a paraplegic, but at the time he
22 didn't move and nobody screamed or anything, so I was like
23 -- I was kind of freaked out. I said oh, man, this gun has
24 shot into the club, so I didn't -- I didn't know anybody
25 was shot at the time.

1 Q. Right. So your friend just gets shot, but you say
2 that you don't know, so what is the first thing that you
3 immediately do after this supposed accidental shooting?
4 A. I picked the gun up.
5 Q. And?
6 A. Went and threw it in the woods.
7 Q. Ran back and threw it in the woods?
8 A. Yeah.
9 Q. And then you come back and what aid did you render
10 to your friend once you realized that he had, in fact,
11 been shot?
12 A. I put him on the ground and all I remember is
13 somebody saying you need to put something over the wound
14 for pressure and that's when I took my shirt off. I don't
15 know where -- I still don't know where it ended up. I
16 think they found it on the car or something. That's when
17 I took my shirt off and threw it at the lady, but I was
18 just -- I was really in shock at that time because I really
19 didn't know what to do because once realizing that he was
20 shot and that I just threw the gun, I mean, the only thing
21 I could think of was to get him to the hospital and that's
22 why when Riko came out that's the first thing that I told
23 her was, you know, hey, we need to get him to the hospital
24 right now and I guess the lady, Shannon, Shandon, she was
25 somewhere in the healthcare industry and she said no, don't

1 move him, just keep pressure on the wound, so I really
2 didn't know what to do at that time.
3 Q. Okay. So I want to make sure that I have this right.
4 After coming back -- first you dispose of this gun. That's
5 the first priority that you have is throw the gun over the
6 fence. You come back and find that your friend has, in
7 fact, been shot and you render aid by, one, taking your
8 shirt off and throwing it at a woman and then, two, asking
9 someone else to call 9-1-1?
10 A. No, I never asked no one to call 9-1-1.
11 Q. You never asked someone to call 9-1-1?
12 A. No.
13 Q. Okay. So you take your shirt off, throw it at someone
14 and then ask a friend or say to someone else he should
15 probably go to the hospital. That's how you rendered aid
16 to your friend who had just been shot?
17 A. No. If you read the transcript, excuse my language,
18 but it says we need to go to the fucking hospital right
19 now. I was pretty upset.
20 Q. Okay. So you used strong language when suggesting
21 that he needed to go to the hospital?
22 A. As in immediately. Yes, ma'am.
23 Q. Okay. So, Mr. Brockmeyer, you changed your story
24 multiple times about how your friend ended up being shot
25 that night, right?

1 A. Yes.
2 Q. Okay.
3 **MS. VALENZUELA:** Nothing further, Your Honor.
4 **THE COURT:** Okay. Anything?
5 **MS. GOLDBERG:** Just one question basically, Your
6 Honor.
7 REDIRECT EXAMINATION
8 BY MS. GOLDBERG:
9 Q. Mr. Brockmeyer, you just admitted that you changed
10 your story multiple times about how your friend was shot?
11 A. (Nods head.)
12 Q. And when you testified at trial, did you testify
13 truthfully?
14 A. Yes.
15 **MS. GOLDBERG:** No further questions.
16 **THE COURT:** Anything else?
17 **MS. VALENZUELA:** No, Your Honor.
18 **THE COURT:** Sir, you may step down. Please be
19 careful.
20 (Witness excused.)
21 **MS. GOLDBERG:** Your Honor, at this time Applicant
22 would call David Mauldin.
23 (Whereupon, David Mauldin was duly sworn by the Clerk
24 of Court.)
25 **THE COURT:** Mr. Mauldin, tell us your full name and

1 spell your last name, please, for the court reporter.

2 **THE WITNESS:** David Michael Mauldin, M-A-U-L-D-I-N.

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

4 DAVID MICHAEL MAULDIN,

5 having been duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MS. GOLDBERG:

8 Q. All right. Good morning, Mr. Mauldin.

9 A. Good morning.

10 Q. Where do you work?

11 A. I work with the Lexington County Public Defender's

12 Office.

13 Q. And what's your experience in criminal law?

14 A. I started in criminal law back in 1999 with the Aiken

15 County Public Defender's Office and have pretty much been

16 doing criminal law since then.

17 Q. How do you know Mr. Brockmeyer?

18 A. I was appointed to represent him on his murder charge

19 and eventually went to trial.

20 Q. Did you represent him the entire time his charges were

21 pending?

22 A. Yes.

23 Q. And when you represented him, did you meet with him at

24 the jail and go over his case with him?

25 A. Yes, ma'am.

1 Q. Okay. I believe it has been -- the facts of this case
2 have been somewhat presented to the Court already, but just
3 to aid in the Court's knowledge of this case, can you
4 provide kind of a factual overview so the judge understands
5 what we're talking about factually?
6 A. Well, the victim and Mr. Brockmeyer are friends. They
7 were from Florida. They had been up here for a little
8 while. Mr. Brockmeyer was working, I think, as a personal
9 trainer at a gym and they had gone out to a bar with
10 several girls and it was kind of an encounter with other
11 people at the bar, drinking, there was some guns involved
12 and then eventually Nick ended up dying and Mr. Brockmeyer
13 was charged with the crime.
14 Q. And this was a crowded bar, correct? Or it appeared
15 there were a lot of people out that night?
16 A. Yes, ma'am.
17 Q. All right. Despite that, there was -- would you agree
18 there was only really one witness who observed the shooting
19 take place?
20 A. I believe so. There were other people that were
21 around, but weren't looking directly at the activity. I
22 think it was kind of on the porch or just outside of the
23 door of the bar and there were people who were there, but
24 until they heard the sound and turned around, so they
25 didn't actually see the actual events.

1 Q. And that was Gina Brakefield?
2 A. That's correct.
3 Q. And what was Mr. Brockmeyer's defense?
4 A. His defense at trial was that Nick -- they had guns,
5 and it gets kind of confusing, and there was some guns
6 going back and forth; one of them would hold the gun while
7 the other was playing pool and that kind of thing and the
8 guns ended up going back and forth and some of the
9 witnesses talk about how each of them might have had a gun.
10 But, anyway, his defense was that Nick ended up with the
11 gun, he went outside, he was kind of really drunk, he was
12 kind of passed out and he had the gun out and was messing
13 around with it and then he was trying to get the gun away
14 from Nick and the gun went off.
15 Q. All right. Do you have the transcript with you?
16 A. Yes.
17 Q. I want to kind of go through the amended application
18 in order. If you will look in the transcript -- do you
19 have the original transcript or do you have the record on
20 appeal transcript? Does that make sense?
21 A. I have one that's in two volumes.
22 Q. Are there two different page numbers at the top of
23 each page?
24 A. On the Volume 1 there is, on Volume 2 there is not.
25 Q. Okay.

1 A. Mr. Madsen might have the other two mixed up. They
2 sent them all in a box.
3 Q. All right. What I'm looking at is Page 147 of the
4 transcript. That's the transcript page, not the record
5 on appeal page number, so that would be in the direct
6 testimony of witness Mariko Clack. Are you there with me?
7 A. Yes.
8 Q. Okay. If you will follow along at lines 22 through
9 25, can you go -- actually start with Line 20. Can you
10 just read 20 through 25 for the record?
11 A. Line 20 is a question by Solicitor Graham. What, if
12 anything, did he tell you on the phone about what happened
13 with Nick and then the answer -- the witness was Clack.
14 He called me and told me to come get him. I told him he
15 wasn't leaving and that people had seen him shoot Nick.
16 Q. And then the next question?
17 A. The question by Shawn Graham at 25 is People said
18 what?
19 Q. And is the answer on the next page?
20 A. They had seen him shoot Nick. There were witnesses
21 that had seen him shoot Nick.
22 Q. Okay. Would you agree that that last answer
23 especially and the related statement and the answer above,
24 are hearsay?
25 A. Yes, ma'am.

1 Q. Okay. Is there any particular reason there was no
2 objection made there?
3 A. I can't recall. It might have gone by so quick
4 because they were talking about like immediately after
5 about him denying doing it.
6 Q. Do you agree that's potentially damaging hearsay?
7 A. That would depend on what the jury thought of it. It
8 probably went by very quickly and I didn't catch it to
9 object to it.
10 Q. Because in the trial only actually one witness
11 testified actually seeing the shooting; is that correct?
12 A. That is correct.
13 Q. And here this Ms. Clack, who didn't see it at all,
14 claims that there are multiple people who saw the shooting?
15 A. Yes, ma'am.
16 Q. She doesn't even say who those people are, correct?
17 A. That's correct.
18 Q. And there wasn't any necessarily trial strategy there
19 to let that go, it was just a missed objection?
20 A. Probably, yes.
21 Q. Okay. All right. Now in Gina Brakefield's testimony,
22 she does a demonstration as described by Mr. Brockmeyer
23 earlier that's actually in this transcript on pages -- let
24 me make sure I've got the right ones -- 102, lines 22
25 through 25. The question from the solicitor is somewhat --

1 I'll read that into the record. The question from the
2 solicitor says Now that we have established the position
3 and you have the hand up in a trigger finger on the neck
4 area of the left side of the neck -- of Nick, what do you
5 see or hear next. From reading the transcript there's no
6 indication of what angle the gun was held at, correct?
7 A. That's correct.
8 Q. Or how the gun was held in any particular way?
9 A. No.
10 Q. The transcript as it's written does not exactly
11 preserve the information that was presented to the jury;
12 is that fair?
13 A. Yes. I mean, somebody reading the transcript
14 wouldn't be able to see exactly where her hand was or what
15 the position was.
16 Q. Do you remember who Dr. Brad Marcus is?
17 A. He was the pathologist in the case.
18 Q. Okay. And I'll direct you to Page 681. If you'll
19 look briefly at the first half of that page.
20 A. Yes, ma'am.
21 Q. Now from the record it appears that the solicitor
22 gave the doctor a prop gun and asked him to orient it as
23 it would have been on the victim when fired; is that right?
24 A. I believe so, yes.
25 Q. And there's no description given as to how the gun

1 was held at all?
2 A. No, ma'am.
3 Q. So, again, from reading the transcript we have no idea
4 what the jury saw or considered, do we?
5 A. No, ma'am.
6 Q. Then on Page 683, if you'll just read briefly pages
7 683 to 684, the beginning of that cross-examination.
8 A. By Mr. Madsen?
9 Q. Yes. Understanding that was Mr. Madsen's.
10 A. Okay. We're starting at Line 15?
11 Q. Yeah.
12 A. Okay. Mr. Madsen says Doctor, you said -- basically
13 I think you had taken the gun and pointed it with someone
14 having it in the right hand and holding it back like this,
15 indicating is in parentheses, is that correct, that's how
16 you held it over there. Let me see. With the right hand
17 -- the answer is I think it was like this. Question: It
18 was not like that. Answer: Then it was error in that
19 part. Question: Because it had to be held like this,
20 indicating, wouldn't it, because this gun, when it is down
21 here, indicating, that circle and that thing around, that's
22 coming from this down here, indicating in parentheses.
23 Q. Okay. I think that's enough to get the point across.
24 From reading the transcript we can't tell anything about
25 how the gun was held?

1 A. No, ma'am.
2 Q. Okay. And Dr. Marcus, the pathologist, actually
3 admits that what he had done on his direct examination was
4 incorrect. Is that fair?
5 A. Yes.
6 Q. That he made an error?
7 A. Yes, ma'am.
8 Q. Did you have something you --
9 A. Oh, I believe the way the gun was -- or at least the
10 muzzle imprint on the neck was oriented, the person holding
11 the gun, if they were right-handed, that it would have been
12 palm up and I think he did it more palm down, gangster
13 style.
14 Q. Okay.
15 A. And he had -- and when Rob cross-examined about that,
16 that's what he went into it.
17 Q. Is there any way between this and the earlier
18 demonstration, because they're not preserved, is there any
19 way to determine how prejudicial Dr. Marcus's error might
20 have been?
21 A. Well, Mr. Madsen crossed the doctor and we had
22 actually discussed it somewhat at the table. It was
23 something that probably would have easily been fixed if we
24 had gone over it extensively during cross, during
25 redirect, the orientation of the gun, that he had just

1 made a mistake, it was like this, like this, and we
2 thought it would kind of be better to leave it at the
3 doctor admitting he made a mistake and not push too hard
4 and then just talk about it a little bit in closing, that
5 it was confusing even to the doctor and how would the jury
6 know, and it seemed like something that -- again, that --
7 you know, and this was -- Mr. Madsen was cross-examining,
8 but I know we were discussing it that it was a mistake and
9 it looked like something we'd be able to fix rather easily
10 and move on from there and so we kind of did what we did
11 with it not to cause more damage.
12 Q. Okay. And I think where you were going with that
13 is in your closing argument you did point out that the
14 doctor's demonstration was incorrect originally and nobody
15 ever did a second demonstration to show the proper holding
16 of the gun?
17 A. Which they could have done on redirect and they did
18 not do it.
19 Q. And you and Mr. Madsen jointly made a decision not to
20 ask them to do that?
21 A. Well, we discussed it a bit and then Mr. Madsen did
22 the cross and then I think that's eventually what we
23 decided to go with.
24 Q. Okay. So it was actually talked about, thought about
25 and decided not to?

