

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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NOV 25 2019

S.C. SUPREME COURT

MARION BONDS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-000447

APPENDIX

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1 any one of these cases when we've heard that --
2 we're sure he did some bad things and we know he's
3 not an angel. Why should I spend my time,
4 especially during the holidays, trying to evaluate
5 whether or not the State proved whether or not it
6 should be one trafficking or two traffickings here
7 the way that they charged it or something like
8 that because it is going to take a little bit of
9 time and brain effort but we all rely on you. The
10 whole court system relies on you and every -- like
11 it was said by the judge and by me in the
12 beginning, there's nothing that can be done to
13 reverse a mistake by y'all. To be honest with
14 you. There's nothing that -- If I mess up, the
15 Judge messes up, or anybody else messes, up we've
16 got a process for that. But not for you guys
17 messing up. And so I know I'm asking you to do a
18 lot but there's no way I can understate the
19 importance.

20 It's easy to think that Marion Bonds is just a
21 defendant but we have to remember that he is a
22 human being, he is one of the residents of
23 Beaufort County, he has a family, and even though
24 nobody chooses to do jury duty, that this is what
25 we've got to do in order to make sure that our

1 process that we have here works. So I really do
2 appreciate it because the level of evidence on
3 different charges is vastly different.

4 The type of evidence that they have at Ball
5 Park Road is a lot different than what they've got
6 at Eddings White. They're two different kinds of
7 cases for one thing, but I mean there's a lot more
8 pictures, there's -- there's a lot more physical
9 evidence, there's more police who are witnesses to
10 the drugs and things like that that happened at
11 the Ball Park Road address.

12 But as far as what happened at Eddings White
13 is more based on what Reggie said. And so while
14 the framework of what happened at Ball Park has a
15 little more corroborations say between, what one
16 person said versus what another did and it fits
17 together. There's tons of police officers there,
18 all who testified before you. What happens at
19 Eddings White Road all really depends on whether
20 or not you can believe Reggie beyond a reasonable
21 doubt. And kind of one way I think about it is if
22 we found out later that Reggie lied about this,
23 how many of us would really be that surprised?
24 Because we know he's lied about certain things and
25 changed his story about others. I'm gonna spend a

1 little more time about Eddings White Road in a
2 little bit but there are some certain things that
3 I want to say about the drugs that were found at
4 the Ball Park Road.

5 You know, I know I'm getting into details here
6 but, I can't stress again how important it is.
7 The last thing we'd ever want to do is convict
8 somebody of something, I don't care if they're
9 Marion Bonds, I don't care they're George
10 Washington himself, you know you wouldn't want to
11 -- anybody have something, a permanent conviction
12 for something that truly wasn't supported by the
13 facts and the law. And that's why I don't think
14 it's appropriate for them to charge Marion for
15 trafficking the stuff in the shoe and then when
16 they don't find everything at the house, come back
17 with yet another trafficking. Were talking about
18 28 to 100 grams. Twenty grams underneath the sink.
19 Forty grams in the shoe. You add them together,
20 whether it's the 40 grams or the 60 grams it's
21 really just the same slot, 28 to 100. But yet
22 he's -- even though we know he hasn't returned
23 back to the Ball Park Road address. It's just
24 that everything wasn't found or the search wasn't
25 as thorough and I submit, if they would have

1 stayed there and searched wherever those drugs
2 happened to be at the time that it would've put
3 that in the group for the drugs that they were
4 charging him with. They charged him with the
5 stuff that was under the mattress. They didn't
6 charge anybody else with the stuff that was under
7 the mattress. I don't really -- haven't heard any
8 evidence that the stuff under the mattress was
9 connected to Marion Bonds at all. There was two
10 other guys either in the room or near room.
11 There's another guy I guess, coming out of the
12 bathroom. Marion Bonds certainly doesn't say
13 anything on the phone about did you get my stuff
14 under the mattress, did you get my stuff from the
15 pill bottle. One of the other guys has an empty
16 pill bottle. So you know I don't want to get too
17 bogged down because when you add the weights
18 together you're still between 28 and 100 whether
19 you include the pill bottles there or whether you
20 don't include the pill bottles, whether you
21 include all of it, including the stuff under the
22 sink or even include some of it. So I mean if
23 it's -- if it's happening it's happening. It's
24 not two traffickings. He's there one time. It's
25 all one case and I submit that only one

1 trafficking would be appropriate. You now...

2 A few words about some of the evidence on the
3 drugs. I don't want to beat a dead horse or
4 anything but it would've been nice if Investigator
5 Fraser had of written a report about walking into
6 Old School's house and actually seeing the drugs
7 underneath the sink instead of not writing a
8 report at all. It would've been nice if he
9 would've told you -- it would've been nice if he
10 would have known really what shoe that it came out
11 of. The shoe that they put into evidence is this
12 shoe, the right shoe. You can tell by the side
13 that the strap is on. He tells you, "I saw the
14 drugs in plain view", takes a picture before he
15 searches the closet, he says, "oh well, I moved
16 the jacket, I saw the drugs in plain view". He
17 takes a picture, you can't see the drugs in plain
18 view and that's the shoe that they're trying to
19 tell you the drugs came in.

20 You now I will like -- first I'd like my I's
21 dotted and my T's crossed a little better than
22 that because this is such a serious event to talk
23 about. Like what's -- let's figure out -- if
24 you're going to take one shoe into evidence, make
25 sure it's the shoe that has the drugs in it. And

1 if you're gonna say that it's in plain view, don't
2 take the picture, admit it into evidence of the
3 shoe, and you can't see the drugs in plain view.

4 It would be nice if the person who located the
5 drugs underneath the sink and turned them into
6 evidence had been fired for dishonesty. You now -
7 - but again to me, I guess it probably sounds like
8 sour grapes to say that kind of stuff. I will
9 like to see, you know, blame the police, you know,
10 on what was found but we are talking about a
11 serious event here and I think that I's need to be
12 dotted and T's crossed.

13 And then finally, the school zone charge. I
14 don't think that is appropriate. The charge is
15 possession with intent to distribute. Yes, he is
16 accused of possession with intent to distribute
17 within a half-mile of the school, not possession
18 within a half-mile of the school with intent to
19 distribute. So, I guess if you were to go to your
20 ninth grade grammar teacher or whatever, what she
21 would tell you is that the word that's being
22 modified by half mile of the school is
23 distribution not possession and that it doesn't
24 matter where you possess the drugs. It matters
25 where you plan on distributing them, you know.

1 And so that is -- we're talking about the St.
2 Helena Elementary School. They have the map here,
3 I mean, and they represented what the half-mile
4 is. It's across Highway 21. It's across the
5 street, you know, is the way I heard her say.
6 It's across Highway 21 and there's about 20 or so
7 houses in between the school and near the
8 residences. There's really no connection between
9 the residence and the school other than they
10 happen to be within a half-mile of each other.
11 And when she said across the road, it's across
12 Highway 21.

13 And then the one thing that I do want you to
14 take into account when you hear the Judge's
15 instructions is that possession with intent to
16 distribute within a half-mile of the school has
17 two elements. One of which is the act that they
18 are accusing him of has to have occurred within a
19 half-mile of the school and what the Solicitor is
20 saying is that phone call, where he's trying to
21 get Old School to take the drugs out of the sink,
22 that that's the act. Well, that act occurred at
23 the detention center. That act did not occur at
24 ■ Ball Park Road. And I know I'm talking about
25 technicalities here but this is, sadly, I mean

1 this is the way the facts and the law interface.
2 And just because somebody -- you know, elements of
3 one offense aren't necessarily satisfied, it
4 doesn't mean that there isn't another way of the
5 Legislature has outlawed a certain type of
6 conduct. Just because somebody broke one law here
7 is what I'm saying and doesn't mean that they
8 broke all of the laws they have been charged with.
9 And that's something that I'm lucky to have, like
10 I said, a smart Jury who's willing to do the work
11 and has the brainpower to do this because it is
12 important here.

13 Every decision that you make is important.
14 It's not just guilty or not guilty. It's not just
15 guilty of the Ball Park stuff and not so sure
16 about the Eddings White stuff. It's about each
17 individual charge, each individual element and so
18 I'm really -- I think you've sworn to do it but I'm
19 asking you to want to do it, I guess. All right.
20 That's really what I wanted to talk to you about
21 on the Ball Park Road stuff.

22 The Eddings White is kind of a whole different
23 ball game. Like I said, you know, (cough, cough)
24 the State has -- get a little water here. The
25 State has really kind of piled it up on the Ball

1 Park Road stuff but when you start learning what
2 happened at Eddings White it gets a little bit
3 skimpier. But I think even the Solicitor
4 recognizes that believing Reggie Holmes beyond a
5 reasonable doubt is a key to this case in a big
6 way. You have to believe him in order to believe
7 that, one that the crime he's saying occurred,
8 occurred. That is an attempted armed robbery
9 occurred. There's nobody to say that he was even
10 trying to be robbed except for him. Whether it
11 was Marion who did it, whether it was Marion and
12 Jason, whether it was Marion or some stranger that
13 he's not sure about now.

14 So I'm about to explain to you all the reasons
15 why you cannot, you cannot trust Reginal Holmes,
16 who testified from that chair right there. You
17 got a chance to look at him. You got to judge his
18 demeanor and his body language, the things he
19 said, the way he behaved. You cannot trust him
20 beyond a reasonable doubt.

21 Reggie lied about how it happened, he lied
22 about where happened, he lied about what happened,
23 he lied about who was there, okay. I'll start
24 with he lied about what happened. They tried to
25 act -- he tried to act like whether or not

1 something was taken from him during this event was
2 not a big deal. The police are investigating an
3 armed robbery, they told you he never said
4 anything was taken. He never said anything was
5 taken. We would have asked. It's a difference
6 between an armed robbery and attempted armed
7 robbery whether something is taken. He tells us
8 now for the first time, he tells somebody -- well,
9 at least as far as I know, not in any of the
10 police reports that were referenced during the
11 trial where they talking about something actually
12 being taken. In fact, it would have caused a
13 different charge. They relied on him when they
14 charged an attempted armed robbery that nothing
15 was taken. And yet now he's changed his story.
16 So he's lied about what happened.

17 He has lied about where it happened. You
18 know, scuff marks at the bottom of somebody stairs
19 without a shell casing, without a bullet. You
20 know that's one thing we don't find bullets very
21 often but they're trying to say that the bullet
22 was fired basically at the ground. They're
23 telling you of the trajectory is this, he's on his
24 butt. The bullet or some mark in the ground
25 should exist if this is where it happened. All

1 right. And then Reggie says, "Oh, I went to my
2 uncle's house." But then he says well today, I
3 went to my -- or he said during the trial, I went
4 to my cousins house. And Mr. Green says that he
5 came walking from behind his house. Makes me
6 wonder whether or not he just walked out of his
7 backdoor and came around to his front door.

8 Reggie lied about who was there. The State
9 kept trying to rehabilitate him picking Jason
10 Thomas out of the photo lineup as the person who
11 came into his house, with a shotgun who, is also
12 his cousin who we met, okay. That -- she tried, I
13 think, to rehabilitate him by saying, "oh you're
14 just picking somebody who you know hangs out with
15 Mario Bonds. That's not what Officer Kelleher
16 did. Officer Kelleher is not trying to find out
17 who were some of the guys that hang out with Jason
18 Thomas. They already know from Investigator Green
19 that they're looking for a Jason Thomas. Not
20 Investigator, Corporal Green that they're looking
21 for Jason Thomas. From Fraser and Chapman, they
22 know. From Jason Thomas being at Ball Park Road,
23 they know that they're there looking for Jason
24 Thomas. Not as somebody who hangs out with Marion
25 Bonds, but as the person with the shotgun who

1 either came into the house and shook Reggie
2 Holmes's hand or remained at the bottom of the
3 steps during the whole thing, which you know there
4 is variation there. They try and say, well you
5 know it's -- it's a scary event. It is a scary
6 event. It would be a scary event if that's how it
7 happened. But it is not credible. And the thing
8 is, and I don't want to think the worst of anybody
9 because that -- you know, I probably wouldn't do
10 what I do if I thought the worst of everybody.
11 But were not ponds and Reggie Holmes's game where
12 Reggie can say Jason did it on the day that it
13 happened and then come back and have convenient
14 amnesia and I don't know what's influenced Reggie
15 or if anything influenced Reggie. There's
16 nothing, no evidence in the record of anything.
17 So we're not going to play this little game. You
18 shouldn't play this little game. We all shouldn't
19 be here because Reggie Holmes is saying Marion and
20 Jason did it, no, no now Jason didn't do it
21 because he's trying to keep him from getting in
22 trouble or something like that. We're not --
23 we're not -- I don't work for Reggie. I'll tell
24 you that right now and neither should you. And
25 when somebody plays a game with the police and the

1 Court system like that, they lose all credibility.
2 You shouldn't believe a word they say. They
3 really lost the right for you to believe them.
4 And I'm not talking about believe them beyond a
5 reasonable doubt. I'm talking about believe them
6 when they walk up to you and say how you're doing
7 and that they really care how you're going. I
8 wouldn't believe Reggie Holmes no matter what he
9 says. I won't believe -- there's no reason to
10 because he's already put us -- you know, he's
11 playing a game and you guys don't deserve that. I
12 don't deserve that either and neither does the
13 police or the Judge or anybody. But this
14 convenient amnesia that I want to get Marion in
15 trouble but I don't want to get Jason Thomas in
16 trouble anymore. No, ma'am and No, sir. I do not
17 like that one bit. Okay.

18 Reggie is lying about how it happened. I
19 guess I think it is probably pretty clear to
20 anybody who saw me when the Doctor was testifying
21 that I got a little bit frustrated. And I got a
22 little bit frustrated, I mean, when he told me
23 that basically, as I understand it, that the
24 bullet hits Reggie in the arm, causes a bruise,
25 that he gets hit by a bullet that causes a big

1 bruise, that the bullet continues on, I guess it
2 skips along his skin after the bruise, and I think
3 he said it would have left a mark because it was
4 hot. So we've got a bruise into a burn trail into
5 this bullet wound. And there's a perfect, you
6 know, it's the exact trajectory that he would
7 expect to see if, if the bullet was to cause this
8 bruise. How can -- how does the bullet cause the
9 bruise, skip along the -- he'd have to have--they
10 can do it like this and they point the stick.
11 They use the stick to point but wherever that
12 stick went that she was pointing, didn't touch
13 where that bruise was. So the arm could not have
14 been in the position that she's saying. And you
15 know he's trying to tell you that this stuff is
16 dried blood. And you can look at it yourself.
17 He tried to say that he hadn't dressed the wound
18 but the police said something different, Oh yeah,
19 this is the hospital stuff that the wound was
20 dressed. He told me the extent of the injuries.
21 The Doctor had already seen the wound and he's
22 trying to act like, well, this is the first time I
23 see the wound is when they take the picture. And
24 I don't think it's --he doesn't have a report
25 that reflects one way or the other. And so he's -

1 - he's got to go by memory. And if he's got a
2 problem with his memory, I think it's quite
3 possible.

4 But I also want to talk about this bruise.
5 First of all, I think anybody who's had a bruise
6 knows that the bruise shows up later. You get hit
7 in a spot, you don't immediately bruise. I mean,
8 I can probably punch myself in the face and you
9 wouldn't see a bruise, you know, for another
10 couple of hours. This is right after this
11 happens. That's not how bruises look. It's not
12 what a fresh bruise looks like. I know he's the
13 doctor and he's the expert. But you know what
14 he's an expert in? He's an expert in treating a
15 bullet wound. And I don't know that you need to
16 know how far a bullet wound is shot from you to be
17 able to treat it. He's not a ballistics expert.
18 He's a medical expert who knows how to treat the
19 injury, not how to forensically figure out how it
20 was caused. So you need to decide whether or not
21 this is dry blood or not. And the thing is, is
22 that to me it is quite obvious how the person --
23 how it occurred. I'm not saying who did it but
24 I'm saying how it occurred is quite obvious.

25 I'm going to ask Mr. Sorrell to help me with

1 the demonstration if you could. Point at me just
2 like this. Just stay still, I'm not going to do
3 anything. You grab the hand like this, the gun is
4 right here, it fires, it shoots right out. I mean
5 any police officer -- the police officer -- you
6 can have a seat, thank you. I mean that's exactly
7 what it is. I mean it's a -- to argue something
8 different is like -- I was thinking about it, the
9 way that happened is -- I was going to say the
10 nose on my face up until this morning when I woke
11 up, I had this big pimple. I was going to say
12 it's clear as this pimple that's on my face that
13 the way this gunshot occurs is during a fight.
14 It's during a fight and that there is a slap away
15 at that gun. And what -- one thing that I worry
16 about is I wonder if Reggie's story was that, if
17 the State's theory, which is based on Reggie's
18 story, was different would they be arguing the
19 exact same thing that I'm arguing right now.
20 Would they have enough evidence with them to try
21 and argue that? But I hope that they don't just
22 try and twist evidence to their needs. I hope
23 that it's an honest mistake that they think that
24 that's not a burn, that there is no stippling,
25 even though you can kind of see it with your own

1 two eyes. And that the way that gunshot is caused
2 is kind of -- it seems classic. It's a classic
3 type gunshot wound. And so I guess what I'm
4 saying is, Reggie lied about how it happened
5 because of all those reasons. Okay.

6 So I guess that brings me to this, you know
7 the -- but I have to talk about it again. It's
8 that if the wound happens as part of a fight then
9 that's where that assault and battery of a high
10 and aggravated nature comes in. The difference
11 between assault and battery with intent to kill
12 and assault and battery of a high and aggravated
13 nature doesn't have to do with the injury itself.
14 The injury can be the same. What it has to do
15 with is what is going through the mind of the
16 person who causes it. And so when it happens as
17 part of a fight, he was swinging on me whatever,
18 whatever is what they're trying to say. Then
19 that's where -- that's the ABHAN. That's the
20 assault and battery of a high and aggravated
21 nature. Where one of these is a violent injury
22 with an aggravating circumstance and the Judge
23 will tell you that one of those aggravating
24 circumstances is the use of a deadly weapon. So
25 that's why that fits. So if we're not gonna go

1 with this -- I mean the only evidence that there
2 is an attempted armed robbery is what Reggie says.
3 Even when the State tries to introduce or does
4 these candid conversations that Marion, they're
5 saying, should've known were being recorded but
6 was behaving as if he didn't know they were
7 recorded that he's not saying, "Oh, we were -- the
8 plan was to rob or something like that". Nothing
9 like that even comes up. So the only place that
10 you get attempted armed robbery is from Reggie who
11 doesn't want to say, "yeah, we were fighting". So
12 anything Reggie's says, we're not playing his
13 game, goes out the window. They did introduce
14 that phone call. I'm not saying that's proof
15 beyond a reasonable doubt. I don't think there's
16 any proof of exactly what he's talking about at
17 that situation is the Eddings White Road stuff. I
18 don't think that is a confession at all of what
19 happened at Eddings White Road. But if that's
20 their theory of what happened, and if this is how
21 the gun shot occurred, I would say that what did
22 happen to Reggie wasn't assault and battery of a
23 high and aggravated nature. I'm not saying he
24 wasn't shot, but I'm not telling you that they
25 have proven that Marion did it by any means.

1 because that little snippet of the phone call, you
2 know all the phone calls that they listen to,
3 you've got work, dope, crack, whatever, the
4 Jordans. On those that, you know, they're using
5 to incriminate him. There is very little on any
6 tape that they played for you about what happened
7 at Eddings White. And so again, for any proof
8 beyond a reasonable doubt that anything that
9 happened at Eddings White had to do with Marion,
10 you must believe Reggie and he's already
11 compromised his credibility not because he was
12 using drugs while on probation for a drug offense
13 but because of what he's done and what his
14 behavior has been in the course of this trial.
15 And so that's why it's a complicated case. You
16 know that's why it's complicated case.

17 I would say that there's nothing that is in
18 these audio tapes that they've played that says
19 "I possessed a gun". They never find a gun. They
20 never find a shotgun. They never find any of that
21 stuff that would go with an attempted armed
22 robbery. If Marion has this \$2000, if you're
23 doing the math, I think Investigator Rice said
24 \$1000 worth of crack. However, you want to call
25 it, it's not about how much money it is, it's

1 about the weight. But he's got all his stash
2 back at Old School's house. He has absolutely no
3 motive to commit an armed robbery. Why would he
4 even be trying to commit an armed robbery when all
5 he has to do is find, sadly, way too many people
6 who like to smoke crack and the stuff sells
7 itself. There is no reason to go and do violence
8 to somebody in a dangerous way when they're trying
9 to tell you that he's got the equivalence of money
10 stashed at Old School's. So that doesn't really
11 even make any sense.

12 And that's why I, you know, when I started out
13 the case kind of questioning why are we believing
14 Reggie Holmes so much. Why are we going so far
15 down this road because Reggie Holmes says you know
16 -- what is -- I don't want you, the Jurors, to
17 think that just because the police and the
18 Solicitor must know something we don't and they've
19 decided that this must of happened. They laid it
20 out all on the table for you. Everything they
21 had, laid it out on the table. You heard me
22 objecting. And my objections that you heard were
23 overruled for the most part. So there's nothing
24 new -- there's no new information out there.
25 That's all. The only reason why I bring that up

1 is because people a lot of times think just
2 because somebody is arrested, they must be guilty
3 and things like that. And that's one, you believe
4 that you've got to save that for another day.
5 They think like that, just because you're a Juror.
6 But also it doesn't really reflect the reality of
7 the situation when you're hammering anything that
8 looks like a nail, I guess. And when you're a
9 police officer in law enforcement, I think,
10 everybody looks like guilty of everything. And so
11 I just want you to keep that in mind. I know that
12 if I keep on talking too much longer that I will
13 start wishing Grace overlooked and I don't want to
14 do that. I know I've been speaking loudly. I
15 hope it doesn't come off as shouting at you or
16 anything like that. But the one thing I do want
17 to leave you with it's not just these discussions
18 on the fact but one last try at explaining to you
19 how important it is to get this right, to get it
20 right. To not just say oh gosh Marion Bonds, you
21 know, why, why. He's making me miss my holiday
22 time with my family and time I need to be at work.
23 But to really get back there and do what Jurors
24 do. And I know you will. I can tell that's what
25 you guys are going to do. I mean you've been

1 paying attention. It's been a long trial. I just
2 wanted thank you for doing what you're about to do
3 and I guess that's all I have to say. Thank
4 y'all.

5 THE COURT: Thank you, Mr. Deysach. Ladies
6 and Gentlemen, does anyone need to stretch or you
7 all fine? You're all fine?

8 JURORS: We're fine.

9 THE COURT: Mr. Foreperson and members of the
10 jury, you followed very patiently and listened
11 very attentatively to the presentation of the
12 evidence in this case and I want to thank you for
13 that. And also the able arguments made by
14 Solicitor Angie Tanner on the part of the State
15 and Mr. Ian Deysach on behalf of the Defendant.

16 It now becomes the duty of the Trial Judge and
17 the Constitution of this State to charge and
18 instruct you in the law as applicable to this
19 case, and it's your duty as Jurors to accept and
20 apply the law as the Court will now state it to
21 you. As Jurors, it is your exclusive duty to
22 decide all issues of fact in this case. You must
23 determine the effect, the value, the weight, and
24 the truth of the evidence. Both the State and the
25 Defendant have a right to expect you will

1 carefully consider and evaluate the evidence and
2 apply the law that pertains to that evidence. And
3 by doing so, both the State of South Carolina and
4 the Defendant, Mr. Bonds, will receive and obtain
5 a fair and impartial trial in this matter.

6 Now the State of South Carolina, by the bills
7 of indictment in this case charge the Defendant,
8 Marion Bonds, with assault and battery with intent
9 to kill, unlawful possession of a weapon,
10 attempted armed robbery, trafficking in crack
11 cocaine, 28 grams or more but less than 100 grams.
12 Trafficking in crack cocaine, more than 10 grams
13 but less than 28 grams, and possession with intent
14 to distribute crack cocaine within a half mile
15 proximity of a school.

16 Ladies and Gentlemen, I will read the
17 indictments to you. The first is for assault and
18 battery with intent to kill. The State alleges
19 that in Beaufort County on or about February 17,
20 2010, the Defendant, Marion Bonds, with malice of
21 forethought did commit an unlawful act in a
22 violent nature upon the victim, Reginal Jermaine
23 Holmes, and that the Defendant did shoot the
24 victim.

25 The second indictment, is for attempted armed

1 robbery. This indictment alleges that on or about
2 February 17, 2010 in Beaufort County, the
3 Defendant, Marion Bonds, at ■ Eddings White Road
4 on St. Helena Island, did by use of force, threat
5 through intimidation, and while armed with a
6 deadly weapon, did attempt to take and carry away
7 goods and or money from the person or in immediate
8 presence of Reginal Jermaine Holmes with the
9 intent to permanently deprive him of that
10 possession.

11 As to the next charge, it is for unlawful
12 possession of a weapon. This indictments states
13 that in Beaufort County, South Carolina on or
14 about February 17, 2010, Defendant, Marion Bonds,
15 did have in his possession a handgun after having
16 been convicted of a crime of violence.

17 The next indictment is for trafficking in
18 crack cocaine, more than 28 grams but less than
19 100 grams. It states that in Beaufort County on
20 or about February 17, 2010, the Defendant, Marion
21 Bonds, did knowingly sell, manufacture, deliver,
22 purchase, or bring into this State, or did provide
23 financial assistance or otherwise aide, abed,
24 attempt, or conspire to sell, manufacture,
25 deliver, or purchase, or bring into this state, or

1 did possess or attempt to possess a controlled
2 substance or a controlled substance analog.
3 Specifically in this case, it was alleged that it
4 was crack cocaine in excess of more than 28 grams
5 but less than 100 grams.

6 The next indictment is for trafficking in
7 crack cocaine, more than 10 grams but less to 28
8 grams. This indictment alleges that in Beaufort
9 County on or about February 17, 2010 the
10 defendant, Marion J bonds, did knowingly sell,
11 manufacture, deliver or purchase, or bring into
12 this state, or did provide financial assistance or
13 otherwise aide, abet, attempt, or conspire to
14 sell, manufacture, deliver or purchase, or bring
15 into this state, or did possess or attempt to
16 possess a controlled substance or a controlled
17 substance analog and again, in this case, it is
18 alleged that it is crack cocaine in excess of 10
19 grams but less 28 grams.

20 And lastly, he is charged in the last
21 indictment in Beaufort County, South Carolina on
22 or about February 17, 2010, the Defendant, Marion
23 J. Bonds, did unlawfully distribute, sell,
24 purchase, manufacture, or possess with the intent
25 to distribute crack cocaine, a controlled

1 substance, within a one half mile radius of the
2 grounds of St. Helena Elementary School.

3 Now Ladies and Gentlemen, I remind you that
4 the fact the Defendant was arrested, charged, and
5 indicted in this case is not evidence in
6 this case and he cannot be considered by you as
7 evidence of guilt in this case. Nor does it
8 create a presumption or inference of guilt. These
9 indictments are simply the formal, written
10 instruments which contain the charges that are
11 known against the defendant. They are the formal
12 documents by which this case was brought into this
13 courtroom.

14 Ladies and Gentlemen, the Defendant, Mr.
15 Bonds, has pled not guilty to these indictments
16 and that plea puts the burden on the State to
17 prove the Defendant guilty beyond a reasonable
18 doubt. A person charged with committing a
19 criminal offense in South Carolina is never
20 required to prove himself innocent.

21 I charge you that it is an important rule of
22 law that the Defendant in a criminal trial, no
23 matter what the seriousness of the charge may be,
24 will always be presumed to be innocent of a crime
25 for which the indictments were alleged unless

1 guilt has been proved by evidence satisfying you
2 of that guilt beyond a reasonable doubt. This
3 presumption of innocence does not end when you
4 begin your deliberations, but it accompanies the
5 Defendant throughout the trial until you reach a
6 verdict of guilt based on evidence satisfying you,
7 the Jury, of that guilt beyond a reasonable doubt.

8 The presumption of innocence is like a Robe of
9 Righteousness that's placed about the shoulders of
10 the defendant and it remains with the defendant
11 until it has been stripped from him by evidence
12 satisfying you of the defendant's guilt beyond a
13 reasonable doubt.

14 Ladies and Gentlemen, the presumption of
15 innocence is not a mere legal theory. It's not
16 just a legal phrase we use. It is a substantial
17 right to which every defendant is entitled unless
18 you, the Jury, are satisfied from the evidence of
19 the defendant's guilt beyond a reasonable doubt.

20 Now again, the State has the burden of proving
21 the Defendant guilty beyond a reasonable doubt.
22 The term reasonable doubt must be given its plain
23 and ordinary meaning. However, to the extent that
24 I may define it for you, a reasonable doubt is the
25 kind of doubt that will cause a reasonable person

1 to hesitate to act in the most important of their
2 personal decisions. The Defendant, Ladies and
3 Gentlemen, is entitled is entitled to every
4 reasonable doubt arising in this case. If upon
5 any issue of fact essential to a conviction, you
6 have a reasonable doubt as to how that issue
7 should be resolved, you must resolve that
8 reasonable doubt in favor of the Defendant.

9 Now Ladies and Gentlemen, some of you may have
10 served as Jurors in civil cases, where you were
11 told it was only necessary to prove that a fact is
12 more likely true than not true, such as by the
13 greater weight of what we call the Greater weight
14 or the Preponderance of the Evidence. In criminal
15 cases, the State's proof must be more powerful
16 than that. It must be beyond a reasonable doubt.

17 Proof beyond a reasonable doubt is proof that
18 leaves you firmly convinced of the Defendant's
19 guilt. Now Ladies and Gentlemen, there are very
20 few things in this world that we know with
21 absolute certainty and in criminal cases, the law
22 does not require proof that overcomes every
23 possible doubt, but based on your consideration of
24 the evidence, you are firmly convinced that the
25 Defendant is guilty of the crime or crimes.

1 charged, you must find the Defendant guilty. If,
2 on the other hand, you think that there's a real
3 possibility that the Defendant is not guilty, you
4 must give the Defendant the benefit of the doubt
5 and find him not guilty.

6 Now Ladies and Gentlemen, I remind you that,
7 during this trial, you and I have certain duties
8 to perform.

9 As the trial Judge, it's my responsibility to
10 preside over the trial of this case and I also
11 have the duty to rule on the admissibility of the
12 evidence that's offered during the trial. Ladies
13 and Gentlemen, you are to consider only the
14 competent evidence that's before you. You are to
15 consider only the testimony which has been
16 presented from the witness stand and any exhibits
17 which were made as part of the record, as well as
18 any stipulations entered into by the parties.

19 I have the additional duty to charge you the
20 law that's applicable in this case. As the
21 presiding Judge, I'm the sole Judge of the law in
22 this case and it's your duty as Jurors to accept
23 and apply the law as I will now state it to you.
24 If you have any idea as to what the law is or what
25 you think the law ought to be and it does not

1 agree with what I now tell you the law in fact is,
2 you must abandon this idea. Because you are sworn
3 to accept the law and apply the law as I state it
4 to you.

5 In every case tried in this court before a
6 Jury, the Jury becomes the sole and exclusive
7 Judge of the facts. The trial judge cannot state,
8 intimidate, or comment or make any statements made
9 to the trial Jury about the facts in this case.
10 Since you, the Jury, are the sole Judge of the
11 facts in this case, you're not to infer from what
12 I've said during the progress of this trial in
13 ruling upon the admissibility of evidence, or
14 otherwise, or anything that I say now during the
15 course of this instruction to you that I have an
16 opinion about the facts in this case. The law
17 does not allow me to have an opinion about the
18 facts in this case. This is a matter solely for
19 you, the Jury, to determine. As Jurors, again, it
20 is your duty to determine the facts, the value,
21 the weight, and the truth of the evidence that's
22 been presented during this trial.

23 Now Ladies and Gentlemen, there are two types
24 of evidence which are generally presented during a
25 trial. That is direct evidence and circumstantial

1 evidence. Direct evidence is the testimony of a
2 person, who claims to have actual knowledge of a
3 fact, such as an eyewitness. It is evidence which
4 immediately establishes the main fact to be
5 proved. Circumstantial evidence is proof of a
6 chain of facts and circumstances indicating the
7 existence of a fact. It is evidence which
8 immediately establishes collateral fact from which
9 the main fact may be inferred. Circumstantial
10 evidence is based on inference and not on personal
11 observation and knowledge. The law makes
12 absolutely no distinction between the weight or
13 value to be given to either direct or
14 circumstantial evidence. Nor is the greater
15 degree of certainty required of circumstantial
16 evidence and direct evidence.

17 Ladies and Gentlemen, you should weigh all the
18 evidence in this case. And after weighing all the
19 evidence, if you're not convinced of the guilt of
20 the Defendant, beyond a reasonable doubt, you must
21 find the Defendant not guilty.

22 Now the rules of evidence ordinarily do not
23 permit witnesses to testify to opinions or
24 conclusions. An exception to this rule exists for
25 witnesses we call expert witnesses. A witness who

1 by education and experience, has become an expert
2 in some art, science, or profession, may give an
3 opinion as to the subject the witness claims to be
4 an expert in and they also give the reasons for
5 their opinion.

6 You should consider an expert opinion given by
7 witness and, like any other evidence give it the
8 weight you think it deserves. If you decide that
9 an expert witness's opinion is not based on
10 sufficient education and experience, or you decide
11 that the reasons given in supporting the opinion
12 are not sound, or the opinion is outweighed by
13 other evidence, you may disregard the opinion
14 entirely.

15 An expert witness's testimony is to be given
16 no greater weight from that of other witnesses
17 simply because the witness is an expert. And you
18 do not have to accept an expert's opinion even
19 though it is uncontradicted.

20 Now Ladies and Gentlemen of the Jury, it's
21 your duty to determine the credibility of
22 witnesses who testified in this case. And
23 credibility simply means believability. It
24 becomes your duty as Jurors to analyze and
25 evaluate the evidence and determine which evidence

1 convinces you of its truth.

2 In determining the believability of witnesses
3 who have testified in this case, you may believe
4 one witness over several witnesses or several
5 witnesses over one. You may believe a part of the
6 testimony of a witness and reject the remaining
7 part of the testimony of that same witness. You
8 may believe the testimony of a witness in its
9 entirety or reject the testimony of a witness in
10 its entirety. You may consider whether the
11 witness exhibited to you any interest, any bias or
12 prejudice, or other motive for the case. You may
13 also consider the appearance and manner of the
14 witness while on the witness stand.

15 Now Ladies and Gentlemen, I instruct and
16 emphasize that the fact that the Defendant did not
17 testify is not a factor to be considered by you in
18 any way in your deliberation and in your
19 consideration on the question of the guilt or the
20 innocence of the Defendant. It must not be
21 considered by you in any manner whatsoever. A
22 Defendant has a Constitutional right to remain
23 silent. And the assertion of this right must not
24 be considered by you in your deliberations. I
25 repeat, under your oath, you are to draw no

1 conclusion whatsoever from the fact the Defendant
2 in this case did not testify. The fact that this
3 defendant did not testify should not even be
4 discussed in the Jury room. The burden of proof
5 as I stated is on the State. The Defendant is not
6 required to prove his innocence. And the burden
7 of proof remains on the State to prove guilt
8 beyond a reasonable doubt.

9 Now Ladies and Gentlemen, the indictments in
10 this case are alleged multiple charges against the
11 Defendant, which I stated to you those are assault
12 and battery with intent to kill, attempted armed
13 robbery, unlawful possession of a weapon,
14 trafficking in crack cocaine, more than 28 but
15 less than 100 grams, trafficking in crack cocaine,
16 more than 10 but less than 28 grams, and
17 possession with the intent to distribute crack
18 cocaine within a half mile proximity of a school.

19 Ladies and Gentlemen, each indictment, charge
20 is a separate and distinct offense. You must
21 decide each item separately on the evidence and
22 the law that's applicable to them, uninfluenced by
23 your decision as to any other indictment. The
24 Defendant may be convicted or acquitted on any or
25 all of the offenses charged. And you will be

1 asked to write a separate verdict of guilty or not
2 guilty for each indictment.

3 Now ladies and gentlemen, the Defendant has
4 been charged with assault and battery with intent
5 to kill. In order to prove assault and battery
6 with intent to kill, the State must prove beyond a
7 reasonable doubt that the defendant committed an
8 unlawful act of a violent nature to the person of
9 another with malice of forethought.

10 Ladies and gentlemen, an assault occurs when a
11 person unlawfully attempts or offers to commit a
12 violent injury upon another person and had the
13 present ability to complete the attempted injury.
14 An assault is the intentional creation of
15 reasonable fear or immediate bodily harm. It's
16 not necessary if the attempted injury or harm
17 actually takes place. For example, ladies and
18 gentlemen, if I walk up to you and we are within
19 arms reach and I reach or draw my hand back as if
20 I'm going to hit you, that is an assault.

21 Now battery is the unlawful touching of
22 another person by the person who's committed the
23 assault. Unlawful touching can be caused by a
24 part of the accused's body or by any object the
25 accused puts in motion. A battery is the

1 completion of the assault by using or applying
2 force to another person, however slight, in a
3 rude, angry, or resentful manner without legal
4 justification for doing so. In using my earlier
5 example, if I carry through with that assault by
6 hitting you, that is the battery portion of it.

