

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DERRINGER YOUNG,

APPELLANT

Appellate Case No. 2011-195446

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FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in refusing to sustain Appellant's objection to and declare a mistrial based upon the prosecutor's closing argument that Appellant threatened three witnesses when no evidence in the record supported the statements, which so infected the trial with unfairness as to make the resulting conviction a denial of Appellant's right to due process?

II. Did the trial court err in failing to exclude expert testimony regarding toolmark identification where the record revealed the identification was not based upon reliable science?

## STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant for murder and assault and battery with intent to kill (ABWIK) during its February 2008 term. Indictments. The prosecution, represented by Burns M. Wetmore and Peter M. McCoy, called the case to trial on July 19, 2010 before the Honorable Kristi L. Harrington. R. 1 -2. Lorelle Proctor and Jessica Mullaney represented Appellant. R. 2. The jury found Appellant guilty as charged on both counts. R. 375, l. 12 – R. 376, l. 2. Judge Harrington sentenced Appellant to imprisonment for twenty years on the ABWIK conviction and life on the murder conviction. R. 378, l. 20 – R. 379, l. 2.

Appellant filed a timely notice of appeal. This brief follows.

## ARGUMENT

I. The trial court erred in refusing to sustain Appellant's objection to and declare a mistrial based upon the prosecutor's closing argument that Appellant threatened three witnesses when no evidence in the record supported the statements, which so infected the trial with unfairness as to make the resulting conviction a denial of Appellant's right to due process.

### **Relevant facts**

During his closing argument, the prosecutor argued facts not in evidence resulting in prejudice to Appellant. Specifically, the prosecutor indicated that two witnesses did not appear for trial and one witness feigned memory loss because of threats by Appellant. The record contained no evidence of threats by Appellant to those witnesses or any evidence that would permit a reasonable inference of such.

### **Joshua Crider**

The prosecution's primary witness was Joshua Crider, who was a bouncer at Club 843, the location of the alleged shooting. R. 24, ll. 1-19; R. 61, ll. 3-5. Crider testified that in November of 2007 Danny Agerson got into a physical altercation with a female at Club 843. This irritated the disc jockey who stopped playing music, causing everyone in the club to turn their attention to the fight. Crider and other security officers attempted to break up the fight and remove Agerson outside the club. Then, Agerson and his friends attacked the security officers. R. 29, ll. 2-23; R. 30, ll. 18-21; R. 63, ll. 20-23; R. 64, l. 6 – R. 66, l. 10. The scene quickly turned into "an all-throw-out brawl." R. 30, l. 21 – R. 31, l. 2. Crider turned on the club's lights and forced everyone to leave, but the fighting continued. R. 31, l. 17 – R. 32, l. 10; R. 66, l. 24 – R. 68, l. 10. Crider testified that during this mayhem, he saw

Appellant shoot Agerson, the man who had been causing problems in the nightclub, in the lower right abdomen. R. 34, ll. 3-9; R. 35, ll. 11-13; R. 36, ll. 21-23; R. 37, ll. 1-3; R. 69, l. 14-17; R. 75, ll. 10-15.

Crider further testified that Appellant then got into an older model car, possibly a Mercury Grand Marquis, in which a black male and female were waiting. Appellant exited the vehicle, exchanged words with another man who was standing in front of the car and then shot the man. R. 34, ll. 10-21; R. 37, ll. 11-14; R. 39, ll. 10-15; R. 39, ll. 17-25. Appellant, his friend and the friend's girlfriend then left the club. R. 41, ll. 15-21.

Although Crider's testimony at trial matched the physical evidence from the scene, interestingly, his 911 call during the actual shootings and his statement to officers during the early morning hours did not match the physical evidence or his trial testimony. R. 46, ll. 18-25. For example, Crider testified at trial that Appellant shot Agerson in the lower abdomen, but on the 911 call, he said the shot was to the chest. R. 47, ll. 1-4. Additionally, Crider testified only three people were in the car in which Appellant left the scene; however, on the 911 call, he stated there were four people in the car. R. 47, l. 25 – R. 49, l. 3. Crider testified that after Appellant left he heard no more shots. R. 49, ll. 4-6; R. 76, ll. 11-22. On the 911 tape, he told authorities he continued to hear gunshots. R. 70, l. 15 – R. 71, l. 8. Further, Crider told the responding officers Appellant was traveling in a Lincoln, rather than a Mercury as his trial testimony indicated. R. 50, ll. 17-21. Crider testified that when officers took him to the scene of a traffic stop, where he identified Appellant as the shooter, he saw that the car was not a Lincoln, but was a Mercury. R. 52, ll. 11-24.