1 A. Yeah, we talked about how he was -- he had the gun, I
2 think, palm down and that was not the way it would have
3 been had it been oriented, and I think further on Page 684,
4 although it's hard to say, they talk about left hand and
5 something having to be facing downward and then there's a
6 lot of indicating, but that's basically what it was. And
7 the way the imprint was on the side of his neck, I believe
8 there's -- there's a barrel and then the bottom part under
9 the barrel there was metal on the gun and it would have
10 been held with palm up next to the neck and the man had his
11 right hand with the palm down.
12 Q. Dr. Marcus had it?
13 A. Dr. Marcus had it, yeah.
14 Q. Is there any particular reason you during the earlier
15 cross-exam of Ms. Brakefield or Mr. Madsen during this
16 particular part with Mr. Marcus didn't try to describe for
17 the record or have witnesses describe for the record the
18 demonstration so that it could be more clear for the
19 transcript?
20 A. I think we were more worried about the presentation
21 to the jury. I didn't think there would be an appeal
22 issue about it. I mean, I wasn't even considering an
23 appeal issue about it just watching it and watching the
24 demonstration to the jury.
25 Q. All right. On Page 827, you -- beginning with

1 Line 13, I'll read into the record, the judge says,
2 Ordinarily we have the charge on the law after
3 distinguished counsel make their closing argument, but
4 over the years many jurors have told me judge, I wish you
5 would give us the law first. Essentially, as a result of
6 this, the judge then does instruct the jurors on the law
7 prior to both counsel giving closing arguments. Did you
8 consider -- was there a discussion with the judge where he
9 asked the consent of the lawyers to do it in that order?
10 A. I don't recollect if there was or not. I don't think
11 -- I know I didn't object to it.
12 Q. You did not object to it?
13 A. No.
14 Q. Is there any particular reason why you didn't object
15 to it?
16 A. I couldn't think of a ground other than that's just
17 not the way it's done, judge. I couldn't think of any kind
18 of constitutional grounds or anything to make an objection.
19 It was unusual and we thought it was unusual, but we just
20 couldn't think -- you know, it's out of order, but just
21 saying well, that's not the way we do it, it didn't have
22 any kind of constitutional limitation or statutory ground
23 that I could think of.
24 Q. Okay. Now you recall that Mr. Brockmeyer was on trial
25 for murder and also the offense of possession of a weapon

1 during commission of a violent crime, correct?
2 A. Yes, ma'am.
3 Q. Those were the only two charges he was on trial for?
4 A. Yes, ma'am.
5 Q. All right. On Page 830, this is part of the judge's
6 instructions to the jury, and I'll read this into the
7 record, if I can find where I am. Starting on Line 1, Now
8 the indictments in this case allege two different offenses
9 against the Defendant as I have indicated. The charges
10 were, one, murder and, two, possession of a deadly weapon
11 during the commission of a violent crime. Each indictment
12 charges a separate and distinct offense. You must decide
13 each indictment separately based on the evidence as to that
14 issue. As an example, your verdict may be different as to
15 each indictment depending on your view of the facts and
16 apply those facts to the law in the case.
17 What is your understanding about possession of a
18 weapon during commission of a violent crime? Would you
19 agree that there's a prerequisite that an individual must
20 be convicted of a violent crime first?
21 A. Well, depending on whether or not they're on trial
22 for both at the same time, but that is an element of the
23 charge, that the person would have had to have the weapon
24 during the commission of a violent crime.
25 Q. The jury would need to find that the Defendant was

1 guilty of a violent crime first?
2 A. That's correct.
3 Q. Practically speaking?
4 A. Yes, ma'am.
5 Q. Okay. This particular instruction that I just read
6 makes it sound like the verdicts are completely separate
7 and not related to each other and could even be
8 inconsistent. Is that fair?
9 A. It is fairly broad in that -- in that manner. It can
10 be interpreted in that way.
11 Q. Okay. And it doesn't say that either one of those
12 convictions is dependent on the other in any way, correct?
13 A. No, that paragraph does not.
14 Q. Now, again, on Page 843 --
15 **MS. VALENZUELA:** Did you say 33 or 43?
16 **MS. GOLDBERG:** 843.
17 BY MS. GOLDBERG:
18 Q. I'm trying to find my correct line number. All right.
19 Line 23, I'll read into the record. In order to find the
20 Defendant guilty of possession of a weapon during the
21 commission of a violent crime, you must first find the
22 Defendant guilty of either committing a violent crime or
23 attempting to commit a violent crime. I charge you that
24 the offense of murder is a violent crime. Do you believe
25 that's a correct statement of the law?

1 A. Yes, ma'am.
2 Q. Would you agree that it would have been more accurate
3 to tell the jury that before they even consider this charge
4 they have to consider the violent crime itself first?
5 A. I think it might have made things more clear, but I
6 still think the charge is accurate.
7 Q. Okay. And on Page 879, beginning on Line 6, I'll
8 read into the record, Again, with reference to the gun
9 charge on the back of this indictment is the word
10 "verdict". You will either write not guilty or guilty.
11 Whatever your verdict is, it's got to be the unanimous
12 verdict of all twelve of you, and then it goes on after
13 that to describe how to arrive at the verdict or how to
14 present and write the verdict for the murder charge. Do
15 you see that?
16 A. Yes, ma'am.
17 Q. And the judge did not instruct the jury to consider
18 and complete the murder verdict form before considering the
19 weapon charge, correct?
20 A. That's correct, he -- he did the one and then the
21 other. He didn't instruct that you had to find on one
22 before the other or the alternative. He just kind of just
23 gave them instructions about the proper form of verdict for
24 each of the charges, but he put the gun one first and the
25 murder one second.

1 Q. Do you recall either from your memory or from looking
2 at the transcript making any objection to the jury
3 instructions or the way they were presented?
4 A. Let's see. No, not to the instructions.
5 Q. Okay. Do you remember about what time of day -- and
6 I know you're not gonna know specifically, but do you
7 remember about what time of day the jury went out to begin
8 deliberations?
9 A. No, I don't.
10 Q. Do you remember -- I mean, was it morning, was it
11 afternoon, late in the day?
12 A. Probably -- I mean, I really couldn't tell you, but
13 probably it would either have been lunchtime or after
14 lunch, yeah.
15 Q. Do you remember how late into the night they stayed?
16 A. No, I don't.
17 Q. Do you recall that as the transcript reflects they
18 came back Friday morning on August 26th to begin
19 deliberating again?
20 A. Yes, ma'am.
21 Q. Okay. You do remember that they began the first day
22 and came back the second day?
23 A. Yes, ma'am.
24 Q. The transcript reflects that the Friday, the 26th,
25 during deliberations the jury requested to re-hear some

1 testimony and also to hear some jury instructions over
2 again regarding legal definitions. Do you remember that?
3 A. Not specifically, but you can either point it out in
4 the transcript or I can read it.
5 Q. You don't dispute that?
6 A. No.
7 Q. And then the transcript reflects that the jury came
8 back with a verdict at 11:58 AM on August 26th, so that
9 would be around lunchtime on Friday. Does that sound right
10 to you?
11 A. Yes, ma'am.
12 Q. All right. Now if we'll go to -- and let me -- the
13 way my transcript is, I assume that everybody is the same,
14 is that there is essentially a new transcript at the back
15 of the record on appeal that captures the verdict and the
16 sentencing. So what I'm looking at is Page 10 of the new
17 transcript, which would be Page 783 of the record on
18 appeal.
19 **MS. GOLDBERG:** Do you have that correctly?
20 **MS. VALENZUELA:** I do. I wanted to make sure that
21 that's what we gave the Court. Is that showing up for you,
22 Your Honor? It would be -- it would be showing up in
23 Volume 2 and then -- and I think it should be labeled
24 Record On Appeal Volume 2 and then if you scroll down on
25 that PDF it should say in bold letters up in the right-hand

1 corner 783.

2 **THE COURT:** Okay. Record On Appeal Volume 2. I have

3 that.

4 **MS. VALENZUELA:** Yes, sir.

5 **THE COURT:** It's where now?

6 **MS. VALENZUELA:** 783, which would be -- since it's a

7 PDF, you basically have to scroll all the way to the bottom

8 and then maybe scroll up approximately thirty-ish pages

9 until you see 783 up in the right-hand corner. When the

10 transcripts aren't so big, the PDF matches up exactly, but

11 when it's this large, it's not.

12 **THE COURT:** Okay. Okay. I have it.

13 **MS. GOLDBERG:** All right. So yours says 783 and then

14 right underneath it says Page 10?

15 **THE COURT:** Yes, ma'am.

16 **MS. GOLDBERG:** Okay. Very good. We're at the same

17 place.

18 BY MS. GOLDBERG:

19 Q. All right. Now on this page it reflects the judge

20 received the verdict form. Mr. Mauldin, if you would just

21 read into the record that page, if you don't mind.

22 A. Page 10?

23 Q. Yeah.

24 A. It started on Page 9, Line 25. The Court says,

25 Mr. Foreman, I'm advised the jury's reached a unanimous

1 verdict; is that true? The foreperson says, Yes, Your
2 Honor. The Court says, If your verdict's a unanimous
3 verdict, all twelve, please signify by raising your right
4 hand. The jury has so signified. Hope, who is Hope Frick,
5 the Clerk of Court there, lease accept the verdict form
6 and hand it to me. The clerk says, Yes, sir. The Court
7 says, What is today's date? The clerk says, The 26th. The
8 Court says, Please take this back so they can date it the
9 date, inadvertently put the 25th, and it's the 26th. The
10 foreman says, Your Honor, around 7:00 last night we did,
11 and breaks off. Then the Court says, Well, date it today,
12 if you will. The foreman says, Yes, sir. The Court says,
13 That's a rendition of the verdict. The clerk says, If
14 you'll just change it, sir, and put your initials beside
15 it. In parentheses it says jury foreman corrects date for
16 the clerk. The clerk says, Thank you, sir. The Court
17 says, You've written the verdict on the back of both
18 indictments as I indicated. On this sheet you've only
19 indicated one verdict.
20 Q. Okay. I am going to hand you a copy of the indictment
21 for possession of a weapon during a violent crime that is
22 already a part of the Court's record.
23 **MS. VALENZUELA:** Your Honor, could I have a brief
24 break? I mean, I'm gonna stay in the courtroom. Just one
25 quick thing.

1 **THE COURT:** Yes, ma'am. Sure.

2 (Pause in proceedings.)

3 **MS. VALENZUELA:** Thank you, Your Honor. I apologize

4 for that.

5 **THE COURT:** No, ma'am. You're fine.

6 **MS. GOLDBERG:** All right. Are you ready, Your Honor?

7 **THE COURT:** Yes, ma'am.

8 BY MS. GOLDBERG:

9 Q. All right. Mr. Mauldin, does that appear to be the

10 indictment that's being discussed in Page 10?

11 A. Yes, ma'am.

12 Q. All right. You see there are the two dates on there?

13 A. Yes, ma'am.

14 Q. What are those dates?

15 A. One is 8-25-2011 and one is 8-26-2011. The numbers

16 are separated by periods.

17 Q. All right. Thank you.

18 **MS. GOLDBERG:** Your Honor, if you don't have that

19 handy, I'd be happy to hand you a copy of this if you want

20 to look at it.

21 **THE COURT:** Okay.

22 BY MS. GOLDBERG:

23 Q. All right. On Page 10 the juror tells the judge that

24 they came to the verdict on the possession of a weapon

25 charge on the 25th, correct?