7 Ladies and Gentlemen, malice is hatred, ill
8 will, or hostility towards another person. It is
9 the intention of doing a wrongful act without just
10 cause or excuse and with an intent to inflict an
11 injury or if under circumstances that the law will
12 infer an evil intent.

13 Malice aforethought does not require that
14 malice exists for any particular time before the
15 act is committed, but malice must exist in the
16 mind of the defendant just before and at the time
17 the act is committed. Therefore, there must be the
18 combination of the previous evil intent and the
19 act.

20 Ladies and Gentlemen, malice aforethought
21 may be express or inferred. These terms, express
22 and infer, do not mean different kinds of malice
23 but merely the manner in which malice may be shown
24 to exist. That is either by direct evidence or
25 inference from the facts and circumstances which

1 are proved. Expressed malice is shown when a
2 person speaks words which express hatred or ill
3 will for another or when the person prepared
4 beforehand to do the act which was later
5 accomplished; For example, lying in wait for a
6 person or any other acts of preparation for which
7 it shows the deed was in the defendant's mind in
8 the expressed malice.

9 Malice may be inferred from conduct showing a
10 total disregard for human life.

11 If facts are proved beyond a reasonable doubt
12 sufficient to the raise an inference of malice to
13 your satisfaction, this inference would simply be
14 an evidentiary fact to be considered by you along
15 with other evidence in the case, and you may give
16 it the weight you decide it should receive.

17 A specific intent to kill is not an intended
18 element of assault and battery with intent to
19 kill, but there must be a general intent to commit
20 serious bodily injury. Intent means intending the
21 result which actually occurs; not accidentally or
22 involuntary. Intent means shown by acts and
23 conduct of the defendant in other circumstances
24 for which he may naturally and reasonably infer
25 intent. Evidence of the character of the assault,

1 the character of the instrument used, the manner
2 in which it was used, the purpose to be
3 accomplished, and the resulting wounds or injuries
4 may be considered to determine the intent for
5 which the assault is committed. Intent may be
6 inferred when it is demonstrated the defendant
7 voluntarily and willfully commit to that. The
8 natural tendency of which is to destroy another's
9 life.

10 Ladies and Gentlemen, if you find the State
11 has not proven that the defendant is guilty of
12 assault and battery with intent to kill, you must
13 then determine whether the State has proved that
14 the defendant is guilty of assault and battery of
15 a high and aggravated nature. Assault and battery
16 of a high and aggravated nature includes all the
17 elements of assault and battery with intent to
18 kill except malice aforethought. In addition, the
19 State must prove, beyond a reasonable doubt, an
20 aggravating circumstance.

21 Circumstances of aggravation include the use
22 of a deadly weapon with intent to commit a felony
23 -- excuse me -- use of a deadly weapon with the
24 intent to commit a felony, infliction of serious
25 bodily injury, or a great disparity between the

1 ages or physical conditions of the parties.

2 Now Ladies and Gentlemen, the Defendant is
3 also charged with attempted armed robbery. In
4 order to prove this offense, the State must first
5 prove beyond a reasonable doubt that the Defendant
6 attempted to take personal property from the
7 person or presence of another person.

8 Property is in the presence of a person if
9 it's within a persons reach, inspection,
10 observation, or control so that the person could,
11 if not overcome with violence or prevented by
12 fear, keep possession of the property.

13 Ladies and Gentlemen, an attempt is an effort
14 to accomplish a crime which does not succeed. An
15 attempt includes a specific intent to do a
16 particular criminal act along with an act falling
17 short of the act intended. The State must show
18 more than mere preparation of an intent. There
19 must be some overt act committed in the effort to
20 commit the crime.

21 Intent means intending the result which
22 actually occurs; not accidentally or involuntary.
23 An intent may be shown by acts of conducts of the
24 defendant and other circumstances for which he may
25 naturally and reasonably infer intent.

1 And then finally, Ladies and Gentlemen, the
2 State must prove beyond a reasonable doubt to
3 prove attempted armed robbery that the defendant
4 was armed with a deadly weapon during the
5 attempted armed robbery.

6 A deadly weapon is an article, instrument, or
7 substance which is likely to cause death or great
8 bodily harm. Whether the instrument's been used
9 as a deadly weapon, Ladies and Gentlemen, depends
10 on the facts and circumstances in each case. The
11 following are examples of instruments that may be
12 used as deadly weapons: a pistol, a shotgun, a
13 rifle, a dirk, a dagger, a knife, a slingshot,
14 metal knuckles, a razor, gasoline, a fire bomb or
15 Molotov cocktail, and lighter fluid.

16 Ladies and Gentlemen, the Defendant is also
17 charged with unlawful carrying of a pistol. It is
18 unlawful for a person who has been convicted of a
19 crime of violence in any court of the United
20 States to possess or acquire handguns within this
21 state.

22 Ladies and Gentlemen, for the purpose of this
23 offense only, the Parties stipulate the Defendant
24 has been convicted of a crime of violence and
25 therefore was prohibited from possessing a gun at

1 the time of this alleged incident. Ladies and
2 Gentlemen, this stipulation cannot be used as
3 evidence as to any other offense charged and it
4 would be completely inappropriate for you to
5 consider this stipulation when evaluating the
6 Defendant's guilt or innocence as to any other
7 offense. Again, the stipulation states only that
8 the Defendant is prohibited from carrying a gun.

9 Now Ladies and Gentlemen, an issue in this
10 case is the identification of the Defendant as the
11 perpetrator of the crimes charged. The State of
12 South Carolina has the burden of proving identity
13 beyond a reasonable doubt. Identification
14 testimony is an expression of belief or impression
15 by a witness. You may consider the opportunity a
16 witness had to observe the alleged offender at the
17 time of the offense and to thereafter make an
18 identification. It is for the Jury to determine
19 the accuracy of the identification of a Defendant.
20 You must consider the credibility of each
21 identification witness in the same way as any
22 other witness. And you must consider his or her
23 truthfulness as well as the capacity, opportunity,
24 and circumstances of the observation of the
25 matters about which he or she has testified.

1 Now Ladies and Gentlemen, the Defendant is
2 also charged with two counts of trafficking in
3 crack cocaine. To prove trafficking in crack
4 cocaine, the State must prove beyond a reasonable
5 doubt the Defendant knowingly sold, manufactured,
6 cultivated, delivered, purchased, brought into the
7 state, provided financial assistance or otherwise,
8 aided, abetted, attempted or conspired to sell,
9 manufacture, cultivate, deliver or purchase, or
10 bring into this state, was knowingly in actual or
11 constructive possession or knowingly attempted to
12 become an actual constructive possession of crack
13 cocaine.

14 Now Ladies and Gentlemen, on the first
15 trafficking charge, the State must prove, beyond a
16 reasonable doubt, that the amount of the crack
17 cocaine was 28 grams or more but less than 100
18 grams.

19 Ladies and Gentlemen, on the second
20 trafficking charge, the State must prove, beyond a
21 reasonable doubt, that the amount of the crack
22 cocaine was 10 grams or more but less than 28
23 grams.

24 Ladies and Gentlemen, the weight of any
25 controlled substance in this section includes the

1 substance in pure form or any compound or mixture
2 of the substance.

3 Now Ladies and Gentlemen, lastly, the
4 Defendant is charged with possession with the
5 intent to distribute crack cocaine within one half
6 mile proximity of a school. It is a separate
7 criminal offense for a person to unlawfully
8 possess, with the intent to distribute, a
9 controlled substance while in, on, or within a one
10 half mile radius of the grounds of a public or
11 private elementary, middle or secondary school, a
12 public vocational or trade school, or technical
13 educational center, or a public or private
14 university. Before you can convict the Defendant
15 of this offense or this offense, the State must
16 prove the following two elements beyond a
17 reasonable doubt. The Defendant did in fact
18 unlawfully possess with the intent to distribute a
19 controlled substance, in this case is alleged
20 crack cocaine and that the actual offense was done
21 within a one half mile radius of the grounds of a
22 public, vocational or trade school, or technical
23 educational center.

24 Mr. Foreperson, members of the Jury, as you
25 retire to begin your deliberations, I wish to

1 express the hope that each of you will be mindful
2 of the importance of your responsibility here
3 today. You're not called upon very often to serve
4 as Jurors and the proper performance of the duty
5 requires each of you to reach the height of
6 freeing your minds of all improper influences.
7 You and I are acting for the community and that's
8 why you must see to it that this trial is fair and
9 the verdict is just.

10 You've observed that the presiding Officer of
11 the Court is always addressed as Your Honor. The
12 reason is because the Court is intrusted with the
13 honor of this community, the honor of this state,
14 and the honor of this country in seeking that
15 every case tried here receives fair impartial
16 justice.

17 Now you, the Jury, take into your care and
18 keeping the preservation the honor of this
19 community, the honor of this state, and the honor
20 of this country.

21 Now Ladies and Gentlemen, please don't get the
22 idea that I'm trying to intimate to you how I
23 think you should decide this case. As I've
24 already told you, the laws in the state of South
25 Carolina, you, The Jury, are the sole judge of all

1 questions of fact and it would be highly improper
2 for me to influence you in the performance of that
3 duty.

4 Ladies and Gentlemen, but as the presiding
5 Officer of this Court, I am vitally concerned that
6 whatever verdict you reach will be the result of
7 you going back into your jury room and confining
8 your consideration to the evidence and the law
9 that you heard in this courtroom, weighing it
10 fairly and impartially, which I have confidence
11 you will.

12 Ladies and Gentlemen, everyone is entitled to
13 justice in this case, both the State and the
14 Defendant. You owe no support or sympathy to
15 anyone. The Court is the confirmed opinion that
16 whatever verdict you reach will represent truth
17 and justice for all the parties concerned.

18 Mr. Foreperson and members of the Jury, I
19 remind you that your verdict must be unanimous.
20 It must be the verdict of all twelve Jurors. And
21 to that end, my law clerk has prepared a verdict
22 form. It has the case caption and it lists the
23 indictment numbers. Sir, there are six questions
24 all of which you need to answer. The first
25 question states, As to indictment number 2010 GS 7

1 598 as to the charge of assault and battery with
2 intent to kill Reginald Jermaine Holmes, we the
3 Jury unanimously find the Defendant, Marion J.
4 Bonds -- and it says check one, guilty or not
5 guilty. Ladies and Gentlemen, as to that question
6 it is a further question that you may potentially
7 answer. It says, "If, and only if, you find the
8 Defendant not guilty of assault and battery of
9 intent to kill, you may consider the lesser
10 included offense of assault and battery of a high
11 and aggravated nature." And again, it says answer
12 this question only if you found the Defendant not
13 guilty of assault and battery with intent to kill.
14 And again that would be as to the indictment
15 number on the charge of assault and battery of a
16 high and aggravated nature, we the Jury
17 unanimously find the Defendant, Marion Bonds,
18 again guilty or not guilty if it's appropriate,
19 give an answer.

20 Number two, as the indictment number 2010 GS
21 7 599, the charge of unlawful possession of a
22 handgun, we the Jury unanimously find the
23 Defendant, Marion J. Bonds, and again, either
24 guilty or not guilty.

25 Number three, as to indictment number

1 2010 GS 7 600, on the charge of attempted armed
2 robbery, we the Jury unanimously find the
3 Defendant, Marion Bonds, again guilty or not
4 guilty.

5 As to indictment 2010 GS 7 602, trafficking
6 cocaine base crack, 28 grams or more less than 100
7 grams, we the Jury, unanimously found the
8 Defendant, Marion J. Bonds, again guilty or not
9 guilty.

10 Question number five, as to indictment number
11 2010 GS 7 603, trafficking in cocaine base crack,
12 10 grams or more but less than 28 grams, we the
13 Jury, unanimously find the Defendant, Marion J.
14 Bonds, either guilty or not guilty.

15 And lastly, as to indictment number
16 2010 GS 7 634, possession with the intent to
17 distribute crack cocaine within a one half mile
18 radius of a school, we the Jury, unanimously find
19 the Defendant, Marion J. Bonds, either guilty or
20 not guilty.

21 Ladies and Gentlemen, the order that I put
22 guilty or not guilty has absolutely no meaning in
23 every single trial, I just reverse that.

24 Ladies and Gentlemen and Mr. Foreperson, after
25 that there is a signature line printed on the

1 verdict form. I will ask Mr. Foreperson, if he
2 could please sign that signature line. And when
3 the Jury has reached the verdict, you knock on
4 your jury room door and we will accept you back
5 into the courtroom to go ahead and receive your
6 verdict.

7 Mr. Foreperson and members of the Jury, I want
8 thank you for your attention. For the very last
9 time, I'm going to send you back to your jury room
10 and I'm going to tell you not to begin
11 deliberating this case. There may be something
12 further that the attorneys want me to charge you
13 on the law. If that's the case, I will bring you
14 back out again and I will charge you further. If
15 not, Mr. Foreperson and members of the Jury, I'm
16 going to send this verdict form along with all the
17 evidence that's been entered into this case back
18 to you. And that will be your signal to begin
19 your deliberation. Again, thank you. I
20 appreciate it and you are excused back to your
21 jury room.

22 (Whereupon the Jury exited the courtroom at 11:12 A.M.)

23 THE COURT: Any exceptions or additions to the
24 charges, from the State?

25 MS. ANGIE TANNER: Nothing from the State.

1 THE COURT: From the Defense?

2 MR. IAN DEYSACH: No, Your Honor. Just the
3 prior points that I already brought up, renew
4 those.

5 THE COURT: All right. Thank you, y'all. I'm
6 going to go ahead and give Debbie the verdict form
7 and I'm going to make sure you both go through all
8 the evidence and make sure it's there.

9 (Whereupon evidence was received by the Jury at 11:20
10 A.M.)

11 (Court was at ease at 11:20 A.M.)

12 (Whereupon Court resumed at 12:09 for Jury Question)

13 THE COURT: Thank ya'll. Please be seated.
14 I understand from the Jury that they want to hear
15 the phone tapes, so they are going to knock on the
16 door when they are ready, I know that they are
17 hashing out something else right now, so we are
18 going to sit tight. I'm going to make sure your
19 client gets out here.

20 (Whereupon the Court started other business while
21 waiting on the Jury)

22 THE COURT: Well, to start with, I've got the
23 Bailiff's getting the jury some lunch. All right,
24 we have the question is, The first thing is we
25 would like to hear the audio tape of the jail and

1 of course, we've already agreed, previously, we
2 would have to bring them in here. Do you have it
3 all queued up?

4 MS. TANNER: Yes, Your Honor.

5 THE COURT: The second question says, Does
6 possession of a weapon require that it be brought
7 with him or simply using a weapon? Possession, it
8 means possession, I guess.

9 MS. TANNER: The conversations Mr. Deysach and
10 I had, I think we agreed the way we would answer
11 that is just recharge the law on that offense.

12 THE COURT: Okay.

13 MS. TANNER: I think it covers the definition
14 ---

15 THE COURT: Okay.

16 MS. TANNER: I don't know if there is anything
17 else we could add, unless there is some
18 constructive way we could add to it.

19 THE COURT: The next question on that, Does
20 conviction on one of the counts require a
21 conviction on count number two?

22 MS. TANNER: What we determined -- what we
23 think that means -- well, we came up with two
24 answers. One, if they are asking about Count One
25 being the ABWIK charge, because you gave them a

1 lesser offense of ABHAN, if they are asking if a
2 conviction on ABHAN, ABWIK is an automatic
3 conviction on ABHAN, if they didn't understand if
4 they convict on ABWIK then they don't have to get
5 to AGHAN.

6 THE COURT: I'm thinking -- I interpreted it
7 differently. I wanna say just to make sure I'm
8 correct, I think she put on the verdict form
9 number two being unlawful carrying and not
10 attempted armed robbery, but I'm not sure so with
11 that the problem is that if we find that he was
12 shot, how can we not find for the unlawful
13 carrying ---

14 MS. TANNER: And I think that was our second
15 answer is if it's not the ABWIK thing -- if it's
16 another question, then I think you just recharge
17 them that each charge is to be decided separately.
18 And I think that that's the only way to answer
19 that one. But it's not the ABWIK.

20 THE COURT: Right.

21 MR. DEYSACH: I agree, without the verdict
22 form in front of us, we lack a little bit of
23 context ---

24 THE COURT: I can handle that. Just tell
25 Robin to get me another copy of it. Okay. Number

1 three, Does each charge for trafficking cover a
2 specific location of the drugs that we are
3 required to consider each separately?

4 MS. TANNER: We both came up with the answer,
5 no. It's not about a specific location. We both
6 just said no. I don't know how you would frame
7 that to them but that was...

8 MR. DEYSACH: Or you can't answer the question
9 is the other possibility. I think that the true
10 answer is no. I'm not sure if that is the
11 appropriate answer for the jury. I think no is
12 what I would like to hear you say but if that is
13 not an accurate statement of law then all you are
14 left with is again, charging them on the law. We
15 want to make sure ---

16 THE COURT: So then just recharge them on
17 trafficking then?

18 MS. TANNER: You could give them the option on
19 recharging them on trafficking. Or tell them that
20 specific location is not an element. It sounds
21 like they are asking about specific location and
22 that language is not in there.

23 THE COURT: Okay. Well, okay. What I am
24 going to do is this. I'm going to bring them in
25 here. I am going to answer these other questions.

1 Then I think at the very end we will play them the
2 tape they wanted to hear. And we will do it that
3 way. Oh, also another note it says, can we get a
4 transcript of the audio of the jail calls. And
5 again, I don't know if we have one but it's not a
6 certified copy and my answer was just, no.

7 THE COURT: Okay, I've got the verdict form.
8 She put number two as unlawful possession, so
9 that's what I think they are asking for. So what
10 they are saying -- and I'll say there are multiple
11 charges, each to be considered separately.

12 MS. TANNER: Yes, ma'am.

13 THE COURT: Okay. All right are we ready for
14 them to come in? The State ready?

15 MS. TANNER: Yes, ma'am.

16 THE COURT: The defense ready?

17 MR. DEYSACH: Yes, Your Honor.

18 THE COURT: Okay.

19 (Whereupon the Jury entered the Courtroom at 1:32 P.M.)

20 THE COURT: Welcome back, ladies and
21 gentlemen. I'm going to go ahead and tell you
22 that I believe my bailiff's have gone ahead and
23 ordered you Pizza so hopefully we can get you fed
24 and you can go about your deliberations.

25 Additionally, you have sent out three notes

1 to me and I'm going to go ahead and address them
2 at this time in the best way I possibly can.

3 The first question was, We would like to hear
4 the audiotape of the jail phone calls and I
5 instructed you that I would need to bring you back
6 out here to play those. And I'm going to do that
7 although it will be at the end. I've got a few
8 other instructions I'm going to give you before
9 that, so that's the last thing we are going to do,
10 okay?.

11 The next of our three questions said, the
12 first is, Does possession of a weapon require that
13 it be brought with him or simply using a weapon
14 possession? What I'm going to do ladies and
15 gentlemen is I'm going to charge you on the
16 elements of the charge of unlawful carrying of a
17 pistol again, which should answer your question,
18 all right, so I'm going to go ahead and do that
19 right now.

20 The defendant is is also charged with unlawful
21 carrying of a pistol. It is unlawful for a person
22 who has been convicted of a crime of violence in
23 any court of the United States to possess or
24 acquire handguns within this State.

25 Then I went on to say for purposes of this

1 offense only, the parties stipulate the defendant
2 had been convicted of a crime of violence and
3 therefore was prohibited from possessing a gun at
4 the time of this alleged incident. This
5 stipulation cannot be used as evidence as to any
6 other offense charged, and it would be
7 inappropriate for you to consider this stipulation
8 when evaluating the defendant's guilt or innocence
9 as to any other charge. Again, this stipulation
10 states only that the defendant was prohibited from
11 carrying a gun. All right.

12 The second question asks does conviction of
13 the counts in number one require conviction on
14 count number two? And I understand count number
15 one is to be considered of assault and battery
16 with intent to kill or assault and battery of a
17 high and aggravated nature. And then your
18 question number two was unlawful possession of a
19 hand gun.

20 Ladies and gentlemen, I am going to charge you
21 again on multiple indictments. Again the
22 indictments in this case allege multiple charges
23 against the defendant. Each indictment charge is
24 a separate and distinct offense. You must decide
25 each indictment separately on the evidence and the

1 law applicable to it, uninfluenced by your
2 decision as to any other indictment. The
3 defendant may be convicted or acquitted on any or
4 all of the offenses charged. Okay.

5 Lastly -- I'm sorry, not lastly. I apologize.
6 The next question, the third question on the
7 second page is, Does each charge for trafficking
8 cover a specific location of the drugs so that we
9 are required to consider each separately and the
10 answer to that is no. And further, Mr.
11 Foreperson, once I send you back to the jury room,
12 if you want me to aid you in recharging you as to
13 trafficking I can certainly to that. The answer
14 to your question, again, is no. Okay.

15 Lastly, it says, Can we get a transcript of
16 the audio of the jail calls and my answer to that
17 is no. So that's your answer to that.

18 Ladies and gentlemen, at this time what I'm
19 going to do is we are going to play those jail
20 calls, again. So, Solicitor if you would come on
21 up and do that for us I would appreciate it. And
22 Mr. Foreperson, while she is doing that, when you
23 return back to your jury room, and there is
24 something further as a result of what you've heard
25 or my answers, if you need more information or you

1 need to hear anything further charging, just let
2 me know. Okay. Solicitor.

3 (Whereupon the Solicitor played the Jail recordings)

4 THE COURT: Mr. Foreperson, you can retire
5 back to your jury room and if there is anything
6 further you need from us you can let the Bailiff
7 know. Thank you.

8 (Whereupon the Jury left the Courtroom at 1:46 P. M.)

9 THE COURT: Anything from the State?

10 MS. TANNER: Nothing from the State.

11 THE COURT: Anything from the Defense?

12 MR. DEYSACH: No, Your Honor.

13 THE COURT: Okay, we'll be at ease until we
14 hear back from them.

15 (Whereupon Court was at ease at 1:47 P.M.)

16 (Whereupon at 2:58, the Court was informed a verdict
17 had been reached)

18 THE BAILIFF: All rise, Judge Carmen Mullen
19 presiding.

20 THE COURT: Thank y'all. Please be seated. I
21 understand they have reached a verdict. I would
22 just ask that if you are hear in the courtroom and
23 cannot contain yourselves in regard to this
24 verdict, I'm going to ask you to excuse yourselves
25 now. Again, if there are any outbursts I'm going

1 to have to take you into custody, so...

2 THE BAILIFF: Do you want me to bring them in?

3 THE COURT: Absolutely.

4 (Whereupon the Jury returned to the courtroom at 3:00
5 P.M.)

6 THE COURT: Mr. Foreperson, I understand you
7 have reached a verdict?

8 MR. FOREPERSON: Yes, Your Honor. We have.

9 THE COURT: All right. If you will hand it
10 to Bob, please.

11 Mr. Deysach, In the case of the State of
12 South Carolina versus Marion J. Bonds, as to
13 indictment number 2010 GS 7 598 for the charge of
14 Assault and Battery with Intent to Kill, we the
15 Jury unanimously find the Defendant, Marion Bonds,
16 Not Guilty.

17 As to indictment number 2010 GS 7 598, on the
18 charge of Assault and Battery of a High and
19 Aggravated Nature, we the Jury unanimously find
20 the Defendant, Marion Bonds, Guilty.

21 As to indictment number 2010 GS 7 599, the
22 charge of Unlawful Possession of a Handgun, we the
23 Jury unanimously find the Defendant, Marion Bonds,
24 Guilty.

25 As to indictment number 2010 600, Attempte

1 Armed Robbery, we the Jury unanimously find the
2 Defendant, Marion Bonds, Not Guilty.

3 As to indictment number 2010 GS 7 602,
4 Trafficking in Cocaine Base Crack, 28 grams or
5 more but less than 100 grams, we the Jury
6 unanimously find the Defendant, Marion Bonds,
7 Guilty.

8 As to indictment number 2010 603, Trafficking
9 in Cocaine Base, 10 grams or more but less than 28
10 grams, we the Jury unanimously find the Defendant,
11 Marion J. Bonds, Not Guilty.

12 At to indictment 2010 GS 7 634, Possession
13 with Intent to Distribute Crack Cocaine within a
14 one half mile radius of a School, we the Jury find
15 the Defendant, Marion J. Bonds, Guilty.

16 Ladies and Gentlemen of the Jury, if this is
17 your verdict, would you please indicate by raising
18 your right hand. (All Jurors raised their right
19 hand) Thank you. You may go ahead and be seated,
20 Mr. Deysach and Mr. Bonds.

21 Would anybody like this jury individually
22 polled?

23 MS. TANNER: Not from the State, Your Honor.

24 MR. DEYSACH: No, Your Honor.

25 THE COURT: Okay. Anything further required

1 of this Jury?

2 MS. TANNER: Not from the State.

3 MR. DEYSACH: No, Your Honor.

4 THE COURT: All right. Ladies and gentlemen
5 of the Jury, I want to tell you, Thank you for
6 being here. I appreciate the hard work you did on
7 this case. I don't think this was an easy case.
8 And again I appreciate you all listening very
9 diligently and carefully to the testimony.

10 Ladies and gentlemen, at this time, there are
11 a couple of matters of law that I need to take up
12 with the attorney's and I'm going to go ahead and
13 sentence Mr. Bonds. You are free to stay if you
14 would like. Again, you are not required to, you
15 don't have to. I'm going to go ahead and excuse
16 you from your service.

17 I will also tell you, Ladies and gentlemen, at
18 this time you are free to discuss this case, if
19 you would like to. Again, ladies and gentlemen,
20 you don't have to. If anyone persists or tries to
21 talk to you and you say, No Thank You, I'm not
22 interested in discussing this case, just call to
23 the Clerks and let me know who it is and I'll take
24 care of them.

25 Ladies and gentlemen, I want to tell you

1 again, the proverbial check is in the mail,
2 unfortunately as you all know, it's a ridiculously
3 small, I say all this so you can thank your County
4 Council person because they are the one who sets
5 the rate, it's not myself.

6 Again, it's not indicative of your time, it's
7 just a token. So again, I want to tell you while
8 I wish we could do more, please understand that
9 this service has helped us not only resolve this
10 case, but so many other cases. When people know
11 that people are sitting in judgement to decide
12 these cases, people become more reasonable and we
13 either negotiate pleas or they plead guilty or
14 it's resolved in another manner.

15 So, I want you to know that while we only
16 tried two case here this week, we started out
17 with about a hundred on our roster. In addition,
18 we will take probably another fifty or sixty
19 guilty pleas this week.

20 So, with that I will tell you thank you. I'm
21 going to go ahead and, if you would like to, I
22 will excuse you now and if any of you would like
23 to stay for the sentencing, you are welcome to do
24 so. I do have a matter of law that I need to
25 discuss with the attorney's before I go ahead and

1 do the sentencing. You are free to sit here, if
2 you like, as we do that. So Ladies and Gentlemen,
3 it is completely up to you. You are free to stay
4 if you would like. If not, then you are free to
5 go. Again, I thank you, ladies and gentlemen.
6 I'm going to see the attorney's just to discuss
7 something.

8 (Whereupon some of the jury members left at 3:06 P.M.)

9 THE COURT: Why don't we just sit tight for
10 a few moments while Ms. Tanner gets the sentencing
11 sheet ---

12 MR. DEYSACH: Your Honor, I still -- I still --
13 -- in this posture I think I do need to renew all
14 of my objections, pre-trial and I guess, during
15 the trial. All of those objections that I made.
16 I would renew my directed verdict motions that
17 would still apply, given the posture that the
18 cases have come to you. I know some of the cases
19 weren't all convictions. And I would ask for a
20 new trial on the same basis that I asked for the
21 directed verdicts on.

22 THE COURT: All right.

23 MR. DEYSACH: I wanted to make sure that I
24 renew all my objections and motions that I made
25 pre-trial and during the trial.

1 THE COURT: Okay. Additionally, we need to
2 put on the record, Solicitor, I know you were
3 counting these as all third drug offenses and It's
4 my understanding -- no one's ever given me the
5 record sheet, which I would like to see and that
6 would assist me.

7 MS. TANNER: Actually, I have copies that are
8 certified.

9 THE COURT: Why don't you go ahead and pass
10 those up. Mr. Deysach, why don't you go ahead and
11 put on the record what your argument is as to them
12 making it to second offenses.

13 MR. DEYSACH: Your Honor, under the case law
14 that we have in our State and it's State v. Boyd
15 and State v. -- I think Robinson is the newer case
16 that goes through a PCR type of procedure to get
17 to the core. They both stand for the proposition
18 that where a defendant has been convicted on two
19 or more counts that are violation of a controlled
20 substance acts, arising out of simultaneous acts
21 committed in the force of a single incident, the
22 conviction will be considered to be only one, as
23 only one, for the purpose of sentencing under a
24 subsequent conviction for a violation of a
25 controlled substance act.

1 THE COURT: Mr. Deysach, I know what the law
2 is. My question is I need to know what charges
3 he pled to.

4 MR. DEYSACH: She's got ---

5 THE COURT: I'm looking at them right now. I'm
6 just going through what I see to be the drug
7 charges. Looking to see if any of these others....

8 MR. DEYSACH: I know what the arrest date was
9 for those charges.

10 THE COURT: I can tell you the only two that
11 I'm seeing, Solicitor, is this what you are
12 relying on? I'm seeing that one is 2007, 2273.
13 One is for possession with intent to distribute
14 cocaine. The other one is for possession crack
15 cocaine. They are both seconds, looks like Perry
16 Buckner on April 29, 2008. Is that correct?

17 MS. TANNER: Yes, ma'am.

18 THE COURT: And those are the two that you are
19 relying on and what you are saying is that they
20 were separate indictments; is that correct?

21 MS. TANNER: Yes, ma'am. That's correct. I
22 am saying that they are separate charges. They
23 are separate substances and he pled guilty to
24 both; that's why the State would count them as two
25 prior convictions, not one.

1 THE COURT: My question is, did the actual
2 offense occur on the same date?

3 MS. TANNER: I have the same offense date, yes
4 ma'am.

5 THE COURT: Okay. So I would agree, Mr.
6 Deysach, that it is part of the common scheme plan
7 and all at the same time relating to the same
8 thing, so I am going to treat this case as second
9 offenses as opposed to a third. All right. Thank
10 you, Solicitor.

11 MS. TANNER: Yes, ma'am.

12 THE COURT: All right. Ms. Lempesis, while
13 I'm waiting on them, what do you have that is
14 short?

15 (Whereupon a plea was taken before sentencing)

16 THE COURT: Please go ahead and bring Mr.
17 Bonds forward, Solicitor, anything else you need
18 to put on the record?

19 MS. TANNER: Your Honor, you've heard about
20 the prior drug offenses. Those occurring just
21 a couple of years ago, 2007 ---

22 THE COURT: Which he did a YOA for; is that
23 correct?

24 MS. TANNER: I believe so.

25 THE COURT: Was he revoked on his Yes?

1 MR. DEYSACH: I can shed a little light. The
2 burglaries, that were the crime of violence that
3 we referenced, he got a YOA on that. I'm not sure
4 if it was suspended or active at the time. I know
5 that as a result of that he has done an active
6 YOA. I'm not sure if it was the SHOCK Program.
7 He went through the SHOCK Program. It may have
8 been after his probation was revoked.

9 THE COURT: Let's ask Mr. Bonds. Mr. Bonds,
10 when you were originally sentenced, did you get a
11 suspended sentence or did you actually go to the
12 SHOCK?

13 MR. BONDS: I did the SHOCK Program.

14 THE COURT: You did the SHOCK, that's what
15 I figured.

16 MS. TANNER: 2002, he was convicted of four
17 counts of burglary in the 2nd degree, four counts
18 of -- I'm sorry -- three counts of grand larceny.
19 He received a suspended YOA but that was revoked
20 in 2003. Then he was arrested in May of 2004 for
21 pointing and presenting a firearm. That charge
22 was null prosed but his parole was revoked. Then
23 in 2006 -- February 2006, he was convicted of
24 resisting arrest. His parole was revoked again.
25 May 2008, possession of marijuana, receiving

1 stolen goods, possession with intent to distribute
2 and the sale and distribution of cocaine times
3 two. He received two years for those offenses.
4 So the convictions for the '07 charges but not
5 until '08.

6 THE COURT: Okay.

7 MR. DEYSACH: He -- he -- after his time at
8 the detention center, he tells me that when he
9 went to the Department of Corrections it was
10 something less than 90 days of a two year sentence
11 after all the time he had already done in County.
12 He was basically a turn around there on that two-
13 year, non-violent sentence.

14 THE COURT: Okay. I don't see the victim in
15 this case ---

16 MS. TANNER: He had exams this week, Your
17 Honor, so he has not been able to come back to
18 Court. We are staying in constant phone
19 conversation with him. Miss Rhonda updates him
20 several times a day.

21 THE COURT: Okay. Thank you. All right. Mr.
22 Deysach?

23 MR. DEYSACH: Thank you very much, Your Honor.
24 I have plenty I want to say but I think the first
25 person that I wanted you to hear from was his

1 mother, and so I ask Marion Bonds -- Ms. Bonds,
2 would you say a few words to the Judge about
3 Marion?

4 THE COURT: Ma'am, would you give me your
5 name for the record?

6 MS. BONDS: I want ya'll to know that Marion
7 is not a bad guy. He grewed up in the church. We
8 raised him to the best way that I knew how. He
9 went to school, Beaufort High School. I just
10 think he had found the wrong crowd to hang out
11 with and he just started getting into a little
12 trouble. He has two babies, two years old and one
13 years old. I kind of like to step in now and try
14 to raise them. It's hard 'cause I take care of a
15 75 year old, disabled sister. I work full-time.
16 I work with Beaufort County School District. I
17 hope Marion learned from this lesson. Well, if he
18 do get out or something, it could be a lesson he
19 could teach his babies.

20 MR. DEYSACH: Thank you, thank you.

21 THE COURT: Thank you, Ms. Bonds.

22 MR. DEYSACH: I guess the first thing I want
23 to say about this trial is that I think it's
24 pretty clear that it was never a trial because
25 Marion wasn't going to admit the trafficking

1 aspect of it. It was pretty clear, from the
2 evidence that the case from that side was very
3 strong. It was that the sticking point was always
4 the attempted armed robbery and the ABIK, on that
5 side of it.

6 Negotiations with the Solicitor's office broke
7 down because there never was any accommodation
8 made to us on -- as part of plea negotiations, as
9 that goes. And so, even though I let Marion know
10 the, kind of the peril, that he put himself in by
11 taking it before a jury and allowing them to
12 decide. He still -- I don't want, Your Honor to
13 think he was never going to take responsibility
14 for things he had done. It's just that what they
15 found him guilty of is different of what he had
16 originally been accused of. And so, in that way,
17 I guess that's what Jury's are for and it's a
18 point I tried to make to them and it's not about
19 is somebody completely guilty or is somebody
20 completely innocent. That there is this gray area
21 in between and that's what the Jury was able to
22 help flesh out for us.

23 I don't think that he should be -- I hope you
24 don't punish him for a failure to take
25 responsibilities for his actions because I think

1 the actions that he didn't take responsibility for
2 are actions that the Jury didn't find him guilty
3 of in the end.

4 So, I just wanted to make that point because
5 Your Honor you have so much discretion in a case
6 like this where we are talking about a minimum
7 seven years and a maximum thirty on that
8 trafficking and minimum ten and maximum fifteen on
9 the school zone charge. And then when you add the
10 other charges together if you were to run them
11 consecutively, he could spend a long time in
12 prison, under the law.

13 So, I want to ask you on Marion's behalf for
14 the shortest amount of jail time you would deem
15 appropriate and before you pass sentence, if there
16 was something that was in one of these tapes from
17 the jail that I wanted to let you hear before you
18 passed sentence. And it's a candid moment, ya'
19 know, Marion doesn't think that he's being -- he's
20 not doing this -- it's just a real moment. And I
21 want to let you hear it if I can get this
22 microphone down here.

23 (Whereupon Mr. Deysach plays a CD from the jail tapes)

24 MR. DEYSACH: That's the sound of a light bulb
25 going off in Marion's head, where he knows that

1 his actions have consequences. When we were
2 sitting there and we were looking at maybe twenty-
3 five, a minimum twenty-five, attempted armed
4 robbery, just years that are hard for a man of
5 twenty-three to even really imagine.

6 We were trying to find -- you know, trying
7 to find meaning. Ya know. So what we are asking
8 for is for Marion to take what he's learned and be
9 able to teach it to his son's when they are still
10 impressionable. So he'll be able to say, Hey,
11 this is the consequence and it's a tough
12 consequence. And he'll be able to come back to
13 them, when they are still young enough, where
14 learning that lesson will make a difference in
15 their lives.

16 And so, Your Honor, I have no problem standing
17 before you, knowing Marion, asking for the minimum
18 seven, asking for the minimum ten on the school
19 zone charge. Asking for concurrent time. I have
20 absolutely no problem doing that. I think the way
21 that the sentence came, you could give probation
22 to follow where things were more structured in a
23 certain way.