Although Crider testified that he received no promises for his testimony during the prosecution's questioning of him, on cross-examination, Crider admitted that he hoped to

receive a downward departure in federal court in exchange for his testimony against Appellant.<sup>1</sup> Crider admitted the prosecutor agreed to write a letter explaining Crider's cooperation and testimony. R. 58, ll. 10-13; R. 73, ll. 14-22; R. 77, l. 15-22. Additionally, Crider testified that he cooperated with police and the prosecution to do his "responsibility as a citizen." R. 79, ll. 2-23.

### Renardo Smalls

During the 2010 trial regarding the 2007 shooting incident at Club 843, the prosecutor called Renardo Smalls, Appellant's cousin, to testify. R. 83, ll. 7-10. Smalls testified he remembered driving a car to Club 843 and that Appellant was with him. R. 83, ll. 12-25; R. 84, ll. 13-15. However, he did not remember the kind of car he was driving at the time. R. 84, ll. 3-4. Smalls testified that he and Appellant went their separate ways at the club. Smalls then got drunk. R. 84, l. 18 – R. 85, l. 11. Smalls also recalled people fighting in and out of the club. R. 85, ll. 12-14. Smalls went to his car during the fighting. R. 86, ll. 1-3. Smalls did not remember hearing gunshots and did not remember talking to police due to his intoxication. R. 86, ll. 6-22. When the prosecution presented him with a statement purportedly made by him to police, he admitted his signature appeared on the typed statement, but he had no independent recollection of the events of that night. R. 87, ll. 10-22; R. 88, l. 23 – R. 89, l. 5; R. 91, l. 5 – R. 92, l. 9; R. 104, l. 22 – R. 105, l. 5. Thereafter, the prosecutor introduced Smalls' statement into evidence and published it to the

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<sup>1</sup> Crider had been convicted of conspiracy to sell cocaine first degree and conspiracy to commit money-laundering in federal court. R. 73, ll. 23-25. The record was unclear as to how much time Crider received for those federal convictions. Appellant stated Crider received eighty years or forty years. The prosecution was unsure of the exact number, but considered it a "big sentence." R. 14, ll. 1-10. In addition, Crider had a 2004 conviction for pointing and presenting a firearm. R. 22, l. 22 – R. 23, l. 1.

jury. According to the statement, Smalls heard a gunshot. He then saw Appellant and a female walking towards his car. He also saw another man walking towards them. He described the other guy as the one Appellant shot. He also stated that Appellant threw the gun out the window of the car. R. 101, l. 4 – R. 102, l. 24.

The prosecutor asked Smalls if he were scared or nervous about testifying, and he responded negatively. R. 103, ll. 11- 14. When the prosecutor asked if anyone had talked to him or communicated anything to him about testifying, Appellant objected on the bases of hearsay and relevance. Then a bench conference, which was not recorded, transpired. Ultimately, the judge sustained Appellant's objection to the testimony. R. 103, l. 15 – R. 104, l. 2.

#### George Gomes

Officer George Gomes with the North Charleston Police Department testified on behalf of the prosecution. He testified that when he arrived at the scene of Club 843 to investigate the alleged shooting, Agerson had been transported to the hospital already. R. 214, ll. 13-23. Eight days later, Gomes met with Agerson for the first and only time. R. 215, ll. 7-8. Gomes obtained a written statement from Agerson, but had no other contact with Agerson. R. 215, ll. 13-20. In preparing for the trial, Gomes and the prosecution attempted to locate Agerson, but were unable to do so. R. 216, ll. 4-25.

Gomes testified that he also interviewed Shemera Brown, who identified herself as Appellant's girlfriend. R. 217, ll. 9-20. Brown provided a statement and was cooperative in the investigation. R. 218, ll. 5-15. According to Gomes, Brown told officers where Appellant threw the gun out the car after the alleged shooting. R. 218, l. 16 – R. 219, l. 4. Gomes further testified that the police department and the prosecuting agency had been in

contact with Brown and met with her on several occasions, including a meeting during the latter part of the week before the trial. R. 219, ll. 10-23. However, Gomes was unable to locate Brown for the trial. R. 219, l. 21- R. 220, l. 3.

Larry Clayton

As its final witness, the prosecution called Larry Clayton to testify. Clayton testified that in November of 2009, he was in the local jail due to “some family court child support issues.” R. 313, ll. 9-13. While in the jail, he was housed near Appellant. R. 313, ll. 14-17. Clayton claimed he overheard Appellant discussing the alleged shooting with others. R. 313, l. 18 – R. 314, l. 4. Clayton further claimed Appellant said to Clayton: “I’ll shoot you in the fucking head like I did the guy at Club 843.” R. 314, ll. 13-15. Additionally, Clayton claimed Appellant said to him: “I ain’t no pussy about the shit I do.” R. 316, ll. 1-3. When the prosecutor pressed Clayton on whether the statement had anything to do with the alleged shooting, Clayton changed his testimony to reflect that Appellant said “I’ll shoot you in the head like I did the guy at Club 843; I ain’t no pussy about the shit I do; I ain’t take no crap off nobody.” R. 316, ll. 5-11. The prosecutor then presented Clayton with a written statement he provided and asked if the statement refreshed his recollection of what transpired. Clayton claimed it did and testified Appellant actually said “he’d shoot me and watch my brains spill out.” R. 316, l. 19 – R. 317, l. 19.