1 **MS. VALENZUELA:** Objection. Well, I'm sorry. I'm
2 gonna -- withdrawn.
3 **THE COURT:** Okay.
4 **THE WITNESS:** When the judge inquires about the date,
5 the foreman says, Your Honor, around 7:00 last night we
6 did, and then it's cut off.
7 BY MS. GOLDBERG:
8 Q. The judge cut him off?
9 A. Right.
10 Q. Is that -- is that what you understood that to mean?
11 A. It's possible that could be an interpretation of that
12 sentence.
13 Q. Okay. It appears that the jury did not understand
14 that they were not allowed to consider the possession of a
15 weapon charge first. Would you agree with that?
16 A. I don't know --
17 **MS. VALENZUELA:** Speculation, Your Honor. There's no
18 way that he can tell what the jury was thinking.
19 **MS. GOLDBERG:** I'll withdraw that.
20 **THE COURT:** Okay.
21 BY MS. GOLDBERG:
22 Q. Why didn't you object to any of this?
23 A. Well, they did find him guilty of a violent crime and
24 then the -- so the verdicts weren't inconsistent. If they
25 had found him guilty of that and were continuing to do

1 deliberations on the other charge if they had found him
2 guilty of involuntary manslaughter or not guilty, I would
3 have objected to the conviction of that as being definitely
4 inconsistent and not par with the consideration of the
5 elements of the greater offense.
6 Q. Okay. If it appears to you that a jury would -- is
7 not following the law as instructed to them, do you think
8 that would be a ground to request a mistrial?
9 A. If I could prove that, yes.
10 **MS. GOLDBERG:** No further questions.
11 **MS. VALENZUELA:** May it please the Court?
12 **THE COURT:** Yes, ma'am.
13 CROSS-EXAMINATION
14 BY MS. VALENZUELA:
15 Q. Okay. So let's start with that first allegation, that
16 allegation that you failed to object to the inadmissible
17 hearsay testimony, and do you remember that as being that
18 you don't remember if you -- or your testimony was that you
19 might have missed it when someone testified that people
20 said they saw the Defendant shoot the victim?
21 A. Right, that might have gone by quick because then most
22 of it afterward was about him denying doing anything wrong.
23 Q. And you wanted that part of the testimony to come out?
24 A. Yes, ma'am.
25 Q. And so Gina did testify before the jury that she saw

1 the Defendant shoot the victim, right?
2 A. Yes, ma'am.
3 Q. Okay. And then if you'll turn to Page 239 to 241.
4 And I'm using the smaller pages of the original transcript
5 pages. 239.
6 **MS. GOLDBERG:** What page?
7 **MS. VALENZUELA:** 239.
8 BY MS. VALENZUELA:
9 Q. And actually I'm -- let me make sure. I'm actually on
10 Page 240 and go all the way down to Line 21. And this is
11 Bassam Kabar's testimony and he's being directed by the
12 solicitor's office, right?
13 A. Direct by Mr. Hubbard.
14 Q. Okay. Is he not one of the prosecutors?
15 A. Yes.
16 Q. Okay. And does Bassam Kabar testify there that he
17 saw the Defendant kneel down in front of the victim, look
18 like he was putting his hands on his shoulder, say
19 something briefly, hears a loud pop around that same time
20 and then sees the Defendant stand up and walk off and exit
21 toward the building?
22 A. Yes, ma'am. That's what the transcript says.
23 Q. Okay. So he doesn't say I saw the Defendant shoot the
24 victim, but he said I saw the Defendant crouch in front of
25 the victim, heard a loud pop and then saw the Defendant

1 walk away right after the victim was shot?
2 A. Yes, ma'am.
3 Q. Okay. So --
4 A. He didn't say anything about a gun or anything like
5 that.
6 Q. He hears a -- he hears a pop, right?
7 A. He hears a pop.
8 Q. Which was consistent with what other witnesses said
9 they heard. They described it also as hearing a pop around
10 that time --
11 A. Yes, ma'am.
12 Q. -- whether they knew there was a gun or not?
13 A. Right.
14 Q. Okay. And then I'm -- I'm just trying to understand
15 this. Your client's own testimony at trial was not
16 refusing that he had any part in that. He admitted and
17 is claiming that it was an accident when he reached for
18 that gun that was in his -- in his friend's hand and shot
19 the victim, right?
20 A. Yes, ma'am. He said it was an accident.
21 Q. So the idea of -- of the victim being shot and the
22 Defendant being involved in the victim being shot is not
23 in dispute even according to your own client's testimony
24 in front of the jury, it's just whether it was intentional
25 or accidental?

1 A. That's correct.

2 Q. Okay. The physical demonstration issue about the way

3 the palm was facing, and I need you to help me out here.

4 If -- if you are the victim -- can you put your hand in the

5 shape of a gun? And it's on -- and actually I'm gonna make

6 this a little bit clearer.

7 **MS. VALENZUELA:** Your Honor, may I approach the

8 witness?

9 **THE COURT:** Yes, ma'am.

10 BY MS. VALENZUELA:

11 Q. Okay. These -- I'm handing you what was entered in

12 the trial as State's Exhibit 55 and State's Exhibit 62.

13 Do you recognize those?

14 A. Yes, ma'am.

15 Q. And did you pull those out of the file that came

16 directly from the Clerk of Court this morning?

17 A. Yes, ma'am. At your request.

18 Q. I'm sorry?

19 A. Yes, ma'am. At your request.

20 Q. Okay. And what do we see in Exhibit 55?

21 A. It is the -- the left side of Nick's head from the

22 mouth downward. You see his head and the beginning of his

23 neck.

24 Q. Okay. And then there was discussion earlier about

25 the way that the -- the way that the gun imprinted on the

1 neck, correctly -- I mean, right?
2 A. Yes, ma'am.
3 Q. Okay. And so -- and then what's Exhibit 62?
4 A. It was an over-image of a gun barrel, I guess, and
5 they -- they had done something where they had aligned that
6 over the picture.
7 Q. Okay. And so I'm just using Exhibits 62 and 55 and
8 then we're just overlaying those two right there?
9 A. Yes, ma'am.
10 Q. Okay.
11 **MS. VALENZUELA:** And, Your Honor, this is for your
12 benefit. The photos on the jaw and the overlay.
13 BY MS. VALENZUELA:
14 Q. And so the gun -- it's undisputed that the gunshot
15 went into the left side of the victim's neck?
16 A. That's correct.
17 Q. Okay. And so if -- the argument about the hand
18 position, if the victim is lifting his -- his left hand
19 because we know that the gunshot went into the left side,
20 so going with your client's last story of how this
21 happened, the victim raises his hand towards his neck,
22 palm up, and to match the gun imprint would need -- the
23 victim would have had to be holding his hand palm up?
24 A. Well, the top of the gun would have to be oriented
25 toward the back of the victim's neck and the bottom of the

1 gun more toward the front of the victim's neck.
2 Q. So hold your hand up, if you don't mind.
3 A. So if he was left-handed, the -- the top of
4 it (demonstrating) --
5 Q. That's how the victim would have had to have been
6 holding the gun?
7 A. Unless he was holding -- you know, had it way around
8 the right hand and holding it with the palm facing down.
9 Q. Okay.
10 A. If he was holding with the left hand, the palm would
11 have to be facing up.
12 Q. Okay. And -- and tell me in terms of your --
13 A. No, it --
14 Q. Is that -- no, take your time. I want to make sure
15 that it's --
16 A. No, the left hand, the palm would be facing down. If
17 you were holding it with your right hand, the palm would be
18 facing up.
19 Q. So if this is the gun and you've got it -- so it's
20 opposite? You've got -- let me -- okay. Let me get the
21 -- is your testimony that it would be the victim's palm
22 facing down?
23 A. If he's holding the gun in the left hand, the way
24 the orientation is the top of the gun would have to be
25 pointed toward the back of the neck and the bottom of the

1 gun would be pointed toward the front of the neck. So if
2 he was holding it left-handed, the palm would be down. If
3 he were holding the gun right-handed, the palm would be
4 up.
5 Q. Okay. Which is what the testimony was by Gina?
6 A. I don't recollect what direction her palm was facing,
7 either down or up, but then reading the transcript on the
8 pathologist he had the palm down, which was wrong. If
9 it was a right hand holding the gun, the palm would have
10 had to have been up, and if that's -- that's the way
11 Mr. Brockmeyer remembers it, that's the way the gun would
12 have been if was held in someone's right hand.
13 Q. Okay. Regardless, in the cross-examination of the
14 issue of how the gun was held, you guys, you and Rob, have
15 a discussion strategically about how you're gonna handle
16 it and then Rob ends up getting -- co-counsel ends up
17 getting the State's expert witness to admit that they were
18 mistaken in their testimony as to how they held the gun --
19 A. Yes, ma'am.
20 Q. -- or how the gun was indicated?
21 A. Yes.
22 Q. Okay. Let me move to the -- we talked about the
23 angle of the gunshot -- or scratch that. I think you
24 covered already that you testified that there were -- you
25 didn't think that there were any constitutional grounds to

1 object to the charges being given before closing argument?
2 A. I couldn't think of any.
3 Q. Okay. When you were asked about the -- the verdict
4 forms and the possibility that one came back before the
5 other, there was never -- did you have the jury come back
6 and indicate that they had only been able to reach the
7 verdict on the possession of a weapon charge?
8 A. I don't recollect that.
9 Q. No, and that's not in the transcript either. So when
10 the jury comes back, they come back with both verdict
11 forms when they indicate to the judge that they have a
12 verdict?
13 A. That's what the transcript says. I don't remember if
14 they said that or not.
15 Q. If they said?
16 A. That they came to one before the other one or not.
17 Q. Well, would you have remembered if -- there was no
18 Allen charge here, right?
19 A. No.
20 Q. There was no like we're not able to reach a resolution
21 on our second verdict?
22 A. No.
23 Q. So your client is convicted of both, so to the extent
24 that he needed a prerequisite he's got it because he's
25 convicted of a violent crime. And you said that if it had

1 come back as an inconsistent verdict you would have
2 objected, right?
3 A. Yes, ma'am.
4 Q. And so you were talking about if the jury had come
5 back and found him not guilty on murder, but guilty on
6 possession of a weapon during the commission of a violent
7 crime, you would have objected at that time?
8 A. Yes, ma'am.
9 Q. Tell us -- and obviously the Court knows what happens,
10 but tell us for the record what happens at that -- at that
11 point, what objections you'd make and what result would you
12 expect.
13 A. Well, I would have objected that it was an
14 inconsistent verdict that they found him not guilty of a
15 violent crime and that the prerequisite for the violent
16 crime wouldn't have been found in their determination of
17 the handgun and I would have asked the judge to vacate the
18 conviction for the handgun and the judge would have made a
19 ruling however he wanted to.
20 Q. And then if for some reason the judge had not vacated
21 that conviction, it would have gone up on appeal at that
22 point?
23 A. That's correct.
24 Q. Okay. And the result would have been if -- you know,
25 assuming that everyone follows the law and the inconsistent

1 verdict, if there was no other verdict, that the sole
2 conviction the jury came back with would have been vacated,
3 the jury doesn't get another chance to come back and say
4 we didn't understand, we actually want to go back and find
5 him guilty of something, your client walks off -- walks
6 out, no conviction?
7 A. Can you go over -- that was a long --
8 Q. It was long. I mean, you make an objection --
9 A. Right.
10 Q. -- saying that it's an inconsistent verdict?
11 A. Right.
12 Q. The judge vacates it?
13 A. Or not. Depending on --
14 Q. Okay. So go with me. And the judge -- on this
15 question, the judge vacates it. What happens to your
16 client?
17 A. Then he would be released.
18 Q. Okay. And -- thank you.
19 **MS. VALENZUELA:** Your Honor, may I have a second?
20 **THE COURT:** Yes, ma'am.
21 **MS. VALENZUELA:** Nothing further.
22 **THE COURT:** Yes, ma'am. Anything?
23 **MS. GOLDBERG:** No, Your Honor.
24 **THE COURT:** Sir, you may step down. Please be
25 careful.

1 **THE WITNESS:** Thank you.

2 (Witness excused.)

3 **MS. GOLDBERG:** No other witnesses from the Applicant.

4 **MS. VALENZUELA:** Nor from the State.

5 **THE COURT:** All right. Sir, you don't know this, but

6 they'll tell you that we do everything by e-mail, so your

7 lawyers will be in touch with you, okay? Thank you.

8 (Whereupon, the proceedings were concluded at

9 11:45 AM.)

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1 C E R T I F I C A T E

2

3 I, Stacy S. Johnson, Official Court Reporter for

4 the Eleventh Judicial Circuit of the State of South

5 Carolina, do hereby certify that the foregoing is a true,

6 accurate and complete transcript of record of all the

7 proceedings had and the evidence introduced in the hearing

8 of the captioned case in Circuit Court on the 9th day of

9 November, 2016.

10 This transcript may contain quoted material. Such

11 material is reproduced as read by the speaker.

12 I do further certify that I am neither of kin,

13 counsel, nor have an interest to any party hereto.

14

15 August 15, 2017

16

17 /S/ Stacy S. Johnson

STACY S. JOHNSON

18 CIRCUIT COURT REPORTER

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

William Brockmeyer, #347527,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
2014-CP-32-0689

ORDER OF DISMISSAL

FILED 2017 OCT 25 AM 9:03 LISA M. COMER CLERK OF COURT LEXINGTON, SC

This matter comes before the Court by way of an application for post-conviction relief filed February 25, 2014. This Application was amended by Applicant on September 29, 2016. An evidentiary hearing in this action was heard by this Court at the Lexington County Courthouse on November 9, 2016. Applicant was present, and he was represented by Kristy G. Goldberg, Esquire. The State was represented by Senior Assistant Deputy Attorney General Johanna C. Valenzuela.