24 And so, that's what I'm asking you to do. You
25 know, Marion has -- he says, "I'll see you tomorrow

1 and he never did see them tomorrow. He's been in
2 jail the whole time. He's not been out. He's
3 been locked up -- so I don't think I can probably
4 tug on any heartstrings any more than I've done.
5 Probably just that I do apologize for the language
6 used but I hope it's something that anybody hasn't
7 really heard before.

8 I told Marion -- Marion's nervous, first of
9 all. He doesn't really want to speak. We've
10 talked about what I was saying and really, he
11 said, Would I get a chance to speak and he was
12 talking about these types of things, being able to
13 teach the lesson when he gets out of jail to his
14 kids when they are still ten years old or
15 somewhere along there at that age. But I told him
16 not to -- it might have something to do with an
17 appeal if he says the wrong thing, but he's also
18 quite nervous and obviously, a bit emotional.

19 THE COURT: Mr. Bonds is there anything you
20 want to say, sir?

21 MR. BONDS: No, ma'am.

22 MS. TANNER: Your Honor, there is something
23 the State would like to add when have the
24 opportunity. There's no light bulb that has gone
25 off. Mr. Bonds, he's been convicted of

1 burglaries, he's been convicted of prior drug
2 offenses. He's a convicted felon in possession of
3 a gun. He's convicted of shooting someone. He's
4 convicted of trafficking drugs, again. He's on
5 the phone, with the mother of that child, talking
6 about hiding those drugs and she's "down with it",
7 she says, "I'm with you".

8 So before we get too touched by that
9 conversation, we need to go back and listen to it
10 in it's entirety about what that phone call was
11 about. And also, at the time, there was a CDV
12 charge against Mr. Bonds.

13 MR. DEYSACH: Your Honor, I don't think it's--

14 -
15 MS. TANNER: --- She can hear anything ---

16 MR. DEYSACH: --- I think ---

17 MS. TANNER: Yes, she can. You can hear
18 hearsay. You can hear anything that's on the
19 record at sentencing hearings. So, I don't know--
20 I don't know -- you're aware of the negotiations
21 that were attempted. You know the efforts that
22 were made and the opportunities that were given
23 and we discussed, in Chambers, what the State
24 would be asking for. The trafficking carries up
25 to thirty years. The State thinks he deserves it.

1 He is what this community is concerned about. He
2 is a convicted felon. He is a drug dealer. He is
3 an armed drug dealer who is not afraid to pull the
4 trigger. He has been found guilty of that today.
5 And we ask for the thirty years because he's
6 earned it.

7 MR. DEYSACH: Just briefly. I did want to
8 point out -- I didn't say the burglaries were at
9 age sixteen when they occurred. He's twenty-
10 three, now. That's all.

11 THE COURT: Thank you. On indictment number
12 2010 GS 7 598, it's for Assault and Batter of a
13 High and Aggravated Nature, the sentence of this
14 Court is that you be committed to the Department
15 of Corrections for a period of ten years.

16 On indictment number 2010 GS 7 599 for Felony
17 Possession of a Handgun, sentence of this Court
18 is that you be committed to the Department of
19 Corrections for a period of five years.

20 On indictment number 2010 GS 7 602 for
21 Trafficking Crack Cocaine, more than 28 but less
22 than 100 grams, second offense, sentence of this
23 Court is that you be committed to the Department
24 of Corrections for a period of 20 years.

25 On indictment number 2010 634 for Possession

1 with Intent to Distribute within a half a mile of
2 a school, sentence of this Court is that you be
3 committed to the Department of Corrections for a
4 period of 15 years.

5 Those are to all run concurrent to each other.
6 I'm giving you credit for the time you've served
7 while awaiting trial. Good luck to you, Mr.
8 Bonds.

9 MR. DEYSACH: Thank you, Your Honor.

10 MS. TANNER: Thank you.

11 MR. DEYSACH: At this time, I would make a
12 motion for you to reconsider, possibly to be heard
13 at a later time.

14 THE COURT: Noted for the record and preserved
15 your right.

16 MR. DEYSACH: Thank you.

17 MS. TANNER: Thank you.

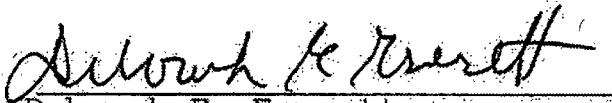
18 (Whereupon Court was dismissed at 3:38 P. M.)

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20 --- END OF TRANSCRIPT OF RECORD ---
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I the undersigned Deborah E. Everett, Official Court Reporter for the Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Beaufort County, South Carolina, on the 16th day of December 2010.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 15, 2011


Deborah E. Everett
Official Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BONDS,

APPELLANT

FINAL BRIEF OF APPELLANT

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South Carolina Commission on Indigent Defense
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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court judge erred when she did not suppress the fruits of a warrantless search of appellant's bedroom in a home owned by another, because appellant had a reasonable expectation of privacy in the room, and law enforcement could not reasonably have believed the landowner when he informed them that appellant did not reside there?

II. Whether the trial court judge erred when she did not suppress the photo line-up which contained a picture of the appellant, because the accuser was related to appellant--and they knew one another well—and when the introduction of the photo lineup bolstered the accuser's testimony?

STATEMENT OF THE CASE

Marion Bonds was indicted by the Beaufort County grand jury for robbery, assault and battery with intent to kill, possession of a pistol by a person convicted of a crime of violence, 2 counts of trafficking in crack cocaine, and distribution within a school zone. He was tried before the Hon. Carmen T. Mullen between December 13- 16, 2010. The jury found appellant guilty of the lesser included offense of assault and battery of a high and aggravated nature, and acquitted him on attempted armed robbery, and acquitted him on trafficking, 10 grams to 28 grams. The jury found him guilty of unlawful possession of a handgun, the other count of trafficking in cocaine, 28 grams -- 100 grams, and possession with intent to distribute within 1/2 mile radius of the school. He was sentenced to 20 years incarceration. He was represented by Ian Deysach, Esquire. The State was represented by Angela Tanner, Esquire.

This appeal timely follows.

ARGUMENTS

I. The trial court judge erred when she did not suppress the fruits of a warrantless search of appellant's bedroom in a home owned by another, because appellant had a reasonable expectation of privacy in the room, and law enforcement could not reasonably have believed the landowner when he informed them that appellant did not reside there.

RELEVANT FACTS

Appellant was convicted of offenses alleged to have occurred on or about February 17, 2010. On that date, appellant and another person allegedly went to the accuser's trailer at around 7:00 AM and demanded money. The accuser's name is Reginal Holmes, and he is related to the appellant. After a brief altercation, appellant allegedly shot Holmes in the arm. Appellant and the other person then left the trailer and approximately 3 hours later appellant was discovered in a closet at a residence purportedly owned by Mr. Richard Lewis. Crack cocaine was found in the closet where appellant was located, and in other places throughout the house. Crack cocaine was found located in a bathroom under a sink. R. 53, ll. 9-21. Appellant was charged with all of it.

Lewis's street name is Old School and he is from New York City. R. 365, l. 25- 63, l. 14. His mother owned the house where he stayed. R. 367, ll. 1-2. He testified at trial that appellant and his girlfriend lived at that residence but had moved out a couple of months before the police descended on the house in February. R. 367, l. 16- 25. According to his testimony at trial, he received a phone call from appellant that morning and appellant wanted to come by his house to "freshen up." R. 368, l. 6-12. Old School also testified that he had significant drug problems over the years, and has used drugs for the last 35 years. He

also has had a number of legal problems as result of his drug use, and additional legal problems resulting from his forging his mother's checks. R. 374, l. 3- 375, l. 10.

Prior to the start of trial, defense counsel made a motion to suppress the drugs that were recovered in this case because the search and seizure were unlawful. R. 29, ll.4-5.

Officer Kelleher testified on behalf of the State, and admitted that he did not have warrant when they entered ■ Ball Park Road, the location where appellant was ultimately found. This location is approximately 2.5 miles from the site of the shooting. R. 30, l. 1- 31, l. 12. Prior to approaching this location, law enforcement had gone to other locations looking for appellant. R. 35, l. 23- 36, l. 5.

According to the officer's testimony, they received consent from the homeowner to enter the house. R. 38, ll. 18 -- 24. The officer also testified that the accuser and appellant's relative, Holmes, told him he should look for him at Old School's house. He conceded that law enforcement knew that appellant had stayed there in the past. R. 43, ll. 3- 44, l. 18. Kelleher also conceded that his written report noted that appellant "often" stayed at that location. R. 63, ll. 9- 64, l. 1. Officer Fraser also testified that he knew that appellant stayed at that location based on his prior dealings. R. 75, l. 10- 76, l. 2. Fraser conceded that Old School told him that appellant stayed with him and that he knew which bedroom appellant stayed in because of his prior dealings with that household. R. 76, l. 11- 77, l. 21. In the bedroom, law enforcement located an extra pair of shoes, about the closet, Vaseline on the nightstand, lotion on the dresser, an iron on the dresser, three pairs of jeans on the dresser, some hats and jackets, and some jeans being pressed underneath the mattress. There was also a camouflage jacket on the bed which matched the description the accuser gave of what

appellant was wearing earlier that morning. R. 85, l. 9- 87, l. 3. Fraser also testified that Old School did not give the consent to enter the bedroom. R. 88, ll. 13-15.

Fraser also testified that they did not really obtain consent to search, so much as they just followed him into the house:

Q: At that point do you get consent again to go into his house?

A: I Mirandized him and told him why we were there and asked him where the crack was. He said it was under the sink in the bathroom.

Q: And so were you—you did enter the house, right?

A: Yes, sir.

Q: Did you do that because you had already gotten consent earlier in the day?

A: No, sir.

Q: Did you do it because you got consent right—

A: No. He took us in the house.

Q: So you don't really come out and ask him for consent but you follow him in as he leads you in?

A: Yes, sir.

R. 89, ll. 7-21.

At trial, Lewis testified that "Yes. They came in with me. They were supposed to wait at the door but as we were coming in someone knocked the screen out my window in front and they all rushed the house the same time." R. 372, ll. 4-7.

During the pretrial suppression hearing, appellant testified that he stayed at the house, and had given Old School \$40 to stay there for the entire week. He also testified that he had a key to the residence. R. 98, ll. 1-17. He further testified that he kept all of his

clothes, and underwear at Lewis's house. R. 99, ll. 2-- 15. He also kept his tooth brush and his deodorant at that address. R. 99, lines 16 -- 20.

Defense counsel objected to the search, and argued that Old School did not have the authority to consent to the search. R. 105, line 1 -- 112, line 3. The State argued that appellant did not have any expectation of privacy in the bedroom. R. 112, ll. 5 -- 17. After lengthy argument, the trial court judge found that appellant did not have any expectation of privacy:

THE COURT: All right. Well, respectfully I think there was no expectation of privacy. At the Richard Lewis gave permission and he was the only one home and I'm not going to suppress the results of that search or the results of that arrest. What is your next motion?

R. 117, ll. 18-23.

The trial court judge erred because appellant had a reasonable expectation of privacy, and law-enforcement and could not reasonably have believed that Old School had the authority to consent to the search of the bedroom occupied by appellant.

Evidence obtained as a result of an unlawful search constitutes a violation of the 4th amendment and is inadmissible at trial. State v. Nelson, 336 S.C. 186, 192 n.3, 519 S.E.2d 786, 789 n. 3 (1999). When a defendant has a reasonable expectation of privacy in the property being searched, 4th amendment rights apply to the search. Minnesota v. Olson, 495 U.S. 91, 95-96. A reasonable expectation of privacy exists when the defendant has a relationship with the property or property owner. State v. Missouri, 352 S.C. 121, 129, 572 S.E.2d 467, 470-471 (Ct. App. 2002).

The South Carolina Supreme Court adopted the test regarding third-party consent articulated in U. S. v. Matlock, 415 U.S. 164 (1974):

In Matlock, the test devised for determining whether a third party had sufficient status to consent to a search was whether the third party possessed common authority over or had some other sufficient relationship to the premises or effects searched.

State v. Middleton, 266 S.C. 251, 258-59, 222 S.E.2d 763, 766 (1976).

Common authority is defined as "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable" for the searching officers to believe that the person granting consent had the authority to do so. State v. Moultrie, 271 S.C. 526, 248 S.E.2d 486 (1978). See Illinois v. Rodriguez, 497 U.S. 177 (1990).

In Moultrie, the South Carolina Supreme Court found that the owner of the home had common authority and a sufficient relationship to the premises to consent to a search. The court also noted that the appellant was a guest in that home. Id. 528-29.

By their own testimony, law enforcement was aware that appellant spent a significant amount of time at the home where Old School resided. They knew that he spent nights there, and they were aware that the accuser also stated that appellant spent time there since he is the one who directed them to that location. In short, law enforcement understood that appellant had an expectation of privacy in that home. Additionally, it should have been evident from the time that they entered the bedroom that it was occupied by appellant. It was not reasonable for them to believe that Old School could grant consent to search the property. Law enforcement was obligated to secure a warrant before they entered appellant's bedroom. Their failure to do so rendered the search and seizure illegal. The trial court judge erred when she found that appellant did not have a reasonable expectation of privacy in that home, especially in light of appellant's testimony that he paid money to Old

School for the privilege of staying there. Respectfully, appellant asks this court to reverse his convictions.

II. The trial court judge erred when she did not suppress the photo line-up which contained a picture of the appellant, because the accuser was related to appellant-- and they knew one another well--and when the introduction of the photo lineup bolstered the accuser's testimony.

Appellant is related to the accuser. Nevertheless, law-enforcement, in connection with this investigation, presented a photo lineup to the accuser to see if he could identify his assailant. At the pretrial hearing, defense counsel objected to the introduction of the six-pack photo ID on the basis that it constitutes improper bolstering since the parties know one another. R. 27 -- 28. The State argued that it was not bolstering, but was part of the investigation, "just another piece of evidence." R. 28, l. 21-22. The trial court judge ruled that it would be admissible. R. 29, lines 4-5.

During trial, the state moved the photo lineup and the evidence. R. 125. Defense counsel objected to its admission. R. 123- 125.

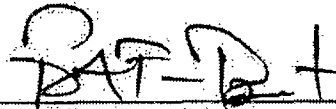
The trial court judge erred when she allowed the State to introduce this evidence, because it improperly bolstered the testimony of the accuser. See State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003) (improper admission of statement that was insufficient to invoke Rule 801(d)(1)(B) improperly bolstered the witness's testimony). As an introduced piece of evidence, this photo lineup was sent back to the jury for their consideration, even though it lacked any probative value. Admission of this photo lineup unduly emphasized the accuser's testimony that he claimed appellant, his relative, committed this crime. It was improper, and appellant was prejudiced. State v. Gullede, 277 S.C. 368, 287 S.E.2d 488

(1982); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980). Respectfully, appellant asks this Court to reverse his convictions.

CONCLUSION

For the preceding reasons, appellant respectfully asks this Court to reverse his convictions, and grant him a new trial.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "EAT-Best", written over a horizontal line.

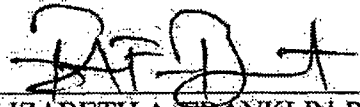
Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of April, 2012.

CERTIFICATE OF COUNSEL

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


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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

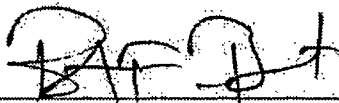
V.

MARION BONDS,

APPELLANT

CERTIFICATE OF SERVICE

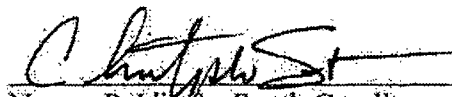
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 12th day of April, 2012.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of April, 2012.



(L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

The State,

Respondent,

vs.

Marion Bonds,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL**I.**

The trial judge properly denied Appellant's suppression motion because the investigators' search of the residence was performed with consent from a party with apparent authority over the premises, exigent circumstances justified the search regardless of any obtained consent, and the evidence was discovered in plain view. Furthermore, Appellant did not possess the capacity to challenge the searches under the Fourth Amendment because he did not have a reasonable expectation of privacy in the Ball Park Road residence.

II.

The trial judge properly allowed the State to introduce the photo line-up that contained a picture of Appellant because the photo line-up did not bolster the victim's testimony, and even if the admission amounted to improper bolstering, any error was harmless.

STATEMENT OF THE CASE

On March 25, 2010, a Beaufort County Grand Jury indicted Appellant for assault and battery with intent to kill, unlawful possession of a handgun by a person convicted of a crime of violence, attempted armed robbery, trafficking in crack cocaine (28 grams or more but less than 100 grams), trafficking in crack cocaine (more than 10 grams but less than 28 grams), and possession with intent to distribute crack cocaine within a one-half mile radius of a school. (R. pp. 557-564.)

On December 13, 2010, Appellant proceeded to trial on all charges. The Honorable Carmen T. Mullen presided over the trial. (R. p. 1.) Ian Deysach represented Appellant, and Angela Tanner represented the State. (R. p. 2.)

On December 16, 2010, the jury found Appellant guilty of the following crimes: 1) assault and battery of a high and aggravated nature, 2) unlawful possession of a handgun by a person convicted of a crime of violence, 3) trafficking in crack cocaine (28 grams or more but less than 100 grams), and 4) possession with intent to distribute crack cocaine within a one-half mile radius of a school. (R. pp. 538-39.) The jury found Appellant not guilty of the following crimes: 1) assault and battery with intent to kill, 2) trafficking in crack cocaine (10 grams or more but less than 28 grams), and 3) attempted armed robbery. (R. pp. 538-39.)

After the jury returned the verdict, Judge Mullen sentenced Appellant to ten years of imprisonment for assault and battery of a high and aggravated nature, five years of imprisonment for unlawful possession of a handgun by a person convicted of a crime of violence, twenty years of imprisonment for trafficking in crack cocaine (28 grams or more but less than 100 grams), and fifteen years of imprisonment for possession with intent to distribute crack cocaine within a one-half mile radius of a school. (R. pp. 555-56.) In total, Appellant was sentenced to 50 years of imprisonment.

Appellant filed his Notice of Appeal on December 23, 2010. Appellant served his Initial Brief on December 8, 2011. This brief follows.

STATEMENT OF FACTS

On February 17, 2010, Appellant went to his cousin's, Reginal Holmes ("Holmes"), residence and shot Holmes. (R. p. 172; R. p. 178; R. p. 181; R. p. 187.)

At trial, Holmes testified that on February 17, 2010, a little before 7:00 a.m., Appellant and another individual showed up at Holmes' residence pointing a gun at Holmes and demanding money. (R. pp. 175-76; R. pp. 177-78.)

Around 7:00 a.m. that morning, Corporal Paul Green and Investigator John Kelleher responded to a "shots fired" call at Holmes' residence. (R. pp. 152-153; R. pp. 239-240.) When Corporal Green arrived at scene, Corporal Green saw Holmes' gunshot wound. (R. p. 155.) Eventually, Holmes took an ambulance to the hospital. (R. p. 183.)

Approximately 9:00 a.m. that morning, Appellant called Richard Lewis ("Lewis") to see if Appellant could come over to Lewis' house, located on Ball Park Road, in order to "freshen up." (R. p. 187.) Lewis told Appellant he could come over. (R. p. 187.) Around 9:30 a.m., Appellant arrived at the Ball Park Road residence. (R. p. 190.) Lewis had to let Appellant inside because Appellant did not have key. (R. pp. 368-69.)

According to Lewis, Appellant used to live with Lewis at the Ball Park Road residence; however, Appellant moved out a few months before the February 17, 2010 shooting. (R. p. 367.) Lewis' mother owned the Ball Park Road residence. (R. p. 367.) On the day of the shooting, Lewis was the only person residing in the trailer. (R. p. 367.) On occasion, Appellant would pay Lewis \$40 a week to stay at the Ball Park Residence; however, Appellant did not pay Lewis any money to stay at the Ball Park Road residence on the day of the shooting. (R. p. 389.)

At trial, Investigator Jeremiah Fraser testified that he went to the hospital with Investigator Brian Chapman to interview Holmes on the day of the shooting. (R. pp. 312-13.)

After questioning Holmes, the two investigators were able to determine two suspects in the shooting—Appellant and Jason Thomas ("Thomas"). (R. pp. 313-14.) Moreover, Holmes gave the investigators a list of addresses where Appellant and Thomas might be hiding. (R. p. 315.)

First, the investigators searched the area where the shooting occurred for Appellant and Thomas. (R. p. 314.) Next, the investigators went to three different residences to look for Appellant and Thomas. (R. pp. 314-15.) However, the investigators were unsuccessful in locating the two suspects at that point. (R. pp. 314-15.) Finally, around 10:00 a.m. on the day of the shooting, the investigators went to the Ball Park Road residence, which was one of the residences Holmes listed. (R. p. 315.)

When the investigators arrived at the Ball Park Road residence, they heard loud, heavy movement inside the trailer, which indicated to them that something was going on inside the trailer. (R. p. 316.) Thereafter, Investigator Fraser walked to the back door and made contact with Lewis. (R. p. 316.) Investigator Fraser asked Lewis if Appellant and Thomas were inside the trailer. (R. p. 316.) At first, Lewis told the investigators that Appellant and Thomas were not inside the trailer. (R. p. 316.) However, once Investigator Fraser told Lewis about the shooting, Lewis indicated to Investigator Fraser that Appellant and Thomas were in the back bedroom. (R. pp. 316-17.)

At that time, Lewis told the investigators that he was the only one that lived in the Ball Park Road residence. (R. p. 93.) Additionally, Lewis told the investigators that Appellant moved out of the Ball Park Road residence months ago; however, Appellant stayed at the residence a week before the shooting. (R. p. 94.)

According to Investigator Lewis, Investigator Kelleher, and Investigator Chapman, Lewis gave the investigators consent to go inside the trailer to search for Appellant and

Thomas. (R. p. 38; R. p. 42; R. p. 317.) However, Lewis testified that he wanted to go inside and tell Appellant and Thomas to come outside and talk to the police. (R. p. 390.) Before Lewis could go inside to mediate, everyone heard a loud crash from the back bedroom window. (R. pp. 390-91.) Thereafter, Investigator Fraser and Investigator Chapman entered the trailer. (R. p. 317; R. p. 391.) Police surrounded the trailer. (R. p. 317.) At trial, Lewis stated he gave Investigator Fraser "implied permission" to enter the residence in order to search for Appellant and Thomas. (R. p. 397.)

When the investigators first entered the trailer, they moved towards the back bedroom where they heard all of the commotion. (R. pp. 317-18.) Before the investigators got to the back bedroom, a man named Larry Holmes came out of the bathroom; Investigator Fraser detained him and passed him back to Investigator Chapman. (R. p. 318.) Thereafter, the investigators heard a window slam and the police officers outside yelled "Sherriff's Office, show me your hands." (R. p. 318.)

Once Investigator Fraser heard the window slam, he hit the bedroom door. (R. p. 318.) As soon as the door opened, Investigator Fraser saw Thomas running towards him. (R. p. 319.) Investigator Fraser detained Thomas and passed him back to Investigator Chapman. (R. p. 319.) Investigator Fraser did not see Appellant until Investigator Fraser yelled for Appellant to show his hands. (R. p. 319.) Appellant displayed his hands on the closet floor, per Investigator Fraser's instructions. (R. p. 319.) Investigator Fraser saw Appellant lying on the closet floor on top of a camouflage jacket. (R. p. 323.) Because Holmes told the investigators that Appellant was wearing a camouflage jacket when Appellant shot him, Investigator Fraser removed the jacket from the floor to keep as evidence. (R. p. 320; R. p. 324.) Once Investigator Fraser moved the camouflage jacket, he saw a shoe that contained a large quantity of crack cocaine. (R. p. 320; R. p. 324.) In addition, the investigators found two pill bottles

containing crack cocaine underneath the mattress in the bedroom where Appellant was found. (R. p. 320.)

At 10:37 a.m., after the police detained Appellant, Lewis signed a consent form, which allowed the investigators to search the house for a weapon. (R. p. 392; R. p. 396.)

After the investigators processed the Ball Park Road residence, they returned to their office. (R. p. 328.) At that point, Appellant was in jail and the investigators began listening to the phone calls Appellant was making. (R. p. 328.) Appellant called Lewis and asked Lewis to get Appellant's drugs of the trash can. Appellant told Lewis to hold on to the drugs. (R. p. 376; R. p. 424.) When Lewis looked in the trash can, he found crack cocaine. (R. p. 376.)

Thereafter, Investigator Fraser sent Corporal Green to the Ball Park Road residence to secure the house. (R. p. 329.) Once Investigator Fraser arrived at the Ball Park Road residence, he immediately spoke with Lewis. (R. p. 329.) At that time, Lewis gave Investigator Fraser consent to enter the residence. (R. p. 329; R. p. 396.) Lewis took Investigator Fraser inside the residence and showed him the crack cocaine that Lewis just hid underneath the bathroom sink. (R. p. 329.)

On February 18, 2010, the day after the shooting, Investigator Kelleher prepared a photo line-up and presented it to Holmes. (R. p. 329.) Holmes identified Appellant and Thomas from the photo line-up. (R. p. 329.)

During the suppression hearing, Appellant's trial counsel moved to suppress the drugs found in both searches of the Ball Park Road residence. In addition, Appellant's trial counsel objected to the introduction of the photo line-up identification made by Holmes.

At the suppression hearing, Appellant testified he stayed at the Ball Park Road a week before the February 17, 2010 incident. (R. p. 98.) Other times, Appellant stayed at his girlfriend's house. Although Lewis testified at trial that Appellant did not pay him any money

to stay at the Ball Park Road residence on February 17, 2010, Appellant claimed he paid Lewis \$40 to stay the week of February 17, 2010. (R. p. 98.) Furthermore, Appellant claimed he owned the clothes, toothbrush, deodorant, and lotion found in the back bedroom of the Ball Park Road residence. (R. p. 99.) However, the address listed on Appellant's license was his mother's address. Moreover, all of Appellant's mail went to his mother's address. (R. p. 103.) Ultimately, the trial judge denied Appellant's trial counsel's motion to suppress the evidence found during the searches of the Ball Park Road residence and the motion to suppress the photo line-up identification made by Holmes. (R. p. 29; R. p. 117.)

After analyzing the crack cocaine found in the Ball Park Road residence, Renata Berry ("Berry"), an expert in forensic chemistry, testified about the quantity of crack cocaine that was found in the residence. (R. pp. 348-59.) According to Berry, during the first search of the Ball Park Road residence, the investigators found 43.04 grams of crack cocaine located in Appellant's shoe, 5.80 grams of crack cocaine in a pill bottle located underneath a mattress, and 16.30 grams of crack cocaine in a pill bottle located underneath a mattress. In total, the investigators found 65.14 grams of crack cocaine in the back bedroom during the first search. (R. pp. 353-59.) During the second search of the Ball Park Road residence, the investigators found 20.40 grams of crack cocaine located underneath the bathroom sink. (R. pp. 356-57.)

ARGUMENT

- I. The trial judge properly denied Appellant's suppression motion because the investigators' search of the residence was performed with consent from a party with apparent authority over the premises, exigent circumstances justified the search regardless of any obtained consent, and the evidence was discovered in plain view. Furthermore, Appellant did not possess the capacity to challenge the searches under the Fourth Amendment because he did not have a reasonable expectation of privacy in the Ball Park Road residence.

Appellant maintains the trial judge erred in not suppressing the evidence recovered in the search of the Ball Park Road residence. Appellant asserts that Appellant had a reasonable expectation of privacy, and the officers could not reasonably believe Lewis when he informed them that Appellant no longer resided at the Ball Park Road residence. However, the investigators had consent to search the home from a person with apparent authority over the residence. Additionally, the search was further justified by exigent circumstances, and the crack cocaine was discovered in plain view. The investigators' actions in searching the home were entirely reasonable. Moreover, the trial judge properly refused to suppress the evidence because Appellant did not have a reasonable expectation of privacy in the residence. Therefore, the evidence recovered in the search was properly admitted at trial, and the trial judge's ruling is supported by the evidence. For these reasons, Appellant's conviction should be affirmed.

Standard of Review

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is *any* evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004) (emphasis added). The appellate court will not reverse merely because it would have reached

a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). The appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005).

General Fourth Amendment Law

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " United States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) the automobile exception; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Additionally, exigent

circumstances can justify a warrantless search of a home which would otherwise be unreasonable. State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009).

A. Consent

Even if Appellant had an expectation of privacy at the Ball Park Road residence, Lewis, the tenant of the residence, gave the investigators consent to enter the residence to search for Appellant and Thomas. (R. p. 38; R. p. 42; R. p. 317; R. p. 396.) When the investigators found Appellant hiding in the closet, they saw, in plain view, Appellant lying on top of his shoe, which contained 43.04 grams of crack cocaine. (R. p. 320; R. p. 324.) Additionally, after the investigators detained Appellant, Lewis gave the investigators consent to search the residence for a weapon. (R. p. 392; R. p. 396.) Thereafter, the investigators found two pill bottles containing crack cocaine underneath a mattress in the bedroom where Appellant was found.¹ Furthermore, when the investigators returned to the residence later in the day, Lewis gave the investigators consent to search the residence when he led the investigators to the crack cocaine that he hid underneath the bathroom sink. (R. p. 329; R. p.

¹ During the first search of the Ball Park Road residence, the investigators found 43.04 grams of crack cocaine located in Appellant's shoe; 5.80 grams of crack cocaine in a pill bottle located underneath a mattress, and 16.30 grams of crack cocaine in a pill bottle located underneath a mattress. In total, there was 65.14 grams of crack cocaine found in the bedroom during the first search. Although it is not entirely clear from the record whether or not the investigators found the two pill bottles containing crack cocaine before or after Lewis signed the consent form at 10:37 a.m. that morning, any error would be harmless. Appellant was charged with trafficking in crack cocaine 28 grams or more but less than 100 grams. Therefore, the 43.04 grams of crack cocaine that was found in Appellant's shoe was enough to find Appellant guilty of trafficking in crack cocaine 28 grams or more but less than 100 grams. In other words, the 22.1 grams of crack cocaine found in the pill bottles underneath the mattress did not increase Appellant's trafficking charge.

396.) Moreover, because Lewis had common authority over the residence, his consent to both of the searches was valid. Therefore, the trial judge properly ruled Lewis consented to the search of the residence. (R. p. 117.)

i. When the police first arrived at the Ball Park Road residence, Lewis consented to a search of the Ball Park Road residence in order to detain Appellant and Thomas, and Lewis consented to the search of the residence in order to find the weapon used in the shooting.

A warrantless search may be justified based on consent obtained from a third party. Flowers, 360 S.C. at 5, 598 S.E.2d at 728. In order to give consent, the third party must have "common authority over or some other sufficient relationship to the premises or effects being searched." Id.; see United States v. Matlock, 415 U.S. 164, 171 (1974) ("These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or sufficient relationship to the premises or effects sought to be inspected."). "Common authority is defined as mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for officers to believe the person granting consent has the authority to do so." State v. Laux, 344 S.C. 374, 376, 544 S.E.2d 276, 277 (2001).

Furthermore, landlords and hotel managers may not validly consent to a search of a tenant or hotel guest's room. State v. Moultrie, 271 S.C. 526, 529, 248 S.E.2d 486, 487-488 (1978). However, where no landlord-tenant relationship exists, a host can validly consent to a search of premises occupied by a guest. Id. at 529, 248 S.E.2d at 488. Guests assume the risk home residents will allow others into the premises. Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916.

In the case at hand, Lewis gave the investigators consent to search the Ball Park Road residence for Appellant and Thomas. In addition, after the investigators detained Appellant and Thomas, Lewis signed a consent form to allow the investigators to search the residence for the weapon used in the shooting. (R. p. 392; (R. p. 396.) Although there were some discrepancies in Investigator Fraser's testimony during the suppression hearing and his testimony during the trial concerning consent during the first search, there is evidence in the record to support the trial judge's ruling that Lewis consented to the first search. (R. p. 88; R. p. 317; R. p. 397.) During the trial, Investigator Fraser testified Lewis gave consent to search the Ball Park Road residence for Appellant and Thomas. (R. p. 317.) Moreover, Lewis testified at trial that he gave the investigators his "implied permission" to enter the Ball Park Road residence to search for Appellant and Thomas. (R. p. 397.) See United States v. Hylton, 349 F.3d 781, 786 (4th Cir. 2003) ("Consent may be inferred from actions as well as words.").

Moreover, because Lewis had common authority over the residence, his consent was valid. At most, Appellant was Lewis' guest on the morning of the shooting. (See Flowers, 360 S.C. at 6, 598 S.E.2d at 728, where the court held that the defendant was a guest in his girlfriend's home. Id. The defendant spent approximately five nights a week at the girlfriend's house. Id. Furthermore, he kept a change of clothing at the girlfriend's house and occasionally paid rent. Id.); see also Moultrie, 271 S.C. at 529, 248 S.E.2d at 488 ("In this case there is no evidence that appellant was renting the room he shared with the owner's daughter. We hold that where no landlord-tenant situation exists, a host can validly consent to a search of the premises occupied by a guest.").

Furthermore, there was no evidence Appellant had exclusive possession of the room where the investigators found him located. See Flowers, 360 S.C. at 6, 598 S.E.2d at 728; see also State v. Vaster, 24 Wash. App. 405, 601 P.2d 1292, 1294-95 (1979) ("holding where a

guest does not maintain exclusive control over any portion of the residence, even if the guest has a legitimate expectation of privacy, a homeowner's power to consent to a search of his own home overrides the objection of a guest to a search). Flowers, 360 S.C. at 6, 598 S.E.2d at 728.

Here, Lewis resided in the trailer and occasionally allowed Appellant to stay in the room where Appellant was found. However, Appellant did not rent the room that day. He was just at the residence to "freshen up." As a guest, Appellant assumed the risk that Lewis would allow others into the premises. See Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916. In summary, because there is evidence to support the trial judge's finding that Lewis gave consent to the search, this Court should uphold the trial court's ruling on the issue of consent.

ii. When the police went to the Ball Park Road residence the second time, Lewis consented to the search by leading the police to the crack cocaine he hid underneath the bathroom sink.

As mentioned above, "[c]onsent may be inferred from actions as well as words." Hylton, 349 F.3d at 786. In the present case, Appellant, called Lewis to get Appellant's crack cocaine out of the trash can located in the Ball Park Road residence. (R. p. 376.) The police heard this entire conversation because Appellant made the phone call while he was in jail; therefore, the conversation was recorded. Thereafter, Lewis removed the crack cocaine from the trash can and threw it underneath the bathroom sink cabinet. (R. p. 378.) While Lewis was on the phone with Appellant, Corporal Green was already at the Ball Park Road residence in order to secure the scene. (R. p. 377.) Corporal Green told Lewis to come outside. (R. p. 379.)

When Investigator Fraser arrived at the Ball Park Road residence for the second time that day, Lewis showed Investigator Fraser where he hid the crack cocaine. (R. p. 329.) According to Lewis' testimony, he willingly showed the investigators where he hid the crack

cocaine. (R. p. 379.) Moreover, he stated he consented to the investigators searching the residence the second time, (R. p. 379.) Because Lewis consented to the second search of the residence, the trial judge properly admitted the crack cocaine into evidence.

B. Exigent Circumstances

When the investigators visited Holmes in the hospital, Holmes told them that Appellant was the one that shot him. Furthermore, Holmes informed the investigators that Appellant might be hiding at the Ball Park Road residence. When the investigators arrived at the Ball Park Road residence, they heard loud, heavy movement inside the trailer, which indicated to them that something was going on inside the residence. (R. p. 316.) Lewis told Investigator Fraser that Appellant and Thomas were inside the residence. (R. pp. 316-17.) Lewis testified that he wanted to go inside himself and tell Appellant and Thomas to come outside and talk to the police. (R. p. 390.) But before Lewis could go inside to mediate, everyone heard a loud crash from the back bedroom window. (R. pp. 390-91.) Faced with exigent circumstances, Investigator Fraser and Investigator Chapman justifiably entered the residence in order to protect their own lives and the lives of others. (R. p. 317; R. p. 391.)

The exigent circumstances doctrine permits law enforcement officers to act without a search warrant where the exigencies of the situation make the officers' course of action immediately imperative. State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). "The exigent circumstances doctrine provides an exception to the Fourth Amendment's protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." Id. "A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement." Herring, 387 S.C. at 210, 692 S.E.2d at 494. Exigent

circumstances justifying a warrantless search include an imminent risk of flight from the suspect or a risk of danger to officers or others. Id. at 210, 692 S.E.2d at 494-495. The imminent destruction of evidence can also constitute exigent circumstances permitting a warrantless search. State v. Simmons, 384 S.C. 145, 174, 682 S.E.2d 19, 34 (Ct. App. 2009).

In Warden v. Hayden, 387 U.S. 294, 298 (1967), the United States Supreme Court considered whether the search of a residence in which a suspected armed robber was believed to have fled to was justified by the exigencies of the situation. Officers were alerted by a cab driver that an armed robbery suspect ran into a particular residence. Id. at 297. The officers responded to the scene within five minutes, entered the home, and searched for the suspect. Id. at 298. Hayden challenged the lawfulness of the search, and the Supreme Court found the search was reasonable and justified. Id. The Court concluded:

The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

Id. at 298-299.