On cross-examination, Clayton admitted that snitching on fellow inmates “usually helps” a person get out of jail. R. 318, l. 22-25. He further admitted that in the jail, anyone can read anyone else’s materials, including discovery in criminal cases. R. 219, ll. 4-15. He also admitted that he had a pending escape charge, which was being prosecuted by the same agency prosecuting Appellant. R. 319, l. 22 – R. 320, l. 8.

### Prosecutor's closing argument

During his closing argument, the prosecutor argued to the jury that Appellant had threatened witnesses.

And let me talk about three people who saw this happen: Joshua Crider, Shemera Brown, and Renardo Smalls. Is there a reason - - is there a reason why Renardo Smalls got up on that stand and told you he didn't remember what happened that night? Is there a reason for that? There is a reason for that, and the reason is right here [indicates]. Is there a reason why Shemera Brown has cooperated with police from day one and has not shown up for this trial this week? Is there a reason for that? That reason is right here [indicates]. Is there a reason why Danny Agerson cooperated with the police from the very beginning - - .

R. 332, l. 23 – R. 333, l. 9. Immediately, Appellant objected to the prosecutor's improper closing argument. R. 333, ll. 10-11. However, the trial judge overruled the objection.

Thus, the prosecutor continued with his line of argument:

Is there a reason why Danny Agerson is not here this week and he's cooperated with the police? That reason is right here [indicates].

Joshua Crider, Danny Agerson, Shemera Brown, and Renardo Smalls have all see[n] first hand with their eyes what this man is capable of. Joshua Crider came in here. He's locked up. [Appellant] can't get to him. He's locked up. He's in jail.

R. 333, ll. 16-23.

### Appellant's Mistrial Motion

Appellant moved for a mistrial as well. Appellant noted the objection to the prosecutor's closing argument telling the jury that witnesses did not appear for trial because Appellant had threatened them. R. 357, ll. 2-7. Appellant argued the comments were improper and shifted the burden to Appellant to deny any threats. Appellant further argued the argument infected the trial with unfairness and violated due process. Appellant

explained that the prosecutor's closing argument was prejudicial based upon the testimony of Clayton, who claimed Appellant threatened him at the detention center. R. 357, ll. 7-18.

The trial judge denied Appellant's motion for a mistrial. The judge explained that she had instructed the jury prior to closing arguments and at the time of Appellant's objection that the arguments were not evidence. R. 357, l. 19 – R. 358, l. 3.

### **Discussion**

Although a solicitor should prosecute vigorously, he is a minister of justice. Thus, his job is not to convict a defendant, but to see justice done. A prosecutor's argument must be based upon that basic principle of the criminal justice system. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). The prosecutor's closing argument "must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence." State v. Vaughn, 362 S.C. 163, 607 S.E.2d 72 (2004)(citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Where a prosecutor makes an improper argument, the question is whether "the remark ... so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The South Carolina Supreme Court explained an appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In Donnelly, 416 U.S. at 643-644, the United States Supreme Court held the prosecutor's improper comments were not so egregious such that they infected the trial with unfairness making the resulting conviction a denial of due process in light of the trial judge's

“special pains” to cure the error and the ambiguous nature of the argument. Although the Donnelly Court afforded no relief to the defendant, the Court reaffirmed the long-standing legal principle that the “Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.” Id., at 646(citing Miller v. Pate, 386 U.S. 1, 7 (1967)). The Donnelly Court distinguished the facts before it from Miller, where the prosecutor repeatedly showed the jury a pair of stained undershorts allegedly belonging to the defendant, which the prosecutor described as stained with blood. The undershorts were actually stained with paint. The Donnelly Court explained that “[t]he ‘consistent and repeated misrepresentation’ of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury’s deliberations.” On the contrary, “[i]solated passages of a prosecutor’s argument, billed in advance to the jury as a matter of opinion, not evidence, do not reach the same proportions.” Id. Likewise, the Court distinguished Donnelly from Brady v. Maryland, 373 U.S. 83 (1973). As explained by the Court, in Brady, the prosecutor withheld evidence that was directly relevant to the defendant’s involvement in the crime. The Court expressed that “manipulation by the prosecution was likely to have an important effect on the jury’s determination.” Id., at 647.

In Darden v. Wainwright, 477 U.S. 168, 179-182 (1986), the Court held the prosecutor’s argument deserved the condemnation it had received; however, the Supreme Court ultimately determined the argument had not so infected the trial with unfairness as to make the resulting conviction a denial of due process. Although the comments were improper, they did not deprive the defendant of a fair trial because the argument did not manipulate or misstate the evidence and did not implicate other specific rights of the defendant, such as the right to counsel or the right to remain silent. Id., at 181-182.