At the hearing, Applicant testified on his own behalf. Assistant Public Defender David Mauldin testified also testified. Before this Court was also a copy of trial transcript, the Application and subsequent amendment, the Return, the records from the South Carolina Department of Corrections, the records of the Lexington County Clerk of Court regarding these convictions, and the records from the direct appeal.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the April 2007 term of the Lexington County Grand Jury for one count of murder (2011-GS-32-1255) and one count of possession of a firearm of knife during a violent crime (2011-GS-32-

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1257). Applicant was represented by David Mauldin and Robert Madsen, both Assistant Public Defenders for Lexington County.

On August 22-26, 2011, Applicant was tried by a jury before the Honorable Edward B. Cottingham, Circuit Court Judge. On August 26, 2011, the jury found Applicant guilty of one count of murder and one count of possession of a weapon during the commission of a violent crime. On October 21, 2009, Judge Cottingham sentenced Applicant to thirty-five (35) years imprisonment for the murder conviction and five (5) years imprisonment for the possession of a weapon during the commission of a violent crime conviction. The sentences were to be served consecutively. Overall, Applicant received an aggregated forty (40) year term of imprisonment.

Applicant timely filed and served a notice of appeal. On the appeal, Applicant was represented by Miles Coleman, Esq., and Robert M. Dudek, Chief Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense.

Applicant's appeal was perfected by the filing of a Final Brief of Appellant. In the Final Brief, Applicant presented four arguments. First, he contended the trial court erred by denying the defense's motion to enforce a subpoena where the information sought was clearly relevant, unavailable from other sources, and not otherwise protected. Second, Applicant argued the trial court erred and violated 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 a computer log. Third, Applicant asserted the trial court erred by permitting the State to introduce a photograph of the defendant where the State used the photograph for the illicit purpose of implying that Mr. Brockmeyer was guilty. Fourth, Applicant claimed the trial court erred by permitting the State to introduce hearsay evidence taken from the decedent's telephone.

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The State filed a Final Brief of Respondent. Applicant subsequently filed a Final Reply Brief of Appellant.

By Order filed February 28, 2013, Applicant's appeal was certified for review by the South Carolina Supreme Court. Oral argument was heard by the South Carolina Supreme Court on May 15, 2013.

In a published opinion filed November 27, 2013, the South Carolina Supreme Court affirmed Applicant's convictions. State v. Brockmeyer, 406 S.C. 324, 331, 751 S.E.2d 645, 649 (2013). The Remittitur was issued on December 13, 2013.

II. ALLEGATIONS

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

10(a) Ineffective Assistance of Counsel
11(a) Counsel failed to properly preserve Appellant issues for appeal
11(b) Counsel failed to show how Appellant Constitutional Rights were violated which denied Appellant due process of law

In the amendment to the Application that was filed as an attachment to the original Application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Counsel was ineffective by failing to properly preserve motion to enforce subpoena for appellate review.

2. Court appointed counsel was ineffective by failing to properly preserve a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution, this denied Appellant due process of law and this was highly prejudicial and rendered the evidence inadmissible

3. Counsel was ineffective for failing to object when the jury foreman stated that jury found defendant of weapon/possession weapon during a violent crime on 8/25/11 the day before jury found defendant guilty of murder on 8/26/11.

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In the Amended Application filed on September 29, 2016, Applicant alleged he is being held in custody unlawfully for the following reasons:

11(a) Ineffective assistance of trial counsel for failing to object to inadmissible hearsay testimony. Page 147 and 148.

11(b) Ineffective assistance of trial counsel for failing to preserve the record clearly and have physical demonstrations done in Court described for the transcript.

11(c) Ineffective assistance of trial counsel for failing to effectively present arguments regarding the angle of the gunshot wound and failure to allow the Applicant to demonstrate what happened.

11(d) Ineffective assistance of counsel for failure to present evidence regarding reputation and use of a nickname prior to the incident.

11(e) Ineffective assistance of counsel for failure to object when the trial judge provided instructions to the jury prior to the closing arguments of counsel.

11(f) Ineffective assistance of counsel for failing to object when the Court did not emphasize to the jury that a conviction on a violent crime was a prerequisite for a conviction on possession of a deadly weapon during commission of a violent crime.

11(g) Ineffective assistance of counsel for failing to object and/or request a mistrial and/or move for a new trial based on the fact that the jury reached a verdict on possession of a deadly weapon during commission of a violent crime prior to reaching a verdict on whether or not he committed a violent crime, and the Court instructed the jury to re-date the verdict on the indictment.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief evidentiary hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Specifically, this Court finds trial counsel's testimony credible and finds Applicant's testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

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Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient

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performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action in regards to all of his allegations of ineffective assistance of counsel.

1. Trial counsel was not ineffective for not preserving the defense motion to enforce subpoena for appellate review.

In his first claim in his initial application for post-conviction relief, Applicant asserts trial counsel was ineffective because counsel did not preserve the motion to enforce a subpoena at trial. Applicant had served a subpoena on local TV station WLTX seeking information about a commenter on their website. The subpoena specifically 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**.

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Court Exhibit 1, p. 6. (ROA p. 800).[1] Counsel for the news station objected to the subpoena by letter, contending 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. (ROA p. 803).

A hearing on the subpoena was convened by Judge Cottingham on August 3, 2011. After hearing argument, 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. (Tr. 15-6). Prior to Applicant's trial and during Applicant's trial, no other mention was made of the subpoena.

Applicant raised the denial of the subpoena as an issue on appeal. Specifically, he argued the trial court erred 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,

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[1] The defense believed that a comment may have been written by a potential witness in the case. The comment stated as follows:

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. (ROA p. 798).

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and not otherwise protected. The South Carolina Supreme Court denied relief upon the claim, finding it was not preserved for appellate review:

> Although Brockmeyer presents a compelling argument for the disclosure of the commenter under the circumstances presented, we decline to reach this issue on issue preservation grounds. We have no way of properly evaluating Brockmeyer's continuing need for the information he sought to subpoena following the trial judge's instructions for the solicitor to take additional steps to assist the defense in identifying everyone at Jager's on the night of the shooting. This is so because Brockmeyer failed to renew his motion at the outset of trial. Thus, Brockmeyer has failed to provide this Court with a sufficient record on appeal to evaluate this assertion of error. See Harkins v. Greenville Cnty., 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (finding it impossible to evaluate the merits of certain issues because the Appellant failed to include the relevant material in the record on appeal); Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 215, 493 S.E.2d 826, 834 (1997) (noting an appellant bears the burden of providing a sufficient record to review his assertions of error).

State v. Brockmeyer, 406 S.C. 324, 338–39, 751 S.E.2d 645, 652–53 (2013). The Supreme Court further found any error by the trial court in not granting the subpoena was harmless because the evidence sought was cumulative to evidence presented at trial.

> However, even assuming the trial court erred in not requiring disclosure of the anonymous commenter's identity, the error would not be reversible. Brockmeyer is unable to show he was prejudiced by the trial judge's denial of his motion to enforce the subpoena. More to the point, evidence of an accidental shooting and Brockmeyer's distraught state was presented. Brockmeyer testified that the shooting was an accident and that he was "in shock" afterwards. More importantly, Mariko Clack, who was among the group of friends with Brockmeyer and the victim on the night of the shooting, testified that Brockmeyer was weeping and was "really shaky and frantic" after the shooting. Thus, any error was harmless because even assuming the anonymous commenter testified to that effect, it would have been cumulative. See State v. Commander, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). In sum, the issue is not properly preserved, but in any event, any error in the trial court's refusal to enforce the subpoena would not constitute reversible error.

Brockmeyer, 406 S.C. at 339, 751 S.E.2d at 653.

There was no testimony regarding this claim at the evidentiary hearing.

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This Court finds Applicant has failed to establish he is entitled to relief upon this claim of ineffective assistance of counsel. First, Applicant has not shown trial counsel was deficient in not further contending the subpoena was needed before trial. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland v. Washington, 466 U.S. 668, 689 (1984). Applicant presented no evidence at the PCR evidentiary hearing that the information requested in the subpoena was still needed at trial. Nor did Applicant establish trial counsel did not make a strategic decision to not continue seeking enforcement of the subpoena. Thus, this Court finds Applicant fails to meet his burden of showing trial counsel was deficient.

Applicant also fails to establish he was prejudiced by any error of counsel in the handling of the subpoena. First, Applicant presented no evidence at the evidentiary hearing in this action to establish what would have been obtained had the subpoena been enforced. His argument regarding prejudice is purely speculative and insufficient to establish prejudice. See Putnam v. State, 417 S.C. 252, 266, 789 S.E.2d 594, 601 (Ct. App. 2016). Second, to the extent Petitioner's argument relies upon his belief that his prejudice stems from the argument not being preserved for appellate review, this Court finds his argument is without merit. In making this finding, this Court finds very persuasive the Supreme Court's reasoning for its finding that any error by the trial court was harmless. As noted by the Supreme Court, the information contained in the online comment that was the basis for the subpoena was cumulative to evidence presented at Applicant's trial. Applicant had testified the shooting was an accident, and he was in shock afterwards. (Tr. 653, 656-58). Further, Mariko Clack had testified that when she saw Applicant after the shooting, she "saw him like weeping", in response to an inquiry as to whether he was

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crying that night. (Tr. 100, 1 2). In light of the Supreme Court's determination that any error by the trial court in not enforcing the subpoena would have been harmless, this Court finds Applicant cannot show he was prejudiced by counsel's failure to preserve this issue for appeal. This claim for relief is therefore denied and dismissed with prejudice.

2. Trial counsel was not ineffective for not preserving an objection asserting a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

In his second claim of the original application, Applicant asserted trial counsel was ineffective in failing to raise an objection to the admission of several items during his trial because the admission of those items violated the Confrontation Clause of the Sixth Amendment. It appears this claim stems from an argument presented by Applicant in his direct appeal. In the appeal, Applicant challenged the admission five items (a shirt worn by Applicant, a shell casing, a pistol magazine, a pistol, and a recovered projectile). (See Final Brief of Appellant, footnote 15). At trial, trial counsel objected to the admission of these items, asserting each time the State had failed to present a sufficient chain of custody or foundation. (Tr. 353, 359-60, 366-67, 421-23). On appeal, Applicant attempted to argue that the admission of these items violated the Confrontation Clause of the Sixth Amendment.

The South Carolina Supreme Court found the arguments were not preserved for appellate review. State v. Brockmeyer, 406 S.C. 324, 350, 751 S.E.2d 645, 659 (2013). The Supreme Court further found there was no Confrontation Clause violation.

> We find the facts of this case demonstrate that the evidence logs were kept as business records for the purpose of identifying and storing evidentiary items. We find the trial judge properly determined the chain-of-custody reports fall within the hearsay exception in Rule 803(6), SCRE, and that the evidence custodians' testimony about the chains of custody was admissible. Critical to admissibility of the chain-of-custody records here is their non-testimonial nature. Regarding the Confrontation Clause analysis, these chains of custody were not created "for the sole purpose of providing evidence against the defendant."

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> Melendez–Diaz, 557 U.S. at 323, 129 S.Ct. 2527. Indeed, the evidence logs do not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items; thus, the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their "primary purpose" is not to constitute evidence in a criminal trial. Because we find these statements are not testimonial, they are exempt from Confrontation Clause scrutiny. See Bullcoming, 131 S.Ct. at 2720 (Sotomayor, J., concurring) ("[B]usiness and public records 'are generally admissible absent confrontation.' ").

Brockmeyer, 406 S.C. at 352, 751 S.E.2d at 660.

No testimony regarding this claim was presented at the PCR evidentiary hearing.

At the outset, this Court would note that the underlying facts regarding how this claim arose at trial are recited in detail in the South Carolina Supreme Court's opinion.

This Court finds Applicant has failed to meet his burden of showing trial counsel was ineffective in not presenting an objection based upon the Confrontation Clause when he objected to the admission of these items at trial.

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Strickland, 466 U.S. at 697. This Court finds Applicant has not shown that he was prejudiced. As found by the South Carolina Supreme Court in the direct appeal, no Confrontation Clause issue was present in this case. The evidence logs and chain-of-custody documents were not testimonial in nature, and are exempt from Confrontation Clause scrutiny. Brockmeyer, 406 S.C. at 352, 751 S.E.2d at 660. Thus, any objection based upon the Confrontation Clause would have been without merit. Applicant cannot show there is a reasonable probability the result at trial

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would have been different had counsel presented timely Confrontation Clause objections. Thus, this claim for relief is denied and dismissed with prejudice.