In the case at hand, Holmes informed the investigators that Appellant shot him. Furthermore, when the investigators arrived at the Ball Park Road residence, Lewis informed the investigators that Appellant and Thomas were inside the residence. The investigators reasonably believed Appellant was armed and dangerous at that time. Moreover, once the investigators heard all of the commotion inside the residence, there was an immediate need

to secure the premises and assist potential victims. Because the Fourth Amendment does not require the police to delay their investigation when doing so would cause a grave danger to their lives or the lives of others, the investigators search of the Ball Park Road residence was reasonable.

C. Plain View

Furthermore, the crack cocaine the investigators discovered underneath Appellant's camouflage jacket was properly found in plain view. See State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999) ("Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence."). "In order for evidence to be seized under the plain view exception, three things must be shown: 1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities." Id.

First, in the case at hand, the investigators had consent and exigent circumstances that justified their initial entry. Therefore, the initial intrusion which afforded the investigators the plain view was lawful.

Second, the discovery of the crack in the tennis shoe was inadvertent. Holmes told the investigators Appellant was wearing a camouflage jacket when Appellant shot him. Therefore, when the investigators saw Appellant lying on top of the camouflage jacket, the investigators properly seized the jacket under the plain view doctrine. Moreover, once the investigators removed the jacket, they saw, in plain view, what appeared to be crack cocaine located in Appellant's shoe.

Finally, the incriminating nature of the evidence was immediately apparent to the seizing authorities. In Beckham, the court held that the latex gloves located in the defendant's home was in plain view of the officers. Id. The defendant's accomplice told the officers that the defendant wore gloves during the commission of the murder. Id. Therefore, the trial judge properly admitted the gloves into evidence. Id. Although a camouflage jacket in itself is not incriminating, the fact that the victim told the investigators that Appellant was wearing the jacket when Appellant shot the victim made the jacket incriminating. Moreover, once the investigators removed the jacket, they saw the crack cocaine in Appellant's shoe.

In summary, the trial judge's decision to admit the evidence was supported by consent, exigent circumstances, and the plain view doctrine, and her ruling was supported by the evidence. See Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings.")

D. Reasonable Expectation of Privacy

A criminal defendant asserting a challenge to an allegedly unreasonable search and seizure must establish his own personal Fourth Amendment rights were violated. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987). "[C]apacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978) (citing Katz v. United States, 389 U.S. 347, 353 (1967)). A subjective expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable. Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990). "Although a person present only intermittently or for a purely commercial purpose does not have a reasonable expectation of

privacy, an overnight guest may have a reasonable expectation of privacy in the host's property." Flowers, 360 S.C. at 5, 598 S.E.2d at 728.

In State v. Missouri, the court held that the defendant had a reasonable expectation of privacy, 361 S.C. 107, 115, 603 S.E.2d 594, 598 (2004). The police found the defendant in an apartment standing over a large quantity of crack cocaine. 361 S.C. at 110, 603 S.E.2d at 595. Although the defendant did not reside in the apartment, the defendant testified that the apartment was a "place of comfort and solace for him and that he felt a sense of privacy there." Id. The defendant did not stay at the apartment the night before the search took place, and the tenants of the apartment testified that they could not remember the last time the defendant stayed at their apartment. Id. The defendant would sometimes have a key to the apartment and kept clothes here. 361 S.C. at 115, 603 S.E.2d at 597. Furthermore, the defendant did not pay to stay at the apartment. Id. Moreover, the defendant was at the apartment for at least seven hours before the search occurred. Id. Because there were facts to support the trial judge's finding that the defendant had a reasonable expectation of privacy, the Court upheld the trial court's decision. 361 S.C. at 115, 603 S.E.2d at 598.

Here, Appellant did not have the capacity to challenge the search of the Ball Park Road residence because he did not have a legitimate expectation of privacy in the residence. On the day of the shooting, Appellant went to the Ball Park Road residence to change clothes and freshen up; however, Appellant was not spending the night. (R. p. 368.) Appellant had only been at the Ball Park Road residence for 30 minutes when the investigators arrived. Moreover, Appellant did not have a key to the residence. (R. pp. 368-69.)

Although, Lewis' mother owned the Ball Park Road residence, Lewis was the only person living in the residence on February 17, 2010. Additionally, Lewis told the investigators that Appellant moved out of the Ball Park Road residence months before the

shooting occurred. (R. p. 367.) Although Appellant did have some clothing and toiletries at the Ball Park Road residence, he testified during the suppression hearing that he would stay at his girlfriend's house. (R. p. 98.) Furthermore, the investigators went to three other residences before they found Appellant at the Ball Park Road residence. (R. p. 73-74.) Appellant's aunt told the investigators that Appellant stayed with her from time to time. (R. p. 74.)

Without a legitimate expectation of privacy in the residence searched, Appellant did not have the requisite capacity to challenge the search on Fourth Amendment grounds. See Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916 ("[Bailey] had no possessory or privacy interests in the premises. As a guest, he assumed the risk that the home resident would allow others into the area." (citations omitted)).

Therefore, because there is evidence to support the trial judge's ruling that Appellant did not have a reasonable expectation of privacy, Appellant's conviction should be affirmed.

- II. The trial judge properly allowed the State to introduce the photo line-up that contained a picture of Appellant because the photo line-up did not bolster the victim's testimony, and even if the admission amounted to improper bolstering, any error was harmless.**

On February 18, 2010, the day after the shooting, Investigator Kelleher prepared a photo line-up and presented it to Holmes. (R. p. 247.) Holmes identified Appellant from the photo line-up. (R. p. 247.) During the pretrial hearing, Appellant's trial counsel objected to the introduction of the photo line-up because Holmes knew Appellant. (R. pp. 27-28.) Furthermore, Appellant's trial counsel argued that because Holmes knew Appellant, the introduction of the photo line-up identification would amount to improper bolstering. (R. pp. 27-28.) The State argued that the photo line-up identification was not bolstering; it was just part of the investigation and "just another piece of evidence." (R. p. 28.) The trial judge properly ruled in favor of the State and allowed the State to introduce the photo line-up identification at trial. (R. p. 29.)

Standard of Review

"The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Foster, 354 S.C. 614, 620-621, 582 S.E.2d 426, 429 (2003) (citations omitted).

- A. Admitting the victim's photo line-up identification did not amount to improper bolstering.**

Black's Law Dictionary defines bolstering as the following: "To enhance (unimpeached evidence) with additional evidence. This practice is often considered improper

when lawyers see to enhance the credibility of their own witnesses." Generally, bolstering is a hearsay objection used when a party improperly offers evidence to support an unimpeached witness or to add credibility to earlier-introduced evidence. State v. Balderas, 915 S.W.2d 913, 919 (Tex. App.-Houston [1st Dist.] 1996, pet. ref'd.) Other times, bolstering objections occur when an attorney makes an implication that the testimony of a witness is corroborated by evidence known to the government but not known to the jury. United States v. Sanchez, 118 F.3d 192, 198 (4th Cir. 1997).

In Foster, the Supreme Court of South Carolina held that the witness' prior consistent statement was inadmissible hearsay, which improperly bolstered the witness' own testimony. 354 S.C. at 622-623, 582 S.E.2d at 430. On cross-examination, the defendant questioned the witness about her prior inconsistent statements. 354 S.C. at 619, 582 S.E.2d at 429. Trying to rehabilitate the witness' testimony, the State introduced the witness' prior consistent statement into evidence. Id. The Court looked at the plain language of Rule 801(d)(1)(B) and determined that the witness' prior consistent statement was inadmissible hearsay because the witness had not been charged with recent fabrication or improper motive or influence. 354 S.C. at 622, 582 S.E.2d at 430.

Unlike the statement in Foster, the photo line-up identification in this case is not hearsay. See Rule 801(d)(1)(C), SCRE (1976). Pursuant to Rule 801, prior consistent statements of a witness are not inadmissible hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person." Id.; see also U.S. v. Jarrad, 754 F.2d 1451, 1456 (9th Cir. 1985) (holding one witness may testify regarding an

identification made by another witness if the declarant also testifies and is available for cross-examination.).

Because Holmes, the declarant, testified at trial and was available for cross-examination, Investigator Kelleher's testimony regarding Holmes' identification of Appellant during the photo line-up did not amount to impermissible hearsay.

Furthermore, because Holmes saw Appellant multiple times a week and had a close personal relationship with Appellant, his testimony did not need to be bolstered. Holmes' testimony as to the identity of the shooter was much stronger evidence than the photo line-up identification. The purpose of Investigator Kelleher's testimony regarding Holmes' successful photo identification of Appellant was not to add credibility to Holmes' testimony, but rather to outline the steps the law enforcement officers took during the investigation. Moreover, Holmes' in-court testimony, where he identified Appellant as the shooter, was more powerful than Investigator's Kelleher's testimony regarding the photo line-up procedure he prepared the day after the shooting occurred.

Moreover, this was not a situation where the solicitor implied that the testimony of a witness was corroborated by evidence known to the government but not known to the jury. In fact, the State did not even mention the photo line-up identification in its closing argument.

In summary, the introduction of the photo line-up identification did not amount to improper bolstering.

B. Even if admitting the victim's photo line-up identification amounted to improper bolstering, any error was harmless.

Error without prejudice does not warrant reversal on appeal. State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996). Appellate courts will generally not set aside a

judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). An admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). When overwhelming evidence of guilt has been established, any trial error may be harmless. State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988).

Here, Holmes testified that Appellant was the person that shot him. Furthermore, Holmes testified that he knew Appellant very well and was even familiar with the teardrop tattoo on Appellant's face. Although Holmes had doubts as to the identity of the second individual at his house during the shooting, Holmes never had any trouble identifying Appellant as the shooter. Furthermore, the investigators testified the reason they went looking for Appellant was because Holmes identified Appellant as the shooter when they first arrived at the scene of the shooting. Therefore, the admission of the photo line-up identification was merely cumulative to the other properly admitted evidence. In summary, if the photo line-up identification improperly bolstered Holmes' testimony as to the identification of the shooter, that error was harmless.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 12, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

The State,

Respondent,

vs.

Marion Bonds,

Appellant.

CERTIFICATE OF COUNSEL

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

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ATTORNEYS FOR RESPONDENT

April 12, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

The State,

Respondent,

vs.

Marion Bonds,

Appellant.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Elizabeth A. Franklin-Best, Esquire
South Carolina Commission on Indigent Defense
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Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.

This 12th day of April, 2012.

Ellen DuBois

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

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

The State, Respondent,

v.

Marion J. Bonds, Appellant.

Appellate Case No. 2011-182146

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2012-UP-563
Submitted October 1, 2012 – Filed October 24, 2012

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Salley W. Elliott, and Staff Attorney
Julie Kate Keeney, all of Columbia; and Solicitor Isaac
McDuffie Stone, III, of Beaufort, for Respondent.

PER CURIAM: Marion Bonds appeals his convictions of assault and battery of a high and aggravated nature, unlawful possession of a handgun by a person convicted of a crime of violence, trafficking in crack cocaine (more than twenty-eight grams but less than one hundred grams) and possession with intent to distribute crack cocaine within a one-half mile radius of a school, arguing the trial court erred in (1) denying his motion to suppress evidence obtained during a search of the residence where Bonds was arrested and (2) admitting testimony that the victim identified him as the perpetrator in a photographic line-up although the victim knew and was related to Bonds. We affirm¹ pursuant to Rule 220(b) and the following authorities:

1. As to whether the trial court erred in denying Bonds's motion to suppress evidence obtained during a search of the residence where police officers arrested Bonds: *State v. Laux*, 344 S.C. 374, 376, 544 S.E.2d 276, 277 (2001) ("The test of whether a third party has sufficient status to consent to a search is whether the third party possesses common authority over or has some other sufficient relationship to the premises or effects searched."); *id.* ("Common authority is defined as mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for officers to believe the person granting consent has the authority to do so.").
2. As to whether the trial court erred in admitting testimony that the victim identified Bonds as the perpetrator in a photographic line-up although the victim knew and was related to Bonds: *State v. Gambrell*, 274 S.C. 587, 589-91, 266 S.E.2d 78, 80-81 (1980) (standing for the proposition that evidence regarding pre-trial identifications that are not the product of unconstitutional procedures is admissible).

AFFIRMED.

FEW, C.J., WILLIAMS and PIEPER, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MARION BONDS,

APPELLANT

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

Opinion No. 2012-UP-563

Appellate Case No. 2011-182146

PETITION FOR REHEARING

On October 24, 2012, this Court affirmed Appellant's convictions for assault and battery of a high and aggravated nature, unlawful possession of a handgun by a person convicted of a violent crime, trafficking in crack cocaine, and possession with intent to distribute crack cocaine within one-half mile radius of a school. State v. Marion Bonds, 2012-UP-563 (Ct. App. filed Oct. 24, 2012).

Concerning Appellant's first issue that the trial judge erred in admitting evidence obtained during a warrantless search of his bedroom, this Court cited State v. Laux, 344 S.C. 347, 544 S.E.2d 276 (2001). The language cited by this Court concerned the authority of a third person to consent to

a warrantless search. While Appellant agrees with this Court's implicit holding that Appellant had a reasonable expectation of privacy, Appellant respectfully disputes this Court's holding that the police obtained consent to search the bedroom from a third person with apparent authority. The record does not support this Court's holding that the evidence seized during the warrantless search was admissible because a third person with apparent authority over the premises consented to the search.

On February 17, 2010, law enforcement entered a home owned by Richard Lewis's mother without a warrant. R. 365, l. 25 – R. 63, l. 14; R. 367, ll. 1-2. Officers found Appellant in a bedroom closet of the residence and placed him under arrest. After searching the residence, including the bedroom where Appellant was found, officers seized multiple items, including crack cocaine, that were introduced against Appellant at his trial. R. 53, ll. 9-21.

During a pretrial hearing concerning Appellant's motion to suppress the evidence seized during the warrantless search, Officer Kelleher testified regarding the sequence of events during the arrest and search. According to Kelleher, he believed officers received consent from the homeowner or renter to enter the house. R. 37, ll. 6-8; R. 38, ll. 18-21. On this point, Kelleher testified he believed Fraser obtained a written consent to search. R. 39, ll. 20-25. When asked if he would not have entered except for consent, Kelleher responded "Not necessarily." R. 40, ll. 1-3. He made clear that he was assuming that consent had been obtained because a search warrant had not. R. 40, ll. 10-15.

Officer Brian Chapman also testified. Chapman testified that he entered the residence without a search warrant. It was his understanding that Fraser had asked for verbal consent to search from Lewis. R. 42, ll. 6-18. Chapman conceded that law enforcement went to that particular residence because they knew that Appellant had stayed there in the past. R. 44, ll. 15-18. When

asked specifically if he entered the residence because of consent, he answered that he entered for officer safety and he was not aware of the substance of the conversation between Fraser and Lewis. R. 52, l. 25 – R. 53, l. 5.

Officer Fraser also testified that he knew that Appellant stayed at that location based on his prior experience as an officer patrolling the area. R. 75, l. 10 – R. 76, l. 2. Fraser conceded that Lewis told him that Appellant stayed with him and that he knew which bedroom Appellant stayed in because of his prior dealings with that household. R. 76, l. 11 – 77, l. 21. Fraser also testified that Lewis did not give consent to enter the bedroom. R. 88, ll. 13-15. In fact, Fraser testified that law enforcement did not really obtain consent to search, so much as they just followed Lewis into the house. R. 89, ll. 7-21.¹

Appellant testified that he stayed at the house, and had given Lewis \$40 to stay there for the entire week. He also testified that he had a key to the residence. R. 98, ll. 1-17. He further testified that he kept all of his clothes, including his underwear at Lewis's house. R. 99, ll. 2 - 15. He also kept his toothbrush and his deodorant at that address. R. 99, lines 16 -- 20.

Defense counsel objected to the search, and argued that Lewis did not have the authority to consent to the search. R. 105, l. 1 – R. 112, line 3. The prosecution argued that Appellant did not have any expectation of privacy in the bedroom. R. 112, ll. 5 - 17. After lengthy argument, the trial court judge found that appellant did not have any expectation of privacy:

Well, respectfully I think there was no expectation of privacy. I think Richard Lewis gave permission and he was the only one home and I'm not going to suppress the results of that search or the results of that arrest.

R. 117, ll. 18-23.

¹ At trial, Lewis testified that "Yes. They came in with me. They were supposed to wait at the door but as we were coming in someone knocked the screen out my window in front and they all rushed the house the same time." R. 372, ll. 4-7.

The trial court judge erred because Appellant had a reasonable expectation of privacy, and law-enforcement and could not reasonably have believed that Lewis had the authority to consent to the search of the bedroom occupied by Appellant, or that Lewis in fact so consented. By holding that the warrantless search was proper based upon consent by Lewis, this Court implicitly held that Appellant had a reasonable expectation of privacy in the home, and specifically in the bedroom.² However, this Court misapprehended the facts and the law in determining law enforcement entered based upon consent.

The South Carolina Supreme Court adopted the test regarding third-party consent articulated in U. S. v. Matlock, 415 U.S. 164 (1974):

In Matlock, the test devised for determining whether a third party had sufficient status to consent to a search was whether the third party possessed common authority over or had some other sufficient relationship to the premises or effects searched.

State v. Middleton, 266 S.C. 251, 258-59, 222 S.E.2d 763, 766 (1976).

Common authority is defined as "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable" for the searching officers to believe that the person granting consent had the authority to do so. State v. Moultrie, 271 S.C. 526, 248 S.E.2d 486 (1978); see also Illinois v. Rodriguez, 497 U.S. 177 (1990). In Moultrie, the South Carolina Supreme Court found that the owner of the home had common authority and a sufficient relationship to the premises to consent to a search. The Court also noted that the defendant was a

² Evidence obtained as a result of an unlawful search constitutes a violation of the Fourth Amendment and is inadmissible at trial. State v. Nelson, 336 S.C. 186, 192 n. 3, 519 S.E.2d 786, 789 n. 3 (1999). When a defendant has a reasonable expectation of privacy in the property being searched, Fourth Amendment rights apply. Minnesota v. Olson, 495 U.S. 91, 95-96 (1990). A reasonable expectation of privacy exists when the defendant has a relationship with the property or property owner. State v. Missouri, 352 S.C. 121, 129, 572 S.E.2d 467, 470-471 (Ct. App. 2002). Appellant's argument concerning the lack of consent in this Petition in no way waives his argument that he had an expectation of privacy in the dwelling and specifically in the bedroom.

guest in that home. Id. at 528-29, 248 S.E.2d at 488. However, in Georgia v. Randolph, 547 U.S. 103, 106 (2006), the United States Supreme Court held that when a physically present co-occupant expressly refuses to consent to a search, law enforcement may not search the area without a warrant even if a co-occupant granted consent. In Randolph, officers arrived at the home of a married couple in response to a domestic dispute. The wife complained of the husband's drug use and consented to the search of the home. The husband unequivocally refused. Id. at 107. Officers searched the residence recovered cocaine. Husband was indicted for possession of cocaine. Id.

Testimony by law enforcement officers demonstrated their awareness that Appellant spent a significant amount of time at the home where Lewis resided, including spending nights there. Therefore, law enforcement understood that Appellant had an expectation of privacy in that home. Additionally, when the officers entered the bedroom, it was evident the room was occupied by Appellant. It was not reasonable for them to believe that Lewis could grant consent to search the property. As a result, law enforcement was obligated to secure a warrant before they entered Appellant's bedroom. Their failure to do so rendered the search and seizure illegal. The trial court judge erred when she found that appellant did not have a reasonable expectation of privacy in that home, especially in light of Appellant's testimony that he paid money to Lewis for the privilege of staying there. This Court erred in concluding Lewis consented to the search or even had the authority to consent to a search.

Regarding Appellant's second issue that the trial judge erred in admitting testimony that the victim identified Appellant in a photographic line-up as the perpetrator although the victim knew and was related to Appellant, this Court cited State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980) for the proposition that photographic identifications that are not the product of unconstitutional procedures are admissible.

Appellant is related to the accuser. Nevertheless, law-enforcement, in connection with this investigation, presented a photo lineup to the accuser to see if he could identify his assailant. At the pretrial hearing, defense counsel objected to the introduction of the six-pack photo identification on the basis that it constituted improper bolstering because the parties knew one another. The State argued that it was not bolstering, but was part of the investigation, "just another piece of evidence." Trial counsel likened the introduction of the photo identification to that of a prior consistent statement. R. 27, l. 1 – R. 28, l. 25. The trial court judge ruled that it would be admissible, R. 29, lines 4-5.

The trial court judge erred when she allowed the State to introduce this evidence, because it improperly bolstered the testimony of the accuser. See State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003) (improper admission of statement that was insufficient to invoke Rule 801(d)(1)(B) improperly bolstered the witness's testimony). As an introduced piece of evidence, this photo lineup was sent back to the jury for their consideration, even though it lacked any probative value. Admission of this photo lineup unduly emphasized the accuser's testimony that he claimed appellant, his relative, committed this crime. It was improper, and Appellant was prejudiced. State v. Gulledege, 277 S.C. 368, 287 S.E.2d 488 (1982); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980).

Respectfully, appellant asks this Court to rehear the matter..

Respectfully submitted,


 Susan B. Hackett
 Appellate Defender

This 8th day of November, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BONDS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Marion Bonds, # 293431, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 8th day of November, 2012.

Susan B. Hackett
 Susan B. Hackett
 Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 8th day
 of November, 2012.

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

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Carmen T. Mullen, Circuit Court Judge

Opinion No. 2012-UP-563 (S.C. Ct. App. filed 10/24/2012)

2010-GS-07, 598-599, 602 & 634.

THE STATE,

RESPONDENT,

V.

MARION BONDS,

PETITIONER

Appellate Case No. 2013-000119

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

SUSAN B. HACKETT

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ATTORNEY FOR PETITIONER.

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1.

Did the Court of Appeals err in finding no violation of Petitioner's right to be free from warrantless searches and seizures guaranteed by the United States Constitution and the South Carolina Constitution where the Court concluded a third party had sufficient status to consent to a search and therefore, the fruits of a warrantless search of Petitioner's bedroom in the home owned by another were admissible, where officers knew Petitioner often stayed in the specific bedroom searched and the third party lacked apparent common authority over the specific bedroom searched?.....5

2.

Did the Court of Appeals err in finding no violation of Petitioner's state and federal right to due process of law where the trial court judge erroneously admitting a photographic line-up, which contained Petitioner's photograph, where the line-up was used to bolster the accuser's testimony concerning the identity of his assailant because the accuser and Petitioner were related and knew each other well?.....12

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 18, 2012.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in finding no violation of Petitioner's right to be free from warrantless searches and seizures guaranteed by the United States Constitution and the South Carolina Constitution where the Court concluded a third party had sufficient status to consent to a search and therefore, the fruits of a warrantless search of Petitioner's bedroom in the home owned by another were admissible, where officers knew Petitioner often stayed in the specific bedroom searched and the third party lacked apparent common authority over the specific bedroom searched?
- II. Did the Court of Appeals err in finding no violation of Petitioner's state and federal right to due process of law where the trial court judge erroneously admitting a photographic line-up, which contained Petitioner's photograph, where the line-up was used to bolster the accuser's testimony concerning the identity of his assailant because the accuser and Petitioner were related and knew each other well?

STATEMENT OF THE CASE

Petitioner was indicted by the Beaufort County Grand Jury for robbery, assault and battery with intent to kill, possession of a pistol by a person convicted of a crime of violence, two counts of trafficking in crack cocaine, and distribution within a school zone. R. 557-564. He was tried before the Honorable Carmen T. Mullen and a jury beginning December 13, 2010. He was represented by Ian Deysach. Angela Tanner prosecuted the case. R. 1-2. The jury found Petitioner guilty of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN), and acquitted him on attempted armed robbery, and acquitted him on trafficking, 10 grams to 28 grams. R. 539, lines 11-20; R. 539, line 25 – R. 540, line 2; R. 540, lines 8-11. The jury found him guilty of unlawful possession of a handgun, the other count of trafficking in cocaine, between 28 grams and 100 grams, and possession with intent to distribute within one-half mile radius of the school. R. 539, lines 21-24; R. 540, lines 3-7; R. 540, lines 12-15. Judge Mullen sentenced Petitioner to ten years for ABHAN, five years for the weapons charge, twenty years for the trafficking conviction, and fifteen years for the proximity conviction. She ordered all sentences to run concurrently. R. 555, line 11 – R. 556, line 5.

Petitioner filed a timely notice of appeal. Petitioner, represented by Elizabeth Franklin-Best, perfected Petitioner's appeal. On October 24, 2012, the Court of Appeals affirmed Petitioner's convictions and sentences. App. 1-2. On November 8, 2012, Petitioner filed a timely petition for rehearing. App. 3-9. On December 18, 2012, the Court of Appeals denied the petition. App. 10.

This petition for writ of certiorari timely follows.

ARGUMENT

I. The Court of Appeals erred in finding no violation of Petitioner's right to be free from warrantless searches and seizures guaranteed by the United States Constitution and the South Carolina Constitution where the Court concluded a third party had sufficient status to consent to a search and therefore, the fruits of a warrantless search of Petitioner's bedroom in the home owned by another were admissible, where officers knew Petitioner often stayed in the specific bedroom searched and the third party lacked apparent common authority over the specific bedroom searched.

Relevant facts

The prosecution alleged that on or about February 17, 2010, Petitioner and another person went to Reginal Holmes' trailer at around 7:00 a.m. and demanded money. Holmes and Petitioner are related. After a brief altercation, Petitioner allegedly shot Holmes in the arm. Petitioner and the other person then left the trailer and approximately three hours later Petitioner was discovered in a closet at a residence purportedly owned by Richard Lewis. Crack cocaine was found in the closet where Petitioner was located, and in other places throughout the house. Crack cocaine was found located in a bathroom under a sink. R. 53, lines 9-21. Petitioner was charged with all of it.

Lewis's street name is "Old School" and he is from New York City. R. 365, line 25 – R. 366, line 9; R. 367, lines 11-15. His mother owned the house where he stayed. R. 366, line 16 – R. 367, line 3. He testified at trial that Petitioner and his girlfriend lived at that residence but had moved out a couple of months before the police descended on the house in February. R. 367, lines 16-25. According to his testimony at trial, he received a phone call from Petitioner that morning and Petitioner wanted to come by his house to "freshen up." R. 368, lines 6-12. Old School also testified that he had significant drug problems over the years, and has used drugs for the last thirty-

five years. He also has had a number of legal problems as result of his drug use, and additional legal problems resulting from his forging his mother's checks. R. 374, line 3 – R. 375, line 10.

Prior to the start of trial, defense counsel moved to suppress the drugs that were recovered in this case because the search and seizure were unlawful. R. 29, lines 6-7. Officer Kelleher testified he had neither a search warrant nor an arrest warrant when police entered the location where Petitioner was ultimately found. This location is approximately two and one-half miles from the site of the shooting. R. 30, line 1 – R. 31, line 12; R. 74, lines 11-20. Prior to approaching this location, law enforcement had gone to other locations looking for Petitioner. R. 31, lines 17-21; R. 56, line 19 – R. 57, line 3; R. 73, lines 4-18; R. 73, line 22 – R. 74, line 9. According to Kelleher's testimony, they received consent from the homeowner, Old School, to enter the house. R. 37, lines 6-8; R. 38, lines 18 – 24. Kelleher admitted that he was uncertain if Old School actually owned the home. R. 39, lines 15-19.

Officer Brian Chapman testified that the accuser and Petitioner's relative, Holmes, told him the police should look for Petitioner at Old School's house. He conceded that law enforcement knew that Petitioner had stayed there in the past. R. 43, line 3 – R. 44, line 18. Kelleher also conceded that his written report noted that Petitioner "often" stayed at that location. R. 63, lines 9- R. 64, line 1. Officer Fraser also testified that he knew that Petitioner stayed at that location based on his prior dealings. R. 75, line 10 – R. 76, line 2. Fraser conceded that Old School told him that Petitioner stayed with him and that he knew which bedroom Petitioner stayed in because of his prior dealings with that household. In fact, that day, Old School told Fraser that Petitioner "still comes by the house and stays with him." R. 76, line 11- R. 77, line 21.

After entering the residence, officers secured the suspects and placed them in patrol vehicles. Thereafter, Fraser searched the bedroom. R. 84, lines 8-24. In the bedroom, law

enforcement located an extra pair of shoes, about the closet, Vaseline on the nightstand, lotion on the dresser, an iron on the dresser, three pairs of jeans on the dresser, some hats and jackets, and some jeans being pressed underneath the mattress. There was also a camouflage jacket on the bed which matched the description the accuser gave of what Petitioner was wearing earlier that morning. R. 85, line 9 – R. 87, line 3. Fraser admitted that he went into the bedroom without the consent of Old School. R. 88, lines 13-15.

Fraser also testified that they did not really obtain consent to search, so much as they just followed him into the house:

- Q: At that point do you get consent again to go into his house?
 A: I Mirandized him and told him why we were there and asked him where the crack was. He said it was under the sink in the bathroom.
 Q: And so were you—you did enter the house, right?
 A: Yes, sir.
 Q: Did you do that because you had already gotten consent earlier in the day?
 A: No, sir.
 Q: Did you do it because you got consent right—
 A: No. He took us in the house.
 Q: So you don't really come out and ask him for consent but you follow him in as he leads you in?
 A: Yes, sir.

R. 89, lines 7-21.

At trial, Lewis testified that: "Yes. They came in with me. They were supposed to wait at the door but as we were coming in someone knocked the screen out my window in front and they all rushed the house the same time." R. 372, lines 4-7.

During the pretrial suppression hearing, Petitioner testified that he stayed at the house, and had given Old School \$40 to stay there for the entire week. He also testified that he had a key to the residence. R. 98, lines 1-17. He further testified that he kept all of his clothes, and underwear at

Lewis's house. R. 99, lines 2-15. Additionally, he also kept his toothbrush and his deodorant at that address. R. 99, lines 16 -- 20.

Defense counsel objected to the search, and argued that Old School did not have the authority to consent to the search. R. 105, line 1 – R. 112, line 3. The prosecutor argued that Petitioner did not have any expectation of privacy in the bedroom. R. 112, lines 5-17. After lengthy argument, the trial court judge found that Petitioner did not have any expectation of privacy: "All right, Well, respectfully I think there was no expectation of privacy. At the Richard Lewis gave permission and he was the only one home and I'm not going to suppress the results of that search or the results of that arrest." R. 117, lines 18-23.

The trial court judge erred because Petitioner had a reasonable expectation of privacy and law enforcement could not reasonably have believed that Old School had the authority to consent to the search of the bedroom occupied by Petitioner. Concerning this issue, the Court of Appeals cited State v. Laux, 344 S.C. 374, 544 S.E.2d 276 (2001) for the authority of a third person to consent to a warrantless search. Thus, the Court of Appeals correctly held Petitioner had a reasonable expectation of privacy, but erroneously concluded Old School had authority to consent to the search of the bedroom occupied by Petitioner. The state failed to file a petition for rehearing or in any way challenge the Court of Appeals' holding that Petitioner had a reasonable expectation of privacy; therefore, this is the law of the case. Nevertheless, in the event, this Court disagrees with Petitioner's position concerning the finding by the Court of Appeals, Petitioner will address both is reasonable expectation of privacy and Old School's lack of authority to consent to the search.

Discussion

The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; see also, S.C. Const. art. I, § 10. Protection under

the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Oliver v. United States, 466 U.S. 170, 177 (1984). The essence of the Fourth Amendment is to protect a person's right to be free from unreasonable government intrusions in his own home. Kyllo v. United States, 533 U.S. 27, 31 (2001). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840.

In Minnesota v. Olson, 495 U.S. 91, 94 (1990), the United States Supreme Court held that an overnight guest had a reasonable expectation of privacy in another's home. The defendant's status as an overnight guest was enough to show he had a legitimate expectation of privacy that society recognized as reasonable. Id. at 96. Therefore, the defendant was permitted to challenge the search. Id. at 100. This Court found a defendant had a reasonable expectation of privacy in an apartment where he was a guest. State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004). This Court was persuaded that the defendant expected privacy in the apartment of his "good friend," with whom he had grown up and frequently visited. In the past, the defendant had spent the night occasionally. The defendant explained he felt comfort at the apartment. He had a key and kept a change of clothes there. He was present in the apartment as a social guest and had been there for at least seven hours prior to the execution of the search. Id. at 115, 603 S.E.2d at 597. This Court held "[b]y choosing to share the privacy of their home with [defendant] on several occasions in the past and on the occasion in question, both the [homeowners] and [defendant] demonstrated a subjective expectation of privacy, and that expectation, we hold is one that society is prepared to recognize as reasonable." Id. at 115, 603 S.E.2d at 597-598.

Turning to the issue of third party consent regarding searches and seizures, this Court adopted the test articulated in U.S. v. Matlock, 415 U.S. 164 (1974):

In Matlock, the test devised for determining whether a third party had sufficient status to consent to a search was whether the third party possessed common authority over or had some other sufficient relationship to the premises or effects searched.

State v. Middleton, 266 S.C. 251, 258-59, 222 S.E.2d 763, 766 (1976). Common authority is defined as "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable" for the searching officers to believe that the person granting consent had the authority to do so. State v. Moultrie, 271 S.C. 526, 248 S.E.2d 486 (1978); see also Illinois v. Rodriguez, 497 U.S. 177 (1990). However, in Georgia v. Randolph, 547 U.S. 103, 106 (2006), the United States Supreme Court held that when a physically present co-occupant expressly refuses to consent to a search, law enforcement may not search the area without a warrant even if a co-occupant granted consent.

In Moultrie, this Court found that the owner of the home had common authority and a sufficient relationship to the premises to consent to a search. This Court also noted that the defendant was a guest in that home. Id. at 528-29, 248 S.E.2d at 488. Additionally, the Moultrie Court recognized that a landlord may not validly consent to a search of a tenant's room. Id. at 529, 248 S.E.2d at 487-488 (citing Chapman v. United States, 365 U.S. 610 (1961)).

In Laux, 344 S.C. at 377, 544 S.E.2d at 277, this Court held a consent to search may be valid if based upon apparent authority of a third party. "[D]eterminations of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" Id. (quoting Rodriguez, 497 U.S. at 188). This Court found the officer had a

reasonable belief that a third party had authority to consent to the search because others told the officer the third party lived with the defendant, the third party answered the door of the defendant's home in bedclothes at 11:15 a.m., and described the apartment as hers. *Id.* at 377-378, 544 S.E.2d at 277-278.

By their own testimony, law enforcement officers were aware that Petitioner spent a significant amount of time at the home where Old School resided. They knew that he spent nights there, and they were aware that the accuser also stated that Petitioner spent time there because he was the one who directed them to that location. In short, law enforcement understood that Petitioner had a reasonable expectation of privacy in that home. Federal and state jurisprudence in this area makes clear that Petitioner had a reasonable expectation of privacy in the home.

The evidence is equally clear that Old School did not have apparent authority to consent to a search of Petitioner's bedroom. Old School and Petitioner were grown men living in the same trailer. Based upon their ages and gender, it was unreasonable for officers to believe the two shared the bedroom.

II. The Court of Appeals erred in finding no violation of Petitioner's state and federal right to due process of law where the trial court judge erroneously admitting a photographic line-up, which contained Petitioner's photograph, where the line-up was used to bolster the accuser's testimony concerning the identity of his assailant because the accuser and Petitioner were related and knew each other well.

Relevant facts

Petitioner and his accuser are related. Nevertheless, law-enforcement, in connection with the investigation, presented a photo lineup to the accuser to see if he could identify his assailant. At the pretrial hearing, defense counsel objected to the introduction of the six-pack photo identification on the basis that it constituted improper bolstering because the parties knew one another. The prosecution argued that it was not bolstering, but was part of the investigation, "just another piece of evidence." Trial counsel likened the introduction of the photo identification to that of a prior consistent statement. R. 27, lines 1 – R. 28, lines 25. The trial court judge ruled that it would be admissible. R. 29, lines 4-5.

Discussion

The Court of Appeals erred in affirming the prosecution's introduction of the line-up because it improperly bolstered the testimony of the accuser. See State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003) (improper admission of statement that was insufficient to invoke Rule 801(d)(1)(B) improperly bolstered the witness's testimony). The Court of Appeals cited State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980) for the proposition that photographic identifications that are not the product of unconstitutional procedures are admissible. Thus, the Court of Appeals analyzed the error using the wrong principles of law. Petitioner's allegation of error was not challenging the admissibility of the photographic line-up as unduly suggestive. Rather, Petitioner

challenged the admissibility of the line-up as it bolstered the accuser's testimony. As an introduced piece of evidence, this photo lineup was sent back to the jury for their consideration, even though it lacked any probative value. Admission of this photo lineup unduly emphasized the accuser's testimony that he claimed Petitioner, his relative, committed this crime. It was improper, and Petitioner was prejudiced. State v. Gullledge, 277 S.C. 368, 287 S.E.2d 488 (1982); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980).

CONCLUSION

Petitioner respectfully asks this Court to reverse his convictions, and grant him a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 21st day of March, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 Certiorari to Beaufort County

Carmen T. Mullen, Circuit Court Judge

 Opinion No. 2012-UP-563 (S.C. Ct. App. filed 10/24/2012)
 2010-GS-07, 598-599, 602 & 634.