Importantly, the Court explained first, “[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense.” Id., at 182. Second, the Court noted the trial court instructed the jury numerous times that their decision must be based on the evidence and the arguments of counsel were not evidence. Third, the Court explained the evidence against the defendant was “heavy.” Id.

The South Carolina Supreme Court addressed this issue in Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994). In Elijah Mincey’s drug distribution trial, two witnesses testified that Mincey had not participated in the drug transaction. Those witnesses were present for the drug transaction and had entered guilty pleas to distribution for their involvement. Id., at 357, 444 S.E.2d at 511. In his closing argument, the prosecutor called Mincey “a pretty intimidating man.” He further argued Mincey “must be pretty intimidating for these guys to come before Judge Connor, tell her, yes, we’re guilty of this.” Id. (emphasis in original). Concerning the confidential informant in the case, the prosecutor stated “Maybe she’s intimidated by Elijah. She’s got children. She lives down there too.” Id., at 358, 444 S.E.2d at 511. The Court held the prosecutor’s argument was improper and trial counsel was ineffective for failing to object. “References to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats.” Id. (citing State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985)). As explained by the Court, Mincey’s defense was that he was not involved in the drug transaction. The prosecutor’s implication that the two witnesses gave false testimony due to intimidation or threats contradicted this defense. The prosecutor’s argument was improper because “[t]here was, in fact, no evidence that Mincey intimidated any of the witnesses.” Id., at 358, 444 S.E.2d at 511.

The South Carolina Supreme Court granted a defendant a new trial where a prosecutor's closing argument, which "misstated the law by improperly injecting parole considerations into the jury's sentencing decision and equating a finding of guilty with a recommendation of mercy with a much lighter sentence of an acquittal." Simmons, 331 S.C. at 338-339, 503 S.E.2d at 167. Although the trial judge informed the jury that the responsibility of sentencing the defendant was for the judge alone, the judge did not explain the sentencing consequences of the verdicts available to the jury. Id., at 339, 503 S.E.2d at 167. Therefore, the instructions did not cure the improper argument. Additionally, the Court was not persuaded by the overwhelming evidence of the defendant's guilt because the prosecutor's argument prevented the jury from fairly considering a verdict of guilty with a recommendation of mercy. Id., at 340, 503 S.E.2d at 167.

In Vaughn, 362 S.C. at 171, 607 S.E.2d at 76, the South Carolina Supreme Court held a defendant was entitled to a new trial based upon the solicitor's improper closing argument. The defendant's attorney asked the jury to remember that only one officer testified on behalf of the prosecution concerning observing drugs despite the fact that another officer and civilians were present. Id., at 167, 607 S.E.2d at 74. The solicitor then informed the jury she did not present additional witnesses because she did not want to waste the jurors' time. She also stated that the rules of evidence did not permit the presentation of duplicative testimony. She told the jury that if any of the potential witnesses listed by the defendant's attorney would have testified differently than the testifying witness, then the defendant had the ability to subpoena those witnesses to testify. She also stated she did not call the other witnesses because they would have said "the very same thing" that the officer presented said. Id., at 168, 607 S.E.2d at 74.

The Court recognized that improper argument includes vouching for a witnesses and initiating argument about the testimony of absent witnesses. *Id.*, at 169, 607 S.E.2d at 75. Additionally, the Court recognized that the defendant “‘opened the door’ to some response from the solicitor” based on is closing argument concerning the absence of witnesses. *Id.*, at 170, 607 S.E.2d at 75. The Court held that the solicitor’s response was unfair and prejudicial in light of the lack of evidence of the defendant’s guilt. *Id.*, at 170, 607 S.E.2d at 75-76.

The closing argument presented by prosecutor in the instant case was clearly improper. Repeatedly and dramatically, the prosecutor pointed to Appellant as the reason why two witnesses did not appear and one allegedly feigned a faulty memory. The prosecutor further exacerbated this improper argument by saying that the only witness to testify was willing to do so only because Appellant could not get to him because the witness was safe in jail. Thus, the prosecutor’s argument was clear: Appellant threatened witnesses with violence to intimidate them into not testifying. The record contained no evidence of threats against those witnesses, much less threats by Appellant against the witnesses. The trial judge overruled Appellant’s objection to the improper argument signaling to the jury that what the solicitor claimed was true and accurate. The trial judge failed to instruct the jury to disregard the prosecutor’s improper argument; therefore, no curative instructions or corrective action was taken by the trial judge, which has been viewed as curing improper arguments in other cases. The evidence against Appellant was not overwhelming. The main witness against Appellant was highly motivated to testify falsely in light of his criminal charges, and his testimony differed from his 911 call significantly. No physical or forensic evidence connected Appellant to the crime. Allowing the prosecution’s argument

to stand would be a “prostitution of justice.” See Mincey, 314 S.C. at 358, 444 S.E.2d at 511(citing State v. Rogers, 96 S.C. 350, 352, 80 S.E.620, 621 (1914)(holding that introduction of evidence that someone attempted to influence a witness by fear or fright without any evidence that connects the defendant to the tampering would be a “prostitution of justice”).