3. **Counsel was not ineffective for not objecting when the jury foreman stated that jury found Applicant guilty of the possession of a weapon during the commission of a violent crime the day before the jury verdict was entered. .**

In his third claim in the original Application, Applicant asserts trial counsel was ineffective for not objecting when the jury indicated it found Applicant guilty of possession of a weapon during the commission of a violent crime before it found Applicant was guilty of murder. Applicant raises a similar claim in his seventh claim (11(g)) of his amended Application. In that claim, he also asserts trial counsel should have moved for a mistrial when this information was disclosed.

This claim stems from the following exchange before the verdicts were read:

THE COURT: Mr. Foreman. I've been advised that the jury has reached a unanimous verdict; is that true?

THE FOREMAN: Yes, Your Honor.

THE COURT: If this verdict be the unanimous verdict of all 12, please signify by raising your right hands.

The jury has so signified.

Hope, please accept the verdict form and hand it to me.

THE CLERK: Yes, sir.

THE COURT: What is today's date?

THE CLERK: The 26th.

THE COURT: Please take this back, so they can date it. The date — inadvertently put the 25th, and it's the 26th.

THE FOREMAN: Your Honor, at around 7:00 o'clock last night we did.—

THE COURT: Well, date it today, if you. will.

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THE FOREMAN: Yes, sir.

THE COURT: That's the rendition of the verdict.

THE CLERK: If you'll just change it, sir. And put your initials beside it.

(Jury foreman corrects date with clerk.)

THE CLERK: Thank you, sir.

(8/26/11 Tr. p. 9, l 25 – Tr. 10, l 20).

At the evidentiary hearing, Applicant stated that in light of the exchange, he did not believe the jury was properly instructed or did not follow the instructions that reflected a conviction for a violent crime was a prerequisite for a conviction on the weapons charge. (PCR Tr. 14-5). He further claimed it was potential evidence the jury did not follow instructions throughout the entire trial. Id.

In explaining why he did not raise an objection after hearing this colloquy between the foreman and the trial judge, trial counsel Mauldin stated:

> Well, they did find him guilty of a violent crime and then the -- so the verdicts weren't inconsistent. If they had found him guilty of that and were continuing to do deliberations on the other charge if they had found him guilty of involuntary manslaughter or not guilty, I would have objected to the conviction of that as being definitely inconsistent and not par with the consideration of the elements of the greater offense.

(PCR Tr. 45, l 23 – Tr. 46, l 5). During cross-examination, counsel noted the jury never indicated they were not able to reach a resolution regarding the murder charge. (PCR Tr. 53). Counsel reiterated he would have objected if the jury had reached an inconsistent verdict in finding Applicant guilty of the possession of a weapon charge, but not on the murder charge. (PCR Tr. 53-4).

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This Court finds Applicant has failed to meet his burden of establishing trial counsel was ineffective in not raising an objection under these circumstances. First, Applicant has not shown trial counsel was deficient. As noted by trial counsel, at the time the verdict was published, the jury had found Applicant guilty of both murder and possession of a weapon during the commission of a violent crime. He had the prerequisite conviction for the possession of a weapon during the commission of a violent crime conviction. Further, the jury confirmed its verdict when it was polled. (8/26/11 Tr. pp. 12-3). There was no inconsistent verdict to be challenged, and Applicant has not identified a valid objection that counsel should have otherwise been made. Second, Applicant has failed to establish he was prejudiced. Again, the jury had found Applicant guilty of both murder and possession of a weapon during the commission of a violent crime. He had the prerequisite conviction for the possession of a weapon during the commission of a violent crime conviction. Further, the jury confirmed its verdict when it was polled. (8/26/11 Tr. pp. 12-3). Thus, any objection based upon an alleged inconsistent verdict would have been without merit. Furthermore, to the extent Applicant attempts to assert he was prejudiced because the jury may have prematurely considered the weapons charge, his argument is dismissed because he has presented no probative evidence to support the allegation. See generally Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (finding no prejudice when PCR applicant failed to present testimony or affidavits to establish underlying facts to support claim when counsel failed to preserve objection). This claim for relief is therefore denied and dismissed with prejudice.

4. Trial counsel was not ineffective for not objecting to hearsay testimony.

In his first claim of his amended Application, Applicant asserts trial counsel was ineffective for not objecting to hearsay testimony presented during the testimony of Mariko

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Clack, one of the patrons at the bar where the shooting occurred. At trial, the following exchange occurred during Ms. Clack's direct examination:

Q: At some point does Will Brockmeyer leave with the police?

A: Yes.

Q: What, if anything, is he saying to you as he is leaving?

A: "Come get me."

Q: At some point later did you get a phone call from Will Brockmeyer?

A: Yes, I did.

Q: How much longer after he left was it when he called you?

A: Maybe an hour, maybe more, a couple of hours.

Q: What, if anything, did he tell you on the phone about what happened with Nick?

A: He called me and told me to come get him, and I told him that he wasn't leaving **and that people had seen him shoot Nick.**

Q: **People said what?**

A: **That they had seen him shoot Nick. There was witnesses that had seen him shoot Nick.**

Q: What did he say?

A: He said he didn't do it.

(Tr. 147, l 8 – Tr. 148, l 4) (emphasis added).

At the PCR evidentiary hearing, counsel testified that the statement that there were witnesses that had seen Applicant shoot the victim were hearsay. (PCR Tr. 29). Counsel could not recall if there was a specific reason no objection was made, and he surmised that it might have gone by quickly because the witness testified about Applicant denying shooting the victim immediately afterwards. (PCR Tr. 30). Counsel further noted only one witness testified to

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actually seeing the shooting. (PCR Tr. 30). Further, Ms. Clack did not see the shooting, and she did not identify the people who claimed to have seen the shooting. (PCR Tr. 30). Counsel then noted it was probably a missed objection. (PCR Tr. 30). During cross examination, counsel again noted, "that might have gone by quick because then most of it afterward was about him denying doing anything wrong." (PCR Tr. 46, ll 21-22). Counsel wanted the testimony regarding Applicant's denial of involvement in the shooting to come out. (PCR Tr. 46).

This Court finds Applicant has failed to meet his burden of showing trial counsel was ineffective in not objecting to this testimony. Here, Applicant fails to establish there is a reasonable probability the result of the proceeding would have been different had counsel objected to this testimony.[2] In this Court's opinion, this testimony had very limited impact on Applicant's trial. The testimony itself was limited in nature. The State did not attempt to use Clack's mention of other witnesses as evidence of Applicant's guilt at any point throughout the rest of the trial. One witness testified she actually saw the shooting. (Tr. 99-103). Another witness described the victim as slumping over in his chair when Applicant approached. (Tr. 245). This witness, Mr. Kabar, noted Applicant knelt down, had his hands on or about the victim, and talked with the victim for approximately fifteen seconds. The witness testified they heard a loud pop, and then Applicant stood up and walked off around the building. (Tr. 245-46). Second, Applicant's defense was that the shooting was accidental. He testified that he touched either the victim's hand or the gun, and the gun went off. (Tr. 759). There was no question at

[2] This Court would also question whether trial counsel was deficient as a strong argument could be made that the testimony at issue was hearsay under Rule 801(c), SCRE. The transcript reflects the testimony was not offered to prove the truth of the matter asserted (i.e. multiple people saw Applicant shoot the victim). To the contrary, this Court finds this testimony was offered to establish Applicant's response to initial allegations regarding his involvement in the shooting, which was to deny he had anything to do with the shooting. See generally Rhodes v. State, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002).

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trial that Applicant was involved in shooting the victim. Clack's testimony did not contradict Applicant's assertions that the shooting was accidental. Furthermore, this Court finds there was overwhelming evidence of Applicant's guilt outside this one statement made by Ms. Clack. In light of these considerations, this Court finds Applicant fails to establish he was prejudiced. As a result, he has not shown trial counsel was ineffective. This claim for relief is denied and dismissed with prejudice.

5. Trial counsel was not ineffective for not preserving physical demonstrations in the record clearly and have physical demonstrations done in Court described for the transcript.

In Applicant's second claim in his amended application, he asserts trial counsel was ineffective in not creating a better record regarding the physical demonstrations that were done at trial by Gina Brakefield, the only State's witness to actually see the shooting, and the pathologist.[3]

At trial, Gina Brakefield testified about what she saw just prior to the shooting, and her observation of the shooting. During her testimony, she also demonstrated what she saw. The exchange went as follows:

Q: When you come out on the front porch, what do you see?

A: I saw Nick in the chair slumped over and Will crouching in front of him.

Q: When you say slouched over, what do you mean?

A: Hands by his side, head in his lap.

Q: Who, if anybody else, do you see around Nick at that time?

A: Amera Kabar and Keith Kabar were still sitting there.

[3] Applicant also asserts another demonstration should have been presented by counsel. Since this argument falls within the claim presented in Applicant's next allegation, it is addressed in section 6 below.

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Q: Who else, if anybody, did you see?

A: That's it.

Q: Where is Will Brockmeyer at that time?

A: He is crouching in front of him.

Q: When you say crouching, what do you mean?

A: Squatting down.

Q: In front of who?

A: In front of Nick.

Q: What, if anything, do you see next?

A: I saw him like whispering in his ear with his hands up in a trigger- like position.

Q: When you say he was whispering in his ear, who was whispering in whose ear?

A: Will was whispering in Nick's ear.

Q: What was Nick doing at that time?

A: He was asleep.

Q: Were you able to hear what Will Brockmeyer was saying?

A: No, sir.

Q: You said his hand came up in a trigger- like position. What do you mean?

A: I'm not sure how to describe it other than show you.

MR. GRAHAM: Your Honor, could I have the witness step down from the stand and use a chair and have her reenact this for the jury, please?

THE COURT: I will permit it.

MR. GRAHAM: Thank you, Your Honor.
(Witness leaves the witness stand.)

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THE COURT: I find it would help the jurors in hearing the testimony.

MR. GRAHAM: Thank you, Your Honor.

THE COURT: Counsel for the defense, you may come forward, please.

BY MR. GRAHAM:

Q: Gina, if you will stand over here and face the court reporter and keep your voice up so she can hear you.

A: Yes, sir.

Q: If this is the chair that Nick was in -- this is Detective Grant, who is a detective on the case - would you put his body in the position that you saw Nick in.

A: Yes, sir (indicating).

Q: You have him slumped forward with his head forward and his arms hanging down to his side?

A: Yes, sir.

Q: Mr. Hubbard will be Mr. Brockmeyer in this situation. Would you have Mr. Hubbard in the position that you saw Will Brockmeyer.

A: (Indicating.)

Q: Crouching down?

A: Uh-huh. (Indicating affirmative response.) Head forward.

Q: You have his right hand up by his neck, and that's when you say he was whispering in his ear. Where are you standing at when this happens?

A: About here (indicating).

Q: That's about five to six feet away?

A: Yes, sir.

Q: You are looking from the right-hand side over Mr. Brockmeyer's shoulder?

A: Yes, sir.

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THE COURT: Have the witness resume the stand if you have completed your demonstration.

MR. GRAHAM: I think we are at this time, Your Honor. I think that is good.

BY MR. GRAHAM:

Q: Have a seat back there, please, Gina.

A: (Witness resumes the witness stand.)

Q: Now that we have established the position and you have the hand up in a trigger finger in the neck area of the left side of Nick, what do you see or hear next?

A: I heard a loud pop. I saw a flash of yellow and a brass casing fly out.

Q: Did you know it was a casing?

A: No.

Q: So what did you see?

A: It was just like a flash of yellow and then something gold.

Q: What did the flash of yellow look like?

A: Like a fire, like a spark, or a flame.

(Tr. 99, l 17 – Tr. 103, l 9).

The cross-examination of Ms. Brakefield that related to the testimony given during the demonstration was as follows:

Q: You say you weren't there but 30 seconds, and you come out again to the porch area; is that right?

A: Yes, sir.

Q: From that front door, I guess area, to where Nick was sitting, would you say it was about this distance (indicating)?

A: From you to her?

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Q: From me to you.

A: From where I was standing?

Q: No, from the door.

A: The entrance?

Q: Yes.

A: No, it was closer.

Q: It was closer than that. Was it about this close (indicating)?

A: Maybe another foot closer.

Q: So about this close. So you were standing pretty much at the door when you saw it?

A: I might have been a foot away from the door. I was getting ready to tap Will on the shoulder. That's what I was walking up to do.

Q: Because you were going outside, and you didn't think anything was going on?

A: No.

Q: You were just there laughing about being whores and that kind of thing. You are going out because you wanted to see what was going on with Nick, I guess, as far as him being sick?