THE STATE,

RESPONDENT,

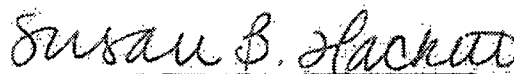
V.

MARION BONDS,

PETITIONER

 CERTIFICATE OF SERVICE

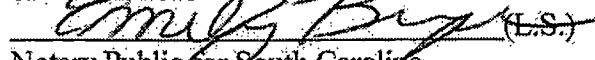
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals and Marion Bonds, # 293431, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 21st day of March, 2013.



Susan B. Hackett
 Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
 of March, 2013.

 (L.S.)
 Notary Public for South Carolina
 My Commission Expires: November 16, 2022.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2013-0001119

THE STATE,

Respondent,

vs.

MARION BONDS,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

I.

The Court of Appeals correctly determined that the investigators' search of the residence was performed with consent from a party with apparent authority over the premises. Additionally, exigent circumstances justified the search regardless of any obtained consent, and the evidence was discovered in plain view. Furthermore, Petitioner did not have a reasonable expectation of privacy in the residence searched.

II.

The Court of Appeals correctly found that the admission of the photo line-up did not improperly bolster the victim's testimony. Moreover, even if the admission of the photo line-up amounted to improper bolstering, any error was harmless.

STATEMENT OF THE CASE

Procedural History

On March 25, 2010, a Beaufort County Grand Jury indicted Petitioner for assault and battery with intent to kill, unlawful possession of a handgun by a person convicted of a crime of violence, attempted armed robbery, trafficking in crack cocaine (28 grams or more but less than 100 grams), trafficking in crack cocaine (more than 10 grams but less than 28 grams), and possession with intent to distribute crack cocaine within a one-half mile radius of a school. (R. pp. 557-564.)

On December 13, 2010, Petitioner proceeded to trial on all charges. The Honorable Carmen T. Mullen presided over the trial. (R. p. 1.) Ian Deysach represented Petitioner, and Angela Tanner represented the State. (R. p. 2.)

On December 16, 2010, the jury found Petitioner guilty of the following crimes: 1) assault and battery of a high and aggravated nature, 2) unlawful possession of a handgun by a person convicted of a crime of violence, 3) trafficking in crack cocaine (28 grams or more but less than 100 grams), and 4) possession with intent to distribute crack cocaine within a one-half mile radius of a school. (R. pp. 538-39.) The jury found Petitioner not guilty of the following crimes: 1) assault and battery with intent to kill, 2) trafficking in crack cocaine (10 grams or more but less than 28 grams), and 3) attempted armed robbery. (R. pp. 538-39.)

After the jury returned the verdict, Judge Mullen sentenced Petitioner to ten years of imprisonment for assault and battery of a high and aggravated nature, five years of imprisonment for unlawful possession of a handgun by a person convicted of a crime of violence, twenty years of imprisonment for trafficking in crack cocaine (28 grams or more but less than 100 grams), and fifteen years of imprisonment for possession with intent to

distribute crack cocaine within a one-half mile radius of a school. (R. pp. 555-56.) Judge Mullen ordered all sentences to run concurrently. Petitioner filed a notice of appeal on December 23, 2010.

On October 24, 2012, the Court of Appeals affirmed Petitioner's convictions and sentences. (App. pp. 1-2.) On November 8, 2012, Petitioner filed a petition for rehearing. (App. pp. 3-9.) On December 18, 2012, the Court of Appeals denied the petition for rehearing. (App. p. 10.) On March 21, 2013, Petitioner filed a petition for writ of certiorari. This return follows.

Factual History

On February 17, 2010, Petitioner went to his cousin's, Reginal Holmes ("Holmes"), residence and shot Holmes. (R. p. 172; R. p. 178; R. p. 181; R. p. 187.)

At trial, Holmes testified that on February 17, 2010, a little before 7:00 a.m., Petitioner and another individual showed up at Holmes' residence, pointed a gun at Holmes, and demanded money. (R. pp. 175-76; R. pp. 177-78.)

Around 7:00 a.m. that morning, Corporal Paul Green and Investigator John Kelleher responded to a "shots fired" call at Holmes' residence. (R. pp. 152-153; R. pp. 239-240.) When Corporal Green arrived at the scene, he saw Holmes' gunshot wound. (R. p. 155.) Eventually, Holmes took an ambulance to the hospital. (R. p. 183.)

Approximately 9:00 a.m. that morning, Petitioner called Richard Lewis ("Lewis") to see if Petitioner could come over to Lewis' house ("residence") in order to "freshen up." (R. p. 187.) Lewis told Petitioner he could come over. (R. p. 187.) Around 9:30 a.m., Petitioner arrived at the residence. (R. p. 190.) Lewis had to let Petitioner inside the residence because Petitioner did not have key. (R. pp. 368-69.)

According to Lewis, Petitioner used to live with Lewis at the residence; however, Petitioner moved out a few months before the February 17, 2010 shooting. (R. p. 367.) Lewis' mother owned the residence. (R. p. 367.) On the day of the shooting, Lewis was the only person residing in the trailer. (R. p. 367.) On occasion, Petitioner would pay Lewis \$40 a week to stay at the residence; however, Petitioner did not pay Lewis any money to stay at the residence on the day of the shooting. (R. p. 389.)

At trial, Investigator Jeremiah Fraser testified that he went to the hospital with Investigator Brian Chapman to interview Holmes on the day of the shooting. (R. pp. 312-13.) After questioning Holmes, the two investigators were able to determine two suspects in the shooting – Petitioner and Jason Thomas (“Thomas”). (R. pp. 313-14.) Moreover, Holmes gave the investigators a list of addresses where Petitioner and Thomas might be hiding. (R. p. 315.)

First, the investigators searched the area where the shooting occurred for Petitioner and Thomas. (R. p. 314.) Next, the investigators went to three different homes to look for Petitioner and Thomas. (R. pp. 314-15.) However, the investigators were unsuccessful in locating the two suspects at that point. (R. pp. 314-15.) Finally, around 10:00 a.m. on the day of the shooting, the investigators went to the residence. (R. p. 315.)

When the investigators arrived at the residence, they heard loud, heavy movement inside the trailer, which indicated to them that something was going on inside the trailer. (R. p. 316.) Thereafter, Investigator Fraser walked to the back door and made contact with Lewis. (R. p. 316.) Investigator Fraser asked Lewis if Petitioner and Thomas were inside the trailer. (R. p. 316.) Lewis told Investigator Fraser that Petitioner and Thomas were in the back bedroom. (R. pp. 316-17.)

At that time, Lewis told the investigators that he was the only one that lived in the residence. (R. p. 93.) Additionally, Lewis told the investigators that Petitioner moved out of the residence months ago; however, Petitioner stayed at the residence a week before the shooting. (R. p. 94.)

According to Investigator Fraser, Investigator Kelleher, and Investigator Chapman, Lewis gave the investigators consent to go inside the trailer to search for Petitioner and Thomas. (R. p. 38; R. p. 42; R. p. 317.) However, Lewis testified that he wanted to go inside and tell Petitioner and Thomas to come outside and talk to the police. (R. p. 390.) Before Lewis could go inside to mediate, everyone heard a loud crash from the back bedroom window. (R. pp. 390-91.) Thereafter, Investigator Fraser and Investigator Chapman entered the trailer. (R. p. 317; R. p. 391.) Police surrounded the trailer. (R. p. 317.) At trial, Lewis stated he gave Investigator Fraser "implied permission" to enter the residence in order to search for Petitioner and Thomas. (R. p. 397.)

When the investigators first entered the trailer, they walked to the back bedroom where they heard all of the commotion. (R. pp. 317-18.) Before the investigators got to the back bedroom, a man named Larry Holmes came out of the bathroom; Investigator Fraser detained him and passed him back to Investigator Chapman. (R. p. 318.) Thereafter, the investigators heard a window slam.

Once Investigator Fraser heard the window slam, he hit on the bedroom door. (R. p. 318.) As soon as the door opened, Investigator Fraser saw Thomas running towards him. (R. p. 319.) Investigator Fraser detained Thomas and passed him back to Investigator Chapman. (R. p. 319.) Investigator Fraser did not see Petitioner until Investigator Fraser yelled for Petitioner to show his hands. (R. p. 319.) Petitioner

displayed his hands on the closet floor. (R. p. 319.) Petitioner was lying on the closet floor on top of a camouflage jacket. (R. p. 323.) Because Holmes told the investigators that Petitioner was wearing a camouflage jacket when Petitioner shot him, Investigator Fraser removed the jacket from the floor to keep as evidence. (R. p. 320; R. p. 324.) Once Investigator Fraser moved the camouflage jacket, he saw a shoe that contained a large quantity of crack cocaine. (R. p. 320; R. p. 324.) In addition, the investigators found two pill bottles containing crack cocaine underneath the mattress in the bedroom where Petitioner was found. (R. p. 320.)

At 10:37 a.m., after the police detained Petitioner, Lewis signed a consent form, which allowed the investigators to search the house for a weapon. (R. p. 392; R. p. 396.)

After the investigators processed the residence, they returned to their office. (R. p. 328.) At that point, Petitioner was in jail and the investigators began listening to the phone calls Petitioner was making. (R. p. 328.) Petitioner called Lewis and asked Lewis to get Petitioner's drugs of the trash can. Petitioner told Lewis to hold on to the drugs. (R. p. 376; R. p. 424.) When Lewis looked in the trash can, he found crack cocaine. (R. p. 376.)

Thereafter, Investigator Fraser sent Corporal Green to the residence to secure the residence. (R. p. 329.) Once Investigator Fraser arrived at the residence, he immediately spoke with Lewis. (R. p. 329.) At that time, Lewis gave Investigator Fraser consent to enter the residence. (R. p. 329; R. p. 396.) Lewis took Investigator Fraser inside the residence and showed him the crack cocaine that Lewis hid underneath the bathroom sink. (R. p. 329.)

On February 18, 2010, the day after the shooting, Investigator Kelleher prepared a photo line-up and presented it to Holmes. (R. p. 329.) Holmes identified Petitioner and Thomas from the photo line-up. (R. p. 329.)

During the suppression hearing, Petitioner's trial counsel moved to suppress the drugs found in both searches of the residence. In addition, Petitioner's trial counsel objected to the introduction of the photo line-up identification made by Holmes.

At the suppression hearing, Petitioner testified he stayed at the residence a week before the February 17, 2010 shooting. (R. p. 98.) Most of the time, Petitioner stayed at his girlfriend's house. Although Lewis testified at trial that Petitioner did not pay him any money to stay at the residence on February 17, 2010, Petitioner claimed he paid Lewis \$40 to stay the week of February 17, 2010. (R. p. 98.) Furthermore, Petitioner claimed he owned the clothes, toothbrush, deodorant, and lotion found in the back bedroom of the residence. (R. p. 99.) However, the address listed on Petitioner's license was his mother's address. Moreover, all of Petitioner's mail went to his mother's address. (R. p. 103.) Ultimately, the trial judge denied Petitioner's trial counsel's motion to suppress the evidence found during the searches of the residence and denied the motion to suppress the photo line-up identification. (R. p. 29; R. p. 117.)

After analyzing the crack cocaine found in the residence, Renata Berry ("Berry"), an expert in forensic chemistry, testified regarding the quantity of crack cocaine that was found in the residence. (R. pp. 348-59.) According to Berry, during the first search of the residence, the investigators found 43.04 grams of crack cocaine located in Petitioner's shoe, 5.80 grams of crack cocaine in a pill bottle located underneath a mattress, and 16.30 grams of crack cocaine in a pill bottle located underneath a mattress. In total, the investigators found 65.14 grams of crack cocaine in the back bedroom during the first

search. (R. pp. 353-59.) During the second search of the residence, the investigators found 20.40 grams of crack cocaine located underneath the bathroom sink. (R. pp. 356-57.)

ARGUMENT

I.

The Court of Appeals correctly determined that the investigators' search of the residence was performed with consent from a party with apparent authority over the premises. Additionally, exigent circumstances justified the search regardless of any obtained consent, and the evidence was discovered in plain view. Furthermore, Petitioner did not have a reasonable expectation of privacy in the residence searched.

Petitioner maintains the trial judge erred in not suppressing the evidence recovered in the search of the residence. Petitioner asserts that he had a reasonable expectation of privacy, and the officers could not have reasonably believed Lewis when he informed them that Petitioner no longer lived at the residence. However, the investigators had consent to search the home from a person with apparent authority over the residence. Additionally, the search was further justified by exigent circumstances, and the crack cocaine was discovered in plain view. The investigators' actions in searching the home were entirely reasonable. Moreover, the trial judge properly refused to suppress the evidence because Petitioner did not have a reasonable expectation of privacy in the residence. Therefore, the evidence found in the search was properly admitted at trial, and the trial judge's ruling is supported by the evidence. For these reasons, Petitioner's conviction should be affirmed.

Standard of Review

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is *any* evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004) (emphasis added). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009). The reviewing court may conduct its own

review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). The appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005).

General Fourth Amendment Law

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " United States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) the automobile exception; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Additionally, exigent circumstances can justify a warrantless search of a home

which would otherwise be unreasonable. State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009).

A. Consent

Even if Petitioner had a reasonable expectation of privacy at the residence, Lewis, the primary tenant of the residence, gave the investigators consent to enter the residence to search for Petitioner and Thomas. (R. p. 38; R. p. 42; R. p. 317; R. p. 396.) When the investigators found Petitioner hiding in the closet, they saw Petitioner lying on top of a camouflage jacket and his shoe, which contained 43.04 grams of crack cocaine. (R. p. 320; R. p. 324.) Additionally, after the investigators detained Petitioner, Lewis gave the investigators consent to search the residence for a weapon. (R. p. 392; R. p. 396.) Thereafter, the investigators found two pill bottles containing crack cocaine underneath a mattress in the bedroom where Petitioner was found.¹ Furthermore, when the investigators returned to the residence later that day, Lewis gave the investigators consent to search the residence when he led the investigators to the crack cocaine that he hid underneath the bathroom sink. (R. p. 329; R. p. 396.) Moreover, because Lewis had common authority over the residence, his consent to both of the searches was valid. Therefore, the trial judge properly ruled Lewis consented to the search of the residence. (R. p. 117.)

¹ During the first search of the residence, the investigators found 43.04 grams of crack cocaine located in Petitioner's shoe, 5.80 grams of crack cocaine in a pill bottle located underneath a mattress, and 16.30 grams of crack cocaine in a pill bottle located underneath a mattress. In total, there was 65.14 grams of crack cocaine found in the bedroom during the first search. Although it is not entirely clear from the record whether or not the investigators found the two pill bottles containing crack cocaine before or after Lewis signed the consent form at 10:37 a.m. that morning, any error would be harmless. Petitioner was charged with trafficking in crack cocaine 28 grams or more but less than 100 grams. Therefore, the 43.04 grams of crack cocaine that was found in Petitioner's shoe was enough to find Petitioner guilty of trafficking in crack cocaine 28 grams or more but less than 100 grams. In other words, the 22.1 grams of crack cocaine found in the pill bottles underneath the mattress did not increase Petitioner's trafficking charge.

i. When the police first arrived at the residence, Lewis consented to a search of the residence in order to detain Petitioner and Thomas, and Lewis consented to the search of the residence in order to find the weapon used in the shooting.

A warrantless search may be justified based on consent obtained from a third party. Flowers, 360 S.C. at 5, 598 S.E.2d at 728. In order to give consent, the third party must have "common authority over or some other sufficient relationship to the premises or effects being searched." Id.; see United States v. Matlock, 415 U.S. 164, 171 (1974) ("These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or sufficient relationship to the premises or effects sought to be inspected."). "Common authority is defined as mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for officers to believe the person granting consent has the authority to do so." State v. Laux, 344 S.C. 374, 376, 544 S.E.2d 276, 277 (2001).

Furthermore, landlords and hotel managers may not validly consent to a search of a tenant or hotel guest's room. State v. Moultrie, 271 S.C. 526, 529, 248 S.E.2d 486, 487-488 (1978). However, where no landlord-tenant relationship exists, a host can validly consent to a search of premises occupied by a guest. Id. at 529, 248 S.E.2d at 488. Guests assume the risk home residents will allow others into the premises. Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916. In the case at hand, Lewis gave the investigators consent to search the residence for Petitioner and Thomas. In addition, after the investigators detained Petitioner and Thomas, Lewis signed a consent form to allow the

investigators to search the residence for the weapon used in the shooting. (R. p. 392; (R. p. 396.)

During the trial, Investigator Fraser testified Lewis gave consent to search the residence for Petitioner and Thomas. (R. p. 317.) Moreover, Lewis testified at trial that he gave the investigators his "implied permission" to enter the residence to search for Petitioner and Thomas. (R. p. 397.) See United States v. Hylton, 349 F.3d 781, 786 (4th Cir. 2003) ("Consent may be inferred from actions as well as words.").

Moreover, because Lewis had common authority over the residence, his consent was valid. At most, Petitioner was Lewis' guest on the morning of the shooting. See Flowers, 360 S.C. at 6, 598 S.E.2d at 728 (noting that the defendant was a guest in his girlfriend's home. The defendant spent approximately five nights a week at the girlfriend's house. Furthermore, he kept a change of clothing at the girlfriend's house and occasionally paid rent); see also Moultrie, 271 S.C. at 529, 248 S.E.2d at 488 ("In this case there is no evidence that appellant was renting the room he shared with the owner's daughter. We hold that where no landlord-tenant situation exists, a host can validly consent to a search of the premises occupied by a guest.").

Furthermore, there was no evidence Petitioner had exclusive possession of the room where the investigators found Petitioner hiding. See Flowers, 360 S.C. at 6, 598 S.E.2d at 728; see also State v. Vaster, 24 Wash. App. 405, 601 P.2d 1292, 1294-95 (1979) (holding where a guest does not maintain exclusive control over any portion of the residence, even if the guest has a legitimate expectation of privacy, a homeowner's power to consent to a search of his own home overrides the objection of a guest to a search).

Here, Lewis resided in the trailer and occasionally allowed Petitioner to stay in the room where Petitioner was found. However, Petitioner did not rent the room that day.

He was just at the residence to "freshen up." As a guest, Petitioner assumed the risk that Lewis would allow others inside the residence. See Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916. In summary, because there is evidence to support the trial judge's finding that Lewis consented to the search, this Court should affirm the trial judge's denial of Petitioner's motion to suppress.

ii. When the police went to the residence the second time, Lewis consented to the search by leading the police to the crack cocaine he hid underneath the bathroom sink.

As mentioned above, "[c]onsent may be inferred from actions as well as words." Hylton, 349 F.3d at 786. In the present case, Petitioner, called Lewis to get Petitioner's crack cocaine out of the trash can located inside the residence. (R. p. 376.) The police heard this entire conversation because Petitioner made the phone call while he was in jail; therefore, the conversation was recorded. Thereafter, Lewis removed the crack cocaine from the trash can and threw it underneath the bathroom sink cabinet. (R. p. 378.) While Lewis was on the phone with Petitioner, Corporal Green was already at the residence in order to secure the scene. (R. p. 377.) Corporal Green told Lewis to come outside. (R. p. 379.) When Investigator Fraser arrived at the residence for the second time that day, Lewis showed Investigator Fraser where he hid the crack cocaine. (R. p. 329.) According to Lewis' testimony, he willingly showed the investigators where he hid the crack cocaine. (R. p. 379.) Moreover, he stated he consented to the investigators searching the residence the second time. (R. p. 379.) Because Lewis consented to the second search of the residence, the trial judge properly admitted the crack cocaine into evidence.

B. Exigent Circumstances

When the investigators visited Holmes in the hospital, Holmes told them that Petitioner was the one that shot him. Furthermore, Holmes informed the investigators that Petitioner might be hiding at the residence. When the investigators arrived at the residence, they heard loud, heavy movement inside the trailer, which indicated to them that something was going on inside the residence. (R. p. 316.) Lewis told Investigator Fraser that Petitioner and Thomas were inside the residence. (R. pp. 316-17.) Lewis testified that he wanted to go inside himself and tell Petitioner and Thomas to come outside and talk to the police. (R. p. 390.) But before Lewis could go inside to mediate, everyone heard a loud crash from the back bedroom window. (R. pp. 390-91.) Faced with exigent circumstances, Investigator Fraser and Investigator Chapman justifiably entered the residence in order to protect their own lives and the lives of others. (R. p. 317; R. p. 391.)

The exigent circumstances doctrine permits law enforcement officers to act without a search warrant where the exigencies of the situation make the officers' course of action immediately imperative. State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). "The exigent circumstances doctrine provides an exception to the Fourth Amendment's protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." Id. "A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement." Herring, 387 S.C. at 210, 692 S.E.2d at 494. Exigent circumstances justifying a warrantless search include an imminent risk of flight from the suspect or a risk of danger to officers or others. Id. at 210, 692 S.E.2d at 494-495. The imminent destruction of evidence can also constitute

exigent circumstances permitting a warrantless search. State v. Simmons, 384 S.C. 145, 174, 682 S.E.2d 19, 34 (Ct. App. 2009).

In Warden v. Hayden, 387 U.S. 294, 298 (1967), the United States Supreme Court considered whether the search of a residence in which a suspected armed robber was believed to have fled to was justified by the exigencies of the situation. Officers were alerted by a cab driver that an armed robbery suspect ran into a particular residence. Id. at 297. The officers responded to the scene within five minutes, entered the home, and searched for the suspect. Id. at 298. Hayden challenged the lawfulness of the search, and the Supreme Court found the search was reasonable and justified. Id. The Court concluded:

The police were informed that an armed robbery had taken place, and that the suspect had entered [a home] less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

Id. at 298-299.

In the case at hand, Holmes informed the investigators that Petitioner shot him. Furthermore, when the investigators arrived at the residence, Lewis informed the investigators that Petitioner and Thomas were inside the residence. The investigators reasonably believed Petitioner was armed and dangerous at that time. Moreover, once the investigators heard the commotion inside the residence, there was an immediate need

to secure the premises and assist potential victims. Because the Fourth Amendment does not require the police to delay their investigation when doing so would cause a grave danger to their lives or the lives of others, the investigators search of the residence was reasonable.

C. Plain View

Furthermore, the crack cocaine the investigators discovered underneath Petitioner's camouflage jacket was properly found in plain view. See State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999) ("Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence."). "In order for evidence to be seized under the plain view exception, three things must be shown: 1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities." Id.

First, in the case at hand, the investigators obtained consent to search the residence and had exigent circumstances that justified their initial entry. Therefore, the initial intrusion which afforded the investigators the plain view was lawful.

Second, the discovery of the crack in the tennis shoe was inadvertent. Holmes told the investigators that Petitioner was wearing a camouflage jacket when Petitioner shot him. Therefore, when the investigators saw Petitioner lying on top of the camouflage jacket, the investigators properly seized the jacket under the plain view doctrine. Moreover, once the investigators removed the jacket, they saw, in plain view, what appeared to be crack cocaine located in Petitioner's shoe.

Finally, the incriminating nature of the evidence was immediately apparent to the seizing authorities. In Beckham, the court held that the latex gloves located in the defendant's home was in plain view of the officers. Id. The defendant's accomplice told the officers that the defendant wore gloves during the commission of the murder. Id. Therefore, the trial judge properly admitted the gloves into evidence. Id. Although a camouflage jacket in itself is not incriminating, the fact that the victim told the investigators that Petitioner was wearing the jacket when Petitioner shot the victim made the jacket incriminating. Moreover, once the investigators removed the jacket, they saw the crack cocaine in Petitioner's shoe.

In summary, the trial judge's decision to admit the evidence was supported by consent, exigent circumstances, and the plain view doctrine, and her ruling was supported by the evidence. See Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings.")

D. Reasonable Expectation of Privacy

A criminal defendant asserting a challenge to an allegedly unreasonable search and seizure must establish his own personal Fourth Amendment rights were violated. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987). "[C]apacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978) (citing Katz v. United States, 389 U.S. 347, 353 (1967)). A subjective expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable. Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990). "Although a

person present only intermittently or for a purely commercial purpose does not have a reasonable expectation of privacy, an overnight guest may have a reasonable expectation of privacy in the host's property." Flowers, 360 S.C. at 5, 598 S.E.2d at 728.

In State v. Missouri, this Court held that the defendant had a reasonable expectation of privacy. 361 S.C. 107, 115, 603 S.E.2d 594, 598 (2004). The police found the defendant in an apartment standing over a large quantity of crack cocaine. 361 S.C. at 110, 603 S.E.2d at 595. Although the defendant did not reside in the apartment, the defendant testified that the apartment was a "place of comfort and solace for him and that he felt a sense of privacy there." Id. The defendant did not stay at the apartment the night before the search took place, and the tenants of the apartment testified that they could not remember the last time the defendant stayed at their apartment. Id. The defendant would sometimes have a key to the apartment and kept clothes here. 361 S.C. at 115, 603 S.E.2d at 597. Furthermore, the defendant did not pay to stay at the apartment. Id. Moreover, the defendant was at the apartment for at least seven hours before the search occurred. Id. Because there were facts to support the trial judge's finding that the defendant had a reasonable expectation of privacy, the Court upheld the trial court's decision. 361 S.C. at 115, 603 S.E.2d at 598.

In the case at hand, Petitioner did not have a legitimate expectation of privacy in the residence. On the day of the shooting, Petitioner went to the residence to change clothes and freshen up; however, Petitioner was not spending the night. (R. p. 368.) Petitioner had only been at the residence for 30 minutes when the investigators arrived. Moreover, Petitioner did not have a key to the residence. (R. pp. 368-69.)

Although, Lewis' mother owned the residence, Lewis was the only person living in the residence on February 17, 2010. Additionally, Lewis told the investigators that

Petitioner moved out of the residence months before the shooting occurred. (R. p. 367.) Although Petitioner did have some clothing and toiletries at the residence, he testified during the suppression hearing that he primarily lived at his girlfriend's house. (R. p. 98.) Furthermore, the investigators went to three other residences before they found Petitioner at the residence. (R. p. 73-74.) Petitioner's aunt told the investigators that Petitioner stayed with her from time to time. (R. p. 74.)

Without a legitimate expectation of privacy in the residence searched, Petitioner cannot challenge the search on Fourth Amendment grounds. See Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916 ("[Bailey] had no possessory or privacy interests in the premises. As a guest, he assumed the risk that the home resident would allow others into the area." (citations omitted)).

Therefore, because there is evidence to support the trial judge's ruling that Petitioner did not have a reasonable expectation of privacy, Petitioner's convictions and sentences should be affirmed.

II.

The Court of Appeals correctly found that the introduction of the photo line-up did not improperly bolster the victim's testimony. Moreover, even if the admission of the photo line-up amounted to improper bolstering, any error was harmless.

On February 18, 2010, the day after the shooting, Investigator Kelleher prepared a photo line-up and presented it to Holmes. (R. p. 247.) Holmes identified Petitioner from the photo line-up. (R. p. 247.) During the pretrial hearing, Petitioner's trial counsel objected to the introduction of the photo line-up because Holmes knew Petitioner. (R. pp. 27-28.) Furthermore, Petitioner's trial counsel argued that because Holmes knew Petitioner, the introduction of the photo line-up identification would amount to improper bolstering. (R. pp. 27-28.) The State argued that the photo line-up identification was not bolstering; it was just part of the investigation and "just another piece of evidence." (R. p. 28.) The trial judge properly ruled in favor of the State and allowed the State to introduce the photo line-up identification at trial. (R. p. 29.)

Standard of Review

"The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Foster, 354 S.C. 614, 620-621, 582 S.E.2d 426, 429 (2003) (citations omitted).

A. Admitting the photo line-up identification did not amount to improper bolstering.

Black's Law Dictionary defines bolstering as the following: "To enhance (unimpeached evidence) with additional evidence. This practice is often considered improper when lawyers seek to enhance the credibility of their own witnesses." Generally,

bolstering is a hearsay objection used when a party improperly offers evidence to support an unimpeached witness or to add credibility to earlier-introduced evidence. State v. Balderas, 915 S.W.2d 913, 919 (Tex. App.-Houston [1st Dist.] 1996, pet. ref'd.) Other times, bolstering objections occur when an attorney makes an implication that the testimony of a witness is corroborated by evidence known to the government but not known to the jury. United States v. Sanchez, 118 F.3d 192, 198 (4th Cir. 1997).

In Foster, this Court held that the witness' prior consistent statement was inadmissible hearsay, which improperly bolstered the witness' own testimony. 354 S.C. at 622-623, 582 S.E.2d at 430. On cross-examination, the defendant questioned the witness about her prior inconsistent statements. 354 S.C. at 619, 582 S.E.2d at 429. Trying to rehabilitate the witness' testimony, the State introduced the witness' prior consistent statement into evidence. Id. This Court looked at the plain language of Rule 801(d)(1)(B) and determined that the witness' prior consistent statement was inadmissible hearsay because the witness had not been charged with recent fabrication or improper motive or influence. 354 S.C. at 622, 582 S.E.2d at 430.

Unlike the statement in Foster, the photo line-up identification in this case is not hearsay. See Rule 801(d)(1)(C), SCRE (1976). Pursuant to Rule 801, prior consistent statements of a witness are not inadmissible hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person." Id.; see also U.S. v. Jarrad, 754 F.2d 1451, 1456 (9th Cir. 1985) (holding one witness may testify regarding an identification made by another witness if the declarant also testifies and is available for cross-examination.).

Because Holmes, the declarant, testified at trial and was available for cross-examination, Investigator Kelleher's testimony regarding Holmes' identification of Petitioner during the photo line-up did not amount to impermissible hearsay.

Furthermore, because Holmes saw Petitioner multiple times a week and had a close personal relationship with Petitioner, his testimony did not need to be bolstered. Holmes' testimony as to the identity of the shooter was much stronger evidence than the photo line-up identification. The purpose of Investigator Kelleher's testimony regarding Holmes' successful photo identification of Petitioner was not to add credibility to Holmes' testimony, but rather to outline the steps the law enforcement officers took during the investigation. Moreover, Holmes' in-court testimony, where he identified Petitioner as the shooter, was more powerful than Investigator's Kelleher's testimony regarding the photo line-up procedure he prepared the day after the shooting occurred.

Moreover, this was not a situation where the solicitor implied that the testimony of a witness was corroborated by evidence known to the government but not known to the jury. In fact, the State did not even mention the photo line-up identification in its closing argument.

In summary, the introduction of the photo line-up identification did not amount to improper bolstering.

B. Even if admitting the victim's photo line-up identification amounted to improper bolstering, any error was harmless.

Error without prejudice does not warrant reversal on appeal. State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt

if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). An admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). When overwhelming evidence of guilt has been established, any trial error may be harmless. State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988).

Here, Holmes testified that Petitioner was the person that shot him. Furthermore, Holmes testified that he knew Petitioner very well and was even familiar with the teardrop tattoo on Petitioner's face. Although Holmes had doubts as to the identity of the second individual at his house during the shooting, Holmes never had any trouble identifying Petitioner as the shooter. Furthermore, the investigators testified the reason they went looking for Petitioner was because Holmes identified Petitioner as the shooter when they first arrived at the scene of the shooting. Therefore, the admission of the photo line-up identification was merely cumulative to the other properly admitted evidence. In summary, if the photo line-up identification improperly bolstered Holmes' testimony as to the identification of the shooter, Petitioner suffered no prejudice.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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BY:
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ATTORNEYS FOR RESPONDENT

April 22, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2013-0001119

THE STATE,

Respondent,

vs.

MARION BONDS,

Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 22nd day of April 2013.

Ellen R. DuBois
ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The Supreme Court of South Carolina

The State, Respondent,

v.

Marion J. Bonds, Petitioner.

Appellate Case No. 2013-000119

Lower Court Case No. 2010-GS-07-598

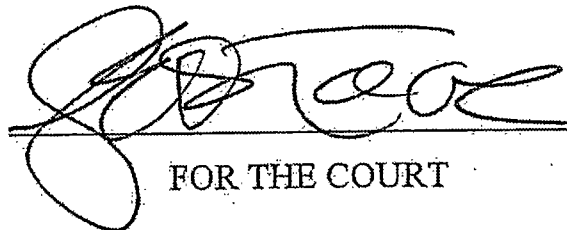
Lower Court Case No. 2010-GS-07-599

Lower Court Case No. 2010-GS-07-602

Lower Court Case No. 2010-GS-07-634

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Bonds*, Op. No. 2012-UP-563 (S.C. Ct. App. filed October 24, 2012). We deny the petition.

 C.J.
FOR THE COURT

Columbia, South Carolina

April 3, 2014

cc:

The Honorable Jenny Abbott Kitchings

John W. McIntosh, Esquire

Salley W. Elliott, Esquire

Susan Barber Hackett, Esquire

Isaac McDuffie Stone, III, Esquire

Julie Kate Keeney, Esquire

Alan McCrory Wilson, Esquire

The Honorable Jerri Ann Roseneau

RECEIVED

APR 3 2014

SC OFFICE OF
APPELLATE DEFENSE

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of Beaufort)

2014-CP07-1950

Marion J. Bonds Jr. 293431)

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

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF)

2014 AUG -8 PM 1:43
CLERK OF COURT
BEAUFORT COUNTY, S.C.**INSTRUCTIONS B READ CAREFULLY**

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

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

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

1. Place of detention Broad River Correctional Inst. 4460 Broad River Rd. Columbia, S.C. 29210
2. Name and location of Court which imposed sentence Beaufort County Court of 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) 2010-GS-07, 598

- (b) 2010-65-07, 599
- (c) 2010-65-07, 602
- (d) 2010-65-07, 634
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 12-16-10 10yrs Concurrent 20yrs
- (b) 12-16-10 5yrs Concurrent 20yrs
- (c) 12-16-10 20yrs
- (d) 12-16-10 15yrs Concurrent 20yrs
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) ☒ after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Direct Appeal Court
- ii. South Carolina Petition Of Habeas Corpus Court
- iii. South Carolina Supreme Court
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. Denied
- iii. Denied
- (c) the date of each such result:
- i. 10-24-2012
- ii. 12-18-2012
- iii. 4-3-2014
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Op. No. 2012-11p-563
- ii. Do NOT Know
- iii. Op. No. 2012-11p-563
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) _____

(b) _____

(c) _____

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

(a) Ineffective Assistance Trial Counsel

(b) Due Process Violation

(c) Ineffective Assistance Of Appellate Counsel

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

(a) Failing to Investigate and Interview Witnesses, And to Secure Witnesses At Suppression Hearing + Trial

(b) ILLEGAL ARREST

(c) Failure to Articulate And Argue the Preserve Meritous Issue of "Illegal Arrest"

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 Ayes to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) Only Could be Raised On (PCR)
(b) _____
(c) _____

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

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

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

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

i. Ian Deyssach

ii. Ian Deyssach

iii. Elizabeth Best

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

i. Trial

ii. Sentencing

iii. Direct Appeal

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

I, Mason J. Bonds Jr, 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.

Mason J. Bonds Jr
Applicant

SWORN or affirmed to and subscribed before me this

5th day of August, 2014.

Susan H. Frye
Notary Public

My Commission Expires

2017

My Commission Expires: _____

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2015 AUG 25 PM 3:04
JEROME ROSENBAU
COUNTY CLERK
Marion Bonds, Jr., #293431

2014-CP-07-1950

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed on August 4, 2014, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. The Applicant was indicted by the March 2010 term of the Beaufort County Grand Jury for Assault and Battery with Intent to Kill (ABWIK) (2010-GS-07-0598), Unlawful Possession of a Handgun (2010-GS-07-0599), Trafficking in Cocaine base, 28 grams or more but less than 100 grams (Cocaine Trafficking) (2010-GS-07-0602), and Possession with Intent to Distribute Crack Cocaine within a One-half Mile Radius of a School (PWID Crack Cocaine) (2010-GS-07-0634). Ian Deysach, Esquire, represented him. On December 16, 2010, the Applicant proceeded to a trial before the Honorable Carmen T. Mullen and a jury. The Applicant was found guilty of Assault and Battery of a High and Aggravated Nature (ABHAN) as a lesser included offense, Unlawful Possession of a Handgun, Trafficking Cocaine, and PWID Crack Cocaine. Judge Mullen sentenced the Applicant to confinement for ten (10) years for ABHAN, five (5) years for Unlawful Possession of a Handgun, twenty (20) years for Trafficking Cocaine, and fifteen (15) years for PWID Crack

Cocaine. These were to be served concurrently.

A notice of appeal was filed and an appeal perfected on the Applicant's behalf. Elizabeth Best, Esquire, represented the Applicant on appeal. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Bonds, Op. No. 2012-UP-563 (S.C. Ct. App. filed October 24, 2012). The Applicant then filed a Petition for Rehearing on November 8, 2012. By Order dated December 18, 2012, The South Carolina Court of Appeals denied the Petition. The Applicant then filed a Petition for Writ of Certiorari on March 21, 2013. The South Carolina Supreme Court denied the petition on April 3, 2014. The Remittitur was issued on April 7, 2014.

II.