II. The trial court erred in failing to exclude expert testimony regarding toolmark identification where the record revealed the identification was not based upon reliable science.

**Relevant facts**

During pretrial proceedings, Appellant moved to limit the prosecution from stating during his opening statement that the cartridge cases found at the crime scene “matched” a firearm recovered approximately one mile from the crime scene. The basis of the motion was that Appellant had moved to exclude the testimony of the prosecution’s introduction of evidence concerning toolmark identification or the in alternative to limit the testimony of the state’s witness. The hearing on the matter was scheduled for the following day; thus, Appellant asked the trial court to prohibit the prosecution from informing the jury of the evidence until the trial court had ruled the evidence admissible. R. 5, l. 9 – R. 11, l. 13. The trial judge overruled Appellant’s objection and permitted the prosecution to use the information during his opening statement. R. 12, ll. 1-17. As permitted by the Court, the prosecutor informed the jury that the gun “matche[d] the evidence at the scene.” R. 19, ll. 2-8.

**Angela Bunker**

The prosecution called Angela Bunker with the North Charleston Police Department to testify. Bunker testified that she recovered three small shell casings from the scene of the shooting. R. 160, ll. 8-11. Bunker further testified that she and another officer recovered a gun from another location. R. 161, l. 23 – R. 162, l. 4.

### Al Hallman

Al Hallman, an employee of the North Charleston Police Department, testified he assisted Bunker in collecting evidence at the scene of the shooting. Additionally, Hallman accompanied Bunker to three separate locations searching for a gun. Finally, Hallman observed a gun lying in a grassy area near a used car lot. R. 202, l. 5 – R. 203, l. 10.

### In-Camera Hearing

Based upon Appellant's motion to exclude testimony of SLED Agent Dan DeFreese or the alternative to limit the testimony, the court presided over an in-camera hearing pursuant to State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Appellant explained that if the Court held the testimony of DeFreese were admissible, then the testimony should be limited in United States v. Glynn, 578 F.Supp.2d 567 (S.D.N.Y. 2008). Specifically, Appellant asked that DeFreese not testify that the cartridge casings "matched" the gun; rather, DeFreese state his opinion "in terms of more likely than not." R. 241, l. 1 – R. 242, l. 4.

### Frank Dan DeFreese

During the in-camera hearing, initially, DeFreese testified regarding his experience and educational background. He explained he received a Bachelor of Science in business administration and began employment with SLED on January 12, 1967. R. 244, ll. 14-24. DeFreese began studying techniques of firearm and toolmark analysis in the firearms laboratory at SLED under the tutelage of Millard Cate and Carl Stokes. After two and a half years of study, he began accepting case work on his own and testifying about the results. R. 245, ll. 1-14. He testified that he had been doing casework in firearms identification either thirty-seven or thirty-eight years. R. 266, ll. 19-21. At this point, SLED considered

DeFreese certified in toolmark and firearms identification and no recertification process is required. R. 271, ll. 5-11.

DeFreese graduated from the FBI National Academy and is a member of the Association of Firearm and Toolmark Examiners (AFTE). He testified that “[f]rom time to time, [his] employer was good enough to send [him] on to seminars conducted by AFTE.” R. 245, ll. 15-23. Although he had written several articles for non-peer reviewed magazine publications, DeFreese admitted he had written no peer reviewed articles. R. 246, ll. 1-3. On cross-examination, he testified that he reads the AFTE Journal. R. 270, ll. 20-22.

DeFreese testified that SLED engaged in proficiency testing. SLED bought the tests in firearms, toolmarks and “perhaps a test in some other related field” from Collaborative Testing Service. Then “usually every year,” each examiner took two or more proficiency tests per year. R. 246, ll. 4-23. DeFreese claimed his error rate is zero. R. 246, ll. 24-25. He admitted this did not mean he had never made an error on the job; rather, this meant he had never answered a question incorrectly during the proficiency testing. R. 247, ll. 1-9. He further testified that the SLED laboratory was accredited by the American Society of Crime Laboratory Directors laboratory accreditation board. R. 247, ll. 10-15.