A: Yes, to see if they were going to come back into the bar or if they were ready to go home.

Q: So he is crouched -- you say he's crouched down, and you are going to tap him on the shoulder, but you are about five, six feet away at that time; is that right?

A: Yes.

Q: And then you -- was his hand up when you first saw him?

A: Yes. Almost right when I saw him like crouched down, he had his hand up.

Q: You said he was whispering?

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A: Yes, it looked as if he was saying something to him.

Q: Okay. But you didn't think anything was untoward or anything at that time?

A: No.

Q: You say you hear the bang and see the flash of light, and you see something gold fly off. You pretty much, I guess, guess that was the bullet afterwards when you were talking to the police; right?

A: Once I realized that he was bleeding out, I knew it was a gun.

(Tr. 119, l 11 –Tr. 121, l 12).

The forensic pathologist, Dr. Bradley Marcus, testified the victim died as a result of a single contact range, penetrating gunshot wound to the left neck. (Tr. 676). Using State's Exhibits 55 and 62, Dr. Marcus showed how the gun was lined up against the victim's neck when the shot was fired. (Tr. 678-80). During his direct examination, the following exchange occurred between the solicitor and Dr. Marcus:

Q: Doctor, if I can get you to step over here to the middle. I want to ask you -- this is not a real gun, Doctor, but it's similar in size and shape to that one.

A: Can you put up the one where I can see his face, please?

Q: State's Exhibit 55. Hypothetically if Nick Rae was sitting in a chair and slumped forward and passed out, would you orient that gun as it was on Nick Rae when it was fired?

A: Sure. Approximately just like this (indicating) in my opinion.

Q: Thank you, Doctor. If you would take the stand again.

(Witness resumes the witness stand.)

(Tr. 681, ll 5-19). To start the cross-examination, the defense immediately addressed the demonstration that was done by Dr. Marcus:

BY MR. MADSEN:

Q: Doctor, you said that basically I think you had taken the gun and pointed it with someone having it in the right-hand and holding it back like this (indicating); is that correct? That's how you held it over there?

A: Let me see.

Q: With the right-hand - -

A: I think it was like this.

Q: It was not like that.

A: Then it was my error in that part.

Q: Because it would have to be held like this (indicating); wouldn't it? Because this gun, what is down here (indicating), that circle and that thing around, that's coming from this down here (indicating)?

A: That's correct. That's correct. Yeah, that was an error on my part.

Q: So it's not consistent with someone holding it in a right-hand and putting it like that (indicating). It would be consistent if I had it like this (indicating) in my left hand because this has to be facing downward instead of like this (indicating); correct? You held it like that. It couldn't be like that because that wouldn't be the way that it would be done; correct?

A: Well, right. That's not the way it was -- that's not the way. Let me see this. This (indicating) is the way it was held. I held in error.

Q: Right. You held it the opposite way.

A: The gun has to be held like this (indicating), absolutely.

Q: And if I have got it, it doesn't make a lot of sense that someone -- that they would end up doing that? That is kind of unnatural; isn't it? If I had it in my left hand and I had this gun like this (indicating), that is kind of how it would end up going?

A: It's possible, yes.

Q: Not inconsistent with what you saw?

A: It's possible, yes.

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(Tr. 683, l 15 – Tr. 685, l 4). The pathologist also indicated the victim had a watch on his left wrist. (Tr. 686).

At the PCR evidentiary hearing, Applicant testified about the demonstration that was done by Ms. Brakefield. Applicant stated,

> She got down from the stand and they had two people -- you know, she put them in position as far as what she said she seen, and obviously in this case it was a contact range gunshot wound so the gun touched the person's skin and she put the gun up to the skin in a certain way saying that she seen me like that but it was not actually how it lined up, but we weren't aware of it at the time. We didn't become aware of it until later, until the pathologist testified.

(PCR Tr. 7, l 24 – Tr. 8, l 6). Applicant indicated Brakefield used a prop gun during the demonstration. (PCR Tr. 8). Applicant further testified that Brakefield said she was standing three or four feet away and was looking over Applicant's shoulder. (PCR Tr. 8). He asserted the transcript does not reflect the demonstration she did at trial. (PCR Tr. 8). He also stated the pathologist did not do a demonstration. (PCR Tr. 8). Applicant complained "it was actually completely reversed all the way around where it would be consistent with being in his own hand." (PCR Tr. 9, ll 22-4). Applicant contended the demonstration done by Brakefield was not possible:

> She demonstrated it with a gun being in my right hand with my palm facing down -- . . . -- which the actual muzzle imprint lines up with the wound as far as either it being in someone -- like Nick's hand, who was sitting down, it could have been in his left hand with palm facing down or if it was, in fact, in my hand, my hand would have been supinated with my palm facing upward.

(PCR Tr. 12, ll 7-8, 10-15).

During cross-examination, Applicant testified the victim was sitting outside, and he was severely intoxicated. (PCR Tr. 21). He also had a gun in his hand in his lap. (PCR Tr. 21). Applicant indicated the victim lifted the gun up, and that was when Applicant grappled with him

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for the gun. (PCR Tr. 21-22). Applicant said he made contact with the victim's hand to pull the gun away. (PCR Tr. 22). When asked if the gun was touching the victim when it fired, Applicant noted the gun was at the victim's neck. Applicant further stated, "[i]t happened so fast. I mean, I don't -- I don't recall all the exact details, but, yeah." (PCR Tr. 22, ll 15-6).

Counsel Mauldin testified that there was no indication of what angle the gun was held in the transcript of Ms. Brakefield's testimony. (PCR Tr. 30-1). Further, Mauldin remembered the solicitor provided the pathologist with a prop gun to demonstrate how the gun would have been positioned on the victim when the gun fired. (PCR Tr. 31). Mauldin acknowledged the transcript did not reflect how the gun was held, and there was no indication of what the jury saw or considered. (PCR Tr. 31-2). After reviewing the questions presented in cross-examination, Mauldin agreed there was no way of knowing how the gun was held. (PCR Tr. 32-33). Mauldin further testified that during cross-examination, the pathologist admitted he had made an error in his demonstration during his direct-examination:

> Oh, I believe the way the gun was -- or at least the muzzle imprint on the neck was oriented, the person holding the gun, if they were right-handed, that it would have been palm up and I think he did it more palm down, gangster style.

(PCR Tr. 33, ll 9-13). Mauldin also stated,

> Well, Mr. Madsen crossed the doctor and we had actually discussed it somewhat at the table. It was something that probably would have easily been fixed if we had gone over it extensively during cross, during redirect, the orientation of the gun, that he had just made a mistake, it was like this, like this, and we thought it would kind of be better to leave it at the doctor admitting he made a mistake and not push too hard and then just talk about it a little bit in closing, that it was confusing even to the doctor and how would the jury know, and it seemed like something that -- again, that -- you know, and this was -- Mr. Madsen was cross-examining, but I know we were discussing it that it was a mistake and it looked like something we'd be able to fix rather easily and move on from there and so we kind of did what we did with it not to cause more damage.

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(PCR Tr. 33, l 21 – Tr. 34, l 11). Mauldin further testified that they talked about how he had the gun palm down, and that would not have been the way the gun was oriented. (PCR Tr. 35).

> [H]e had the gun, I think, palm down and that was not the way it would have been had it been oriented, and I think further on Page 684, although it's hard to say, they talk about left hand and something having to be facing downward and then there's a lot of indicating, but that's basically what it was. And the way the imprint was on the side of his neck, I believe there's -- there's a barrel and then the bottom part under the barrel there was metal on the gun and it would have been held with palm up next to the neck and the man had his right hand with the palm down.

(PCR Tr. 35, ll 1-11). Mauldin also testified they were more worried about the actual presentation to the jury than preserving the demonstration for appeal. (PCR Tr. 35). Mauldin did not believe there would be an appeal issue about the demonstration. Id.

During cross-examination, Mauldin agreed that Applicant's defense was not denying his involvement in the shooting. (PCR Tr. 48). Applicant said it was an accident. (PCR Tr. 48). Further, counsel examined State's Exhibits 55 and 62 from the trial.[4] It was undisputed the gunshot went into the left side of the victim's neck. (PCR Tr. 50). Mauldin noted the top of the gun had to be oriented toward the back of the victim's neck and the bottom of the gun was more towards the front of the victim's neck. (PCR Tr. 50-1). Mauldin testified that if the gun was in the victim's left hand, his palm would be facing down, but if it was in his right hand, the palm would be facing up. (PCR Tr. 51-2). Mauldin could not recall which direction Ms. Brakefield held the gun, but it was clear the pathologist held the gun in the wrong position. (PCR Tr. 52). Mauldin agreed that he and Counsel Madsen discussed how to handle the matter, and they made a strategic decision to handle it in the cross-examination in the manner that was done. (PCR Tr. 52).

[4] State's Exhibit 55 was the left side of the victim's head from the mouth downward. State's Exhibit 62 was an overlay of an image of the gun barrel.

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This Court finds Applicant has failed to meet his burden of establishing trial counsel was ineffective in their handling of the demonstrations at trial. First, this Court finds trial counsel were not deficient in the handling of the Ms. Brakefield's demonstration. As noted by trial counsel, their concern with the demonstrations was with the presentation to the jury, not an appeal. Furthermore, trial counsel's strategy for combatting the demonstration was borne out during cross-examination of Ms. Brakefield. Counsel attempted to first establish Brakefield viewed Applicant negatively because of his use of a fake name. (Tr. 111-13). Counsel also had Brakefield admit there were several inconsistencies between her testimony at trial and the statements and emails she provided to law enforcement. (Tr. 116-17, 121, 122). During cross-examination, Brakefield also admitted she was five to six feet away before the shooting occurred, and it did not look as if Applicant was doing anything untoward the victim just before the shooting occurred. (Tr. 120-21). Counsel also had Brakefield clarify that her statement to law enforcement that indicated Applicant shoved the victim to the ground after the shooting was not accurate. (Tr. 122). Where, as here, trial counsel conducts a thorough and meaningful cross-examination of a witness, counsel's failure to employ a trial strategy that, in hindsight, might have been more effective does not constitute unreasonable performance for purposes of an ineffective assistance of counsel claim. Cardwell v. Netherland, 971 F.Supp. 997, 1019 (E.D.Va.1997).

Second, this Court finds trial counsel were not deficient in the handling of the pathologist's demonstration of the positioning of the gun when the shot was fired. The trial transcript reflects that during cross-examination, trial counsel had the pathologist admit that his demonstration during his direct testimony was incorrect. Further, the transcript reflects trial counsel also did a demonstration while Dr. Marcus was on the stand, and Dr. Marcus agreed the

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corrected positioning demonstrated would have been the consistent with the evidence Dr. Marcus observed. Counsel Mauldin testified that he and Counsel Madsen did discuss how to handle the demonstration done by Dr. Marcus at counsel table, and the cross-examination done by Counsel Madsen was a reflection of their strategy in handling their concerns that had been raised by Dr. Marcus's demonstration during his direct testimony. This Court finds Counsel's Mauldin's testimony regarding trial counsel's strategic decision to be credible, and affords it great weight. Based upon this testimony and the trial transcript reflecting that counsel's actions, this Court finds Applicant has failed to show trial counsel was deficient in this regard.

This Court further finds Applicant has not shown that he was prejudiced. First, this Court would note that Applicant has not presented any testimony or established before this Court how the demonstration done by either Ms. Brakefield or Dr. Marcus at trial should have been preserved for the record. Neither Ms. Brakefield nor Dr. Marcus testified at the PCR evidentiary hearing, and none of the testimony presented clarifies their demonstrations in any more detail than was presented at trial. Thus, to the extent Applicant's claim is based upon a belief that counsel was ineffective for not clearly establishing a record of the demonstration, Applicant fails to establish he was prejudiced. His assertion that he was prejudiced is merely speculative. Furthermore, Applicant also fails to establish how better record of the demonstration would have possibly led to a different result at trial. Applicant appears to believe that a better record would have provided an avenue for a different argument on appeal. This Court rejects this argument for two reasons. In addition to not presenting what a record of the demonstrations during either witnesses' testimony would have looked like in a transcript, Applicant has also not presented an argument that could have been raised on appeal had the demonstrations been better preserved in the record. This Court would note that no objections were made at trial regarding either the

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demonstration done by Ms. Brakefield or by Dr. Marcus. Altogether, Applicant has not shown there was a reasonable probability that the result at trial would have been different had counsel handled the demonstrations in a manner that would have better reflected the demonstrations in the trial transcript. This claim for relief is therefore denied and dismissed.

6. Trial counsel were not ineffective for not allowing Applicant to demonstrate the shooting, and for not presenting a different argument regarding the shooting in closing argument.