In his application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counselor"
 - a. "Failing to investigate and interview witness, and to sever witness at suppression hearing and trial"
2. "Violation of Applicant Due Process rights"
 - a. "Illegal arrest"
3. "Ineffective assistance of appellate counsel"
 - a. "Failure to articulate and argue the preserve meritous [sic] issue of 'illegal arrest'"

Attached herewith and incorporated herein by reference are the records of the Beaufort County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the opinion of the South Carolina Court of Appeals. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Respondent asserts that the Applicant's allegation of ineffective assistance of trial

counsel is without merit. The Respondent also asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

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 v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). 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 v. Washington. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington 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. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant also alleges that he was denied due process of law. The Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a *prima facie* showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

The allegation that appellate counsel was ineffective is without merit. The Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the

Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate 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. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

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

VII.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective and whether the Applicant's appellate counsel was ineffective.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

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By: 
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August 20, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

2014-CP-07-1950

MARION J. BONDS, JR., #293431,)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

AFFIDAVIT OF SERVICE BY MAIL

2015 AUG 25 PM 3:49
 JAMES ARTHUR BROWN, JR.
 BEAUFORT COUNTY, S.C.
 PRESIDENT OF COURT

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James Arthur Brown, Jr.
 Law Offices of Jim Brown, P.A.
 PO Box 592
 Beaufort, SC 29901

DATED this 20th day of August, 2015.


 Elizabeth McLellan Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF COMMON PLEAS
CASE NUMBERS 2014-CP-07-01950

MARION BONDS

APPLICANT

VERSUS

STATE OF SOUTH CAROLINA

RESPONDENT

MAY 18, 2016

TRANSCRIPT OF POST-CONVICTION RELIEF HEARING
BEAUFORT, BEAUFORT COUNTY, SOUTH CAROLINA

BEFORE

HON. BROOKS P. GOLDSMITH, JUDGE

APPEARANCES

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BY THE COURT

1 BEGINNING 9:46 A.M.

2 BY THE COURT:

3 MR. JOHNSON: May it please the Court, your Honor.

4 THE COURT: Yes, sir.

5 MR. JOHNSON: This is Marion Bonds, Jr. versus the
6 State of South Carolina, Case Number 2014-CP-07-1950.
7 Mr. Bonds was indicted the March 2010 term of the
8 Beaufort County Grand Jury for assault and battery with
9 intent to kill; unlawful possession of a handgun;
10 trafficking cocaine base, 28 grams or more, but less
11 than a hundred grams; and possession with intent to
12 distribute crack cocaine within half a mile radius of a
13 school. There were two other charges, one, I think in
14 trafficking, another PWID within a school, which he was
15 found not guilty on.

16 On December 16, 2010, he proceeded to trial before
17 the Hon. Carmen T. Mullen and a jury, pursuant to which
18 he was found guilty of assault and battery of a high and
19 aggravated nature as a lesser-included offense; unlawful
20 possession of a handgun; the trafficking in cocaine; and
21 PWID crack cocaine. Judge Mullen sentenced him to
22 confinement for ten years for the ABHAN; five years for
23 the unlawful possession; twenty years for the
24 trafficking in crack cocaine; and fifteen years for the
25 PWID. All to be served concurrently.

1 A notice of appeal was filed on his behalf, and
2 the appeal was perfected. The Court of Appeals
3 confirmed his conviction and sentence. There was a
4 petition for re-hearing, which was denied. And then
5 there was a petition for writ of certiorari, which was
6 denied by the Supreme Court on April 3, 2014. The
7 remittitur was thereafter issued April 7, 2014. And he
8 filed this immediate action August 4, 2014. The State
9 filed its return on August 20, 2015. And he is
10 represented today by Mr. Jim Brown.

11 THE COURT: Mr. Brown.

12 MR. BROWN: May it please the Court, your Honor.

13 THE COURT: Yes, sir.

14 MR. BROWN: I'm retained on this case. I just
15 thought it was worth saying. And we do -- my client's
16 here and he's got the family. We do have one witness.

17 If you don't mind, I'm going to give you an
18 overview. I think it'll actually really shorten where
19 this is.

20 THE COURT: Yes, sir.

21 MR. BROWN: My client filed a pro se application
22 for post-conviction relief. I filed an amended one. I
23 apologize. I did not put *amended*. It is the typed one.
24 The handwritten one is the pro se one. I adopted the
25 issues that were filed pro se. I left those in, because

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BY THE COURT

1 I didn't want to abandon them, and I'm not saying
2 they're without merit. I will tell you, they are very
3 related to the same issues that were presented on
4 appeal. And so, we'll concede that part that there has
5 been a lot of litigation over the validity of the
6 search.

7 For what it's worth, the lead charge on his
8 incarceration is the trafficking charge. So, to that
9 extent, there are -- the allegations that there had been
10 a robbery with some gun play at one location; then they
11 chased him to a second. Well, didn't chase him, but
12 they tracked him down at a second location. When he was
13 arrested, there were drugs found. And then there were
14 later drugs found following the intercept of a jail
15 phone call.

16 So, long story short, there -- there was an
17 argument about severing the trials, but for the most
18 part, the lead case at this point is the drug case, and
19 not the other cases, which resulted in a mixed verdict.
20 We also have a mixed verdict on the drug cases. But
21 succinctly, the search issue that we're going to present
22 today is that the lawyer did not pre-trial present
23 enough testimony through investigation from the -- one
24 of the tenants of the house that he had sublet a room to
25 my client. And I want to come back to that later,

1 because I do want to put him up, but that's not my lead
2 argument now that I've taken over and amended it, but I
3 did put those in there. And so, I do plan to present
4 Mr. Lewis, who was the, I guess, the sub-landlord. I
5 don't see that kind of word, but it was his family
6 member's house that he then rented a room to my client.

7 And I do have an affidavit that was obtained a
8 couple years back that I'm going to just put him up; get
9 him to review the affidavit. And I think that'll
10 shorten that. But Mr. Lewis is here.

11 And then the other issues deal, and the best way I
12 can say this is, with the multiplicity of the charges,
13 there were two trafficking in cocaine indictments
14 presented for crack found at the same house on the same
15 day. There's also a third charge for an intent to
16 distribute within a half mile of a school. And it is
17 the interplay of those three charges that's before your
18 Honor.

19 My client was convicted of the trafficking that
20 was a larger amount; he was convicted of the intent to
21 distribute; and then he was acquitted on the trafficking
22 of a smaller amount. They were not charged as lesser
23 includeds. And so, there's going to be a lot of law,
24 and not a lot of factual dispute, because I've got a
25 list of pages that I'm going to direct your Honor to

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BY THE COURT

1 that discusses this.

2 I will say at the outset that trial counsel did --
3 he did a great job on the case of making a lot of great
4 legal arguments. And towards the end, he makes this
5 argument about merger, and says, you know, maybe I
6 should have asked you to merge these things. Now, that
7 discussion comes up as the State rests. So he's already
8 had the two trafficking charges presented to the Court.

9 And so, long story short, when they find Mr.
10 Bonds, they do what I'm going to call kind of a search
11 incident to arrest. They're already in there. And I'm
12 not trying to get to the search part of it, but they
13 kind of search the area in the room and they find drugs
14 in more than one spot, in a shoe, under a mattress, here
15 and there. So there are multiple pieces of drugs that
16 they charge him with at the time that he's --
17 contemporaneous with his arrest.

18 He then goes to the jail; there's a phone call
19 that they intercept from the jail, back to, actually,
20 Mr. Lewis. And they ask Mr. Lewis to -- there's a
21 discussion about Mr. Lewis taking care of some stuff for
22 him. And of course, they don't let Mr. Lewis in. They
23 go in and they find more drugs in this -- in a bathroom.
24 And the other drugs are in the bedroom.

25 THE COURT: Okay.

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BY THE COURT

1 MR. BROWN: And of course, the argument that the
2 State -- well, actually, I don't even think it was an
3 issue in the trial -- is that Mr. Bonds had gone there
4 following this other dispute. So it's not like there
5 was a lot of proof that Mr. Bonds had been there on and
6 off. That may be an issue about whether he had
7 standing, but they're not saying that Mr. Bonds had been
8 living there every day. And in fact, on the search
9 issue, they assert that he's only a casual guest and
10 does not have an expectation of privacy. And I pointed
11 that out because that's circumstantial evidence that all
12 the drugs, if possessed by him, were possessed at one
13 time in one place. If I have beers in the cooler, beer
14 in whatever else, out on the dock, it's still all my
15 beer at one time in one place.

16 But long story short, we believe there's a --
17 multiplicity is kind of a fancy word for watch out for
18 double jeopardy. And so, it's when you split charges
19 that should be charged together. And so, the case,
20 believe it or not, the leading case in South Carolina
21 talks about double jeopardy. It does not use the phrase
22 multiplicity. But if you'll notice on the indictments,
23 on the face, the trafficking indictments are identical.
24 They're Indictments Number 6 -- and I have copies, if
25 your Honor would like to see those. And I know they may

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BY THE COURT

1 already be in the -- the Court's record, but it may be
2 best to just incorporate a lower court record into this
3 record. That's what I usually do in capital cases
4 PCRs. That would kind of shorten it.

5 THE COURT: I don't think that I have actually the
6 court record.

7 MR. BROWN: Okay. I understand, your Honor.

8 THE COURT: I have copies of numerous documents
9 handed up to me by the Attorney General.

10 MR. BROWN: Yes, sir. Then, tell you what I --
11 I'm just going to -- if I can take a second and mark
12 these. They're court -- they're copies of court
13 documents. I've given him a copy.

14 THE COURT: The Attorney General's reviewed the --

15 MR. BROWN: If you don't mind, I'm going to go
16 ahead and mark them. I think they're already in, so
17 there wouldn't really be an objection. But that way, I
18 know, for purposes of this record, we can go through
19 with Petitioner's A, B, C, D. If I may just take --

20 THE COURT: Any objection from the Attorney
21 General?

22 MR. JOHNSON: No, your Honor. They're already in
23 your record. So, this is -- this is actually
24 cumulative.

25 MR. BROWN: Maybe so, but I'm assuming they're

1 identified as the items submitted, and I'd rather refer
2 to them by exhibit number.

3 THE COURT: All right. Okay.

4 ITEM IDENTIFIED AS VERDICT FORM
5 MARKED APPLICANT'S EXHIBIT 1
6 ADMITTED AS EVIDENCE.

7 ITEM IDENTIFIED AS INDICTMENT
8 AND ATTACHMENTS
9 MARKED APPLICANT'S EXHIBIT 2
10 ADMITTED AS EVIDENCE.

11 ITEM IDENTIFIED AS INDICTMENT
12 AND ATTACHMENTS
13 MARKED APPLICANT'S EXHIBIT 3
14 ADMITTED AS EVIDENCE.

15 ITEM IDENTIFIED AS INDICTMENT
16 AND ATTACHMENTS
17 MARKED APPLICANT'S EXHIBIT 4
18 ADMITTED AS EVIDENCE.

19 ITEM IDENTIFIED AS INDICTMENT
20 AND ATTACHMENTS
21 MARKED APPLICANT'S EXHIBIT 5
22 ADMITTED AS EVIDENCE.

23 ITEM IDENTIFIED AS INDICTMENT
24 AND ATTACHMENTS
25 MARKED APPLICANT'S EXHIBIT 6

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BY THE COURT

1 ADMITTED AS EVIDENCE.

2 ITEM IDENTIFIED AS INDICTMENT

3 MARKED APPLICANT'S EXHIBIT 7

4 ADMITTED AS EVIDENCE.

5 MR. BROWN: Petitioner's 1 through 7, your Honor,
6 if I could hand those up. 1 is a verdict form. and
7 then the other 2 through 6 are indictments, followed by
8 sentencing sheets, if applicable, and warrants, except
9 on Number 7, I do not have the arrest warrant for it.

10 THE COURT: All right.

11 MR. BROWN: Okay. The two indictments that are
12 listed, one is 602 and one is 603, those were read in
13 their entirety to the jury during the instructions. The
14 warrant body was not. The warrant body does at least
15 list the acts as occurring seven hours -- eight -- seven
16 hours apart. It does actually list the amount of drugs
17 that they're referring to. The jury never hears those.
18 So what happens is there's a trial where the jury is
19 presented two options of trafficking with no distinction
20 as to which drugs that they're supposed to consider.
21 Now, such an instruction, actually, I think would
22 violate our charge on the facts. So I don't think a
23 judge could have said, as to the drugs in the bedroom,
24 because I don't think she gets to charge that way.

25 MR. JOHNSON: Your Honor, I'm going to object to

1 this. This is -- he's making closing argument without a
2 case ever being put up. This is not proper.

3 MR. BROWN: Well, I'll be honest with you. It's
4 in the record already.

5 THE COURT: Well, but where are we headed with all
6 this?

7 MR. BROWN: Because the argument is --

8 THE COURT: Actually, you --

9 MR. BROWN: Yes, sir.

10 THE COURT: I will admit that you helped me
11 understand where you're headed with all this, but I'm
12 inclined to agree with the Attorney General. Isn't it
13 time to go ahead and proceed?

14 MR. BROWN: Okay. We would enter those pieces of
15 evidence.

16 THE COURT: All right.

17 MR. BROWN: And the trans -- the entire trial
18 transcript, not the record on appeal, which I'm assuming
19 is already included.

20 MR. JOHNSON: It's in.

21 MR. BROWN: The entire record, not the -- because
22 the record on appeal that I get is --

23 MR. JOHNSON: I have the trial transcript, not the
24 record on appeal.

25 MR. BROWN: There you go. Trial transcript's what

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BY THE COURT

1 I'm referring to. And if I may ask you to look at these
2 pages, then, essentially, I'm going to ask that you find
3 on my behalf on those arguments, because counsel did not
4 -- did not actively present that. He does it at the
5 directed verdict stage when the State rests; asks for a
6 merger of charges that have already been tried.
7 Jeopardy's attached to both charges at that point in
8 time. And our argument --

9 And if you'd like the pages now, I'll give you the
10 pages. They're already in the record, so, I mean, if
11 your Honor asks for briefing, I can brief it, but I
12 thought that I could direct you to a few pages that
13 discuss this issue or deal with jury instructions, and
14 then that's my case.

15 MR. JOHNSON: And your Honor --

16 MR. BROWN: I did present evidence. I did present
17 those exhibits.

18 MR. JOHNSON: Your Honor, I'm going to move to
19 strike that, because we have not presented a case
20 through live testimony, and I have not --

21 MR. BROWN: That's not required. Present
22 evidence, that's what's required.

23 MR. JOHNSON: Your Honor, if that's his entire
24 case, then I will call witnesses.

25 MR. BROWN: I don't have any problem with him

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BY THE COURT

1 calling witnesses. I mean, I would expect him to. He's
2 going to say there's probably some strategy.

3 THE COURT: You rest. Is that correct?

4 MR. BROWN: Well, I'd like to tell your Honor the
5 pages succinctly. And I would like to mention one thing
6 real quick, too.

7 THE COURT: You going to tell me that all again
8 later?

9 MR. BROWN: Well, at some point in time, but I
10 thought when we called the witnesses, it might be
11 interesting to go through the pages I've separated.
12 There's a discussion --

13 THE COURT: I'm trying to figure out how we can do
14 it without doing it twice, without you going to tell me
15 later on the same thing.

16 MR. BROWN: Well, that's why I'm going to give you
17 the pages now. I tell you, these are the pages I'm
18 relying on. These pages --

19 THE COURT: Okay. Tell me the pages.

20 MR. BROWN: The pages that the directed verdict or
21 jury -- because the State rested, and the Defense ends
22 up resting. Those appear at 125 -- and these are Volume
23 III -- 125, 135, 138 through 141, 138 through 149, 156
24 through 160.

25 THE COURT: The last one was what? 1 what?

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BY THE COURT

1 MR. BROWN: '56 through 160. There are also
2 discussed -- because that's the last page in Volume III,
3 they're also discussed in the first page -- first four
4 pages of Volume IV, which are 5 through 8.

5 Then, in the State's closing argument, Pages 15
6 through 17, the State urges their theory to convict.
7 Then in the -- That's in Volume IV. All of these are
8 Volume IV now. Then in the Defense closing, they
9 discuss the interplay of the charges on 23 through 25 --
10 23 through 28. I apologize. Then the judge's
11 instructions to the jury at Volume IV, at 43 to 46, and
12 62 to 63 as it relates to these charges.

13 And since the transcript pages -- in fact, the
14 entire transcript is in evidence and the indictments are
15 clearly part of the record of the case, but now have
16 been entered as we've entered them with the verdict
17 form, we believe, as asserted in here, that there are
18 multiple multiplicity errors, because he's been charged
19 with --

20 THE COURT: I understand. And aren't you getting
21 ready to tell me all this again at the conclusion of the
22 case?

23 MR. BROWN: There's one other part I did not talk
24 about. During the jury instructions request, nobody
25 asked for the lesser instruction of possession with

1 intent to distribute, even though that was charged as to
2 the same drugs on the proximity charge, using the same
3 inferences. So, if the facts support an intent-to-
4 distribute charge instruction as to those drugs on half
5 mile, it supports that lesser instruction on the other
6 charge. It's the same drugs and the same inferences.

7 In fact, he asked for a directed verdict as to the
8 intent-to-distribute-in-the-proximity charge for other
9 reasons. But your Honor, we argue that that instruction
10 should have been requested, and it was not. I mean,
11 it's not in the record. It was not requested. And we
12 believe if they get it -- if the State gets an
13 instruction on one charge, it can be considered intent
14 to distribute. We believe that that then triggers the
15 lesser on the other. I know our statutes are horribly
16 worded, and they -- really, the General Assembly might
17 want to look at the federal statute, which just talks
18 about an act, and then looks at weight. I mean, I don't
19 know why we want to call it --

20 THE COURT: Anything else?

21 MR. BROWN: Yes, sir.

22 THE COURT: All right.

23 MR. BROWN: To the extent Rule 15 allows, if this
24 becomes a case regarding adequate preservation of the
25 issue by the trial counsel, then we intend, under Rule

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BY THE COURT

1 15, to ask to amend the application and include
2 appellate counsel's deficiency for not arguing it. But
3 we did not plead it that way, because I don't believe
4 under Rule 11 that it was preserved. So I don't believe
5 I can make the appellate argument on the multiplicity.
6 We don't believe it was preserved, at the D.V. stage,
7 after he's already been tried on it.

8 THE COURT: Okay.

9 MR. BROWN: And that's our argument on that. I do
10 have Mr. Lewis. The State's told me that they believe
11 his affidavit is perjurious, since it is sworn.

12 THE COURT: Are you going to call any witnesses?

13 MR. BROWN: I'm going to call Mr. Lewis.

14 THE COURT: You said you weren't going to call
15 anybody. You rested.

16 MR. BROWN: I call Mr. Lewis as to the search
17 issue. I'm not calling him about any other issues.
18 They're matters of law. And actually, I call Mr. Lewis.
19 I'm just going to ask him to adopt this.

20 THE COURT: Call your witness.

21 MR. BROWN: Mr. Lewis.

22 MADAM CLERK: Place your left hand on the *Bible*
23 and raise your right. Do you solemnly swear or affirm
24 that the testimony you give to the Court in this case
25 shall be the truth, so help you God?

1 MR. RICHARD LEWIS: I do.

2 MADAM CLERK: You may be seated.

3 MR. JOHNSON: Your Honor, before he testifies, I
4 would like, if you will, to instruct him concerning
5 perjury, because I believe his affidavit is
6 contradictory to what he testified to under oath at the
7 trial.

8 THE COURT: Do you agree with that?

9 MR. BROWN: I don't agree it's perjury. We
10 actually assert this affidavit as truth.

11 MR. JOHNSON: Then the sworn testimony would be a
12 lie, your Honor.

13 MR. BROWN: I'm not going to make a claim that
14 they're mutually exclusive. Our claim is that had the
15 information in this affidavit been investigated and
16 discovered by trial counsel and argued, the drugs would
17 have been suppressed.

18 MR. JOHNSON: I just don't want to be a part of --

19 MR. BROWN: If I can get this marked.

20 MR. JOHNSON: Remind me to finish my argument. I
21 don't want to be a part of known perjury testimony, and
22 I've advised Mr. Brown that I believe this is going to
23 be that, and we have a duty as lawyers under Rule 11 not
24 to present perjury testimony to the Court.

25 THE COURT: Well, I guess we'll have to see where

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1 that goes.

2 Mr. Brown.

3 MR. BROWN: I've got to get it marked, your Honor.

4 MR. JOHNSON:

5 RICHARD LEWIS

6 DIRECT EXAMINATION BY MR. BROWN:

7 Q. Let me present Mr. Lewis this item that's been
8 marked as Petitioner's 8. Are you familiar with that
9 item?

10 A. Yes, I am.

11 Q. Is that your signature at the bottom?

12 A. Yes, it is.

13 Q. Did you swear to that information as truthful?

14 A. Yes, I do.

15 Q. Is that information truthful?

16 A. Yes, it is.

17 Q. Did you talk to me about that affidavit in my
18 office?

19 A. Yes, I did.

20 Q. Did I prepare that affidavit for you?

21 A. No.

22 MR. BROWN: Your Honor, I move that affidavit in,
23 in lieu of questioning about every issue that's in it,
24 because that's the testimony I intend to elicit. Just
25 trying to shorten it. I know it's not admissible, but

1 I'll ask him the same questions.

2 MR. JOHNSON: Your Honor, I move to keep this out,
3 because he is here, he's live, I can cross-examine him.
4 I do not have a chance to cross-examine an affidavit.

5 MR. BROWN: Well, I think you can absolutely
6 cross-examine. I was trying to shorten it, but I don't
7 mind asking.

8 THE COURT: I sustain the objection.

9 MR. BROWN: Okay.

10 BY MR. BROWN:

11 Q. Mr. Lewis.

12 A. Um-hmm.

13 Q. Tell me about the ownership of a property at
14 28 Ball Park Road on Saint Helena? Who owns that?

15 A. My mother actually owns the property.

16 Q. All right. And what is your relationship to
17 that property?

18 A. I live there. So --

19 Q. Are you a tenant?

20 A. Excuse me?

21 Q. Are you a tenant? What was your relationship
22 at the property?

23 A. I live there, yes, so I guess you could say
24 I'm a tenant. Yes.

25 Q. Okay. And what was the relationship of Mr.

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1 Bonds to that property?

2 A. I allowed him to rent one of the rooms in the
3 trailer.

4 Q. Is it an accurate statement that you entered
5 into a landlord/tenant agreement with Mr. Bonds?

6 A. Yes, I did.

7 Q. Did he pay you money?

8 A. Yes.

9 Q. Okay. And to the extent that he -- was he a
10 tenant in a, was it a room that he sublet?

11 A. It was a room.

12 Q. Okay. Is that the room the police said the
13 drugs were found in?

14 A. That's the room the police said they found --
15 yes.

16 Q. And is that as to all of the rooms where drugs
17 were found? Is that his room? The bathroom and the
18 bedroom?

19 A. The room that -- room where he lives is where
20 the drug is found, so that's the room. The room I
21 rented him is where the drugs were found.

22 Q. And that was the case on February 17, 2010.

23 A. Correct.

24 Q. All right. And if you had been asked that
25 information by defense counsel pretrial, would you have

1 testified the same?

2 A. Yes, I would.

3 Q. All right. Thank you.

4 MR. JOHNSON: May it please the Court, your Honor.

5 RICHARD LEWIS, CROSS-EXAMINATION

6 BY MR. JOHNSON:

7 Q. Mr. Lewis, did you not testify at trial that
8 the defendant was not living with you at the time the
9 drugs were found in that room?

10 A. I don't recall that. I know I did say that he
11 was -- I did rent him the room. I just remember saying
12 that, yes.

13 Q. Do you remember saying that no money was
14 exchanged that day?

15 A. That day, no. No money was exchanged that
16 day.

17 MR. JOHNSON: Court's indulgence, your Honor.

18 THE COURT: All right.

19 MR. JOHNSON: May I approach the witness?

20 THE COURT: Yes, sir.

21 BY MR. JOHNSON:

22 Q. Let the record reflect I'm showing Mr. Lewis
23 Volume III of Mr. Bonds' transcript, Page 63. And sir,
24 I'm not trying to be insulting when I say this. You can
25 read and write?

1 A. Yes.

2 Q. If you would read out loud Lines 3 through 9
3 for the Court, please.

4 A. This line.

5 Q. 3 through 9.

6 A. 3 through 9.

7 *Do you live in the property?*

8 *Yes, I do.*

9 *So you have any roommates?*

10 THE COURT: Slow down.

11 A. *Do you live in the property?*

12 *Yes, I do.*

13 *So you have any roommates?*

14 *No.*

15 *Okay. On February 17th of this year,*
16 *was anyone living with you?*

17 *No, no one was living with me.*

18 *Now, do you have a nickname?*

19 *Yes.*

20 Q. That's all I need you to say. So your
21 testimony at the trial was you had no roommates and
22 nobody was living with you at the property on February
23 17, correct?

24 A. That's what that says.

25 Q. And that's completely different than what you

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BY THE COURT

1 have in this affidavit, is it not, and what you just
2 testified to?

3 A. I believe so.

4 BY THE COURT:

5 MR. JOHNSON: No further questions, your Honor. I
6 move to strike his testimony.

7 MR. BROWN: He's provided the testimony. It's up
8 to the finder of fact in this case, your Honor, to
9 decide which part's credible. That's exactly the same
10 situation --

11 THE COURT: I'm going to deny the motion.

12 MR. BROWN: Thank you. And I would ask that the
13 affidavit be entered. I understand -- and here's why.
14 It is a prior statement that rebuts the idea that he has
15 fabricated this statement. It's prior to this hearing.

16 THE COURT: Say that again.

17 MR. BROWN: Under the rules, you can introduce a
18 prior consistent statement to the extent it's offered to
19 rebut an allegation that it was some type of fake
20 statement made. If I can consult the rule book, your
21 Honor. We believe it is a consistent statement
22 following their suggestion that it was false that we
23 need to bring in. He says his testimony's false. I
24 have a prior consistent statement. That's admissible
25 now that they've suggested his testimony is false.

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BY THE COURT

1 That's what the rule says.

2 THE COURT: What's the attorney going to say?

3 MR. JOHNSON: If I can just have a moment, your
4 Honor.

5 THE COURT: All right.

6 MR. BROWN: Your Honor, I would urge 801(d)(1)(b),
7 consistent with the declarant's testimony offered to
8 rebut an express or implied charge against the declarant
9 of a recent fabrication. 801(d)(1)(b), that's not
10 hearsay.

11 MR. JOHNSON: Your Honor, it says:

12 *Provided, however, the statement must*
13 *have been made before the alleged fabrication.*

14 His original testimony is that there was nobody
15 living there. Now he comes up with this affidavit, and
16 so, it's not before the alleged fabrication. So
17 801(d)(1)(b) is inapplicable here. And it is hearsay.

18 MR. BROWN: And briefly, the idea is that he is
19 now committed perjury on the stand. They're saying that
20 the first testimony was truthful, and that this
21 testimony's fabricated. And that 2014 affidavit pre-
22 dates this testimony and the express statement that this
23 testimony's fabricated. It is a prior consistent
24 statement, prior to the alleged fabrication.

25 THE COURT: I understand what Mr. Brown's saying.

1 I guess your question is which statement is being
2 attacked. This statement's the one being attacked.

3 MR. JOHNSON: Correct. He is attacking the trial
4 statement. I'm attacking the affidavit.

5 THE COURT: You're attacking his statement he just
6 made on the witness stand.

7 MR. JOHNSON: Yes, sir. Correct.

8 THE COURT: He's trying to offer evidence.

9 MR. JOHNSON: Either, to my argument, your Honor,
10 is why this is perjury. He testified under oath at the
11 trial that nobody was living with him. He comes in here
12 now under oath and testifies that Mr. Bonds was living
13 with him. Those are inconsistent statements and one of
14 them is a perjury testimony.

15 THE COURT: I understand. But --

16 MR. JOHNSON: If you're going to let the affidavit
17 in, that's fine. I'm going to ask the solicitor to
18 charge him with perjury.

19 THE COURT: I'm going to overrule the objection
20 and admit it into evidence.

21 MR. BROWN: Thank you, your Honor. And we rest on
22 that to the extent that we've argued that both that
23 trial counsel's deficient for not presenting this
24 information. It was argued twice at trial, your Honor,
25 too.

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BY THE COURT

1 THE COURT: All right.

2 ITEM IDENTIFIED AS AFFIDAVIT

3 OF RICHARD LEWIS

4 MARKED APPLICANT'S EXHIBIT 8

5 ADMITTED AS EVIDENCE.

6 MR. BROWN: And then, that's succinctly it. We do
7 make that claim about --

8 THE COURT: I'm going to hear all this again from
9 you, I know I am.

10 MR. BROWN: Well, we -- then we rest.

11 THE COURT: All right, Mr. Lewis, you may step
12 down.

13 A. Thank you, sir.

14 MR. BROWN: And your Honor, it's worth pointing
15 out, he was granted immunity for his testimony at trial.

16 THE COURT: I'm sorry?

17 MR. BROWN: He was granted immunity for his
18 testimony at trial. I didn't represent him or involved
19 in that proceeding.

20 THE COURT: All right. Now, did I understand you
21 to say, Mr. Brown, you are resting now?

22 MR. BROWN: Yes, sir.

23 THE COURT: All right. Applicant rests.

24 MR. BROWN: Well, subject to the arguments we put
25 in there, that's correct. We've got our evidence in.

1 MR. JOHNSON: Court's indulgence, your Honor.

2 THE COURT: Yes, sir.

3 MR. JOHNSON: Your Honor, the State will rest on
4 the record, and then we'll -- you know, I'll let him
5 argue, but just to give you a roadmap, the issues he's
6 about to argue, counsel argued and they were argued on
7 appeal as far as the search. As far as the indictments
8 were concerned, counsel, in Volume IV, Page 125, I
9 believe, argues for it; it's denied; it is properly
10 preserved. And therefore, under *Ashley versus State* and
11 *Simmons versus State*, it's a direct appeal issue and
12 would not be proper for this forum. I will turn this
13 over Mr. Brown.

14 THE COURT: Mr. Brown.

15 MR. BROWN: And very briefly, your Honor, we then
16 ask if the issue becomes whether it was -- say this
17 correctly. If trial counsel adequately preserved it,
18 and now that issue, which I didn't raise, but now that
19 they're arguing it, we believe that in Rule 15 that we
20 are allowed -- that you need to do a post-judgment if
21 the issue's been argued on the merits, and I believe it
22 now suggests trial counsel -- or appellate counsel
23 deficiency to the extent it was preserved. Under Rule
24 11, I don't believe it was preserved, because it wasn't
25 argued until the State had rested. You can't argue

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BY THE COURT

1 merger for jeopardy purposes after you've been tried on
2 both of them. That's -- jeopardy is the trial -- trying
3 of the matter, being put -- they swore the witnesses,
4 swore the jury, called the witnesses. He did make that
5 argument on 125. We agree. He makes the argument on
6 merger. He does not make all the arguments I make.
7 Now, that's pretty clear, because I'm arguing merger
8 between PWID and trafficking also. So then, he doesn't
9 make that argument.

10 THE COURT: And so, you now wish to amend.

11 MR. BROWN: To the extent it wasn't preserved,
12 that it was deficient appellate counsel. Succinctly,
13 your Honor, if there was a meritorious ground that would
14 get him out of the twenty-year sentence, there is no
15 strategy to not argue that. This is a matter of law.
16 This is not a factual dispute. And so, they should have
17 argued it. There's no reason not to. And we haven't
18 heard one. I don't believe it is preserved. But I do
19 think that that's what Rule 15 allows. I mean, it
20 allows for an amendment even after judgment.

21 There are some jury instruction issues that were
22 not preserved.

23 THE COURT: But of course, if the Court grants
24 that motion, the Court may be compelled to continue that
25 issue.

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BY THE COURT

1 MR. BROWN: And I'm -- we're not trying to hide
2 anything. We believe this is a very square legal issue.
3 We may be wrong on it. We believe it's a real issue.
4 There's a case out there. That case -- the result is
5 not favorable for my guy. The drugs are in one county,
6 and another county, it's under his pocket, somewhere in
7 his apartment. They find that is not double jeopardy.
8 They don't talk about multiplicity, but that is what
9 they're talking about. They call it the merger of
10 charges. But we agree with your Honor. We're not
11 talking about -- I mean, we're not trying to hide
12 anything. We want it all square before you. We don't
13 believe it's appellate deficiency because it's not
14 preserved. Alternatively, obviously, if it is, we
15 would. There is no requirement for the jury
16 instructions, so they lumped it all in. He did ask to
17 merge the two trafficking charges only.

18 THE COURT: I see. Well, do you need more time to
19 think about what your position is on the applicant
20 moving to amend?

21 MR. JOHNSON: No, your Honor. Like I said, it was
22 not pled. I know that he's trying to amend to conform
23 to the evidence, but there's been no evidence presented
24 yet, so I don't know what he's conforming to. However,
25 I do have appellate counsel on standby, ready to testify

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BY THE COURT

1 if necessary.

2 THE COURT: Well, and that's what I was saying.
3 If we were going to -- if the Court grants the motion to
4 amend, then the State may need time to have appellate
5 counsel present.

6 MR. JOHNSON: I have her on phone testimony, and
7 he's agreed to allow that to happen.

8 THE COURT: Oh, I see.

9 MR. JOHNSON: Yes, sir. However, I don't think a
10 motion to amend is proper, because he's had all the time
11 in the world to amend, and he actually has amended his
12 application. He could have done it and raised
13 ineffective assistance of appellate counsel. He's
14 failed to do so. And I don't think he should get a
15 second, you know, run-around to get that in. I'm just
16 saying it's not proper for the PCR Court because it's a
17 direct appeal issue because it was preserved. He thinks
18 otherwise, and that's why your Honor's here.

19 MR. BROWN: We're a little lucky because it's
20 their jury. So, there's some -- your Honor has a lot of
21 flexibility to get to the truth of the merit here, or
22 lack thereof.

23 THE COURT: All right. I'll grant the motion to
24 amend. Now, you want to take a break while you contact
25 appellate counsel?

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BY THE COURT

1 MR. JOHNSON: I had her standing by her email this
2 morning so I can -- should take me less than two
3 minutes.

4 THE COURT: All right. We'll be at ease for a
5 moment.

6 OFF THE RECORD.

7 BACK ON THE RECORD.

8 MR. JOHNSON: Are we back on the record?

9 THE COURT: Back on the record.

10 MR. JOHNSON: Elizabeth?

11 MS. ELIZABETH A. FRANKLIN-BEST: Yes.

12 MR. JOHNSON: Hey, it's Rutledge. How are you?

13 MS. ELIZABETH A. FRANKLIN-BEST: Good. How are
14 you doing, Rutledge?

15 MR. JOHNSON: Good. We're back on the record in
16 Marion Bonds' case. Just have a few questions for you.

17 MS. ELIZABETH A. FRANKLIN-BEST: Okay.

18 MR. JOHNSON: Do you have your brief handy?

19 MS. ELIZABETH A. FRANKLIN-BEST: I do not.

20 THE COURT: Do you need to swear your witness?

21 MR. JOHNSON: Oh. You need to be sworn in.

22 Sorry.

23 MS. ELIZABETH A. FRANKLIN-BEST: Okay.

24 MADAM CLERK: Do you solemnly swear or affirm that
25 the testimony you give to the Court in this case shall

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FRANKLIN-BEST - DIRECT - JOHNSON

1 be the truth, so help you God?

2 MS. ELIZABETH A. FRANKLIN-BEST: I do.

3 MADAM CLERK: Okay. Thank you.

4 ELIZABETH A. FRANKLIN, BEST

5 DIRECT EXAMINATION BY MR. JOHNSON:

6 Q. All right, Elizabeth, can you please explain
7 to the Court how long you've been practicing law.

8 A. Yeah, sure. I graduated from law school in
9 2001. Became licensed in the state of New York in 2002,
10 and licensed in South Carolina in 2004.

11 Q. And since 2004, what type of cases have you
12 been handling?

13 A. I would say exclusively criminal law cases,
14 from felonies, misdemeanors, and now capital cases.

15 Q. And were you ever at Appellate Defense?

16 A. I did. I was at the Office of Appellate
17 Defense I believe from the beginning of 2006 until some
18 time in 2011.

19 Q. And since then you've been in private
20 practice?

21 A. That's correct.

22 Q. But still doing appellate work?

23 A. Yes.

24 Q. Okay. And roughly how many appellate cases
25 have you handed?

1 A. Wow. I mean, I believe 500.

2 Q. And that would be briefs to the Court of
3 Appeals and briefs to the Supreme Court, among other
4 courts?

5 A. Among other courts, that's correct.

6 Q. And you were appellate counsel for Mr. Bonds
7 in this case?

8 A. Yes, that's correct.

9 Q. And then the two issues I believe you raised
10 were concerning the warrantless search of his bedroom in
11 a home owned by another, basically on the reasonable
12 expectation of privacy. And the second issue would be
13 suppression of a photo lineup or lack thereof?

14 A. I'm sorry. I don't have any independent
15 recollection of that, but I'm not surprised. I mean, I
16 do not dispute that.