In the instant case, DeFreese testified that in his opinion, the cartridge cases recovered from the scene of the shooting were fired from the gun recovered from a separate location. R. 247, ll. 20-25. According to DeFreese, a firearm breech face leaves a unique and reproducible toolmark on an object, such as a cartridge casing or bullet. Thus, identification is possible based upon the mark. R. 248, ll. 1-9. DeFreese acknowledged that in 2008, the National Research Council, the operating agency of the National Academy of Sciences, undertook a study of ballistic imaging and concluded that “the validity of the

fundamental assumption of uniqueness and reproducibility of firearms related to toolmarking ha[d] not yet been fully demonstrated.” R. 248, ll. 11-23. The study also concluded that a significant amount of research was necessary to determine the degree to which toolmarks were unique. R. 248, l. 25 – R. 249, l. 5. According to DeFreese, whether a match exists is the opinion of the examiner and examiners’ opinions may differ because no national standard for qualifying what it takes to establish an identification exists. R. 249, l. 6 – R. 250, l. 3. Later, however, DeFreese claimed a national standard established in the AFTE theory of identification existed. The standard requires “sufficient agreement in order for there to be an identification.” R. 265, ll. 20-25. According to DeFreese, “sufficient agreement” exists “when the degree of similarity is better than that found in known non matches and approaches that found in known matches.” R. 265, l. 25 – R. 266, l. 3.

DeFreese explained that in reviewing firearms evidence, the first consideration is class characteristics, which are the caliber of the firearms and projectiles and lands and grooves of bullets. R. 250, ll. 20-25. The shape of the firing pin and the direction of the twist are also important class characteristics. R. 251, ll. 1-4; R. 251, ll. 9-11. In addition to class characteristics, subclass characteristics are considerations for firearms examiners. Subclass characteristics are “typically characteristics of the tooling that was used to form whatever the work piece happened to be.” Those are “constantly changing.” R. 251, l. 21- R. 252, l. 7. In addition to the characteristics changing constantly, the subclass characteristics may persist over several different work pieces, such as barrels that are produced consecutively. R. 252, ll. 9-15. Finally, examiners look to individual characteristics, which form the bases for their opinions. R. 252, ll. 16-22. Manufacturers

do not place the individual characteristics on the firearms; “they occur accidentally.” R. 252, l. 23 – R. 253, l. 1.

DeFreese admitted that individual characteristics are comprised of non-unique marks. He explained “[t]here is always a danger of something, but it’s something that a trained examiner controls for.” R. 254, l. 15 – R. 255, l. 2. DeFreese admitted that individual characteristics of toolmarks change over time. However, he countered that “even the individual marks that are left on bullets and cartridge cases, for instance, remain relatively stable over time.” He claimed the marks are “stable enough” in most cases so it is “not an issue for [his] identification.” R. 255, ll. 9-25. Initially, DeFreese testified the markings do not change “so fast as to affect our ability to identified bullets and cartridge cases in most cases,” he then testified that he had had guns “that literally changed their markings so quickly that I simply could not identify the bullets fired by that gun.” R. 260, ll. 7-17.

Ultimately, DeFreese admitted there is a danger in a pattern appearing to be a class characteristic, but the depth of the line making it only an individual one, but again countered that this is a danger that he would control for in his training. When asked if an examiner may confuse individual characteristics of class or subclass characteristics resulting in false negatives or false positives, DeFreese claimed only the “uninformed” would make a wrong conclusion in that circumstances. R. 257, ll. 18-24; R. 258, ll. 4-13.

Although DeFreese admitted that technology has improved to the point where some machining processes are capable of reproducing remarkably similar surface characteristics, he claimed “they’re still not totally identical.” R. 260, ll. 1-6. DeFreese explained that toolmarks on bullets fired from the same gun are never exactly alike – “no such thing as a

hundred-percent match.” This is true even among test-fired bullets. R. 261, ll. 7-12. DeFreese test fired six times the gun recovered in this case. R. 262, l. 4. He admitted that a critical look at each of the six cartridge cases would reveal “some differences” and “substantial similarities.” R. 262, ll. 5-7. Further, he admitted that he only test fired the gun recovered by the police officers and did not test against another gun. R. 262, ll. 13-18. According to DeFreese, doing a blind test would have served “no purpose” as that is something done in training, not for case work. R. 262, l. 18 – R. 263, l. 8. Although a nine millimeter gun is a very common gun, he claimed “the gun in question here was only made for two years.” It was considered a “no-frills” weapon and considerably less expensive than other guns by the same manufacturer. R. 264, l. 21 – R. 265, l. 7.

In the instant case, DeFreese examined the test cartridges and the cartridge cases received in evidence using his comparison microscope, which permits visual inspection of two objects at the same time.<sup>2</sup> R. 268, ll. 10-20. DeFreese looked “to see if the same markings were present.” R. 268, ll. 16-20. DeFreese opined “these cartridge cases were very well-marked.” R. 268, ll. 21-23. Based on that observation, he concluded the three cartridge cases recovered from the scene of the shooting were fired from the gun recovered from another location. R. 268, l. 24 – R. 269, l. 1. However, DeFreese could provide no statistical certainty numbers concerning his opinion. R. 272, ll. 5-8. DeFreese elaborated:

In my opinion, the three cartridge cases ... were fired by this pistol. And I know in science there's no absolutes. Science doesn't tend to tolerate absolutes. But the likelihood that I'm mistaken is very, very remote, remote to approaching the range of practical impossibility. I just do not believe there's another firearm that fired these.