In his third allegation in the amended application, Applicant complains trial counsel should have allowed him to demonstrate what occurred at the shooting, and counsel should have presented a different closing argument challenging the State's demonstrations of the shooting. This Court finds these contentions are without merit.

At the PCR evidentiary hearing, Applicant presented a demonstration of how the shooting occurred from his point of view:

> Okay. Like if you're holding a gun, the handle would be here, the muzzle would be here. Gina testified that she seen me -- if I could use you. Well, he was sitting down. She said she seen me leaning, holding the gun like this, which if he would have lifted his hand up there was no way it could be in his hand, but it actually lines up the other way. So if you could grab it, put it in your left hand. If you were holding it up to your neck, it would be exactly consistent like that. That's how it actually lines up. The muzzle imprint with the imprint of the wound, but she said that she seen me completely the opposite way, like this, which -- can have I have it one more time? If she was correct in this, there's no way it could have fit in no hand and that's what the State relied on saying that my testimony couldn't have been right because of that fact.

(PCR Tr. 11, ll 9-24). Applicant claimed he did not believe his lawyers presented the issue effectively, and another demonstration should have been done, noting "if my counsel was confused about, you know, the -- the physical proof, then obviously the jury would have been, too, and wouldn't have been able to make a proper decision based upon the evidence presented because it wasn't presented enough to them for them to make an educated decision." (PCR Tr.

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13, ll 10-5). Applicant also expressed he believed counsel admitted as much in closing argument when counsel noted another demonstration was not done. (PCR Tr. 13-4).

During cross-examination, Applicant admitted he was intoxicated at the time, and the victim had the gun sitting in his lap shortly before the shooting. (PCR Tr. 21). Applicant stated the victim lifted up the gun, and Applicant went to grab it, not thinking it was loaded. (PCR Tr. 21). Applicant asserted he was reaching for the gun trying to grab it went it fired. (PCR Tr. 21-22). Applicant further testified the gun was right at the victim's neck when it fired. "It happened so fast. I mean, I don't -- I don't recall all the exact details, but, yeah." (PCR Tr. 22, ll 15-6).

Trial counsel was not directly asked about whether the defense considered having Applicant present a demonstration regarding how the shooting occurred. However, Counsel Mauldin did note that in regards to the pathologist's testimony, he and Counsel Madsen discussed and jointly decided against asking for a second demonstration of how the shooting occurred. (See PCR Tr. 34-5).

This Court finds Applicant has failed to meet his burden of showing trial counsel was deficient in not having Applicant demonstrate how the shooting occurred, and also not presenting a closing argument based upon such a demonstration. Counsel's testimony reflects they made a strategic decision not to present a second demonstration of how the shooting occurred. Counsel's strategy, as indicated in the trial transcript and closing argument, was to utilize the fact the State failed to present an accurate depiction of the shooting to argue there was reasonable doubt. This Court finds this strategy was a reasonable and valid strategy. Thus, Applicant cannot show counsel was deficient. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance).

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This Court also finds Applicant fails to show that he was prejudiced. In light of Applicant's testimony that he was intoxicated when the shooting occurred, and he did not recall all of the exact details at the evidentiary hearing, this Court does not find the demonstration presented by Applicant to be credible. Further, this Court finds there was not a reasonable probability the result at trial would have been different had counsel asked Applicant to present this demonstration at trial. Applicant's credibility issues at trial (stemming from his use of a fake name the days prior to the shooting and his differing accounts of how the shooting occurred when talking with law enforcement, among other issues), a demonstration by Applicant would not have assisted his defense at trial. Similarly, this Court finds Applicant has failed to show he was prejudiced by counsel's closing argument and counsel's decision not to present another demonstration for closing argument. This claim for relief is therefore denied and dismissed with prejudice.

7. Applicant's claim that trial counsel was ineffective assistance for failing to present evidence regarding reputation and use of a nickname prior to the incident was withdrawn.

At the evidentiary hearing, Applicant withdrew this claim from consideration. (PCR Tr. 4). Thus, this Court finds Applicant has withdrawn his fourth allegation in the amended application for post-conviction relief. Thus, this claim is dismissed with prejudice.

8. Trial counsel was not ineffective in not objecting when the trial judge provided instructions to the jury prior to the closing arguments of counsel.

In his fifth claim of the amended application, Applicant asserts trial counsel was ineffective for not objecting when the trial court giving the jury charge before the parties presented their closing arguments. This Court finds this claim is without merit.

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This claim stems from the trial court's decision to give its instructions prior to closing argument. Prior to giving the jury charge, the trial court stated as follows,

> THE COURT: Mr. Foreman, as you are well aware, we have now concluded all of the testimony in the case and thus remaining is the final arguments of counsel and my charge to you upon the law, after which I will give you the case this afternoon for your deliberations.
>
> Ordinarily we have the charge on the law after distinguished counsel have made their closing arguments, but over the years many jurors have told me, "Judge, I wish you would have given us the law first. I believe I could have followed the lawyers' positions better and applied the facts as I found them to the law, and it would have helped me to know the law first so I could follow the lawyer's position."
>
> That just simply makes sense to me. So it is for the last 15 years, by and with the consent of the State and the defendant, I have done that. With their consent I propose to do it at this time.
>
> I will give the charge on the law, have you take a short break. We will return and we will have first counsel for the defense's argument. We will take a very short break at that time.
>
> Then we will have arguments from the State. At that time I will give any concluding remarks that may be appropriate or necessary, and you will have the case for your deliberation.

(Tr. 827, 17 – 828, 17).

At the PCR evidentiary hearing, Mr. Mauldin testified he did not recall if there was a discussion with the judge where the judge asked the attorneys if they consented to having the jury instructions be given before closing argument. (PCR Tr. 36). When asked why he did not object, Mauldin explained,

> I couldn't think of a ground other than that's just not the way it's done, judge. I couldn't think of any kind of constitutional grounds or anything to make an objection. It was unusual and we thought it was unusual, but we just couldn't think -- you know, it's out of order, but just saying well, that's not the way we do it, it didn't have any kind of constitutional limitation or statutory ground that I could think of.

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(PCR Tr. 36, ll 16-23). Mauldin reiterated this explanation during cross-examination. (PCR Tr. 53).

This Court finds Applicant fails to show trial counsel was deficient in not objecting to the order of the jury instructions and closing argument. "Generally, the conduct of a criminal trial is left largely to the sound discretion of the trial court." State v. Oglesby, 384 S.C. 289, 292, 681 S.E.2d 620, 622 (2009). It was well within the trial court's sound discretion to order the proceedings in the manner it selected. Applicant has failed to identify any objection that trial counsel could have raised to the trial court's decision to give its jury instructions before closing argument. Thus, he has failed to meet his burden of establishing trial counsel was deficient. Furthermore, this Court finds Applicant also fails to show he was prejudiced by any error of counsel in their handling of this issue. He has not presented any evidence to support a finding there was a reasonable probability the result at trial would have been different had counsel objected to the order of the jury instructions and closing arguments. Since Applicant fails to establish he is entitled to relief upon this claim, this Court denies this claim and dismisses it with prejudice.

9. Trial counsel was not ineffective in not objecting to the trial court's instructions that a conviction on a violent crime was a prerequisite for a conviction on possession of a deadly weapon during commission of a violent crime.

In the sixth claim of the amended application, Applicant asserts trial counsel was ineffective for not objecting to the trial court's jury instruction regarding his charge for possession of a weapon during the commission of a violent crime. Applicant asserts trial counsel should have requested an instruction that emphasized that a conviction for a violent crime was a prerequisite for a conviction on the possession of a weapon during the commission of a violent crime.

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Applicant takes issue with a portion of the trial court's instruction. Specifically, Applicant appears to complain about this portion of the instructions:

> Now, the indictments in this case allege two different offenses against the defendant as I have indicated. The charges were, one, murder and, two, possession of a deadly weapon during the commission of a violent crime.
>
> Each indictment charges a separate and distinct offense. You must decide each indictment separately based on the evidence as to that issue. As an example, your verdict may be the same as to each indictment, but it may be different as to each indictment, depending on your view of the facts as you apply those facts to the law of the case.

(Tr. 830, ll 1-12).

The trial court later gave the following instruction regarding possession of a weapon during the commission of a violent crime:

> The defendant is charged with possession of a weapon during the commission or attempt to commit a violent crime. The State must prove beyond a reasonable doubt that the defendant was in possession of a firearm, such as a pistol, or visibly displayed what appeared to be a firearm during the commission of a violent crime.
>
> Of course, firearms mean obviously machine gun, rifle, pistol, or weapons of that nature. In order to find the defendant guilty of possession of a weapon during the commission of a violent crime, you must first find the defendant guilty of either committing a violent crime or attempting to commit a violent crime. I charge you that the offense of murder is a violent crime.

(Tr. 843, l 16 – 844, l 3).

At the PCR evidentiary hearing, trial counsel Mauldin testified at trial that his understanding the jury to find the defendant guilty of a violent crime before the defendant could be found guilty of possession of a weapon during the commission of a violent crime. (PCR Tr. 37-8). Mauldin agreed that the trial court's specific instruction regarding possession of a weapon during the commission of a violent crime was an accurate and correct statement of the law.

(PCR Tr. 38-9). Mauldin also acknowledged the trial court did not instruct the jury to consider and complete the murder verdict form before considering the weapons charge. (Tr. 39).

This Court finds Applicant fails to meet his burden of showing trial counsel was ineffective. First, Applicant fails to show trial counsel was deficient. "In general, the trial court is required to charge only the current and correct law of South Carolina. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002). A jury charge is correct if it contains the correct definition of the law when read as a whole. Id." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472–73 (2004). This Court agrees with trial counsel's assessment that the trial court's instruction regarding the law of possession of a weapon during the commission of a violent crime was an accurate statement of the law. When taken as a whole, the trial court properly instructed the jury that it had to find Applicant guilty of either a violent crime or attempting a violent crime before it could find him guilty of possession of a weapon during the commission of a violent crime. Since the trial court's instruction was a proper statement of the law, trial counsel was not deficient in not challenging the instructions.

Applicant also fails to establish that he was prejudiced. Again, the instructions given by the trial court were proper. Further, Applicant was convicted of murder, the predicate violent crime for the possession of a weapon during the commission of a violent crime conviction. He fails to show there is reasonable probability the result at trial would have been different had counsel objected. This claim for relief is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his

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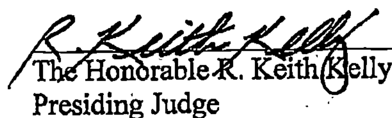
application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

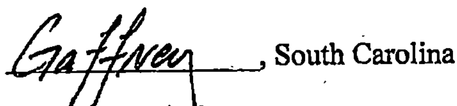
Accordingly, the Court denies relief on each of Applicant's claims. This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on his behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of the Department of Corrections to complete service of his sentence.



The Honorable R. Keith Kelly
Presiding Judge



Gaffney, South Carolina
16 October 2018

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ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	))	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
William Brockmeyer, # 347527, Applicant, v. State of South Carolina, Respondent.	))))))))	Case No. 2014-CP-32-0689 **MOTION TO ALTER/AMEND JUDGMENT**

FILED
2018 NOV -9 AM 10: 3
LISA M. CO
CLERK OF COURT
LEXINGTON CO

Counsel for the Applicant has received the Order of the Court dismissing Applicant's claims for Post-Conviction Relief. Pursuant to South Carolina Rule of Civil Procedure Rule 59(e), the Applicant hereby requests this Court consider to Alter or Amend the current Judgment based upon the following argument:

Trial Counsel was ineffective for failing to object and request a mistrial when the jury admittedly reached a verdict on the "possession of a deadly weapon during commission of a violent crime" offense prior to reaching a verdict on the violent crime.

The Court's order simply relies upon the fact that, at the time the verdicts were published, they were not inconsistent. *See,* Order of Dismissal page 14. The Applicant contends this does not cure the clear errors of the jurors leading up to reaching those verdicts.

On page 10 of the sentencing transcript from August 26, 2011 a juror attempts to tell the Court that around 7 pm last night (August 25) a verdict was reached on the charge of possession of a weapon during the commission of a violent crime charge. *See also,* indictment 2011-GS-32-01257 which has both dates written on the face of the document under the verdict. After reaching a verdict on this one charge on August 25, the jury resumed deliberations on the Murder at 9:30

a.m. on August 26. Tr. Page 4. Between 9:30 a.m. and 11:58 a.m. that morning, the jurors asked for copies of transcripts of several witnesses and a written copy of the jury instructions defining murder, involuntary manslaughter and accident. Tr. Page 4-7. The jury then continued to deliberate regarding the Applicant's murder charge until almost noon whereupon a verdict was eventually reached.