17 Q. Okay. And when you receive one of these
18 cases, how do you go about preparing it for brief?

19 A. I mean, generally what I'll do is, I'll go
20 through and, well, read the transcript; make any
21 notations, anything that kind of strikes me as being
22 improper. I take special note of objections that are
23 made by trial counsel. And really, I mean, anything
24 that looks to me like it could be an arguable basis to
25 raise on appeal, I'll make notations. And generally,

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1 after I do that, I'll conduct some legal research and
2 kind of assess the merits of the claim. And then I'll
3 select which ones that I think have some chance of
4 prevailing. And then those will be the claims that I
5 raise in the brief.

6 Q. And so, you choose your issues based on what's
7 the most meritorious? Is that what I'm getting?

8 A. Yeah, I think that's accurate.

9 Q. Okay.

10 A. That's an accurate characterization, yes.

11 Q. And so, based on that, would it be a proper
12 statement that these two issues you briefed you saw as
13 the most meritorious in this case?

14 A. At the time that I wrote that appeal, those
15 would have been the issues that I considered the most
16 meritorious.

17 Q. And you don't necessary have a duty to raise
18 all meritorious issues, do you?

19 A. No. No, I mean, it's been my practice that I
20 will raise all meritorious issues.

21 MR. BROWN: To the extent that is her expert
22 opinion.

23 THE COURT: I'm sorry?

24 MR. BROWN: I object to the extent it asks for
25 expert opinion. I don't think expert opinions are

1 allowed. The question was about the level of duty or
2 care. And we believe -- I mean, that's used against me
3 all the time. You can't get a lawyer to tell the judge
4 what the law is. The question was what duty she had to
5 my client. I do agree that the threshold of competence
6 representation is a question. That's one of the
7 stricter questions.

8 MR. JOHNSON: I ask her, you know, what -- did she
9 had a duty to raise all meritorious issues. To which
10 she replied not necessarily.

11 MR. BROWN: That asked about the duty of care,
12 level of care, which I can't put up experts to say the
13 level of care is -- there was another case, I think
14 Robinson was one of the cases where a lawyer was put up
15 as an expert witness, and they said judges don't need
16 experts on the law.

17 THE COURT: Well, she followed that up by saying
18 she tried to.

19 MR. BROWN: That, I have no objection to. But
20 whether or not she has a duty to raise all meritorious
21 issues is a matter of law.

22 MR. JOHNSON: I would just say that in her
23 experience, this is what -- how she practices law, your
24 Honor.

25 MR. BROWN: That, I have no problem with. It's

1 her experience that she does raise all or does not. To
2 the extent that he's asking for the prong one on
3 Strickland expert opinion from Ms. Franklin, I move to
4 strike it.

5 THE COURT: I didn't get the impression that he
6 was asking her for an expert opinion, but, and so, to
7 that extent, I will sustain the objection.

8 MR. BROWN: Yes, sir.

9 THE COURT: And rephrase.

10 MR. JOHNSON: I'll re-phrase the question, your
11 Honor.

12 BY MR. JOHNSON:

13 Q. Ms. Franklin-Best, in your experience, do you
14 -- you said you try to raise all meritorious issues,
15 correct?

16 A. Yes.

17 Q. Okay. And in this case, like I said, that the
18 first -- the two issues that you briefed were, at the
19 time, the most meritorious, in your opinion, correct?

20 A. Yes. If I could just kind of clarify --

21 Q. Please.

22 A. -- my answer a little bit, because I was
23 hearing you argue about it, and it didn't quite sound
24 like what I intended to convey. I mean, if there was a
25 meritorious claim that I failed to raise, then I would

1 be rendering ineffective assistance of counsel. I mean,
2 there could be no strategic reason for failing to raise
3 a winning claim. You know, the question is, you know,
4 in assessing all of the claims that could be raised, I
5 mean, you know, I'm not -- my understanding is that I'm
6 not required to raise every single claim that has any
7 potential merit. But I mean, if I overlooked a
8 meritorious claim, then I rendered ineffective
9 assistance of counsel in doing that, you know, in
10 failing to raise a meritorious claim. So, I --

11 MR. JOHNSON: Your Honor, no offense to Ms.
12 Franklin-Best, I would move to strike that because that
13 is an ultimate issue for your Honor to decide and not
14 Ms. Franklin-Best.

15 BY MR. JOHNSON:

16 Q. But Ms. Franklin-Best, in reviewing this
17 transcript, trial counsel raised -- there were two
18 charges of trafficking in this case. One due to drugs
19 found in a closet in a shoe where applicant was found by
20 law enforcement. And then there's a separate charge
21 later on as a result of a phone conversation at the jail
22 that there were pill bottles found underneath the
23 mattress. And there was another -- actually the other
24 drugs were found underneath a sink. But he was charged
25 with two counts of trafficking. He was found not guilty

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FRANKLIN-BEST - CROSS - BROWN

1 of the ones underneath the bed, and then found guilty of
2 the ones in the closet. But trial counsel makes the
3 argument that they should have been merged, those two
4 charges should have been merged into one and essentially
5 giving the State two bites of the apple. And the judge
6 denied that motion. And this is after the State rested.
7 Would you have attempted to brief that issue, or did you
8 find your other two issues had more merit than that one?

9 A. I don't have any independent recollection of
10 why I did not raise that particular claim.

11 Q. But based on your experience, you would have
12 raised at the time what you thought to be the most
13 meritorious issues, correct?

14 A. What I believed at the time would have been
15 the most meritorious issues, yes.

16 MR. JOHNSON: That's all the questions I have for
17 this witness, your Honor. Please answer any questions
18 Mr. Brown may have.

19 A. Okay.

20 ELIZABETH A. FRANKLIN-BEST

21 CROSS-EXAMINATION BY MR. BROWN:

22 Q. Good morning.

23 A. Morning.

24 Q. All right. Do you recall that Mr. Bonds was
25 charged with two different indictments for trafficking

1 crack cocaine?

2 A. I don't have any independent recollection
3 that, you know, I do not perceive that's true.

4 Q. Okay. And assuming that that is true -- and
5 there are some exhibits I would otherwise show you.
6 Assuming that that is true, do you believe that a person
7 can be tried on charges that have been split, or are --
8 I'll put it differently. Let me strike that. Are you
9 familiar with the claim of improper multiplicity?

10 A. I mean, yes.

11 Q. So, if you have --

12 A. I've not done any research on it, but I -- I
13 think I know what you're talking about.

14 Q. So, if I have, let's say, fifty widgets in my
15 pocket that it's not proper for me to have, the idea is
16 multiplicity doesn't allow the government to take one
17 offense and split it into two charges.

18 A. Yeah, I would agree with that.

19 Q. Okay. And to the extent that the face of the
20 indictments -- Indictment ending 602 and Indictment
21 ending 603, to the extent that the language charging the
22 crime is identical but for the weight level, identical
23 as to the actual location and to the date, how would you
24 believe that a jury could distinguish that during the
25 trial?

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FRANKLIN-BEST - CROSS - BROWN

1 MR. JOHNSON: Objection, your Honor. That's for a
2 -- the jury's purview, and (b) that's actually calling
3 for a legal conclusion, which your Honor is the one to
4 render that.

5 BY MR. BROWN:

6 Q. I'll ask you differently. Betsy, did you ever
7 consider arguing that multiplicity issue?

8 A. I do not recall specifically considering that
9 multiplicity issue.

10 Q. Now, are you aware that multiplicity is a
11 dovetail with double jeopardy concerns?

12 A. It makes sense to me that it would.

13 Q. In South Carolina, the case -- actually, it
14 doesn't say multiplicity. It says double jeopardy.
15 Would you believe it's proper to bring an objection to
16 the trial on the two indictments after the State has
17 rested?

18 MR. JOHNSON: Objection. She's about to render
19 expert testimony on what trial counsel should or should
20 not have done, and that is not proper under *Green versus*
21 *State*, your Honor.

22 MR. BROWN: The Green case is the one I mentioned.
23 So I'll ask it a different way, and avoid that
24 objection, your Honor.

25 THE COURT: All right.

1 BY MR. BROWN:

2 Q. Do you believe that that issue would have been
3 adequately preserved?

4 A. No, that's -- no. An objection to the
5 indictment, as I recall, must be made before a jury is
6 sworn.

7 Q. And you can actually waive double jeopardy,
8 can't you?

9 A. That, I'm not sure of. Perhaps. I'd have to
10 research that. But I do remember the Gentry case,
11 though, about when timely objections to indictments
12 should be raised.

13 Q. And basically, Gentry says if it's valid on
14 its face and it charges a crime within the trial
15 capabilities of the court, then it's adequate?

16 A. You know, I haven't read Gentry in a while,
17 but if that's what it states, I do not dispute that.

18 Q. And let me ask you this. What's your
19 understanding about the interplay between a charge of
20 trafficking and intent to distribute within a half mile
21 of a school? Or, I'm going to shorten that, a proximity
22 charge?

23 A. I don't understand the question.

24 Q. Sure. What is the double jeopardy interplay
25 between a substantive trafficking charge versus a

1 proximity charge?

2 A. You know, having not conducted any legal
3 research on these issues, I would not want to speculate
4 on that right now.

5 Q. And let me just -- and I certainly understand.
6 And let me ask you this. If there's no evidence that
7 there is an action other than trafficking, do you get an
8 instruction on an intent to distribute in a trafficking
9 case?

10 MR. JOHNSON: Objection, your Honor. That calls
11 for a legal conclusion.

12 MR. BROWN: I withdraw it and ask it another way.

13 BY MR. BROWN:

14 Q. Would you believe -- well, let me ask you
15 this. Could the same evidence supporting the intent-to-
16 distribute jury instruction for a proximity charge also
17 serve to allow that same lesser instruction on the
18 trafficking charges?

19 MR. JOHNSON: Objection, your Honor. That calls
20 for a legal conclusion.

21 THE COURT: Sustained.

22 BY MR. BROWN:

23 Q. Do you have any comments regarding your
24 knowledge of your decision not to raise an intent-to-
25 distribute issue, or was it not preserved, or do you

1 recall at all?

2 A. I'm afraid I do not recall.

3 MR. BROWN: I don't have any other factual
4 questions, your Honor. Thank you.

5 MR. JOHNSON: Nothing from the State. Ms.
6 Franklin-Best, I appreciate your being willing to stand
7 by.

8 MS. FRANKLIN-BEST: Well, I appreciate you all
9 allowing me to conduct this by way to telephone. I
10 appreciate it.

11 MR. JOHNSON: Thank you. Bye-bye.

12 THE COURT: All right, thank you.

13 MR. JOHNSON: And the State would have no further
14 witnesses, your Honor.

15 THE COURT: The State rests.

16 MR. BROWN: And we have no further witnesses.

17 THE COURT: And argue.

18 ARGUMENT:

19 MR. BROWN: Very succinctly, Judge. We believe
20 Mr. Lewis' testimony actually would support a different
21 result on appeal; that that evidence wasn't put in at
22 the appropriate stage of the case, in other words, the
23 evidence that Mr. Bonds was a tenant defeats the consent
24 to search that Mr. Lewis gave. This is a consent-to-
25 search case, your Honor. And Mr. Lewis, under rules of

1 tenancy in *Fourth Amendment* law, can't consent to the
2 search of his tenant's room. And that's on that.

3 And so, we pled it both as trial counsel and
4 appellate counsel -- we don't believe that the -- we
5 believe that the testimony provided today and also
6 included in that affidavit would have -- had that been
7 discovered and presented, would have resulted in a
8 different outcome. And that's my argument on those.

9 THE COURT: All right.

10 MR. BROWN: It gets a little more disjointed on
11 the other ones. We believe that multiplicity rules
12 would have required trial counsel to make an objection
13 at an earlier stage and claim the merger -- and I'm
14 using these phrases interchangeably -- but that he
15 should have moved for the State to merge -- or the Court
16 to merge those two charges. On the face, they're
17 identical as to the relevant facts. The factual
18 dispute's about the weight, that is clearly actually
19 argued to the jury at some point in time in closing.

20 There's almost concession of guilt made by trial
21 counsel, but I'm going to assume he didn't concede guilt
22 to the charge for which we're challenging today. I
23 don't bring that issue, because I don't read it that
24 way, but it could suggest it.

25 But we believe that those are double jeopardy. We

1 believe that, notwithstanding the current state of the
2 law, that it's double jeopardy to try an intent-to-
3 distribute-proximity charge and a trafficking charge.
4 We know from federal law that they are the same offense
5 for double jeopardy review.

6 MR. JOHNSON: I'm going to object to that, your
7 Honor, because federal law is not applicable in state
8 court.

9 MR. BROWN: It is when it's a habeas claim out of
10 the State of South Carolina.

11 MR. JOHNSON: Your Honor, that is not proper for
12 this, and I move to strike that. And he's trying to set
13 up a Martinez claim, and that is not proper for this
14 Court to decide.

15 MR. BROWN: I don't even know what a Martinez
16 claim is. All I'm trying to tell you is that proximity
17 and the actual substantive charge has been determined by
18 a federal judge -- not by me, your Honor -- to be the
19 same offense. They don't find double jeopardy because
20 the legislature said they wanted it to be a separate
21 offense. And so, we actually challenge that -- not that
22 holding -- but we challenge -- we actually believe it is
23 double jeopardy to have the proximity and the
24 trafficking charge. That other charge dealt with the
25 proximity. So we do urge that just alone, you can't be

1 tried on trafficking proximity, but we certainly don't
2 think you get three bites of the apple, so you don't get
3 to charge on trafficking and on trafficking and on
4 proximity. And the way it was instructed to the jury,
5 Judge, there's no differentiating between this charge
6 goes with these drugs. That's never done.

7 Now, the proximity charge, interesting, because
8 the State and the Court clearly indicate that one
9 trafficking charge is for one set of drugs and one is
10 for the other set of drugs, your Honor. But the
11 proximity charge, there's only one. So we believe the
12 State can't merge the drugs from the proximity and fail
13 to merge it for the trafficking.

14 We also urge, should your Honor agree with that,
15 that jeopardy's already attached to the trafficking and
16 he's been acquitted, and your Honor would have to
17 release him, because an acquitted client is unable to be
18 tried again on that other trafficking charge, because he
19 was acquitted on one and convicted on the other. That's
20 jeopardy, and we believe he can't be tried on the two.
21 So we're challenging, obviously, the conviction. And
22 should it come back, we do believe it's jeopardy would
23 prevent him from being re-tried on that. It would not
24 free him; there are still other charges for which he's
25 incarcerated.

1 We also believe, your Honor, that the instruction
2 that was provided as to the proximity charge that they
3 could consider weight as an inference level, Judge. We
4 believe that that part, that instruction, the evidence
5 that supports that intent-to-distribute instruction is
6 the same evidence that would support that same
7 instruction on the trafficking charge. You can't have
8 an intent-to-distribute theory before the Court on the
9 same drugs, and then deny the client that same factual
10 dispute to be resolved by a jury.

11 And succinctly, that's our argument; that they
12 could have gotten a jury instruction on intent to
13 distribute. If your Honor grants that, we would go --
14 grants that and grants that alone, it would come back
15 for trafficking trial on that trafficking charge. It
16 might actually leave the intent-to-distribute charge on
17 that theory still in place. But we believe the intent-
18 to-distribute charge is improper because they acquitted
19 on part of the drugs. That was included in the intent
20 to distribute, and we have to assume it's included,
21 because it's not separated. If they would have brought
22 two intent-to-distribute charges, then that would be a
23 different story. So we believe his acquittal on the one
24 trafficking also acquits him on the intent to
25 distribute.

1 But we do believe there should have been a jury
2 instruction, and to the extent it's preserved, appellate
3 counsel should have argued it. She was very clear that
4 she has no reason to avoid a meritorious claim. She
5 also opined that she wouldn't have filed it, because
6 that's not appropriate time to challenge the trial. And
7 your Honor, we urge that as a matter of law now in
8 closing, that you can't object to being tried on two
9 indictments after the case has been tried.

10 And clearly, at the time the directed verdict
11 stage comes up, your Honor, we know from directed
12 verdict appeal law that a successful appeal of the
13 denial of directed verdict ends the case, because that's
14 jeopardy. You can't go back again. And so, that's --
15 we know jeopardy ran; it attached at the swearing of the
16 jury and the State rested; then there was a request to
17 not try him on the two; and that's the first request.

18 It is worth noting -- and I'm going to end with
19 this. It is worth noting that the State put up what I
20 agree with the trial court was a very smart theory.
21 They argued that one trafficking charge for the greater
22 weight dealt with the substantive act of possessing more
23 drugs than 28 grams. They argued that the other
24 trafficking charge was a conspiracy theory by which Mr.
25 Bonds and Mr. Lewis conspired during a phone call. And

1 certainly, you can have conspiracy in a substantive act.
2 But that's not the way it was instructed or written in
3 the indictment. So that discussion goes on between
4 counsel and the judge, and the jury's never told that.

5 Now, I would suggest if the Judge would have said,
6 this charge applies to these drugs only, that's a charge
7 on the fact, I don't think that's allowed. I mean, I
8 think the quandary here comes from the fact that we've
9 got a very poorly drafted drug statute. In fact, it
10 doesn't even talk about inference. It talks about
11 presumptions. Those presumption laws were found to be
12 invalid. The General Assembly still didn't re-write it.
13 The courts re-wrote it for them. And of course, still,
14 the statute says presumption. It's a tricky wicket
15 they're in.

16 But for what it's worth, your Honor, under the
17 State's theory as presented during the trial, there are
18 four different -- there are two pill bottles of drugs,
19 drugs in a shoe, and drugs in the bathroom trash can.
20 And I point that out because they claim that the three
21 sets of drugs found contemporaneous with the arrest go
22 on one charge. So they're grouping drugs that are not
23 all in one place. But they're grouping it by their
24 choice. And it's not based on where Mr. Bonds had it;
25 it's based on when they found it. They find three sets

1 of drugs; they charge him with trafficking for those
2 three sets; then they come back and charge him with the
3 other.

4 And that's our argument, your Honor.

5 THE COURT: All right.

6 MR. BROWN: Thank you.

7 MR. JOHNSON: May it please the Court, your Honor.

8 THE COURT: Yes, sir.

9 MR. JOHNSON: First, I want to point your
10 attention to *Strickland versus Washington*, pinnacle case
11 of post-conviction relief, 466 U.S. 668. I'm looking at
12 689 where it says:

13 *Judicial scrutiny of counsel performance*
14 *must be highly deferential. It is all too*
15 *tempting for a defendant to second guess*
16 *counsel's assistance after conviction or*
17 *adverse sentence. And it is all too easy*
18 *for a court examining counsel's defense*
19 *after it proved unsuccessful to conclude*
20 *that a particular act or omission of*
21 *counsel was unreasonable. A fair assessment*
22 *of attorney performance requires that every*
23 *effort be made to eliminate the distorting*
24 *effects of hindsight; to reconstruct the*
25 *circumstances of counsel's alleged,*

1 *challenged conduct, and to evaluate the*
2 *conduct from counsel's perspective at the*
3 *time.*

4 Your Honor, as far as the, I think it's the
5 proximity, the distribute, the basic possession with
6 intent to distribute within proximity of a school and
7 the trafficking case, I think he's trying to argue that
8 you -- you can't argue both. However, they're
9 completely separate. And I'm looking at the face of the
10 indictments on -- which ones were you --

11 MR. BROWN: 602, 603, and I believe the next one's
12 634.

13 MR. JOHNSON: '34. Okay. And so, the State is
14 allowed to bring two sets of indictments because there
15 were two sets of drugs found. One is I think 40 grams
16 found in a shoe in a closet underneath a jacket where
17 applicant was found. And then, pursuant to the consent
18 and search warrant, they find drugs underneath the bed,
19 and they find that third. But the proximity, it does
20 have that same date, but that's completely different
21 than the trafficking. And the trafficking, albeit, is
22 at the exact same location. Of course, it's going to be
23 the same location, because it's the bedroom. They just
24 in two different locations within the bedroom, and it's
25 going to be on the same date. So those -- the solicitor

1 can bring those claims separately. However, counsel did
2 argue that.

3 Now, I will have to research whether or not he's
4 allowed to argue the merger after the State presents its
5 case, but he does argue that, and that issue was
6 preserved for appeal, and that's a direct appeal issue
7 and not proper for this Court to decide.

8 As far as the multiplicity rules -- oh, I just
9 covered that, your Honor.

10 And then, the consent to the tenant, once again,
11 that's a direct appeal issue. That's what exactly was
12 briefed based on Mr. Lewis' testimony that was
13 preserved. That was the issue on appeal, and the Court
14 of Appeals directly addressed that issue, so that's a
15 non-issue. However, if you do decide that issue, I
16 would ask you to find Mr. Lewis not credible. He
17 testified under oath at this trial completely opposite
18 as to what he testified to here today. So I don't know
19 which one's the truth, your Honor, but one of them's
20 not. That's for sure. And I ask you to find him not
21 credible.

22 Once you review this case, you're going to realize
23 that there is overwhelming evidence of Mr. Bonds' guilt,
24 which would eliminate any defense from counsel's
25 performance. His cousin is the one he actually shoots

1 and robs at the first incident. And then he flees to
2 Mr. Lewis' home, where he's hiding in the closet. And
3 his -- let me make sure. And that's Mr. Lewis who
4 testifies that he did not live there. And so, your
5 Honor, they find him exactly where they were going to
6 find him. He came out, and the drugs are right
7 underneath a camouflaged jacket, in a pair of shoes,
8 right in Mr. Bonds' control. Once you read this -- the
9 transcript, you'll find there's overwhelming evidence
10 that Mr. Bonds committed these crimes.

11 He also, then, through jail calls, calls Mr. Lewis
12 to hide the crack cocaine, that he threwed, Mr. Lewis
13 throws underneath the sink. That's where they take
14 issue, and counsel argued it, about the intent to
15 distribute. So that's another charge -- that's a third
16 set of drugs that he was charged with.

17 So, once you read through this entire record,
18 your Honor, you'll see there's not ineffective
19 assistance of counsel. Appellate counsel testified
20 that she didn't have any independent recollection, but
21 she would have at the time found the two issues that
22 she did brief the most meritorious. She does not have
23 a duty to raise all meritorious issues, and did so
24 within professional reasonableness, your Honor. We
25 ask that you deny and dismiss this application with

1 prejudice.

2 THE COURT: Mr. Brown.

3 MR. BROWN: Very briefly. There are more -- there
4 are -- and again, I wasn't there live, but there were
5 four different sets of drugs that were found, and they
6 obviously don't have four traffickings. Or four
7 substantive drugs charges in all. We actually -- some
8 of the drugs were lower weight. I believe, based on the
9 weights, they actually could have charged three
10 traffickings and an attempt to distribute, if they were
11 allowed to charge each on separately. It's a factual
12 matter and it may be included in the record as an
13 exhibit. It's in evidence.

14 There's a discussion about the phone call.
15 There's a jail phone call. You know, Mr. Bonds,
16 assuming you argue he's guilty of the act, and that's
17 committed the act, assuming that, the jail phone call
18 discusses drugs. That's what they believe that that
19 other charge is for. He doesn't know what drugs have
20 been found. He's been removed based on the shooting.
21 So, to the extent the drugs are found after he was
22 arrested, that jail phone call, he has no information
23 about what drugs have been found or not. So, to the
24 extent they're saying it was a conspiratorial phone
25 call, Judge, that would apply to all of the drugs,

1 ostensively. Because the discussion's about go get my
2 drugs. And so, and but the record's very clear on that,
3 and I believe I gave your Honor all of the pertinent
4 pages.

5 I would suggest this, trial counsel wouldn't have
6 raised that issue at some point in the trial if he
7 didn't think it had merit. I mean, whether he should
8 have raised it pretrial or not and whether it was waived
9 is a matter of law. So, we know that the merger issue
10 piqued the interest of trial counsel, so it's not like
11 he chose not to argue merger. We just want to point
12 out, he didn't -- he didn't choose to avoid that
13 strategy, your Honor.

14 MR. JOHNSON: And your Honor, if I just may
15 respond with that. Look at the second prong of
16 Strickland, which is prejudice. Clearly, Judge Mullen
17 denied that motion. It was there for proper [sic]. And
18 even had he brought it prior to that ruling after the
19 State rests, that she denies the motion kind of gives
20 you a view of what she would have done had he raised it
21 -- if he's supposed to raise it prior to the jury being
22 sworn in, she would have denied it. If she does that,
23 there's still no prejudice. And therefore, he fails the
24 Strickland test, your Honor. So the State would rest on
25 that.

1 MR. BROWN: And that -- that's our appellate
2 argument; if it is preserved, then it should have gone
3 on appeal. Obviously, the question about whether the
4 multiplicity argument is -- carries the day is the
5 ultimate argument. Whether the deficient performance
6 fell on appellate or trial counsel is a secondary
7 argument to that. Thank you.

8 THE COURT: All right. I take it both of you have
9 anticipated I am going to take this under advisement. I
10 am going to review the file.

11 MR. BROWN: Yes, sir.

12 THE COURT: And will be in touch.

13 MR. BROWN: Yes, sir.

14 THE COURT: Probably shortly. I mean, I'm not
15 talking about today.

16 MR. BROWN: Yes, sir.

17 THE COURT: I'm talking in the next few days.

18 MR. BROWN: We agree this is not a fact-intensive
19 question, except for the issue on the search issue,
20 which I would point out was --

21 THE COURT: Except for what?

22 MR. BROWN: Except for the search issues.

23 THE COURT: Right.

24 MR. BROWN: And it's worth pointing out
25 there are two convictions that are not being challenged

1 here. That's the assault and the possession of the
2 gun.

3 THE COURT: All right.

4 MR. BROWN: I mean, those are not pertinent to any
5 of that. And there is a case I did not -- I mention.
6 But *State v. Sanders* talks about double jeopardy on
7 splitting charges. And that's 476 S.E. 2nd 711, but I
8 have a copy.

9 THE COURT: Okay. Well, does the Solicitor want
10 to respond to this case?

11 MR. JOHNSON: I have not spoken with the Solicitor
12 on this, your Honor.

13 THE COURT: I'm sorry. I said solicitor. I meant
14 the Attorney General.

15 MR. JOHNSON: Your Honor, I think we rest on our
16 arguments that even if there is some type of
17 ineffective, it's not prejudicial, because Judge Mullen
18 denied. She would have denied it beforehand and allowed
19 all these to go forward.

20 MR. BROWN: We just suggest that case is the one
21 case -- well, the leading case on point regarding
22 multiplicity. They don't use that phrase.

23 THE COURT: Double jeopardy.

24 MR. BROWN: They call it double jeopardy and
25 merger. It's still the same.

5-18-16 BONDS V STATE

ARGUMENT

1 THE COURT: All right. I'll be in touch.

2 MR. BROWN: Thank you, your Honor.

3 . END PROCEEDING 10:55 a.m.

5-18-16 BONDS V STATE

CERTIFICATE OF REPORTER

CERTIFICATE OF REPORTER

MAY 18, 2016 POST-CONVICTION RELIEF HEARING

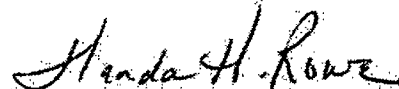
STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I hereby certify that the foregoing May 18, 2016 Post-conviction Relief Hearing was taken by and before me and at the time and place set forth; that the foregoing is a true and accurate record of the proceeding had and exhibits admitted; that I am of neither kin, counsel, nor interest to any party hereto.

This Certificate of Reporter contains my original signature and is attached to the original of this transcript requested by SCCID. Pursuant to SCACR 607, requests for copies of this transcript must be made to the court reporter. Unauthorized copying/emailing is prohibited.

Witness my signature June 18, 2019.



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5-5-2027

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September 15, 2017

The Honorable Brooks P. Goldsmith
Presiding Judge, 14th Judicial Circuit
PO Box 895
Edisto Island, SC 29438

Re: Bonds v. South Carolina; 2014-CP-07-1950

Judge Goldsmith:

I am writing on behalf of my client, Mr. Marion Bonds. As you may recall, you presided over a post-conviction relief action merits hearing in this matter on or about May 18, 2016, 2016 in the Beaufort County Court of Common Pleas. Following that hearing, on May 20, 2016, 2016, you requested that the South Carolina Attorney General prepare a proposed order denying Mr. Bonds relief.

Following the passage of a significant amount of time, I wrote on April 28, 2017 to inquire as to the proposed order. It appears that the assistant attorney general who appeared on behalf of the state at the merits hearing was no longer employed with that office and that no proposed order had been prepared. I write now because another 5 months have passed since the discovery of this dilemma.

I am willing to assist the court but I do not believe it would be proper for me to prepare an ordering against my client's interests. I know this is unusual but I would ask the Court to consider striking the state's response to our application and enter an order granting post-conviction relief and reversing Mr. Bonds' convictions and remanding this matter for a new trial. I believe your Honor would be justified in taking this course of action as it appears the State has abandoned its efforts to oppose my client's request for relief.

Sincerely,

Jim Brown

cc:

Beaufort County Clerk of Court
Office of the SC Attorney General, Post Conviction Division
Marion Bonds

2017 SEP 19 AM 11:51
JAMES ANN ROSENBAUM
BEAUFORT COUNTY, S.C.
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Marion Bonds, Jr., #293431

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT

Case no. 2014-CP-07-1950

ORDER OF DISMISSAL

2017 SEP 26 PM 1:43
JIM BROWN, ESQUIRE
BEAUFORT COUNTY, SC
CLERK OF COURT

Applicant filed an application for post-conviction relief (PCR) on August 4, 2014. This Court convened an evidentiary hearing into the matter on May 18, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by Jim Brown, Esquire. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Applicant.

Applicant's trial counsel, Ian Deysach (Counsel), Esquire, and Applicant were present. This Court had before it a copy of the trial transcript, the records of the Beaufort County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter. This Court finds as follows:

I. PROCEDURAL HISTORY

Applicant was indicted by the March 2010 term of the Beaufort County Grand Jury for Assault and Battery with Intent to Kill (ABWIK), 2010-GS-07-0598, Unlawful Possession of a Handgun, 2010-GS-07-0599, Trafficking in Cocaine base, 28 grams or more but less than 100 grams (Cocaine Trafficking), 2010-GS-07-0602, Cocaine Trafficking, 2010-GS-07-0603, and Possession with Intent to Distribute Crack Cocaine within a One-half Mile Radius of a School

(PWID Crack Cocaine), 2010-GS-07-0634. On December 16, 2010, Applicant proceeded to a trial before the Honorable Carmen T. Mullen and a jury. Applicant was found guilty of Assault and Battery of a High and Aggravated Nature (ABHAN) as a lesser included offense, Unlawful Possession of a Handgun, 1 count of Cocaine Trafficking, and PWID Crack Cocaine. Judge Mullen sentenced Applicant to concurrent confinement for ten years for ABHAN, five years for Unlawful Possession of a Handgun, twenty years for Trafficking Cocaine, and fifteen years for PWID Crack Cocaine within a half mile of a school.

A notice of appeal was filed and an appeal perfected on the Applicant's behalf. Elizabeth Best (Appellate Counsel), Esquire, represented Applicant on appeal. Appellate Counsel appealed Applicant's case on two issues:

1. Whether the trial court erred in denying Counsel's motion to suppress evidence found during the search of the resident.
2. Whether the trial court erred in admitting testimony that the victim identified Applicant as the perpetrator in a photographic line-up although the victim knew and was related to Applicant.

State v. Bonds, Op. No. 2012-UP-563 (S.C. Ct. App. filed October 24, 2012).

The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. Bonds, Op. No. 2012-UP-563. Applicant then filed a Petition for Rehearing on November 8, 2012. By Order dated December 18, 2012, The South Carolina Court of Appeals denied the Petition. Applicant then filed a Petition for Writ of Certiorari on March 21, 2013. The South Carolina Supreme Court denied the petition on April 3, 2014. The Remittitur was issued on April 7, 2014.

II. ALLEGATIONS

Applicant's original PCR application alleged the following grounds:

1. "Ineffective assistance of trial counselor"

- a. "Failing to investigate and interview witness, and to sever witness at suppression hearing and trial"
- 2. "Violation of Applicant Due Process rights"
 - a. "Illegal arrest"
- 3. "Ineffective assistance of appellate counsel"
 - a. "Failure to articulate and argue the preserve meritorious [sic] issue of 'illegal arrest'"

Applicant alleged the following grounds in his amended application:

- 1. Ineffective Assistance of Trial Counsel
 - a. Failure to adequately investigate and present information in support of his motion to suppress pursuant to a warrantless search.
 - b. Failure to argue the legality of Applicant's arrest and preserve the issue for appeal.
 - c. Failure to challenge Applicant's multiple charges on crack cocaine on the basis of double jeopardy.
 - d. Failure to move for a directed verdict on Applicant's multiple crack cocaine charges because they allege the same conduct.
 - e. Failure to request lesser-included jury instruction to the charge of Trafficking in Crack Cocaine.

III. SUMMARY OF FACTS

On February 17, 2010, Applicant went to his cousin's, Reginal Holmes (Holmes), residence and shot Holmes. Tr. 172; 178; 181; 187. Holmes testified that on February 17, 2010, a little before 7:00 a.m., Applicant and another individual showed up at Holmes' residence, pointed a gun at Holmes, demanded money, and then shot Holmes. Tr. 175-176; 177-178. Around 7:00 a.m., Corporal Paul Green and Investigator John Kelleher responded to a shots fired call at Holmes' residence. Tr. 152-153; 239-240. Upon arrival to the scene, Corporal Green observed Holmes' gunshot wound and an ambulance was called. Tr. 155.

At 9:00 a.m., Applicant called Richard Lewis (Lewis) to see if Applicant could come over to Lewis' house, located on Ball Park Road, in order to "freshen up." Tr. 187. Lewis told Applicant he could come over. Tr. 187. At 9:30 a.m., Applicant arrived at the Ball Park Road residence. Tr. 190. Applicant did not have key, so Lewis let him inside. Tr. 368-69. According to

Lewis, Applicant formerly lived with Lewis at the Ball Park Road residence. However, Applicant moved out a few months before the shooting. Tr. 367. Lewis' mother owned the Ball Park Road residence. Tr. 367. On the day of the shooting, Lewis was the only person who resided in the trailer. Tr. 367. On occasion, Applicant would pay Lewis \$40 a week to stay at the Ball Park Residence. However, Applicant did not pay Lewis any money to stay at the Ball Park Road residence on the day of the shooting. Tr. 389. At trial, Investigator Jeremiah Fraser testified he went to the hospital with Investigator Brian Chapman to interview Holmes. Tr. 12-13. After questioning Holmes, the two investigators were able to determine two suspects in the shooting—Applicant and Jason Thomas (Thomas). Tr. 313-314. Moreover, Holmes gave the investigators a list of addresses where Applicant and Thomas might be hiding. Tr. 315. First, the investigators searched the area where the shooting occurred for Applicant and Thomas. Tr. 314. Next, the investigators went to three different residences to look for Applicant and Thomas. Tr. 314-15. The investigators were unsuccessful in locating the two suspects at that point. Tr. 314-15.

At 10:00 a.m. on the day of the shooting, the investigators went to the Ball Park Road residence, which was one of the residences Holmes had listed. Tr. 315. When they arrived, they heard loud, heavy movement inside the trailer. Tr. 316. Investigator Fraser walked to the back door and where he made contact with Lewis. Tr. 316. Investigator Fraser asked Lewis if Applicant and Thomas were inside the trailer. Tr. 316. At first, Lewis told the investigators Applicant and Thomas were not inside the trailer. Tr. 316. However, once Investigator Fraser told Lewis about the shooting, Lewis told Investigator Fraser Applicant and Thomas were in the back bedroom. Tr. 316-317.

Lewis told the investigators he was the only one that lived in the Ball Park Road residence. Tr. 93. Additionally, Lewis told the investigators Applicant moved out of the Ball



Park Road residence months ago. However, Applicant stayed at the residence a week before the shooting. Tr. 94. According to law enforcement, Lewis gave the investigators consent to go inside the trailer to search for Applicant and Thomas. Tr. 38; 42; 317. However, Lewis testified he wanted to go inside and tell Applicant and Thomas to come outside and talk to the police. Tr. 390. Before Lewis could go inside to mediate, everyone heard a loud crash from the back bedroom window. Tr. 390-391. Following the crash, Investigator Fraser and Investigator Chapman entered the trailer. Tr. 317; 391.

At trial, Lewis stated he gave Investigator Fraser implied permission to enter the residence in order to search for Applicant and Thomas. Tr. 397. When the investigators first entered the trailer, they moved towards the back bedroom. Tr. 317-318. Before the investigators reached the back bedroom, a man named Larry Holmes came out of the bathroom. Investigator Fraser detained him and passed him back to Investigator Chapman. Tr. 318. The investigators then heard a window slam and the police officers outside yelled "Sherriff's Office, show me your hands." Tr. 318.

As soon as the door opened, Investigator Fraser saw Thomas running towards him. Tr. 319. Investigator Fraser detained Thomas and passed him back to Investigator Chapman. Tr. 319. Investigator Fraser did not see Applicant until Investigator Fraser yelled for Applicant to show his hands. Tr. 319. Applicant displayed his hands on the closet floor, per Investigator Fraser's instructions. Tr. 319. Investigator Fraser saw Applicant lying on the closet floor on top of a camouflage jacket. Tr. 323. Because Holmes told the investigators Applicant was wearing a camouflage jacket when Applicant shot him, Investigator Fraser removed the jacket from the floor to keep as evidence. Tr. 320; 324. Once Investigator Fraser moved the camouflage jacket, he saw a shoe that contained a large quantity of crack cocaine. Tr. 320; 324. In addition, the



investigators found two pill bottles containing crack cocaine underneath the mattress in the bedroom where Applicant was found. Tr. 320.