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<sup>2</sup> DeFreese testified further that his comparison microscope is calibrated by the manufacturer and checked monthly. R. 269, ll. 14-20; R. 270, ll. 3-14.

R. 272, ll. 12-19.

According to DeFreese, the method he used for determining the “match” was “the standard and the norm, the practice, in South Carolina and throughout the United States. R. 269, ll. 2-5. Later, DeFreese admitted that there are “two general ways” for an examiner to make an identification. The newer method is called consecutively marked line counting and it requires the examiner to count the number of consecutively matching striates. Only when an examiner finds a certain number of consecutively matching striates may the examiner make an identification. R. 273, l. 15 – R. 274, l. 5. The other method involves “pattern matching” and does not require any counting of lines or any certain number of similarities to declare a match. DeFreese adheres to the older method and is a self-described “pattern matcher.” R. 274, ll. 6-20.

Appellant argued the prosecution had not met the standard established in State v. Council, supra, and State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001)(hereinafter Jones I) concerning the admissibility of expert testimony. Concerning the third factor, the use of quality control measures to ensure reliability, Appellant argued the prosecution had not satisfied this factor because DeFreese did not conduct blind testing. Regarding the fourth factor, the consistency of the method with recognized scientific laws and procedures, Appellant relied primarily upon the study conducted by the National Academy of Research Science in 2008 indicating that more study was needed to determine whether toolmark identification relied upon sound science. Appellant noted that even if guns leave unique and reproducible marks, no scientific basis exists for an examiner’s claim to determine that a single gun produced a given toolmark. Thus, Appellant argued the trial court should exclude the testimony of DeFreese. R. 274, l. 25 – R. 277, l. 6; R. 277, l. 20-21.

In the alternative, Appellant argued the trial court should limit DeFreese's testimony such that he may testify that in his opinion it is more likely than not that the cartridge casings found at the scene of the shooting were fired by the gun found at a separate location. R. 278, l. 7-25.

The trial court determined the testimony was admissible, that DeFreese be admitted as an expert in the area of firearms and toolmark identification, and that he be permitted to give his opinion to a reasonable degree of ballistic certainty. R. 279, l. 23 – R. 281, l. 25. The judge relied upon DeFreese's lengthy career in the area of firearms examinations, his membership in a prestigious organization in the area, his authorship of numerous magazine articles, and his prior qualifications as an expert witness in the state. Additionally, the judge indicated DeFreese's testimony indicated his work was subject to peer review, his equipment was calibrated and "tested rigorously," and he had stayed current in the area of firearm and toolmark identification. R. 282, ll. 1-10. The judge then indicated DeFreese could testify that his opinion was "with reasonable degree of certainty in the firearms and toolmark identification field." R. 282, ll. 11-15.

#### Frank Dan DeFreese

After the trial judge's ruling on Appellant's motion, the prosecution called DeFreese to testify in front of the jury. His testimony before the jury was consistent with his testimony in camera. Importantly, DeFreese testified that toolmarks are different for every single pistol. He explained that the tools wear during the process of cutting things and the metal comprising the firearms is not completely homogenous. R. 296, ll. 11-23. Further, as the metal is being cut, chips of metal may go into the teeth of the machine doing the cutting and leave marks unique to that area. R. 296, l. 24 – R. 297, l. 3. Finally, the finishing –

deep blasting, shot blasting, polishing, oxidizing – may leave markings on the breech face as well. R. 397, ll. 4-8. When asked for his opinion concerning the items tested for Appellant’s case, Appellant objected. R. 298, l. 22 – R. 299, ll. 9. DeFreese then testified that the results of his findings were that the cartridge casings recovered from the scene of the shooting had sufficient agreement with the test fired casings to conclude the recovered casings were fired by the gun recovered at a different location. R. 299, l. 23 – R. 300, l. 4; R. 300, ll. 17-21. In other words, the fired cartridge casings matched the recovered gun.

### **Discussion**

In Council, 335 S.C. at 20, 515 S.E.2d at 518, our Supreme Court held that “[w]hen admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” In order to determine whether the underlying science is reliable, the trial judge must apply the four factor test announced in Jones I. Id. Those factors are (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Id., at 19, 515 S.E.2d at 517(citing Jones I, 273 S.C. at 731, 259 S.E.2d at 124). Recently, the Supreme Court reiterated the Jones test for determining reliability. State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009) (Jones II). The trial judge erred in admitting the testimony of DeFreese because the underlying science is not reliable.