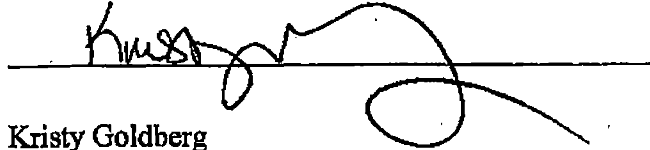
When evidence exists that the jurors did not correctly consider the law in reaching a verdict, the verdict should not be relied upon as having produced a just result. South Carolina Code of Laws Section 16-23-490 makes it clear that a conviction for a violent crime (or an attempted violent crime) is required before an individual can be guilty of possession of a firearm during the commission of a violent crime. The Court instructed the jurors accordingly. Tr. P. 243, lines 22-25, through page 844, lines 1-3.

The Applicant would argue that prejudice exists when evidence exists that the jurors did not follow the law in reaching their verdict. Under such a circumstance the entirety of the jury's verdicts cannot be relied upon as having produced a just result. The Applicant is further prejudiced by the ***consecutive*** five year sentence for the offense of possession of a weapon during commission of a violent crime.

Remaining Claims

As to the Applicant's remaining claims, Applicant hereby asserts that all allegations offered in his Post-Conviction Relief application and during the hearing were valid claims for Post-Conviction Relief that were sufficiently addressed on the record. Applicant would ask the Court to reconsider all allegations but does not have additional argument and intends to file a

Notice of Appeal regarding the Court's decision on those grounds upon the final conclusion of this case after a ruling on this Motion to Alter/Amend Judgment is received.



Kristy Goldberg
Attorney for Applicant

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Columbia, South Carolina

This 30 th day of October, 2018

FILED
2018 DEC -3 AM 8: 16
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

William Brockmeyer, #347527,
Applicant,

v.

State of South Carolina,
Respondent.

Case No. 2014-CP-32-00689

RETURN TO APPLICANT'S "MOTION TO ALTER/AMEND JUDGMENT"

Respondent, by and through undersigned counsel, making its Return to Applicant's "Motion to Alter/Amend Judgment," would respectfully show unto this Court:

I.

William Brockmeyer (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. During its May 2011 term, the Lexington County Grand Jury indicted Applicant murder (2011-GS-32-01255) and possession of a weapon during the commission of a violent crime (2011-GS-32-01257). Eleventh Circuit Public Defender Robert M. Madsen and Assistant Public Defender David Mauldin represented Applicant on these charges. Eleventh Circuit Solicitor S.R. Hubbard, III, and Deputy Solicitor Shawn Graham prosecuted the case. On August 22-26, 2011, Applicant proceeded to a jury trial before the Honorable Edward B. Cottingham. The jury convicted Applicant as indicted. Judge Cottingham sentenced Applicant to a term of imprisonment of thirty-five years for murder and a consecutive term of imprisonment of five years for the weapons charge.

Applicant filed a timely notice of appeal, and Miles E. Coleman, Esquire, and A. Mattison Bogan, Esquire, perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issues:

1. Did the Trial Court err by applying the wrong legal standard and denying the [Applicant's] motion to enforce a subpoena where the information sought 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 State 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 of the [Applicant] where the State repeatedly used the photograph for the illicit purpose of implying that the [Applicant] was guilty? [and]
4. Did the Trial Court err by permitting the State to introduce hearsay testimony taken from the decedent's cell phone?

By order filed February 28, 2013, Applicant's appeal was certified for review by the South Carolina Supreme Court. Following briefing and oral argument, the Supreme Court affirmed Applicant's conviction and sentence by published opinion on November 27, 2013. *State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645 (2013). The Remittitur was issued on December 13, 2013.

II.

On February 25, 2014, Applicant filed an application for post-conviction relief. In this application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.
    a. Counsel failed to properly preserve appellant issues for appeal;
        i. Counsel was ineffective for failing to properly preserve motion to enforce subpoena for appellate

review.

b. Counsel failed to show how [Applicant's] constitutional rights were violated which denied [Applicant] due process of law; [and]
    i. Court appointed counsel was ineffective by failing to properly preserve a violation of the confrontation Clause of the Sixth Amendment to the United States Constitution, this denied [Applicant] due process of law and this was highly prejudicial and render the evidence inadmissible.
c. Counsel was ineffective for failing to object when the jury foreman stated that jury found [Applicant] guilty of weapon/possession of a weapon during a violent crime on 8/25/11 the day before jury found [Applicant] guilty of murder on 8/26/11.

Respondent made its return on September 30, 2014, requesting an evidentiary hearing. Subsequently, through his counsel, Applicant filed an amended application for post-conviction relief on September 29, 2016. In this amendment Applicant raised the following grounds for relief:

1. Ineffective assistance of trial counsel [and]
    a. Ineffective assistance of trial counsel for failing to object to inadmissible hearsay testimony. Page 147 and 148;
    b. Ineffective assistance of trial counsel for failing to preserve the record clearly and have physical demonstrations done in Court described for the transcript;
    c. Ineffective assistance of trial counsel for failing to effectively present arguments regarding the angle of the gunshot wound and failure to allow the Applicant to demonstrate what happened;
    d. Ineffective assistance of counsel for failure to present evidence regarding reputation and use of a nickname prior to the incident;
    e. Ineffective assistance of counsel for failure to object when the trial judge provided instructions to the jury prior to the closing arguments of counsel;
    f. Ineffective assistance of counsel for failing to object when the Court did not emphasize to the jury that a conviction on a violent crime was a prerequisite for a conviction on

possession of a deadly weapon during commission of a violent crime; [and]

g. Ineffective assistance of counsel for failing to object and/or request a mistrial and/or move for a new trial based on the fact that the jury reached a verdict on possession of a deadly weapon during commission of a violent crime prior to reaching a verdict on whether or not he committed a violent crime, and the Court instructed the jury to re-date the verdict on the indictment.

A hearing into the matter was convened at the Lexington County Courthouse on November 9, 2016, before the Honorable R. Keith Kelly. Applicant was present at the hearing and represented by Kristy G. Goldberg, Esquire. Senior Assistant Deputy Attorney General Johanna C. Valenzuela of the South Carolina Attorney General's Office represented Respondent. After hearing all the testimony presented at the evidentiary hearing, as well as arguments from both parties, this Court issued an order of dismissal on October 16, 2018, denying and dismissing the application with prejudice. Said order was filed with the Lexington County Clerk of Court on October 25, 2018.

Subsequently, on October 30, 2018, Applicant, through his counsel, submitted a "Motion to Alter/Amend Judgment." Respondent received a copy of said motion on November 1 2018. This Return follows.

III.

In his "Motion to Alter/Amend Judgment," Applicant asserts trial counsel was ineffective for failing to object and request a mistrial when the jury reached a verdict on the possession of a deadly weapon during commission of a violent crime offense prior to reach a verdict on the violent crime. He further asserts this Court's order "simply relies on the fact that, at the time the verdict were published, they were not inconsistent." Applicant contends this does not cure the

errors of the jurors leading up to those verdicts. Applicant further contends "prejudice exists when evidence exists that the jurors did not follow the law in reaching their verdict." Due to this alleged error, Applicant asserts the verdicts cannot be relied upon as having produced a just result.

Respondent submits this Court's order of dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP. *See also McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991). Respondent submits this Court fully ruled on all issues properly presented through Applicant's post-conviction relief application, and amendment thereto, and Applicant's "Motion to Alter/Amend Judgment" should be denied. As each properly raised allegation was addressed fully in the order, Respondent submits Applicant's assertions are without merit.

IV.

WHEREFORE, having made its Return to the motion, the State requests the relief requested in the motion be denied and that said motion be dismissed.

[signature block to follow]

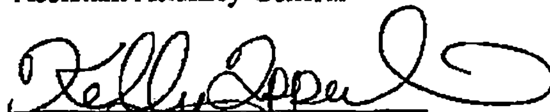
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

KELLY OPPENHEIMER
Assistant Attorney General

BY: 
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

November 27, 2018.

FILED
2019 APR 22 PM 3: 04
LISA M. COMER
CLERK OF COURT
LEX. CO. SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) FOR THE ELEVENTH JUDICIAL CIRCUIT

William Brockmeyer, #347527, Applicant,

v.

State of South Carolina, Respondent.

Case No. 2014-CP-32-00689

ORDER DENYING APPLICANT'S "MOTION TO ALTER/AMEND JUDGMENT"

This matter comes before this Court by way of Applicant's "Motion to Alter/Amend Judgment," asking this Court to alter or amend its order of dismissal denying Applicant's application for post-conviction relief.

I.

William Brockmeyer (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. During its May 2011 term, the Lexington County Grand Jury indicted Applicant murder (2011-GS-32-01255) and possession of a weapon during the commission of a violent crime (2011-GS-32-01257). Eleventh Circuit Public Defender Robert M. Madsen and Assistant Public Defender David Mauldin represented Applicant on these charges. Eleventh Circuit Solicitor S.R. Hubbard, III, and Deputy Solicitor Shawn Graham prosecuted the case. On August 22-26, 2011, Applicant proceeded to a jury trial before the Honorable Edward B. Cottingham. The jury convicted Applicant as indicted. Judge Cottingham sentenced Applicant to a term of imprisonment of thirty-five years for murder and a consecutive term of imprisonment of five years for the weapons charge.

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   b. Counsel failed to show how [Applicant's] constitutional rights were violated which denied [Applicant] due process of law; [and]
      i. Court appointed counsel was ineffective by failing to properly preserve a violation of the confrontation Clause of the Sixth Amendment to the United States Constitution, this denied [Applicant] due process of law and this was highly prejudicial and render the evidence inadmissible.
   c. Counsel was ineffective for failing to object when the jury foreman

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> stated that jury found [Applicant] guilty of weapon/possession of a weapon during a violent crime on 8/25/11 the day before jury found [Applicant] guilty of murder on 8/26/11.

Respondent made its return on September 30, 2014, requesting an evidentiary hearing. Subsequently, through his counsel, Applicant filed an amended application for post-conviction relief on September 29, 2016. In this amendment Applicant raised the following grounds for relief:

1. Ineffective assistance of trial counsel [and]
    a. Ineffective assistance of trial counsel for failing to object to inadmissible hearsay testimony. Page 147 and 148;
    b. Ineffective assistance of trial counsel for failing to preserve the record clearly and have physical demonstrations done in Court described for the transcript;
    c. Ineffective assistance of trial counsel for failing to effectively present arguments regarding the angle of the gunshot wound and failure to allow the Applicant to demonstrate what happened;
    d. Ineffective assistance of counsel for failure to present evidence regarding reputation and use of a nickname prior to the incident;
    e. Ineffective assistance of counsel for failure to object when the trial judge provided instructions to the jury prior to the closing arguments of counsel;
    f. Ineffective assistance of counsel for failing to object when the Court did not emphasize to the jury that a conviction on a violent crime was a prerequisite for a conviction on possession of a deadly weapon during commission of a violent crime; [and]
    g. Ineffective assistance of counsel for failing to object and/or request a mistrial and/or move for a new trial based on the fact that the jury reached a verdict on possession of a deadly weapon during commission of a violent crime prior to reaching a verdict on whether or not he committed a violent crime, and the Court instructed the jury to re-date the verdict on the indictment.

A hearing into the matter was convened at the Lexington County Courthouse on November 9, 2016, before the Honorable R. Keith Kelly. Applicant was present at the hearing and represented by Kristy G. Goldberg, Esquire. Senior Assistant Deputy Attorney General Johanna C. Valenzuela of the South Carolina Attorney General's Office represented Respondent. After hearing all the testimony presented at

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the evidentiary hearing, as well as arguments from both parties, this Court issued an order of dismissal on October 16, 2018, denying and dismissing the application with prejudice. Said order was filed with the Lexington County Clerk of Court on October 25, 2018.

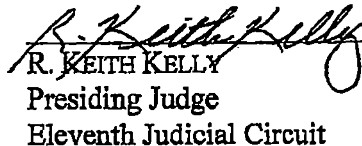
Subsequently, on October 30, 2018, Applicant, through his counsel, submitted a "Motion to Alter/Amend Judgment." Respondent submitted its return on or about November 27, 2018.

III.

This Court finds its order of dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP. *See also McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991). Having carefully reviewed the entire record in this matter, this Court finds there is no basis for altering or amending its prior ruling.[1] Therefore, this Court hereby denies Applicant's motion in its entirety, and affirms the previous order of dismissal.

This Court notes if Applicant desires to secure appellate review of this order and the order of dismissal, a notice of appeal must be filed and served within thirty days of the service of this order. Applicant is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND, IT IS SO ORDERED this 17 day of April, 2019.



R. KEITH KELLY
Presiding Judge
Eleventh Judicial Circuit

Spartanburg, South Carolina

[1] The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the Court in reaching its decision. *See* Rule 59(f), SCRCP.