At 10:37 a.m., after the police detained Applicant, Lewis signed a consent form, which allowed the investigators to search the house for a weapon. Tr. 392; 396. After the investigators processed the Ball Park Road residence, they returned to their office. Tr. 328. At that point, Applicant was in jail and the investigators began listening to the phone calls Applicant was making. Tr. 328. Applicant called Lewis and asked Lewis to get Applicant's drugs out of the trash can. Applicant told Lewis to hold on to the drugs. Tr. 376; 424. When Lewis looked in the trash can, he found crack cocaine. Tr. 376. Thereafter, Investigator Fraser sent Corporal Green to the Ball Park Road residence to secure the house. Tr. 329. Once Investigator Fraser arrived at the Ball Park Road residence, he immediately spoke with Lewis. Tr. 329. At that time, Lewis gave Investigator Fraser consent to enter the residence. Tr. 329; 396. Lewis took Investigator Fraser inside the residence and showed him the crack cocaine that Lewis just hid underneath the bathroom sink. Tr. 329. On the day after the shooting, Investigator Kelleher prepared a photo line-up and presented it to Holmes. Tr. 329. Holmes identified Applicant and Thomas from the photo line-up. Tr. 329.

During the suppression hearing, Counsel moved to suppress the drugs found in both searches of the Ball Park Road residence. In addition, Counsel objected to the introduction of the photo line-up identification made by Holmes. At the suppression hearing, Applicant testified he stayed at the Ball Park Road a week before the February 17, 2010 incident. Tr. 98. Other times, Applicant stayed at his girlfriend's house. Although Lewis testified at trial Applicant did not pay him any money to stay at the Ball Park Road residence on February 17, 2010, Applicant claimed he paid Lewis \$40 to stay there that week. Tr. 98. Furthermore, Applicant claimed he owned the

clothes, toothbrush, deodorant, and lotion found in the back bedroom of the Ball Park Road residence. Tr. 99. However, the address listed on Applicant's license was his mother's address. Moreover, all of Applicant's mail went to his mother's address. Tr. 103.

Ultimately, the trial judge denied Counsel's motion to suppress the evidence found during the searches of the Ball Park Road residence and the motion to suppress the photo line-up identification made by Holmes. Tr. 29; 117. After analyzing the crack cocaine, Renata Berry (Berry), an expert in forensic chemistry, testified about the quantity of crack cocaine found in the residence. Tr. 348-359. According to Berry, during the first search of the Ball Park Road residence, the investigators found 43.04 grams of crack cocaine located in Applicant's shoe, 5.80 grams of crack cocaine in a pill bottle located underneath a mattress, and 16.30 grams of crack cocaine in a pill bottle located underneath a mattress. In total, the investigators found 65.14 grams of crack cocaine in the back bedroom during the first search. Tr. 353-359. During the second search of the Ball Park Road residence, the investigators found 20.40 grams of crack cocaine located underneath the bathroom sink. Tr. 356-357.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that Applicant has failed to satisfy his burden to prove that Counsel were deficient or that he was prejudiced by Counsels' alleged deficiencies. Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 1985. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 1984. The proper measure of performance is whether Counsels provided representation within the range of competence required in criminal cases. Id.

This Court finds Applicant has failed to satisfy his burden to prove that Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by Counsel's alleged deficiencies. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial. This Court finds Counsel rendered adequate assistance and exercised professional judgment in his decisions at trial. This Court also finds Appellate Counsel exercised professional judgment in deciding which issues to brief. Further, this Court finds Appellate Counsel did not fail to brief any strong issues for Applicant. Accordingly, this Court dismisses Applicant's application for the reasons set out below:

A. Ineffective Assistance of Trial Counsel

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 1989. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsels' deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 117-18, 386 S.E.2d at 625. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's

decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 1992.

1. Failure to adequately investigate and present information in support of his motion to suppress pursuant to a warrantless search.

Applicant failed to show how further investigation by Counsel would have benefited Applicant at trial or on appeal. Applicant's assertion Counsel should have investigated further or presented other information in support of his motion to suppress is purely speculative. Applicant did not prove what Counsel would have found if he had investigated further or that the information found would have altered the trial or appellate court's decisions. 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. An applicant's claim based on mere speculation cannot satisfy an applicant's burden of showing prejudice. See State v. Glover, 318 S.C. 496, 498-499, 458 S.E.2d 538, 540. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). At the evidentiary hearing, the only evidence Applicant presented was the testimony of Lewis, who rented the residence from his mother. Lewis testified he sublet one of the rooms in the house to Applicant. Lewis testified to the opposite at trial. Tr. 63, Vol. III.

Applicant failed to prove Lewis's testimony would have changed the trial court or the appellate court's decisions. Further, Applicant testified he sublet the room at trial. Tr. 104, Vol. II. Counsel argued for this proposition at the suppression hearing. Tr. 111, Vol. II. Therefore,

evidence of Applicant renting the property was before the trial court and appellate courts. "Third party consent may be given by one who has common authority over or some other sufficient relationship to the premises or effects being searched. Common authority does not require common ownership, but merely mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for the searching officers to believe that the person granting consent had the authority to do so." State v. Flowers, 360 S.C. 1, 5-6, 598 S.E.2d 725, 728 (Ct. App. 2004). "[Homeowner] did not relinquish control over her premises simply because [defendant] resided at her house on occasion." State v. Pressley, 288 S.C. 128, 130, 341 S.E.2d 626, 627 (1986).

Further, this Court finds Counsel properly objected. The merits of the search were upheld on appeal. "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975). "Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel." Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993).

Accordingly, this Court finds this issue was addressed on direct appeal and, therefore, is inappropriate for PCR. This Court also finds Applicant failed to prove Counsel was deficient for failing to extract testimony from Lewis that Applicant sublet a room. This Court also finds Applicant failed to prove Lewis's testimony created a reasonable probability the result of the trial would have been different had it been brought out in trial. Accordingly, this Court denies and dismisses this allegation.

2. Failure to argue the legality of Applicant's arrest and preserve the issue for appeal.

Counsel properly objected to the legality of Applicant's arrest. Tr. 117, Vol. II. The legality of the arrest was preserved for appeal. Judge Mullen denied Counsel's objection. Tr. 119, Vol. II. "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Simmons, 264 S.C. at 423, 215 S.E.2d at 885. "Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel." Drayton, 312 S.C. at 9, 430 S.E.2d at 520.

Further, if the search was legal, then the arrest was legal. Law enforcement was searching for Applicant because he was identified by Holmes, the victim Applicant shot earlier that day. When law enforcement began the search, based on Lewis's consent, it was an attempt to arrest Applicant as the suspect of the shooting. Therefore, the arrest was legal and law enforcement had probable cause to arrest Applicant. Counsel did not have an objectionable ground. So, Applicant has failed to show he was prejudiced by Counsel's alleged failure to object. Accordingly, he was overruled by the trial court and the ruling was affirmed by the Court of Appeals.

Accordingly, this Court finds this issue was preserved for appeal and, therefore, is inappropriate for PCR. This Court also finds the record does not support Applicant's allegation Counsel failed to object. Further, this Court finds and the record shows Counsel did argue and object to the legality of the arrest as it related to law enforcement's search of premises. Accordingly, this Court denies and dismisses this allegation.

3. Failure to challenge Applicant's second Cocaine Trafficking charge on the basis of double jeopardy and failure to ask for a directed verdict because of the similar nature of the charges.

Counsel was not deficient for failing to request a lesser-included charge because the amount of crack cocaine exceeded the statutory amount and, therefore, no lesser-included could be submitted to the jury. The jury found Applicant not guilty of the second Cocaine Trafficking charge. Therefore, Applicant is unable to show he was prejudiced by Counsel's failure to object to the second charge or request a directed verdict on that charge. If Counsel objected or made a motion to dismiss and been successful Applicant would still be facing one Cocaine Trafficking charge. The jury found Applicant guilty of only one charge. "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.

Counsel was not deficient for not moving to dismiss on the basis of double jeopardy. The State clearly provided enough evidence on each Cocaine Trafficking indictment to defeat a motion for a directed verdict. "Under traditional double jeopardy analysis, multiple punishment is not prohibited where each offense calls for proof of a fact that the other does not. [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Under the Blockburger test, a defendant may be convicted of two separate crimes arising from the same conduct without being placed in double jeopardy where his conduct consists of two distinct offenses." State v. Brandt, 393 S.C. 526, 539, 713 S.E.2d 591, 597-98 (2011) (citations omitted). The State provided evidence of



collusion between Applicant and Lewis to hold the remaining 20.40 grams for Applicant upon his release. This phone call differentiates the cocaine found during the second search from the cocaine found during the first search. In the light most favorable to the State, this conversation evidences a conspiracy to continue dealing in trafficking crack cocaine 10-28 grams. Therefore, Counsel was not deficient for failing to argue for a directed verdict on the ground of double jeopardy. Further, the trial court already ruled he did not believe there were jeopardy problems on Counsel's motion to sever. Tr. 15, Vol. 1. This Court finds there was no double jeopardy because the second charge concerned different conduct and proof. Therefore, Counsel was not deficient for not moving to dismiss on the basis of double jeopardy or requesting a directed verdict on double jeopardy grounds.

Applicant failed to prove he was prejudiced by Counsel's failure to challenge the second Cocaine Trafficking charge. The jury convicted Applicant of only one charge of Cocaine Trafficking. Applicant was not convicted or sentenced on the second charge and, therefore, cannot show he was prejudiced by its submission to the jury.

This Court finds Applicant failed to prove Counsel was deficient for failing to make motions to dismiss, based on double jeopardy grounds. This Court also finds Applicant failed to prove he was prejudiced where he was found not guilty of the second charge. Accordingly, this Court denies and dismisses this allegation.

4. Failure to request lesser-included jury instruction to the charge of Trafficking in Crack Cocaine.

During the first search, the total amount of crack cocaine found in Applicant's room was 65.14 grams. The trial court charged Cocaine Trafficking, 28-100 grams, for the crack cocaine found during the first search. During the second search, the investigators found a total of 20.40 grams of crack cocaine. The trial court charged Cocaine Trafficking, 10-28 grams, for the crack

cocaine found during the second search. The jury found Applicant not guilty of the indicted charge or the lesser-included PWID charge. "[W]hen there is conflicting evidence as to whether the amount of marijuana involved is sufficient to invoke the trafficking statute, both charges should be submitted to the jury. Where, however, the undisputed evidence is that the amount involved exceeds the minimum trafficking amount, then only the trafficking charge should be submitted to the jury." Matthews v. State, 300 S.C. 238, 241, 387 S.E.2d 258, 260 (1990). Here, the amount of crack cocaine, 65.14 grams, found in the first search was undisputed. The undisputed evidence shows the 65.14 grams found exceeded the 28 gram minimum for the statutory trafficking amount for S.C. Ann. 44-53-370(e)(2)(b). The trial judge would have overruled any request for a lesser-included offense for the Cocaine Trafficking charge in the first search. There was undisputed evidence the amount of crack cocaine exceeded the statutory amount. Therefore, the trial court could not submit a lesser-included to the jury.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for requesting a lesser-included when there was no evidence to support the charge. Accordingly, this Court denies and dismisses this allegation.

B. Ineffective Assistance of Appellate Counsel

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Applicant must show (1) that appellate counsel's performance was deficient; and (2) that he was prejudiced by the deficient performance. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Further, the courts presume that counsel rendered adequate assistance and made all significant decisions

in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 386 S.E.2d at 624.

To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Counsel is not required to raise every non-frivolous claim, but instead may select among them to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259 (2009). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). See also Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985) (finding the failure to appeal all trial errors is not ineffective assistance where strategic decision to exclude issues on appeal is based on reasonable professional judgment).

When a claim of ineffective assistance of appellate counsel is based on failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. If the issue is not preserved for appeal, appellate counsel cannot be ineffective for not raising that issue on appeal. See State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991) (holding where an objection and the ground therefore is not stated in the record, there is no basis for appellate review).

1. Appellate Counsel was deficient for failing to argue the arrest was illegal.

This Court finds Applicant failed to prove he was prejudiced by Appellate Counsel's decision not to brief the issue of the legality of Applicant's arrest. Applicant alleges Appellate

Counsel was deficient for failing to challenge the legality of his arrest on appeal. Appellate Counsel instead argued the search of the residence was illegal. Appellant Brief 3. The Court of Appeals disagreed and affirmed, holding the search was legal. Op. No. 2012-UP-563.

If the search was legal, then the arrest was legal. Law enforcement was searching for Applicant because he was identified by Holmes, the victim Applicant shot earlier that day. When law enforcement began the search, based on Lewis's consent, it was an attempt to arrest Applicant as the suspect of the shooting. Therefore, the arrest was legal and law enforcement had probable cause to arrest Applicant. Counsel did not have an objectionable ground. Accordingly, Counsel was overruled by the trial court and the ruling was affirmed by the Court of Appeals. Therefore, Appellate Counsel correctly chose to attack law enforcement's search of the residence because the legality of the arrest hinged on the search of the residence.

This Court finds Applicant failed to prove Appellate Counsel failed to raise significant and obvious issues on appeal. This Court finds Appellate Counsel chose the stronger issue to brief and present to the Court of Appeals. Accordingly, this Court finds Applicant failed to prove Appellate Counsel was deficient. Applicant also failed to prove he was prejudiced by Appellate Counsel's failure to brief his arrest. Accordingly, this Court denies and dismisses this allegation.

2. Appellate Counsel was deficient for failing to argue double jeopardy should have prevented precluded one of the Cocaine Trafficking charges.

The jury found Applicant not guilty of the second Cocaine Trafficking charge. Therefore, Applicant is unable to show he was prejudiced by Appellate Counsel's failure to raise this issue on direct appeal. "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.

Counsel was also not deficient for failing to brief Applicant's double jeopardy issue. "Under traditional double jeopardy analysis, multiple punishment is not prohibited where each offense calls for proof of a fact that the other does not. [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Under the Blockburger test, a defendant may be convicted of two separate crimes arising from the same conduct without being placed in double jeopardy where his conduct consists of two distinct offenses." Brandt, 393 S.C. at 539, 713 S.E.2d at 597-98 (citations omitted). The State provided evidence of a conspiracy between Applicant and Lewis. Applicant told Lewis to hold the remaining 20.40 grams of cocaine for Applicant upon his release. This phone call differentiates the cocaine found during the second search from the cocaine found during the first search. The wording of S.C. Code Ann. §44-53-370(b)(2)(e) provides for a "conspiracy" to traffic cocaine. This conspiracy is different from the mere possession of cocaine and is evidenced by the phone call between Applicant and Lewis. "A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two 'distinct' offenses." Id. The conversation between Applicant and Lewis evidenced a conspiracy to deal in trafficking crack cocaine 10-28 grams. Therefore, Appellate Counsel was not deficient for choosing not to allege double jeopardy because no double jeopardy existed.

Importantly, the jury convicted Applicant of only one charge of Cocaine Trafficking. Applicant failed to prove he was prejudiced by the decision of Appellate Counsel not to argue a charge on which he was found not guilty. Applicant was only convicted of the second Cocaine Trafficking charge. There was no possible jeopardy or prejudice for Appellate Counsel to assert

because Applicant was found not guilty of the secondary charge. Therefore, Counsel was not deficient for failing to argue a ground on which Applicant was found not guilty.

Accordingly, this Court finds Applicant failed to prove he was prejudiced by Counsel's failure to challenge the second Cocaine Trafficking charge where he was not convicted or sentenced on the second charge. Further, Applicant has not proven Counsel was deficient for failing to assert double jeopardy grounds on appeal when he was found not guilty on the second charge. Accordingly, this Court denies and dismisses this allegation.



VI. CONCLUSION

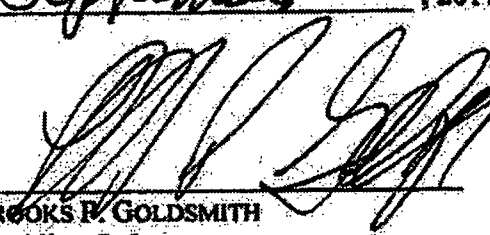
Based on the foregoing, this Court finds and concludes Applicant, Marion Bonds, has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty 30 days from 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 71.1g, SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are 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 must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 19 day of September, 2017.


 BROOKS R. GOLDSMITH
 Presiding Judge
 14th Judicial Circuit

 , South Carolina

Office of the Clerk of Court

Beaufort County

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Jerri Ann Roseneau
Clerk

Alronnie Roberts
Judicial Clerk

Date: March 29, 2018

From: Clerk of Court, Beaufort County, South Carolina

To: Marion J. Bonds, Jr., Petitioner Pro Se
James Arthur Brown, Jr., Attorney of Petitioner ✓

Case: 2014CP0701950, Marion J. Bonds, Jr., vs. The State of South Carolina

EXHIBIT DESTRUCTION NOTICE

Pursuant to Rule 606 of the South Carolina Supreme Court, we are in the process of releasing or disposing of civil exhibits held by the Clerk of Court. Attached is an exhibit sheet listing what was entered for the case.

If you wish to retrieve the exhibits, please indicate in the proper space below. Sign and return this form to the Clerk of Court's Office. If you do not wish to retrieve the exhibits, please indicate in the proper space below granting your permission to destroy them. Please return this original notice.

Note that failure to respond within 30 days will result in the exhibits being destroyed. Thank in advance for your assistance.

Staff initials: AR

_____ I wish to retrieve exhibits in the above case.

_____ I grant permission to the Clerk of Court for destruction of exhibits admitted by me in the above case.

Date: _____

Signature: _____

RECEIPT FOR

Petition ~~cc~~

EXHIBITS

DATE

5-18-16

 JD Brooks Goldbrooks CASE NO. 2014-CP-67-01950 PAGE
 COUNTY Beaufort FL State of SC DEF Marion J. Bonds, Jr.

NO.	EXHIBIT NAME	DATE	WITNESS	ID	ENTERED
①	Verdict cc	5-18-16			✓ 1
②	Indictment cc	"			✓ 2
③	Indictment cc	"			✓ 3
④	Indictment cc	"			✓ 4
⑤	Indictment cc	"			✓ 5
⑥	Indictment cc	"			✓ 6
⑦	Indictment cc	"			✓ 7
⑧	Affidavit of Richard Lewis	"	Lewis		✓ 8
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CR Handwritten Signature CLERK MM Neila DATE 5-18-16

 2016 MAY 18 PM 12:10
 CLERK OF COURT
 BEAUFORT COUNTY, S.C.
 GENERAL

STATE OF SOUTH CAROLINA

County of Beaufort2017-CP-07-2437
In the Court of Common PleasMarion J. Bonds, Jr., #293431*Full name and prison number (if any) of Applicant,*

vs.

State of South Carolina*Name of Respondent.*APPLICATION FOR
POST-CONVICTION RELIEF2017 NOV 16 PM 1:29
CLERK OF COURT
S.C.**INSTRUCTIONS — READ CAREFULLY**

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

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

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

1. Place of detention Broad River Correctional Institution, 4460 Broad River Road, Columbia, S.C. 29210
2. Name and location of Court which imposed sentence Beaufort County Court of General Sessions.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) (2010-GS-07-0598; 2010-GS-07-0599; "0602"; and "0603)
 - (b) Trafficking cocaine base 28 grams or more; Trafficking Cocaine
 - (c) "School Zone"; Unlawful Possession of a weapon.
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 12/16/2010 (a) 10 yrs for ABHAN; (b) 5 yrs for unlawful poss. of
 - (b) a weapon; (c) 20 years for trafficking cocaine; (d) 15 yrs for
 - (c) PWID Crack in School Zone.

5. Check whether a finding of guilty was made

- (a) after a plea of guilty _____
- (b) after a plea of not guilty XX
- (c) after a plea of nolo contendere _____

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

Certainly.

7. If you answered "yes" to (6), list

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

- i. S.C. Court of Appeals
- ii. S.C. Supreme Court
- iii. _____

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

- i. Affirmed
- ii. Affirmed
- iii. _____

(c) the date of each such result:

- i. October 24, 2012
- ii. March 21, 2013
- iii. _____

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

- i. N/A
- ii. N/A
- iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

- (a) N/A
- (b) N/A
- (c) _____

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

- (a) Ineffective Assistance of Counsel. (See Attached Sheets)
- (b) _____
- (c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

- (a) Counsel failed to file a requested 59(e) and appeal from
- (b) the PCR final judgment. See Austin v. State, 409 S.E.2d 395
- (c) 305 S.C. 448 (S.C. 1990).

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? PCR Application
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? No.
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? No.
- (d) any other petitions, motions or applications in this or any other Court?
No.

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Post Conviction Relief Application (2014-CP-07-1950)

ii. _____

iii. _____

iv. _____

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

i. Beaufort Court Court of Common Pleas

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. Denied

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. Sept. 20, 2017

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. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) N/A This is just an "AUSTIN APPEAL"

(b) _____

(c) _____

16. 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.

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

17. If you answered "yes" to one or more parts of (16), list:

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

i. Ian Deysach, Esquire, trial and Sentencing

Elizabeth Best, on Appeal

ii. Jim Brown, Esquire, Initial PCR hearing.

iii. _____

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

i. Trial

ii. Direct Review.

iii. PCR

18. State clearly the relief you seek in filing this application.

To be granted the opportunity to file my 59(e) and
appeal from the PCR ruling.

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

No.

STATE OF SOUTH CAROLINA)
 COUNTY OF BEAUFORT)

COURT OF COMMON PLEAS
 FOURTEENTH JUD. CIRCUIT

Marion Bonds, Jr., #293431,
 Applicant,

Vs.

Case No.: _____

State of South Carolina,
 _____ Respondent./

AUSTIN V. STATE APPEAL.

This matter is being brought to the attention of this Honorable Court, by way of this pro-se litigant "claiming a right to relief pursuant to Austin v. State, 409 S.E.2d 392 (1990)". Whereas, Applicant contends the following facts in support.

- (1) That on or about August 4, 2014, Applicant filed a timely PCR in the Fourteenth Judicial Circuit, Court of Common Pleas, for the State of South Carolina. (2014-CP-07-1950).
- (2) The Court convened a hearing into the matter on May 18, 2017, at the Beaufort County Courthouse.
- (3) At such time, the Applicant was represented by Jim Brown, Esquire, and the State was represented by Rutledge Johnson, of the

STATE OF SOUTH CAROLINA

County of Beaufort

VERIFICATION

I, Marion Bonds, Jr., 293431, 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.

Marion Bonds Jr. 293431

SWORN to and subscribed before me this 13thday of November 2017

Janelle T. Spearman (L.S.)
Notary Public
My Commission Expires August 26, 2025

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

I, Marion Bonds, Jr., #293431, 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 therefor.

Marion Bonds Jr. 293431
Applicant

SWORN or affirmed to and subscribed before me this

13thday of November 2017

Janelle T. Spearman
Notary Public - State of South Carolina
My Commission Expires August 26, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
	)	
Marion Bonds, #293431,	)	Case No.: 2017-CP-07-2437
	)	
Applicant,	)	
	)	RETURN AND PARTIAL
v.	)	MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the application for Post-Conviction Relief ("PCR") filed on November 16, 2017, would respectfully show this Court:

I.

Applicant is presently incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. The March 2010 term of the Beaufort County Grand Jury indicted Applicant for assault and battery with intent to kill ("ABWIK") (2010-GS-07-0598), unlawful possession of a handgun (2010-GS-07-0599), trafficking in cocaine base, 28 grams or more but less than 100 grams ("cocaine trafficking") (2010-GS-07-0602), and possession with intent to distribute crack cocaine within a one-half mile radius of a school ("PWID crack cocaine within proximity") (2010-GS-07-0634). Ian Deysach, Esquire, represented Applicant at trial. Angie Tanner, Esquire, prosecuted the case. On December 16, 2010, Applicant proceeded to a trial before the Honorable Carmen T. Mullen and a jury. Applicant was found guilty of assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense, unlawful possession of a handgun, trafficking cocaine, and PWID crack cocaine within proximity. Judge Mullen sentenced the Applicant to confinement for ten years for ABHAN, five

years for unlawful possession of a handgun, twenty years for trafficking cocaine, and fifteen years for PWID crack cocaine within proximity, all to be served concurrently.

Applicant filed a timely notice of appeal. Elizabeth Best, Esquire, represented the Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion filed October 24, 2012. State v. Bonds, Op. No. 2012-UP-563 (Ct. App. 2012). Applicant then filed a petition for rehearing on November 8, 2012. By order dated December 18, 2012, the South Carolina Court of Appeals denied the petition. Applicant then filed a petition for writ of certiorari on March 21, 2013. The South Carolina Supreme Court denied the petition on April 3, 2014. The remittitur was issued on April 7, 2014.

2014-CP-07-1950

Applicant filed his first application for post-conviction relief on August 4, 2014, in which he alleged the following grounds for relief:

1. "Ineffective assistance of trial counselor"
 - a. "Failing to investigate and interview witness, and to sever witness at suppression hearing and trial"
2. "Violation of Applicant Due Process rights"
 - a. "Illegal arrest"
3. "Ineffective assistance of appellate counsel"
 - a. "Failure to articulate and argue the preserve meritorious issue of 'illegal arrest'"

Applicant later amended his application to include the following allegations:

1. Ineffective Assistance of Trial Counsel
 - a. Failure to adequately investigate and present information in support of his motion to suppress pursuant to a warrantless search.
 - b. Failure to argue the legality of Applicant's arrest and preserve the issue for appeal.
 - c. Failure to challenge Applicant's multiple charges on crack cocaine on the basis of double jeopardy.
 - d. Failure to move for a directed verdict on Applicant's multiple crack cocaine charges because they allege the same conduct.

- e. Failure to request lesser-included jury instruction to the charge of Trafficking in Crack Cocaine.

An evidentiary hearing into the matter was convened on May 18, 2017, at the Beaufort County Courthouse before the Honorable Brooks P. Goldsmith. Applicant was present at the hearing and represented by Jim Brown, Esquire. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Judge Goldsmith denied and dismissed Applicant's application with prejudice by an order of dismissal signed September 19, 2017, and filed September 26, 2017.

II.

In his second and current application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of [PCR] Counsel
 - a. "Counsel failed to file a requested 59(e) and appeal from the PCR final judgment. See Austin v. State, 409 S.E.2d 395, 305 S.C. 448 (1990)."

III.

Applicant alleges he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Respondent lacks sufficient information to admit or deny this allegation. Respondent therefore requests an evidentiary hearing limited to this ground for relief.

IV.

Respondent submits that all other allegations other than Applicant's Austin claim should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction

Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was sentenced for his convictions on December 16, 2010. Remittitur from the direct appeal was issued on April 7, 2014. The application was therefore due on April 7, 2015. This application was filed on November 16, 2017, over two years beyond the statutory filing period. Therefore, the all allegations, with the exception of Applicant's Austin claim, should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

V.

All allegations with the exception of Applicant's Austin claim should also be summarily dismissed because the application is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d

834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). Therefore, the Court should summarily dismiss all allegations with the exception of Applicant's Austin claim as successive to Applicant's previous PCR application.

VI.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[Signature block on following page]

VII.

WHEREFORE, Respondent requests that an evidentiary hearing be held limited to Applicant's claim that he was denied his right to appeal the dismissal of his PCR application.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General

By: Christian Saville
ATTORNEYS FOR RESPONDENT

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

Feb 26, 2018

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

MARION BONDS, #293431)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent,)

IN THE COURT OF COMMON PLEAS

2017-CP-07-2437

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Partial Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Marion Bonds, #293431
 Broad River Correctional Institution
 4460 Broad River Road
 Columbia, SC 29210

DATED this the 26th day of February, 2018.



Tamieka Russell-Brown, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Marion Bonds, #293431,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2017-CP-07-2437

BEAUFORT COUNTY, S.C.
CLERK OF COURT
2019 FEB 28 PM 12:15
**CONSENT ORDER
GRANTING BELATED
REVIEW PURSUANT TO
AUSTIN V. STATE¹**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on November 16, 2017. Applicant is represented by James K. Falk, Esquire. Respondent is represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office.

I. PROCEDURAL HISTORY

#1
R/S
Applicant is presently incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. The March 2010 term of the Beaufort County Grand Jury indicted Applicant for assault and battery with intent to kill ("ABWIK") (2010-GS-07-0598), unlawful possession of a handgun (2010-GS-07-0599), trafficking in cocaine base, 28 grams or more but less than 100 grams ("cocaine trafficking") (2010-GS-07-0602), and possession with intent to distribute crack cocaine within a one-half mile radius of a school ("PWID crack cocaine within proximity") (2010-GS-07-0634). Ian Deysach, Esquire, represented Applicant at trial. Angie Tanner, Esquire, prosecuted the case. On December 16, 2010, Applicant proceeded to a trial before the Honorable Carmen T. Mullen and a jury. Applicant was found guilty of assault and battery of a high and aggravated nature

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

(ABHAN) as a lesser included offense, unlawful possession of a handgun, trafficking cocaine, and PWID crack cocaine within proximity. Judge Mullen sentenced the Applicant to confinement for ten years for ABHAN, five years for unlawful possession of a handgun, twenty years for trafficking cocaine, and fifteen years for PWID crack cocaine within proximity, all to be served concurrently.

Applicant filed a timely notice of appeal. Elizabeth Best, Esquire, represented the Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion filed October 24, 2012. State v. Bonds, Op. No. 2012-UP-563 (Ct. App. 2012). Applicant then filed a petition for rehearing on November 8, 2012. By order dated December 18, 2012, the South Carolina Court of Appeals denied the petition. Applicant then filed a petition for writ of certiorari on March 21, 2013. The South Carolina Supreme Court denied the petition on April 3, 2014. The remittitur was issued on April 7, 2014.

2014-CP-07-1950

Applicant filed his first application for post-conviction relief on August 4, 2014, in which he alleged the following grounds for relief:

1. "Ineffective assistance of trial counselor"
 - a. "Failing to investigate and interview witness, and to sever witness at suppression hearing and trial"
2. "Violation of Applicant Due Process rights"
 - a. "Illegal arrest"
3. "Ineffective assistance of appellate counsel"
 - a. "Failure to articulate and argue the preserve meritorious issue of 'illegal arrest'"

Applicant later amended his application to include the following allegations:

1. Ineffective Assistance of Trial Counsel
 - a. Failure to adequately investigate and present information in support of his motion to suppress pursuant to a warrantless search.
 - b. Failure to argue the legality of Applicant's arrest and preserve the issue for appeal.

- c. Failure to challenge Applicant's multiple charges on crack cocaine on the basis of double jeopardy.
- d. Failure to move for a directed verdict on Applicant's multiple crack cocaine charges because they allege the same conduct.
- e. Failure to request lesser-included jury instruction to the charge of Trafficking in Crack Cocaine.

An evidentiary hearing into the matter was convened on May 18, 2017, at the Beaufort County Courthouse before the Honorable Brooks P. Goldsmith. Applicant was present at the hearing and represented by James A. Brown, Jr., Esquire. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Judge Goldsmith denied and dismissed Applicant's application with prejudice by an order of dismissal signed September 19, 2017, and filed September 26, 2017.

II. ALLEGATIONS

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

1. "Counsel failed to file a requested 59(e) and appeal from the PCR final judgment. See Austin v. State, 409 S.E.2d 395, 305 S.C. 448 (1990)."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application because his prior PCR counsel, James A. Brown, Jr., Esquire, never filed his notice of appeal. This allegation is corroborated by an affidavit from Mr. Brown attached to this order. Pursuant to Austin v. State, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application.

Respondent consents to allow Applicant a belated review of the denial of his PCR application (2014-CP-07-1950). In light of the information provided to this court and the attached affidavit, this Court finds that Applicant did not knowingly and voluntarily waive his

right to appeal his first PCR application. Accordingly, this Court grants Applicant a belated review of the denial of post-conviction relief pursuant to Austin v. State, in which he may raise on appeal any issues that were raised and ruled upon in his prior application. In order to secure this review, however, Applicant must appeal from this Order.

IV. CONCLUSION

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243 of the South Carolina Appellate Court Rules for the appropriate procedures for filing a belated appeal.

IT IS THEREFORE ORDERED:

1. That Applicant be granted an appeal of case 2014-CP-07-1950 pursuant to Austin v. State;
2. That all other PCR allegations are waived and dismissed with prejudice;
3. That Applicant remain in the custody of the South Carolina Department of Corrections.

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


 PERRY M. BUCKNER, III
 Chief Administrative Judge
 Fourteenth Judicial Circuit

Walterboro, South Carolina

DOCKET NO. 2010GS0700598

The State of South Carolina
County of Beaufort

COURT OF GENERAL SESSIONS

March Term 2010

THE STATE

vs.

Marlon J Bonds

Indictment for

Assault and battery with intent to Kill (ABWIK)

SC Code: 16-03-0620
 GDR Code: 0014

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. and G.S.

557

5 min

558

ABHAN

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

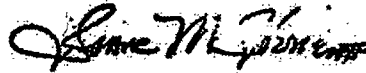
INDICTMENT
2010G80700598

At a Court of General Sessions, convened on March 25, 2010, the Grand Jurors of Beaufort County present upon their oath:

Assault and battery with intent to Kill (ABWIK)

That in Beaufort County, South Carolina, on or about February 17, 2010, the Defendant, Marion Bonds, with malice aforethought, did commit an unlawful act of a violent nature upon the victim, Reginal Jermaine Holmes, to wit: the Defendant did shoot the victim; all in violation of the Common Law of South Carolina and Section 16-03-620 of the Code of Laws of South Carolina (1976, as amended).

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



Solicitor

DOCKET NO. 2010GS0700689

The State of South Carolina
County of Beaufort

COURT OF GENERAL SESSIONS

March Term 2010

THE STATE

vs.

Marlon J Bonds

Indictment for

**Weapons / Sale or delivery of pistol to, and
possession by, a person unlawful**

**SC Code: 16-23-0030; 16-23-0050(A)
CDR Code: 2384**

After being fully advised as to my legal
rights, I hereby waive presentment to the
Grand Jury.

Defendant

Hereby appear in my own proper person
and plead guilty to the within indictment or
to

Defendant

Witness:

C.C.C. PLS. and G.S.

559

2010

560

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT
2010GS0700399

At a Court of General Sessions, convened on March 25, 2010, the Grand Jurors of Beaufort County present upon their oath:

Weapons / Sale or delivery of pistol to, and possession by, a person unlawful

That in Beaufort County, South Carolina, on or about February 17, 2010, the Defendant, Marion J Bonds, did have in his possession a handgun, after having been convicted of a crime of violence; all in violation of Section 16-23-30(B), Code of Laws of South Carolina, (1976, as amended).

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


Solicitor

DOCKET NO. 2010GS0700802

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

March Term 2010

THE STATE

vs.

Marion J Bonds

Indictment for

**Drugs / Trafficking in meth. or cocaine base - 28
grams or more, but less than 100 grams**

**SC Code: 44-53-0375(C)(2)(c)
CDR Code: 0349**

After being fully advised as to my legal
rights, I hereby waive presentment to the
Grand Jury.

Defendant

Hereby appear in my own proper person
and plead guilty to the within indictment or
to

Defendant

Witness:

C.G.C. PLS. and G.S.

562

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT
2010GS0700602

At a Court of General Sessions, convened on March 25, 2010, the Grand Jurors of Beaufort County present upon their oath:

**Drugs / Trafficking in meth. or cocaine base - 28 g or more,
but less than 100 grams**

That in Beaufort County, South Carolina, on or about February 17, 2010, the Defendant, Marlon J Bonds, knowingly did sell, manufacture, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: crack cocaine, in excess of more than 28 grams but less than 100 grams; in violation of 44-53-375 of the South Carolina Code of Laws (1976) as amended.

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



Solicitor

DOCKET NO. 2010GS0700834

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

March Term 2010

THE STATE

vs.

Marlon J Bonds

Indictment for

**Drugs / Distribute, sell, purchase, manuf. crack
within 1/4 mile proximity of school**

**SC Code: 44-53-0446(B)(2)
CDR Code: 0108**

After being fully advised as to my legal
rights, I hereby waive presentment to the
Grand Jury.

Defendant

Hereby appear in my own proper person
and plead guilty to the within indictment or
to

Defendant

Witness:

C.C.C. PLS. and G.S.

563

564

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT
2010G80700634

At a Court of General Sessions, convened on March 25, 2010, the Grand Jurors of Beaufort County present upon their oath:

Drugs / Distribute, sell, purchase, manuf. crack within 1/2 mile proximity of school

That in Beaufort County, South Carolina, on or about February 17, 2010, the Defendant, Marion J Bonds, unlawfully did distribute, sell, purchase, manufacture, or possess with intent to distribute crack cocaine, a controlled substance, within a one-half mile radius of the grounds of St. Helena Elementary School; all in violation of Section 44-53-445, Code of Laws of South Carolina (1976, as amended).

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



Solicitor