In Jones II, 383 S.C. at 550, 681 S.E.2d at 588, the Supreme Court concluded the trial judge erred in admitting testimony that “barefoot insole impression” testimony revealed Jones’ foot to be consistent with the impression made by the wearer of steel toe boot

because the “science” lacked reliability. The Court held that although research by two witnesses had been presented and published, it did not satisfy the requirement of “peer review.” Id. at 556, 681 S.E.2d at 591. The Court also concluded that the “barefoot insole impression” testing conducted in Jones’ case was the first for SLED, and the testing is no longer used by SLED or the FBI. Id. at 557, 681 S.E.2d at 591. The SLED agent testified that SLED had no established protocol or quality control procedure in place for the testing. Thus, the Court concluded the evidence lacked quality control measures to ensure reliability. Id. Finally, the Court held the testing lacked a consistency of the methodology based upon the testimony of a statistician. The research supporting the testing was a sample of barefoot impressions of 1000 college students. The statistician testified the sample could not be applied to the general population due to the sampling. In addition, the sample involved barefoot impressions, not barefoot insole impressions and the measurements were conducted differently. Id.

The trial court erred in admitting the testimony of DeFreese in Young’s trial because the prosecution did not present evidence to establish that toolmark and firearms identification is based upon reliable science. In 2006, the National Academy of Sciences established a committee to study forensic science pursuant to a mandate from Congress. National Research Council’s Committee on Identifying the Needs of the Forensic Science Community, Strengthening Forensic Science in the United States: A Path Forward, at 2 (2009)(quoting P.L. No. 109-08, 119 Stat. 2290 (2005) hereinafter “NRC Forensic Science Report” or “the Report”). Among the requests of the committee was to produce “best practices and guidelines concerning the collection and analysis of forensic evidence to help ensure quality and consistency in the use of forensic technologies and techniques to solve

crimes, investigate deaths, and protect the public.” Id. The Report, published in 2009, explained that toolmark identification testing has “never been exposed to stringent scientific scrutiny.” Id. at 42. Further, the Report explained that when a toolmark examiner determines the extent of agreement in marks made by tools, the decision “involve[s] subjective qualitative judgments by the examiner.” Id. at 153. “[T]he accuracy of the examiners’ assessments is highly dependent on their skill and training.” Id. Toolmark examiners make determinations based upon “direct physical comparison of the evidence . . . , not the computer analysis of images.” The examiner then makes a subjective decision based on unarticulated standards. There exists no statistical foundation for estimation of error rates. Id. at 153-154.

According to the Report, the committee was unable to specify how many points of similarity were necessary for any level of confidence in a result because not enough was known about the variables among individual guns and tools. “Sufficient studies have not been done to understand the reliability and repeatability of the methods.” The committee could state only that class characteristics “are helpful in narrowing the pool of tools that may have left a distinctive mark.” Further, “[i]ndividual patterns from manufacturer or from wear might, in some cases, be distinctive enough to suggest one particular source.” However, the committee warned more studies were necessary “to make the process of individualization more precise and repeatable.” Id. at 154.

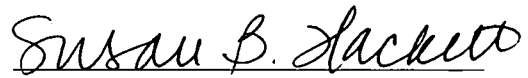
The committee explained that a fundamental problem with toolmark examination is the lack of a specific protocol. The AFTE permits an examiner to identify a match based on “sufficient agreement,” which is defined using terms such as “exceeds the best agreement” and “consistent with” that offer no specificity or quantifiable measurement. Id. at 155.

The focus for this Court is whether firearm toolmark identification is a science and if so whether its methodology will withstand rigorous scientific scrutiny. The answer is toolmark identification is not a science as evidenced by the findings of the NRC Forensic Sciences Report. If this court determines it is a science, then certainly its methodology cannot withstand rigorous scientific scrutiny as it has never been exposed to such. The trial court erred in admitting the testimony of DeFreese based upon the unreliability of the “science” on which DeFreese based his testimony. In the alternative, the judge erred in failing to limit the testimony to the only appropriate opinion that DeFreese could offer – that the cartridge cases more likely than not were fired by the recovered gun.

Conclusion

Appellant respectfully requests this Court reverse his convictions and sentences and remand the matter to the Circuit Court for a new trial.

Respectfully submitted,

  
Susan B. Hackett  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of May, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability 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."

May 13th 2013

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IN THE COURT OF APPEALS

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Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge  
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SC Court of Appeals

THE STATE,

RESPONDENT,

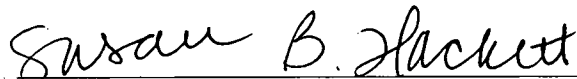
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DERRINGER YOUNG,

APPELLANT

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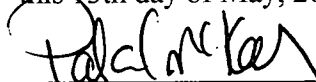
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Anthony Mabry, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of May, 2013.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 13th day of May, 2013.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires July 24, 2022.